

DRONE STRIKES: A REMOTE FORM OF SELF-DEFENCE?

Nigel D White and Lydia Davies-Bright

I. Introduction

A *Motyxia Sequoiae* millipede glows with bioluminescence in order to warn off predators. Should it be faced with an imminent threat, it secretes a toxic mix of cyanide and chemicals in order to stave off a potentially fatal attack.¹ This capacity of the organism to defend itself is arguably one of the most basic and fundamental natural instincts – the desire to live and the ability to survive an external attack will ensure the continuance of the life form. If an organism capitulates in the face of external danger, it will soon be subsumed by others and be but a mere speck in the history of life on this planet. Thus, it could be said that every organism has the right to defend itself from external attack as to deny it the capacity to do so, is to condemn it to death and annihilation.

The right of the individual person to defend themselves against an imminent attack is recognised in law.² Similarly, a state, as an international legal person, has an ‘inherent’ right to defend itself.³ As with the *Motyxia Sequoiae*, a state may passively warn would-be attackers that it is dangerous, for example, by having a well-equipped military. However, in the event of an imminent threat, a state will also launch appropriate counter-measures. This right to self-defence against ‘unjust’ attack was described in 1758 by Emmerich de Vattel as ‘not only the right that every Nation has, but it is a duty, and one of its most sacred duties’.⁴ It follows that

¹ C Arnold, ‘New Glowing Millipede Found; Shows How Bioluminescence Evolved’ (*National Geographic*, 4 May 2015) <<http://news.nationalgeographic.com/2015/05/150504-glowing-millipedes-evolution-insects-animals-california/>> accessed 13 April 2016; CQ Choi, ‘Strange Glowing Millipedes Ooze Cyanide to Foil Predators’ (*Live Science*, 26 September 2011) <www.livescience.com/16221-glowing-millipedes-toxic-warning.html> accessed 13 April 2016.

² Criminal Law Act 1967 (UK) s3(1) ‘A person may use such force as is reasonable in the circumstances in the prevention of crime’; D Ormerod and K Laird, *Smith and Hogan’s Criminal Law* (OUP 2015) 427.

³ Charter of the United Nations (24 October 1945) 1 UNTS XVI (UNC) art 51.

⁴ E de Vattel, *The Law of Nations, or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (trans T Nugent, Liberty 2008) 246.

states have a duty to protect those who belong to it, which is part of the basic agreement underlying social and legal structures.⁵ A state cannot be sovereign, independent, or expect to continue to exist if it does not have the right to defend itself and its citizens from aggression emanating from an external party: if a state cannot protect its citizens from ‘the subjection of a foreign power’, then it has breached the social contract and so can no longer exercise a monopoly over the use of coercive force.⁶

This chapter addresses the concept of self-defence through an analysis of a drone strike conducted by the UK government in August 2015 against an individual British citizen residing in ISIL-held territory within Syria. In this case, self-defence is posited in a way that reveals a new reliance on an old understanding of self-defence, based on self-defence as sovereignty and less as a distinct and confined rule of the *jus ad bellum*. In a way, although individual terrorists cannot normally be seen as an existential threat to a state, their antipathy towards the status quo has the potential to erode the system of sovereign states, by challenging their continuation, but also by provoking increasingly draconian responses by states that will potentially destroy them from within.

The chapter examines the contribution of technology to legal change, but concludes that technology is also contributing to changes to the overall structure of international relations by facilitating the breakdown in sovereignty by its persistent erosion of borders, provoking, in response, desperate efforts to shore it up by returning to primordial understandings of sovereignty based on preservation of the nation state. Technology has speeded up the escalating and apparently never-ending cycle of blows and counter-blows⁷ and means that individual terrorists can orchestrate attacks on states from afar as well as being targeted by remotely

⁵ A fact explicitly acknowledged by national leaders, especially when justifying a use of force and framing it as being in defence of the nation, eg Prime Minister David Cameron speaking to the House of Commons, ‘My first duty as a Prime Minister is to keep the British people safe.’ HC Deb 7 September 2015, col 27 <www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0001.htm> accessed 13 April 2016; UK Secretary of State for Defence Michael Fallon MP in his oral evidence to the Joint Committee on Human Rights asserting that preventing loss of life is the ‘primary duty of government’, Joint Committee on Human Rights, *Oral Evidence: The UK Government’s Policy on Use of Drones for Targeted Killing* (HC 2015–16, 574) 7 <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-governments-policy-on-the-use-of-drones-for-targeted-killing/oral/27633.pdf>> accessed 13 April 2016.

⁶ J Locke, *Two Treatises of Government. In the Former, the False Principles and Foundation of Sir Robert Filmer, and his Followers, are Detected and Overthrown: the Latter, is an Essay Concerning the Original, Extent, and End, of Civil Government* (prepared by R Hay for the McMaster University Archive of the History of Economic Thought, Thomas Tegg, W Sharpe and Son 1823) 200 para 217 <<http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/locke/government.pdf>> accessed 13 April 2016.

⁷ TJ Farer, ‘Beyond the Charter Frame: Unilateralism or Condominium?’ (2002) 96 *AJIL* 359.

operated drones, but the return to absolute forms of sovereignty by technologically advanced states is something more profound and alarming. The reversion to ancient notions of sovereignty is in contrast to progress in technology.

II. Self-Defence and the Social Contract

The frequent targeted strikes by drones on an individual (suspected) terrorists demonstrate the modern phenomenon of ‘legally saturated violence’,⁸ namely that international relations is now characterised by multiple, every-day uses of force by states that are not simply cynically justified in legal terms, but are seen as the exercise of the essence of sovereignty as states seek to defend themselves and their citizens from violence emanating from other states, so-called states (eg Islamic State of Iraq and the Levant – ISIL), non-state armed groups and individual terrorists. In the current debate about drone usage, law is not peripheral to the exercise of state power but is at the heart of it, a return, in a way, to the basic social contract at the heart of a state – to provide security in return for its monopoly on the use of force. However, the monopoly of the state over force cannot take away an individual’s right to self-defence. In Western legal traditions, an individual is permitted to defend their self and also others as an extension of this right.⁹ Aggression by an external actor compromises an individual’s freedom, who is then entitled to ‘vindicate [their] freedom by repelling the aggressor’.¹⁰

The endemic global violence unleashed after 9/11 in 2001 has generated numerous explanations under the *jus ad bellum* and *jus in bello*, but increasingly also by a ‘meta’ concept of ‘self-defence’ that has hitherto largely been confined to the *jus ad bellum*, and now seems to have been unchained from its shackles in Article 51 of the UN Charter to become the overriding norm. Its apparent transformation from a right that justified the defence of one state from an attack by another, to an overweening inherent exercise of sovereign duty to protect all aspects of a state (its territory, its government and its population, even its way of life¹¹) has had

⁸ A-C Martineau, ‘Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force’ (2016) 29 *LJIL* 95, 112.

⁹ GP Fletcher and JD Ohlin, *Defending Humanity* (OUP 2008) 51.

¹⁰ *ibid* 48.

¹¹ See, eg the statement by President Hollande following the terrorist attacks Paris on 13 November 2015 declaring that the attacks were ‘committed by a terrorist army, the Islamic State group, a jihadist army, against France, against the values we defend everywhere in the world, against what we are: a free country that means something to the whole planet... What we are defending is our country, but more than that, it is our values’. L Dearden, ‘Paris terror attack: Francois Hollande vows merciless response to Isis “barbarity”’ *The Independent* (London, 14 November 2015).

a profound effect on the conduct of international relations, facilitated by advances in technology and the securitisation of many aspects of everyday life.

The advent of ‘human security’, broadly defined as a freedom from want and a freedom from fear, was promoted as a value to balance against the narrow state-centric focus of ‘security of territory from external aggression, or as protection of national interests’.¹² However, the attempt to focus security concerns on the micro level – on the lives of ordinary people – has now been merged with ‘state security’ to justify the return to a focus on the macro level by framing uses of force as being against targets that present a general threat to a state’s citizens and their daily lives. The reconceptualising of security as people-centric, ‘a concern with human life and dignity’ rather than with weapons,¹³ has been accepted by politicians and commentators and also, perhaps, by history. The world is not currently locked in an ideological battle for global dominance manifested in a nuclear arms race, the Cold War has been won by the West. Accordingly, the current threat is also framed as being centred on people – the enemy is not a state, it is people who seek to destroy the every-day lives of ordinary people.¹⁴ Thus, the requisite response, the self-defence to this threat, is also people centred.

Self-defence has an instinctive, almost visceral quality to it and, when contemplated, the question asked is often not *if* violence in the face of danger is acceptable, but rather *how far* is a person or state permitted to go when repelling an apparent threat. For Grotius, defence is one of the ‘just’ causes of war and lies at the heart of sovereign statehood.¹⁵ Similarly, many philosophers have connected the nature of the state with self-defence. John Locke viewed protection as being the core justification for the state’s monopoly on the use of force. In order to preserve their wealth, life, liberty and general well-being, men united together to form states and made a pact (the social contract) with government that it would have coercive power, in exchange for protection. It follows that, if the government becomes unable to protect the people against threats, the people are justified in throwing over the government as the pact has been broken – the people have returned to the state of nature.¹⁶

¹² UNDP, *Human Development Report 1994* (OUP 1994) (HDR 1994) 22 <http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf> accessed 10 April 2016.

¹³ HDR 1994 (n 12) 22.

¹⁴ The HDR 1994 (n 12) includes terrorism as being a security threat that concerns ordinary people, 22.

¹⁵ ‘Hugo Grotius’ (*Stanford Encyclopedia of Philosophy*, 28 July 2011) <<http://plato.stanford.edu/entries/grotius/#JusWarDoc>> accessed 13 April 2016.

¹⁶ Locke (n 6).

By legitimising the use of force through citing self-defence, governments are able to maintain their position and the status quo – the people accept the use of force as the government is fulfilling its duty. Indeed, as mentioned above, this duty is often cited by politicians when justifying a particular incident of force.¹⁷ Thus, the continuance of the current situation relies on a threat that people need protecting from and the ability of the state to provide that protection. Hobbes conceptualised a social order in which people join together in a social covenant that provides them security from an external threat.¹⁸ Their motivation is to escape the state of nature in which they live in perpetual fear and under continual threat and so they agree to form communities, common laws and mechanisms to keep and enforce the laws. Although Hobbes argued that the sovereign had to be given absolute authority in order to ensure the preservation of society, he permitted the people to disobey the sovereign in the event that it failed to provide adequate protection.¹⁹ Again, the legitimacy of the sovereign is connected to its ability to sufficiently safe-guard its people.

Similarly, Jean-Jacques Rousseau also conceived of a social pact in which people agree to form a collective and to accept restrictions on their individual liberties in order to receive the benefits of state protection. The sovereign is committed to the good of the individuals that constitute it and each individual is committed to the good of the whole.²⁰ On this conception, the idea that an individual may break ‘the contract’ and so be denied membership to the collective²¹ has at least an appearance of validity. An individual does not have the liberty to decide whether or not they wish to fulfil their duties to the sovereign power and collective, whilst still receiving the benefits of citizenship. However, the sovereign power has the monopoly on power in order to maintain order and to ensure compliance with the agreed rules. Expelling every individual who dissented would restrict and limit the form of direct democracy that Rousseau espoused and so is arguably not in keeping with his philosophy.

¹⁷ Eg Prime Minister David Cameron (n 5).

¹⁸ T Hobbes, *Leviathan or the Matter, Forme, and Power of a Common-wealth Ecclesiasticall and Civill* (prepared by R Hay for the McMaster University Archive of the History of Economic Thought, Andrew Crooke 1651) 106 <<http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf>> accessed 13 April 2016.

¹⁹ ‘The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them.’ Hobbes (n 18) 136.

²⁰ J-J Rousseau, *The Social Contract* (trans M Cranston, Penguin 2004).

²¹ A Nossiter, ‘French Proposal to Strip Citizenship over Terrorism Sets off Alarms’ *The New York Times* (New York, 8 January 2016): Prime Minister Manuel Valls ‘insisted in a television interview... that “you are French because you adhere to a community. This strict measure applies to terrorists who have been convicted of especially grave crimes, and it is because they have broken the contract... it is a way of consolidating the national pact.”’

To legitimately evoke the right to self-defence, a state is required to demonstrate that it has suffered an intentional armed attack.²² Traditionally, this was understood as being an attack on the territory or flagged ship of a state. In the modern era, it is not necessarily so straightforward to determine when an armed attack has begun and so when it is legitimate to utilise armed force in self-defence. In the aftermath of 9/11, the UN Security Council adopted Resolution 1368 and made explicit reference to ‘the inherent right of individual or collective self-defence in accordance with the Charter’. Resolution 1373 reaffirmed this statement and, utilising Chapter VII powers, adopted a series of binding decisions, which included an instruction for all states to ‘take the necessary steps to prevent the commission of terrorist attacks’. These resolutions designated terrorism as a threat to international peace and security and recognised or, indeed, helped to create conditions in which states would be able to exercise their inherent right to self-defence in response to terrorism or even the threat of terrorism. Thus, in this age of terrorism, NSAs are deemed capable of mounting an armed attack that justifies and legitimises the use of force in self-defence. This developing of the principle of self-defence *in extremis*, without providing criteria for determining whether an act by an NSA is an ‘armed attack’ (and so a threat to international peace and security) and without thought to the consequences, has arguably undermined the prohibition on the use of armed force as now states are able to designate a fellow state or an NSA as terrorist and thereby justify the use of force by citing self-defence. For example, in response to the 2015 Paris shootings, France embarked upon an aerial bombing campaign against ISIL in Syria, citing self-defence, despite the lack of credible evidence that the shootings were carried out by ISIL operatives and/or explicitly co-ordinated and directed by the group and so actually attributable to them.²³ It appears that it is enough for an act of violence to be ‘inspired by’ ISIL for it to justify the use of force in self-defence.²⁴

²² *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161, 187 para 51: ‘Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as “armed attacks” within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force.’

²³ BBC News, ‘Paris Attacks: Who were the attackers?’, 8 March 2016, available at <http://www.bbc.co.uk/news/world-europe-34832512>, accessed 18 April 2016. See generally K Tibori-Szabo, ‘Self-Defence and the United States Policy on Drone Strikes’ (2015) 20 *JCSL* 381, 401.

²⁴ See, eg Prime Minister David Cameron, during the Parliamentary debate on Syrian airstrikes, claiming that the UK Security Services have foiled seven plots against the UK that were ‘inspired by’ the radical teachings of the ‘death cult’ that is ISIL in order to justify his claim that ISIL poses a credible threat and so Britain should join the airstrikes campaign. It has since emerged that there is no actual evidence of a direct link between the plots and ISIL. Thus, it appears that merely the existence of ISIL and its ideology poses a threat to international peace and security and so engages the inherent right to self-defence (and self-preservation – the Western states are arguably fighting to maintain the status quo and to preserve their existence as it is now): ‘They have inspired the worst terrorist attack against British people since 7/7 on the beaches of Tunisia, and they have plotted atrocities on the streets here at home. Since November last year our security services have foiled no fewer than seven different

III. Drone Technology and Legal Change

With the odd exception, such as the regulation of outer space,²⁵ international law tends to develop as a reaction to change. In this way it might be anticipated that new non-kinetic technologies that can be used to disable computer networks, or to carry mass covert surveillance of e-mail traffic, may take decades to bring within a clear legal framework, depending on how quickly states come to realise that it is in their mutual self-interest to effectively regulate cyber-space. It may, in any case, prove to be an impossible task as it raises the question of whether states can actually regulate something that has escaped the confines of sovereignty – it may simply be too late to put the genie back into the bottle. In this scenario, states will fall back on general principles of international law, such as the norm prohibiting intervention in a state's political or economic affairs, which will not prevent cyber operations but will enable selective condemnation in the General Assembly and, occasionally, executive responses to particular threats by the Security Council.

In contrast, when it comes to new technologies that seem to provide straightforward improvements in military efficacy, such as Unmanned Aerial Vehicles (UAVs), commonly known as drones, it should be expected that existing international law will be adequate. Indeed, this is quite commonly the argument made in the literature, given that drones are seen as mere 'platforms' for the launch of weapons such as missiles and not new weapons per se.²⁶ Furthermore, drones are portrayed by their users and supporters as upholding the value of security rather than undermining it.²⁷ Drone using states, in particular, argue that new law is unnecessary for the regulation of drones, since they are simply another means of delivering death and destruction. But such arguments belie the fact that existing laws have to be reinterpreted and applied to drones and that in this process the louder voices of the drone using state tends to dominate. Such debate is not confined to the rules of humanitarian law on

plots against our people, so this threat is very real... do we go after these terrorists in their heartlands, from where they are plotting to kill British people, or do we sit back and wait for them to attack us?' HC Deb 2 December 2015, col 324 <www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151202/debtext/151202-0001.htm> accessed 14 April 2016.

²⁵ See UNGA Res 1962 'Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space' (13 December 1963) UN Doc A/RES/1962 (XVIII); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205.

²⁶ D Turns, 'Droning on: Some International Humanitarian Law Aspects of the Use of Unmanned Aerial Vehicles in Contemporary Armed Conflicts', in C Harvey, J Summers and ND White (eds), *Contemporary Challenges to the Laws of War* (CUP 2014) 199.

²⁷ For critical evaluation, see C Gray, 'Targeted Killings: Recent US Attempts Obama to Create a Legal Framework' (2013) *Current Legal Problems* 1.

targeting,²⁸ but also include the rules of the use of lethal force found in human rights law (in the context of the right to life) and, moreover, the application of the right of self-defence both within the meaning of Article 51 and under human rights law. The essence of self-defence is action necessary to ensure the survival of a state or person under threat of imminent attack. Given that the drones themselves are not entitled to the right of self-defence since their operators are not under imminent threat of attack, and the targets are a distance away from the state using them, the dynamics of self-defence action through the use of drones are clearly different.

The increasing use of drones raises security concerns for a number of reasons. When they are used for surveillance they are potential threats to personal security and privacy. When used for targeting purposes they not only raise security concerns for civilians potentially caught in the blast (the problem of collateral losses), but they also seem to either extend the battlefield, thereby bringing the instability inherent in war, or constitute the extraterritorial application of force for the purposes of some extreme form of law enforcement. Under this model of law enforcement, capture, arrest and trial are replaced by summary execution. All of these conceptions of drone use challenge the notion that they represent a new era of clean, clinical and, above all, legitimate use of force. Perceptions and assertions of security by governments are difficult for the courts to resist, particularly in times of terrorism that are characterised by random attacks against civilians, even when government actions to protect the lives and security of its citizens may appear to tread on the very freedoms it is fighting to protect.

Governments are under a duty to provide their citizens with security, but it cannot be an absolute duty – one that it aims to achieve at all costs. Due diligence obligations upon governments are obligations of conduct,²⁹ rather than result, and so a failure by government to prevent specific acts of terrorism is not necessarily an indication that the state has failed to fulfil its duties to protect life and security. The random nature of many terrorist actions means that it is very difficult to prevent each and every one. When considering how these obligations have been interpreted by the Human Rights Committee in the context of the rights to life and security under the International Covenant on Civil and Political Rights,³⁰ it is clear that states

²⁸ WH Boothby, *The Law of Targeting* (OUP 2012) 593.

²⁹ S Marks and F Azizi, 'Responsibility for Violations of Human Rights Obligations: International Mechanism' in J Crawford, A Pellet and S Olleson (eds), *The Law of State Responsibility* (OUP 2010) 729.

³⁰ (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 6 and 9.

must take reasonable and appropriate measures to protect individuals within their jurisdiction who are subject to known threats to their lives.³¹ The European Court of Human Rights has similar jurisprudence, stating in one judgment that a government that ‘knew or ought to have known... of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party’, must take ‘measures within the scope of their powers, which, judged reasonably, might’ be ‘expected to avoid that risk’.³² As has been stated by Bates:

Applying this jurisprudence by analogy to terrorist attacks creates some challenges: the bombing of civilians on aircraft or commuter trains and the hijacking of aircraft suggests a random choice of victims, rather than the selection of an ‘identified individual or individuals’ as victims.³³

When drones are used outside of a state’s jurisdiction, whether for surveillance or for targeting purposes, and when lethal force is used against individuals, the human rights issues become more complex. While human rights obligations apply to individuals within a state’s territory, there is considerable debate about when they apply to individuals outside its territory but, arguably, within its jurisdiction.³⁴ When considering the use of armed force from a drone against a terrorist suspect, the question is whether the individual is within the jurisdiction of the state using force. Although there is some Inter-American case-law that supports the application of the right to life in these circumstances,³⁵ there is contrary European jurisprudence.³⁶ Rather than considering whether the state using force has enough control over the targeted individual for the purposes of evaluating whether there is an assertion of jurisdiction in these circumstances, it might be better for the Courts to focus on the fact that the operator of the drone, often a distance away from the target, is clearly under the control of the state using force.³⁷

³¹ *Delgado Paez v Columbia* (12 July 1990) Human Rights Committee Communication No 195/1985, para 5.5.

³² *Osman v United Kingdom* (1998) 29 EHRR 245.

³³ ES Bates, *Terrorism and International Law: Accountability, Remedies and Reform* (OUP 2011) 83–4.

³⁴ See generally M Milanovic, ‘Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age’ (2015) 56 *Harvard International Law Journal* 81, 111ff.

³⁵ *Armando Alejandro Jr, Carlos Costa, Mario de la Pena and Pablo Morales v Cuba (Brothers to the Rescue)*, Case 11.589, Report No 86/99 (28 September 1999) para 25.

³⁶ *Bankovic and others v 17 NATO States* Admissibility Decision (Grand Chamber) App no 52207/99 (ECtHR, 12 December 2001) paras 52–3.

³⁷ F Hampson, ‘The Scope of the Extra-Territorial Applicability of International Human Rights Law’ in G Gilbert, F Hampson and C Sandoval (eds), *The Delivery of Human Rights: Essays in Honour of Sir Nigel Rodley* (Routledge 2011) 181–2.

If jurisdiction is established, such uses of targeted force from drones, when taken outside of armed conflict, appear to be violations of the right to life as there is usually no imminent threat to the state to justify its use of force as a last resort.³⁸ Indeed, the use of lethal force from drones seems to be an extreme and unlawful version of law enforcement where it is easier to kill suspects than to capture them (particularly as capturing suspects would put them within the capturing state's jurisdiction).³⁹ Furthermore, the use of drones for targeting suspected terrorists appears to be an attempt to externalise a state's security measures to counter terrorism by taking out targets in another state's territory before they have chance to hit the drone state's territory or nationals. The US has tried to justify this by arguing what is the ultimate justification for using lethal force – that there is a global armed conflict against terrorists or, at the very least, a transnational armed conflict against Al Qaeda and its associates. This argument is an attempt to justify a lower standard for the use of lethal force for, in simple terms, a use of lethal force is allowed in an armed conflict if the target is either a military objective, a combatant, or a civilian who is directly participating in hostilities, and the anticipated collateral damage ('incidental loss of civilian life') is not excessive in relation to the expected military advantage.⁴⁰ The US has interpreted these rules liberally: to carry out 'signature' strikes on the basis that the targeted individual is performing suspicious activities; to target funerals where there is a concentration of Taliban leaders; to target drug lords (who are criminals not combatants); and sometimes to order strikes outside of a conflict-zone, for example, in Yemen in 2002 and again in 2011.⁴¹ Under President Obama the 'war on terror' rhetoric has been abandoned in favour of a mixture of *jus ad bellum* and *in bello* justifications according to which a targeted killing is lawful 'if the targeted individual posed an imminent threat of violent attack against the USA, capture was not feasible, and the operation was conducted in line with law of war principles',⁴² with a presumption that a known terrorist located anywhere in the world constitutes an imminent threat to the US and its citizens.⁴³ Rather than determining whether that individual is a specific imminent threat (i.e. is about to launch an attack), their membership of a group such as Al Qaeda or ISIL is sufficient per se. In this way *jus in bello* reasoning in the form of identification of a 'combatant' is used to justify triggering a right of self-defence

³⁸ UNHRC 'P Alston: 'Study on Targeted Killings, Report to the Human Rights Council' (2010) UN Doc A/HRC/14.24/Add.6, paras 85–6.

³⁹ *Ocalan v Turkey* App No 46221/99 (ECtHR, 12 March 2003) para 125.

⁴⁰ Article 55, Additional Protocol I 1977; Turns (n 26) 207.

⁴¹ S Casey-Maslen, 'The Use of Armed Drones, in S Casey-Maslen (ed), *Weapons under International Human Rights Law* (CUP 2014) 400–3.

⁴² Tibori-Szabo (n 23) 383.

⁴³ *ibid* 402.

under the *jus ad bellum*. The confusion of legal concepts is a deliberate manipulation of the law to justify drones, which are used to hunt down their targets rather than respond to imminent attacks.

It seems that after the devastating attacks on the US of 11 September 2001, governments (and not just the US) have re-assessed their security priorities, have reasserted national security (often on the basis that this is the best way to protect human security) and have acted in violation of basic norms governing when coercion can be used by the state against individuals in order to protect the majority of its citizens. This has either been as a result of the extension of the battlefield or the extension of law enforcement. While the majority of states may support this, or, more accurately, remain supine in the face of these erosions, the securitisation of post-9/11 life has meant that (the right to) security has been elevated to a pre-eminent position in political rhetoric and action in contradistinction to its position as one of a number of human rights and protections provided by international law.⁴⁴

Thus, while there are international norms applicable to drone use, a great deal of it is underdeveloped, indeterminate or ineffectual, and furthermore, has been subject to artful manipulation of the boundaries between the *jus ad bellum* and *jus in bello*, with little regard to the right to life of the target. The UN itself has not tackled the legality of drone usage in any meaningful way. Although this is probably to be expected in the executive body, it is disappointing to see that the plenary body has also failed to fulfil its functions as a security community with the ability to shape normative frameworks, confining itself instead to exhortation in general resolutions to the effect that counter-terrorism efforts by states should be undertaken in conformity with international human rights law, refugee law and international humanitarian law.⁴⁵ This simply begs the question of how these norms should be applied to drone strikes.

IV. The Killing of an Individual in Self-Defence of a State

Given the discussion above, it seems that technology may have outstripped the law, for drones are not just new platforms for delivering weapons, they actually change the dynamics of both the battlefield and of law enforcement outside the battlefield. In the former, they enable the

⁴⁴ See generally L Lazarus, 'The Right to Security – Securing Rights or Securitising Rights?' in R Dickinson, E Katselli, C Murray and OW Pederson (eds), *Examining Critical Perspectives on Human Rights* (CUP 2012) 87.

⁴⁵ Eg UNGA Res 68/178 (18 December 2013) UN Doc A/RES/68/178.

enemy to be taken out without any risk to the drone-state's soldiers. They change the idea of war from the clash of armies, towards asymmetrical warfare often characterised by a technologically rich state using force against a technologically poor state or non-state actor. While international humanitarian law seems to be more readily interpreted to allow the calculated killings of soldiers and other combatants, outside of that law enforcement generally requires that the state (through its police or other agents) acts out of self-defence or defence of others, sometimes also when absolutely necessary in attempting to carry out arrests or quell riots.⁴⁶ The UN Declaration on the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990 stated:

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.⁴⁷

It is to the use of lethal force delivered by drones outside of armed conflict, and whether the above-stated standard is applicable, that this chapter now turns by focusing on one particular strike by a drone operated by the UK that resulted in the death of Reyaad Khan in Syria on 21 August 2015.

A. The Killing of Reyaad Khan

In the House of Commons, Prime Minister David Cameron justified this action as one of self-defence. He began by contextualising the UK's action:

Turning to our national security, I would like to update the House on action taken this summer to protect our country from a terrorist attack. With the rise of ISIL, we know

⁴⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art 2.

⁴⁷ 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990) para 9 <www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx> accessed 10 April 2016.

terrorist threats to our country are growing. In 2014, there were 15 ISIL-related attacks around the world. This year, there have already been 150 such attacks, including the appalling tragedies in Tunisia in which 31 Britons lost their lives. I can tell the House that our police and security services have stopped at least six different attempts to attack the UK in the past 12 months alone.⁴⁸

The Prime Minister provided no more detail on these alleged plots – not even an indication of the stage at which the plots were stopped or the nature of the attempted attacks. There is also no indication as to whether or not the plots were such that those involved faced (successful) criminal prosecution under counter-terrorism legislation, or whether the security services relied on more conventional criminal law provisions. The lack of detailed information is interesting as it allows the Prime Minister to build an image of a country under siege from terrorist attacks, without being restricted by or bogged-down in the details. He continued:

The threat picture facing Britain in terms of Islamist extremist violence is more acute today than ever before. In stepping up our response to meet this threat, we have developed a comprehensive counter-terrorism strategy that seeks to prevent and disrupt plots against this country *at every stage*. It includes new powers to stop suspects travelling. It includes powers to enable our police and security services to apply for stronger locational constraints on those in the UK who pose a risk. It addresses the root cause of the threat—the poisonous ideology of Islamist extremism—by taking on all forms of extremism, not just violent extremism.⁴⁹

Here Mr Cameron continues in the construction of a UK facing an unprecedented threat (it has never before been as acute), which requires an even stronger response, by explaining a counter-terrorist strategy that ultimately requires the extinction of threats at their source. The vagueness of his language here is concerning, especially when viewed in the light of the government's over-broad definition of extremism in its Counter-Extremism Strategy,⁵⁰ which is potentially capable of covering any form of opposition to the current status quo. The definition has simultaneously shifted and narrowed from its literal meaning of driving something to the limit,

⁴⁸ HC Deb (n 5) col 25.

⁴⁹ *ibid*, emphasis added.

⁵⁰ Home Office, *Counter-Extremism Strategy* (Cm 9148, Counter-Extremism Directorate: UK Home Office 2015) 9: 'Extremism is the vocal of active opposition of our fundamental values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs.'

to the extreme (or edge)⁵¹ to a term that indicates political and/or religious views that lie outside of the (acceptable) mainstream attitudes of a given society. Given that ‘Extremism is a relational concept’⁵² and ‘...the labelling of activities, people, and groups as “extremist”, and the defining of what is “ordinary” in any setting is always a subjective and political matter.’⁵³ For something to be considered ‘extreme’, there must be a mainstream against which it can be measured – extremism is now used to label views and opinions as ‘bad’ in an apparent attempt to create an objective standard to which all must adhere. The Prime Minister continued by outlining the UK government’s response to the threat:

We have pursued Islamist terrorists through the courts and the criminal justice system. Since 2010, more than 800 people have been arrested and 140 successfully prosecuted. Our approach includes acting overseas to tackle the threat at source, with British aircraft delivering nearly 300 air strikes over Iraq. Our airborne intelligence and surveillance assets have assisted our coalition partners with their operations over Syria. As part of this counter-terrorism strategy, as I have said before, if there is a direct threat to the British people and we are able to stop it by taking immediate action, then, as Prime Minister, I will always be prepared to take that action. That is the case whether the threat is emanating from Libya, from Syria or from anywhere else.⁵⁴

The Prime Minister then turned to the targeted drone strike in question, explaining it as a precise use of lethal force taken under the UK inherent right to self-defence in order to eliminate the threat caused by the terrorist activities of the targeted individual:

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

⁵¹Random House Kernerman Webster’s College Dictionary (*KDictionaries*) <www.kdictionaries-online.com/DictionaryPage.aspx?ApplicationCode=18#&&DictionaryEntry=extremism&SearchMode=Entry> accessed 13 April 2016; Merriam-Webster Dictionary (*Merriam-Webster.com*) <www.merriam-webster.com/dictionary/extremism> accessed 13 April 2016.

⁵² M Malik, ‘Engaging with Extremists’ (2008) 22 *International Relations* 85, 88.

⁵³ PT Coleman and A Bartoli, ‘Addressing Extremism’ (*International Center for Cooperation and Conflict Resolution*, nd) 2 <www.fpamed.com/wp-content/uploads/2015/12/WhitePaper-on-Extremism.pdf> accessed 10 April 2016.

⁵⁴ HC Deb (n 5) col 25.

right here in Britain, such as plots to attack high-profile public commemorations, including those taking place this summer.⁵⁵

Interestingly, the Prime Minister does not explain why the drone strike was still considered to be necessary in August when the commemorative events had already occurred without incident.⁵⁶ Lethal force used too late is an illegal reprisal or punishment, not a form of self-defence in the face of an imminent attack. Action taken too early because the pattern of behaviour suggested further attacks were being planned is illegal force taken pre-emptively in anticipation of a future attack.⁵⁷ The Prime Minister's justification comes close to an explicit recognition that this was a form of capital punishment:

We should be under no illusion; their intention was the murder of British citizens, so on this occasion we ourselves took action.⁵⁸

Here Prime Minister Cameron asserts knowledge of Reyaad Khan's intention regarding British citizens. It is not clear how he came to be able to state this so emphatically and with such certainty, especially given that Reyaad Khan was not interviewed by any security agency or asked about his intentions directly. This statement is more a rhetorical device encouraging the listener to accept Khan as a particularly dangerous threat that necessitated a response from the UK government than a statement of fact.

The justifications for lethal uses of force in self-defence often involve mentioning the illegitimacy of the victim due to their perceived wrongdoing.⁵⁹ This approach links the act of

⁵⁵ HC Deb (n 5) col 25.

⁵⁶ 'It is understood that the two events were the VE Day commemorations, presided over by the Queen at Westminster Abbey on 10 May, and a ceremony to mark the murder of Lee Rigby in Woolwich on Armed Forces Day on 27 June' (emphasis added), N Watt, P Wintour and V Dodd, 'David Cameron Faces Scrutiny Over Drone Strikes Against Britons in Syria' *The Guardian* (London, 8 September 2015) <www.theguardian.com/world/2015/sep/07/david-cameron-justifies-drone-strikes-in-syria-against-britons-fighting-for-isis> accessed 13 April 2016.

⁵⁷ G Fletcher, *Basic Concepts in Criminal Law* (OUP 1998) 133.

⁵⁸ HC Deb (n 5) col 25.

⁵⁹ See eg Israeli Spokesperson Mr Gillerman speaking at the UN Security Council 2004 debates on Israel's targeted killings on the death of Sheikh Yassin at the hands of Israeli security forces, 'He was an arch-terrorist with international aims and international ties... This is the man whom the Council is asked to defend.' (23 March 2004) UN Doc S/PV/4929; Michael Fallon in evidence before the Joint Committee on Human Rights stating that, 'These were people fighting for ISIL. They were not innocent civilians' when discussing the deaths of those with Khan, Fallon (n 5) 15; Liam Fox MP stating that those killed in the UK's drone strike 'were part of a barbaric organisation involved in systematic gang rape, torture and beheadings' in his article defending the Government's action and describing scrutiny of the legality of the strike as spurious. L Fox 'Drone Strikes in Syria are not just Legally Justified' *Independent* (London, 9 September 2015)

self-defence with the concept of punishment and promotes the concept that some states are in a position to discipline individuals in other states. However, the ‘purpose of a defensive act is not to inflict harm according to the desert of the aggressor; its purpose is to repeal the attack’.⁶⁰ Thus, self-defence needs to be just that – the *defence* of the self.

B. Killing an Individual as an Act of Self-Defence of the UK

The Prime Minister relayed to the House the circumstances of Reyaad Khan’s death:

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.⁶¹

In this statement Mr Cameron unequivocally asserts that the UK was acting in self-defence. For a state to be able to assert its inherent right to self-defence under the *jus ad bellum* against Reyaad Khan, there needs to be an ‘armed attack’.⁶² In the *Nicaragua* case of 1986 the International Court of Justice stated that not every use of force would amount to an armed attack justifying the use of serious retaliatory force.⁶³ A substantial imminent attack by *ISIL* may well meet the threshold of ‘scale and effects’ specified by the Court.⁶⁴ However, the Prime Minister is asserting the right to self-defence against an *individual*. Given that the only information regarding potential targets was in relation to events that had already passed at the time of the airstrike and, in the absence of any details regarding what exactly Khan was planning, it is hard to see how an individual would be able to remotely launch an armed attack in a *jus ad bellum* sense.⁶⁵

<www.independent.co.uk/voices/comment/drone-strikes-in-syria-are-not-just-legally-but-morally-justified-10493619.html> accessed 13 April 2016.

⁶⁰ Fletcher and Ohlin (n 9) 57

⁶¹ HC Deb (n 5) col 25.

⁶² UNC art 51.

⁶³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14, para 195.

⁶⁴ *ibid.*

⁶⁵ Of course, if Khan was in possession of a WMD then he may have been able to commit an act of sufficient magnitude to pass the threshold of armed attack. However, there was no suggestion from the UK Government that this was the case.

The point is that self-defence, by itself, is not a sufficient justification, especially when considering a use of force by a state against a specific individual. While not confining self-defence at the international *jus ad bellum* level to force used against an attacking state, the attacker must still represent an imminent threat to the *state*, as per the scale and effects test in the *Nicaragua* case. The attacks of 9/11 conducted by a non-state actor, or imminent attacks of a similar nature, may cross the threshold of such an attack justifying self-defence under Article 51 of the Charter, but care must be taken that the imminent threat posed by one individual is of sufficient gravity to trigger the Article 51 right, and if not, the standard must be a the more precise one as to when life can be taken under human rights law, where lethal force can only be used when absolutely necessary to defend oneself or others under imminent threat, unless the state using force is engaged in an armed conflict under which there are more generous rules on the use of lethal force.⁶⁶ The UK was not engaged in an armed conflict in Syria at the time of Reyaad Khan's killing in August 2015 and so the law of armed conflict was not applicable. It was not until December 2015 that the House of Commons approved of airstrikes in Syria.⁶⁷

C. Self-Defence as a Legal Principle

That states have the right to self-defence is undisputed, what is potentially problematic here is the proposition that states have the right to self-defence under the *jus ad bellum* against an individual person outside of their territory. The importance to a government of being able to bring a use of force under the self-defence banner is that it renders a potentially wrongful act lawful and legitimate. Article 21 of the International Law Commission's Articles on State Responsibility 2001 provides that: 'The wrongfulness of an act of a state is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations'. The government seems to be deliberately conflating the right of individual self-defence a state has under the UN Charter and customary law, with the right that individuals have to defend themselves when attacked. Essentially these are separate rights exercised within different legal orders (international law and domestic criminal law), although international human rights law also recognises the right of individuals to self-defence in delineating the right

⁶⁶ UK Ministry of Defence, *The Manual on the Law of Armed Conflict* (OUP 2004) 54–7

⁶⁷ The UK House of Commons resolved that it 'supports Her Majesty's Government in taking military action, specifically airstrikes, exclusively against ISIL in Syria'. It also noted the 'clear legal basis to defend the UK and our allies in accordance with the UN Charter' HC Deb (n 24) col 499.

to life. The human rights standard is applicable to state agents when they use force to defend themselves or others, or to prevent a serious crime from being committed.

i. In criminal law

In UK domestic law, self-defence is the use of reasonable force in defence of the self, another person, or property. Imminence of threat is a necessary element.⁶⁸ UK domestic criminal law generally does not apply extraterritorially, although for certain serious crimes it does – those offences include murder and manslaughter.⁶⁹

ii. In human rights law

The UK did not have control or authority over the area in which Khan resided. According to the European Court of Human Rights, for human rights to have extra-territorial application, the state in question must be exercising control and authority over the relevant individual and/or the territory in which they are in.⁷⁰ As the UK was not involved in military action in Syria at that time, this was prima facie not the case and so the European Convention on Human Rights (ECHR) would not appear to apply. If the ECHR were held to apply, on the basis either that the use of force against an individual should be construed as an assertion of jurisdiction by the UK, and/or that the drone operator situated in the UK should trigger jurisdiction as he or she is clearly under the control (and is within the territory) of the UK, article 2(2) ECHR permits killing in defence of others where absolutely necessary to protect life, which is one way of appraising the UK government's claim to self-defence in this case, although it presented no evidence that the lives of specific individuals in the UK or elsewhere were under imminent threat of existential attack.

iii. In international law

States have a right to self-defence that pre-dates the UN Charter. In the *Nicaragua* case the International Court established that the right to self-defence was an 'inherent' right under customary international law that was 'confirmed and influenced by' the UN Charter.⁷¹ The articulation of self-defence as an international legal principle developed through the *Caroline*

⁶⁸ Above n 2.

⁶⁹ DJ Harris and S Sivakumaran, *Cases and Materials on International Law* (8th edn, Sweet & Maxwell 2015) 226

⁷⁰ *Al Skeini and Others v United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) paras 130–142

⁷¹ *Nicaragua* (n 63) 94

case in the nineteenth century. In that case, ‘self-defence was changed from a political excuse to a legal doctrine’.⁷²

The *Caroline* case was later referred to in the Nuremberg Trials where it was stated that, ‘preventative action in foreign territory is justified only in case of “an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation”’.⁷³ The trial also made it clear, when discussing Germany’s invasion of Norway, that the claim that an act was one of self-defence is subject to objective scrutiny.⁷⁴ Thus, a state’s judgement of its own actions is not final.⁷⁵ It is therefore appropriate that the actions of any state claiming self-defence, as a justification for a use of force be placed under proper scrutiny, especially in the current climate of broadening legal claims to a right of self-defence.

During correspondence between the British Foreign Office and US Secretary of State discussing the *Caroline* incident the British laid out three arguments to justify its destruction of the steamer *Caroline*, the latter of these being self-defence. It was clear that this was not regarded as ‘strictly legal’,⁷⁶ that the only criterion was sufficient provocation and that the British Law Officers regarded the action as being fully justified under ‘self-defence and self-preservation’⁷⁷ as it was performed with the aim of guarding against future hostile activities.⁷⁸ The British had launched a surprise midnight attack on the vessel and in his correspondence US Secretary of State Webster stated that the British carried the burden of demonstrating that threats or a warning would have been ‘impracticable, or ... unavailing,’ that ‘day-light could not be waited for,’ and that seizing and detaining the vessel ‘would not have been enough’.⁷⁹ The US Secretary of State also provided the fundamentals of self-defence, which were accepted by the British Foreign

⁷² RY Jennings, ‘The Caroline and McLeod Cases’ (1938) 32 *AJIL* 82.

⁷³ Nuremberg Trial (1947) 41 *AJIL* 172, 205

⁷⁴ *ibid.*

⁷⁵ CW Jenks, *A New World of Law? A Study of the Creative Imagination in International Law* (Longmans 1969) 203

⁷⁶ Letter from British Foreign Office to US Secretary of State, 13 January 1838 (Record Office FO5 322) cited in Jennings (n 72) fn 13.

⁷⁷ There is a significant difference between these two concepts that needs to be examined: self-defence is the defence of the self against an imminent threat or attack; self-preservation is to secure the preservation of the self – in this situation, the self is the state. Thus, a state may justify the use of force against any enemy that seeks to destroy its very existence. In the case of terrorism, this is precisely what is asserted. Prime Minister David Cameron asserts that ISIL/Daesh pose a very real and existential threat to the UK as they seek to ‘destroy our way of life’ HC Deb (n 24). JL Brierly describes self-preservation as being ‘an instinct’ rather than a ‘legal right’, *The Law of Nations* (2nd edn, Clarendon Press 1936), which means that it would be limited by law (not all acts of self-preservation are permissible) and it is now self-defence that is referred to.

⁷⁸ Jennings (n 72) 87.

⁷⁹ Jennings (n 72) 89.

Office and are now acknowledged as being part of customary international law. It is for the state claiming self-defence to demonstrate that there existed a ‘necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’. Furthermore, the state must also evidence that it ‘did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.’⁸⁰ Thus, the essential elements can be summarised as: i) necessity (or imminence); and ii) proportionality.

i) Necessity: The right of self-defence ‘can be invoked only against a danger which is serious and actual or imminent’.⁸¹ Necessity is a fundamental principle of the doctrine of self-defence in both domestic and international law. The *Caroline* case made it clear that that the situation must be such that no practical alternative exists. The International Court of Justice held that necessity was a criterion for self-defence in the *Nicaragua* case,⁸² and also in its *Nuclear Weapons* Advisory Opinion.⁸³ Additionally, the Chatham House Principles state that:

...there should be no practical non-military alternative to the proposed course of action that would be likely to be effective in averting the threat or bringing an end to an attack.⁸⁴

In the strike against Reyaad Khan, it was revealed that the ‘preparations took place over a period of months after the intelligence agencies briefed ministers’,⁸⁵ strongly indicating that this was a premeditated killing rather than an act forced upon the government as the only means of preventing an imminent attack.

ii) Proportionality: According to a classic statement of self-defence by de Vitoria writing in the sixteenth century: ‘In war everything is lawful which the defence of the common weal requires... the end and aim of war is the defence and preservation of the State’⁸⁶ as without the existence of the state, all international law and the international system would be redundant. However, in the

⁸⁰ Webster’s letter to Lord Ashburton, Parliamentary Papers (1843) Vol LXI; British and Foreign State Papers, Vol 30, 193 cited in Jennings (n 72).

⁸¹ Jenks (n 75).

⁸² *Nicaragua* (n 67) para 176.

⁸³ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 41.

⁸⁴ ‘The Chatham House Principles of International Law on the Use of Force in Self-Defence’ (2006) 55 ICLQ 963, 967.

⁸⁵ Watt, Wintour and Dodd (n 56).

⁸⁶ Francisco de Vitoria quoted in J Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (The Lawbook Exchange 2000) 430.

modern context the ‘defensive measure must be limited to what is necessary to avert the attack or bring it to an end’,⁸⁷ and the measures taken must be reasonably limited to the necessity of protection and proportionate to the danger.⁸⁸ From the Prime Minister’s speech, it appears that although Khan was allegedly planning the attacks from his safe-haven in Syria, the actual attacks would have emanated from *within* the UK. Thus, it would seem that the UK security forces would have had the opportunity to intervene within the UK in order to prevent the attacks. Additionally, depending upon the stage of the plans, it may be that the attacks could still occur, notwithstanding the death of Khan – especially if those working in concert with Khan remain at large. The Prime Minister gave no details regarding arrests of those with whom Khan was working and upon whom he was relying for the implementation of his plans.

Applying these principles of necessity and proportionality to the present case: the killing of Reyaad Khan was ‘meticulously planned’ over a course of months, suggesting that the drone strike was not a reaction to an imminent threat. Furthermore, the events identified as potential targets had passed. Khan was not going to perform the attack himself and so his co-conspirators may have retained the capacity to continue with the plot despite his death. Thus, it is asserted that whatever nefarious plots Reyaad Khan may or may not have been involved in, they do not appear to have been such as to leave ‘no moment for deliberation’ and that the UK security services would have had the potential capability to prevent the attacks from occurring without the death of Khan.

iv. Pre-emptive strikes

The concept of anticipatory self-defence is not uncontroversial and is not accepted by the majority of states.⁸⁹ It seems that it is generally prohibited in law, although there may be circumstances in which anticipatory self-defence is morally or politically justified.⁹⁰ However, pre-emptively repelling an identified and imminent attack (however that is defined and recognising that the ‘battleground for this debate is the correct definition of imminence’⁹¹) is not the same as launching a preventative war, which would, in all likelihood, lack the necessary element of imminence as it would be aiming to prevent an attack from manifesting at all – unless the notion of imminence is stretched beyond common sense limits. Where the line is

⁸⁷ Chatham House Principles (n 84) 967.

⁸⁸ Jenks (n 75) 29.

⁸⁹ C Gray, *International Law and the Use of Force* (OUP 2008) 112–8.

⁹⁰ A Cassese, *International Law in a Divided World* (2nd edn, OUP 2005) 362.

⁹¹ Fletcher and Ohlin (n 9) 156.

drawn is crucial in determining whether or not a defensive act by a state was justified. In his evidence to the UK's Joint Committee on Human Rights Michael Fallon MP made it clear that he did not consider the *Caroline* definition to be current and that it was not 'possible to have a hard and fast rule about how you would define "imminent"'.⁹² This is a problematic proposition as a flexible approach to imminence would allow states to justify almost any use of force against a perceived enemy by claiming that an attack was imminent, notwithstanding the seeming reassurance of Mr Fallon's assertion that he has 'to be absolutely satisfied that there is simply no other way of preventing an attack that is imminent'.⁹³

According to the Chatham House principles:

The requirements set out in the *Caroline* case must be met in relation to a threatened attack. A threatened attack must be 'imminent' and this requirement rules out any claim to use force to *prevent* a threat emerging. Force may be used in self-defence only when it is necessary to do so, and the force used must be proportionate.⁹⁴

The UN's High Level Panel of 2004 opined that 'a threatened state, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate'.⁹⁵ The UN Secretary General has also declared that imminent threats are also covered by the right to self-defence.⁹⁶ The UK holds the view that states have the right to pre-emptively strike against an imminent attack.⁹⁷

Thus, it seems that a pre-emptive strike can be acceptable when the defender perceives an attack is about to occur. It would be to go against natural instinct and would be 'unrealistic in practice to suppose that self-defence must in all cases await an actual attack'.⁹⁸ When

⁹² Fallon (n 5) 9.

⁹³ *ibid* 4.

⁹⁴ Chatham House Principles (n 84) 965.

⁹⁵ UNGA 'Report of the UN High Panel on Threats, Challenges and Change' (2004) UN Doc A/59/565, para 188.

⁹⁶ UNSG 'In Larger Freedom' UN Doc A/59/2005, para 124.

⁹⁷ See eg the British proposition in the *Caroline* case, Jennings (n 72); in answer to a question in the House of Commons on the legitimacy of pre-emptive armed attack, the Attorney-General replied that '...it has been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent.' United Kingdom Materials of International Law (2004) *BYIL* 595, 822-3.

⁹⁸ Chatham House Principles (n 84) 964.

considering violence between individuals, the legitimacy of pre-emption is understandable as an individual faces possible extinction from an attack, especially one involving a weapon. A state does not face the same degree of threat in that it is hard to see how one individual can sufficiently threaten a state with extinction. However, to allow terrorist threats to materialise would potentially undermine the social contract between state and its citizens as the monopoly on force the state enjoys is quid pro quo for the security each citizen enjoys. This would only occur, however, if the level of terrorist force was allowed to be such as to have the ‘scale and effects’ spoken about in the *Nicaragua* case.⁹⁹ Below that threshold, terrorist violence should be dealt with in the same manner as the serious threat of violent crime arising within the UK from organised crime, drug-related crime, vigilantism, and other similar challenges to the state monopoly on force.

D. An Additional Criterion

In continuing his speech to the House, the Prime Minister appeared to add another criterion to the assessment of when the use of force in self-defence is legitimate:

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.¹⁰⁰

The UK appears to be adding an additional criterion of ‘unable or unwilling’, on the part of the host state where the terrorists are found, to the assessment of when the use of self-defence is legitimate. This is a problematic additional criterion as it is not clear how that is to be assessed and who is qualified to make that determination.¹⁰¹ It is not clear where this criterion has come from in relation to self-defence and appears to be a mixing of different legal principles

⁹⁹ *Nicaragua* (n 63).

¹⁰⁰ HC Deb (n 5) col 5.

¹⁰¹ C Gray, ‘Targeted Killings: Recent US Attempts to Create a Legal Framework’ (Legal Studies Research Paper Series, University of Cambridge Paper No 52/2013, November 2013) 11.

(principally borrowing from international criminal law). Although it has gained traction in the literature,¹⁰² it has not been expressly accepted by states.¹⁰³

E. The United Kingdom's Legal Basis for the Strike

The Prime Minister continued by outlining the legal basis for the strike:

With these issues of national security and with current prosecutions ongoing, the House will appreciate that there are limits on the details I can provide. However, let me set out for the House the legal basis for the action we took, the processes we followed and the implications of this action for our wider strategy in countering the threat from ISIL. 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. The United Nations Charter requires members to inform the President of the Security Council of activity conducted in self-defence, and today the UK permanent representative will write to the President to do just that.¹⁰⁴

The Prime Minister went on to explain that this was not action undertaken as part of an armed conflict in Syria in which the UK was involved, something that did not happen until December 2015 when the government won a vote in the House of Commons in favour of UK airstrikes in Syria.¹⁰⁵ Despite this, however, the Prime Minister did allude to principles of humanitarian law - minimising civilian casualties, proportionality and military necessity. These are referenced as

¹⁰² 'Where a State is unable or unwilling to assert control over a terrorist organization located in its territory, the State which is a victim of the terrorist attacks would, as a last resort, be permitted to act in self-defence against the terrorist organization in the State in which it is located' (fn omitted), Chatham House Principles (n 84) 970.

¹⁰³ Gray (n 101) 11.

¹⁰⁴ UNSC 'Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (8 September 2015) UN Doc S/2015/688.

¹⁰⁵ Above n 24.

also framing the conduct of the operation, but the overriding claim was that the government had no other choice but to use lethal force in defence of the UK.

Our intelligence agencies identified the direct threat to the UK from this individual and informed me and other senior Ministers of that threat. At a meeting of the most senior members of the National Security Council, we agreed that should the right opportunity arise, military action should be taken. The Attorney General attended the meeting and confirmed that there was a legal basis for action. On that basis, the Defence Secretary authorised the operation. The strike was conducted according to specific military rules of engagement, which always comply with international law and the principles of proportionality and military necessity. The military assessed the target location and chose the optimum time to minimise the risk of civilian casualties. This was a very sensitive operation to prevent a very real threat to our country, and I have come to the House today to explain in detail what has happened and to answer questions about it.

I want to be clear that the strike was not part of coalition military action against ISIL in Syria; it was a targeted strike to deal with a clear, credible and specific terrorist threat to our country at home. 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 core 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.

My first duty as Prime Minister is to keep the British people safe. That is what I will always do. There was a terrorist directing murder on our streets and no other means to stop him. The Government do not for one minute take these decisions lightly, but I am not prepared to stand here in the aftermath of a terrorist attack on our streets and have to explain to the House why I did not take the chance to prevent it when I could have done. That is why I believe our approach is right. I commend this statement to the House.¹⁰⁶

¹⁰⁶ HC Deb (n 5) cols 26–27.

The government has declined to publish the Attorney-General's advice and it is not exactly clear whether or not the advice was specific to the killing of Khan or was more in principle.¹⁰⁷

In response to a question from Harriet Harman MP, the Prime Minister stated:

She asked: is this 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? The answer to that is yes. Of course, Britain has used remotely piloted aircraft in Iraq and Afghanistan, but this is a new departure, and that is why I thought it was important to come to the House and explain why I think it is necessary and justified... If it is necessary to safeguard the United Kingdom and to act in self-defence, and there are no other ways of doing that, then yes, I would [do it again]'.¹⁰⁸

Debates about the extra-territorial application of human rights can tend to obscure the central problem with drone strikes taken outside of armed conflict, namely the claim that they are justified actions of self-defence of a state under the international law governing the use of force by states. Rather than this *jus ad bellum* standard, cases of threats posed by individual terrorists should be assessed at the level of the individual right to life, at least in principle, where lethal force is only permitted for state agents acting in self-defence when absolutely necessary to protect the lives of those using force or other individuals under attack or in danger of imminent attack. It is clear that the UK government is deliberately using a self-defence standard that does not recognise this divide on the basis that the average citizen will not recognise 'fine' legal distinctions. There is also a deliberate attempt by the UK government to mould the concept of self-defence to capture any state use of force against state, non-state actor or individual, who is presented as a threat to the nation, understood not only as the state but also every UK national. This is not justifiable under the concept of self-defence as 'military action, even in national-defense, remains morally problematic in a profound and troubling way'.¹⁰⁹ What may be used to justify legitimate self-defence by an individual person, 'fails to do so for national defense'.¹¹⁰ The use of the self-defence argument is predicated on the notion that it is possible to determine

¹⁰⁷ O Bowcott, 'Syria Drone Strikes: UK Attorney General Refuses to Disclose Advice' *The Guardian* (London, 15 September 2016) <www.theguardian.com/politics/2015/sep/15/syria-drone-strikes-uk-attorney-general-refuses-to-disclose-advice> accessed 13 April 2016.

¹⁰⁸ HC Deb (n 5) col 30.

¹⁰⁹ D Rodin, *War and Self-Defense* (OUP 2002) 199.

¹¹⁰ *ibid* 198.

which actor has behaved illegitimately and in a manner that makes the use of force against them justifiable.¹¹¹

However, the interpretation of self-defence at both national levels and international levels is much disputed, creating the conditions for drone using states to exploit and operate what appears to be a new form of remote self-defence in the shape of drone strikes undertaken by operators thousands of miles away from the targets. Even within federal states, there are different understandings of what is allowed in self-defence.¹¹² There are differences in criminal law standard between states, while at the international level self-defence means different things in different contexts. For example, in the case of peacekeeping, self-defence has been extended from a narrow conception of a peacekeeper defending himself and his colleagues from attack, to include defending third parties under imminent threat, to extend to defending the mandate and the peace process.¹¹³ In peacekeeping, self-defence straddles a national criminal law/human rights standard and what could be called a *jus ad bellum* standard of self-defence, when a state is defending itself from attack. Normally a peacekeeper is concerned with defending himself from attack and increasingly defending civilians under imminent existential threat, but occasionally, especially under mandates given to forces in the 21st century, he or she is concerned with defending the state in which they have been deployed. However, that expanded concept of self-defence of the state can only be justified under a Chapter VII mandate given to the peacekeeping force by the Security Council under which certain ‘necessary measures’ have been authorised. In any case, a peacekeeper acting in defence of a civilian under attack is to be judged by narrower and specific standards of imminence, proportionality and necessity, than when he or she is acting to defend the state from non-state actors who threaten the peace. Similarly, when a state authorises a drone operator to use lethal force against an individual target in defence of potential victims, as the UK did against Reyaad Khan, it should be judged by the narrower and specific standards of a state agent coming to the defence of threatened citizens in the UK, which focuses on when an individual’s life can be taken by a state that owes him a duty not to violate his right to life, unless a ‘use of force is no more than

¹¹¹ *ibid* 107 and 193.

¹¹² For an overview of the differences in self-defence laws within the US, see eg C Currier, ‘The 24 States that have Sweeping Self-Defence Laws Just Like Florida’ (*ProPublica*, 22 March 2012) <www.propublica.org/article/the-23-states-that-have-sweeping-self-defense-laws-just-like-floridas> accessed 13 April 2016.

¹¹³ N Tsagourias, ‘Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping Operations: Their Constitutional Dimension’ (2006) 11 *JCSL* 465, 473.

is absolutely necessary ... in defence of any person from unlawful violence',¹¹⁴ and not by standards applicable to self-defence of a state under Article 51 of the UN Charter and under customary international law.

Doubts about sufficiency of the claim to self-defence made by the Prime Minister in relation to the lethal strike against Reyaad Khan, may explain why, in the letter to the Security Council explaining the defensive nature of the action, referred to by the Prime Minister, the British ambassador widened the threat to include ISIL:

On 21 August 2015 armed forces of the United Kingdom of Great Britain and Northern Ireland carried out a precision airstrike against an ISIL vehicle in which a target known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom was travelling. This airstrike was a necessary and proportionate exercise of the individual right of self-defence of the United Kingdom.

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.¹¹⁵

The justification becomes an even broader *jus ad bellum* one, namely that Reyaad Khan's killing was both an act of individual self-defence of the UK and an action in collective self-defence of Iraq, and, moreover, was a strike against ISIL, an armed group that is more likely to be able to mount attacks of the scale and effects required to trigger the UK's right of self-defence of the state under Article 51 of the Charter. This effectively became the position of the UK following the terrorist attacks on Paris in November 2015, when Parliament voted for airstrikes against ISIL, after gaining a resolution in the Security Council that lent support to states using force against that organisation.¹¹⁶ It might be argued that this renders the debate about the killing of Reyaad Khan an academic one as ISIL and its members became a legitimate target after Paris, but that would leave the stand-alone killing of an individual by a drone strike as a precedent for when there for future terrorist scares and threats that are not overtaken by events.

¹¹⁴ ECHR art 2(2)(a).

¹¹⁵ UN doc (n 104).

¹¹⁶ UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249, op para 5.

Further obfuscation of the legal basis of the strike is found in evidence given on 16 December 2015 to the Joint Committee on Human Rights Inquiry into UK government's policy on the use of drones for targeted killings, when the Secretary of State for Defence, Michael Fallon MP, stated that:

I think that compliance with international humanitarian law discharges any obligation that we have under international human rights law, if I can put it that way. If any of those obligations might be thought to apply, they are discharged by our general conformity with international humanitarian law.¹¹⁷

Although by this time the UK's use of force in Syria had been approved by the House of Commons (on 3 December 2015), the discussion focused on the drone strike of August 2015 in which Reyaad Khan was killed. Furthermore, the above was an answer given to a specific question: 'The human rights law standard says that lethal force outside an armed conflict situation is justified only if it is absolutely necessary to protect life. Is that the standard?'¹¹⁸ The most relevant question was not answered; instead the government fell back on arguments of humanitarian law that only apply in an armed conflict to which the UK is a party. The introduction of *in bello* standards to displace the stricter human rights ones is yet another example of the government playing fast and loose with international law.

V Conclusion

There will be drone strikes in the future where there is no link to an armed conflict, where the standard against which the action should be measured is one of self-defence and then care must be taken to assess whether the claim can be founded under the UN Charter, essentially as a defence of state, or under human rights law, as a defence of individuals. Self-defence at both levels shares common features, such as imminence, that drone strikes like the one against Reyaad Khan, struggle to match, but killing individuals in defence of individuals is properly assessed at the more precise level of the right to life. The fact that human rights law has lagged behind the technology reality of drone strikes, by failing to recognise whether the use of lethal force against an individual by a state agent firing a weapon from a drone flying over another state is an assertion of jurisdiction over the target, should not detract from the conclusion that

¹¹⁷ Fallon (n 5) 4.

¹¹⁸ *ibid.*

the targeted killing of an individual is an act that should be judged by human rights standards. There are two exceptions to this: first, if the targeted individual can be said to be part of an imminent armed attack on the UK that has such scale and effects that it triggers the right of self-defence of the state itself under Article 51 of the Charter, when proportionate force can be used to eliminate the attack or imminent threat of it; secondly, where the UK is engaged in an on-going armed conflict against a non-state actor such as ISIL, and the individual is a legitimate target under the law of armed conflict (international humanitarian law). It is submitted that Reyaad Khan's killing did not fit either of the exceptions and, moreover, on the evidence presented by the Prime Minister, did not represent such an existential threat to individuals within the UK to justify the use of lethal force against him in violation of his right to life.

New technology, whereby an operator, sitting thousands of miles away, can in real time and with great precision kill an individual, means that individual drone strikes outside of an armed conflict challenge our conceptions of when force is legally justifiable. The surgical killing of an individual by a drone operator who is not under imminent threat of existential violence or physically close to others who are under such a threat, does not seem to fit our definition of self-defence as either captured in criminal law or human rights law, but it is argued that it should be these standards that are applicable. Evidence of an existential imminent threat to individuals in the UK or to its citizens abroad must be given for such strikes to be justified. Claiming the right to defend the state by targeted killings of individuals cannot be accepted per se without evidence that the individual was part of an imminent orchestrated attack that is of sufficient scale as to elevate the attack to one against the state and not only against individuals within it. To blithely accept that the UK has the right to defend itself against Reyaad Khan is to grossly exaggerate the threat one individual can pose, but it also represents a reversion to a very primitive view of the state whereby its promise to protect its citizens at all costs is used to circumvent the basic rights of individuals. Moreover, the portrayal of individuals like Khan as dangerous and evil serves the purpose of justifying their demise. Precise and clinical summary execution of individuals suspected of terrorist activities in a country far away from the UK is technologically possible but it clearly violates human rights *standards*. It is time, however, that human rights *laws* caught up with technology.