ESIL Reflections
Editorial Board: Anne van Aaken (editor-in-chief), Jutta Brunnée, Başak Çali, Jan Klabbers

July 11, 2016 Volume 5, Issue 7

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Drone Strikes, Terrorism and the Zombie: On the Construction of an Administrative Law of Transnational Executions

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Last month the UK House of Lords and House of Commons Joint Committee on Human Rights issued a report entitled “The Government’s policy on the use of drones for targeted killing”. While putting a lot of emphasis on respecting the rule of law the report reveals to what extent a new legal regime for targeted killings in fighting Islamist terrorism has become accepted in Western policy elites. Central discursive elements of the extremely disputed US justifications for its drone strikes against suspected terrorists are beginning to proliferate in official statements of Western governments in order to justify contributions to the fight against ISIL in Syria and Libya. Given that an acceptance of these arguments put forward by the US for its drone programme would have dramatic consequences for post-1945 attempts to constrain state violence by legal guarantees, the Paris attacks could in retrospect turn out to be ISIL’s decisive blow against Western modern legalism and its cherished ideal of the rule of law.

The Joint Committee report is a reaction to the disputed killing of Reyad Khan, a 21 year old British citizen, who was killed by an RAF drone strike in Syria last year in August. Prime Minister Cameron had justified the killing before the House of Commons as an act of individual self-defence “to protect the British people from a direct threat of terrorist attacks being plotted and directed by Khan”[1]. He explicitly stated that it was the first time for centuries that lethal force was used by the British army in a country, in which the UK was not involved in a war and thus spoke of “a new departure” for counter-terrorism measures outside of armed conflicts.[2] Nehal Bhuta in an EJIL-Talk blog-post spoke of a “sea change” in UK foreign policy.[3] Other UK governmental statements were more careful than the Prime Minister, justifying the killing as collective self-defence in the framework of the armed conflict with ISIL in Iraq.[4]

[1] As summed up in ‘The Government’s policy on the use of drones for targeted killing’, House of Lords and House of Commons Joint Committee on Human Rights, Second Report of Session 2015 – 16 dated 10 May 2016, para 1.3.
[2] Quoted in Ibid., para 2.4 et. seq.
[3] Nehal Bhuta, ‘On Preventive Killing’, (*EJIL: Talk!*, 17 September 2015) <http://www.ejiltalk.org/on-preventive-killing/> accessed 23 June 2016.
[4] Letter from the Permanent Representative of the United Kingdom to the President of the Security Council S/2015/688, 7 September 2015.

As the report of the Joint Committee on Human Rights criticises, the UK government since then has proved unable or unwilling to come up with a coherent presentation of their legal position to the interested public. From the statements made before the Joint Committee it seems clear, however, that killing of individual terror suspects with or without British citizenship by drone strikes without the consent of the state in which the strike is conducted, remains a policy option for the UK-government, which it sees as a legally defensible position.[5] With this policy change, the UK has basically endorsed the counter-terrorism policies, including the drone programme, of the Obama administration.[6]

The legal justifications presented by the US and now partly accepted also by the UK are not only unclear and disputed as the report states, but they call into question basic structures of three legal regimes aimed at constraining state violence: the law of international peace and security, international humanitarian law and international human rights law. What the Joint Committee report gets wrong is the underlying assumption that the new drone-counter-terrorism policy could eventually be justified if only the existing legal regimes were coherently applied. Instead, the current attempts to legally justify such killings turn these legal regimes into a zombie, only very remotely resembling the original normative structures. It seems as if the UK Prime Minister Cameron was right: it is something new and revolutionary that is happening here – a decisive break with post 1945 attempts to constrain state violence through legal guarantees.

If these justifications were accepted the remaining question is whether the created zombie is in fact a new legal regime - a creature that can still be called law, something like a new administrative law for transnational executions; or whether Western governments are just creating a vast lawless space for executive assassinations. Both options make me feel really uncomfortable and this anxiety inspires this reflection . But let me justify first my rather strong zombie claim, according to which the legal justifications put forth by Western governments for drone strikes against terror suspects outside of a confined armed conflict – if accepted – would distort fundamental structures of the *ius contra bellum*, of international humanitarian law, as well as of fundamental human rights norms, including *habeas corpus* rights and the right to life.

1. Deriding the *ius contra bellum*

The concrete practice that primarily the US and now also the UK seek to justify is the unilateral killing of terror suspects outside of hot battlefields such as the regular drone-strikes in Pakistan and Yemen (before the civil war) without the consent by these states. Up until the beginning of the century, such killings would have been considered illegal by an overwhelming majority of international legal experts for the following reasons: In the absence of a Security Council authorization, such attacks violate the prohibition of the use of force enshrined in Art 2(4) UN Charter, given that self defence is traditionally only permitted vis à vis an attacking state. Even if one accepts that self-defence can under international law be exercised as a reaction to attacks by terrorists, such attacks usually do not have the intensity in scale and effects demanded by the International Court of Justice. If aerial strikes are conducted in order to prevent future attacks by terrorists, classic doctrine requires that these attacks are imminent and sufficiently concrete in order to justify so called anticipatory self-defence. Even if all these requirements for

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[5] 'The Government's policy on the use of drones for targeted killing', House of Lords and House of Commons Joint Committee on Human Rights, Second Report of Session 2015 – 16 dated 10 May 2016, para 2.35 *et seqq*.

[6] Bhuta (n 3).

lawful self-defence were fulfilled, attacking terror-suspects on foreign soil without governmental consent violates the territorial sovereignty of the state, in which the raid is conducted.[7]

With respect to each of these four legal hurdles, the US has developed a discursive counter-strategy, [8] with recently as a reaction to the ISIL-threat more and more Western states supporting these arguments. First, self-defence against non-state actors is now considered possible also to prevent future non-imminent terrorist attacks, despite the wording of Art. 51, which speaks of "if an armed attack occurs", which makes crystal clear that pre-emptive action based on intelligence suggesting that a terrorist attack might occur sometime in the future does not qualify as self-defence under this article. Secondly, the insufficient intensity of a past terrorist attack to qualify as an "armed attack" under Art. 51,[9] is now seen by the US and the UK as sufficient by adding up various past terrorist attacks to one great de-temporalized cumulative attack. Most interestingly, the missing consent of the state concerned is overcome by the assumption that consent does not matter once the state is quote "unwilling or unable" to stop its territory being used by terrorists as a place of refuge or a so called "safe haven". Taken together, these fundamental re-interpretations of basically all conceptual elements of self-defence construct a permissive regime for aerial assassinations over long distances without the consent of the state, in which the drone strikes take place. Most of these arguments are so openly instrumental in their approach to existing *ius contra bellum* structures and so far-fetched making it difficult to consider them as conforming to conventional standards of practical legal argumentation.

Nonetheless, more and more Western governments have like the UK government recently begun to endorse both the right to self-defence against suspected terrorists and the "unwilling and unable" doctrine in the fight against ISIL in Syria.[10] ISIL barbarism seems to have opened the floodgates for accepting the initially extremely disputed US arguments regarding self-defence against Al-Qaida. A notable exception is the German government. In its letter to the Security Council justifying German military contributions to fighting ISIL in Syria it does not refer to the "unwilling and unable" doctrine nor does it claim a general right to self-defence against non-state actors outside of an armed conflict. Instead it refers to the fact that ISIL effectively controls a certain territory excluding Syrian control and therefore can be a legitimate object of collective self-defence.[11] Whatever one might think of these aerial bombardments on ISIL-fighters in Iraq and Syria, in which reportedly more than 1300 civilians have been killed so far,[12] the justification put forth by the German government seems much more careful in its refusal to

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[7] Except for cases where terrorist action can be attributed to the state according to the rules on state responsibility.

[8] Christine Gray, 'Targeted Killings: Recent US Attempts to Create a Legal Framework' (2013) 66 Current Legal Problems 75.

[9] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, para. 195.

[10] Letter from the Permanent Representative of Australia to the President of the Security Council S/2015/693, 9 September 2015; Letter from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the President of the Security Council S/2015/221, 31 March 2015; Letter from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the President of the Security Council S/2015/563, 24 July 2015.

[11] Letter from the Chargé d'affaires of the Permanent Mission of Germany to the President of the Security Council S/2015/946, 10 December 2015 (now likewise Belgium, see Marko Milanovic, 'Belgium's Article 51 Letter to the Security Council', (*EJIL: Talk!*, 17 June 2016) <http://www.ejiltalk.org/belgiums-article-51-letter-to-the-security-council/ accessed 21 June 2016).

[12] Minimum estimate by the non-profit Airwars Project available at <https://airwars.org/civilian-casualty-claims/ accessed 21 July 2016.

endorse the “unable or unwilling” doctrine. This could be read as a sort of *lex-ISIL*, non-applicable to Al-Qaida or any other terrorist network without a territorial basis and military forces capable of making and stabilising territorial gains. It also shows that for justifying military action against ISIL in Syria it is not necessary to endorse the propagated new self-defence regime against terrorist networks with its disastrous legal consequences, especially since there is an armed conflict in Iraq involving ISIL, which had crossed the Syrian border. ISIL is not Al Qaida, its mimetic and partly successful efforts to establish state-like structures can make it a legitimate object of self-defence in the sense of Art 51 UN Charter.

A decisive feature of the propagated new legal regime is by the way that the main protagonists in this discursive effort take it for granted that the new legal regime will not be applied among us, which is among Western states and the 5 permanent Security Council members. There will be no US-drone attacks in Brussels or Paris to kill ISIS-terrorists without the consent of the Belgian or French government, even if these governments proved to be unable to find and arrest terrorists. The new regime is a legal framework for what can be called the “semi-periphery”, consisting of states that do not belong to the inner circle or are not powerful enough to resist the application of the regime.[13] Historically, a specific regime was developed for how the European powers dealt with the Middle East and North Africa belonging at the time mainly to the Ottoman Empire. The rules applied here – both *ius ad bellum* and *ius in bello* rules – in practice differed significantly from the rules that hitherto had been recognized between what was called fully “civilized” nations. 19th century European international lawyers did not contend that no rules existed, but they held that in the semi-periphery rules should be applied less rigidly by creating new exceptions and re-interpretations of the law, creating a discursive grey zone, which allowed governments to get away with violent interventions in the increasingly vigilant Western media.

As a case in point may serve the very first aerial bombardments in the history of warfare conducted from Italian balloons in its war over Tripoli in 1912 against the Ottoman Empire. Justifying the annexation of what today is Libya and the way it was conducted, an Italian international lawyer in the most prestigious German international law journal of the time held that the rules applicable vis à vis the Ottoman Empire “were more of a colonial nature” and thus different from the rules applicable among civilized nations.[14] It was a distinctive feature of 19th and 20th century great power interventions in the periphery and semi-periphery that new weapons are being tested and employed, the legality of which was still disputed by contemporaries. As to the reasons for the war, the Italian government remained vague. In a formal declaration of war Italy rejected an extremely forthcoming and conciliatory reply from Istanbul to a prior Italian ultimatum demanding better protection of the interests of Italian nationals in Tripoli. For Italy the reply from the High Porte was “evidence of either the ill-will or of the powerlessness of which the Imperial Government and authorities have given so many proofs, particularly with regard to Italian rights and interests in Tripoli and Cyrenaica.”[15]

Air-policing and targeted aerial bombardments by the way were the preferred British and French military strategy to control and supress local uprisings in the Middle East in the Interwar Period, after these territories had become British or French Mandate-Territories. Such violent

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[13] The history of international lawyers from the semi-periphery has recently been intriguingly explored by Arnulf Becker Lorca, *Mestizo International Law* (Cambridge University Press 2015).

[14] Gennaro Tambaro, ‘Das Recht Krieg zu führen‘ (1914) 24 Niemeyers Zeitschrift für Internationales Recht 70.

[15] Cited in ‘Editorial Comment - Tripoli’ (1912) 6 American Journal of International Law 152.

interventions of the West in the Middle East then fuelled the birth and spread of radical Islamist movements in the late 19th and early 20th century.[16]

2. Universalizing the "Licence to Kill"

Let me now add a few words on the *ius in bello* issues. The as such legally undisputed "licence to kill combatants" authorised by international humanitarian law is according to both the US and the UK government now suddenly applicable even outside a territorially confined armed conflict. According to this claim, which is irreconcilable with the concept of armed conflict in existing treaty law,[17] the armed conflict follows the individual terror suspect; wherever a terror suspect can be located we have an armed conflict and a legitimate target, stripped off his or her right to life, a reconceptualization which constitutes a dramatic expansion or reconceptualization of the fundamental notion of "armed conflict" in international humanitarian law.[18]

You may counter from a US or now also UK governmental perspective: ok, but new challenges and risks through international terrorism as well as new technologies, such as drones, do require new conceptualizations! A new concept of armed conflict is needed in times of global terrorism! For me this is a highly questionable approach to legal interpretation in its complete disregard of the still existing normative framework. Moreover, killing suspected terrorists outside of a hot and confined battlefield through drones is also for other reasons deeply at odds with basic structures of international humanitarian law. Terrorist networks like Al-Qaeda, unlike the ISIL-army, do not qualify as combatants and they usually also do not qualify as "civilians directly taking part in hostilities". Instead they are criminals and as such they must be dealt with under the law-enforcement paradigm.[19] The right to use lethal violence for better or worse has been granted by international humanitarian law to combatants that are part of an armed conflict and that potentially risk their own lives by participating in an antagonistic struggle to realize military objectives.[20] Interestingly the very same features of these drone-strikes, which render them morally susceptible are those which put them outside of the general logic of humanitarian law: it is the extreme asymmetry between those individuals conducting a strike and those who are killed – the absence of a reciprocal risk-situation in a concrete antagonistic struggle over military advantages.

Outside of armed conflicts, lethal aerial attacks are generally illegal under international human rights law, except in extremely rare cases where the executed individual poses an immediate and concrete threat to the life of another human being at this very moment in time and the execution is the only available means to protect the threatened individuals. Paradigmatic is the example of the hostage taker with the hostage at gun-point who can be killed by the police employing lethal force. Such an immediate time connection between the execution and the threat posed was arguably not the case in 99 per cent of the killings ordered by the Obama

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[16] Mark Neocleous, 'Air Power as Police Power' (2013) 31 Environment and Planning D: Society and Space 578.

[17] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston on targeted killings, A/HRC/14/24/Add.6, 28 May 2010, para. 46 *et seqq*.

[18] On associated new notions of the "battlefield" Frédéric Mégret, 'War and the Vanishing Battlefield' (2012) 9 Loyola University Chicago International Law Review 131.

[19] Cf. on the two paradigms Paul W. Kahn, 'Imagining Warfare' (2013) 24 European Journal of International Law 199.

[20] Cf. Michael Walzer and Avishai Margalit, 'Israel: Civilians & Combatants' (14 May 2009) The New York Review of Books 21. Report of the UN Special Rapporteur Christof Heyns on Lethal Autonomous Weapons, A/HRC/23/47, 9 April 2013, para. 60; on autonomous weapons also see Robin Geiß, Claus Kreß *et al.* (eds), 'Autonomous Weapons Systems' (Cambridge University Press, planned publication July 2016).

Administration under its drone-based counter-terrorism policy. Not to speak of the innocent civilians who are regularly also killed by lethal drone strikes on suspected terrorists. Killings without trial under human rights law are generally qualified as “extrajudicial executions” violating the right to life.[21] From that perspective, it is highly problematic that the Report by the Joint Committee suggests that such killings could potentially be justified by the government’s obligation to protect its citizens under the right to life hereby endorsing the associated argument that tries to turn “extrajudicial executions” into a human rights obligation by some sort of opaque and arbitrary balancing exercise. Taking all these findings together, the practice referred to is a grave violation of human rights aggravated by a simultaneous violation of the prohibition of the use of force in international relations, the latter of which is considered a *ius cogens* norm and a “cornerstone” of UN Charter Law by the International Court of Justice. This is arguably how any sensible international lawyer before 2001 would have subsumed the practice of executing terrorists from the air over long distances on foreign soil without authorization by the affected state or the Security Council.

Conclusion

Let me add a few words by way of conclusion on the zombie created by these distortions of legal constraints on governmental violence once cherished as achievements of Western legal modernity. The Zombie is created by a fundamental reconceptualization of the notion of self-defence and armed conflict in international law with the aim to get rid of all legal constraints on state violence imposed by the law enforcement paradigm. Is this a new legal regime? Are we really moving towards an administrative law of transnational executions? It is an inherent problem of international legal discourse that measures of Great Powers violating the law will often be reformulated as an evolving new legal regime and legal scholars should be extremely sceptical of any such claims, since whoever says “emerging” in an international legal context very likely wants to cheat. But even if one went along with framing all these distortions as new defensible interpretations of the law in force, what would be the content of such a new law? A licence to kill any suspected terrorist plus innocent bystanders in any non-OECD country outside of armed conflicts by drone strikes as an unlimited right of those states, which can afford and operate a fleet of drones?

No! According to the UK Attorney General giving testimony before the Joint Committee, important legal constraints do remain in place. The killing has to be “necessary and proportionate”.[22] That is of course *very* reassuring. Administrative balancing is supposed to replace fundamental legal prohibitions enshrined in rules; an argumentative twist that by the way seems to leave those parts of the discipline defenceless, which have already given in to the cult of proportionality as the new global rule-of-law-paradigm. We are being told that with proportionality and the associated balancing exercises an extremely solid legal basis for regulating transnational executions is in place. *Honi soit qui mal y pense!*

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[21] Alston (n 17).

[22] As quoted in the Joint Committee Report (n 1), para 3.12.