

Written evidence from the All-Party Parliamentary Group on Drones¹ (UMF 18)

Public Administration and Constitutional Affairs Committee

The Role of Parliament in the UK Constitution: Authorising the Use of Military Force inquiry

Summary

It is recognised that the fundamental role of the state is to protect its citizens. This may lead from time to time to exceptional circumstances requiring exceptional action. Balancing this is the need in our society for the highest possible degree of democratic consent. For these reasons, Parliament should have a strong and central role in the authorisation and deployment of force in all but exceptional circumstances. This practice has been set out in the constitutional convention,² through practice,³ and in official Government policy.⁴ Parliament's ability to debate, vote on, and provide oversight over military force underpins essential pillars of democracy. For the rare occasions when a pre-deployment vote is not possible, mechanisms to enable post-hoc scrutiny within Parliament must be strengthened and formalised. Similarly, the convention on ministerial accountability provides an important framework for accountability and oversight. For any convention to be meaningful, however, its terms must be well-established, and the means to uphold its obligations robust. These conventions are only useful if the Government provides Parliament with accurate, detailed and timely information about its policies and activities. For example, without disclosing its understanding of 'military force', or that of a 'combat' or 'non-combat' operation, Parliament's ability to scrutinise military activities is highly limited. Currently, Britain's growing military capabilities and commitments are far outpacing the existing procedures for parliamentary scrutiny and oversight, highlighting the need for a strengthened Parliament to meaningfully uphold its obligations under the conventions.

The Royal Prerogative and the development of the constitutional convention

The centuries old Royal Prerogative gives the executive legal power to use force without consulting or informing parliament. However, over the past decades, a consensus has been established that it is more desirable to gain the approval for action from the wider polity. The constitutional convention responds to the demands of modern democracy for increased legitimacy and oversight, whilst ensuring government retains the ability to act in emergencies when necessary.

¹ Chair: Adam Holloway MP | Co-Chair: Baroness Stern CBE | Vice-Chairs: Alex Sobel MP, Tom Brake MP, Caroline Lucas MP, Lord Hodgson of Astley Abbotts, Lord Wallace of Tankerness, Lord Macdonald of River Glaven

²See for example House of Commons Library (2018) Parliamentary approval for military action, 17 April (<https://bit.ly/2qCbxcx>)

³Votes in Parliament: Iraq 2003, Syria in 2013, Iraq 2014, Syria (ISIS) 2015.

⁴ Cabinet Office (2011) Cabinet Manual: A guide to laws, conventions and rules on the operation of government. 11 October. 406764/1011, p. 44 (<http://bit.ly/2MQHmHM>)

Echoing the evolution of societal opposition to the unchecked use of the Royal Prerogative by the Monarch, Committees of both Houses have produced reports concluding that the use of the royal prerogative by the Executive to deploy armed force is also outdated; and that parliamentary approval should be sought for the use of armed force in all but exceptional cases. The formal role of Parliament is already partially codified in Article VI of the Bill of Rights, established in 1689⁵. For example, each year it approves defence expenditure, and every five years it must renew the legal basis for the existence of the armed forces and system of military law. In addition, successive Governments under Prime Ministers Tony Blair, Gordon Brown and David Cameron have all indicated that they would not commit the armed forces without parliamentary approval, with several initiatives undertaken to further the debate on formalising the convention.⁶

As outlined by the House of Commons Library, the debate surrounding the convention ‘appears to have evolved from the question of whether the convention exists at all, to one of when it will be triggered’. On the basis of recent deployments a nominal threshold for parliamentary approval appears to have been established:

- The possibility of premeditated military action exists.
- Military forces are to be deployed in an offensive capacity.⁷

The fundamental role of the state is to protect its citizens. This may lead from time to time to exceptional circumstances requiring exceptional action. Under the convention, as it has developed, it has been made clear that the Government would also come to the House retrospectively in emergency situations, where there was a need to protect a critical British national interest or to prevent a humanitarian catastrophe. If the House is dissolved the Government would also come to Parliament as soon as possible for a parliamentary debate on the matter. This arrangement would provide sufficient military flexibility to enable operational effectiveness in an emergency.⁸

This however, should not render the convention toothless, as the use of the royal prerogative in these *exceptional* situations would still need to be held to account by necessary standards, as we will outline in the sections below on the need for a strengthened Parliament.

Furthermore, the main argument for quick executive decision-making via the royal prerogative is to protect the country from attack, invasion, and occupation. As outlined by Professor Nigel White, since 1945 the UK has claimed the right of self-defence in its response to the Argentinian invasion of the Falklands in 1982 and in a collective response alongside the US to the attacks of 9/11 in 2001. However, even in these situations the defensive response was not immediate and allowed significant Parliamentary debate although no vote was taken.⁹ Furthermore, most significant deployments and uses of force since 1945

⁵Article VI of the Bill of Rights 1689: “That the raising or keeping of a standing army within the kingdom in time of peace unless it be with the consent of Parliament is against the law.”

⁶ The Cabinet Manual 2011; The Governance of Britain, Cm 7170, July 2007

⁷ Mills, C. (2018) ‘Parliamentary approval for military action’, House of Commons Library, 17 April (<https://bit.ly/2qCbxcx>)

⁸ Ibid

⁹ White, N. (2014) Written evidence from Professor Nigel White, Professor of Public International Law, University of Nottingham (PCD 01) to HoC Political and Constitutional Committee (12th Report) (

were not taken to defend the territorial integrity or political independence of the UK from attack, but were concerned with enforcing international laws¹⁰, or preventing humanitarian crises¹¹. Except in these cases (themselves matters of significant debate at the time), there have been very few instances where the government has not had the time to go to Parliament before taking action. Thus prior approbation should be the norm. Therefore, as emergency situations are rare, and accordingly would not hinder the majority of operations, what was once the rationale for the prerogative power to go to war should no longer dictate the entire decision-making process.¹²

By making prior approval for the deployment of force the norm, as underlined by the convention, in all but exceptional situations, Parliament would not only exercise an accountability function, but may also be said to have accepted co-responsibility for any decision. Importantly, in this way the decision to deploy force remains political, and neither changes the balance between elected bodies and the military, nor infringes on the military's ability to do its job. Furthermore, co-responsibility provides added incentive for all involved to consider these decisions with care. Coupled with strengthening the means for Parliament to uphold its obligations under the convention, its involvement would enable the highest possible degree of democratic consent in decisions on the use of force. Post-Iraq 2003, any use of force undertaken as an emergency measure should need to stand up to post-hoc scrutiny at the minimum, with prior Parliamentary approval being a means to secure the support and buy-in of the wider polity in the majority of decisions.

Therefore, the use of the Royal Prerogative by itself is no longer appropriate. To respond to the demands of a modern democracy, its use needs to be regulated by conventions that facilitate the appropriate level of oversight. For any convention to be meaningful, however, its terms must be well-established, and the means to uphold its obligations robust. As we will outline in the sections below, currently Britain's growing military capabilities and commitments are far outpacing the existing procedures for parliamentary scrutiny and oversight, highlighting the need for a strengthened Parliament to meaningfully uphold its obligations under the conventions.

The importance of Parliament's role in the deployment of military force

According to the 2012 Democratic Audit, Parliament's influence over the use of force is among the weakest in the EU.¹³ In fact, by comparison to their European counterparts, developments in Britain in military capabilities have greatly outrun the legal framework guiding said military actions, leaving the latter inadequate.¹⁴ Looking ahead, the

<https://bit.ly/2zDrvqT>)

¹⁰ (Iraq in 2003 and proposed in Syria in 2013)

¹¹ (Kosovo 1999, Libya 2011)

¹² N.D. White, *Democracy Goes to War: British Military Deployments under International Law* (Oxford University Press, 2009) chapters 7 and 8.

¹³ Democratic Audit UK (2013), Parliament has relatively weak war powers compared to legislatures in other democracies. 29 August (<https://bit.ly/2SU3hl4>); Wilks-Haeg, S., Blick, A. and Crone, S. (2013) The 2012 Democratic Audit Report.

¹⁴ White, N. (2014) Written evidence from Professor Nigel White, Professor of Public International Law,

marginalisation of parliamentary participation on the use of force and the growing civil-military gap may affect public perception of military operations and ultimately, personnel.¹⁵ Whereas public support for the individuals serving remains high in the UK, that of military operations has declined over the past decades.¹⁶ As the civil-military gap increases, whereby the public have little knowledge of the activities of the Armed Forces, some have predicted that public support for military personnel will also decline should the military increasingly engage in remote, coalition and clandestine actions.¹⁷ Public support also hinges on the notion that the use of force is based on democratic consent and representation. It is a widely established democratic notion (and has been since at least the Boston tea party) that populations that pay taxes are entitled to representation in parliament and decision-making¹⁸. The use of force is among the most decisive actions a state will make and can have widespread impacts on the public. As such, the participation of Parliament in this decision-making, as the only directly elected, and therefore truly representative body in the UK, falls in line with democratic evolution and is crucial to representation.

Whilst some information must be withheld from the public on accounts of national security, the public's knowledge that Parliament has a strong and central role in the deployment of force, can positively affect support for military operations and increase perceptions of democratic legitimacy and accountability.¹⁹ Recognising the importance of Parliament's role in engendering trust and support for the deployment of military force, a convention of seeking parliamentary approval before the deployment of troops has developed. This constitutional convention represents an important step in the effort to bring this area of the British Government up to date with modern democracy, and was set out in writing in the *Cabinet Manual* in 2011:

*"In 2011, the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate."*²⁰

University of Nottingham (PCD 01) to HoC Political and Constitutional Committee (12th Report) (<https://bit.ly/2zDrvqT>); see also Democratic Audit UK (2013), Parliament has relatively weak war powers compared to legislatures in other democracies. 29 August (<https://bit.ly/2SU3hl4>); Wilks-Haeg, S., Blick, A. and Crone, S. (2013) The 2012 Democratic Audit Report.

¹⁵Hines, L. A., Gribble, R., Wessely, S., Dandeker, C., & Fear, N. T. (2015). 'Are the Armed Forces Understood and Supported by the Public? A View from the United Kingdom'. *Armed Forces & Society*, 41(4), p. 688–713. (<https://bit.ly/2zqqwLk>); see also Zeigler, K. (2005) Oral Evidence to the Lords Select Committee on the Constitution. (<https://bit.ly/2JPaG0V>)

¹⁶Hines, L. A., Gribble, R., Wessely, S., Dandeker, C., & Fear, N. T. (2015). 'Are the Armed Forces Understood and Supported by the Public? A View from the United Kingdom'. *Armed Forces & Society*, 41(4), p. 688–713. (<https://bit.ly/2zqqwLk>)

¹⁷ *ibid.*

¹⁸ "Taxation and Democracy" Wolfgang Schön Max Planck Institute (<https://bit.ly/2ENQWtH>)

¹⁹Zeigler, K. (2005) Oral Evidence to the Lords Select Committee on the Constitution. (<https://bit.ly/2JPaG0V>)

²⁰Cabinet Office (2011) *Cabinet Manual: A guide to laws, conventions and rules on the operation of government*, 11 October, 406764/1011, p.44 (<https://bit.ly/2MQHmHM>).

The adoption of the constitutional convention was again underlined following the parliamentary votes concerning military intervention in Libya in 2013²¹, Syria in 2013²² and Iraq in 2014²³. Numerous academics welcomed the vote, some arguing it contributed to the institutionalisation of the aforementioned convention, whereas others said it represented a significant step in the direction of a convention.²⁴ Efforts to uphold the constitutional convention have already been seen in the reforms and strengthening of key committees' mandates, for example the Intelligence and Security Committee. As pointed out by former Chair, Sir Malcolm Rifkind, this was done in response to growing acknowledgement of the need to "modernise and strengthen parliamentary oversight of the intelligence community, in which Parliament and the public can have full confidence".²⁵

However, the nature and effectiveness of the convention relies on a strengthened Parliament that is able to uphold the scrutiny and decision-making obligations the convention seeks to protect. For example, the related convention on ministerial accountability, institutionalised in the *Ministerial Code* in 2010 depends on the adequate ability of Parliament to hold ministers to account.²⁶ A key aspect of this, is the 'paramount importance that Ministers give accurate and truthful information to Parliament'.²⁸

A strengthened Parliament - in particular formally recognising and institutionalising the constitutional convention - will have broader positive effects on democracy in Britain. Most importantly it would:

- create procedural legitimacy and credibility, in particular in and among civil society;
- increase democratic legitimisation of decisions of magnitude;
- increase civilian control of the deployment of force, and;
- increase control of deployments to coalitions, which is important as partnership and coalitions increase in the future, and as coalition control becomes increasingly internationalised.²⁹

The need for a strengthened role for Parliament in the deployment of military force

As it stands, however, there are several crucial gaps in Parliament's ability to uphold the scrutiny and decision-making obligations the convention on the deployment of military force

²¹ HC Deb 21 March 2011 vol 525 c700 (<https://bit.ly/2IY0otv>)

²² HC Deb 29 August 2013 vol 566 c1425 (<https://bit.ly/2Ns0uwG>)

²³ UK Parliament, Commons recalled to debate Iraq: Coalition against ISIL, 26 September 2014, (<https://bit.ly/2KEYdRe>)

²⁴ Democratic Audit (2013) War, Peace and Parliament: experts respond to the government's defeat on Syrian intervention. (<https://bit.ly/2yVP1jq>)

²⁵ The Intelligence and Security Committee (2011) [Press Release](#), 19 October (<https://bit.ly/2T0kCJ2>)

²⁶ Gay, O. (2012) 'Individual ministerial accountability', House of Commons Library, 8 November (<https://bit.ly/2Qwf1c7>)

²⁷ Professor Diana Woodhouse has noted that 'individual ministerial responsibility has its origins in the need for parliament to act as a check on Ministers...and in the recognition of Ministers that they must ultimately rely on the support of the Commons for their policies'. Ibid.

²⁸ Ministerial Code 2010 (2010)

²⁹ Dr Zeigler, Professor Bell (2005) '[Oral Evidence](#) to the House of Lords Select Committee on the Constitution', Waging War: Parliament's Role and Responsibility, 7 December, p.47-8 (<https://bit.ly/2JPaG0V>)

seeks to protect. This is due to the inadequate provision of information to committees³⁰, and the lack of any one body within Parliament to holistically scrutinise all aspects of the use of force - particularly when working with partners.³¹ Without strengthening parliament, it is unable to properly carry out its obligations.

Today, growing military capabilities and commitments far outpace the existing procedures for Parliament to be able to have an effective role in approving and scrutinising deployment of military force. It is no longer clearly understood when or why the UK deploys force. This contrasts traditional understandings, where it was associated with conventional forces going to war. Current practice shows an increase in the deployment of force by unconventional methods that marginalise the need for parliamentary approval, or even knowledge, of military action; a development that is predicted to increase in the future.³² Examples of this are the deployment of information-gathering drones and sharing said intelligence, which may aid targeting for partner strikes, the use of Special Forces instead of regular troops,³³ and the provision of capabilities to allies, such as embedded troops, intelligence and advice and assist activities.³⁴ The available information on these contemporary deployments suggests the development of a nebulous grey area between ‘combat’ and ‘non-combat’ operations, including that one can rapidly transform into the other. Through these methods, the Government deploys UK force to combat missions in countries – even where Parliament has explicitly not approved military action.

The APPG on Drones Inquiry into *the UK’s Use of Drones: Working with Partners*, along with years of reporting by organisations such as Remote Warfare Programme, Reprieve, Amnesty International, Rights Watch UK and Human Rights Watch, shows there is growing evidence that Britain is taking on military commitments via these methods and through working with partners, without Parliament’s explicit authorisation.³⁵ Crucially, when this facilitates or assists partners’ lethal strikes in conflicts the UK is not a party to, and where differing Rules of Engagement risk unlawful action, there is a distinct lack of process to ensure that Parliament is informed - or its approval sought. While due respect is given to the

³⁰ Joint Committee on Human Rights (2016) The Government’s policy on the use of drones for targeted killing: Government response to the Committee’s second report of Session 2015- 16, 19 October, HC 747, p.4 (<https://bit.ly/2NqUC6P>); Intelligence and Security Committee (2017) UK Lethal Drone Strikes in Syria, 26 April, HC 1152, p.10 (<https://bit.ly/2ISfLdG>).

³¹ APPG on Drones (2018) *The UK’s Use of Drones: Working with Partners*. (<https://bit.ly/2yZSMoe>)

³² Ibid, p.18

³³ Walpole, L. and Karlshøj-Pedersen, M., (2018) ‘Britain’s Shadow Army: Policy Options or External Oversight of UK Special Forces’ Remote Warfare Programme. (<https://bit.ly/2Q16SiG>)

³⁴ APPG on Drones (2018) *The UK’s Use of Drones: Working with Partners*. (<https://bit.ly/2yZSMoe>)

³⁵ See for example: Reprieve (2018) Submission to the APPG Inquiry on the use of armed drones: working with partners, p.2;13 (<https://bit.ly/2KYR6Pz>) ; Drone Wars (2018) Drone Wars UK submission to APPG Drones Inquiry, 16 March, no.3.9 (<https://bit.ly/2tTCLNU>) Remote Control Project (now Remote Warfare Programme) (2018) Written submission to drones APPG inquiry into the use of armed drones: working with partners, no. 1.2; 3.4 (<https://bit.ly/2lY9bm7>) ; Abdul Rahim, R. (2018) Deadly assistance: The role of European states in US drone strikes, Amnesty International (<https://bit.ly/2KMGYxp>); Hjort, C. (2017) Hidden from the public: the UK’s drone warfare, Rights Watch UK (<https://bit.ly/2BBfWmm>); Human Rights Watch (2018), Hiding behind the Coalition (<https://bit.ly/2Nar7pp>)

need for operational secrecy, this continues to raise serious questions about the legality, efficiency and strategic coherence of UK use of force – via drone or otherwise.

“A substantial part of UK assistance is the sharing of intelligence, provision of bases and embedding of personnel. This is deeply problematic because Parliament is not privy to this intelligence, and almost every request for information on this topic is categorically dismissed. Likewise, there is no form of parliamentary approval or oversight sought for embedded personnel, despite remaining the legal responsibility of the UK.”³⁶

- Professor Michael Clarke, former Director-General of the Royal United Service Institute (2007-15)

Furthermore, the lack of government transparency of its policies and working definitions, and its failure to disclose these to Parliament, has led to a loss of confidence in the legality of military operations, both within civil society, academia, Parliament itself and the general public. As pointed out by the House of Commons Library:

“[The] lack of established definitions [for military action and operations] continues to cause unease for many and has led several to argue that the Government retains considerable discretion on what meets the convention’s threshold thereby making the whole framework potentially open to interpretation and exploitation.”³⁷

- House of Commons Library

For example, the government recently confirmed that there is “no official definition of combat and non-combat operations or a set list of criteria”.³⁸ In practice, this allows many forms of military deployment to slip through the cracks of Parliamentary knowledge and oversight, as ‘non-combat’ operations (however they may be defined) are not disclosed to, or voted on in, Parliament. The APPG on Drones’ recent report highlights the significance of this lack of official definition when looking at use of force via drone. Currently, drones operating on ‘non-combat’ missions are not disclosed to, or voted on, in Parliament. Drones were deployed on this ‘non-combat’ basis in Syria for reconnaissance purposes, following the 2013 vote that explicitly forbade deployment of force on that territory. However, the 2015 strike on Reyaad Khan in Syria, revealed a precedent to use these same drones to carry out targeted strikes in the absence of any parliamentary authority for UK use of force in that country. While there may be reasonable barriers to parliamentary authorisation prior to a strike (as was the case here), as it stands, even post-hoc scrutiny of strikes like this one is not adequate due to the sensitivities around the intelligence and legal basis for military action. Both the Joint Committee on Human Rights (JCHR) and Intelligence and Security Committee (ISC) Inquiries into this strike expressed ‘disappointment’ in the Government in failing to address crucial questions that would have enabled them to assess the legality of the strike and evaluate UK policy.

³⁶ APPG on Drones (2018) The UK’s Use of Drones: Working with Partners, p.9 (<https://bit.ly/2yZSMoe>)

³⁷ Mills, C. (2018) ‘Parliamentary approval for military action’, House of Commons Library, 17 April (<https://bit.ly/2qCbxcx>)

³⁸ Armed Forces: Deployment: Written question – 167831, answered 4 September 2018. (<https://bit.ly/2PNpQJp>).

*“This failure to provide what we consider to be relevant documents [to the ISC Inquiry on UK Lethal Drone Strikes in Syria] is profoundly disappointing. Oversight depends on primary evidence: the Government should open up the ministerial decision-making process to scrutiny on matters of such seriousness.”*³⁹

- Dominic Grieve, Chair of the Intelligence and Security Committee

This template for enabling emergency action and reporting back to Parliament was seen again in April 2018 whereby the Prime Minister authorised strikes in Syria against the Assad regime, in concert with the US. However, without having robust means for post-hoc scrutiny, like the Reyaad Khan strike in 2015, there remains no holistic means for assessing the legal, intelligence and strategic basis of what is effectively the involvement of the UK in a new conflict in the region, expressly against the mandate agreed by Parliament.

In addition, recent efforts by the Government and Attorney General have expanded legal definitions and produced ambiguous policy positions that essentially work to negate the constitutional convention and put individuals and the UK at risk. For instance, the APPG on Drones Inquiry Report found that the norms guiding the use of force appear to have been stretched, allowing for a broader application of force, rooted in an expansive - and previously rejected - US-style definition of imminence. Following on from this, recent comments by Boris Johnson and Gavin Williamson challenge the Government’s legal underpinning for drone strikes. Whereas Johnson implies that strikes may have been motivated by revenge for previous actions, not the inherent right to self-defence against future attacks⁴⁰, Williamson’s comments suggest a broadening of when, where and under what circumstances an individual can be killed.⁴¹

“It seems to us that the Government is seeking to stretch the principles contained in existing legal frameworks to fit a new use of lethal force abroad, rather than conforming its practice to existing principles. This risks encouraging other states to adopt expansive interpretations of existing international law and the further erosion of international legal norms.”

- The APPG on Drones Inquiry: *the UK’s Use of Drones: Working with Partners*⁴²

Lack of clarity concerning the Government’s policy on the use of force permits wide-ranging discretion to define what policies mean, undermining democratic accountability and the constitutional convention. The failure to disclose said policy to Parliament, and the subsequent lack of meaningful oversight and accountability (due to the lack of information provided to Parliament), can work to reinforce public mistrust in British military operations

³⁹ Intelligence and Security Committee (2017) Press Briefing, April 26, p.1 (<https://bit.ly/2ThFfkh>)

⁴⁰ Wright, O (2018) Drone strikes are retribution for atrocities, Boris Johnson suggests (<https://bit.ly/2A00tdo>)

⁴¹ Doward, J. (2018) MOD in chaos over drone use outside of war zones (<https://bit.ly/2Em3EAp>)

⁴² APPG on Drones (2018) *The UK’s Use of Drones: Working with Partners*, p.44 (<https://bit.ly/2yZSMoe>); Chaired by Professor Michael Clarke, former Director-General of RUSI; Legal advice provided by Dapo Akande, Fellow of Exeter College and Co-Director of the Oxford Institute for Ethics, Law and Armed Conflict, University of Oxford. See the full panel [here](#).

and undermine democratic norms. Without access to the policy, Parliament is unable to ensure UK compliance with domestic and international law.

Our armed forces are operating in dynamic, fast-paced and complex environments, which may lead to the need for exceptional action. It is essential, however, that military necessity is balanced with the need in our society for the highest possible degree of democratic consent. The failure to extend democratic oversight to elected officials outside the Government, means that today, the British public, Parliament and the international community are unable to assess British compliancy with appropriate legal frameworks. Consequently, the UK's position as a global leader in upholding the rule of law is jeopardised. A strengthened Parliament would increase democratic oversight, and help mitigate these risks.

The risks posed by a lack of parliamentary scrutiny and oversight

As outlined above, Parliament's ability to debate, approve and scrutinise UK deployment of military force needs to be strengthened. Crucial gaps include unconventional methods of deploying force which marginalise parliamentary involvement, and the lack of official working definitions of key policy terms. When it comes to British assistance or aid to, or cooperation or partnership with, allies this lack of parliamentary oversight and accountability may have important consequences. The APPG on Drones Inquiry found that at present time UK military personnel (including ministers) may be at risk of criminal liability for providing assistance in allies potentially unlawful actions.⁴³ If the persons targeted are civilian, this can amount to a war crime.⁴⁴ The risk of prosecution is also present when the use of force occurs outside situations of armed conflict, as the doctrine of combatant immunity only applies to armed conflict. In such situations UK personnel could be liable to prosecution for murder. As the Joint Committee on Human Rights stated in 2016:

*"The possibility of criminal prosecution for complicity in murder also arises for all those UK personnel who have a role in assisting or facilitating the use of lethal force by coalition allies, such as the US, which has a much wider approach to the use of lethal force outside of armed conflict. Such assistance might take the form of logistical support (for example, permitting US jets to use UK airbases), or the provision of intelligence about targets gathered by UK surveillance and reconnaissance."*⁴⁵

This position mirrors that of the Court of Appeal, who in a judicial review held that it was "certainly not clear" that UK personnel would benefit from the combatant immunity defence.⁴⁶ Reports suggest that some senior RAF commanders share the "legal misgivings" around the use of drones outside of armed conflict.⁴⁷ Armed Forces are already operating in difficult

⁴³APPG on Drones (2018) The UK's Use of Drones: Working with Partners, p.42 (<https://bit.ly/2yZSMoe>)

⁴⁴Ibid.

⁴⁵Joint Committee on Human Rights (2016) The Government's policy on the use of drones for targeted killing, 10 May, HC 174 2015-16, p. 24 (<https://bit.ly/2v07Mkp>).

⁴⁶R. (on the application of Noor Khan) v. Secretary of State for Foreign and Commonwealth Affairs [2014] EWCA Civ 24 (<https://bit.ly/2KweNm1>).

⁴⁷Foster, P. (2015) 'RAF remote drone pilots facing real-world combat stress', Telegraph, 9 November,

circumstances to ensure our safety; clarity on policy and legality within Parliament would help to increase confidence in operations within the military, in Parliament and among the public, and enable Parliament to meaningfully uphold its obligations under the convention.

The long-term view of Parliament's role in the deployment of military force

As we enter a new era of military operations in which remote warfare and collaborative military operations are likely to become central elements to UK deployment of force, the rapid development of a complimentary legal framework is crucial to ensure democratic accountability and legitimacy of operations. Moreover, contrary to present oversight mechanisms and priorities, military assistance falls within a complex legal environment and demands more, not less oversight and accountability.⁴⁸⁴⁹

The APPG on Drones' Inquiry highlighted three cross-cutting areas where Parliament's current ability to hold the government to account, debate policy and provide support for government military actions is severely lacking. These are:

- Targeted killing outside areas of existing military action;
- The UK's process for mitigating civilian casualties; and
- The provision of intelligence and other forms of assistance to the widely criticised US drone programme.⁵⁰

These three issues illustrate the lack of publicly or parliamentary available information on activities related to military partnerships or the provision of assistance. At present, the Government maintains that it does not operate a programme of targeted killing, despite the JCHR Inquiry finding it did,⁵¹ a deleted line in a policy document stating the UK had 'a practice of targeting suspected terrorists outside of the armed conflict itself',⁵² and a growing body of evidence provided by civil society pointing to the contrary.⁵³ Similarly, the

(<https://bit.ly/2uaHycX>) last accessed 6 July 2018.

⁴⁸See: Remote Control Project (now Remote Warfare Programme) (2018) Written submission to drones APPG inquiry into the use of armed drones: working with partners. (<https://bit.ly/2lY9bm7>)

⁴⁹ House of Commons Public Administration and Constitutional Affairs Committee (2017), Lessons still to be learned from the Chilcot Inquiry, Tenth Report of Session 2016–17, p.3-4 (<https://bit.ly/2K9CUU9>)

⁵⁰Heyns, C. (2012), Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/20/22/Add.3 (<https://bit.ly/2Nu59OY>); Sridharan, V. (2014), UN official seeks probe into US drone attacks, International Business Times (<https://bit.ly/2lY8zNm>); Stohl, R. (2018), An action plan on US drone policy: Recommendations for the Trump Administration, Stimson Center (<https://bit.ly/2u9G5nc>); Abdul Rahim, R. (2018) Deadly assistance: The role of European states in US drone strikes, Amnesty International (<https://bit.ly/2KMGYxp>); Emmerson, B. (2014) Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/25/59 (<https://bit.ly/2KPjYgr>).

⁵¹Joint Committee on Human Rights (2016) The Government's policy on the use of drones for targeted killing. p. 37; 39. (<https://bit.ly/2v07Mkp>)

⁵²APPG on Drones (2018) The UK's Use of Drones: Working with Partners, p.8; 25. (<https://bit.ly/2yZSMoe>)

⁵³Abdul-Rahim, R. (2018) 'Drones: call for 'full public inquiry' into UK's secret involvement in US attacks', Amnesty International. (<https://bit.ly/2F7nNXw>); Drone Wars/ Cole. C. (2018) 'British armed drone operations reach a crossroads', Drone Wars. (<https://bit.ly/2PBx8fH>); see also Oliver Wright (2018) 'Drone strikes are retribution for atrocities, Boris Johnson suggests', The Times, 26 July. (<https://bit.ly/2A00tdo>); Jamie Doward (2018) 'MoD 'in chaos' over drone use outside war zones', The Observer/Guardian, 3 February (<https://bit.ly/2Em3EAp>); Dan Jarvis MP (2017) 'The defence secretary wants us to kill Brits who fought for ISIS. We can't sink to their level', The Guardian, 7 December. (<https://bit.ly/2ja1iwb>).

Government continues to dismiss credible reports regarding its civilian casualty numbers as well as questions from Parliamentarians challenging the adequacy of the MOD's 'zero civilian casualty' stance.⁵⁴ Finally, the Government disregards ongoing questions concerning the legality of providing intelligence to the US that it may use for its widely criticised programme of targeted killing in areas such as Yemen, Pakistan and Somalia where the UK is not at war.⁵⁵

These are but three issues that illustrate the changing nature of legal and ethical challenges that must be coupled with policy and legal debate in real time, to ensure Britain adheres to its national and international obligations. The three issues above already reflect badly on the UK's international standing, subject its personnel to policies of legal uncertainty, and sow mistrust about the democratic legitimacy of UK actions. As such, long-term developments, including new generations of military capabilities and increased partnerships, the lack of a strong and central Parliament in the use of force, combined with lack of clearly defined policies, legal positions and processes, leaves the UK open to risk of complicity in unlawful action.

As military capabilities and modes of engagement change, the rationale that informs the deployment of force should too. In particular, the overwhelming emphasis on efficient decision-making (by the Government), at the expense of democratic debate and approval (by Parliament), needs to be re-evaluated. This logic has been seen time and again, for example, informing both the 2015 Reyaad Khan strike and the most recent Syria strikes in April this year. A re-evaluation entails recognising the changing methods used to deploy force, and public awareness of, and responses to, military activity. Crucially, this includes acknowledging that today, democratic accountability and legitimacy of military operations is as important as operational efficiency. In fact, democratic accountability is crucial to the public's perception of the legitimacy of an operation. As shown in Professor White's testimony to the Political and Constitutional Committee in [2014](#), over the past decades – following on from the Falkland War – there has been sufficient time for parliamentary debate ahead of the deployment of force.⁵⁶ Learning from our past experience, it stands that the rationale that informs the deployment of force can no longer be framed as a binary choice between efficient deployment or democratic deliberation.⁵⁷ Instead, the Parliament and Government should address growing concerns that question the democratic accountability and legitimacy of UK military actions. Parliament is best placed to make democratic and publicly supported decisions on the use of force in the vast majority of cases. In emergencies, this must be decided by the Government. However, strict post-scrutiny proceedings by Parliament will ensure that these decisions are also accountable, legitimate and lawful, and will contribute to public trust in British military policy and operations.

⁵⁴ Beale, J (2018) RAF strikes on IS in Iraq 'may have killed civilians', BBC (<https://bbc.in/2DL6UVn>)

⁵⁵ Amnesty International (2018) Deadly Assistance (<https://bit.ly/2SXNe5T>)

⁵⁶ White, N. (2014) Written evidence from Professor Nigel White, Professor of Public International Law, University of Nottingham (PCD 01) to HoC Political and Constitutional Committee (12th Report) (<https://bit.ly/2zDrvqT>)

⁵⁷ Ibid.

Furthermore, Parliament is perfectly positioned to evaluate the strategic and long-term success of the deployment of force. The recent concerns surrounding Britain's reported single civilian casualty in Iraq and Syria, suggests that Government and military policy have been unable to accurately measure the impact of British operations and the broader implications said operations may have. Providing oral evidence to the APPG's Inquiry into the UK's use of Drones, Chris Woods, director of AirWars, said about British efforts in Syria and Iraq:

*"I don't think it is possible for the UK to have conducted so many airstrikes [more than 1700 as of July 2018⁵⁸] and not to have harmed civilians. So, our view is, if the British repeatedly cannot see civilian harm, but all of the modelling indicates that we should be seeing civilian harm, then that suggests that the aerial civcas [civilian casualties] monitoring that the MOD is doing is not fit for purpose."*⁵⁹

With the debate on civilian casualties raising concerns about the strategic efficiency of UK policies, Parliament is well placed to holistically not only evaluate the deployment of force, but its immediate military effects and middle- to long-term impact on British foreign policy goals and national security.

Conclusion & Recommendations

We are at the dawn of a new generation of military capabilities. While increased integration of partnerships continue to improve military efficiency, this development may also challenge the democratic, lawful and effective use of force.⁶⁰ The best way to ensure UK deployment of force adheres to these principles in future operations is by grounding the decision-making process in Parliament. As such, it is crucial that Britain pursues the development of democratic accountability, scrutiny and oversight, that can match the rapid development of military capabilities. By grounding the responsibility of and decision to deploy force in Parliament, the UK will significantly ensure that high-stakes decisions are carefully considered and executed to the highest democratic standard. Domestically, this will increase the legitimacy of military deployment and improve democratic accountability. Furthermore, it will guarantee that Britain retains power over the deployment of force when participating in supranational coalitions. Finally, it will provide protection for British personnel and civilians abroad, and strengthen the UK's position internationally as a global standard-setter in the deployment of force.

With these broad aims in mind, the APPG on Drones has set out 18 recommendations aimed at reinforcing Parliament's role in the deployment of military force, specifically via drone.

⁵⁸ AirWars (2018) Written submission to Defence Committee Inquiry into UK Military Operations in Mosul and Raqqa. (<https://bit.ly/2KcT0LV>)

⁵⁹ Chris Woods is an investigative journalist and leads the AirWars project. His oral evidence to the Inquiry is available at <https://bit.ly/2m3W7f7> (see, p.17); NB: his initial figure of 1400 when giving evidence has been updated to match current figures.

⁶⁰ Remote Control Project (now Remote Warfare Programme) (2018) Written submission to drones APPG inquiry into the use of armed drones: working with partners. (<https://bit.ly/2lY9bm7>)

Please see the annex below to read them in full, with the recommendations most relevant for this Inquiry (focusing on adequacy of information, clarification of policies and definitions and means of oversight) highlighted in bold.

March 2019

Annex 1

APPG on Drones Inquiry into the UK's Use of Drones: Working with Partners: *Recommendations*

In order to ensure its actions strengthen, rather than undermine, its obligations under the rules-based international system, we call on the Government to:

I. Operational

1. Update and publish its policy on the use of drone technologies for military purposes, with explicit reference to the use of drones (a) for lethal strikes, and (b) in complex environments where allied partners are, or may be, involved.
2. Clarify the processes in place to ensure that its rules of engagement, and the UK's adherence with international law, are upheld at all times.
3. **Explain to Parliament the steps it has taken, and intends to take, in response to the UN Secretary General's call to action in May 2018, to lead the creation of common protocols amongst allies on the legal and effective use of drone technologies in complex environments.**

II. Legal

4. Review and revise the UK's expansive interpretation of 'imminence', as conveyed in the Attorney General's speech in January 2017, in light of the damaging influence it could have on the international rule-based order.
5. **Set out its position on the geographical scope of armed conflicts with non-state armed groups. In particular, the Government should clarify its position with specific regard to two criteria under the law of armed conflict: (a) whether it considers that lethal force may be used against members of a non-state armed group that the UK is involved in an armed conflict with, when those persons are located in a different state from that in which the conflict is taking place, and (b) whether non-state actors operating across different states may be targeted in light of affiliations with other groups.**
6. **Publish its guidance on the principle of distinction in the context of non-international armed conflicts in order to address concern that the UK has not properly counted as civilians persons killed in airstrikes. This guidance should specifically address the 'continuous combatant' principle.**

7. Focus its attention on *how* to apply international human rights law in situations of armed conflict (including its obligations under the European Convention on Human Rights), rather than continuing to debate *whether* human rights law applies.

III. Transparency and accountability

8. **Publish its policy on the targeted killings of individuals in line with the precedent set by the US and Israel. This policy should include the (a) legal basis, (b) criteria used and precautions applied in the selection of targets, (c) decision-making processes, (d) oversight mechanisms in place, (e) the processes in place during, and after each strike to ensure (i) that the operation was conducted in a manner that would avoid disproportionate civilian casualties, (ii) a meaningful remedy in case of any error, and (f) that the process in determining that every alternative method of neutralising a threat posed by an individual target (for example, capture) has been exhausted.**

9. **Establish an independent scrutiny mechanism responsible to Parliament in the event that any UK drone (armed or unarmed) is used in an operation where lethal force is also employed, particularly if that operation is undertaken outside of existing military action. Such independent scrutiny could take the form of (a) extending the mandate, with commensurate resources, of the Intelligence and Security Committee, (b) establishing a new parliamentary Task Group with members drawn from appropriate parliamentary committees, or (c) creating the post of an independent reviewer of such operations in the manner of the successful Independent Reviewer of Terrorism Legislation.**

10. **Seek, other than in exceptional circumstances, prior authorisation from Parliament if it (a) intends to operate drones for lethal or non-lethal purposes outside the circumstances of a declared military campaign, or (b) embed UK personnel with authority to prosecute drone strikes in an ally's military establishment.**

11. **Commit to (a) *ex post facto* reporting to Parliament of any use of armed drones deployed via emergency measures and without parliamentary approval; and (b) formalise automatic post-strike scrutiny of the intelligence and legal basis for such strikes.**

12. **Urgently re-evaluate its methodology by which civilian casualties are calculated in 'air-only' operations, and publish (for example, by making it available to the Intelligence and Security Committee) the process by which civilian casualties are (a) calculated, and (b) investigated.**

13. **Publish the number of UK drones in deployment, in line with transparency and reporting for conventional, manned aircraft.**

IV. Partnerships

14. Make all memorandums and arrangements with other states concerning the use of drones, guidance systems and related operational intelligence available to Parliament via one of the suggested mechanisms above in recommendation 9.

15. Report regularly to Parliament with precise details (including the number, location and precise function) of all UK personnel embedded in allies' forces, with specific reference to when such personnel are involved in air operations, including the use of drones.

16. Review the mechanisms by which the role of UK personnel embedded in allies' forces should, in principle, be subjected to a higher level of parliamentary scrutiny than personnel operating within regular UK forces.

17. Report regularly to Parliament with precise details of how UK military assets (including the provision of basing facilities for drone operations) are shared with allies, and subject these arrangements to appropriate scrutiny via one of the suggested mechanisms in recommendation 9.

18. Ensure that any determination of *ad hoc* military cooperation with an ally involving air power is assessed against consolidated criteria in the same vein as the existing Arms Export Control Regime. This criteria should include the Government's commitment to (a) its legal obligations, (b) human rights, (c) peace and security, and (d) the security of the UK.

19. Publish consolidated guidance on the provision of intelligence for allied air strikes, with specific regard to drone operations and drone strikes, in line with best practice set by the publication of the *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* in July 2010.