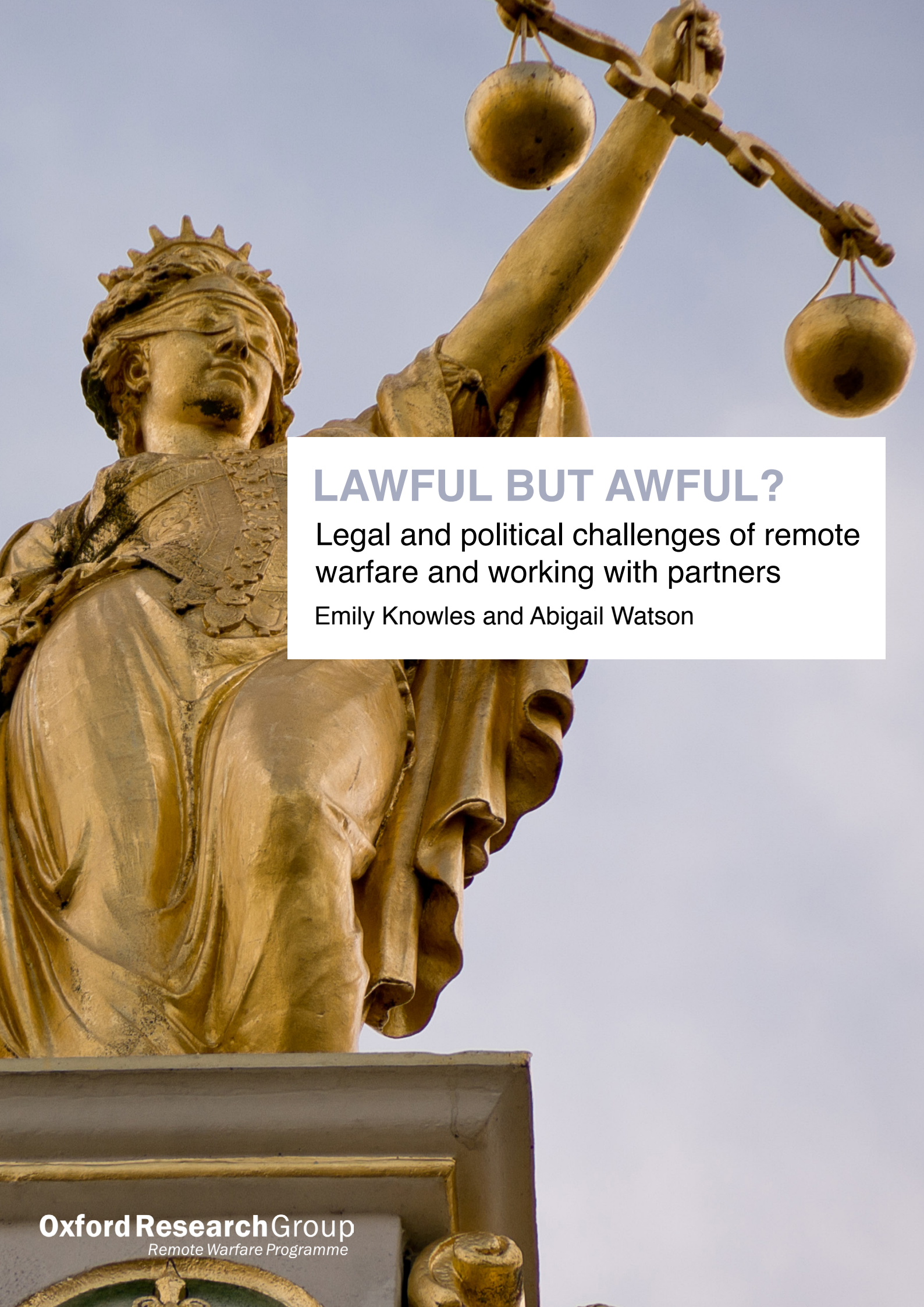

LAWFUL BUT AWFUL?

Legal and political challenges of remote warfare and working with partners

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This report has been written by staff at the **Oxford Research Group's Remote Warfare Programme**, formerly known as the Remote Control Project. We were set up in 2014 to examine changes in military engagement, with a focus on remote warfare. This is the trend in which countries like the United Kingdom choose to support local and regional forces on the front lines rather than deploying large numbers of their own troops.

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Introduction

Rather than placing large numbers of British troops on the ground to counter groups like al-Qaida, so-called Islamic State (IS), al-Shabaab, Boko Haram and the Taliban, the UK is increasingly countering threats 'remotely'. In part this means working by, with and through local and regional allies like the Iraqi National Army, the Kurdish Peshmerga, or the Royal Saudi Airforce who have shouldered the bulk of the frontline fighting in contemporary theatres.

In some cases – such as the anti-IS Coalition – this has extended to providing extensive British air and ISR (Intelligence, Surveillance and Reconnaissance) support, resulting in a significant number of British sorties and strikes. In other cases – such as the lethal strike against Reyaad Khan, a British citizen fighting for IS in Syria – the UK has complemented coalition activity with unilateral targeting. Working 'by', 'with', or 'through' partners speaks to different points on a spectrum of British engagement in these overseas conflicts. However, each presents challenges for those in charge of safeguarding British troops and interests overseas, and for those responsible for holding the British government to account for its actions in far-flung theatres.

Shifts in the ways that wars are fought tend to generate intense legal debate. For example, the concurrent applicability of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) in extra-territorial situations has given rise to a host of hitherto unaddressed legal questions that remain in flux.[1] There is also continuing controversy about the principle of humanitarian intervention (which was used to justify recent UK strikes against Assad regime targets in Syria) and the 'responsibility to protect' (which gained prominence during NATO operations in Libya).[2] Debate over changes in the legal landscape surrounding the use of force looks set to continue, particularly as new and emerging technologies such as cyber and artificial intelligence challenge existing legal concepts.[3]

There are characteristics of the way that the UK is currently choosing to approach its military operations abroad that mean that it may find itself in legal 'grey zones'. In the short-term, this may provide additional flexibility and freedom of manoeuvre. However, it also leaves the government and the armed forces alike in a position of latent legal liability as we wait for future court rulings in areas that are currently contested in international or domestic law, or that are poorly covered by existing legal guidance. Of equal importance to the military, legal, and policy communities should be the fact that legality is not synonymous with good strategy – what is lawful can still be awful.

Engaging in conflict without placing large numbers of British boots on the ground – a strategic approach we call 'remote warfare' – poses a number of key challenges that will be discussed in this report:

- The first section focusses on the legal responsibilities of assisting states for the behaviour of their partners. These are particularly complex when engaging in remote warfare, which tends to take place in large, ad-hoc coalitions of international, regional, local, and non-state actors.
- The second section covers the – perhaps widening – gap between public expectations of transparency around the use of force and the information that governments currently release. This creates a climate of mistrust that may be weakening the perceived legitimacy of government decisions, even when they may be strictly legal.

This report is one of three that have been informed by a series of roundtables run by the team at the Remote Warfare Programme. Two others on the political and military implications of remote warfare complete the series.

What is 'remote' about remote warfare?

Many aspects of remote warfare are not new. Wars have been fought alongside and integrated with allies and partners since antiquity.[4] The arming and supporting of rival factions reached fever pitch in the Cold War, when proxy wars enabled great powers to clash indirectly and – crucially – below the threshold for nuclear retaliation. However, contemporary British operations have moved on from these past templates of waging war – not least in terms of the UK's own restricted reach and influence over the forces it fights alongside, who are not merely 'proxies'. Political, legal, and ethical landscapes have also shifted. This raises a number of new challenges that need careful attention.

The central pillar to remote warfare is that it precludes the deployment of large numbers of a country's own ground troops. In this sense, the 'remoteness' comes from a country's military planners and policy makers being one step removed from the frontline fighting – which tends to be carried out by local groups or regional coalitions. For example, UK support to the Saudi-led Coalition in Yemen can be seen as remote warfare because the UK is supporting and enabling Coalition actions through the supply of arms, training, advice and assistance – plus reports of the occasional provision of small numbers of discreet special forces and intelligence assets.[5] If the UK were to put its own troops on the ground and assign them combat roles and rules of engagement (ROEs) this would cease to be remote warfare, at least for the purposes of our work.

This is not to say that remote warfare is anything other than the deployment of combat troops. The UK provides a lot of assistance to allies that cannot be sensibly characterised as 'war' – for example the majority of short term training teams, arms sales, joint exercises and so on are designed and delivered in relative peacetime for a whole range of reasons other than empowering frontline groups. It is important not to focus on 'remote' to the detriment of 'warfare' – a term going through its own identity crises thanks to growing attention to so-called 'hybrid' or 'greyzone' conflicts. In the most basic sense, remote warfare requires there to be an adversary that the UK is mobilising to degrade or counter – it cannot just be activities designed to support partners.

The last point to emphasis is that remote warfare is not always carried out via remote weapons systems. While drone strikes, air strikes, cyber attacks or autonomous weapons no doubt have the potential to increase the physical distance between operator and target, they can be used to support any sort of operation. In short, the 'remote' in 'remote warfare' speaks more to strategic than physical distance.

The contemporary legal context

Modern warfare operates within a complex legal environment – particularly for the non-legal expert. Understanding when states can legally use force – and how – can throw up a web of different legal definitions whose interpretations are not necessarily fixed or universally accepted. The post-9/11 era has proven a challenging time both for the laws governing the *right to use force* (jus ad bellum) and the laws governing the *way that force is applied* (jus in bello or international humanitarian law). Contemporary campaigns have thrown up a series of interesting questions – not least those that challenge state consensus on key questions of when it is lawful to use force in the territory of another state.

As a matter of law, the principle of state sovereignty prevents acts of aggression on another state's soil. There are some exceptions to this, such as in the case of a UN Security Council (UNSC) Resolution, or when force is used in self-defence in the face of an overwhelming and imminent threat. However, the type of military engagement that states have recently undertaken do not fit easily within existing legal frameworks. This is because international law on the use of force was drafted on the assumption of inter-state conflict rather than conflict with non-state armed groups. In particular, 'franchise terrorism' makes defining the geographic boundaries of a state's right to use force problematic. This speaks to the fact that terrorist groups like IS have defied

UN Charter Chapter VII — Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression: Article 51

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."[6]

geographic state boundaries with affiliates cropping up not only in states bordering Iraq (where the group was founded) but in locations as disparate as the Sahel-Sahara or the Philippines.

For example, the geographic spread of terrorist groups poses problems for the concept of collective self defence, which was enshrined in Article 51 of the UN Charter. The Iraqi government formally requested the assistance of the international community to aid in its collective self-defence against IS. This collective self-defence justification has been used to extend international military efforts from Iraq to Syria. However, it is debatable whether Article 51 can be invoked by a state against a non-state actor to use force on the territory of another state. It may not be hard to make the case that an IS safe haven across the border in Syria would be a threat to Iraqi security, but this expansion of *jus ad bellum* into an unconsenting neighbouring state's territory poses serious questions. In particular, how clear is it that the collective self-defence of Iraq is enough to authorise military operations against IS across the whole of Syrian territory? While the border zones might be seen as a 'spillover' area, is it reasonable to suggest that an IS presence in Aleppo – a city more than 450 miles from Baghdad – is a threat to Iraq's security?

Similarly, it poses vital questions for whether the *ad bellum* justification for the extension of hostilities into Syria will end once IS is defeated in Iraq, or whether collective self-defence will continue to be argued. If this justification is made, it will be interesting to see whether specific reference to the proximity of Syria to Iraq is made or whether it is left open. In the case of the latter, it could begin to look like the continued existence of IS – wherever the group is found – is being used as a justification for the use of force.

This would be hugely controversial, not least because the U.S. State Department recognises nine IS affiliates outside of Iraq and Syria as terrorist organisations: ISIL Sinai Province (Egypt), ISIL-Khorasan (Afghanistan), ISIL-Libya, ISIS-Bangladesh, ISIS-Philippines, ISIS-West Africa, ISIS-Somalia, Jund al-Khilafah-Tunisia, and ISIS-Egypt (separate from the Sinai Province affiliate).[7] In evidence given to a 2016 Joint Committee on Human Rights investigation, government testimony confirmed that the UK does not consider itself to be "in a generalised state of conflict with ISIL, except in Iraq and Syria."[8] The UK has always been careful to maintain that it does not consider itself in any kind of global war on terror.

In addition, there is not legal consensus over whether military intervention can be justified on the territory of non-consenting states under the "unable and unwilling" test.[9] This holds that states can respond to an attack emanating from an armed group in another country if the state is either unwilling or unable to address the threat themselves. In 2006, Department of State legal adviser John Bellinger stated that "we were justified in using military force in self-defence against the Taliban because it had allowed al-Qaida to use Afghanistan as an area from which to plot attacks and train in the use of weapons and it was unwilling to prevent al-Qaida from continuing to do so."[10] Similar arguments have since been used in the context of extending military action against IS from Iraq to Syria, although they are refuted by some.

Finally, while there is a rich and comprehensive body of law (interchangeably referred to in this report as International Humanitarian Law – IHL – or the Laws of Armed Conflict – LOAC) that has emerged to cover traditional state-on-state conflict, the crises that the UK is currently confronting through remote warfare fall under the rubric of non-international armed conflict (i.e. involving non-state actors), where IHL is much less developed. One of the most pressing legal grey zones has emerged as a result of the fact that the status, rights, and responsibilities of non-state actors under international law are far more contested than those of states. This has potential implications for the state allies of non-state armed groups like the Peshmerga, particularly when it comes to understanding the various standards of responsibility a future court may hold them to over their assistance.

In short, the international legal regimes governing the use of force are complex, and differences in interpretation of key concepts and definitions are emerging between groups of states. These stresses to the international legal system are not caused by remote warfare, nor is remote warfare uniquely affected by them. Nevertheless, there are key aspects of a remote warfare approach that may leave states more likely than in the past to find themselves in these legal 'grey zones' – spaces that are contested in international or domestic law, or that are poorly covered by existing legal guidance.

While in the short-term this may give a degree of flexibility and freedom of manoeuvre, it also leaves the government and the armed forces alike in a position of latent legal liability where it is unclear how a future court will interpret British actions or the actions of others. It could also result in greater contestation, both in the international and legal spaces but also by domestic publics concerned about the legitimacy as well as the legality of British overseas engagements.

The first section of this report will focus on the legal challenges posed by remote warfare, in particular when working with partners. The second section will explore the impact of the court of public opinion on British military operations – particularly when it comes to the existing opacity over government policy and legal positions on many aspects of remote warfare.

Section 1: the legal liabilities of working with partners

While many British military operations may have a component of training, advising, or assisting partner forces, remote warfare is an approach that relies on the provision of assistance to allies in a way that other forms of warfare do not. This is because of the absence of large numbers of British boots on the frontlines, which places the UK in more of a supporting role to local ground troops.

These ad-hoc 'coalitions of the willing' are put together to counter a specific threat, and may contain a mixture of NATO, regional, and local militaries as well as non-state armed groups (the anti-IS coalition is a good example). Small numbers of special forces may be fighting 'by' or 'with' local forces on the front lines, while Western air support protects allied forces or degrades enemy forces. In addition, Western assistance – be that in the form of guidance, intelligence-sharing, training, or equipment – allows international partners to engage 'through' their partners without placing large numbers of their own boots on the ground. This broad spectrum of involvement, from arms sales to joint operations, presents a challenge when it comes to determining British responsibility for the actions of their partners in contemporary theatres.

A key legal challenge is that there are multiple grounds for the attribution of responsibility – shared or joint control over coalition troops, derived responsibility for assisting states, the positive obligations of states under international law, and treaty obligations of signatories to instruments like the Arms Trade Treaty. These are not mutually exclusive. This is where the law is complex – and legal precedents and hard guidance are hard to come by.

Nevertheless, the existence of multiple overlapping legal obligations for assisting states means that there are British responsibilities for ensuring the legal conduct of the operations it is supporting. Understanding where the boundary lines lie, and how to both legally and legitimately toe the line between protecting British interests and being accountable for mistakes that are made, should be a priority for the government going forwards.

Figure 1: Norwegian soldiers look off into the horizon in Faryab Province, Afghanistan (image credit: Resolute Support Media, Flickr Creative Commons)

Shared responsibility for multinational operations

British military operations have evolved to include a growing number of actors – both local and regional partner forces, international organisations like NATO, and a collection of non-state allies like the Peshmerga or Syrian Democratic Forces. In these 'coalitions of the willing' – where the mission determines the coalition rather than the other way around[11] – partnerships can be fluid, ambiguous, and complex.

These ad-hoc coalitions do not possess any international legal personality, nor are they recognised as legal persons within the states' domestic legal systems – unlike more traditional alliance structures such as the UN or NATO.[12] Contributing states and lead nations are responsible for the conduct of their own troops, as they participate in operations in an individual national capacity rather than under a NATO mandate. However, recent study suggests that the complex command and control structures of these coalitions means that their 'ad-hoc' nature does not "preclude forms of shared responsibility among coalition partners."[13] This is particularly pertinent when the UK is fighting 'by' or 'with' local troops, either on the ground or by providing air and intelligence support for allied operations.

Shared responsibility for the commission of an internationally wrongful act hinges on the effective participation of coalition partners in conduct (or omission – failure to act) that results in a breach of law. This means that responsibility (at least in a legal sense) has to be linked to concrete participation in a 'particular context' or 'specific conduct' rather than a general sense of responsibility for the behaviour of partners. However, it is unclear exactly how degrees of responsibility are determined in an ad-hoc coalition setting – for example whether a future court would look to levels of participation in coalition decision-making processes. In this case, lead nations – as well as other national contingents sitting in the coalition's command – may also be considered to exercise some degree of joint or shared control over troops on the front lines.[14]

If a troop-contributing nation's degree of participation in the decision-making process can be considered an indicator of levels of responsibility for the conduct of operations, this poses several important questions. First of all, how are these levels of responsibility measured? If it is linked to position in the chain of command, or the hierarchy within the coalition HQ, would the UK – when it acts as 'senior junior partner' to the U.S.– be in a position of greater liability than other coalition members?

"...Typically, coalition headquarters are in fact staffed with officers from different TCNs [troop-contributing nations]. As regards to omissions, should those TCNs, whose officers could prevent a violation from taking place, or were informed of an order/ directive that could presumably lead to a breach of law and did not act accordingly, be held responsible/liable, even though the officer who eventually issued the order/ directive and the unit that materially committed the violation belonged to other coalition partners? Perhaps an international or domestic court could answer this question in the affirmative."[15]

This alludes to a question of a practical nature – are coalition decisions and structures being recorded in a way that might be admissible to a court used to dealing with highly structured NATO coalition operations or similar? The burden of proof is likely to hinge on information about both individual operations and coalition command and control structures that is highly unlikely to be in the public domain. In ad-hoc coalitions, command and control structures may vary between different operations, as might the roles of the various groups involved.

Ad-hoc agreements may not be recorded consistently, and lines of responsibility may be fluid. It is therefore unclear how future courts will evaluate coalition responsibility for wrongful acts committed in the course of campaigns. However, as the case studies on Cameroon, Yemen, and Kenya at the end of this section show – and as claims begin to surface that troops supported in recent anti-IS operations have committed abuses –[16] it is clear that the government needs to be proactive in terms of working out what its responsibilities are and whether it could improve its safeguarding systems.

Figure 2: U.S. Marines exercise with the newly established Sri Lankan Marine Corps (image credit: U.S. Pacific Command, Flickr Creative Commons)

Derived responsibility for assisting states

Where the UK provides assistance – engaging 'through' rather than fighting 'by' or 'with' local forces – it does not run the same risk of shared responsibility for abuses that may take place. However, it may still be possible for future courts to seek a ruling of derived responsibility –a standard outlined in Article 16 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). As recent scholarship has noted, "responsibility under Article 16 is not responsibility for the internationally wrongful act committed by the assisted state, but responsibility for assisting that state to commit the internationally wrongful act. It is therefore an ancillary responsibility."[17] The text states:

> **"A State which aids or assists another State in the commission of an internationally wrongful act (IWA) by the latter is internationally responsible for doing so if:**
>
> **a. that State does so with knowledge of the circumstances of the internationally wrongful act; and**
>
> **b. the act would be internationally wrongful if committed by that State."[18]**

In theory, this would permit charges to be brought against coalition members for abuses committed by their allies even in the absence of control over troops or participation in the decision-making process. The provision of assistance – be that through arms sales, training, intelligence-sharing, or guidance – could trigger court proceedings if it can be shown that the assisting state had knowledge of the circumstances of the internationally wrongful act and there is a demonstrable link between the assistance and the internationally wrongful act.

The International Law Commission's accompanying commentary states that "the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act."[19] It goes on to make clear that "[there] is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act."[20] The definition of a 'significant contribution' is not clear, but is presumably a lower threshold than an 'essential contribution'. Further information on how states are interpreting this obligation, and whether Article 16 factors into government decision-making, would be useful.

Nevertheless, despite the potential for Article 16 to be invoked without assistance having played an essential part in the commission of an abuse, in general Article 16 retains high thresholds not dissimilar to those under other

principles of state responsibility. Again, a direct link must be established between the assistance given and a particular instance of illegal activity, rather than general abuses at the hands of an ally that a particular state is assisting. This sets a high bar. In a similar fashion, the European Commission on Human Rights (ECHR) has made it clear that exporting arms "to a country that is violating provisions of international law does not automatically generate state responsibility under the ECHR"[21] stating that "there is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible 'indiscriminate' use thereof in a third country."[22]

On top of this, the requirement for the assisting state to have 'knowledge' of the circumstances of the illegal action could raise the threshold of evidence even higher. For example, Para (3) of the ILC Commentary states that the aid or assistance must be given 'with a view to' facilitating the commission of the internationally wrongful act. Para (5) of the Commentary refers to the need for the assisting state to have 'intended', by the aid or assistance given, to facilitate the occurrence of the internationally wrongful conduct.[23] A requirement for intent, on top of knowledge, would not only be extremely difficult to prove but would also set the threshold for responsibility extremely high.

As recent research has concluded, however: "knowledge and intent are closely intertwined, and… actual or near-certain knowledge of illegality is effectively a form of intent. Applying this to Article 16, if an assisting state has actual or near-certain knowledge that unlawful conduct will be committed, it cannot shield itself from responsibility by arguing that its purpose is not to facilitate unlawful conduct."[24] In today's information age, where a large amount of evidence is accessible to governments through the media and non-government organisation reports as well as through internal channels, it may be difficult to make a defence based on 'ignorance', even though a standard of wilful blindness or similar is not explicitly included in the text. It is yet to be seen how courts will apply these provisions in practice, which should encourage states to heighten their due diligence procedures and adapt these to monitor changing circumstances on the ground.

An additional aspect of Article 16 that states should pay attention to is the potential future application to assistance to non-state actors. While the text of Article 16 appears to be bound to cases of state-to-state assistance, it has been invoked by analogy in relation to assistance to non-state actors. For example an Austrian position paper, arguing against the lifting of an EU arms embargo on the supply of weapons to the Syrian opposition, stated that "such supply would trigger responsibility under Article 16 because the Syrian opposition had engaged in war crimes."[25] In light of this, it may be prudent for governments to introduce, as a matter of policy rather than law, to treat assistance to non-state actors as subject to the same due diligence standards as state-to-state assistance.

It is also worth noting that individuals, including ministers, can be held criminally liable for international crime:

The Rome Statute contains a provision for criminal responsibility under Article 25 for:

- Soliciting or inducing a crime that occurs/is attempted, or
- Facilitating the commission of a crime, in that an individual's action "aids, abets or otherwise assists in its commission or in its attempted commission, **including providing the means for its commission**" art 25(3)(c)[26]

This could open up individual decisions to approve assistance to court scrutiny. This makes the question of who is able to sign off on particularly high-risk cases of assistance particularly important. In current British policy, the level of approval is determined by the outcomes of an OSJA (Overseas Security and Justice Assistance) assessment:

British policy and treaty obligations

The OSJA Guidance

Unlike the United States where both the Foreign Assistance Act and the Leahy Law contain specific due diligence obligations requiring the government to verify the human rights situation on the ground before providing assistance to other states,[27] the UK has not passed domestic legislation to enshrine this requirement.

Instead, the government has produced standard guidance on overseas security and justice assistance (often referred to as the OSJA Guidance) that aims to "ensure that our security and justice work defends and promotes human rights."[28] The OSJA Guidance sets out which human rights or IHL risks must be considered prior to providing justice or security sector assistance, as well as measures that may mitigate those risks. It specifies an assessment methodology that must be followed to assess the potential impact of any proposed assistance on those risks, as well as on reputational or political risk, prior to the provision of any assistance. It also provides guidance on who can sign off on decisions to offer assistance.[29]

There is, however, no stipulation to not authorise assistance even if "there is a serious risk that the assistance might directly or significantly contribute to a violation of human rights and it is assessed that the mitigation measures will not effectively mitigate this risk."[30] Instead, these cases require ministerial approval:[31]

	Low Risk	Medium Risk	High Risk
Human Rights and IHL Risk, as per Stage 2 Section c	There is a **less than serious risk** that the assistance might directly or significantly contribute to a violation of human rights.	There is a **serious risk** that the assistance might directly or significantly contribute to a violation of human rights but this can be **mitigated effectively**.	There is a **serious risk** that the assistance might directly or significantly contribute to a violation of human rights and it is assessed that the mitigation measures will **not effectively mitigate** this risk.
Reputational and Political Risk	There is **little or no** reputational or political risk for HMG or agencies.	There is **some** reputational or political risk for HMG or agencies but this can be mitigated effectively.	There is a **serious** reputational or political risk for HMG or agencies.
Appropriate action	**Approval can be sought from the person with day-to-day oversight of the proposal.**	**Consult senior personnel within your organisation**, usually SCS Head of Department, DHM, Head of Mission or Assistant Chief Constable.	**Consult Ministers**, unless Ministerial approval has already been given for this activity with this institution and nothing material changed.

Figure 3: OSJA Guidance p.16

When it comes to assessing risk, departments are pointed towards FCO annual human rights reports, U.S. State Department human rights reports, UN reports, credible NGO reports, HMG Conflict Assessments, and DFID Country Governance Analyses to make a judgement on the overall approach to IHL in a recipient country. However, much of the emphasis is placed on evaluating the situation prior to the approval of assistance, making the assessment a seemingly static process. While extensions to existing assistance programmes require a new assessment if "a substantial change in circumstances has

significantly altered the risk for existing assistance"[32], it is unclear who is responsible for keeping the guidance up to date for countries, institutions, and units. Indeed, while the OSJA Guidance suggests that there is a 'monitor' function built in to the system, there is no information as to what that might entail:[33]

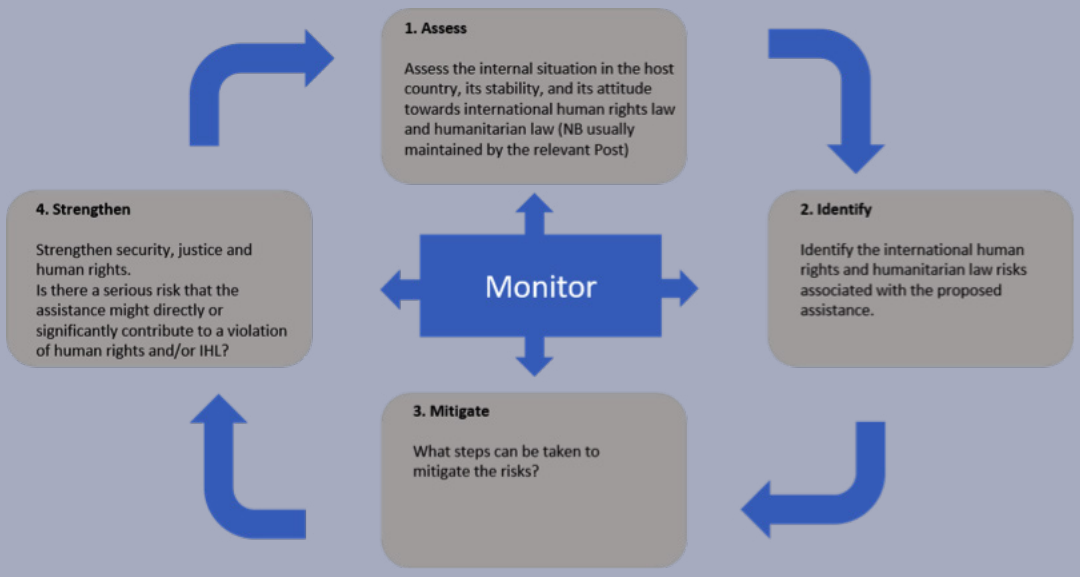

Figure 4: OSJA Guidance p.3

There is also no mention of British policy in the case of assistance to non-state actors in the existing OSJA Guidance.

Arms Sales

If the assistance in question is an arms export, it would be subject to an additional range of Treaty requirements. The Arms Trade Treaty (ATT) –which the UK has ratified–contains a provision not to authorise a sale if the exporting state "has knowledge at the time of authorisation that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party."[34] Crucially, the ATT goes on to stipulate that "if, after conducting [an] assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk… the exporting State Party shall not authorize the export."[35]

The Consolidated EU and National Arms Export Licensing Criteria contains its own assessment requirement, and the EU Code of Conduct for Arms Exports contains several mandatory (albeit non-legally binding) provisions under which export licences are to be refused when "there is a clear risk that the proposed export might be used for internal repression" or exports would "provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination."[36] As commentators have noted, "some authors have interpreted these criteria to be more far-reaching than Article 16, as a 'clear risk' is sufficient to warrant the non-granting of an export licence."[37] Nevertheless, the general respect of the buyer country for international law is only listed among the criteria considered to be non-mandatory.[38]

Because of the sensitivities involved in assessing partner capabilities and willingness to uphold international law, the OSJA Guidance notes that "HMG is therefore only rarely able to publish the full reasoning behind its decisions. This is not borne out of any aversion to external scrutiny, but rather is a necessary corollary of conducting a thorough assessment. We continue to welcome external challenge to our decision-making on human rights, including through our Annual Human Rights Report, parliamentary scrutiny, regular dialogue with civil society and consultation with our international partners."[39] This is extremely positive. Nevertheless, the relationship between the government and civil society on these issues often appears more antagonistic than productive. In part, this is perhaps fuelled by the opacity that surrounds contemporary military campaigns. This is a topic dealt with in the second section of this report.

Greater clarity over how governments are interpreting their obligations under Article 16, and whether they are factoring them in to decisions over assistance, would be useful. It is unclear how well existing British policy on providing assistance fits with the thresholds for knowledge or contribution that are laid out in the text or the commentary to Article 16, or to whether British procedures would prove robust enough if a future court were to extend derived responsibility to state assistance to non-state actors.

The positive obligations of states

Aside from standards of control and derived responsibility there are interpretations of international legal principles that suggest states not only have 'negative' obligations – i.e. to avoid committing or aiding IHL violations – but also have 'positive' obligations – i.e. to take reasonable measures to ensure that IHL is not violated. Much of the discussion on the existence of positive obligations centres on Common Article 1 of the Geneva Conventions, which contains a requirement for state parties to 'respect and ensure respect' for the Conventions.[40]

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

RESPECT FOR THE CONVENTION

ARTICLE 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.[41]

How this last provision is interpreted – 'to ensure respect' – is the subject of some debate. Narrow interpretations suggest that this simply requires states to have adopted all measures necessary to ensure respect for the Conventions within their jurisdiction – i.e. by their own militaries and other state organs. Broader interpretations take 'to ensure respect' to include an obligation for states to do everything in their power to induce transgressor states to abide by the Conventions. This more extensive interpretation has long been championed by the ICRC, and appears to have been largely accepted (or at least, not contested) by states.[42] In remarks to the American Society of International Law in April 2016, U.S. State Department Legal Adviser Brian Egan signalled a willingness to consider interpretations that entail positive obligations to ensure respect of the law of armed conflict by partner states and non-state actors:

> *"Some have argued that the obligation in Common Article 1 of the Geneva Conventions to "ensure respect" for the Conventions legally requires us to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed conflict. Although we do not share this expansive interpretation of Common Article 1, as a matter of policy, we always seek to promote adherence to the law of armed conflict generally and encourage other States to do the same. As a matter of international law, we would look to the law of State responsibility and our partners' compliance with the*

> *law of armed conflict in assessing the lawfulness of our assistance to, and joint operations with, those military partners."*[43]

The Inter-American courts, but also more recently in the European Court of Human Rights, have supported the idea of a *lex specialis* regime of positive responsibility in the realm of human rights in particular. In these instances, the state does not become complicit, but incurs responsibility for failing to undertake adequate due diligence. In the *Paniagua Morales* case the court ruled that "the sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognised in the Convention" rather than a requirement to demonstrate the 'control' of the state over those that committed the crimes.[44]

On a policy level, the UK appears to have adopted an approach that recognises the positive obligation aspect of supporting partners. The OSJA Guidance states that "assistance should seek to strengthen compliance with human rights and/or international humanitarian law in the host country."[45] However, it is somewhat unclear how these positive and negative obligations interact. For example, there may be scenarios where there is a positive obligation argument to be made for continuing – or even strengthening – support to countries where IHL is being violated on the basis that assistance may improve compliance. However, in doing so, the risk of aiding the commission of abuses increases, heightening a state's potential legal liability.

This is a policy dilemma with no clear answer. However, if nothing else, it should highlight the importance of carefully documenting the decision-making process when it comes to providing assistance so that the rationale is clear. We do not currently know how many 'high risk' cases the UK government has to consider each year under the OSJA system, nor what sort of mitigation measures might exist. If it is rare that the government comes up against cases where it judges that the risk of its assistance aiding IHL/IHRL abuses and where its mitigation measures are weak, this is all for the better. However, the following case studies from contemporary campaigns suggest that more work needs to be done to ensure that government safeguards are adequate as remote warfare becomes a more prevalent approach to UK overseas engagement.

Figure 5: A joint conference by the FCO and the British Red Cross called "The 1949 Geneva Conventions - 60 Years On" (image credit: Foreign and Commonwealth Office, Flickr Creative Commons)

Case studies: Cameroon, Yemen and Kenya

In July 2017, Amnesty International released a report documenting the cases of 101 individuals accused of supporting Boko Haram – often without evidence – who were held incommunicado and tortured by Cameroonian security forces.[46] The regular army are believed to be responsible for some of these breaches of Cameroonian and international law, as is the elite Rapid Intervention Battalion (Bataillon d'Intervention Rapide, BIR) – a key local partner for U.S. and French troops in the fight against terrorism in the region.[47]

Research conducted by Amnesty International in conjunction with London-based agency Forensic Architecture highlights the regular presence of military personnel from some of Cameroon's international military partners at the BIR's base at Salak over the period where torture and incommunicado detention were routinely practiced at the base. Witness statements from those who were held at the base cited the regular presence of white, English-speaking troops.[48] Photographic and video evidence gathered for the report backs up those claims, showing the regular presence of U.S. personnel in numerous locations across the base, including making use of a makeshift gym and a trailer converted into an office.[49] Facebook posts uncovered by the media following the release of the story show some American soldiers playing football on Salak base, with the cell blocks in the background where detainees were held clearly visible in the background.[50]

While there are no indications that international troops were involved in the detention or torture themselves, Amnesty have used their evidence to raise questions about the degree to which international personnel "may have been aware of the widespread practices of illegal detention and torture at the base, and whether they took any measures to report it to their hierarchy and to the Cameroonian authorities."[51] In an exchange with an American news outlet, a senior Cameroonian Army official alleged that "The Americans are aware of every single thing happening in Salak… We have an understanding to share information with the American troops working there, and to give them full access to our facilities."[52]

In statements to CNN following the publication of the report, U.S. Army Major Audricia Harris confirmed that "at any time up to 300 U.S. military personnel advise and assist the Cameroonian Rapid Intervention Battalion as part of a broader multinational effort to counter violent extremist organizations in the Lake Chad Basin region."[53] Indeed, Cameroon has received $52,212,752 in U.S. Security Assistance since 2014 when their fight against Boko Haram began.[54] In a spring 2016 article by the U.S. Ambassador to Cameroon, he praises the BIR unconditionally, claiming that "in their training, conduct, and leadership, the BIR exhibited all of the values we expect in our own armed forces—professionalism, protection of the civilian population, and respect for human rights... Not only did our support to the BIR increase, but we were able to expand overall military-to-military engagement to improve combat capability and overall professionalism."[55]

A spokesperson for U.S. Africa Command (AFRICOM), Samantha Reho, confirmed that "DoD [Department of Defense] policy directs that military members or others accompanying the DoD component will report any possible, suspected, or alleged violation of the law of war for which there is credible information during the conduct of operations…These reports are required to be made promptly to the chain of command in the most expeditious means possible."[56] Reho confirmed that AFRICOM "has not received any reports from U.S. forces of human rights abuses by Cameroonian forces to this date," and is trying to determine "what reported information, if any, AFRICOM was aware of prior to this allegation."[57]

This lack of awareness comes despite repeated warnings of human rights abuses by the BIR contained in U.S. State Department reports from 2010-2016.[58] Despite the Ambassador's earlier praise of the BIR, the Embassy of the U.S. in Cameroon admitted in their response to the Amnesty report that "currently, certain units of the BIR based out of Salak, Mora, and Adamawa are ineligible for assistance in accordance with the Leahy Law because of

credible allegations of GVHRs [Gross Violations of Human Rights] committed by the BIR and other Cameroonian security forces."[59] Indeed, the State Department's 2016 report on Cameroon noted that there had been "reports of the use of unofficial military detention facilities in the Far North Region, including on the BIR bases at Salak and Mora."[60]

Proving exactly what U.S. military partners knew, or suspected, about detention and torture at Salak is likely to prove very difficult. The mesh of different U.S. and international legal commitments means that there are many potential routes to explore whether, and to what extent, the U.S. (and potentially other international allies) should be held responsible for the abuses committed under their noses in Cameroon.

At around the same time as the Amnesty report on Cameroon, Human Rights Watch and the Associated Press released reports of grave human rights abuses at the hands of U.S. allies the UAE in Yemen.[61] Documenting a swathe of arbitrary detentions and torture of prisoners accused of being associated with al-Qaida, the reports questioned the close relationship between the U.S. and their Emirati allies. According to the Associated Press, "Several U.S. defense officials, speaking on condition of anonymity to discuss the topic, told AP that American forces do participate in interrogations of detainees at locations in Yemen, provide questions for others to ask, and receive transcripts of interrogations from Emirati allies. They said U.S. senior military leaders were aware of allegations of torture at the prisons in Yemen, looked into them, but were satisfied that there had not been any abuse **when U.S. forces were present**."[62] (emphasis added). Publicly, the U.S. continues to praise the Emiratis for their support to U.S. counter-terrorism efforts across the Middle East:

"The United Arab Emirates (UAE) is one of our most steadfast and capable partners in the USCENTCOM AOR. The Emirates have clearly demonstrated a willingness and ability to take an active role in shaping outcomes in the Central Region. The country hosts more than 4,000 U.S. service members and provides critical support for U.S. operations, goals, and objectives. The UAE was among the first countries to join the Counter-ISIS Coalition in 2014. While their primary focus has since shifted to support the ongoing KSA [Kingdom of Saudi Arabia]-led military campaign in Yemen, UAE continues to provide support to several of the C-ISIS Coalition's key lines of effort, including counter-messaging, counter-financing, and stemming the flow of foreign fighters. In Yemen, the UAE serves as the leading ground element in ongoing operations against the Saleh- and Iranian-backed Huthis. The Emirates are also supporting our efforts to counter the al Qaeda affiliate, AQAP. In April, using local fighters and tribal militias, the Emirates played a critical role in liberating Mukalla, driving AQAP elements out of the port city and thereby denying them a key source of revenue. In conjunction with its military efforts, the UAE is heavily focused on providing humanitarian assistance to ease the crisis facing Yemen's population. We value our strong relationship with the Emirates and seek to build upon our robust mil-to-mil relationship, including by concluding a new Defense Cooperation Agreement that could serve as a foundation for expanded, mutually beneficial defense cooperation. We will work to expand our collaboration, specifically in the areas of security cooperation and foreign military sales. Additionally, we will work with the Emirates to promote their leadership role among partner nations in the region."[63]

The UK has not been immune from similar accusations of transgressions by forces it has supported. For example, following reports of extrajudicial killings carried out by Kenyan counter-terrorism police forces hunting members of al-Shabaab,[64] Britain's assistance to the units involved has come under greater scrutiny. According to officers interviewed by al Jazeera, "Britain provides training, equipment and intelligence to the units."[65] However, in response to a parliamentary question on what funding and other support the government has provided, Tobias Ellwood (Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs) insisted that "we do not provide direct funding to the Anti-Terrorism Police Unit, but support capacity building in investigative skills, operations management, forensics and evidence recovery as well as infrastructure. Respect for human rights and adherence to the law form key components of all our engagement."[66]

The legalities of these relationships are complex. It is uncertain how a future court will interpret the overlapping responsibilities and positive obligations of states in relation to the behaviour of their partners. However, as claims begin to surface about the behaviour of UK and U.S. partners in the anti-IS Coalition,[67] ensuring that the necessary structures and safeguards are in place to reduce the risk that British assistance feeds abuses on the ground is essential. This should be a growing priority for the British government, particularly as working by, with, and through local partners seems set to be the most likely course of action for the military in the years ahead.

At the moment, a reliance on remote warfare may mean that the British government ends up with the worst of both worlds – it is sufficiently engaged to be considered party to conflicts by a growing number of commentators, yet it is not engaged enough to have any realistic chance of gaining or maintaining strategic control over the behaviour of those that it ends up assisting.

This creates a dilemma for governments who want to make partnership decisions on the basis of improving conduct and meeting strategic objectives, versus those who prioritise minimising legal liability. This creates a complex set of what may be competing priorities and obligations, which may not be conducive to effective engagement abroad. As the next section of this report will show, even decisions that prove legally justifiable may still not be publicly defensible or strategically sound.

Section 2: legitimacy over legality

From a political and strategic point of view, the limit at which perceived complicity begins to weaken chances of mission success and damage relationships or reputations may be demonstrably lower than the limits for legal complicity. Local and domestic audiences tend to apportion a general sense of British responsibility for the conduct of conflicts to which the UK is contributing troops or other forms of assistance – even when standards of legal responsibility are unlikely to be met. A prominent example of this is the case of British arms sales to Saudi Arabia. Despite a judicial review ruling to the contrary – which is now being appealed – many commentators consider the UK to be complicit in abuses committed by the Saudi-led coalition in Yemen. As a result, stopping arms sales to Saudi Arabia became a key platform for opposition parties in the 2017 General Election.

This narrative of British responsibility has also been mobilised by local actors in these theatres. For example, the Prime Minister of the unrecognised Houthi government Abdulaziz bin Habtour has made statements condemning UK policy in the region: "[Britain has] sold cluster bombs to Saudi Arabia… They are participating in the bombing of Yemen people."[68] On a trip to Sa'dah in January 2017, former International Development Secretary Andrew Mitchell encountered posters declaring that 'British and American bombs are killing Yemeni people'.[69] Perceived complicity may damage the credibility of the UK as a neutral broker in any eventual peace process or dialogue in the region.

In a recent report for the Remote Warfare Programme (then the Remote Control Project), Alison Pargeter examined local Libyan responses to the UK's secretive military footprint on the ground in the country. She found that the multiple special forces deployments from the UK, U.S., France, and their allies in the post-Gadhafi era have stoked suspicions that the international community is willing to trade prospects for long-term peace in Libya for short-term counter-terrorism objectives. In addition, rumours abound about how the international community has been manoeuvring to empower preferred factions in the conflict.[70]

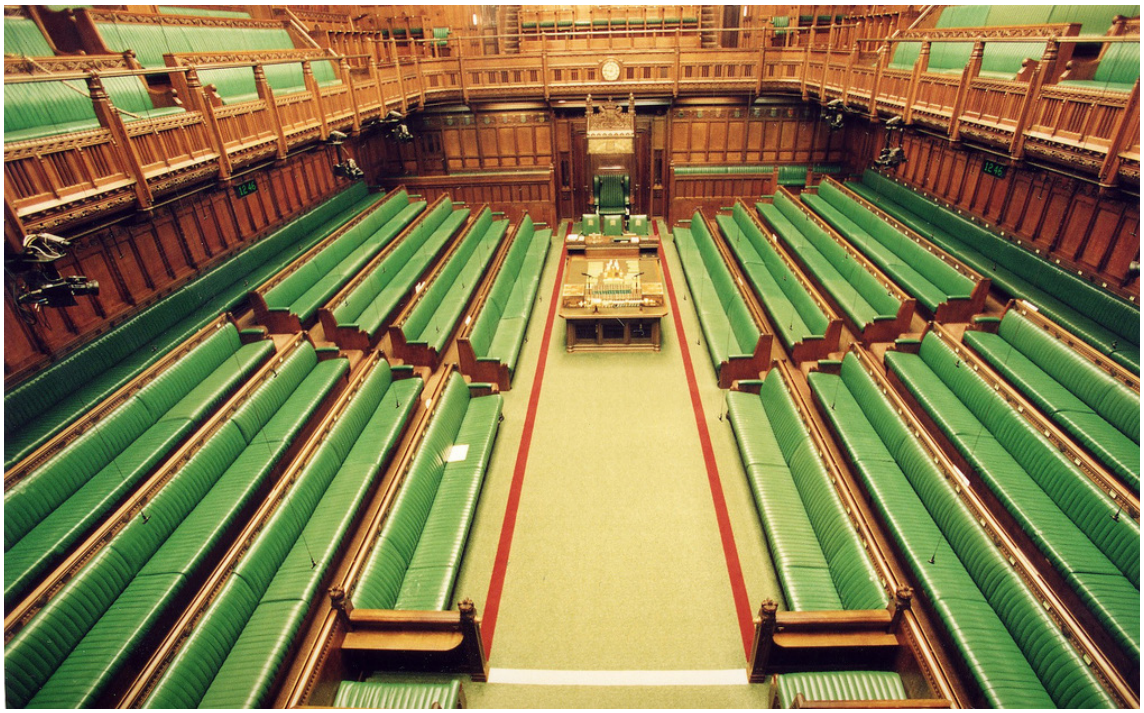

Figure 6: House of Commons Chamber (image credit: UK Parliament, Flickr Creative Commons)

It is important for decision-makers to recognise the impact of an empowered Parliament and a vocal civil society in setting the context for decisions over when, where, and how Britain involves itself in overseas military engagements. This is perhaps particularly true in the post-Iraq and Afghanistan era, with the general public and Parliament alike more likely to scrutinise government decision-making. An important part of this is the evolution of the War Powers Convention and the recent test-cases of civil society and parliamentary mobilisation over arms sales to Saudi Arabia and the lethal strike against Reyaad Khan.

Parliament and the War Powers Convention

For many centuries the Crown Prerogative—powers once bestowed upon the British Sovereign, but today wielded by the Prime Minister and his or her Ministers—has provided the occupant of Number 10 Downing Street with a source of individual power to make decisions about how and when Britain has used force abroad.[71] In recent decades however, there has been increasing cross-party consensus that a move towards greater transparency and accountability was pivotal for a 21st century democracy.[72] Over the last few years, a convention of seeking Parliamentary approval before the deployment of troops abroad has developed – also known as the War Powers Convention (WPC).

This sort of parliamentary control over decisions to use force represents a huge shift in attitude by the executive. In 1983, the then-Labour Leader Michael Foot, called on Prime Minister Margaret Thatcher to request Parliament's say over her decision to deploy British Armed Forces to deter Argentinian aggression on the Falkland Islands. Thatcher demurred: "It is an inherent jurisdiction of the government to negotiate and reach decisions… afterwards the House of Commons can pass judgment on the government."[73] Decisions to use lethal force in subsequent conflicts – the Gulf War, Kosovo and Afghanistan – followed the logic upheld by Lady Thatcher. Jack Straw, a senior Cabinet Minister during the last Labour government, once described how the Prerogative allowed "government Ministers… [to] rule virtually by decree in many areas not covered by statute," including the decision to deploy British Armed Forces.[74]

The vote on military intervention in Iraq on 18th March 2003 changed that. The House of Commons vote (in which 412 to 149 voted in favour of military intervention) represented "the first example in modern times of prior parliamentary approval having been sought, and granted."[75] To some extent this established a Parliamentary Convention in which the House of Commons was recognised as having a formalised role in "any future decisions on military action."[76] It was, for the first time, the Labour government putting words into action by deferring its Prerogative to Parliament, and placing the fate of war in their hands.

The early years of David Cameron's leadership of the Conservative Party suggested that the permanency of the WPC would hold. When in Opposition, William Hague (the future Foreign Secretary) wrote an unambiguous article in The Guardian newspaper outlining his support for strengthening Parliament's role in the decision to go to war.[77] True to their word, in government Cameron invited the House of Commons to provide its consent on interventions in Libya in 2011, Syria in 2013 (and again in 2015), and Iraq in 2014. After Cameron was defeated in a Parliamentary vote on the principle of military intervention in Syria in 2013, the then-Labour Leader Ed Miliband, raised a point of order to elicit a formal confirmation from Cameron that he would not use the Prerogative following the government's defeat.[78]

This is not to mean that parliamentary power over decisions to use force have become absolute. In 2013 the government unilaterally gave the green light to deploy British troops to support French forces in Mali by providing logistical support.[79] Responding to criticism about the decision to go ahead with the deployment without Parliamentary consent, Andrew Lansley, the Leader of the House at the time stated that "the role of British troops is clearly not a combat role and it is not our intention to deploy combat troops", narrowing the conditions under which the Convention applies to British combat deployments.[80] In addition, the 'emergency' nature of the request was cited as a reason for bypassing a vote in Parliament.[81]

In April 2018, the British government's decision to bypass Parliament and launch strikes against Assad regime targets in Syria after a chemical weapons attack in the Damascus suburb of Douma was again justified on the basis of speed, with Prime Minister Theresa May stating: "we have always been clear that the government has the right to act quickly in the national interest."[82] The fact that there was a week-long lag between the strikes and the initial use of chemical weapons has made this a controversial argument, with many parliamentarians accusing May of avoiding a vote on the basis she thought she might lose it.[83]

In addition to the emergency justification, May echoed Thatcher's comments that "it is an inherent jurisdiction of the government to negotiate and reach decisions… afterwards the House of Commons can pass judgment on the government"[84] when she said "I am absolutely clear that it is Parliament's responsibility to hold me to account for such decisions but it is my responsibility as prime minister to make these decisions."[85] This casts doubt on the future adherence to the WPC under her government.

Remote warfare and the War Powers Convention

In March 2017 we launched a report called "All quiet on the ISIS front: British secret warfare in an information age"[86] where we explored the ways in which much of remote warfare slips through the net when it comes to the War Powers Convention:

For example, where the UK is using armed drones to conduct intelligence, surveillance, and reconnaissance missions rather than combat missions, these deployments are not disclosed or voted on in Parliament. This is in line with the treatment of other 'non-combat' missions, which do not fall under the War Powers Convention. However, there is now also a precedent for the UK to use these armed drones to carry out targeted strikes, such as the one that killed Reyaad Khan in Syria, when parliamentary authorisation had not been given for British military engagement in the country.[87] This raises questions about the policy governing these decisions, as well as whether the existing War Powers Convention is flexible enough to cover the increasing fluidity between non-combat and combat missions.

Where the UK carries out operations with special forces rather than with regular troops, parliamentary authorisation or notification is not required. This allows them to operate in combat roles in countries where Parliament has not voted on military action,[88] as well as in places where the relevant authorisations specifically preclude the deployment of UK troops in ground combat operations.[89] In addition, scrutiny is severely restricted by the MOD's long-held policy not to comment on special forces.[90]

In addition, where the UK provides capabilities to allies rather than taking an active lead in operations, it does not necessarily need to report them to Parliament. For example, in 2015 it was revealed that a small number of UK pilots embedded with the U.S. military had carried out airstrikes in Syria against IS targets before parliamentary authorisation was given.[91] This allows the government to have troops involved in combat without having to declare a UK role in offensive missions, and without having to bring their engagement to a vote in Parliament.

Finally, there is little information in the public domain about the military's advise and assist activities, even when they take place in close proximity to frontline conflict. While some narrative is given in the MoD's annual reports,[92] this only gives a snapshot of activities in a selection of countries where the UK works. Because budgetary information is rarely given, and because the information given is not necessarily comparable or consistent between countries or over time, it is very difficult to get a sense of how much time and effort the UK is putting in to capacity building and engaging with its local allies. This makes judging the relationship between the UK and its allies, and any responsibility for their behaviour in combat, incredibly difficult to judge.

The fact that much of remote warfare falls outside the parameters for parliamentary authorisation does not mean that it does not attract parliamentary and public attention. The fact that the UK Parliament had no forewarning of the combat role of British embeds caused widespread criticism. John Baron MP, a senior Conservative backbencher, claimed the government had shown "insensitivity to Parliament's will" by not taking the issue to vote in the House of Commons.[93] Edward Leigh MP argued in the House of Commons debate that, while "we should keep the embedding of five pilots in hundreds of missions in perspective… the fact remains that we were given a solemn promise that if British service people were to bomb in Syria, we would be consulted."[94] Senior members on the opposition bench, such as Harriet Harman, the then-acting Leader of the Labour Party, and Coaker were also shocked they had not been briefed – even when they attended the National Security Council earlier that week.[95]

In addition, over the past two years the Chairs of the Intelligence and Security Committee (ISC), the Foreign Affairs Committee (FAC) and the House of Commons Defence Committee (HCDC) have each publicly questioned the government's blanket opacity policy towards the UK's special forces:

"My view is that the current trend in this country has been towards facilitating parliamentary scrutiny of all government activities. Indeed, in a modern democracy, having areas of state activity that are not subject to any scrutiny at all by parliament is not a very good place to be. What is clear is if there was a desire for us to look at special forces, then this committee would probably be in a position to do it . . . But it is a matter for parliament".

Source: The Sunday Times (December 2017)

Rt. Hon. Dominic Grieve QC MP

"We do not have a mechanism in Parliament for any form of scrutiny of the activities of UK special forces. That work is classified for understandable reasons, but so is the work of the intelligence and security services, and we have a mechanism in the form of the Intelligence and Security Committee that is able to exercise scrutiny over those top-secret activities. Would it not be sensible for Parliament to fill what is apparently a scrutiny gap so far as UK special forces are concerned, especially when the United States and other countries seem able to manage such scrutiny without impeding operational capabilities?"

Source: HCDC Evidence Session (October 2017)

Rt. Hon. Dr Julian Lewis MP

"If they are classic Special Forces operations—sharply in, and sharply out—then you would need to maintain their secrecy. If they are part of a strategy you would expect that strategy to be overseen."

Source: Middle East Eye (May 2016)

Rt. Hon. Crispin Blunt MP

Whether through the War Powers Convention or through the activities of individual MPs and Committees, it is clear that the government will be making future decisions over the use of force against a backdrop of public and parliamentary interest. Allowing for a more informed debate, based on clearer understandings of government policy and legal interpretations, is one way of ensuring that this relationship can be as constructive as possible. As the following cases of arms sales to Saudi Arabia and the lethal strike against Reyaad Khan show, the alternative appears to be a climate of speculation that can create a lot of unnecessary mistrust and hostility towards government actions.

The court of public opinion: arms sales to Saudi Arabia

Strikes by the Saudi-led coalition in Yemen form just one part of multiple conflicts that are devastating the poorest country in the Gulf and exacerbating some of the worst humanitarian conditions in the world. After the Arab Spring, President Ali Abdullah Saleh was overthrown and his deputy Abdrabbuh Mansour Hadi oversaw the formation of a power-sharing government and began implementing reforms. However, unsatisfied with the reforms proposed, Saleh and the Houthi rebels, a political movement dominated by Zaydi Shia Muslims,[96] formed an alliance and forced Hadi out of the country.

In defence of Hadi, a Saudi-led coalition (made up of Bahrain, Kuwait, Qatar, Saudi Arabia and the United Arab Emirates (UAE), Egypt, Jordan, Morocco, and Sudan) began airstrikes against the Saleh-Houthi rebel alliance in Yemen in March 2015 – supported by Western allies like the UK and the U.S. who have provided logistics, training, weapons, and some level of frontline assistance.[97] These strikes have been heavily criticised and the Saudi-led coalition has been accused of human rights abuses by a number of groups, including the UN and Amnesty International.[98]

While many accept the legality of the intervention itself, the conduct of the campaign has been met by increased criticism.[99] Frequent strikes against civilian targets – such as religious sites and vital infrastructure – have led many to accuse the coalition of widespread human rights violations.[100] One of the most shocking incidents was the killing of 140 people, and wounding of 525, attending a funeral on the 8th October 2016 in Yemen's capital, Sana'a.[101] The coalition has also hit hospitals so frequently that Médecins Sans Frontières (MSF) evacuated their staff in August 2016.[102]

As the Saudi-led coalition's strikes in Yemen have come under increased criticism for apparent violations of international law, pressure on the UK to suspend its arms sales to the Kingdom has also grown. Saudi Arabia accounted for 48% of UK exports in the period 2012-2016 and, despite rising numbers of reports of potential violations of international law by the Saudi-led coalition, the UK government has licensed over £4 billion worth of arms since the bombing of Yemen began.[103] The weapon categories included for arms exports since the bombing of Yemen began include approximately:

- £1.7 billion worth of ML10 licences (Aircraft, helicopters, drones)
- £1.1 billion worth of ML4 licences (Grenades, bombs, missiles, countermeasures)
- £430,000 worth of ML6 licences (Armoured vehicles, tanks)[104]

Many of these weapons have been used by Saudi Arabia in their campaign in Yemen. For example, the government has confirmed that Typhoon and Tornado aircraft, manufactured by BAE Systems, have been used in combat missions in Yemen. Similarly, UK-built Brimstone missiles and Paveway laser-guided bombs have also been used in the conflict.[105]

However, UK support of Saudi Arabia goes well beyond this. There have been reports of UK special forces on the ground,[106] intelligence-sharing that could be used for Saudi and U.S. strikes,[107] liaison officers in command and control rooms, [108] and embedded troops in U.S. bases that are used to carry out strikes.[109] Indeed, in the First Joint Report of the Business, Innovation and Skills and International Development Committees of Session 2016-17, "The use of UK-manufactured arms in Yemen", the Committee complained that:

> "*We were told that UK personnel are not part of the intelligence planning cells, but that they are in the Joint Combined Planning Cell HQ. We also heard that UK personnel are in Saudi Arabia to train, educate and teach best practice, which includes understanding IHL and training air crews and planners how to go about assessing targets for the future, but that our liaison officers 'do not provide training, they do not provide advice on IHL compliance, and they have no role in the Saudi targeting chain.' This is an area in which there is much confusion and greater clarity is needed.*"[110]

In 2016 the Committees on Arms Export Controls launched an investigation into arms sales to Saudi Arabia and one of the two reports to surface recommended the suspension of sales.[111] During the 2017 general election campaigns, all of the British opposition parties – barring the Democratic Unionist Party (DUP) – promised to reassess the Saudi relationship in their manifestos. In addition, the silence of senior politicians on the UK-Saudi relationship has been frequently challenged. For example Angus Robertson, then Westminster leader for SNP, challenged UK arms to Saudi during Prime Minister's Questions the day after the U.S. stopped supplying precision guided munition to the Kingdom.[112]

The CAAT case

In response to the growing controversy, the Campaign Against the Arms Trade (CAAT) launched a judicial review of the government's decision to continue granting weapons export licenses to Saudi Arabia. The case, brought against the Secretary of State for International Trade who grants such licenses, was based on the Consolidated EU and National Arms Export Licensing Criteria. It states in Criterion 2c that "[h]aving assessed the recipient country's attitude towards relevant principles established by international human rights instruments, the Government will…not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law."[113]

CAAT claimed that "the Secretary of State acted irrationally in deciding Criterion 2c was not met" considering the "substantial body of evidence from NGOs and international bodies…[that] there was a 'clear risk' of a 'serious violation' of International Humanitarian Law."[114]

In response, the government argued that it operates a robust system for determining whether Criterion 2c is met and uses more sophisticated sources of information than those available to the sources relied upon by CAAT. This was used to argue that the

Key terms

Deference of Court

Judicial respect for the actions or decisions of a statutory or prerogative authority reflected most generally in a requirement that an applicant for judicial review make a very strong case for error before the court will intervene.

Secret Courts

The 2013 Justice and Security Act contained changes to allow sensitive information to only be seen by the judge and security-cleared 'special advocates'. The special advocate who represents the interests of an individual claimant cannot reveal precise details of the evidence and may only provide a 'gist' or loose summary. While there have been some benefits of this system, which allows cases that would previously have been deemed non-justiciable because of the level of secret information, there have been many critics. Some argue that it means parties are no longer "on an equal footing, tilting the advantage in the government's favour." Civil liberties groups have also been concerned with the rise in cases going through secret courts and have argued that the government is using them to save embarrassment rather than because of fears of threatening national security through the release of information.

government's conclusion that Criterion 2c was not met "is rational and not open to challenge on public law grounds."[115] The High Court ruled in favour of the government, despite the judges stating that the evidence presented by CAAT "represent[s] a substantial body of evidence suggesting that the Coalition has committed serious breaches of International Law in the course of its engagement in the Yemen conflict."[116] CAAT have now been granted a request to appeal this decision.

While the case against the government may have been unsuccessful in its aim to halt arms sales, the judgement has heightened rather than dispelled many of the concerns about weapons sales to Saudi Arabia and the deference of court when it comes to holding the government to account. As Dr Anna Stavrianakis noted in evidence to a Committee on Arms Export Controls (CAEC) inquiry into the use of UK-manufactured arms in the conflict in Yemen: "The Government's response thus far has been to say, "We have a policy. It's okay," or, "We've been reassured by the Saudis. It's okay," but there is a whole series of credible allegations the government have simply not responded to."[117] Similarly, both of the parliamentary reports that were released from the inquiry called on the government to increase transparency, stating:

> *"The Government points to its robust licensing regime as evidence that its arms export practices are responsible. However, by failing to provide persuasive evidence to support this statement or to respond to reports of breaches of international humanitarian law, the Government is preventing public scrutiny of its practices."*[118]

CAAT, along with a number of others, criticised the fact the Court "relied heavily on secret evidence given in closed court by the government which could not be examined or challenged by campaigners."[119] The secret evidence presented by the government apparently included "fast-jet operational reporting data", "high-resolution MoD-sourced imagery" and "UK defence intelligence reports and battle damage assessments".[120] The Court said that this "closed material", which had not been made public for national security reasons, "provides valuable additional support for the conclusion that the decisions taken by the secretary of state not to suspend or cancel arms sales to Saudi Arabia were rational."[121] The judgement concluded:

> **"…in our judgment, the open and closed evidence demonstrates that the Secretary of State was rationally entitled to conclude as follows: (i) the Coalition were not deliberately targeting civilians; (ii) Saudi processes and procedures have been put in place to secure respect for the principles of International Humanitarian Law; (iii) the Coalition was investigating incidents of controversy, including those involving civilian casualties; (iv) the Saudi authorities have throughout engaged in constructive dialogue with the UK about both its processes and incidents of concern; (v) Saudi Arabia has been and remains genuinely committed to compliance with International Humanitarian Law; and (vi) that there was no "clear risk" that there might be "serious violations" of International Humanitarian Law (in its various manifestations) such that UK arms sales to Saudi Arabia should be suspended or cancelled under Criterion 2c."**[122]

In addition to emphasising the effort that the UK government was putting into improving Saudi targeting behaviour, the court case revealed a number of processes that were in place to safeguard British assistance against contributing to violations of IHL. These included a sophisticated MOD "Tracker" database of strikes, British-run IHL compliance workshops with Saudi personnel, and the establishment of a Joint Incidents Assessment Team (JIAT) to build Saudi capacity to monitor strikes.[123] These all sound like good initiatives, which begs the question of why it took litigation to reveal them.

In a similar fashion, it was only after legal charity Reprieve sued the British government to publish its "torture policy" that it published 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.[124] Once published, the Consolidated Guidance showed the efforts the government was making to provide intelligence and military personnel "with some much-needed certainty [on] the principles which govern the interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees."[125] Importantly, it also clearly states that: "if ministers ultimately conclude that there is a serious risk of torture which cannot be adequately mitigated, they will not be able to authorise the contemplated action and maintain compliance with the absolute prohibition on such conduct."[126]

The CAAT challenge of arms sales to Saudi Arabia has revealed that the government has multiple layers of checks and balances in place to safeguard against abuses of its assistance in conflict. However, the fact that it needed a court case to reveal this information is far from ideal. Adopting a more proactive policy of transparency and engagement could do much to improve relations between the government and civil society communities and would allow for a more informed debate about British operations overseas without the need for recourse to litigation.

Reyaad Khan

Another case that stands as testament to the damage that can be done when government policy or legal positions are poorly communicated or withheld from the public is that of the lethal strike against Reyaad Khan on 21st August 2015.

Reyaad Khan, a British citizen fighting for IS in Syria, was killed by a Hellfire missile fired from a British Reaper drone.[127] This strike took place before UK Parliament approved British airstrikes in the country – which happened in December 2015.[128] Many now accept that the strike against Khan was legally justifiable; however, the government's failure to communicate – and occasional attempts to conceal – key aspects of its legal justifications and policies surrounding targeted killing needlessly exacerbated concerns that the UK was adopting a similar policy to the U.S.'s controversial drone campaign and conflation of different armed groups under the rubric of a "war on terror".

In August 2013, the House of Commons rejected possible UK military action by 285-272.[129] In September 2014 the House of Commons had approved the use of force in Iraq but explicitly stated:

> *"this motion does not endorse UK air strikes in Syria as part of this campaign and any proposal to do so would be subject to a separate vote in Parliament."*[130]

A month later, the MOD announced it would send drones for surveillance missions over Syria but said that, as these were not in an offensive capacity, they did not require parliamentary approval.[131] The MOD said "no UK Reaper missions have been conducted in Syria other than for surveillance purposes. No authority has been granted for the discharge of weapons from UK Reaper aircraft operating in Syrian airspace."[132]

During the debate on the use of force in Iraq on 26th September the previous year, the Prime Minister reserved the right to strike within Syrian national territory "if there were a critical British national interest at stake or there were a need to act to prevent a humanitarian catastrophe." In those circumstances, he said he would "act immediately and explain to the House of Commons afterwards. I am being very frank about this because I do not want to mislead anybody."[133]

As promised, the then-Prime Minister David Cameron announced to the House of Commons at the earliest opportunity that the UK had undertaken a lethal strike in Syria against Khan during Parliament's summer recess. Cameron said that the strike represented a "new departure" for UK policy and the first time "a British asset has been used to conduct a strike in a country where we are not involved in a war."[134] This was welcome transparency, but it was followed by a series of confusing and contradictory statements from different government officials about the nature and basis for the strike, which began to call into question whether or not the government knew what its policy or legal basis for the strike actually were. The poor handling of the incident began to generate concerns about the legality of the strike, which many commentators went on to call "extremely alarming."[135]

The 'new departure' debacle

Importantly, the debate around the use of drones and targeted killing has been tainted by the controversial policies of the U.S., and many feared that the 'new departure' speech marked a shift towards these policies. Many have criticised the U.S. policy of lethal strikes against suspected members of al-Qaida and affiliated forces in countries such as Pakistan, Yemen and Somalia, as "a serious, sustained, and visible assault on the generally accepted meaning of certain core legal concepts".[136] For example, Philip Alston, former United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, said that the U.S. policy of targeted killing since 9/11 has shown:

> *"...a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks – human rights law, the laws of war, and the law applicable to the use of inter-state force. Even where the laws of war are clearly applicable, there has been a tendency to expand who may permissibly be targeted and under what conditions"*[137]

The U.S. government has maintained that it is only targeting high value targets (HVT) in its "war on terror"; however, there have been numerous – very public – reports indicating that the U.S. has been targeting a far wider pool of individuals than just a small number of leaders directly planning attacks on the U.S.[138] For example, the U.S. has undertaken strikes against military aged males "on battlefields around the world"[139] and has killed people whose threat to the U.S. remains heavily disputed, such as 16-year-old Abdulrahman Anwar al-Awlaki and eight-year-old Nawar al-Awlaki,[140] the son and daughter of Anwar al-Awlaki, the U.S.-born Yemeni cleric also killed by a U.S. drone strike.[141] Similarly, its strikes in Yemen and Pakistan raise serious questions about the U.S.'s respect for national sovereignty.[142]

While state criticisms of the U.S. approach have been minimal,[143] public backlash has often been extremely negative. The "new departure" speech, plus subsequent announcement from both Fallon and Cameron that suggested that this was the "first time" that a strike like this had been carried out in self-defence of the UK directly fed into this perception. Additionally, on 8 September 2015, Fallon inadvertently suggested that the ECHR might indeed be the appropriate framework to use by stating publicly that the strike was taken on "the same basis on which armed police on our streets can use lethal force."[144] This would mean using an IHRL framework rather than an IHL one.

This led many to believe that the UK was adopting a U.S.-style policy that would result in strikes outside of 'areas of active hostilities.'[145] People quickly picked up on the fact that the UK, unlike the U.S., is bound by the ECHR, which places a higher threshold on the use of force than IHL, and used this to suggest that – if the Reyaad Khan strike had been undertaken "in a country where we are not involved in a war" like Cameron's initial statement suggested, it would have to meet the ECHR's higher threshold in order to be legally permissible. This caused consternation among government lawyers, who insisted that IHL was the appropriate framework – a position supported by the existence of a non-international armed conflict between the UK and IS at the time of the strike due to the ongoing operations against them in Iraq.

The Permanent Representative to the UN, Matthew Rycroft also went on to justify the strike on the basis of the collective defence of Iraq in his statement to the UN. This seemed to indicate that, far from being a "new departure" for UK engagement abroad, the strike represented no more than continuation of the UK's ongoing armed conflict in Iraq, and would therefore easily sit under IHL.

While the existence of two government justifications for the strike – one on the basis of British self-defence and one on the basis of the collective self-defence of Iraq - are not necessarily legally irreconcilable, the sporadic way in which they were delivered does suggest a certain amount of policy confusion. Even former Director of the Government Communications Headquarters (GCHQ), Sir David Omand, who agreed with the UK government position that the strike was legal said he "had to read the Prime Minister's statement several times" to try to square Cameron's comments to the House and the justification given to the UN.[146] Thus,

far from dispelling concern, statements such as these led to a belief that the UK did not fully understand the legal basis for the strike, or perhaps its own policy towards the use of force, feeding fears that the UK was embarking on a policy close to the U.S.'s.

A lack of government transparency

Many of the participants in our legal roundtables noted that, while it was justifiable to keep many of the operational details of the strike secret, the government should have made public from the outset the legal basis on which it undertook the strike to minimise the confusion and controversy which ensued. Some felt that a major driver for secrecy was fear of being dragged through the courts – which would chime with a number of comments made by senior officials bemoaning litigation. However, many noted the danger of remaining silent in setting precedents and in damaging the international and domestic reputation of UK decision makers.

Moreover, the lack of transparency has continued to fuel accusations that the government had something to hide. In response to widespread concern, the Joint Committee on Human Rights (JCHR) launched an inquiry into the UK's policy on targeted killing, but the Prime Minister and Attorney General, Jeremy Wright Q.C., refused to give evidence. Instead, a somewhat vague memorandum,[147] and evidence from the Defence Secretary, Michael Fallon, had to suffice. Fallon refused to answer a number of questions, including fundamental things such as the types of people targeted by the UK, the similarities and differences between UK and U.S. policy and the people involved in the decision to kill Khan, stating: "I am not able to discuss intelligence matters."[148]

In October 2016, the government responded to the JCHR's inquiry, but refused to answer many of the committee's questions. For example, it would not disclose "the grounds on which the government considers the Law of War to apply to a use of lethal force outside armed conflict" because it claimed "this is a hypothetical question."[149]

The government justified this lack of transparency by allowing the Intelligence and Security Committee (ISC) to provide oversight. As its members are security cleared they are able to view sensitive information which the rest of Parliament cannot, including the intelligence and legal advice that informed the strike against Khan. Nevertheless, the inquiry was dogged by a number of reports suggesting that the ISC was struggling to get important information. Early last year, when questioned by the Liaison Committee, Cameron admitted that, although the ISC has been allowed to examine the intelligence that prompted the strike, "ministers would retain the right to withhold some intelligence." Andrew Tyrie MP, chair of the Liaison Committee, stated:

> *"On the basis of today's evidence, the Intelligence and Security Committee will not be able to do a thorough job. The Prime Minister should reconsider his decision to prevent the ISC from looking at information on the military aspects of the drone strikes. Unless he permits this, the ISC will be incapable of providing reassurance to Parliament and the public that the strikes were both necessary and proportionate."*[150]

Again, in February 2017, it was reported by *The Times* that the ISC was "dissatisfied" with the information it had been provided on the attack in its report to 10 Downing Street. The ISC felt it was not provided enough information to make a judgement, especially on how well the government had assessed the potential for "collateral damage" or how "imminent" the threat posed by Khan was.[151] On the 26th April 2017, when the ISC finally released its heavily redacted report on the strike, these concerns were proved correct. It was clear that the committee had not been provided with enough information to assess key elements of the strike such as how imminent the threat posed by Khan was. In his press briefing, Chair of the ISC Dominic Grieve MP stated:

> *"This failure to provide what we consider to be relevant documents 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."*[152]

The Attorney General's speech on imminence

A full year and a half after the strike against Reyaad Khan, the government appeared to recognise the damage that its opacity was doing to public opinion on drone strikes. The Attorney General (Jeremy Wright Q.C.), for the first time, outlined the legal considerations that would be discussed before lethal action is taken against non-state groups in self-defence against an "imminent attack."

As Wright's speech notes, the traditional definition of an "imminent threat" is one that is "instant, overwhelming, leaving no choice of means, and no moment of deliberation" – typified by the Caroline Incident of 1837.[154] Wright explained that the UK now assesses whether a threat is imminent by using the five considerations developed by Sir Daniel Bethlehem in 2012:[155]

1. The nature and immediacy of the threat;
2. The probability of an attack;
3. Whether the anticipated attack is part of a concerted pattern of continuing armed activity;
4. The likely scale of the attack and the injury, loss or damage likely to result therefrom in the absence of mitigating action;
5. The likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury, loss or damage.[156]

This is more expansive than the traditional definition, especially given the assertion made by Bethlehem, and repeated by Wright, that: "*…the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defence, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.*"[157]

While the Attorney General's speech represents some welcome transparency over UK policy, many legal experts remain concerned that without greater clarity the new legal requirements are too permissive. If evidence of a specific attack is no longer needed, it is more likely that individuals who demonstrate patterns of suspicious behaviour (such as meeting with members of militant groups) but do not necessarily represent an immediate threat to the UK could end up being targeted. Reducing the specificity and immediacy required by the evidence may also increase the risk that people followed because of mistaken identities[158] or flawed intelligence[159] could be killed sooner. As Elizabeth Wilmshurst and Sir Michael Wood argued in response to Bethlehem's criteria in 2012:

"The more far-reaching, and the more irreversible its external actions, the more a State should accept (internally as well as externally) the burden of showing that its actions were justifiable on the facts. And there should be proper internal procedures for the assessment of intelligence and appropriate procedural safeguards."[160]

This highlights the difficult balancing act that the government faces when it comes to being more open about its policies and legal interpretations surrounding the use of force. It is true that the release of statements like those of the Attorney General often leads to more questions rather than resolving points of contention. However, rather than putting the government off, this should highlight the value of dialogue as an addition to the simple transmission of information to an external audience. While this is challenging in an environment where the government is unnerved by the levels of litigation it has been subject to in the past few years, it is vital if the relationship between government and civil society is to improve.

This was made worse by the fact the government had sat on the report for so long that the ISC was unable to challenge the heavy redactions that the government had made to the report if it wanted to be able to launch it before the election when the ISC, along with other parliamentary committees, would be disbanded. This added further fuel to concerns that the government was deliberately trying to stymie proper oversight of the strike.[153]

Beyond the example of the Reyaad Khan strike, the government has also maintained high levels of secrecy over UK drone operations in many of its counterterrorism operations. Before parliamentary approval of strikes against IS in Syria, Tom Watson asked: "how many of the remaining UK Reapers in Afghanistan will be redeployed to support the coalition mission against the Islamic State of Iraq and ISIL?"[161] The government refused to answer citing reasons of security – however, it was willing to give similar details for its operations in Iraq.[162]

In February 2016, Catherine West MP asked: "how many operations UK Reaper drones have undertaken in Libyan airspace this year?" to which the government replied that it "has a long-standing policy not to comment on intelligence matters."[163] In September 2016, Richard Burden MP asked "whether the UK is currently using armed Reaper drones outside of Iraq and Syria." Mike Penning MP, Minister of Defence, replied saying: "I am unable to provide further information on the deployment of Reaper as its disclosure would, or would be likely to, prejudice the capability, effectiveness or security of the Armed Forces."[164]

This stands in contrast to the U.S. approach. At the end of 2016, the Obama administration released the "Report on the Legal and Policy Frameworks Guiding the United States' use of Military Force and Related National Security Operations." This 60-page Framework Report, among other things, brought together explanations the Obama Administration had provided on its use of force,

As a spokesman for the National Security Council, stated:

"The President has emphasized that the U.S. Government should be as transparent as possible with the American people about our counter-terrorism operations… Our counter-terrorism actions are effective and legal, and their legitimacy is best demonstrated by making public more information about these actions as well as setting clear standards for other nations to follow."[165]

Without greater clarity over the UK policy, speculation – which is often negative in such controversial policy areas – will continue to be the driver of public debate and discussion. While there are many ways in which the Khan strike is legally justifiable, the argument that a legally sound argument exists but is secret hardly holds up in the court of parliamentary or public opinion. In fact, the perception that the government has deliberately tried to keep secret as many details of the strike as possible has fed suspicions that the UK has something to hide. This cannot be good for the UK, which has long professed to be champion of international law.

"the UK is a world leader in promoting, defending and shaping international law."[166]

Attorney General, Jeremy Wright QC

It remains to be seen what the fall-out from the April 2018 UK-U.S.-French strikes against Assad regime targets following a chemical attack in the Damascus suburb of Douma will be. From a policy perspective, the fact that the UK put out a legal justification for its action is to be welcomed. The fact that it chose to rely on a contested legal principle of alleviating "extreme humanitarian suffering"[167] however will require a better information campaign and more robust dialogue than surrounded the Reyaad Khan case.

If the British government is serious about using its influence to boost conflict prevention and resolution, this is contingent on the UK being a credible international broker. In part, this means being able to tell other governments when they are failing to reach their commitments under international law, or when they are acting irresponsibly. This is only going to work if the British national brand has already achieved a high degree of respect and domestic and international legitimacy.

The government is not going to have a choice about greater public and parliamentary scrutiny of its actions in war, or greater access to information about British actions overseas. It is therefore vital that opportunities for greater understanding and dialogue are explored – perhaps through broad-based consultation as the UK's IHL manual is updated.

The case for government transparency: a summary

It is important for decision-makers to recognise that opacity over UK involvement overseas is not an antidote to this climate of greater scrutiny. In a world dominated by smart phones, social media, and burgeoning access to the internet, the assumption that governments can control access to information about UK military action abroad is an increasingly outdated premise. Instead of giving the government greater freedom of manoeuvre, a policy of limited transparency may end up exacerbating the low levels of public trust in military interventions that are currently constraining the choices available to policy makers.

One of the major warnings to come out of the Iraq Inquiry (also known as the Chilcot report) into Britain's involvement in the 2003 war in Iraq was that the government's misrepresentation of the facts had done long-term damage to public trust in politics.[168] When information surfaces in the media that appears to contradict government statements about what government policy may or may not be on contentious issues like arms sales and targeted killing it could serve to undermine public and parliamentary trust further. One major scandal could result in huge restrictions being placed on the UK's engagement abroad, as could a steady drip of media information that raises suspicions and fuels accusations of government deception.

The current lack of clarity about government policy and legal positions on contentious issues like arms sales and targeted killing is fuelling a huge amount of speculation that may be doing damage to the UK's legitimacy at home and abroad. Recent cases like the CAAT challenge of arms sales to Saudi Arabia have revealed that the government has multiple layers of checks and balances in place to safeguard against abuses of its assistance in conflict. However, the fact that it needed a court case to reveal this information is far from ideal. Adopting a more proactive policy of transparency and engagement could do much to improve relations between the government and civil society communities and would allow for a more informed debate about British operations overseas.

Conclusions

Operating in legal grey zones can be a double-edged sword. While ambiguity may offer freedom of manoeuvre in some instances, it may also expose British forces and HMG to unforeseen legal challenges that result in more restrictions being put on their deployments in the longer term. Working with, or in close proximity to, partners that have poor human rights records is clearly an area of both legal and policy concern.

As the UK engages by, with and through international, regional and local partners more often, it must be clear of the risks of doing so. Following the legal challenges that followed large-scale British deployments in Iraq and Afghanistan, there may be a sense that the lower public profile and lighter footprint of remote warfare means that it is a lower risk form of engagement. However, as this report suggest, this is not always the case. Indeed, in its attempts to reduce the political risk of overseas deployments, it may turn out that the government is transferring risk into areas that are harder for it to control – particularly when it comes to working with partners. Opacity may also serve to reduce political visibility in the short-term, but could exacerbate a climate of mistrust in government decisions over the use of the force that could restrict freedom of manoeuvre in future theatres.

We recognise that there is an important legal distinction between the responsibility of states to implement adequate safeguards against partner IHL violations and the complicity of states who assist partners in the knowledge that they will facilitate abuses. However, the law is only one among many things that the government needs to consider when deciding how to engage with partners. Law tends to defer to the strength of government processes, rather than providing a judgement on whether policy decisions are right or not in light of the significant civilian harm that may occur throughout the course of a campaign. What is lawful can still be politically, strategically, or morally awful. Nonetheless, it is crucial that working through coalitions of actors is not used to dilute or obfuscate lines of legal accountability when abuses do occur.

Governments and civil society alike can sometimes unhealthily fixate on litigation as the inevitable outcome of greater transparency. In part this is a product of a breakdown in relations between the sectors following the controversies of Iraq, when trust in government was deeply shaken. It must be understood that a kneejerk reaction towards opacity to protect against litigation can create a climate of perceived impunity both for the states responsible for large numbers of civilian deaths in a conflict, and for those assisting them. This creates the impression that the government has something to hide and can lead to unnecessary scandal like that which surrounded the lethal strike against Reyaad Khan.

There are currently immense information barriers for external parties hoping to inform government debate about overseas military engagement. There is a pervasive lack of clarity about government interpretations of legal principles, British policy as it relates to things like targeted killing, or UK safeguards against the abuse of assistance by partners. The government has an interest in fostering a more informed debate around its actions in theatres across the world, but this can only come through greater strategic openness and a more constructive relationship between the government, Parliament, civil society, and the wider public. This could be a vehicle to set positive international precedents that serve the UK interest for the years to come.

Recommendations for the British government

Ensuring that the necessary structures and safeguards are in place to reduce the risk that British assistance feeds abuses on the ground is essential. This should be a growing priority for the British government, particularly as working by, with, and through local partners seems set to be the most likely course of action for the military in the years ahead.

- The UK government should release further information demonstrating its commitment to and mechanisms for mitigating against the risks identified in this report. This could include:
    - Releasing statistics about how many cases fall into each risk category of its current OSJA system of assessing assistance.
    - Releasing information about the mitigation measures in place for high-risk cases.
    - Releasing abbreviated information about the assessments for high-risk cases.
- The government should, if it has not already done so, adapt its due diligence and approval systems to monitor and adapt to changing circumstances on the ground. A summary of how this has been done should be made publicly available.
    - As part of this effort, the government should consider the advantages and disadvantages of introducing the automatic suspension of assistance to allies where the OSJA risk assessment appears to have been inaccurate in light of partner conduct. The U.S. Leahy Law could be one template for this.
    - The government should also consider, as a matter of policy, bringing assistance to non-state actors clearly under the OSJA system in line with state-to-state assistance.
    - In light of the potential for shared or joint responsibility of coalition partners for abuses committed by partners, the government should examine its methods for recording the decisions made by, and the structure of, ad-hoc coalitions to which the UK is a party.

In addition, if the British government is serious about being a credible international broker, it needs to be able to tell other governments when they are failing to fulfil their commitments under international law, or when they are acting irresponsibly. This is only going to work if the British national brand has already achieved a high degree of respect and perceived legitimacy, both at home and abroad.

- The government should explore options to improve its public engagement on international legal and policy principles. Aiming to provide the maximum possible clarity would do much to assuage concern and build trust.
- The government should use the process of updating its current Manual of the Law of Armed Conflict to ensure that it adequately covers shifts in the ways that wars are being fought. This should be used as an opportunity for meaningful external consultation and dialogue.

Recommendations for the legal community

Modern warfare operates within a complex and challenging legal environment – particularly for the non-legal expert. Understanding when states can legally use force – and how – can throw up a web of different legal definitions whose interpretations are not necessarily fixed or uncontested. The legal community could do much to add clarity and additional analysis on some of these current legal greyzones. In particular we would welcome further legal study on the following questions:

- What legal responsibilities exist for non-state parties to a conflict, and what does this mean for states that support them?
- [How] Can Article 16 ARSIWA be enforced?
- What impact will the introduction of Specialised Infantry Battalions have on the responsibility of the UK for the conduct of troops that it has trained and assisted over a long period of time?
- What role does providing partners with training on the laws of armed conflict play in discharging the UK's positive and treaty obligations to mitigate the risks that assistance facilitates the commission of internationally wrongful acts? Are there things that this training needs to include to be sufficient?
- What is the interplay between positive and negative obligations of states when providing assistance to partners on the frontlines? How could policy better address the dilemma over whether to halt assistance to reduce legal liability or whether to increase assistance to improve partner conduct?

In addition, there should be further legal scholarship on provisions in legal regimes that touch on responsibility for the actions of allies and the positive obligations of states. This could include:

- definitions of **shared, joint, and parallel authority;**
- standards of **effective control in coalition settings;**
- thresholds for a '**significant contribution' to an internationally wrongful act** under Article 16 ARSIWA;
- interpretations of the requirement for **'knowledge of the circumstances of the internationally wrongful act'**, including **to what extent past behaviour can be used an indicator of future conduct;**
- interpretations of the responsibilities that can be incurred by states **assisting non-state actors** in conflict;
- interpretations of what the Common Article 1 requirement to **'respect and ensure respect' for the Conventions** means in practice, and whether it extends to the **behaviour of non-state actors;**
- interpretations of what constitutes a **'clear' or 'overriding' risk** UK assistance contributes to internationally wrongful acts under existing treaty obligations.

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