



House of Lords
House of Commons
Joint Committee on Human
Rights

The Government's policy on the use of drones for targeted killing

Second Report of Session 2015–16



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*Report, together with formal minutes
relating to the report*

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Joint Committee on Human Rights

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Contents

| | |
|---|-----------|
| Summary | 5 |
| 1 Introduction | 13 |
| Background | 13 |
| Our inquiry | 14 |
| The threat posed by ISIL/Da'esh | 17 |
| The implications of drone technology | 18 |
| The context: a new situation | 18 |
| Why it matters | 20 |
| The importance of the rule of law | 20 |
| The risk of criminal prosecution | 24 |
| The Government's engagement with our inquiry | 25 |
| The scope of our Report | 27 |
| 2 The Government's policy | 29 |
| Introduction | 29 |
| A "new departure" | 29 |
| Conflicting messages about "armed conflict" | 30 |
| Clarification | 32 |
| The significance of the constitutional convention to consult Parliament | 32 |
| Lethal force abroad outside of armed conflict | 35 |
| Conclusion | 37 |
| 3 Legal Basis | 38 |
| Introduction | 38 |
| The Government's understanding of the legal position | 39 |
| The right of self-defence in international law | 43 |
| The meaning of "armed attack" | 44 |
| The meaning of "imminence" | 45 |
| Other relevant international law frameworks | 48 |
| The Law of War | 48 |
| When does the Law of War apply? | 48 |
| What does the Law of War require? | 49 |
| The US and UK positions on the applicability of the Law of War | 49 |
| The European Convention on Human Rights ("ECHR") | 51 |
| When does the ECHR apply? | 52 |
| What does the ECHR require? | 53 |

| | |
|--|-----------|
| ECHR may require the use of lethal force to protect life | 54 |
| Flexibility inherent in concepts of necessity and proportionality | 55 |
| The legal basis for UK support of US lethal force outside armed conflict | 57 |
| Conclusion | 59 |
| 4 The decision-making process | 61 |
| Introduction | 61 |
| The Government’s account of the process | 61 |
| Concerns about the transparency of the current process | 62 |
| The published US policy | 62 |
| Clarifications needed about the decision-making process | 63 |
| Is there a “kill list”? | 63 |
| Legal advice | 64 |
| Conclusion | 65 |
| 5 Accountability | 67 |
| Introduction | 67 |
| Implications of the ECHR applying | 67 |
| Coroner’s inquest? | 68 |
| The Investigatory Powers Tribunal | 69 |
| The Intelligence and Security Committee | 69 |
| Automatic referral | 70 |
| Remit | 70 |
| Independent Legal advice | 72 |
| Legal accountability | 73 |
| 6 Developing international consensus | 75 |
| The international rule of law dimension | 75 |
| The UK’s lack of international engagement to date | 75 |
| UN initiatives | 75 |
| Council of Europe initiatives | 76 |
| Time for leadership | 78 |
| Conclusions and recommendations | 81 |
| Declaration of Lords’ interests | 89 |
| Formal Minutes | 90 |
| Witnesses | 91 |
| Published written evidence | 92 |

| | |
|---|------------|
| List of Reports from the Committee during the current Parliament | 93 |
| Annex 1: The Relevant Legal Frameworks | 94 |
| Annex 2: Flowcharts for assessing the lawfulness of the use of lethal force abroad | 104 |
| Annex 3: Law of War and Human Rights Law compared | 106 |
| Annex 4: The U.S. Policy | 108 |

Summary

Introduction

On 21 August 2015 Reyaad Khan, a 21 year old British citizen from Cardiff, was killed by an RAF drone strike in Raqqa, Syria. He had appeared in a recruitment video for ISIL/Da'esh and was suspected of being involved in plotting and directing terrorist attacks in the UK and elsewhere.

Deploying the UK's Armed Forces is a prerogative executive power, but the Government has chosen to observe a recently established constitutional convention that, before troops are committed abroad, the House of Commons should have an opportunity to debate the matter, except when there is an emergency and such a debate would not be appropriate. Pursuant to this convention, the House of Commons in August 2013 debated the possibility of airstrikes against President Assad's forces in Syria after their use of chemical weapons but both the Government's motion and the Opposition's amendment (which did not rule out airstrikes) were defeated. When voting in favour of military action against ISIL/Da'esh in Iraq in September 2014, the House expressly did not endorse UK airstrikes in Syria and resolved that any proposal to do so would be subject to a separate vote in Parliament. At the time of the drone strike that killed Reyaad Khan, the Government therefore had the express authorisation of the House of Commons to use military force against ISIL/Da'esh in Iraq, but airstrikes in Syria were expressly not endorsed without a separate Commons vote.

The Prime Minister told the House of Commons on 7 September 2015 that the lethal drone strike in Syria was "a new departure": the first time, in modern times, he said, that a British military asset had been used in a country in which the UK was not involved in a war. He said explicitly that the strike was not part of coalition military action against ISIL in Syria, before which, he acknowledged, the House of Commons would have to be consulted. Rather, the strike was part of the Government's comprehensive counter-terrorism strategy that seeks to prevent and disrupt plots against the UK at every stage, as part of the stepped-up response to the acute threat from Islamist extremist violence.

The Prime Minister's statement to the House of Commons, that the drone strike against Reyaad Khan was not part of military action against ISIL/Da'esh to protect Iraq, was contradicted by the statement of the UK Permanent Representative to the UN, also on 7 September 2015, that the action had been taken in the collective self-defence of Iraq. That statement suggested that there had been no "new departure" in UK policy, merely a conventional use of force abroad by the UK in an armed conflict in which the UK was already involved.

Our inquiry

We decided to hold an inquiry into the matter in view of the extraordinary seriousness of the taking of life in order to protect the lives of others, which raises important human rights issues; the fact that the Government announced it as a "new departure" in its policy; and because of the importance we attach, as Parliament's human rights committee, to the rule of law. It is obviously right in principle that the Government

is subject to the rule of law and must comply not only with domestic law but with the international obligations it has voluntarily assumed. But the UK's compliance with the rule of law is also vitally important to its ability to influence other countries in its foreign policy and to be a force for good in the world. When meeting the challenges of countering terrorism in the new situation, it is therefore imperative that the UK complies with international law, because it sends an important signal to the rest of the world about the importance of the international rule of law. The Government therefore urgently needs to demonstrate that it at all times complies with the international legal frameworks that regulate the use of lethal force abroad outside of armed conflict.

We were also concerned that the ongoing uncertainty about the Government's policy might leave front-line intelligence and service personnel in considerable doubt about whether what they are being asked to do is lawful, and may therefore expose them, and Ministers, to the risk of criminal prosecution for murder or complicity in murder.

The main purpose of our inquiry was to achieve clarification in relation to a number of important questions, in particular: (1) what precisely is the Government's policy? (2) what is its legal basis? (3) what is, and what should be, the decision-making process that precedes such a use of lethal force? and (4) what are, and what should be, the mechanisms for accountability?

Context

The context in which our inquiry has taken place is important. Two developments have combined to blur the line between war in the traditional sense on the one hand and countering the crime of terrorism on the other. First, rapid technological advance has transformed both the nature of the threat the UK faces from terrorism and its capacity to counter it: both terrorist attacks and prevention of such attacks can be carried out remotely and instantaneously. Second, the nature of armed conflict has changed, with the steady rise of non-state armed groups such as ISIL/Da'esh with both the intent and capability to carry out terrorist attacks globally, and aspirations which are without territorial limit. This has created a new situation for which the legal frameworks which currently obtain were not designed. While the answer to some legal questions (such as the applicability of the European Convention on Human Rights) is clear, there is an urgent need for greater international consensus about precisely how the relevant international legal frameworks are to be interpreted and applied in this new situation.

The Government's policy

Our inquiry has analysed the Government's policy. The Prime Minister's statement to the House of Commons on 7 September 2015 should be read in the context of the recently established constitutional convention whereby, before the Government uses military force abroad, the House of Commons has an opportunity to debate the proposed use of force, except when there is an emergency which means it would not be appropriate to consult the House of Commons in advance. Examples of such exceptions include if there were a critical British national interest at stake, or considerations of secrecy make it impossible. In such exceptional cases the constitutional convention is that the Government can act immediately and explain to the House of Commons afterwards, at the earliest opportunity.

The Government used military force to target and kill Reyaad Khan in Syria on 21 August 2015. The nature of the operation meant it was not appropriate for the House of Commons to debate it in advance. The Prime Minister came to the Commons on Parliament's first day back after the summer recess, in accordance with the requirement of the constitutional convention that such exceptional use of military force be explained to Parliament at the earliest opportunity.

The killing of Reyaad Khan was therefore a "new departure" in the sense that it was the first time since the recent establishment of the domestic constitutional convention governing the use of military force abroad that the Government had invoked the exception recognised by that convention by using military force against ISIL/Da'esh outside the geographical area (Iraq) already authorised by the House of Commons, indeed in the very area (Syria) where the use of force had been expressly excluded by the House of Commons without a further resolution. The Government says that, for the different purposes of determining the relevant law that applies, the drone strike on Reyaad Khan *was* part of an armed conflict with ISIL/Da'esh taking place in Iraq and Syria. We accept that the drone strike in Syria was part of that wider armed conflict in which the UK was already engaged, to which the Law of War applies, and that the Government therefore did not use lethal force outside of armed conflict when it targeted and killed Reyaad Khan on 21 August.

However, our inquiry has also confirmed what the Prime Minister appeared to tell the House of Commons on 7 September: that it *is* the Government's policy to be willing to use lethal force abroad, *outside of armed conflict* (in Libya, for example), against individuals suspected of planning an imminent terrorist attack against the UK, as a last resort, when there is no other way of preventing the attack. The Secretary of State for Defence was unequivocal in his confirmation to us that this is the Government's policy and it has now been put beyond any doubt by the recent permission given to the US to use UK airbases for the US airstrikes against an ISIL/Da'esh training camp in Libya. Although the Government says that it does not have a "targeted killing" policy, it is clear that it does have a policy to use lethal force abroad outside armed conflict for counter-terrorism purposes.

The Government's view of the legal basis of its policy will determine the exact circumstances in which it will be prepared, in practice, to use lethal force abroad outside armed conflict, pursuant to that policy.

Legal basis

The legal basis of the Government's policy is that the use of lethal force abroad outside of armed conflict for counter-terrorism purposes is lawful if it complies with (1) the international law governing the use of force by States on the territory of another State, and (2) the Law of War. In the Government's view, it is not necessary to consider whether human rights law applies, or what it requires, because compliance with the Law of War, it argues, is sufficient to discharge any obligations that apply under international human rights law. Certain aspects of the Government's view of the legal basis for its policy require urgent clarification.

The Government's interpretation of the concept of "imminence" in the international law of self-defence is crucial because it determines the scope of its policy of using lethal force outside areas of armed conflict. Too loose an interpretation of imminence could be used to justify any member of ISIL/Da'esh anywhere being considered a legitimate target. We therefore recommend that the Government provide, in its response to our Report, clarification of its understanding of the meaning of "imminence" in the international law of self-defence. In particular, we ask the Government to clarify whether it agrees with our understanding of the legal position, that while international law permits the use of force in self-defence against an imminent attack, it does not extend more widely to authorise the use of force pre-emptively against a threat which is more remote, such as plans which have been merely discussed but which lack the necessary intent or capability to make them imminent.

The Government's position that the Law of War applies to the use of lethal force abroad outside of armed conflict, and that compliance with the Law of War satisfies any obligations which apply under human rights law, is based on a misconception about the legal frameworks that apply outside of armed conflict. In an armed conflict, it is correct to say that compliance with the Law of War is likely to meet the State's human rights law obligations, because in situations of armed conflict those obligations are interpreted in the light of the lower standards of the Law of War. Outside of armed conflict, however, the Law of War, by definition, does not apply. What applies is human rights law, and in particular the right to life in Article 2 of the European Convention on Human Rights (ECHR). We recommend that the Government, in its response to our Report, makes clear its view about the law which would apply were it to use lethal force outside of armed conflict: does it accept that the Law of War, by definition, does not apply, and that the higher standards of human rights law apply?

The fact that the ECHR, not the Law of War, applies to the use of lethal force outside of armed conflict does not, however, unduly restrict the Government's ability to protect the UK from terrorism. In the Government's example of the circumstances in which it might use lethal force abroad outside armed conflict (as a last resort, where the Government has intelligence that there is a direct and imminent threat to the UK and there is no other way of preventing that threat), the ECHR would not only permit but positively require the use of lethal force by the Government. The ECHR imposes a positive obligation on the State to protect life, including by taking effective preventive measures against a real and immediate risk to life from a terrorist attack. There is also inherent flexibility in the concepts of necessity and proportionality, which have to be applied realistically having regard to the nature of the threat from terrorism which is being countered. It would be helpful if the Government spelt out its interpretation of what the right to life in Article 2 ECHR requires in this particular context, in accordance with the principle of subsidiarity. We ask the Government to clarify in particular its recognition that the use of force to protect life must be no more than is absolutely necessary, and its understanding of that requirement in the new context, having regard to the nature of the threat posed by ISIL/Da'esh.

We also ask the Government to clarify, in its response to this Report, its understanding of the legal basis on which it provides any help which facilitates the use of lethal force outside of armed conflict by the US, or any other country which takes the same or a similar view to the US (as explained below), with regard to the use of lethal force against

ISIL/Da'esh, whether by providing logistical support (such as allowing the US to use UK airbases) or providing intelligence (such as that gathered through drone surveillance and reconnaissance). The US takes the view that it is in a global armed conflict with ISIL/Da'esh, so that the Law of War applies and lethal force can be used against ISIL/Da'esh wherever in the world they appear. The Secretary of State for Defence, however, said that the UK Government does not take that view, but regards itself to be in armed conflict with ISIL/Da'esh only in Iraq and neighbouring Syria. However, the nature of this conflict is both unprecedented and fast-moving. The UK's recent assistance to the US to enable airstrikes against ISIL/Da'esh in Libya, and the increase in UK military activity in Libya, make it urgent that the Government clarifies its understanding of the legal position on this issue.

We therefore recommend that the Government provide clarification of its position on the following specific legal questions:

- its understanding of the meaning of the requirement of “imminence” in the international law of self-defence;
- the grounds on which the Government says that the Law of War applies to a use of lethal force outside armed conflict;
- its view as to whether the right to life in Article 2 ECHR applies to a use of lethal force outside armed conflict, and if not why not;
- its understanding of the meaning of the requirements in Article 2 ECHR that the use of force be no more than absolutely necessary, and that there is a real and immediate threat of unlawful violence, in the context of the threat posed by ISIL/Da'esh;
- its understanding of the legal basis on which the UK takes part in or contributes to the use of lethal force outside armed conflict by the US or any other country adopting the same or a similar view with regard to the use of lethal force.

The decision-making process

The decision-making process requires safeguards to be built into it to ensure that any particular operation is planned and conducted in a way which ensures compliance with the higher standards of the ECHR and which minimises the risk of loss of life, including to civilians. We recommend that the Government makes clear, in its response to this Report, when ministerial involvement is required, when legal advice is sought and from whom, and what opportunities are provided for review of the continuing justification for the authorisation to kill identified individuals.

Accountability

There must also be a mechanism for effective independent investigation capable of leading to accountability for actions taken under the Government's policy. Independent scrutiny is a means of ensuring that decision-makers keep to the relevant standards; is a safeguard against the danger of mission creep, when broad powers are exercised in ever

wider circumstances; and gives the public the confidence that it is necessary to entrust such exceptional powers to ministers. It is also a legal requirement, being part of the obligation to protect life in Article 2 ECHR.

Where there is a coroner's inquest that would provide some investigation. However, there is unlikely to be an inquest in most cases in which lethal force might be used under the Government's policy, even if the target is a UK national. Even were such an inquest to take place, it is unlikely to be an adequate and effective investigation because coroners are not security-cleared and closed material procedures are not available in inquests under the Justice and Security Act. If there is no inquest, there must be a sufficiently broad investigation by some other independent body with access to the necessary intelligence. We recommend an enhanced role for the Intelligence and Security Committee, in the wider context of accountability through the courts, for example by the possible criminal liability of individuals who act unlawfully.

International leadership

To date the UK Government has not directly engaged in international efforts, for example in the United Nations and the Council of Europe, to build international consensus about how the international legal frameworks apply to the use of lethal force abroad in counter-terrorism operations outside of armed conflict.

In light of the Government's welcome commitment to "strengthen the rules-based international order and its institutions" we recommend that, in addition to clarifying its own understanding of the specific legal issues identified above, the Government now takes the lead in such international initiatives and act multi-laterally to build consensus. We identify a number of specific avenues which the Government could explore internationally in order to bring about such a consensus, for example by:

- including a detailed response to the questions posed in 2014 by the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, particularly those concerning how the requirement of imminence in the international law of self-defence is to be applied in the new context and whether the Law of War recognises a non-international armed conflict which has no finite territorial boundaries;
- initiating an urgent discussion of the subject in the UN Human Rights Council;
- building international support for the development of some core UN principles applying to the use of lethal force outside armed conflict for counter-terrorism purposes;
- inviting the Committee of Ministers of the Council of Europe to reconsider, in light of our Report, its rejection of the Parliamentary Assembly's proposal that some draft guidelines be developed for member states on how to ensure that uses of lethal force abroad outside armed conflict are consistent with States' international obligations, including the ECHR;
- inviting the Committee of Ministers to consider the scope for requesting an advisory opinion from the European Court of Human Rights under Article 47

ECHR, seeking guidance on the application and interpretation of the right to life in Article 2 ECHR where lethal force is used abroad for counter-terrorism purposes outside armed conflict, or help is given to a third country facilitating such use of force; and

- supporting any request the Parliamentary Assembly may make for an Opinion from the European Commission for Democracy through Law (the Venice Commission) about the requirements of the ECHR and any other Council of Europe standards when a Council of Europe Member State uses lethal force abroad outside armed conflict for counter-terrorism purposes or facilitates such use of lethal force by a third country.

We will follow up these recommendations with the relevant international bodies.

1 Introduction

Background

1.1 On 21 August 2015 Reyaad Khan, a 21 year old British citizen from Cardiff, was killed by a Hellfire missile fired from an RAF Reaper drone whilst he was travelling in a vehicle in the area of Raqqa in Syria. The drone was flown, and the missile fired, from a ground control station, or “virtual cockpit”. Khan, who had appeared in a recruitment video for the terrorist organisation ISIL/Da’esh¹ in June 2014 and was suspected of being involved in plotting and directing terrorist attacks in the UK and elsewhere, was the target of the strike. Two other people were also killed by the missile: Ruhul Amin, also a UK national, and Abu Ayman al-Belgiki, a Belgian national.

1.2 The power to deploy the UK’s Armed Forces is a prerogative executive power exercised on the Sovereign’s behalf by ministers.² However, the Government has chosen to observe a recently established constitutional convention that, before troops are committed abroad, the House of Commons should have an opportunity to debate the matter, except when there is an emergency and such action would not be appropriate.³ Pursuant to this convention, on 29 August 2013 the House of Commons debated the Government’s motion raising the possibility of airstrikes (subject to a further Commons vote and efforts to secure a UN Security Council Resolution) against President Assad’s forces in Syria after their use of chemical weapons. The motion was defeated as was an amendment from the Opposition which did not rule out airstrikes but imposed stronger preconditions.⁴ In September 2014, the House of Commons voted in favour of using military force, including airstrikes, against ISIL/Da’esh in neighbouring Iraq, but not in Syria: according to the terms of the resolution approved by the House of Commons, “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”.⁵ At the time of the drone strike that killed Reyaad Khan, therefore, the Government had the express authorisation of the House of Commons to use military force against ISIL/Da’esh in Iraq, but airstrikes in Syria were expressly not endorsed without a separate Commons vote.

1.3 On 7 September 2015, the first sitting day after the summer recess, the Prime Minister made an oral statement to the House of Commons on Refugees and Counter-terrorism, in which he told Parliament about the lethal drone strike in Syria on 21 August and explained the Government’s justification for the action.⁶ The Prime Minister’s statement remains one of the clearest descriptions of the Government’s policy and we therefore consider it in some detail in this Report. In short, he said that Reyaad Khan had been killed in an act of self-defence, to protect the British people from a direct threat of terrorist attacks being plotted and directed by Khan. He had been “involved in actively recruiting ISIL sympathisers and

1 On 2 December 2015 the Prime Minister announced that the Government would henceforth be using the terminology “Da’esh” to refer to the organisation which calls itself “Islamic State” or “Islamic State in Iraq and the Levant” (or “ISIL”): HC Deb, 2 Dec 2015, [col 328](#). The UN Security Council in its most recent resolution 2249 (2015) referred to the organisation as “ISIL also known as Da’esh”. Except where quoting verbatim, we use the shorthand “ISIL/Da’esh” throughout this Report.

2 The Cabinet Office, [The Cabinet Manual: a guide to laws, conventions and rules on the operation of government](#) (October 2011), para. 3.34

3 *Ibid.*, para. 5.38. See from para 2.17 below for a more detailed consideration of the constitutional convention.

4 HC Deb, 29 Aug 2013, [col 1556](#)

5 HC Deb, 26 September 2014, [col 1255](#)

6 HC Deb, 7 September 2015, [cols 23-27](#)

seeking to orchestrate specific and barbaric attacks against the west, including directing a number of planned terrorist attacks right here in Britain, such as plots to attack high profile public commemorations, including those taking place this summer.” The Prime Minister said that the Government had acted because there was no alternative: in the absence of a Government in Syria that it could work with, and no military forces on the ground, direct action was the only way of preventing Khan’s planned attacks on Britain. The Attorney General had advised that there was a clear legal basis in international law, namely the UK’s inherent right to take necessary and proportionate action to defend itself against terrorist attack.

1.4 The Prime Minister explained that the strike was part of the Government’s comprehensive counter-terrorism strategy that seeks to prevent and disrupt plots against the UK at every stage, as part of the stepped-up response to the acute threat from Islamist extremist violence. Although the Prime Minister said there was clear evidence that the planned armed attacks on the UK were part of a series of actual and foiled attempts to attack the UK “and our allies”, he was very clear that the justification for the strike was to defend the British people against the threat of terrorist attack in the UK, rather than part of the armed conflict in Syria:

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

1.5 The Prime Minister acknowledged that this was the first time in modern times that a British military asset had been used in a country in which the UK was not involved in a war, and said that this was “a new departure”. He also restated the Government’s consistent position that “the Government will return to the House for a separate vote if we propose to join coalition strikes in Syria.” However, he said that the lethal drone strike on 21 August had been within the carefully preserved exception to the requirement that the House of Commons should normally have an opportunity to debate the matter before the Government uses military force abroad, whereby the Government reserves the right to act immediately and explain to the House of Commons afterwards “if there were a critical British national interest at stake” which makes it not appropriate for there to be prior parliamentary debate.⁷ That exception is a recognised part of the recently established constitutional convention.⁸

1.6 On 2 December the House of Commons voted to extend its authorisation of the use of military force against ISIL/Da’esh from Iraq to Syria.⁹ Since that date any use of force by the UK against ISIL/Da’esh in Syria has therefore been part of an armed conflict in which the Government has been authorised by the House of Commons to participate.

Our inquiry

1.7 When our Committee was constituted in late October, we considered that the “new departure” in Government policy, to use drones for targeted killing outside of armed conflict, was one of the most significant human rights issues that demanded detailed

⁷ See, for example, HC Deb, 26 September 2014, [col 1265](#)

⁸ The Cabinet Office, [The Cabinet Manual: a guide to laws, conventions and rules on the operation of government](#) (October 2011), para 5.38.

⁹ HC Deb, 2 Dec 2015, [cols 495-499](#)

scrutiny by Parliament. The taking of life in order to protect other lives raises human rights issues of profound importance. The UK had previously used armed drones to deliver lethal strikes, but only in areas such as Iraq and Afghanistan where the UK was already clearly involved in an armed conflict. The policy apparently announced by the Prime Minister on 7 September, of using armed drones to kill suspected terrorists in areas outside of armed conflict, as part of the Government's counter-terrorism strategy, required careful consideration. Many commentators were of the view that the UK had adopted the controversial policy of targeted killing as part of its counter-terrorism strategy. Nehal Bhuta, Professor of Public International Law at the European University Institute, for example, suggested that on one reading:¹⁰

“it amounts to a sea-change in the UK's legal position, and indeed aligns it with several US legal positions in the ‘war on terror’ which, hitherto, no European state has formally embraced.”

1.8 “Targeted killing” is the phrase which has been used¹¹ to describe the policy adopted by the US and Israel, involving the intentional, premeditated and deliberate use of lethal force by the State against specific, pre-identified terrorist suspects outside areas of armed conflict.¹² We were aware of the controversy surrounding the use of “targeted killing” as part of a State's counter-terrorism strategy, and of the common criticism of the US policy in particular that, particularly in its early days, there was insufficient transparency surrounding what was generally a covert programme of targeted killing by drones. We were conscious that the UK's apparent change of policy had not been preceded by any parliamentary scrutiny or debate and that the Government had not published any formulated policy. We also noted that there was considerable uncertainty about exactly what the Government's policy now was in the light of ambiguous and apparently contradictory Government statements about whether the action taken in Syria had been part of the armed conflict in which the UK was already involved in neighbouring Iraq.¹³

1.9 As well as there being no clarity about precisely what the Government's policy now is, there was also a lack of clarity about the legal basis of the policy. The Government had invoked the international law of self-defence, but said very little about whether the Law of War or human rights law were also relevant, and, if so, what they required. For reasons we explain in more detail below, we were particularly concerned about the importance of the Government complying, and being seen to comply, with the rule of law, including international law. We were also concerned that the ongoing uncertainty about the Government's policy and its legal basis might leave front-line intelligence and armed service personnel in considerable doubt about whether what they are being asked to do would expose them to the risk of criminal prosecution for murder or complicity in murder.¹⁴ Ministers also run the same risk in giving those orders. We also thought that there were important questions to be asked about the decision-making process that

10 N Bhuta, “*On Preventive Killing*”, EJIL:Talk! 17 September 2015

11 For example by UN Special Rapporteurs on Extra-Judicial Killing: see paras 1.37-1.39 below

12 According to Chris Woods, *Sudden Justice: America's Secret Drone Wars* (2015), p. 69, “Uniquely among nations, only Israel and the United States had claimed the right to carry out targeted or extrajudicial killings by drone away from the hot battlefield.” Another commentator, however, suggests that Pakistan has also used drones to kill its own citizens: Humeira Iqtidar, [The killing of British citizens without democratic oversight raises questions over the government's use of drones](#), Democratic Audit UK, October 2015

13 See paras 2.8-2.15 below

14 See paras 1.45-1.51 and chapter 3 below, para 3.88

precedes a lethal drone strike outside an area of armed conflict. What mechanisms exist to ensure that there is independent and effective scrutiny of such actions to ensure that there is accountability for the exercise of such an extraordinary power also required scrutiny.

1.10 We therefore decided to hold an inquiry into “The UK Government’s Policy on the Use of Drones for Targeted Killing”. We announced our inquiry and issued a call for evidence on 29 October 2015.¹⁵ We invited submissions on the following themes in particular:

- i) clarification of the Government’s policy and its legal basis;
- ii) the decision-making process that precedes the Government’s use of drones for targeted killing, including the safeguards to ensure the sufficiency of evidence; and
- iii) accountability for actions taken pursuant to the policy (what independent checks exist before and/or after a strike; should there be independent scrutiny and, if so, who should carry it out?).

1.11 The focus of our inquiry was the Government’s *policy* on the use of drones for targeted killing, not the use of drones for targeted killing in any particular case.¹⁶ We have not sought to inquire into the drone strike in Syria on 21 August, other than to the extent that the events leading up to that particular use of lethal force shed light on the main themes of our inquiry. We have also focused on the policy through a human rights lens, not its efficacy or desirability as a matter of foreign or defence policy: that is a matter for other committees.

1.12 There were two other lethal drone strikes in Syria targeting UK nationals before the House of Commons voted to extend authorisation for military force to Syria on 2 December: on Junaid Hussain on 24 August and on Mohammed Emwazi (dubbed ‘Jihadi John’ by the media) on 12 November.¹⁷ Both of these strikes were carried out by US drones. In relation to the second of these strikes, the Prime Minister made clear that the UK’s intelligence agencies worked “hand in glove” with the US to track down the target of the strike.¹⁸ We asked the Government about sharing intelligence with other governments and what steps it takes to satisfy itself that the policy of the recipient state is lawful. However, the Government did not respond to these questions. We consider in Chapter 3 below the important issues raised by UK help, for example by logistical support or the sharing of intelligence, for the use of lethal force by coalition partners such as the US, which may have different policies in relation to the use of lethal force, as a result of different understandings of the legal framework, and identify some of the questions on which clarification of the Government’s position would be desirable.¹⁹

1.13 We received 20 written submissions in response to our call for evidence. A list of all those who contributed is at the back of this Report. All written submissions we received

15 UK policy on use of drones for targeted killing inquiry [launched](#)

16 Our inquiry did not consider the increasingly urgent but separate question of whether there needs to be new regulation of the civilian use of drones.

17 According to press reports, another UK national, Abu Rahin Aziz, was also killed by a US drone strike near Raqqa in Syria in July 2015, before the UK strike on Reyaad Khan. “*Death of British jihadi in July drone strike raises ‘kill list’ questions*”, The Guardian, 8 September 2015

18 Statement made by the Prime Minister, Rt Hon David Cameron, on the US air strike targeting British militant Mohammed Emwazi, [12 November 2015](#)

19 See paras 3.81-3.89 below

can be found on our website.²⁰ We refer to some of the submissions in our Report where relevant, but every submission we received has been carefully considered and used to inform our investigation of the issues.

1.14 The Acting Chair of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, Michael McNamara T.D., wrote to us drawing our attention to its recent Report, *Drones and targeted killings: the need to uphold human rights and international law*, which we have found helpful in our inquiry.²¹ He also invited us to an exchange of views with his Committee in Strasbourg, which took place on 21 April.

1.15 We held two oral evidence sessions. At the first evidence session, on 9 December, we took evidence from Professor Sir David Omand, Professor in the Department of War Studies at King's College, London, and Chair of the Birmingham Policy Commission on Drones²²; Jennifer Gibson, a lawyer from the NGO Reprieve, also a member of the Birmingham Policy Commission and author of *Living Under Drones*; and Professor Thomas Simpson, Associate Professor of Philosophy at the University of Oxford and a former officer with the Royal Marines. At the second evidence session, on 16 December, we heard from the Secretary of State for Defence, the Rt Hon Michael Fallon MP. Transcripts of both evidence sessions are available on our website.²³

1.16 We visited RAF Waddington in Lincolnshire on 3 December 2015. RAF Waddington is one of the bases from which RAF pilots fly the RAF's armed Reaper drones. We found the visit useful and instructive and we refer to some of the useful things we learned from the visit in the course of our Report.

1.17 During our recent visit to Edinburgh we raised the main issues in our inquiry with our interlocutors there.

1.18 The Chair of the All Party Parliamentary Group on Drones, Rt Hon David Davis MP, and its secretariat have helpfully shared background information and material in their possession.

1.19 We are grateful to those individuals and organisations who have engaged with our inquiry and provided us with helpful evidence and other material.

The threat posed by ISIL/Da'esh

1.20 We preface our Report by making clear that it is the Government's duty to ensure the safety and security of the people of this country and we endorse the Government's seriousness in discharging that duty. ISIL/Da'esh poses a very serious threat of terrorist attack in the UK and on British citizens abroad. In light of the horrific attacks in Paris in November 2015, and many other murderous attacks throughout the world, including the attack on tourists on the beaches of Tunisia which killed 30 British citizens, the

20 <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/uk-drone-policy-15-16/publications/>

21 <http://www.parliament.uk/documents/joint-committees/human-rights/2015-20-parliament/drones/Letter-from-Strasbourg-Cttee-on-Legal-Affairs-081215.pdf>

22 University of Birmingham, 'The Security Impact of Drones: Challenges and Opportunities for the UK', Birmingham Policy Commission, October 2014

23 <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/uk-drone-policy-15-16/publications/>

UN Security Council has rightly determined that the threat posed by this organisation represents a threat to international peace, which has been confirmed by the attacks in Brussels and Ankara in March 2016.²⁴

1.21 Indeed, as Parliament's human rights committee we point out that, in the face of such a serious threat of terrorist attack, human rights law itself imposes a number of important duties on the State to take effective preventive action to ensure people's safety and security. As the Committee of Ministers 2002 Guidelines on Human Rights and the Fight Against Terrorism make clear, "States are under an obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts."²⁵ The universally recognised and protected right to life, for example, requires the State to take action to protect life against clear risks such as terrorist attacks. As we explain in more detail in Chapter 3 below, where the State is in possession of clear evidence of a threat to life, human rights law requires the State to take preventive operational measures to protect people against that threat.²⁶

1.22 The Secretary of State for Defence was therefore quite right to emphasise in his evidence to us that when ministers make difficult counter-terrorism decisions, they are aiming to fulfil their duty to protect the right to life of those who would be victims of terrorist atrocities.²⁷

1.23 It is important that the debate about this difficult issue is not framed as a clash between national security on the one hand and human rights on the other. It is about how best to reconcile both duties to protect the human right to life.

The implications of drone technology

1.24 We also wish to preface our Report by making clear that we have become well aware during our inquiry of the capability offered by drone technology in countering terrorism and other threats to national security. It is clear that, in addition to their contribution to surveillance capability, compared to conventional weapons platforms including fast jets, drones have the potential to enhance compliance with the Law of War in armed conflicts. The better quality surveillance and the greater precision in targeting, for example, make it easier to avoid civilian casualties. We also found persuasive the suggestion that the calmer conditions in the virtual cockpit of a drone, together with the superior access to intelligence and other information, and crews' enhanced concentration because of the ability to rotate personnel on shorter shifts than is possible in flight, all have the potential at least to make for better quality operational decision-making at the critical moment of whether or not to use lethal force.²⁸

The context: a new situation

1.25 The context in which we have conducted our inquiry is important. In the course of our inquiry it has become clear to us that two developments have combined to bring about a new situation for which our long established legal frameworks were not designed.

24 UN Security Council Resolution 2249 (2015) (20 November 2015)

25 Council of Europe, [Guidelines on human rights and the fight against terrorism](#), July 2002

26 See paras 3.70-3.72

27 Q26 [Rt Hon Michael Fallon MP]

28 The point was made both in written evidence, see for example, evidence of Professor Tom Simpson, and by RAF crew during our visit to RAF Waddington.

1.26 The first development is rapid technological advance which has transformed both the nature of the threat we face from terrorism and our capacity to counter it. Instantaneous global communication over the internet means that terrorist attacks can be launched remotely, from the other side of the world, and without warning. At the same time, rapidly developing drone technology means that some States have the capacity to defend themselves against terrorism by remotely gathering detailed visual intelligence and using lethal force with some precision against targets on the other side of the world. The increasing availability of drone technology means it is only a matter of time before this ability to deliver lethal force remotely is also at the disposal of terrorist organisations.²⁹

1.27 The second development which poses challenges for our legal frameworks is the changing nature of armed conflict, with the steady rise of non-state armed groups with the intent and capability to carry out terrorist attacks globally. The recent rapid rise of ISIL/Da'esh poses particular challenges: the UK is now threatened with attack by an armed terrorist organisation which claims to be a "State", occupies territory and has demonstrated that it has not only the intention but the ability to attack in many places across the world, including UK nationals overseas. Moreover, unlike other terrorist organisations which have threatened in the past, ISIL/Da'esh has global aspirations which are without territorial limit. We agree with the UN Security Council that this makes the nature of the terrorist threat from ISIL/Da'esh "unprecedented".

1.28 These two developments have led to a blurring of the lines between war in the traditional sense on the one hand, and countering the crime of terrorism on the other. Countering a threat from transnational terrorists abroad is quite different from the domestic enforcement of criminal law which has been the traditional way of countering terrorism. This blurring of the lines raises a number of questions about how the relevant legal frameworks are to be interpreted in this new set of circumstances. Does the Law of War alone govern the lawfulness of action taken to counter terrorism in such circumstances, or does human rights law apply? Do they overlap, and, if so, which takes precedence? Are there circumstances in which only one or other applies? When they apply, what are their requirements? Do we need a new legal framework to deal with this new situation,³⁰ or just guidance about how existing legal frameworks apply?³¹ How flexible do the existing legal frameworks need to be to cope with these new challenges, and are they flexible enough? These are the sorts of questions with which we have grappled in our inquiry.

1.29 As we explain in our Report, there are clear answers to some of these questions, but a real lack of clarity in relation to others. Where we think the answers are clear, we say so, but we also point out where there is room for disagreement about how the legal framework should be interpreted. In this Report we identify some specific legal questions on which there is room for interpretive argument and on which clarification of the Government's view is necessary. Indeed, one of the important conclusions that we have reached is that the Government needs urgently to address some specific questions about how the

29 For recent parliamentary consideration of the risk of armed drones being used by terrorists see HL Deb, 19 Jun 2016, [col 635](#)

30 As contended by Tom Simpson for example, who argues that only the Law of War should apply, not human rights law or criminal law.

31 As argued, for example, by Christof Heyns, Dapo Akande, et al, ([DRO0024](#)), who argue that the existing legal frameworks are adequate, subject to clarification about how exactly they apply.

existing legal frameworks should be interpreted and applied in this new situation, and to demonstrate that it has done so by publishing, in its response to our Report, a clear statement of its understanding of how those frameworks apply.

Why it matters

1.30 We are very conscious that, at a time when the world faces such a serious threat of attack from ISIL/Da'esh, some may question why we consider it to be such a priority to inquire into a particular aspect of the Government's response to that threat. We decided to inquire into this controversial subject for two main reasons: first, because of the importance we attach, as a human rights committee, to compliance with the rule of law, including international law; and second, because of the need to provide reassurance to all those involved in implementing the Government's policy that they are not running the risk of criminal prosecution.

The importance of the rule of law

1.31 The rule of law requires the Government to hold to certain minimum standards, including when it is countering terrorist attacks on democracy. The Government is subject to both domestic law and the international treaty obligations which the UK has voluntarily entered into. Compliance with the rule of law is vital to maintaining international peace and security and is a prerequisite of the effective protection of human rights both here in the UK and abroad. The UK's domestic system for protecting human rights is augmented by and interwoven with the international treaty, the European Convention on Human Rights, which the UK was so instrumental in designing. The UK's compliance with its international treaty obligations sends an important message to the rest of the world about the importance of abiding by international obligations: if the UK appears to be selective in its approach to its international obligations, that would be rapidly seized upon and invoked by other States as an excuse for their record of disrespect for international law. In the UK's foreign policy it expects to be able to press other Governments to comply with the rule of law, including human rights. The Government is undermined in its efforts to do this unless it constantly demonstrates that its own commitment to the rule of law is more than merely rhetorical.³² The Government therefore urgently needs to demonstrate that it at all times complies with the international legal frameworks that regulate the use of lethal force abroad outside of armed conflict.

1.32 The international rule of law is one of Lord Bingham's eight principles in his justly famous account of the rule of law.³³ According to Lord Bingham, "the rule of law requires compliance by the state with its obligations in international law as in national law." The importance internationally of the UK being seen to comply with its international obligations is a point which has been forcefully made by a number of significant visitors to the UK. The UN High Commissioner for Human Rights, for example, alluded to the importance of the UK complying with international law during his visit to the UK in October 2015 (in the context of speculation about the Government's plans to repeal the Human Rights Act).³⁴

32 This point was made in a number of the written submissions we received: see in particular the evidence of Dr William Boothby ([DRO0004](#)), Reverend Nicholas Mercer ([DRO0005](#)), Mr Alex Batesmith ([DRO0006](#)), Professor Robert McCorquodale ([DRO0008](#)), Drone Wars UK ([DRO0007](#)), Christof Heyns, Dapo Akande et al ([DRO0024](#))

33 Tom Bingham (former Senior Law Lord, Lord Bingham), *The Rule of Law*, (2011), chapter 10

34 UN rights chief speaks out on refugee crisis and UK plans to "scrap" Human Rights Act, [October 2015](#)

1.33 The Council of Europe Commissioner for Human Rights, Nils Muižnieks, with whom we met, impressed upon us (in the different context of responding to judgments of the European Court of Human Rights) the potential damage that is done to the ECHR's system for the collective protection of human rights if one of its members is perceived to be openly breaching its international obligations, and all the more so when the State is as influential internationally as the UK.

1.34 The availability of drone technology makes targeted killing much easier for States. It also makes it much easier to use lethal force in the territory of another State. Combined with the fact that the technology is ever more widely available, and is likely to be at the disposal of a growing number of States in the years to come, we are concerned about the threat posed to the right to life. The right to life is not absolute, but our long established legal frameworks make clear that the taking of life is only ever justified as a last resort and in order to protect other life. If the availability of drone technology is not to lead to a significant lowering of the level of protection for the right to life, it is important to ensure that there is absolute clarity about the legal frameworks that apply to the use of drones for targeted killing, and that all those involved understand exactly what those legal frameworks require of them.

1.35 Compliance with international law in the fight against terrorism is of the utmost importance. As a number of witnesses reminded us in the course of our inquiry, international law applies to all States, and expansive interpretations of well established legal doctrines and principles may have unfortunate consequences if invoked by other States.³⁵ As the former Deputy Director of Legal Services to the RAF and author of *The Law of Targeting*, Dr. William Boothby, said to us in written evidence:

“Of course interpretations that we make, and actions we take pursuant to them, will be noted by our adversaries and potential adversaries who may choose to take a similar position. We should therefore consider any policy on these matters most carefully and with that in mind.”³⁶

1.36 Drone technology is rapidly becoming more widely available and it is therefore very important that there is as much clarity as possible about how the use of such a powerful technology is regulated by international law. In the last few years this has been a subject of growing concern in intergovernmental contexts such as the UN and the Council of Europe. However, as we explain in Chapter 6, the UK has so far not played an active part in these international initiatives to seek greater international consensus about how the use of lethal force abroad by armed drones for counter-terrorism purposes fits within the relevant frameworks of international law. We summarise briefly here what those initiatives have been, as they provide the important international context in which our inquiry has taken place.

United Nations initiatives to maintain consistency with international law

1.37 In 2010 the UN Special Rapporteur on extrajudicial, summary or arbitrary execution, Philip Alston, reported to the UN Human Rights Council on “targeted killings”, in light

³⁵ Oral evidence [Jennifer Gibson] taken on 9 December 2015

³⁶ Dr William Boothby ([DRO0004](#))

of the adoption by a few states of targeted killing policies, whether openly or impliedly.³⁷ He reported that a policy of targeted killing, or “the intentional, premeditated and deliberate use of lethal force [. . .] against a specific individual who is not in the physical custody of the perpetrator”, appeared to have been adopted by certain states as part of their counter-terrorism policy, including in the territory of other states. The availability of armed drone technology had made it easier to kill targets with fewer risks to the personnel of the targeting State, and therefore contributed to the rise of targeted killing. The Special Rapporteur warned that this had led to “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.” States with such policies often failed to specify the legal justification for their policies, to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, or to provide accountability mechanisms for violations. He recommended that States should publicly identify the rules of international law they consider to provide a basis for any targeted killings they undertake; and specify the procedural safeguards in place to ensure in advance of targeted killings that they comply with international law, and the measures taken after any such killing to ensure that its legal and factual analysis was accurate.

1.38 The UN Special Rapporteur's 2013 Report to the Human Rights Council, by Christof Heyns, focused on the use of lethal force by armed drones from the perspective of the protection of the right to life.³⁸ He examined the way in which the law of war, human rights law and the law on the inter-State use of force regulate the use of lethal force by armed drones. He concluded that the established international legal framework which governs the use of lethal force is an adequate framework for regulating the use of such force by armed drones, and does not need to be abandoned to meet the new challenges posed by terrorism. On the contrary, he argued, the fact that drones makes targeted killing so much easier made it all the more important to ensure that the long established standards are diligently applied. He called on States and intergovernmental organisations to engage in processes to seek consensus about the correct interpretation and application of the established international standards that govern the use of armed drones.

1.39 In 2014 the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, also focused on the use of armed drones in extra-territorial lethal counter-terrorism operations and made recommendations to the Human Rights Council aimed at clarifying and promoting international consensus about the relevant principles of international law that apply.³⁹ His report identified a number of legal issues on which there is currently no clear international consensus, or where established legal norms are coming under pressure from changing State practice. Arguing that such legal uncertainty about the interpretation and application of the core principles of international law governing the use of lethal force in counter-terrorism operations fails to provide adequate protection for the right to life and leaves

37 United Nations General Assembly, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions – Study on targeted killings, Philip Alston, [28 May 2010](#)

38 United Nations General Assembly, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Professor Christof Heyns, [13 September 2013](#). See also, to similar effect, Christof Heyns, Dapo Akande et al ([DRO0024](#)), The Right to Life and the International Law Framework Regulating the Use of Armed Drones in Armed Conflict or Counter-Terrorism Operations.

39 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emerson, [28 February 2014](#)

dangerous latitude for differences in practice by States, the Special Rapporteur invited States to clarify their position on a number of legal issues, with the aim of reaching an international consensus on those principles.

1.40 The UN Human Rights Council passed a Resolution in April 2014 urging States to ensure that any use of armed drones to counter terrorism complies with their international law obligations, including the UN Charter, international human rights law and the Law of War.⁴⁰ It also called upon States to conduct prompt, independent and impartial investigations whenever there are indications of a violation of international law caused by the use of armed drones. In March 2015 the Human Rights Council decided to invite the UN High Commissioner for Human Rights, relevant Special Rapporteurs and the human rights treaty bodies “to pay attention, within the framework of their mandates, to violations of international law as a result of the use of [...] armed drones”, as well as to remain seized of the matter.⁴¹

Council of Europe initiatives

1.41 The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe did some important work on the subject of drones and targeted killing in 2014.⁴² Its Report, *Drones and targeted killing: the need to uphold human rights and international law*, concluded (as we do in this report) that the issue is not the use of armed drones as such but the fact of targeting individuals for intentional killing.

“The decision-making process leading to such strikes must not be allowed to deteriorate into a routine procedure leading to death sentences passed by members of the executive without ‘the accused’ even being informed of the grounds for suspicion against him or her, let alone given a chance to defend him or herself. [...]

The Assembly should therefore recall the basic principles governing the use of lethal force under international law, in particular international humanitarian and human rights law, and urge all Council of Europe member and observer states to respect these principles, and to provide sufficient transparency to ensure that adherence to these principles can be independently monitored. The Committee of Ministers should be invited to lay down relevant guidelines.”

1.42 In 2015 the Parliamentary Assembly of the Council of Europe, referring to Resolution 2051 (2015) on drones and targeted killings: the need to uphold human rights and international law,

“invited the Committee of Ministers to undertake a thorough study of the lawfulness of the use of combat drones for targeted killings and, if need be, draft guidelines for member States on targeted killings, with special reference to those carried out by combat drones. These guidelines should reflect States’

40 Human Rights Council Resolution 25/22, Ensuring use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law, [15 April 2014](#)

41 Human Rights Council Resolution 28/3, Ensuring use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law, [19 March 2015](#)

42 Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Drones and targeted killing: the need to uphold human rights and international law*, June 2015

obligations under international humanitarian and human rights law, in particular the standards laid down in the European Convention on Human Rights (ETS No. 5), as interpreted by the European Court of Human Rights.”⁴³

1.43 As we explain in more detail in Chapter 6,⁴⁴ the Committee of Ministers has recently indicated that, while it agrees about the need to address many legal issues raised by the use of armed drones, and for greater consensus on the terms of their use, it is not persuaded of the need for guidelines such as those suggested by the Parliamentary Assembly.

1.44 However, were the Committee of Ministers to attempt the task of drawing up such guidelines, it could, in principle, seek an advisory opinion from the European Court of Human Rights, under Article 47 ECHR, on any legal question concerning the interpretation of the Convention which is raised by such guidelines, such as the applicability of the right to life in Article 2 to any use of lethal force abroad.⁴⁵

The risk of criminal prosecution

1.45 Our other main reason for conducting our inquiry was the need to provide reassurance to all those involved in implementing the Government's policy that they are not running the risk of criminal prosecution for murder or complicity in murder.

1.46 The deliberate killing of another person “under the Queen's peace” is murder unless there is a defence. Moreover, the courts of England and Wales have extra-territorial jurisdiction in relation to unlawful killing: a British national who kills someone abroad without lawful defence can be tried in England and Wales for the offence of murder or manslaughter.⁴⁶ Where UK personnel kill another person abroad as part of a traditional armed conflict, the defence of combatant immunity applies and there is no risk of criminal liability provided the killing was in accordance with the Law of War. However, where lethal force is used abroad for counter-terrorism purposes outside armed conflict, the defence of combatant immunity is not available.

1.47 An important question therefore arises: what defences to a charge of murder are available where lethal force is used abroad outside armed conflict? Professor Simon Gardner, an expert on criminal law, examined the available defences in his written submission to us and concluded that, where the use of lethal force is outside armed conflict, and is not a reasonable response to an attack that is honestly believed to be imminent, it is by no means clear that a defence to a murder charge is available.⁴⁷

1.48 The possibility of criminal prosecution for complicity in murder also arises for all those UK personnel who have a role in assisting or facilitating the use of lethal force by coalition allies, such as the US, which has a much wider approach to the use of lethal force outside of armed conflict.⁴⁸ Such assistance might take the form of logistical support (for example, permitting US jets to use UK airbases), or the provision of intelligence about targets gathered by UK surveillance and reconnaissance.

43 Council of Europe, Parliamentary Assembly, [Recommendation 2069](#), 2015

44 See paras 6.7—6.12

45 Under [Article 47\(1\) ECHR](#): “The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.”

46 Offences Against the Person Act 1861, [section 9](#)

47 Evidence of Professor Simon Gardner ([DRO0002](#)). See also evidence of Dr William Boothby ([DRO0004](#)), Reverend Nicholas Mercer ([DRO0005](#)), Professor Robert McCorquodale ([DRO0008](#)), Mr Joseph Savirimuthu ([DRO0013](#))

48 See paras 3.50-3.51 below

1.49 The legal uncertainty faced by such personnel was demonstrated recently by the judicial review case of *Noor Khan*, in which it was argued that by sharing locational intelligence with the US for use in drone strikes in Pakistan, UK intelligence personnel would be aiding and abetting murder. The claim sought to establish that the UK Government's policy and practice of sharing intelligence with the US in the knowledge that it was used to locate targets who were then killed by drone strikes was unlawful, because it required GCHQ officers to encourage and/or assist the commission of murder,⁴⁹ or required them to engage in conduct ancillary to crimes against humanity and/or war crimes.⁵⁰ Although the Court of Appeal ruled that the issue was non-justiciable in those civil proceedings because it required the court to decide the lawfulness of the US policy on drone strikes, and the Court therefore declined to determine the question, it said that it is "certainly not clear that the defence of combatant immunity would be available to a UK national who was tried in England and Wales with the offence of murder by drone strike."⁵¹

1.50 While it may be highly unlikely that a prosecution would in practice be brought in the UK, front-line personnel (including those who order a strike from the virtual front line) should be entitled to more legal certainty than is offered by the mere expectation that the Director of Public Prosecutions would be unlikely to consider prosecution to be in the public interest. Nor can the risk be ruled out of a criminal prosecution being commenced in another State (for example in respect of a national of that State who was killed by a UK drone strike), and giving rise to a request for extradition (under a European Arrest Warrant for example).

1.51 In our view, we owe it to all those involved in the chain of command for such uses of lethal force (intelligence personnel, armed services personnel, officials, Ministers and others) to provide them with absolute clarity about the circumstances in which they will have a defence against any possible future criminal prosecution, including those which might originate from outside the UK.

The Government's engagement with our inquiry

1.52 On 4 November we wrote to the Defence Secretary, the Foreign Secretary and the Attorney General to make clear the intended scope of our inquiry and to indicate some ways in which we hoped the Government would be able to help us with our inquiry.⁵² We made clear that the focus of our inquiry was the Government's policy and not the use of drones for targeted killing in any particular case. We also made clear that, while the events leading up to the lethal drone strike in Raqqa on 21 August 2015 might be relevant to our inquiry insofar as they suggest what the Government's policy is and reveal the decision-making process prior to such a use of force, we were not in a position to inquire into the intelligence on which the decision was made to launch that particular strike as our members are not security-cleared. We regarded that as a matter for the Intelligence and Security Committee ("the ISC"), which had announced on 29 October that one of its immediate work priorities would be looking into "the intelligence basis surrounding the recent drone strikes in which British nationals were killed."⁵³ The ISC's members are

49 Contrary to the Serious Crimes Act 2007, [sections 44-46](#)

50 Contrary to the International Criminal Court Act 2001, [section 52](#)

51 Para 19

52 http://www.parliament.uk/documents/joint-committees/human-rights/Letter_to_Jeremy_Wright_MP_041115.pdf

53 Intelligence and Security Committee, Work Priorities Statement, [29 October 2015](#)

security cleared, enabling the Government to give them access to highly classified material if it so chooses, and the Committee is therefore able to inquire into matters requiring access to the underlying intelligence.⁵⁴

1.53 We asked the Government to provide us with a detailed memorandum, covering a number of matters:

- i) A clear statement of the Government's policy on the use of drones for targeted killing.
- ii) A comprehensive description of the legal framework which the Government considers to be relevant to its policy, including international law, and an explanation of the circumstances in which it is lawful to use drones for targeted killing.
- iii) A description of all existing guidance which the Government considers to be relevant to any use of drones for targeted killing.
- iv) A description of the decision-making process that precedes any ministerial authorisation in a particular case.
- v) A summary of all the existing accountability mechanisms which apply to any use of drones for targeted killing.

1.54 We also asked for the memorandum to address a number of specific questions set out in the Annex to our letter, which were intended to establish some basic factual and legal matters at the outset of our inquiry. These included important questions about the international law frameworks that govern the use of drones for targeted killing abroad, such as what tests must be satisfied for a targeted killing abroad to be lawful, and, importantly, whether the Government considers human rights law to apply to such uses of lethal force abroad.

1.55 We regret that the Government failed to provide us with many of the answers to our questions. We initially received a request for an extension of time by two weeks for the submission of the Government's memorandum. Our Chair declined that request on the basis that our inquiry was urgent in light of the Government's stated intention to conduct similar lethal drone strikes in future in similar circumstances, and the Government should already have been clear about the legal basis for its policy before it implemented it by the lethal drone strike in Syria on 21 August.

1.56 We received a brief, four page Memorandum from the Government on 3 December 2015. We consider the substance of the Memorandum in the chapters which follow, but we record here our disappointment that the Memorandum leaves unanswered a number of important questions that we had asked in our letter, including whether, in the Government's view, international human rights law applies to UK drones strikes in Syria.

1.57 We therefore wrote again on 7 December to the Ministry of Defence making clear our disappointment and asking for a further Memorandum, answering each of the questions we had asked in our letter or, if any could not be answered, an explanation of why not, in time for the Secretary of State's appearance before us.⁵⁵

⁵⁴ See Chapter 5 below for consideration of the role of the ISC

⁵⁵ http://www.parliament.uk/documents/joint-committees/human-rights/Letter_to_Defence_Secretary_on_Drones_Inquiry_071215.pdf

1.58 We also asked that the Secretary of State be accompanied by the MoD Legal Adviser when he came to give evidence, to give us the opportunity to ask some detailed questions about the availability of legal advice in the decision-making process that precedes a lethal drone strike. The Secretary of State declined to provide a further memorandum on the basis that the earlier Memorandum contained the Government's response to all the questions we had raised in our letter.⁵⁶ He also said that ministers had decided that Government lawyers would not appear, "in order to protect the principle of Legal Professional Privilege".

1.59 We thank the Ministry of Defence for facilitating our visit to RAF Waddington, and the serving officers there who made the visit so informative. We also thank the Secretary of State for Defence for giving oral evidence to us. We were disappointed, however, by the Government's failure to answer a number of important questions that we asked of them, particularly about the Government's understanding of the applicable legal frameworks that govern the use of lethal force abroad outside of armed conflict. We fully acknowledge the inevitable limits to transparency in relation to intelligence-based military and counter-terrorism operations, but the need to protect sensitive information cannot explain the Government's reluctance to clarify its understanding of the relevant legal frameworks.

1.60 Because the issue of taking a life in order to protect lives is so important, we hope the Government will respond positively and transparently to this Report.

The scope of our Report

1.61 Our inquiry has ranged broadly across a wide range of significant legal, moral and policy issues raised by the availability of armed drone technology and its possible use by the Government to protect the public against the very real risk of terrorist attack on the streets of the UK.

1.62 During the course of our inquiry, a number of witnesses persuasively argued that, while drone technology makes the use of lethal force abroad outside armed conflict easier, it is ultimately just one means of delivering lethal force.⁵⁷ We agree. The significant shift in policy is to the use of lethal force abroad outside areas of armed conflict, rather than the use of drones per se. The availability of drone technology makes the use of such force much easier and therefore calls for renewed attention to how the legal framework applies in the light of new technologies and consideration of whether there is a need for internationally agreed guidance about what the relevant legal frameworks are and what they require.

1.63 At the end of our inquiry, therefore, the issues have crystallised in a way which makes it possible for our report to focus on a relatively specific issue: the need for the Government to clarify its understanding and interpretation of the legal framework for the exceptional use of lethal force abroad, outside areas of armed conflict, for counter-terrorism purposes. In the light of the UK Government's recent permission for the use of UK airbases for US

⁵⁶ http://www.parliament.uk/documents/joint-committees/human-rights/Letter_from_SoS_for_Defence_111215.pdf

⁵⁷ See, for example, evidence of Professor Sir David Omand GCB ([DRO0025](#))

air strikes against ISIL/Da'esh in Libya,⁵⁸ which is outside the geographical area (Iraq and Syria) in which the UK is currently involved in armed conflict, and press reports that the UK may itself be preparing for such strikes,⁵⁹ the need for such clarification is now urgent.

58 See para 3.81-3.84 below

59 www.politicshome.com/foreign-and-defence/articles/story/uk-military-planning-strike-isis-libya

2 The Government's policy

Introduction

2.1 One of the main objectives of our inquiry was to clarify whether the drone strike in Syria on 21 August heralded the adoption of a new policy by the Government on the use of lethal force abroad and, if so, exactly what that new policy is. In particular, as the title of our inquiry indicates, we were concerned to establish whether the Government had now followed the US and Israel by adopting a policy of “targeted killing” of suspected terrorists abroad.⁶⁰ In this chapter, we examine the various ministerial and other statements of the Government's position, from what the Prime Minister called a “new departure” in UK policy in the House of Commons on 7 September, through a number of other formulations by various ministers, to the most recently stated position in the oral evidence of the Defence Secretary to us on 16 December and the Prime Minister's evidence to the Liaison Committee on 12 January, with a view to establishing exactly what the Government's policy now is.

2.2 We have considered carefully the nuances and, in some cases, contradictions and inconsistencies in the Government's account of its policy, which have given rise to confusion, in particular, in relation to whether or not the strike in Syria on 21 August was part of an armed conflict in which the UK was already involved at the time of the strike. This matters because the UK has never previously had an explicit policy of using lethal force abroad outside an area of armed conflict. The Government says that it has not adopted a policy of targeted killing. However, as we make clear in this Chapter, our inquiry has established that it is the Government's policy to use lethal force abroad, even *outside of armed conflict*, against individuals suspected of planning an imminent terrorist attack against the UK, when there is no other way of preventing the attack.

A “new departure”

2.3 When the Prime Minister reported to the House of Commons on 7 September, he made very clear that the strike in Syria had not been part of the wider conflict with ISIL/Da'esh in Syria, which the House had, at that point, not yet authorised:

“I want to be clear that the strike was not part of coalition military action against ISIL in Syria; it was a targeted strike to deal with a clear, credible and specific terrorist threat to our country at home. The position with regard to the wider conflict with ISIL in Syria has not changed.”⁶¹

2.4 In response to a question from our Chair, as to whether this was the first time in modern times that a British asset has been used to conduct a strike in a country where we are not involved in a war, the Prime Minister said:

“The answer to that is yes. Of course, Britain has used remotely piloted aircraft in Iraq and Afghanistan, but this is a new departure, and that is why I thought it was important to come to the House and explain why I think it is necessary and justified.”⁶²

60 See para 1.8 above for an explanation of what is meant by “targeted killing”

61 HC Deb, 7 September 2015, [col 26](#)

62 *Ibid.*, [col 30](#)

2.5 The Prime Minister was therefore unequivocal that the lethal drone strike on Reyaad Khan in Syria on 21 August was a “new departure”, and it seemed that his reason for characterising it as a new departure was because it was the first time that a military asset had been used to deliver lethal force outside an area of armed conflict.

2.6 Earlier in his statement the Prime Minister had also made clear that this action was part of a wider counter-terrorism strategy, according to which such action would be taken wherever the threat comes from:

“As part of this counter-terrorism strategy, [...] if there is a direct threat to the British people and we are able to stop it by taking immediate action, then, as Prime Minister, I will always be prepared to take that action. That is the case whether the threat is emanating from Libya, from Syria or from anywhere else.”⁶³

2.7 Following the Prime Minister's statement, other ministers made clear that the exceptional action taken on 21 August in Syria was not a one-off, but the Government would do the same again if similar circumstances arose. The Secretary of State for Defence, for example, said:

“There are other terrorists involved in other plots that may come to fruition over the next few weeks and months and we wouldn't hesitate to take similar action again. [...] There is a group of people who have lists of targets in our country, who are planning armed attacks on our streets, who are planning to disrupt major public events in this country and our job to keep us safe, with the security agencies, is to find out who they are, to track them down and, if there is no other way of preventing these attacks, then yes we will authorise strikes like we did.”⁶⁴

Conflicting messages about “armed conflict”

2.8 At the time of the Prime Minister's statement to the House of Commons on 7 September, it was widely thought that the “new departure” of which he spoke was that it was now part of the Government's counter-terrorism strategy to use lethal force against suspected terrorists abroad who pose an imminent threat to the UK, even in countries where the UK is not involved in an armed conflict, and that the drone strike against Reyaad Khan was the first application of this new policy. Indeed, this was the assumption on which two parliamentarians, Caroline Lucas MP and Baroness Jones of Moulsecoomb, threatened to bring judicial review proceedings against the Government, challenging “the Government's failure to formulate and publish a Targeted Killing Policy, or publish any such existing policies or procedures, governing the circumstances in which it will pre-authorise the deliberate killing of individuals overseas outside an armed conflict or war in which the UK is participating.”⁶⁵

63 HC Deb, 7 September 2015, col 25

64 “UK prepared to carry out more drone strikes against British jihadis, says Fallon”, The Guardian, 8 September 2014

65 See written evidence of Caroline Lucas MP and Baroness Jones (DRO0020), and their letter before claim dated 23 September 2015 from Leigh Day & Co. solicitors www.parliament.uk/documents/joint-committees/human-rights/Leigh_Day_letter_to_Defence_Secretary_230915.pdf. In the event, the threatened judicial review proceedings were not commenced.

2.9 However, whether the UK now had a policy of using lethal force abroad outside of armed conflict was immediately thrown into question by the Government's apparently contradictory statement that the drone strike in Syria on 21 August was carried out in the context of an existing armed conflict: the armed conflict with ISIL/Da'esh in Iraq that is spilling over the border into Syria.

2.10 In a letter dated 7 September to the UN Security Council the UK Permanent Representative to the UN said that the strike in Syria was not only in self-defence of the UK but was *also* in exercise of the right of collective self-defence of Iraq (which suggests that it was carried out as part of the armed conflict with ISIL/Da'esh in which the UK was already involved):

“I am writing to report to the Security Council that the UK has undertaken military action in Syria against the so-called Islamic State in Iraq and the Levant (ISIL) in exercise of the inherent right of individual and collective self-defence. [...] ISIL is engaged in an ongoing armed attack against Iraq, and therefore action against ISIL in Syria is lawful in the collective self-defence of Iraq.”⁶⁶

2.11 In a letter dated 23 October from the Government Legal Department to Leigh Day & Co., solicitors, in response to the letter before claim threatening judicial review proceedings referred to above, the Government's lawyers similarly asserted that the strike in Syria *was* part of an armed conflict:

“[...] your letter proceeds from the premise that the action taken in Raqqa occurred outside the context of an armed conflict. That premise is fundamentally mistaken. An armed conflict is taking place in Iraq, and crossing over into Syria, at present. The United Kingdom is not currently participating in coalition air strikes within Syria (but is doing so in Iraq). The military action taken in Syria by the RAF on 21 August 2015 was aimed at a specific ISIL target that presented a clear, credible and specific threat of armed attack on the United Kingdom in the context of an active armed conflict in which the three ISIL fighters killed in the attack were participants. The fact that the United Kingdom had not up to that point conducted any air strikes on Syrian territory provides no basis for the assertion that this action took place outside the context of an armed conflict. The Raqqa strike was a military operation which was consistent with international humanitarian law [ie. the Law of War].”⁶⁷

2.12 There is nothing inherently contradictory in the Government relying on both individual and collective self-defence as justification for its action in Syria on 21 August. A single use of force can simultaneously serve both purposes. There is, however, a direct contradiction between what the Prime Minister told the House of Commons on 7 September (that the drone strike was not part of coalition action to protect Iraq) and what the UK Permanent Representative told the UN (that it was).

2.13 On the basis of the statement of the UK Permanent Representative to the Security Council, Sir David Omand told us that in his view the Government had maintained what

66 Q1 [Professor Sir David Omand]

67 http://www.parliament.uk/documents/joint-committees/human_rights/Letter_from_Govt_Legal_Dept_Leigh_Day_231015.pdf

he and the Birmingham Policy Commission had concluded was the important distinction between the law that applies in times of peace and that which applies in times of war. He did not consider that the Government had a new policy of strikes by remotely piloted aircraft outside areas of armed conflict. He made clear that, if there were such a policy, he would “deplore” it.⁶⁸

2.14 Jennifer Gibson, on the other hand, another member of the same Policy Commission, disagreed. She read the statements of the Prime Minister and other ministers to indicate that the Government now had a broader targeted killing policy that is not just about using drone strikes in traditional zones of armed conflict.⁶⁹

2.15 The disagreement between these two members of the same, unanimous Birmingham Policy Commission, about what the Government's policy now is, demonstrates the Government's lack of clarity about its position as a result of the inconsistent statements made in the wake of the drone strike in Syria.

Clarification

2.16 In view of the confusion and uncertainty created by the Government about its policy, when the Secretary of State for Defence appeared before us we asked him directly what the UK's policy is on targeted killing *outside recognised areas of conflict*.⁷⁰ The Secretary of State's answers provided two important clarifications of the Government's position.

The significance of the constitutional convention to consult Parliament

2.17 The first clarification provided by the Secretary of State for Defence concerns the significance of the constitutional convention to consult Parliament before exercising the prerogative power to deploy the Armed Forces.

2.18 The Secretary of State for Defence confirmed what the Prime Minister had told the House of Commons on 7 September: “This was the first time that we had acted in an area in which we were not previously involved in an armed conflict.” The Prime Minister had reported it to Parliament as soon as he could because what was novel about the situation was that the use of lethal force had been in a country which:

“was not only a country in which we were not involved militarily but a country in which we said we would not be involved militarily when we first came to Parliament in August 2013 [sic] to get approval to act in Iraq.”⁷¹

2.19 The Secretary of State's answers have clarified the context in which the Prime Minister spoke of the drone strike on Reyaad Khan in Syria being a “new departure”.

2.20 In March 2011 the Government acknowledged that in recent years a convention had developed that the House of Commons should have the opportunity to debate a proposed use of military force. The then Leader of the House of Commons, Rt Hon Sir George Young MP, said:

68 Q1 [Professor Sir David Omand]

69 Q1 [Jennifer Gibson]

70 Q20 [Jeremy Lefroy MP]

71 Q20 and, to the same effect, Q34. The House of Commons vote approving military operations in Iraq was in fact in September 2014, not August 2013.

“A convention has developed in the House that before troops are committed, the House should have an opportunity to debate the matter. We propose to observe that convention except when there is an emergency and such action would not be appropriate. As with the Iraq war and other events, we propose to give the House the opportunity to debate the matter before troops are committed.”⁷²

2.21 The Cabinet Manual confirms that this is the case. It states:

“In 2011, the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate.”⁷³

2.22 Examples of when it might not be appropriate to have a prior debate in the House of Commons include if there were “a critical British national interest at stake”⁷⁴; “the need to act to prevent a humanitarian catastrophe”⁷⁵; or “considerations of secrecy make it impossible”.⁷⁶ In such exceptional cases the convention is that the Government can act immediately but will explain to the House of Commons afterwards, at the earliest opportunity. As the Prime Minister put it in September 2014:

“If there was the need to take urgent action to prevent, for instance, the massacre of a minority community or a Christian community, and Britain could act to prevent that humanitarian catastrophe [...] I would order that and come straight to the House and explain afterwards.”⁷⁷

2.23 The Prime Minister's statements on 7 September 2015 about a new departure in UK policy, and the strike on Reyaad Khan not being part of an armed conflict in which the UK was involved, were made in the context of this constitutional convention and should be read in that light. The Government used military force to target and kill Reyaad Khan in Syria on 21 August. The nature of the operation was such that it was not appropriate for the House of Commons to debate the use of force in advance. The Prime Minister came to the House of Commons on 7 September, Parliament's first day back after the summer recess, to explain the use of military force in Syria. While this was not the first time since the emergence of the recent constitutional convention that the Government had used military force abroad without a prior debate in the House of Commons,⁷⁸ it was the first time that military force had been used in a country where the House of Commons had not only voted against the use of military force in 2013⁷⁹, but had specifically excluded the use of airstrikes in its resolution in September 2014 supporting air strikes against ISIL/Da'esh in Iraq:

72 HC Deb, 10 March 2011, [col 1066](#) [Sir George Young]

73 The Cabinet Office, [The Cabinet Manual: a guide to laws, conventions and rules on the operation of government](#) (October 2011), para 5.38

74 HC Deb, 26 Sep 2014, [col 1265](#) [Prime Minister, Rt Hon David Cameron MP]

75 HC Deb, 26 Sep 2014, [col 1265](#) [Prime Minister, Rt Hon David Cameron MP]

76 HC Deb, 23 Feb 2016, [col 149](#) [Foreign Secretary, Rt Hon Philip Hammond MP]

77 HC Deb, 26 Sep 2014, [col 1265](#)

78 See, for example, Libya in 2011 and Mali in 2013, both referred to in, Parliamentary approval for military action, House of Commons Library, Briefing Paper, [7166](#), May 2015.

79 HC Deb, 29 August 2013, [col 1556](#)

“[...] this House [...] notes that 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.”⁸⁰

2.24 It was therefore a “new departure” in terms of the domestic constitutional convention governing the use of military force abroad: the first time since the establishment of that convention that the Government had invoked the exception recognised by the convention, by using military force against ISIL/Da'esh not only outside the geographical area (Iraq) already authorised by the House of Commons, but in the very area (Syria) where the use of such force had been expressly excluded by the terms of the authorising resolution, and against the background of the House of Commons having voted not to support airstrikes in Syria in 2013.

2.25 In our view, these very particular circumstances also explain why the Prime Minister was so insistent in his statement on 7 September that the 21 August drone strike in Syria was *not* part of an armed conflict in which the UK was already involved. Indeed, it is testament to the remarkable normative strength already acquired by the recently established constitutional convention. Because of the importance attached to that convention, he was keen to establish that the Government had not ignored the will of the Commons, but rather had acted in accordance with the convention, by taking urgent military action and then coming to the Commons at the earliest opportunity to explain the justification for that action. His remarks about the strike not being part of armed conflict were part of his explanation as to why the Government had in fact acted in accordance with the domestic constitutional convention rather than ignored it.

2.26 Whether the drone strike in Syria on 21 August was part of a wider armed conflict with ISIL/Da'esh, for the purposes of whether the Law of War applies, is a wholly separate question of international law. For reasons we explain in more detail in Chapter 3 below, we accept the Government's argument that the drone strike in Syria on 21 August was part of the same armed conflict with ISIL/Da'esh in which the UK was already involved in neighbouring Iraq, at the request of the Iraqi Government. It was therefore a use of force to which the Law of War applies.

2.27 As Sir David Omand said in evidence:⁸¹

“I have read the authoritative statement as that of Matthew Rycroft, the Permanent Representative to the United Nations, to the Security Council on 7 September, where the strike in Syria was seen as action against ISIL in Syria in the collective self defence of Iraq. That is a formal letter that is on the record. That, I think is the formal position. I had to read the Prime Minister's statement several times to try to square it with that. It was, I think, a political statement to explain to the House that, although this strike was in Syria, it was not going against the will of the House, which had failed to authorise strikes against President Assad's forces.”

2.28 We welcome the Government's commitment to the recently established constitutional convention that, other than in exceptional emergencies, the Government will not use military force abroad without first giving the House of Commons an

80 HC Deb, 26 Sep 2014, [col 1255](#)

81 Q1 [Professor Sir David Omand]

opportunity to debate it. We welcome too the fact that the Prime Minister came to the House of Commons at the earliest opportunity on 7 September to explain the exceptional use of force in Syria. In our view, his statements that the drone strike in Syria on 21 August was a “new departure” and was not part of an armed conflict must be read in the context of that domestic constitutional convention.

2.29 We accept that the action taken against ISIL/Da'esh in Syria was part of the same armed conflict in which the UK was already involved in Iraq. Whether the Law of War applies depends on the proper characterisation of the situation from the point of view of international law, not domestic rules of constitutional law governing when the Government will use military force. We are satisfied that the strike on Reyaad Khan was a new departure in terms of the domestic constitutional convention governing the use of military force abroad. It was not, however, a new departure in the sense of being a use of lethal force outside of armed conflict, because we accept, as a matter of international law, that it was part of the wider armed conflict with ISIL/Da'esh already taking place in Iraq and spilling over into Syria.

Lethal force abroad outside of armed conflict

2.30 The second clarification provided by the Secretary of State for Defence concerns whether it is the Government's policy that it would be prepared in future to use lethal force against terrorist suspects abroad even outside of armed conflict.

2.31 In the Government's response to the letter before claim from Caroline Lucas MP and Baroness Jones, it argued that the Government does not have a “policy” as such at all: rather, in deciding whether to initiate a strike when faced with a threat such as that posed by ISIL/Da'esh in Iraq and Syria, it will consider the applicable law (including international law) and then consider whether, on the facts, a strike is justified in law.⁸² That involves a factual assessment as to whether or not military action should be taken and is justified, applying the relevant legal framework.

2.32 In the Government's Memorandum which it provided to us for the purposes of our inquiry, however, it set out its position under the heading “The policy”, and made clear its preparedness to use force in accordance with international law where it is necessary to do so and there is no alternative:

“It is the first duty of any Government to ensure the safety and security of the people they serve. This is a responsibility which this Government takes very seriously and which it will discharge by all lawful means it considers necessary. The Government has made very clear that when there is an identified direct and imminent threat to the UK and British interests abroad it will take action to counter that threat. [...] Lethal action will always be a last resort, when there is no other option to defend ourselves against an attack and no other means to detain, disrupt or otherwise prevent those plotting acts of terror. The principles of necessity and proportionality underpin all our decision-making.”⁸³

82 Letter dated 23 October 2015 from the Government Legal Department to Leigh Day, Solicitors, in response to the letter before Claim dated 23 September 2015 on behalf of Caroline Lucas MP and Baroness Jones of Moulsecoomb, www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/uk-drone-policy-15-16/publications/

83 http://www.parliament.uk/documents/joint-committees/human-rights/Government_Memorandum_on_Drones.pdf

2.33 When we asked the Secretary of State directly what the UK's policy is on targeted killing outside recognised areas of conflict, his response was unequivocal:

“There is no policy of targeted killing.”⁸⁴

2.34 We understand the Government's reluctance to describe its policy as one of “targeted killing”. “Targeted killing”, outside of armed conflict, sounds uncomfortably close to assassination, which is illegal under international law, and has always, rightly, been rejected by the UK, which has criticised other countries such as the US and Israel when it has judged their policies to go too far.

2.35 However, when we asked the Secretary of State whether the Government's approach “would apply anywhere where there is no recognised Government, where there is a vacuum”,⁸⁵ the Secretary of State confirmed that this was indeed the Government's position:

“If there is a direct and imminent threat to the United Kingdom and there is no other way of dealing with it—it is not possible to interdict that threat or to arrest or detain the people involved in that threat—then of course as a last resort we have to use force.”⁸⁶

2.36 Later in his evidence, the Secretary of State gave a hypothetical example of such a use of lethal force outside an area of armed conflict in which the Government had been authorised to use military force:⁸⁷

“If we had known that our 30 citizens were going to be murdered on the beach in Sousse [Tunisia], and we knew that that attack was being directly planned from, say, a training camp in Libya, would we have needed to seek authority if we were trying to forestall that attack by striking in Libya? I suspect that the answer would be fairly similar, that there was no political authority in Libya, there might have been no other way of preventing it and therefore we would have been justified in doing it—but, again, we would have had to explain it afterwards.”

2.37 Libya is outside the geographical area (Iraq and Syria) in which the UK is involved in an armed conflict with ISIL/Da'esh. There are no extant UN Security Council Chapter VII Resolutions authorising the use of force against ISIL/Da'esh in Libya.⁸⁸ The Secretary of State for Defence was therefore quite unequivocal in his oral evidence to us that the Government does claim the right to use lethal force against suspected terrorists *outside of armed conflict*, if there is a direct and immediate threat to the UK which cannot be averted in any other way. Even if, as we accept above, the particular strike in Syria on 21 August is correctly characterised as being part of an armed conflict, the Secretary of State's Libyan example leaves no room for doubt that it is the Government's policy to use lethal force abroad outside of armed conflict if the same circumstances arose. It confirms the Prime Minister's statement to the House that he will always be prepared to take immediate action to stop a direct threat to the British people, “whether the threat is emanating from

84 Q20 [Rt Hon Michael Fallon]

85 Q20 [Jeremy Lefroy MP]

86 Q20 [Rt Hon Michael Fallon]

87 Q34

88 UNSC Resolution 1973 (2011) is the latest Chapter VII resolution in relation to Libya and cannot be interpreted as authorising the use of force against ISIL/Da'esh in Libya

Libya, from Syria or from anywhere else.”⁸⁹ That this is the Government's policy has now been further confirmed by the permission given to the US Government by the Defence Secretary to use UK air-bases for the US air strikes against an ISIL/Da'esh training camp in Libya on 19 February.⁹⁰

2.38 Our inquiry has therefore secured a second important clarification of the Government's position: it has established that it is the Government's policy to use lethal force abroad against suspected terrorists, even outside of armed conflicts, as a last resort, if certain conditions are satisfied.

Conclusion

2.39 Despite the sometimes confusing explanations offered by the Government, we are now clear about what the Government's policy is. Although the Government says that it does not have a “targeted killing policy”, it is clear that the Government does have a policy to use lethal force abroad outside armed conflict for counter-terrorism purposes. We understand why the Government does not want to call its policy a “targeted killing policy”. In our view, however, it is important to recognise that the Government's policy on the use of lethal force outside of areas of armed conflict does contemplate the possibility of pre-identified individuals⁹¹ being killed by the State to prevent a terrorist attack.

2.40 We welcome the Government's recognition that such use of lethal force abroad outside of armed conflict should only ever be “exceptional”. As we make clear later in this Report, we accept that in extreme circumstances such uses of lethal force abroad may be lawful, even outside of armed conflict. Indeed, in certain extreme circumstances, human rights law may even impose a duty to use such lethal force in order to protect life. How wide the Government's policy is, however, depends on the Government's understanding of its legal basis. Too wide a view of the circumstances in which it is lawful to use lethal force outside areas of armed conflict risks excessively blurring the lines between counter-terrorism law enforcement and the waging of war by military means, and may lead to the use of lethal force in circumstances which are not within the confines of the narrow exception permitted by law. As David Davis MP, Chair of the All Party Parliamentary Group on Drones, said in the Westminster Hall debate on Armed Drones on 1 December 2015:⁹²

“[t]he most important aspect of this debate is the blurring of the area between war and peace. Drone operations in war zones worry me much less than drone operations outside war zones. That is where Governments will be tempted to do things that are beyond what we normally expect of a civilized Western Government.”

2.41 We therefore turn to consider the legal basis for the Government's policy of the use of lethal force abroad outside of armed conflict for counter-terrorism purposes.

89 HC Deb, 7 Sep 2015, [col 25](#)

90 See paras 3.81-3.89 below

91 See chapter 4 below for consideration of the decision-making process, including the identification of individuals who pose a threat of imminent attack on the UK.

92 HC Deb, 1 December 2015, [col 72WH](#) [David Davis MP]

3 Legal Basis

Introduction

3.1 The second main objective of our inquiry has been to clarify the legal basis of the Government's policy on the use of lethal force abroad outside of armed conflict for counter-terrorism purposes. The legal basis of the Government's policy matters for a variety of reasons. The rule of law requires the Government to act lawfully when countering terrorism, including in accordance with the UK's international legal obligations. Moreover, the legal basis of the policy determines the legal standards that apply. The circumstances in which the Government will be prepared to use lethal force abroad outside armed conflict, pursuant to its policy, will therefore depend on the Government's view of its legal basis. If the Government proceeds on a misunderstanding about any aspect of the legal basis of its policy, it runs the risk of using lethal force in circumstances which cannot be legally justified, thereby exposing ministers and other personnel involved in such action to the risk of criminal prosecution.

3.2 In this chapter we examine the Government's apparent understanding of the legal position in light of the most relevant aspects of the various international legal frameworks that apply and the relationship between them.⁹³ We consider first the international law on the use of force, which governs whether a State is entitled to resort to force at all on the territory of another State, and in particular the right of self-defence against threatened armed attacks by terrorist organisations. We then go on to consider the other relevant international legal frameworks which govern not whether but how force may be used: the Law of War and human rights law. We consider, first, when the Law of War applies and what it requires when it does apply; and, second, when human rights law applies and what it requires if it is applicable. Finally we consider the legal position where the UK provides support for the use of lethal force outside armed conflict by a third country such as the US.

3.3 The apparent legal complexity of this area is a real obstacle to parliamentary debate and therefore effective democratic scrutiny of the Government's position on this important question. We hope that our Report will help to demystify some of the legal questions by identifying the most important legal issues on which the Government's position requires clarification. Annex 1 to this Report contains a more detailed account of the relevant international legal frameworks. Annex 2 contains three flowcharts which are intended to make the complex legal framework more accessible by parliamentarians and the public. The flowcharts do not purport to provide an exhaustive legal analysis of the issues, but are designed to help explain the relationship between the relevant international legal frameworks and identify the main questions that need to be asked under each of those frameworks when assessing the lawfulness of the use of lethal force abroad.⁹⁴ Readers looking for more detailed analysis are referred to Annex 1, and also to the written evidence we received, much of which concerned what legal frameworks are applicable and what they require.⁹⁵

93 See Annex 1 for a more detailed account of the relevant international legal frameworks.

94 We are grateful to Arabella Lang, Senior Research Analyst in the International Affairs and Defence section of the House of Commons Library, and Iana Messetchkova, Web and Publications Assistant in the House of Commons Web and Publications Unit, for their invaluable assistance in drawing up these flowcharts

95 See especially the evidence of Professor Simon Gardner ([DRO0002](#)), Dr William Boothby ([DRO0004](#)), Reverend Nicholas Mercer ([DRO0005](#)), Mr Alex Batesmith ([DRO0006](#)), Professor Robert McCorquodale ([DRO0008](#)), Professor Nicholas J. Wheeler ([DRO0009](#)), Dr Noelle Quenivet ([DRO0010](#)), Mr Joseph Savirimuthu ([DRO0013](#)), Ms Konstantina Tzouvala ([DRO0014](#)), Verity Adams ([DRO0015](#))

The Government's understanding of the legal position

3.4 In our letter of 4 November to the Government at the start of our inquiry, we asked for a comprehensive description of the legal framework which the Government considers to be relevant to its policy, including international law, and an explanation of the circumstances in which it is lawful to use drones for targeted killing. We also asked for the Government's memorandum to address a number of much more detailed questions about their view of the relevant international law frameworks that govern the use of lethal force abroad, including the following four important questions:

- the Government's understanding of the meaning of the requirement in the international law on self-defence that an attack on the UK must be "imminent"
- whether the Government considers the UK to be involved in a non-international armed conflict with ISIL/Da'esh
- whether the Law of War applies to UK drone strikes in Syria
- whether international human rights law applies to UK drone strikes in Syria and, if so, what it requires.

3.5 The answers to these legal questions are absolutely central to our inquiry because, having established that it is the Government's policy to use lethal force abroad outside armed conflict for counter-terrorism purposes, how far that policy goes depends entirely on the legal basis on which it rests.

3.6 While the Government's Memorandum contains some helpful analysis of some of the legal issues, we regret to say that, despite repeated requests, we never received a detailed memorandum from the Government setting out its understanding of the relevant international legal frameworks (such as whether human rights law applies) or its answers to some of our more specific questions about important aspects of those frameworks. We note that in the Government's response to the letter before claim from Caroline Lucas MP and Baroness Jones, it argued:⁹⁶

"There is no requirement to publish the Government's conception of the applicable legal framework in any particular context, still less in a context such as the present. Indeed, such information is privileged and the courts have consistently recognised the importance to be attached to the concept of legal professional privilege."

3.7 We are disappointed by the Government's unhelpfulness in this respect. Invoking the Government's acknowledged right to legal professional privilege seems quite inappropriate in this context. We have made very clear that we do not wish to see the Government's confidential legal advice or any documents which attract such privilege. However, considerations of transparency and democratic accountability require the Government to explain publicly its understanding of the legal basis on which it takes action which so seriously affects fundamental rights. We routinely receive from Government departments, for example, detailed and very helpful human rights memoranda accompanying Bills which explain the Government's reasons for its view that the provisions in a Bill are

⁹⁶ [Letter from the Government Legal Department in response to the letter before claim from Caroline Lucas MP and Baroness Jones](#), dated 23 October 2015

compatible with the European Convention on Human Rights and other relevant human rights instruments.⁹⁷ Such human rights memoranda often contain detailed legal analysis, including the Government's understanding of the requirements of human rights law in the context of specific provisions in Bills. Although strictly speaking some of this analysis no doubt attracts legal professional privilege, the Government chooses to make it available in the interests of transparency and democratic accountability, in order to facilitate effective parliamentary scrutiny of the human rights compatibility of its legislation. It has been invaluable to us and our predecessors in enabling this Committee to perform that function.

3.8 We understand the sensitivity around the matters which we are investigating in this inquiry and respect the legitimate requirements of national security which make this different from our regular scrutiny work on legislation brought forward by the Government. However one of our roles as a select committee is to give careful and detailed scrutiny to Government policy which has significant implications for human rights, including those of our armed forces who are involved in such actions. In order to fulfil this important function, it is vital that the Government engage with the detailed questions which we ask about its understanding of the legal frameworks in which the policy is situated.

3.9 In the absence of a detailed Government memorandum on the relevant legal frameworks, we have pieced together what we believe to be the Government's understanding of those frameworks from a variety of sources. The Government's understanding of the legal position is to be found primarily in the Prime Minister's statement to the House of Commons on 7 September; the evidence of the Attorney General to the Justice Committee on 15 September;⁹⁸ the Government's brief Memorandum responding to our letter at the beginning of our inquiry;⁹⁹ and the oral evidence of the Defence Secretary on 16 December.

3.10 The Prime Minister first set out the legal basis for the drone strike on Reyaad Khan in Syria in his statement to the House of Commons on 7 September. He said:¹⁰⁰

“I am clear that the action we took was entirely lawful. The Attorney General was consulted and was clear that there would be a clear legal basis for action in international law. We were exercising the UK's inherent right to self-defence. There was clear evidence of these individuals planning and directing armed attacks against the UK. These were part of a series of actual and foiled attempts to attack the UK and our allies, and given the prevailing circumstances in Syria, the airstrike was the only feasible means of effectively disrupting the attacks that had been planned and directed. It was therefore necessary and proportionate for the individual self-defence of the United Kingdom. The United Nations charter requires members to inform the President of the Security Council of activity conducted in self-defence, and today the UK permanent representative will write to the President to do just that.”

97 See, for example, the ECHR Memoranda accompanying the Trade Union [Bill](#), the Immigration [Bill](#), the Police and Crime [Bill](#), and the Investigatory Powers [Bill](#)

98 Oral evidence taken before the Justice Select Committee on 15 September, [HC \(2015–16\) 409](#)

99 In a written answer to a PQ by Dave Anderson MP the Prime Minister said that “the legal basis for the airstrike against Reyaad Khan is set out in the Government's Memorandum to the Joint Committee on Human Rights” (25 January 2016).

100 HC Deb, 7 September 2015, [col 26](#)

3.11 As we pointed out above, when the UK Permanent Representative wrote to the President of the Security Council later the same day, as well as the individual self-defence of the UK referred to by the Prime Minister, he invoked the right of collective self-defence of Iraq, notwithstanding that the Prime Minister had expressly disavowed that as the legal basis in his statement to the Commons. We asked the Defence Secretary, the Foreign Secretary and the Attorney General in our letter of 4 November why the right of collective self-defence of Iraq was relied on by the UK Permanent Representative but not mentioned by the Prime Minister in his statement to the House on 7 September, but we did not receive a reply to this question.

3.12 The Prime Minister's summary of the Government's legal position has been supplemented somewhat by subsequent statements by ministers. The Attorney General himself went a little bit further than the Prime Minister when giving evidence to the Justice Committee on 15 September.¹⁰¹ He declined an invitation to disclose the legal test he had applied when advising that there was a clear legal basis for the drone strike, on the grounds that this would disclose the detailed content of his advice in breach of the "Law Officers' Convention" whereby the content of the Attorney's advice is not disclosed. However, he went on to say:

"[...] in order for any state to act in lawful self-defence, it is necessary to demonstrate that there is an imminent threat that needs to be countered and that, in countering that threat, the action taken is both necessary and proportionate, and it is necessary to demonstrate that what you do complies with international and humanitarian law. In all of those respects I was satisfied that this was a lawful action."

3.13 This went further than the Prime Minister's statement by indicating that, in addition to satisfying the tests for lawful self-defence, the action also had to be compatible with the Law of War.

3.14 The Government's Memorandum to our inquiry gives a little bit more detail in its explanation of the legal basis for the Government's military action against ISIL/Da'esh in Syria. Invoking the inherent right of individual and collective self-defence, as recognised by Article 51 of the UN Charter, the Memorandum explains why, in the Government's view, the requirement of an "armed attack" is satisfied:¹⁰²

"Individual terrorist attacks, or an ongoing series of terrorist attacks, may rise to the level of an "armed attack" for these purposes if they are of sufficient gravity. This is demonstrated by UN Security Council resolutions 1368 (2001) and 1373(2001) following the attacks on New York and Washington of 11 September 2001. Whether the gravity of an attack is sufficient to give rise to the exercise of the inherent right of self-defence must be determined by reference to all of the facts in any given case. The scale and effects of ISIL's campaign are judged to reach the level of an armed attack against the UK that justifies the use of force to counter it in accordance with Article 51."

3.15 The Memorandum also explains that, in keeping with the long-held position of successive UK Governments, force may be used in self-defence not only where an armed

¹⁰¹ Oral evidence taken before the Justice Select Committee on 15 September, [HC \(2015–16\) 409](#)

¹⁰² [Memorandum from the Government on Drones](#)

attack is underway, but also where such an attack is imminent, and where the UK determines that it faces an imminent armed attack from ISIL, it is therefore entitled to use necessary and proportionate force to repel or prevent the attack. It explains why the legal test of an imminent armed attack was satisfied in the particular case of Reyaad Khan:¹⁰³

“There was clear evidence of Khan’s involvement in planning and directing a series of attacks against the UK and our allies, including a number which were foiled. That evidence showed that the threat was genuine, demonstrating both his intent and his capability of delivering the attacks. The threat of attack was current; and an attack could have become a reality at any moment and without warning. In the prevailing circumstances in Syria, this airstrike was the only feasible means of effectively disrupting the attacks planned and directed by this individual. There was no realistic prospect that Khan would travel outside Syria so that other means of disruption could be attempted. The legal test of an imminent armed attack was therefore satisfied.”

3.16 Finally, the Memorandum, like the Attorney General, goes beyond invoking the right of self-defence, and states that in addition “[t]he UK always adheres to International Humanitarian Law [i.e., the Law of War] when applying military force, including upholding the principles of military necessity, distinction, humanity and proportionality.”¹⁰⁴

3.17 The Secretary of State for Defence, in his oral evidence to us, also elaborated a little on the law which the Government considers to apply to the action it takes in self-defence. He said “the military force we use is governed by humanitarian law [i.e., the Law of War].”¹⁰⁵ He made no distinction in this respect between military force used in an area of armed conflict, and force used outside of armed conflict. In the Secretary of State’s view, all uses of military force are governed by the Law of War, and the applicable legal standards are therefore those of the Law of War. When we asked him directly about whether the human rights law standard applies, he said that if any human rights law obligations are thought to apply, they are discharged by the UK’s compliance with the Law of War:

The Chair: “The human rights law standard says that lethal force outside an armed conflict situation is justified only if it is absolutely necessary to protect life. Is that the standard?”

Michael Fallon MP: “I think that compliance with international humanitarian law discharges any obligation that we have under international human rights law, if I can put it that way. If any of those obligations might be thought to apply, they are discharged by our general conformity with international humanitarian law.”¹⁰⁶

3.18 When dealing with an issue of such grave importance, taking a life in order to protect lives, the Government should have been crystal clear about the legal basis for this action from the outset. They were not. Between the statements of the Prime Minister, the Permanent Representative to the UN and the Defence Secretary, they were confused and confusing.

103 [Memorandum from the Government on Drones](#)

104 *Ibid.*

105 Q23 [Rt Hon Michael Fallon]

106 Q23 [Rt Hon Michael Fallon]

3.19 The legal basis of the Government's policy appears to be that the use of lethal force abroad outside of armed conflict for counter-terrorism purposes is lawful if it complies with (1) the international law governing the use of force by States on the territory of another State, and (2) the Law of War. In the Government's view, it is not necessary to consider whether human rights law applies, or what it requires, because compliance with the Law of War, it argues, is sufficient to discharge any obligations that apply under international human rights law.

3.20 We now turn to consider whether this is a sound legal basis on which to rest the Government's policy of using lethal force abroad outside of armed conflict for counter-terrorism purposes, or whether there are aspects of the Government's legal understanding which require clarification.

The right of self-defence in international law

3.21 As the Government rightly observes, any use of lethal force abroad outside of armed conflict must, first, be lawful under the international law on the use of force which governs whether a State is entitled to resort to force at all.¹⁰⁷ The Government invokes the inherent right to self-defence against a threat of imminent armed attack.

3.22 Whether the right of self-defence can be exercised where the threat of armed attack emanates from non-state actors such as ISIL/Da'esh who are not acting under the control or direction of another state is an issue which is not clearly settled in international law. Some international lawyers appear to take the view that the right of self-defence can only be invoked against another State.¹⁰⁸ Others, including the Government, take the view that a State's inherent right of self-defence extends to attacks originating from non-state actors such as ISIL/Da'esh. State practice since 9/11 certainly supports the view that a State's right of self-defence includes the right to respond with force to an actual or imminent armed attack by a non-State actor, and the most recent UN Security Council Resolution 2249 (2015) lends support to this view. To be entitled to rely on self-defence against non-state actors, the State from whose territory the armed attack is being launched or prepared for must be unable or unwilling to prevent the attack.

3.23 The Government's position is that the right of self-defence can be invoked against non-state actors such as ISIL/Da'esh operating in another state which is unwilling or unable to prevent the attack by the non-state actors. The Prime Minister told the Commons in the run up to the debate on extending authorisation for use of military force to Syria that "there is a solid basis of evidence on which to conclude, first, that there is a direct link between the presence and activities of ISIL in Syria and its ongoing attack on Iraq, and secondly, that the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL's continuing attack on Iraq, or indeed attacks on us."¹⁰⁹

3.24 We accept the Government's argument that there is a right of self-defence against armed attack by non-State actors such as ISIL/Da'esh, and that anticipatory self-defence is also permitted. We have examined carefully two particular aspects of the Government's

¹⁰⁷ See Annex 1; Annex 2 flowchart 1; and evidence of Dr William Boothby ([DRO0004](#)), Ms Konstantina Tzouvala and Tom Sparks ([DRO0014](#))

¹⁰⁸ Relying on the Advisory Opinion of the International Court of Justice ("ICJ") in the Israeli Wall case (Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 136.

¹⁰⁹ HC Deb, 26 Nov 2015, [col 1491](#)

individual self-defence argument: first, the assertion that the scale and effects of ISIL's campaign reach the level of an "armed attack" and, second, the assertion that the armed attack the UK faces is "imminent" in the sense required by the right of self-defence.

The meaning of "armed attack"

3.25 For a State to invoke the right of self-defence there must be an "armed attack" or the threat of an imminent armed attack. To constitute an "armed attack" for the purposes of the right of self-defence the attack must cross a certain threshold of seriousness or intensity. A series of minor attacks is not necessarily enough to constitute an armed attack. The scale and effect of the attack must reach a certain threshold of gravity.

3.26 The Prime Minister told the House of Commons that "It is [...] clear that ISIL's campaign against the UK and our allies has reached the level of an 'armed attack', such that force may lawfully be used in self-defence to prevent further atrocities being committed by ISIL."¹¹⁰ The Government's Memorandum similarly states that the scale and effects of ISIL's campaign reach the level of an armed attack against the UK which justifies the use of force to counter it.

3.27 It is clear that terrorist attacks by non-State actors such as ISIL/Da'esh can amount to an armed attack on a State. It is not clear, however, what level the Government considers they have to reach in order to constitute an armed attack. The Prime Minister, in his statement on 7 September, referred to six terrorist plots having been foiled in the UK in the preceding 12 months. A number of written submissions that we received pointed out that this raises a question as to the level and scale of violence that the UK considers to be sufficient to cross the threshold between criminal offences and armed attack such that the State is entitled to go beyond counterterrorism law enforcement and use military force on the territory of another state to defend itself.¹¹¹

3.28 We note that the UN Security Council, in its Resolution 2249 (2015), refers to "the horrifying terrorist attacks perpetrated by ISIL also known as Da'esh which took place on 26 June 2015 in Sousse, on 10 October 2015 in Ankara, on 31 October 2015 over Sinai, on 12 November 2015 in Beirut and on 13 November 2015 in Paris, and all other attacks perpetrated by ISIL also known as Da'esh, including hostage-taking and killing", and determines that the threat from ISIL/Da'esh "affects all regions and Member States, even those far from conflict zones."

3.29 We accept, as does the UN Security Council, that the attacks on the UK already mounted by ISIL/Da'esh satisfy the requirement that there must be an armed attack on the UK which entitles it to invoke the right to self-defence. However, to provides certainty for the future, we recommend that in its response to our Report the Government provide clarification of its view about the threshold that needs to be met in order for a terrorist attack or threatened attack to constitute an "armed attack" which entitles the Government to invoke its right of self-defence in international law.

¹¹⁰ HC Deb, 26 November 2015, [col 1491](#)

¹¹¹ See, for example, evidence of Reverend Nicholas Mercer ([DRO0005](#)), Christof Heyns, Dapo Akande et al ([DRO0024](#)), Professor David Hastings Dunn and Professor Nicholas J. Wheeler ([DRO0009](#))

The meaning of “imminence”

3.30 Although it is not expressly provided for in the UN charter, it is well-established that a State's right of self-defence can be invoked preventively, in anticipation of an armed attack. The UK Government's view has always been that such preventive action in self-defence may only be taken to avert an *imminent* armed attack.¹¹²

3.31 However the precise meaning of imminence is disputed in international law. Under the long established “Caroline test” for imminence (so called after a 19th century case on the use of force), the need to use force in self-defence must be “instant, overwhelming, leaving not choice of means and no moment for deliberation.” However, others argue that the Caroline test is too narrow in the light of modern conditions. In 2004, the then Attorney-General Lord Goldsmith said in the House of Lords:¹¹³

“The concept of what constitutes an ‘imminent’ armed attack will develop to meet new circumstances and new threats [...] It must be right that States are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack.”

3.32 However, the then Attorney-General distinguished the UK Government's position from the much more expansive US doctrine of pre-emptive self-defence set out in the US's 2002 National Security Strategy:¹¹⁴

“It is [...] the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive attack against a threat that is more remote.”

3.33 The Government has made clear, in the course of our inquiry, that it favours a more flexible approach to the meaning of “imminence”, to include an ongoing threat of a terrorist attack from an identified individual who has both the intent and the capability to carry out such an attack without notice.

3.34 The Attorney General, for example, indicated that he considers that the traditional “Caroline” test for imminence (that the threat must be “instant, overwhelming, leaving no choice of means and no moment for deliberation”) needs to be reassessed in the light of modern conditions:¹¹⁵

“The Caroline case, as you will appreciate, goes back to the 19th century, and we are talking about very different circumstances now. [...] One of the things we probably need to think about as a society in any event is what imminence means in the context of a terrorist threat, compared with back in the 1890s when you were probably able to judge imminence by a measure of how many troops you could see on the horizon. That is something that everyone—including the academic world, no doubt—will want to consider, but the basic tenets of acting in self-defence have not changed.”

112 See Sir Michael Wood (former Foreign Office Legal Adviser), *The Use of Force in 2015 With Particular Reference to Syria*, Hebrew University of Jerusalem Legal Studies research paper Series No. 16-05, p 14

113 HL Deb, 21 Apr 2004, [cols 370-371](#)

114 *Ibid.*

115 Oral evidence taken before the Justice Select Committee on 15 September, [HC \(2015-16\) 409](#), Q34

3.35 The Secretary of State for Defence also preferred a much more flexible approach to the meaning of imminence:¹¹⁶

“Jeremy Lefroy: Secretary of State, to return to the understanding of the word “imminence”, because it is clearly very important, in the past an armed attack was considered imminent only if it was so proximate in time that it left no moment for deliberation. Clearly, we live in an era of instant communication and the fact that we are dealing with people who have made it quite clear that they want to kill us at any time and in any way possible means that that definition of “imminent” may have changed a bit. Is your understanding that “imminence” means what it used to mean—that is, so proximate that it leaves no time for deliberation—or have circumstances changed so that an ongoing threat from a specific terrorist is considered imminent all the time?

Michael Fallon MP: Circumstances have certainly changed from the definition that you have quoted. I would not want to rest on that. You look at these things on a case-by-case basis in the light of the assessment that you make in each particular case. I do not think it is possible to have a hard and fast rule about how you would define “imminent”.

[...]

The Chair: Basically, to summarise your response to Jeremy’s question, an imminent threat can be ongoing: somebody by their very nature, by their ongoing commitment to a particular course of action, can be an ongoing imminent threat by virtue of what they have done in the past and their general way of going about things?

Michael Fallon MP: I am not, as you have probably realised, a lawyer. But yes, an imminent threat can presumably grow in immediacy. It may grow in seriousness. It may grow in likelihood. It may exist for some period of time, absolutely.”

3.36 We accept that the meaning of “imminence” in the international law of self-defence must be interpreted with a degree of flexibility, in light of modern conditions and in particular the fact that we live in an era of instantaneous communication. A terrorist on the other side of the world may well have the capability to launch a terrorist attack in the UK literally at the touch of a button. While opinion is divided amongst international law experts as to the legally correct interpretation of “imminence” in the international law of self-defence,¹¹⁷ we note that the broader interpretation of “imminence” preferred by the Government appears to have the implicit support of the UN Security Council in its most recent resolution concerning ISIL/Da’esh in Syria and Iraq (UNSCR 2249 (2015)).

3.37 We welcome the implicit indication in the Government’s Memorandum that for the test of imminence to be satisfied the threat must be “genuine” in the sense that there was both an intention to attack and the capability to do so; and that the attack could happen

¹¹⁶ Q28 [Rt Hon Michael Fallon MP]

¹¹⁷ See, for example, Dr Noelle Quenivet and Dr Aurel Sari ([DRO0010](#))

at any moment and without warning. We also note the Government's recent answer to a written question asking the Secretary of State for Defence "what working definition of imminence his Department uses in the application of Article 51 of the UN Charter?"¹¹⁸

"It has long been the position of successive UK Governments that "the inherent right of self-defence", as recognised in Article 51 of the UN Charter, does not require a State to wait until an armed attack is actually under way before it can lawfully use force to alleviate the threat. A State may use force in anticipation of an armed attack where such an attack is imminent, provided that such force is both necessary and proportionate to averting the threat. The assessments would depend on the facts of each case, with consideration likely to include issues such as the nature and immediacy of the threat, the probability of an attack, its scale and effects and whether it can be prevented without force."

3.38 We welcome the Government's indication in this written answer that, while the assessment of imminence will be fact-dependent, it will include consideration of relevant issues which clearly go to the question of imminence, such as the nature and immediacy of the threat and the probability of an attack.

3.39 We nevertheless have some concerns about the implications of too expansive a definition of "imminence" for the width of the right of self-defence in international law. Introducing flexibility into the meaning of imminence raises important questions about the degree of proximity that is required between preparatory acts and threatened attacks.¹¹⁹ Is it enough to trigger the right of self-defence, for example, if there is evidence that an individual is planning terrorist attacks in the UK, or does the preparation need to have gone beyond mere planning? Once a specific individual has been identified as being involved in planning or directing attacks in the UK, does the wider meaning of imminence mean that an ongoing threat from that individual is, in effect, permanently imminent?¹²⁰ These questions arise directly in relation to the UK drone strike in Syria on 21 August, as it appears that the authorisation of the use of force may have been given by the National Security Council in May 2015, up to three months before the actual use of lethal force. Whether the test of imminence was in fact satisfied on that occasion will, of course, turn on the intelligence and should therefore be a question for the ISC to consider, not us.

3.40 We do not feel that all of these questions about the Government's understanding of the meaning of "imminence" in the international law of self-defence have been fully answered by the end of our inquiry. **The Government's interpretation of the concept of "imminence" is crucial because it determines the scope of its policy of using lethal force outside areas of armed conflict. Too flexible an interpretation of imminence risks leading to an overbroad policy, which could be used to justify any member of ISIL/ Da'esh anywhere being considered a legitimate target, which in our view would begin to resemble a targeted killing policy.**

118 PQ 23242 [on defence], 28 January 2016

119 See, for example, evidence of Dr William Boothby ([DRO0004](#)), Reverend Nicholas Mercer ([DRO0005](#)), Professor David Hastings Dunn and Professor Nicholas J. Wheeler ([DRO0009](#)), Christof Heyns, Dapo Akande et al ([DRO0024](#)), Ms Konstantina Tzouvala and Tom Sparks ([DRO0014](#))

120 We return to this important question of what "imminence" requires below at para. 3.65, where we consider the standards which have to be satisfied where the ECHR applies to a use of lethal force.

3.41 We therefore recommend that the Government provides, in its response to our Report, clarification of its understanding of the meaning of “imminence” in the international law of self-defence. In particular, we ask the Government to clarify whether it agrees with our understanding of the legal position, that while international law permits the use of force in self-defence against an imminent attack, it does not authorise the use of force pre-emptively against a threat which is too remote, such as attacks which have been discussed or planned but which remain at a very preparatory stage.

3.42 Subject to the two questions we have raised above about the Government's understanding of the meaning of “armed attack” and “imminence”, we accept the Government's understanding of the international law of self-defence which forms the first part of the legal basis for its policy of using lethal force abroad outside of armed conflict.

Other relevant international law frameworks

3.43 However, compliance with international law on the use of force does not exhaust all the questions which must be asked about the legal basis of a use of lethal force abroad.¹²¹ The fact that a use of lethal force is lawful under the international law on the use of force, for example because it was taken in self-defence, does not mean that the use of force is necessarily lawful under the other relevant international legal frameworks: the Law of War (otherwise known as the law of armed conflict or international humanitarian law) and international human rights law, which govern not *whether* but *how* force may be used.¹²² Any use of force in lawful exercise of the right of self-defence must also comply with those other legal frameworks where they apply. Human rights law requires standards to be met which are more protective of the right to life than those required by the Law of War. Which legal framework applies to a particular use of lethal force, and precisely what they require, are therefore of crucial importance. The applicability and requirements of those legal frameworks must also therefore be addressed, separately and in turn.

The Law of War

3.44 In the case of force used in armed conflict, the most relevant legal framework is the Law of War.¹²³ The Law of War is the set of international law rules that governs the way in which armed conflict is conducted, premised on the idea that even in war some things are not permitted because military necessity must be tempered by basic principles of humanity.¹²⁴

When does the Law of War apply?

3.45 The Law of War applies where there is an armed conflict. Whether an armed conflict exists, for the purposes of deciding whether the Law of War applies, is not a matter for a State to decide for itself, by mere assertion; it is a legal question, governed by the international

¹²¹ The flowcharts in Annex 2 explain the relationship between the different international legal frameworks that are relevant to the use of lethal force abroad

¹²² International Law Commission Commentary to Article 21 of the Articles on the Responsibility of States for Wrongful Acts.

¹²³ See Annex 1 for a more detailed explanation of the Law of War

¹²⁴ See Annex 2, flowchart 2

Law of War. Armed conflicts are of two types. An international armed conflict is the traditional type of armed conflict, between two or more States. A non-international armed conflict is an armed conflict between a State and an “organised non-State armed group” or several such groups. A non-international armed conflict can take place across State boundaries: the conflict is “non-international” because one of the parties is a non-State actor, even though the territorial scope of the conflict may cross State boundaries.

3.46 A non-international armed conflict exists if armed violence reaches a certain level of intensity and is with an armed group that is sufficiently organised to meet the international law criteria. Although ISIL/Da'esh claims to be a State, it is not recognised as such in international law. It is an organised non-State armed group, involved in protracted armed violence with governmental authorities in Iraq and Syria. It seems clear to us that, as a matter of international law, the UK is therefore involved in a non-international armed conflict with ISIL/Da'esh in Iraq and Syria, and that the Law of War applies to that armed conflict.

What does the Law of War require?

3.47 Where the Law of War applies, it permits targeted killing in an armed conflict, provided certain principles are complied with. The principle of distinction requires targeting to distinguish between lawful military targets and civilians. A person is a lawful target in a non-international armed conflict if he or she is a member of an armed group or a civilian directly participating in hostilities. The principle of proportionality requires civilian casualties to be proportionate to the military advantage to be gained from the use of force. The principle of precaution requires care to be taken to minimise the danger to civilians in any use of force.

3.48 International human rights law also applies in armed conflict.¹²⁵ However, the substantive protections of human rights law, including for the right to life, are to be read in light of the more specific requirements of the Law of War.¹²⁶ Compliance with the lower standards of the Law of War will therefore usually be sufficient to satisfy the requirements of human rights law in armed conflict.¹²⁷

3.49 As will be seen when we consider the requirements of human rights law below, the relevant legal standards on the use of lethal force are therefore more permissive where the Law of War applies than where only international human rights law applies: the Law of War does not prohibit deliberate “targeted killing” in armed conflict provided certain principles are observed.

The US and UK positions on the applicability of the Law of War

3.50 The United States has caused controversy in the years since 9/11 by arguing that it is involved in a single, global non-international armed conflict with Al Qaida, so that the permissive rules of the Law of War, rather than the stricter rules of human rights law, apply to the use of lethal force against members of Al Qaida wherever in the world they may be found. The International Committee of the Red Cross has criticised this view that the international fight against terrorism is a single, global non-international armed

¹²⁵ *Al Skeini v UK*, applied by the UK Supreme Court in *Smith v MOD*.

¹²⁶ See, for example, *Hassan v United Kingdom* [2014] (Grand Chamber, ECtHR)

¹²⁷ See Annex 1, para 58

conflict, but the US has continued to take this position and to use it to justify lethal drone strikes against suspected terrorists in a variety of countries which are not in an area of armed conflict, such as Yemen, Somalia and Pakistan.

3.51 The US position has been widely criticised on the ground that it risks turning the world into a global battlefield in which the lower protection of the Law of War is the norm rather than the exception.¹²⁸ Some of the broader statements by ministers since the drone strike in Syria on 21 August suggested that the UK Government may have adopted the same position, and considers itself to be involved in a global armed conflict with ISIL/Da'esh wherever it may be found.

3.52 Our inquiry has importantly established, however, that the UK Government does not take the US position that it is in a global war against ISIL/Da'esh such that it can use lethal force against them anywhere in the world. We asked the Secretary of State for Defence about this directly and he made absolutely clear in his evidence to us that the Government does not consider the UK to be in a non-international armed conflict with ISIL/Da'esh wherever it may be found: rather than such a generalised state of conflict, with no geographical limits, the Government considers itself to be involved in a geographically defined non-international armed conflict with ISIL/Da'esh in Iraq and Syria.¹²⁹

The Chair: Can you clarify whether the Government consider the UK to be in a non-international armed conflict with ISIL wherever it may be found?

Michael Fallon MP: We consider that to be true in Iraq and Syria.

The Chair: Wherever it is?

Michael Fallon MP: No, in Iraq and Syria.

The Chair: So we are not in a generalised state of conflict with ISIL, except in Iraq and Syria? What about in Yemen, Somalia or Libya, as Mr Lefroy asked?

Michael Fallon MP: No, we consider we are involved in a non-international armed conflict in Iraq and Syria, primarily because we have been invited to assist by the legitimate Government of Iraq.

The Chair: That is different from the Americans' policy, is it not?

Michael Fallon MP: There may well be differences, yes, as I said."

3.53 We welcome the unequivocal statement by the Secretary of State for Defence in his evidence to us that the Government does not consider the UK to be in a non-international armed conflict with ISIL/Da'esh wherever it may be found. This disavowal of the controversial US position according to which it considers itself to be in a single, global non-international armed conflict with Al Qaida and its associates goes some way towards meeting concerns that the Government's policy is now so wide as to seek to justify using lethal force against any person it considers to be a member of ISIL/Da'esh wherever they are.

¹²⁸ See, for example, evidence of Reprieve ([DRO0026](#)), Drone Wars UK ([DRO0007](#)), Dr Alan Greene, Verity Adams and Jane Rooney ([DRO0015](#))

¹²⁹ Q22

3.54 However, the Secretary of State went on to assert that where the UK uses lethal force abroad outside of armed conflict, pursuant to the policy we described in Chapter 2 above, it will comply with the Law of War and that compliance will be sufficient to meet any obligations that the UK may have under human rights law. The effect of that assertion is that the UK Government's policy ends up in the same place as the US policy, despite disavowing the wide American view of the existence of a non-international armed conflict.

3.55 In our view, the Secretary of State's position that the Law of War applies to the use of lethal force abroad outside of armed conflict, and that compliance with the Law of War satisfies any obligations which apply under human rights law, is based on a misunderstanding of the legal frameworks that apply outside of armed conflict. In an armed conflict, it is correct to say that compliance with the Law of War is likely to meet the State's human rights law obligations, because in situations of armed conflict those obligations are interpreted in the light of humanitarian law. Outside of armed conflict, however, the conventional view, up to now, has been that the Law of War, by definition, does not apply.¹³⁰ We recommend that the Government, in its response to our Report, clarifies its position as to the law which applies when it uses lethal force outside of armed conflict.

The European Convention on Human Rights ("ECHR")

3.56 International human rights law recognises and protects the right to life. This includes customary international law's rule against the arbitrary deprivation of life; the right to life under Article 6 of the International Covenant on Civil and Political Rights; and the right to life under Article 2 ECHR.¹³¹ The right to life is often referred to as the most fundamental human right, or the supreme right. The common law has also long recognised and protected the right to life, as demonstrated, for example, in the common law criminal offences of murder and manslaughter. Of the international human rights standards, we focus in this Report on the right to life in Article 2 ECHR, which is part of UK law by virtue of the Human Rights Act, and from this point on we therefore refer to "the ECHR" rather than "human rights law" more generally.

3.57 Article 2 ECHR provides, so far as relevant:

"2(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than is absolutely necessary:

(a) in defence of any person from unlawful violence".

¹³⁰ See, for example, evidence of Dr William Boothby ([DRO0004](#)), Reverend Nicholas Mercer ([DRO0005](#)), Professor Robert McCorquodale ([DRO0008](#))

¹³¹ See Annex 1, paras 45-49

When does the ECHR apply?

3.58 The applicability of the right to life in Article 2 ECHR depends on the victim being “within the jurisdiction” of the UK.¹³² Jurisdiction under the ECHR is primarily territorial, but the ECHR also has extraterritorial application in certain circumstances, including the exercise of power and control over the person in question.¹³³ On the current state of the case-law, the use of lethal force abroad by a drone strike is sufficient to bring the victim within the jurisdiction of the UK: in the recent case of *Al Saadoon v Secretary of State for Defence*, the High Court held that “whenever and wherever a state which is a contracting party to the [ECHR] purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights.”¹³⁴ The judge found it difficult to imagine a clearer example of physical control over an individual than when the State uses lethal force against them:

“I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is indeed the ultimate exercise of physical control over another human being.¹³⁵ [...] jurisdiction arose through the exercise of physical power and control over the individual who was shot and killed.”¹³⁶

3.59 The right to life in the ECHR therefore clearly applies to the use of lethal force abroad outside of armed conflict. The same applies to the right to life in the ICCPR.¹³⁷

3.60 The ECHR permits States to take measures “derogating” from their obligations under the Convention “in time of war or public emergency threatening the life of the nation.”¹³⁸ The effect of such a derogation is to make the relevant right not apply. One of the concerns often articulated about the Human Rights Act and the ECHR is that the European Court of Human Rights has, by interpretation, extended the scope of the Convention to the battlefield, which hinders the armed forces in the performance of their task.¹³⁹ The Conservative Party manifesto at the 2015 General Election included a commitment to look at the application of the ECHR to the operation of the armed forces.

3.61 We therefore asked the Defence Secretary if the Government has any plans to derogate from the right to life in Article 2 ECHR. Although the Defence Secretary told us that the Government had no present plans that he was aware of,¹⁴⁰ he was subsequently reported in the press as considering a derogation from the ECHR in relation to the actions of the UK's armed forces on the battlefield.¹⁴¹ According to the press report, the Secretary of State considers that the ECHR is not needed in the field of military conflict overseas, because it

132 Article 1 ECHR provides that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”

133 *Al Skeini v UK*, applied by the UK Supreme Court in *Smith v MOD*. See also *Al Jedda v UK* and *Jaloud v The Netherlands* (2014)

134 [2015] EWHC 715 (Admin) (17 March 2015), para 106. The Government is appealing against the judgment to the Court of Appeal.

135 [2015] EWHC 715 (Admin) (17 March 2015), para 95

136 *Ibid.*, para 117

137 [Article 6 ICCPR](#)

138 [Article 15\(1\) ECHR](#)

139 See, for example, Policy Exchange, [Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat](#), 2015

140 Q36

141 [“Defence Secretary Michael Fallon: suspend Human Rights Act to protect our troops”](#), The Telegraph, 26 December 2015

merely duplicates the Law of War which already protects the human rights of combatants. Any future derogation is likely to be brought forward as part of the package of proposals in relation the Human Rights Act and a British Bill of Rights, which is now not likely to be before the EU referendum in June.

3.62 We note that any future derogation from the ECHR will not affect the Government's policy in relation to the use of lethal force abroad outside of armed conflict. Derogation from the right to life in Article 2 ECHR is only possible in relation to "deaths resulting from lawful acts of war".¹⁴² States can therefore choose to be bound by the more permissive rules of the Law of War, rather than the more restrictive rules of human rights law, in times of war or public emergency. However, the Government will not be able to derogate from the right to life in Article 2 where it uses lethal force abroad outside of armed conflict: such deaths will not be the result of "acts of war" because by definition they will have taken place outside armed conflict. The right to life in Article 2 ECHR therefore inescapably applies to uses of lethal force abroad outside of armed conflict.

What does the ECHR require?

3.63 What are the implications of the right to life in the ECHR applying to uses of lethal force abroad outside of armed conflict? Article 2 of the ECHR prohibits the taking of life by the use of force where this is not justified by any of the exceptions expressly permitted by its text. One of the exceptions is where the deprivation of life results from the use of force which is "no more than is absolutely necessary in defence of any person from unlawful violence".¹⁴³

3.64 According to the case-law of the European Court, where the right to life in the ECHR applies, it requires (1) the use of lethal force must be "no more than absolutely necessary" to avert an immediate threat of unlawful violence to other people and be strictly proportionate to that aim; (2) the use of lethal force by the state must be effectively regulated by a clear legal framework and the planning and control of any particular operation must be such as to minimise the risk of loss of life; and (3) there must be an effective independent investigation capable of leading to accountability for any unlawful deprivation of life. The effect of the right to life in Article 2 ECHR applying, therefore, is that the applicable standards which govern the use of lethal force are in certain respects higher than those imposed by the Law of War.¹⁴⁴

3.65 The main difference as far as the relevant standards for the use of lethal force are concerned is that under the Law of War there is no "imminence" requirement, provided the use of force is necessary to advance the military objective. As Professors Simpson and Ekins explained in their evidence:

"In war [...] it is not the case that [soldiers] are permitted to use force only when they are imminently threatened. [...] The imminence condition is

¹⁴² [Article 15\(2\) ECHR](#)

¹⁴³ [Article 2\(2\)\(a\) ECHR](#)

¹⁴⁴ See Annex 3 for a table comparing the Law of War with Human Rights Law.

redundant because, in war, the enemy's future intentions are plain. Someone is killed justifiably if there is sufficient evidence that they are a combatant, and without proof of personal, imminent intention to attack."¹⁴⁵

3.66 In Syria, for example, where we accept that the UK is involved in an armed conflict with ISIL/Da'esh, the question of the imminence of an armed attack by ISIL/Da'esh fighters does not arise so long as that armed conflict subsists, so they can be targeted without having to demonstrate that they pose a direct and imminent threat to the UK.

3.67 In Libya, however, which is outside armed conflict, the higher standards of the ECHR alone would apply and require there to be an immediate threat of unlawful violence to other people which makes it "absolutely necessary" to act to prevent it. In other words, outside of war the right of self-defence can only be exercised if there is an imminent threat of unlawful violence. Even if an individual has been previously identified as somebody suspected of planning terrorist attacks, the critical time for consideration of the imminence question is before the decision is taken to use lethal force against that individual. That assessment will depend very much on the facts, but it is important that the mind of the relevant decision-maker is directed to the question of imminence at the relevant point in time.

3.68 The Government must acknowledge that where the Government takes a life where we are not in armed conflict, the higher standards laid down in the Human Rights Act and the ECHR have to be met. It is only where the taking of life is in an armed conflict, that the lower standards of the Law of War apply.

3.69 The fact that the ECHR, and not the Law of War, applies to the use of lethal force outside of armed conflict does not, however, make it impossible to use force in such circumstances, and therefore shackle the Government's ability to protect the UK from terrorism, as is commonly supposed, for two main reasons.

ECHR may require the use of lethal force to protect life

3.70 First, in the Government's hypothetical example of the circumstances in which it might use lethal force abroad outside armed conflict (that is, as a last resort, where the Government has intelligence that there is a direct and imminent threat to the UK and there is no other way of preventing that threat), the ECHR would not only permit but positively require the use of lethal force by the Government if it were in a position to do so. This is because Article 2 of the ECHR imposes a positive obligation on the State to protect life, including by taking effective preventive measures against a real and immediate risk to life from a terrorist attack.

3.71 The European Court of Human Rights made this clear in the case of *Osman v UK*, in which it held that the obligation in Article 2(1) ECHR to protect life requires the State to take preventive action where "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and [...] failed to take measures within the scope of their powers which, judged reasonably, might have been expected

145 Q2 [Professor Thomas Simpson]

to avoid that risk.” In subsequent cases, this positive obligation to take preventive action to protect life has been extended beyond the protection of particular individuals to the protection of the public at large.

3.72 It follows that if the UK had clear and reliable intelligence that a terrorist attack was about to be launched on the UK or UK citizens from an ISIL/Da'esh training camp in Libya, so that there was a real and immediate risk to life, and the only way of preventing that attack and therefore saving those lives was to use lethal force against the would-be attackers in Libya, the Government would be under a positive obligation to use lethal force to protect life if it was in a position to do so.

Flexibility inherent in concepts of necessity and proportionality

3.73 The second reason why the applicability of the ECHR does not mean that the Government's ability to protect the UK from terrorism is undermined is that, even in less extreme circumstances than the hypothetical case just described, it is clear from the European Court's case-law that it will take a realistic approach to applying the concepts of necessity and proportionality in difficult counter-terrorism situations in which States have to make heat of the moment decisions about how to prevent a terrorist threat to life. The Strasbourg Court has, in its application of the high standards in Article 2, demonstrated that it is “acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence and recognises the complexity of this problem.”¹⁴⁶ As the President of the Court recently said, at the opening of the judicial year in Strasbourg:

“[...] my overview of 2015 would not be complete without mentioning the crises that we have witnessed: [...] above all the terrorist attacks which have struck us in Europe—again recently—and which have left our democracies in a state of shock. [...] I felt that it was important to emphasise, on this occasion, that the Court is [, to use the words of its case-law,] “acutely conscious of the difficulties faced by States in protecting their populations against terrorist violence, which constitutes, in itself, a grave threat to human rights”. The Court thus finds it legitimate for “the Contracting States to take a firm stand against those who contribute to terrorist acts”, but without destroying our fundamental freedoms, for not everything can be justified by an emergency.”¹⁴⁷

3.74 In the case-law referred to by the President of the Court, the Court has recognised that the rigorous standard of “absolute necessity” in Article 2 ECHR may sometimes be departed from in circumstances in which its application may simply be impossible, where certain aspects of the situation lie far beyond the Court's expertise and where the authorities had to act under enormous time pressure and where their control of the situation was minimal. The Russian authorities were therefore allowed a certain amount of discretion in deciding how best to try to save the lives of 950 hostages taken by Chechen terrorists in a theatre in Russia, where the hostages' lives were at real and immediate risk.

3.75 In other cases the Court has accepted that States are entitled under Article 2 to use force to protect lives in counter-terrorism operations which go beyond the use of lethal force by the police on a city street. In a Turkish case, for example, intense firing by security

¹⁴⁶ *Finogenov v Russia* (2011)

¹⁴⁷ President Guido Raimondi, President of the European Court of Human Rights, Speech at the opening of the judicial year, [29 January 2016](#)

forces at a village, using missiles and grenades in reaction to shots fired from the village in an area of known PKK terrorist activity, was found to be justified under Article 2 ECHR as a use of force that was no more than was absolutely necessary to protect life.¹⁴⁸ The massive use of indiscriminate force, however, would be unlikely to be proportionate to the threat to life that has to be averted.

3.76 Most recently, the Grand Chamber of the Court has held, in the case arising out of the mistaken shooting of Jean Charles de Menezes by counter-terrorism police in Stockwell tube station, that the test for self-defence in England and Wales is compatible with the right to life in Article 2 ECHR.¹⁴⁹ The Court held that the existence of “good reasons” for an honest belief in the necessity to use lethal force should be determined subjectively:

“In a number of cases the Court has expressly stated that as it is detached from the events at issue, it cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life or the lives of others; rather, it must consider the events from the viewpoint of the person(s) acting in self-defence at the time of those events [...] Consequently, in those Article 2 cases in which the Court specifically addressed the question of whether a belief was perceived, for good reasons, to be valid at the time, it did not adopt the standpoint of a detached observer; instead, it attempted to put itself into the position of the person who used lethal force, both in determining whether that person had the requisite belief and in assessing the necessity of the degree of force used. [...] It can therefore be elicited from the Court’s case-law that in applying the McCann and Others test the principal question to be addressed is whether the person had an honest and genuine belief that the use of force was necessary. In addressing this question, the Court will have to consider whether the belief was subjectively reasonable, having full regard to the circumstances that pertained at the relevant time.”¹⁵⁰

3.77 In the light of this case-law, we do not consider that the applicability of the ECHR, rather than the Law of War, to any use of lethal force against ISIL/Da’esh outside armed conflict would necessarily hamper the Government’s ability to protect lives from the threat of terrorism, provided there was a real and immediate threat to life by ISIL/Da’esh fighters and the use of force was proportionate to the threat to life posed by those fighters. Any assessment of the necessity and proportionality of the use of force will have to take account of the unprecedented nature and seriousness of the threat posed by ISIL/Da’esh.

3.78 While it is clear that the ECHR applies to any use of lethal force abroad for counter-terrorism purposes outside of armed conflict, and that the Article 2 thresholds of necessity and proportionality would have to be met, exactly how the right to life in Article 2 ECHR will be interpreted, and precisely what it will be held to require in light of the unprecedented nature of the threat from ISIL/Da’esh is therefore open to interpretation.

3.79 In our view, there is scope to spell out the Government’s interpretation of what the right to life in Article 2 ECHR requires in this particular context and we ask the Government to set out its understanding in its response to our Report. The issue which

148 Ahmet Ozkan v Turkey (2004)

149 Armani da Silva v UK (application no. 5878/08), 30 March 2016

150 Armani da Silva v UK (application no. 5878/08), 30 March 2016

would particularly benefit from clarification by the Government is how it understands the requirement that the use of force to protect life must be no more than is absolutely necessary, having regard to the nature of the threat posed by ISIL/Da'esh. It would be useful if the Government's response could spell out the sorts of considerations which will be relevant to assessing whether resort to lethal force really is the only option to prevent the threatened violence, and no other means such as capture or some other means of incapacitation is practical.

3.80 We also consider there to be scope for internationally agreed guidance as to how the right to life in Article 2 ECHR should be interpreted and applied in this context, and in Chapter 6 we consider what role the Government could play in seeking to achieve such international consensus.

The legal basis for UK support of US lethal force outside armed conflict

3.81 On 19 February the US carried out airstrikes on an ISIL/Da'esh training camp near Sabratha in western Libya. The target of the attack was said by the Pentagon to be Nouredine Chouchane, a Tunisian national suspected of being involved in two recent terrorist attacks in Tunisia, including the attack on the beaches in Sousse in which 30 British nationals were killed. According to press reports, 41 people were killed in the airstrikes.¹⁵¹

3.82 The Secretary of State for Defence confirmed that the US operation had made use of UK bases and was quoted as saying:

“I welcome this strike that has taken out a Da'esh training camp being used to train terrorists to carry out attacks. I was satisfied that its destruction makes us all safer, and I personally authorised the US use of our bases.”¹⁵²

3.83 Asked at Defence Questions in the Commons to explain his assessment of whether the action in Libya was lawful according to the law relating to the use of force, international humanitarian law and human rights law,¹⁵³ the Defence Secretary said:

“The United States followed standard procedures, and made a formal request to use our bases. Once we had verified the legality of the operation, I granted permission for the United States to use our bases to support it, because they are trying to prevent Da'esh from using Libya as a base from which to plan and carry out attacks that threaten the stability of Libya and the region, and indeed, potentially, the United Kingdom and our people as well. I was fully satisfied that the operation, which was a United States operation, would be conducted in accordance with international law.”

3.84 The US spokesman explained the US view of the legal basis for the air strikes in Libya. The strikes were said to demonstrate that the US will go after ISIL/Da'esh whenever it is necessary, confirming President Obama's statement that the US “will go after ISIS

151 “US airstrikes target Islamic State militants in Libya”, The Guardian, 19 February 2016

152 Para 3.52

153 HC Deb, 29 Feb 2016, [col 671](#) [Kirsten Oswald MP]

wherever it appears, the same way that we went after al-Qaida wherever they appeared.”¹⁵⁴ Surveillance of the training camp had led the US to believe that an ISIS attack emanating from the camp on US interests in the region was at some stage of preparation, and the camp had been struck before they could pose a more specific threat: “they had ill intent in their mind” said the Pentagon spokesman.

3.85 The UK's support for this use of lethal force abroad by the US demonstrates the urgent need for the Government to clarify its understanding of the legal basis for the UK's policy. The US policy, in short, is that it is in a global armed conflict with ISIL/Da'esh, as it has been since 9/11 with al-Qaida, which entitles it to use lethal force against it “wherever they appear.” On this view, the Law of War applies to any such use of force against ISIL/Da'esh, wherever they may be.¹⁵⁵ This is not, however, the position of the UK Government. As the Defence Secretary made clear in his evidence to us,¹⁵⁶ the Government considers itself to be in armed conflict with ISIL/Da'esh only in Iraq and Syria. This means that the Law of War may not apply to strikes such as the US airstrikes in Libya. Rather, as our Report demonstrates, the ECHR applies to such airstrikes outside of armed conflict.

3.86 As explained above, the ECHR may well provide a legal basis for such use of lethal force, where there is a real and immediate risk to life which cannot be prevented in any other way, or when the force used is no more than absolutely necessary to defend any person against unlawful violence. Whether the ECHR requirement that the use of force must be no more than absolutely necessary is satisfied where air strikes on training camps against ISIL/Da'esh fighters with “ill intent in their minds” kill 41 people, however, requires careful scrutiny.

3.87 Parliament and the public are entitled to expect absolute clarity about the legal basis on which the Government provides support to other countries which facilitates such uses of lethal force outside of armed conflict. Complicity by a State in the internationally unlawful act of another State is itself unlawful under general international law principles of State responsibility for internationally wrongful acts.¹⁵⁷ The general principles of state responsibility in international law, now conveniently set out in the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts*,¹⁵⁸ expressly deal with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter:

ARTICLE 16

“Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

¹⁵⁴ *'We will go after ISIS wherever it appears'* President Obama talked about the situation in Libya on Feb. 17 at the U.S.-Asean Leaders Summit in California

¹⁵⁵ *"Is the U.S. Now at War With the Shabab? Not Exactly"*, The New York Times, March 2016

¹⁵⁶ See above, para 3.17

¹⁵⁷ See Joint Committee on Human Rights, Twenty-third Report of Session 2008–09, [Allegations of Complicity in Torture](#), HL Paper 152 /HC 230, paras 24-35

¹⁵⁸ The Articles on State Responsibility are annexed to United Nations Resolution 56/83 adopted by the General Assembly on 12 December 2001. The Articles are recognised as an authoritative statement of the principles of State responsibility in international law: see, for example, the reference to them by the House of Lords in *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976 at para. 36.

- (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.”

3.88 UK personnel who facilitate such uses of lethal force outside of armed conflict by providing logistical support to the US, or who provide intelligence gathered through UK surveillance and reconnaissance,¹⁵⁹ also deserve absolute clarity from the Government about the legal basis on which such support is being provided to the US, to provide the necessary reassurance that they are not at any risk of criminal prosecution for complicity in killings which may lack international legal justification.

3.89 We therefore also ask the Government to clarify, in its response to this Report, its understanding of the legal basis on which it provides any support which facilitates the use of lethal force outside of armed conflict by the US or any other country adopting the same or a similar view with regard to the use of lethal force.

Conclusion

3.90 In our view, the Government's assertion that the Law of War applies to a use of lethal force outside of armed conflict demonstrates the necessity of the Government clarifying, in its response to our Report, its understanding of the legal position. The tests which are to be satisfied before such force is used, the safeguards required in the decision-making process and the necessary independent and effective mechanisms for accountability all flow from the legal framework which governs such uses of lethal force. We call on ministers to avoid conflating the Law of War and the ECHR and to remove the scope for such legal confusion by setting out the Government's understanding of how the legal frameworks are to be interpreted and applied in the new situation in which we find ourselves.

3.91 The clarification of the Government's understanding of the legal frameworks, and any subsequent consideration of it in Parliament, is in our view an opportunity for a very practical application of the important principle of “subsidiarity”: the principle that the national authorities (including the Government and Parliament) have primary responsibility for securing the rights and freedoms in the Convention to everyone within their jurisdiction. Just as in the Immigration Act 2014 the Government asked Parliament to approve its detailed interpretation of the requirements of the right to respect for private and family life in Article 8 ECHR in the context of deportations, as an exercise in subsidiarity, so the Government would be doing the same by setting out its detailed interpretation of the requirements of the right to life in Article 2 ECHR in the particular context of using lethal force outside of armed conflict

3.92 We therefore recommend that the Government provides clarification of its position on the following legal questions:

- **its understanding of the meaning of the requirements of “armed attack” and “imminence” in the international law of self-defence;**

¹⁵⁹ The fact that two former UK nationals, Mohamed Sakr and Bilal al-Berjawi, were killed by US drone strikes in Somalia (outside armed conflict) after having been deprived of their UK citizenship in 2010, has raised questions about whether the use of lethal force against them was in any way facilitated by the provision of UK intelligence: see, for example, Chris Woods, *Sudden Justice: America's Secret Drone Wars* (2015), pp 122-127

- **the grounds on which the Government considers the Law of War to apply to a use of lethal force outside armed conflict;**
- **its view as to whether Article 2 ECHR applies to a use of lethal force outside armed conflict, and if not why not;**
- **its understanding of the meaning of the requirements in Article 2 ECHR that the use of force be no more than absolutely necessary, and that there is a real and immediate threat of unlawful violence, in the context of the threat posed by ISIL/Da'esh; and**
- **its understanding of the legal basis on which the UK takes part in or contributes to the use of lethal force outside armed conflict by the US or any other country adopting the same or a similar view with regard to the use of lethal force.**

4 The decision-making process

Introduction

4.1 Another of the objectives of our inquiry was to clarify the decision-making process that precedes any use of lethal force in circumstances such as those on 21 August in Syria. In this chapter we have pieced together, from various sources, the Government's own description of the decision-making process, before considering some of the arguments made to us in favour of greater transparency in that process. We compare the information provided about the decision-making process in the published US Policy and we identify some of the most significant questions about the UK process which remain unanswered at the end of our inquiry. We consider the implications for the decision-making process of the fact that the ECHR applies to decisions to use lethal force outside armed conflict, and we make some recommendations for the future.

The Government's account of the process

4.2 The Prime Minister summarised "the processes we followed" before the use of lethal force in Syria on 21 August 2015 in his statement to the House of Commons on 7 September:

"Our intelligence agencies identified the direct threat to the UK from this individual and informed me and other senior Ministers of that threat. At a meeting of the most senior members of the National Security Council, we agreed that should the right opportunity arise, military action should be taken. The Attorney General attended the meeting and confirmed that there was a legal basis for action. On that basis, the Defence Secretary authorised the operation. The strike was conducted according to specific military rules of engagement, which always comply with international law and the principles of proportionality and military necessity. The military assessed the target location and chose the optimum time to minimise the risk of civilian casualties."¹⁶⁰

4.3 The Government's Memorandum does not provide any further detail about the process, other than to add that "decisions concerning the use of force in self-defence are taken by the Prime Minister in consultation with other senior ministers and advisers."¹⁶¹

4.4 We also asked the Secretary of State for Defence a number of questions to try to understand better the decision-making process that precedes a lethal drone strike.

4.5 During our visit to RAF Waddington we also learnt about the command and control chain and the detailed decision-making at the operational level.

4.6 Authorisation of particular uses of force is given by the Defence Secretary, who also sets the framework of rules in which the operation takes place, such as the rules of engagement for particular missions, which may include directives about civilian casualties. Operational decision-making is delegated to service personnel, operating within the framework set by the Defence Secretary. This means that decisions which have

¹⁶⁰ HC Deb, 7 September, [col 26](#)

¹⁶¹ http://www.parliament.uk/documents/joint-committees/human-rights/Government_Memorandum_on_Drones.pdf

to be taken at the very moment of action, such as whether the risk of civilian casualties if the strike goes ahead is proportionate to the military advantage to be gained from the strike, or whether to abort a strike because it has become clear at the very last minute that civilians or children are nearby, are taken by those in the very front line: those in the virtual cockpit who are actually operating the drone.

4.7 Our inquiry has therefore established that, apart from Prime Ministerial, Attorney General and National Security Council involvement at the stage of in principle approval of target selection on the basis of intelligence, the decision-making process that precedes a use of lethal force abroad outside of armed conflict is, to all intents and purposes, identical to the process followed by conventional uses of lethal force in armed conflict, following well established procedures designed, in part at least, to ensure compliance with the Law of War.

Concerns about the transparency of the current process

4.8 A number of witnesses argued in their evidence to us that there is currently insufficient transparency in the decision-making process that precedes a use of lethal force pursuant to the Government's policy.

4.9 In short, they argued that there needs to be greater transparency about the decision-making process in order for there to be public confidence that the process is robust, with sufficient challenge built into it, rigorous testing of intelligence, access to the requisite advice including legal advice, and assurance that decisions are taken at a level within Government which are commensurate with their importance.

The published US policy

4.10 The published US policy that we referred to above,¹⁶² on the use of force in counterterrorism operations abroad outside areas of active hostilities, set out in Annex 4, contains information not only about the standards (both legal and policy) applied by the US Administration when deciding whether or not to use such lethal force, but also about the procedures that are followed when making such decisions. The document refers to "written policy standards and procedures that formalize and strengthen the Administration's rigorous process for reviewing and approving operations to capture or employ lethal force against terrorist targets outside the United States and outside areas of active hostilities." The published policy sets out only certain "key elements" of those standards and procedures, to enable the American people to make informed judgments and hold the Executive Branch accountable. It outlines the decision-making process and indicates the sorts of analysis that inform the decision-making process:

"Decisions to capture or otherwise use force against individual terrorists outside the United States and areas of active hostilities are made at the most senior levels of the US Government, informed by departments and agencies with relevant expertise and institutional roles. Senior national security officials—including the deputies and heads of key departments and agencies—

¹⁶² Para 3.85

will consider proposals to make sure that our policy standards are met, and attorneys—including the senior lawyers of key departments and agencies—will review and determine the legality of proposals.

These decisions will be informed by a broad analysis of an intended target's current and past role in plots threatening US persons; relevant intelligence information the individual could provide; and the potential impact of the operation on ongoing terrorism plotting, on the capabilities of terrorist organizations, on US foreign relations, and on US intelligence collection. Such analysis will inform consideration of whether the individual meets both the legal and policy standards for the operation.”¹⁶³

4.11 Also notable in the US policy is the express mention of congressional notification, and in particular the commitment that “appropriate Members of the Congress will be regularly provided with updates identifying any individuals against whom lethal force has been approved.”

Clarifications needed about the decision-making process

4.12 As a result of the evidence we have received and what we learned on our visit to RAF Waddington, we have a better idea of the decision-making process but the picture is still far from complete. Some important questions about that process remain unanswered. How are targets identified? How is intelligence tested for reliability so that risks such as mistaken identity are minimised? Is some form of challenge built into the process for identifying targets? Is there a list of pre-authorised targets and what process is there for review of names on that list? At what points in the decision-making process is legal advice sought? How does the process balance potential harm to other people who are not the target of the attack? Does the process ensure that counter-terrorism operations are always planned and conducted so as to minimise the risk of loss of life of innocent bystanders, as they ought to be? We do not suggest that all of these questions about the decision-making process can necessarily be subjected to public examination without running the risk of harming national security. However, they are questions which, it seems to us, need to be asked about the decision-making process by some person or body who can provide independent scrutiny with access to the necessary intelligence. We consider the candidates for such a role in chapter 5.

4.13 Here we consider some of the most significant questions about the process which in our view should be clarified by the Government in its response to our Report.

Is there a “kill list”?

4.14 One of the questions we have considered is whether there is what the media have dubbed a “kill list”—that is, a list of pre-authorised targets in respect of whom ministerial authorisation has already been given for targeted killing because of the risk they pose to the UK.

4.15 The Government did not answer directly the questions in our letter about whether there is such a list, nor did the Secretary of State answer the question in oral evidence,

¹⁶³ *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, The White House, Office of the Press Secretary, May 2013

regarding it as “an intelligence matter”.¹⁶⁴ Reyaad Khan’s MP, Kevin Brennan, has twice asked the Minister for Armed Services the same question directly in an oral question, but also has not received an answer.¹⁶⁵

4.16 If, however, such a list exists, we think it would be desirable for a trusted independent body to scrutinise issues such as how the Government ensures that it meets the requirement that the threat they present must be imminent; whether there is further ministerial authorisation, subsequent to the inclusion of the name on the list of legitimate targets; and whether there is provision for review. Mark Field MP has pointed out that the notion that an individual is on a list until such time as they are assassinated seems to be at odds with the “imminence” requirement in Article 51 of the UN Charter: “There needs to be a process whereby the question of whether a person is still an imminent threat to the UK is regularly turned over in people’s minds.”¹⁶⁶ The decision-making process must therefore allow for continued inclusion on any list to be kept under constant review. We note that under the US published policy, “appropriate Members of the Congress will be regularly provided with updates identifying any individuals against whom lethal force has been approved.”¹⁶⁷

4.17 These are the sorts of questions that demonstrate the necessity of independent review following an exceptional use of lethal force outside of armed conflict, and we hope they will be asked by the ISC when, as we suggest it should, it scrutinises the decision-making which leads up to any future uses of lethal force abroad outside of armed conflict. **We recommend that the ISC should consider whether it should have a role in keeping under review any list which may exist of pre-identified targets against whom lethal force might be used outside of armed conflict, as happens in the US.**

Legal advice

4.18 We are still not clear, at the end of our inquiry, about precisely when, in the decision-making process preceding a use of lethal force outside armed conflict, legal advice is provided, by whom and about what. We asked the Government to make the relevant Government lawyers available to us so that we could find out more about the important question of where legal advice fits in the decision-making process, but the Government refused our request notwithstanding our assurance that we would respect the Government’s right to legal professional privilege.

4.19 In the particular case of Reyaad Khan, it is a matter of public record that the Attorney General advised the National Security Council which, we understand, approved in principle the taking of military action against Khan in view of the threat he posed. The detailed content of his advice is not known, nor is the scope of it. The Prime Minister indicated that his advice “largely concerned self-defence”, but the Attorney General himself subsequently implied that he may also have advised about compatibility with the Law of War.¹⁶⁸ There is nothing to suggest that the Attorney General provided legal advice about the applicability or requirements of human rights law in relation to the drone strike

164 Q21

165 See HC Deb, 19 October 2015, [col 643](#) and, HC Deb, 1 December 2015, [col 61WH](#)

166 HC Deb, 1 December 2015, [col 61WH](#)

167 See Annex 4

168 Oral evidence taken before the Justice Select Committee on 15 September, [HC \(2015–16\) 409](#)

on 21 August. Nor is there anything to suggest that the Attorney General was involved at the later stage in the decision-making when the Secretary of State for Defence authorised the particular operation that resulted in Khan's death.

4.20 The Secretary of State for Defence pointed out that the Attorney General is not the only source of legal advice to the Government, and that the MoD also receives legal advice directly from its own legal advisers.¹⁶⁹ He said that he took legal advice from those MoD legal advisers when deciding whether the relevant thresholds for the use of lethal force had been met.

4.21 We note that there has been no reference to whether legal advice was sought from the Foreign Office Legal Advisers at any stage in the decision-making process. The Foreign Office Legal Advisers are an important part of the acknowledged expertise in international law within Government. The US Policy explicitly states that "the senior lawyers of key departments and agencies"¹⁷⁰ will review and determine the legality of proposals to use lethal force against individual terrorists outside the US and outside areas of active hostilities. **We recommend that the Government should make clear, in its response to our Report, precisely when legal advice is sought and from whom prior to use of lethal force outside armed conflict, and that legal advice should always be sought from senior Foreign Office lawyers on any question of international law.**

Conclusion

4.22 **The applicability of the ECHR to uses of lethal force abroad outside of armed conflict has some important implications for the decision-making process. To be compatible with the right to life, operations which result in the use of lethal force outside armed conflict must have been planned and controlled in such a way as to minimise the risk of loss of life.¹⁷¹ The decision-making process for more conventional uses of lethal force in armed conflict is designed to secure compliance with the Law of War.**

4.23 **In our view, the applicability of the ECHR to uses of lethal force outside of armed conflict means that the decision-making process for more conventional uses of lethal force in armed conflict may not be sufficient to ensure compliance with the relevant standards on the use of lethal force. The Government should consider whether any changes to the process are required for what the Government acknowledges to be a wholly exceptional situation which is likely to arise very infrequently.**

4.24 **For the Government's policy to command public confidence, and to make it more likely that decisions pursuant to it do not lead to breaches of the right to life, the decision-making process must be robust, with sufficient challenge built into the process, rigorous testing of intelligence to minimise the risk of mistakes, and access to the requisite advice including legal advice at the appropriate stages in the process.**

4.25 **It is also important that there is provision for constant review of whether or not the relevant conditions continue to be satisfied. As Mark Field MP said in the Westminster**

169 Q24

170 *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, The White House, Office of the Press Secretary, May 2013

171 See, for example, *McCann v UK*. See evidence of Professor Michael Newman ([DRO0011](#)) for concern about the risk to innocent bystanders from drone strikes.

Hall debate on drones, “[t]he notion that an individual is on a list until such time as they are eliminated or assassinated seems to be at odds with article 51 [of the UN Charter]. There needs to be a process whereby the question of whether a person is still an imminent threat to the UK is regularly turned over in people’s minds.”¹⁷² The same applies to the other main condition which has to be satisfied: whether the use of force is no more than absolutely necessary to protect life.

4.26 We also consider that there could be greater clarity about the level within Government at which exceptional decisions to use lethal force outside armed conflict are made. The Prime Minister told the Liaison Committee on 12 January that “these decisions are in no way made lightly. It is one of the most difficult decisions that any Prime Minister has to make”.¹⁷³ Our understanding is that the Prime Minister is only involved at the “in principle” stage of authorising a target for a lethal strike. The level of decision-making at the later operational stage should also, in our view, reflect the extraordinary seriousness of such a use of lethal force outside areas of armed conflict. Uses of lethal force pursuant to the policy will, we presume, be extremely rare, and we do not think it is unreasonable to expect ministerial involvement in the operational decision. We look forward to the Government’s clarification of these matters in its response to our Report.

172 HC Deb, 1 December 2015, [col 61WH](#)

173 Oral evidence taken before the Liaison Committee on 12 January 2016, [HC \(2015–16\) 716](#), Q29

5 Accountability

Introduction

5.1 The final area which our inquiry looked into was the important question of accountability where someone is killed pursuant to the Government's policy. When the government orders our military to take a life outside of armed conflict, there must be proper accountability. Those making and carrying out the order to take a life need to know that there will be independent scrutiny to ensure that the highest standards have been adhered to.

5.2 In this chapter we consider the need for independent scrutiny capable of leading to accountability, and the implications of the ECHR applying to the use of lethal force outside armed conflict;¹⁷⁴ what independent scrutiny already exists; and whether this could be improved in light of the requirements of the ECHR. We consider whether there should be more independent scrutiny, and, if so, who should carry it out. We make some recommendations about how accountability could be improved in future.

5.3 The need for independent scrutiny of what the Government has done in authorising the use of lethal force in Syria without prior Commons approval was raised by our Chair with the Prime Minister when he made his statement to the House of Commons on 7 September.¹⁷⁵ The Prime Minister acknowledged that this was “a very good question” and appeared to accept that ministerial appearances before the House of Commons to answer questions are not necessarily enough, when he said he was “happy to look at what other ways there may be of making sure these sorts of acts are scrutinised in the coming months and years.”¹⁷⁶ **We welcome the Prime Minister's acknowledgment of the importance of independent scrutiny of such extraordinary acts. Accountability is important for a number of reasons: it is a means of ensuring that decision-makers keep to standards; it is a safeguard against the danger of mission-creep when broad powers are exercised in ever wider circumstances; and it gives the public the confidence that is necessary to entrust such exceptional powers to ministers. It is also necessary in order to comply with the requirements of the ECHR.**

Implications of the ECHR applying

5.4 As well as the obvious need to maintain public confidence, the need for independent scrutiny is also a consequence of the fact that the ECHR applies to the use of lethal force abroad outside armed conflict. The ECHR imposes stronger procedural obligations than the Law of War.¹⁷⁷ The procedural obligations in the Law of War are largely *ex ante*—they require certain safeguards to be built into the decision-making process before the decision to use force is made. The procedural obligations imposed by the right to life in Article 2 of the ECHR, however, are more onerous after the event: they require an independent and effective investigation capable of leading to accountability for any violations of the right to life, including the possibility of criminal prosecution in respect of any such violation. This is not to presume that there will have been any such violations; rather it is to provide

174 See, for example, Mr Alex Batesmith ([DRO0006](#))

175 HC Deb, 7 September 2015, [cols 23-27](#)

176 *Ibid.*, [col 31](#)

177 For a more detailed explanation see the Legal Memorandum contained in Annex 1 to this Report.

public confidence that a mechanism is in place to enable independent scrutiny of whether there has. The investigation must be “broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force, but also all the surrounding circumstances, including such matters as the planning and control of the operations in question.”¹⁷⁸

5.5 However, while it is clear that the procedural obligation in Article 2 ECHR applies to any use of lethal force abroad for counter-terrorism purposes outside of armed conflict, it is less clear exactly what that obligation requires in this new context. Some allowance may be made for the difficulty of conducting an investigation in difficult security conditions.¹⁷⁹ This would obviously be the case in relation to the use of lethal force against Reyaad Khan in Syria and is likely to be the case whenever there is a use of lethal force outside armed conflict, since the Government appears to envisage such uses of lethal force taking place in ungoverned spaces where there is no government to work with and no effective control over the territory. In such cases, the obligation on the authorities is to take “all reasonable steps” in the circumstances to ensure that an effective, independent investigation is conducted.¹⁸⁰

5.6 We consider first what accountability already exists in relation to such uses of lethal force abroad outside armed conflict, and compare it to the accountability mechanisms which exist in relation to the use of lethal force by the police to which the ECHR also applies.

Coroner's inquest?

5.7 One of the main ways in which the UK complies with the procedural obligation in Article 2 ECHR to have an independent and effective investigation where there has been a use of lethal force by the State is by a coroner's inquest into the death.

5.8 Reyaad Khan's Member of Parliament, Kevin Brennan MP, asked the Minister for the Armed Forces whether there should be an inquest in the UK into the death of Reyaad Khan in Syria, which “might help to establish some of the legal parameters in such cases.”¹⁸¹ The Minister replied that there will be no inquest “[b]ecause it is outside the coroner's jurisdiction.”¹⁸²

5.9 A coroner's duty to investigate a death where the deceased died a violent or unnatural death only applies where the body of the deceased is in the coroner's area,¹⁸³ or, if there is no body, if the coroner suspects that the death occurred “in or near the coroner's area.”¹⁸⁴ Where the State uses lethal force against a person abroad, outside of armed conflict, there is therefore no duty on the coroner to investigate the death.

5.10 In the case of a UK national such as Reyaad Khan, such a duty would arise if the body were repatriated to the UK, in which case a coroner's inquest would be held in the area where the body was repatriated, just as inquests are held into the deaths of returning service

178 See *Al-Skeini v UK*, 55721/07, 2011, para 163

179 See *Al-Skeini v UK*, 2011, para. 164.

180 *Ibid.*

181 HC Deb, 1 December 2015, [cols 61WH-62WH](#)

182 *Ibid.*, [col 71WH](#)

183 Coroners and Justice Act 2009, [section 1\(1\)](#)

184 Coroners and Justice Act 2009, [section 1\(4\)](#)

personnel who have been killed in service overseas. While this is theoretically possible, if the family of the UK national were to repatriate the body of their family member, it does not appear to have been an issue in relation to any of the UK nationals who are known to have been killed by drone strikes in Syria. It therefore seems unlikely that there will be a coroner's inquest into any of those deaths. Even if a coroner's inquest were to take place, it is unlikely that it would satisfy the requirements of an adequate and effective investigation because coroners are not security-cleared and closed material procedures are not available in inquests under the Justice and Security Act 2013.

The Investigatory Powers Tribunal

5.11 The Investigatory Powers Tribunal can hear and determine complaints against the intelligence services for breaches of Convention rights under the Human Rights Act. However, this would depend on the initiative being taken by the family of the deceased. It therefore cannot satisfy the procedural obligation to ensure that there is an independent and effective investigation.

The Intelligence and Security Committee

5.12 Where the police use lethal force there is a well established independent accountability mechanism in the shape of the Independent Police Complaints Commission (the "IPCC"). The primary statutory function of the IPCC is to increase public confidence in the police complaints system in England and Wales.¹⁸⁵ Death following police contact must be referred to the IPCC even when no complaint has been made or misconduct alleged. The IPCC therefore investigates all uses of lethal force by the police, including intelligence-based counter-terrorism operations such as the shooting of Jean Charles de Menezes in Stockwell tube station in July 2005.¹⁸⁶ There is no equivalent independent accountability mechanism where the State uses lethal force abroad outside of an armed conflict.

5.13 The only accountability mechanism capable of carrying out an investigation of such an intelligence-based use of lethal force outside armed conflict is the Intelligence and Security Committee ("the ISC"). The ISC is quite different from any other committee of Parliament. Its members are all security cleared and appointed by Parliament on the nomination of the Prime Minister.¹⁸⁷ It is the only parliamentary committee with the ability to consider sensitive intelligence material. We see considerable force in the suggestion that the ISC is the most suitable existing body to perform this important function.

5.14 We have therefore considered the ability of the ISC to provide the necessary independent and effective scrutiny where lethal force has been used abroad outside armed conflict. There are three matters in particular which in our view would enhance the ability of the ISC to provide the scrutiny that is required: automatic referral; a broader remit to enable it to consider operational matters where necessary; and access to expert legal advice which is independent of the Government.

¹⁸⁵ Police Reform Act 2002, [section 10](#)

¹⁸⁶ See [IPCC Report](#) into the shooting of Jean Charles de Menezes

¹⁸⁷ See Justice and Security Act 2013, [section 1\(4\)](#). For a description of the ISC's functions and remit, see the Committee's [website](#)

Automatic referral

5.15 The ECHR requires the authorities to act of their own motion in investigating a use of lethal force once the matter has come to their attention: they cannot leave it to the family of the deceased to take the initiative. In the case of uses of lethal force by the police, this is satisfied by the automatic referral to the IPCC of any death following police contact.

5.16 There is no automatic referral to the ISC or anyone else of any use of lethal force outside of armed conflict. Our Chair asked the Prime Minister on 7 September to refer the Reyaad Khan strike for investigation to the ISC, but he did not respond to that request, nor subsequently refer the matter to the ISC. The ISC announced on 29 October, of its own accord, that it would be looking at the intelligence on which the drone strikes in Syria were based.

5.17 Our Chair asked the Prime Minister, at Liaison Committee on 12 January, to agree to automatic referral to the ISC where lethal force is used outside armed conflict, but he declined on the basis that it is for the ISC to decide its own work programme.¹⁸⁸ The Defence Secretary gave the same reason in his oral evidence to us.¹⁸⁹

Remit

5.18 The drone strike which killed Reyaad Khan in Syria was an intelligence-based counter-terrorism operation using military means. Although, for reasons we have explained above, we accept that the particular drone strike on Reyaad Khan was part of the wider armed conflict with ISIL/Da'esh in Iraq, to which the Law of War therefore applied, the Government envisages similar intelligence-based counter-terrorism operations using military means outside of armed conflict, such as in Libya.

5.19 For the ISC investigation into such a future use of lethal force to be thorough and effective, and therefore to command the confidence of Parliament and the public, it will need to investigate a number of questions which will determine the lawfulness of the use of lethal force, such as:

- Was the individual in question threatening the UK with armed attack?
- Was the threatened attack imminent?
- Was the use of lethal force “absolutely necessary” to protect life (ie. genuinely a last resort, or was there any other way of preventing the threatened attack, such as by capture of the individual or arrest of his associates in the UK)?
- Was the degree of force used proportionate to the threat?
- Did the planning and control of the operation minimise the risk of loss of life?

5.20 To investigate these issues effectively the ISC will need to consider in detail the surrounding circumstances of the military operation that culminated in the lethal drone strike and will need to be provided by the MoD with all the relevant information

¹⁸⁸ Oral evidence taken before the Liaison Committee on 12 January 2016, [HC \(2015–16\) 716](#), Q29

¹⁸⁹ Q30

in relation to that particular military operation. However, the current Memorandum of Understanding between the Prime Minister and the ISC (dated November 2014)¹⁹⁰ precludes the ISC from considering the operational activities of the MoD.

5.21 Section 2 of the Justice and Security Act 2013 provides that the ISC may examine the operations of the Security Service, the Secret Intelligence Service and GCHQ, but under s. 2(2) “The ISC may examine or otherwise oversee such other activities of HMG in relation to intelligence or security matters as are set out in a memorandum of understanding.”

5.22 Under the current memorandum of understanding the ISC and the PM have agreed that the ISC shall oversee specific operational activities of the MoD (the strategic intelligence activities undertaken by the Chief of Defence Intelligence, and “offensive cyber”), but in a footnote there is a sweeping exclusion of general military operations from the oversight of the ISC:¹⁹¹

“In respect to operational matters [...] general military operations conducted by the MOD are not part of the ISC’s oversight responsibilities.”

5.23 The Prime Minister *may* have a discretion under the memorandum of understanding to permit the ISC to consider particular operational matters if certain conditions are met¹⁹² (“may” because it is not clear from the memorandum whether this discretion is precluded by the general exemption for military operations in footnote 9), and in such circumstances the MoD could choose voluntarily to provide information about the operation to the ISC. However, even if this interpretation of the memorandum is correct, it leaves the effectiveness of the ISC’s investigation in the hands of the Government, which will not provide the necessary public reassurance or satisfy the requirements of the ECHR.

5.24 We therefore believe that the ISC’s remit should be widened to enable it to fulfil the important function of conducting thorough and effective scrutiny capable of providing Parliament and the public with the necessary reassurance that future uses of lethal force outside of armed conflict were necessary and proportionate. The need for this has been underlined by the exchange of correspondence between Andrew Tyrie MP and the Prime Minister on this subject.¹⁹³ The Prime Minister was unable to provide the necessary reassurance that the ISC would be able to conduct a sufficiently broad investigation into the military operation and would be provided with all the relevant information to enable it to do so.¹⁹⁴ The current Memorandum of Understanding between the Prime Minister and the ISC prevents the ISC from considering military operations and leaves the provision of information that the ISC needs to carry out its investigation in the discretion of Ministers and the Prime Minister.

5.25 Andrew Tyrie MP pressed the Prime Minister on this at Liaison Committee on 12 January, asking for a new Memorandum of Understanding to be drawn up which does not exclude military operations from oversight by the ISC, and for the Prime Minister to agree not to withhold any relevant information that the ISC will need to conduct an effective investigation of the drone strike in Syria on 21 August. The Prime Minister agreed to

190 Intelligence and Security Committee of Parliament, [Annual Report 2013–14](#), HC 794, Annex A

191 *Ibid.*, p12

192 *Ibid.*, para 11

193 <http://www.parliament.uk/business/committees/committees-a-z/commons-select/liaison-committee/publications/>

194 The correspondence between the Chair of the Liaison Committee and the Prime Minister is on the Liaison Committee website: <http://www.parliament.uk/documents/commons-committees/liaison/correspondence/Letter-from-PM-070116.pdf>

consider whether the Memorandum of Understanding prevents the ISC from carrying out an effective investigation into the drone strike, but declined to undertake to make all relevant information available to the ISC, on the basis that it may be justifiable to withhold some particularly sensitive intelligence information, for example when there is a risk that its disclosure might endanger life.

5.26 After the exchange with the Prime Minister at Liaison Committee, the Chair of the ISC, the Rt. Hon. Dominic Grieve QC MP, wrote an open letter to our Chair in which he said that the unique contribution which the ISC can bring to Parliament's collective oversight of the Government's policy was "its statutory power to access highly classified material and its ability to examine the intelligence which led to the decision to conduct the operation."¹⁹⁵

5.27 We welcome the ISC's announcement that one of its immediate priorities is to look into the intelligence basis surrounding the recent drone strikes in which British nationals were killed. We agree with the Chair of the ISC that his Committee is best placed to investigate such matters. Where the use of lethal force is outside armed conflict, we think it is necessary to enable that investigation to go further and to look more broadly at the operational aspects of that use of lethal force, to ensure that there is appropriate accountability for the whole operation that culminated in the taking of life outside of an armed conflict.

5.28 We note that in a recent written answer the Secretary of State for Defence referred to the Prime Minister and the Chair of the ISC having "reached agreement on the disclosure of material to the ISC that will enable the Committee to conduct a review of the threat posed by Reyaad Khan."¹⁹⁶ That may be sufficient in the case of a use of lethal force in armed conflict (as we accept was the case in relation to Reyaad Khan). In our view, however, where the use of lethal force is outside armed conflict the ISC should be able to conduct the necessary independent scrutiny of whether the particular use of lethal force abroad was justified and lawful; an inquiry only into the threat posed by the target of the strike will not be broad enough to consider all the questions that need investigating. It is therefore necessary to build on the positive start that has been made by the ISC, by ensuring that it has the power and the information to conduct such a broader investigation.

Independent Legal advice

5.29 We also note a point made by a predecessor Committee, in the context of the ISC's role investigating allegations of complicity in torture: the need for Parliament and its committees, when they are scrutinising the compatibility of Government policy with legal standards, to have access to independent legal advice which is not provided by the Government's own lawyers.¹⁹⁷

5.30 We recommend that the Government should establish clear independent accountability mechanisms in relation to the future use of lethal force abroad outside of armed conflict, capable of carrying out effective investigations into whether particular uses of lethal force were justified and lawful, including:

¹⁹⁵ Open letter of 14 January 2016 from the Rt Hon Dominic Grieve QC MP to the Rt Hon Harriet Harman QC MP, available on the ISC website.

¹⁹⁶ PQ 2432 [Syria: Military Intervention] [27 January 2016](#)

¹⁹⁷ Joint Committee on Human Rights, Twenty-third Report of Session 2008–09, [Allegations of Complicity in Torture](#), HL Paper 152, HC 230

- **automatic referral to the ISC of any such use of lethal force;**
- **a revised Memorandum of Understanding between the Prime Minister and the ISC making clear that the Government accepts that the ISC has the power to consider intelligence-based military operations, and that the MoD must provide the ISC with all the relevant information about such an operation that the ISC needs to make its investigation effective;**
- **access to independent legal advice rather than legal advice from the Government's lawyers.**

Legal accountability

5.31 Accountability through the ISC is a form of “political accountability”: it involves scrutiny of ministers’ actions as part of the democratic process, conducted by fellow parliamentarians. We have considered whether there is also a role, alongside such political accountability, for any form of legal accountability: that is, accountability through the courts, for example by the application of the criminal law, or civil law proceedings where appropriate.

5.32 In the case of uses of lethal force by the police, the independent accountability provided by the IPCC is in addition to a variety of forms of legal accountability, including coroner’s inquests, prosecutions, and judicial review. As the College of Policing’s Authorised Professional Practice (“APP”) on Armed Policing points out, “despite making important and often time-critical decisions, police officers are still accountable through the law for their actions.”

5.33 In our questions to the Government about the accountability mechanisms which exist following a use of lethal force outside an area of armed conflict, we specifically asked about legal accountability, including what role there is for the judiciary in holding the Government to account and what legal remedies exist for victims of unlawful strikes. The Government did not answer these questions. In its Memorandum in response to our letter, the Government refers only to political accountability for its actions to Parliament. It refers to the Prime Minister’s statement to the House of Commons on 7 September, the ISC’s role in relation to issues touching on the use of intelligence, and our own inquiry.

5.34 The Government’s position appears to be that there should be no accountability through the courts for any action taken pursuant to its policy of using lethal force outside areas of armed conflict. The Government’s memorandum refers to the fact that the use of military force in the exercise of the inherent right of self-defence is within the Government’s discretionary powers under the Royal Prerogative, and invokes the importance of the Government being able to act effectively and decisively to protect the country.

5.35 In its response to the letter before claim from Caroline Lucas MP and Baroness Jones, threatening judicial review of the Government’s failure to formulate and publish a policy on targeted killing outside of armed conflict, the Government argued that the proposed claim was “non-justiciable”: that is, a matter on which the courts have no jurisdiction to enter, because of the extreme sensitivity of the issues it would require the court to consider in order to adjudicate on the claim.

5.36 The Defence Secretary, in his oral evidence to us, clearly did not think there was any need for legal accountability: “the Government should be accountable to Parliament [...] That is what I am doing, or trying to do, this afternoon.”¹⁹⁸

5.37 The Government is right to say that the courts tread very carefully in relation to the exercise of prerogative powers concerning the use of force abroad and the deployment of military force. This is as it should be. However, being slow to review the exercise of such powers and deferential to discretionary assessments based on intelligence or other sensitive considerations is qualitatively different from refusing to consider altogether any questions which arise about the legality of Government action which has a serious effect on fundamental rights.¹⁹⁹ Political accountability is not a substitute for legal accountability: both are necessary, and they can exist alongside each other. The courts have a well-established role in relation to the use of lethal force in counter-terrorism law enforcement operations, notwithstanding that such operations are often based on intelligence and the exercise of judgment by front-line officers. Indeed, the ECHR requires there to be access to court for the determination of any legal issues concerning compatibility with the right to life, and the possibility of legal accountability for unlawful deprivations of life.

5.38 We agree with the Government about the importance of political accountability, and ask the Government to reconsider its apparent position that there should be no accountability through the courts for any action taken pursuant to its policy of using lethal force outside areas of armed conflict.

198 Q30

199 In *Noor Khan* the Government's non-justiciability argument was accepted by the courts, but turned on a very particular aspect of the case, which in the courts' view required it to determine whether the US policy on targeted killing was unlawful, a matter on which courts do not adjudicate for reasons of international comity.

6 Developing international consensus

The international rule of law dimension

6.1 In the preceding chapters we have recommended that the Government respond to the central problem we have identified in our inquiry by clarifying its understanding of the legal framework which governs its policy on the use of lethal force abroad for counter-terrorism purposes outside of armed conflict. If the Government responds constructively to that main recommendation, by explaining, amongst other things, its understanding of the meaning of “imminence” in the international law of self-defence and its interpretation of what the ECHR requires in this particular context, it will set a good example of how States can proactively address the new challenges posed by the rapid changes in technology and the nature of armed conflict.

6.2 We conclude our Report by considering whether there is anything more the Government should do, in addition to publishing its own understanding of the relevant legal framework, to accelerate international progress towards greater clarity and consensus about how the relevant international law rules apply to the new and fast-moving challenges of counter-terrorism in today's world, in order to ensure that States' responses are consistent with the international rule of law. As the world faces the grey area between terrorism and war, there needs to be a new international consensus on when it is acceptable for a state to take a life outside of armed conflict. The U.K. Government should lead in the establishment of that consensus and thereby ensure that states are able to take the action which is necessary to protect their citizens without breaching the rule of law.

The UK's lack of international engagement to date

6.3 In Chapter 1 above we outlined recent international initiatives aimed at promoting understanding and building consensus about the international legal framework that applies to the use of armed drones for counter-terrorism purposes.²⁰⁰

UN initiatives

6.4 The UK Government has so far not engaged at all with UN efforts to reach a clear international consensus on the applicable legal principles and what they require. It has not responded in detail to the invitation of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in his February 2014 Report to the Human Rights Council, to clarify their position on a number of important legal issues on which there is no clear international consensus, including the meaning of imminence in the law of self-defence and whether a State can be in a global non-international armed conflict with a non-State armed group. It opposed Human Rights Council Resolution 25/22 (which urged States to ensure that any measures used to counter terrorism, including the use of armed drones, comply with their international law obligations including under human rights law) and was not in favour of an Expert Panel Discussion on the subject in the Human Rights Council. When the UN Human Rights Council considered the use of armed drones in counter-terrorism and military operations

²⁰⁰ Paras 1.37-1.44

in accordance with international law, in September 2014,²⁰¹ the UK Government argued that the Human Rights Council was not an appropriate forum for discussion of the use of armed drones²⁰² and stated that it did not believe that the Council should take up particular weapons on a thematic basis.

6.5 The UK's failure to engage with these UN initiatives aimed at achieving international consensus about the legal frameworks prompted a letter from Sir Jeremy Greenstock, former UK ambassador to the UN, and a number of leading parliamentarians from all parties and none, welcoming the lead taken by the Human Rights Council and arguing that "the increased use of armed drones underscores the need for greater consensus between States on how to apply the international laws that regulate lethal force."²⁰³

6.6 Since the last consideration of this issue by the Human Rights Council, as we have demonstrated in this Report, the UK Government has made clear its preparedness to use armed drones to deliver lethal force in areas outside armed conflict, to which human rights law applies for the reasons we have explained. **We therefore would not expect the Government to maintain its opposition to the UN Human Rights Council considering the subject of how the international legal frameworks apply to the use of armed drones for counter-terrorism purposes**, and we make specific recommendations below about how the Government should now take the lead in these UN initiatives.

Council of Europe initiatives

6.7 As we noted in Chapter 1 above,²⁰⁴ the Committee of Ministers of the Council of Europe (comprising representatives of the Governments of the Member States) has recently rejected²⁰⁵ the Parliamentary Assembly's recommendation²⁰⁶ that the Committee of Ministers undertake a thorough study of the lawfulness of the use of combat drones for targeted killing and, if need be, draft guidelines for States on the subject, reflecting their obligations under both the Law of War and human rights law.

6.8 In its Reply, the Committee of Ministers notes that the use of armed drones is relatively recent and has greatly increased in the last few years. It agrees with the Parliamentary Assembly that, "given the fact that the number of States with the capacity to use armed drones is likely to increase, a greater consensus on the terms of their use should be reached in order to ensure compliance with public international law" and "considers that many legal issues raised by the use of [armed drones] need to be addressed". However, the Committee of Ministers "does not find that there is a need at the present stage to draft guidelines along the lines suggested by the Assembly." Instead, it asked its Committee of Legal Advisers on Public International Law (an intergovernmental committee comprising Government Legal Advisers) to monitor developments and to signal any further developments which might give rise to a need for the Council of Europe to take further action.

201 United Nations Human Rights Council, *Human Rights Council holds panel on remotely piloted aircraft or armed drones in counterterrorism and military operations*, September 2014

202 See Professor Dapo Akande, "UN Human Rights Council Panel Discussion on Drones" EJIL: *Talk!*, October 2014

203 "UK fails to engage with Human Rights Council on drones", United Nations Association, September 2014

204 Chapter 1, para 1.43

205 CM Reply to Rec 2069 (2015) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22301&lang=en> (1-2 December 2015)

206 Recommendation 2069 (2015) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21747&lang=en> (23 April 2015)

6.9 The Committee of Ministers' Reply to the Parliamentary Assembly is premised on the assertion that "there is a broad agreement that [...] relevant rules of international law regulating the use of force and the conduct of hostilities as well as of international human rights law apply to their use." The Reply also only contemplates the use of armed drones in the context of armed conflict: it does not consider the possibility that armed drones might be used by States outside of armed conflict. As our Report has shown, however, the UK Government's policy includes the possible use of armed drones to deliver lethal force abroad outside of armed conflict, and does not appear to accept that the relevant rules of international human rights law apply to such uses of armed drones. In our view, the basis on which the Committee of Ministers has rejected the Parliamentary Assembly's recommendation is therefore questionable. We consider it to be the Government's responsibility to ensure that our Report, which questions the basis of the Committee of Ministers' reply to the Parliamentary Assembly, is drawn to the attention of the Committee of Ministers and to the Committee of Legal Advisers on Public International Law which has been charged with the task of drawing significant developments to the Committee of Ministers' attention.

6.10 We will draw our Report to the attention of the Parliamentary Assembly. We note that the Parliamentary Assembly has recently requested Opinions from the European Commission for Democracy through Law ("the Venice Commission") on a number of significant issues raised by the laws or practices of a particular State which have wider implications for the Council of Europe. The Venice Commission is the Council of Europe's advisory body on constitutional matters.²⁰⁷ It provides expert opinions on the compatibility of laws, policies and institutional structures with established European standards, including the ECHR. The Venice Commission's opinions are often referred to in judgments of the European Court of Human Rights.²⁰⁸

6.11 The Parliamentary Assembly of the Council of Europe can request an opinion from the Venice Commission and it has done so in relation to issues which concern not only the country in question but are of wider interest to other Council of Europe Member States. For example, the Assembly recently asked the Venice Commission for an opinion on the compatibility of the proposed draft revision of the French Constitution, concerning states of emergency and deprivation of nationality, with the ECHR and with Council of Europe standards.²⁰⁹ The Venice Commission's opinion has also been sought on the compatibility with the ECHR of Russia's law on the implementation of European Court of Human Rights judgments, and the Polish law concerning the Constitutional Tribunal.

6.12 In light of the Committee of Ministers' rejection of the Parliamentary Assembly's recommendation that the Committee of Ministers draw up guidelines for Council of Europe Member States on targeted killing using armed drones, the Parliamentary Assembly may now consider requesting an Opinion from the Venice Commission about

207 The Council of Europe, [European Commission for Democracy through Law](#)

208 For example, in the case of *Shindler v UK*, which concerned the Convention compatibility of the UK law under which British citizens lose the right to vote after they have been resident overseas for more than fifteen years, the Court referred to the Venice Commission's 2011 Report on Out of Country Voting CDL-AD (2011) 022.

209 PACE Resolution 2090 (2016), [Combating international terrorism while protecting Council of Europe standards and values](#) (27 January 2016), para. 21, The Venice Commission considered its opinion in response to the Assembly's request at its meeting on 11 and 12 March 2016.

the requirements of the ECHR and other relevant Council of Europe standards when a Council of Europe Member State uses lethal force abroad outside armed conflict for counter-terrorism purposes or facilitates such use of lethal force by a third country.²¹⁰

Time for leadership

6.13 In the FCO's Human Rights and Democracy Report 2014, the Government stated its commitment to working through a rules-based international system and to "supporting efforts to strengthen the UN system further, including working to mainstream human rights within the UN's [...] peace and security agendas."²¹¹

6.14 In the Government's more recent National Security Strategy, it goes further and states as one of the Government's main priorities to:²¹²

"Help strengthen the rules-based international order and its institutions [...] We will work with our partners to reduce conflict and to promote stability, good governance and human rights."

6.15 The UK is hoping to be re-elected to the UN Human Rights Council when its current term expires in 2017. Membership of the Council is of considerable importance to the UK's influence on the human rights situation in other countries. As the FCO's 2014 Human Rights Report puts it:²¹³

"The UN is a key vehicle for advancing the UK's priorities on human rights: it enables scrutiny of human rights violations worldwide; provides a forum for dialogue between states; and provides technical assistance to states on human rights in country. In 2014, the UK resumed its seat on the Human Rights Council (HRC), the UN's main intergovernmental human rights forum, which meets in Geneva three times a year. Throughout 2014, there was significant ministerial engagement with the HRC, which helped deliver UK priorities."

6.16 It is important, therefore, that the UK is seen to deliver on the aspirations in the FCO's Human Rights Report and the National Security Strategy to strengthen the rules-based international order. In our view, the urgent need for greater international consensus about how international law applies to the use of lethal force abroad for counter-terrorism purposes provides an ideal opportunity for the UK Government to show the international leadership it professes. We have therefore considered what concrete, practical steps the Government could take (in addition to publishing its own clarifications of its understanding of the legal framework within three months in response to this Report as we have recommended earlier) in order to bring some urgent international consensus to the many legal uncertainties to which we have drawn attention in this Report.²¹⁴

210 The Parliamentary Assembly, or one of its Committees, has recently requested Opinions from the Venice Commission concerning, for example, the compatibility with the ECHR of Russia's law on the implementation of European Court of Human Rights judgments, and France's laws on the state of emergency and deprivation of nationality.

211 FCO Human Rights Report 2014, p. 91 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415912/21064_WL_Human_Rights_Annual_Report_High_Res.pdf

212 National Security Strategy and Strategic Defence and Security Review 2015, Cm 9161 (November 2015), p 10

213 FCO Human Rights Report 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415912/21064_WL_Human_Rights_Annual_Report_High_Res.pdf

214 See, for example, Mr Alex Batesmith ([DRO0006](#)), Drone Wars UK ([DRO0007](#))

6.17 We welcome the Government's recent restatement of its commitment to "strengthen the rules-based international order and its institutions." In light of that commitment, we recommend that the Government not only engages fully but now takes the lead in international initiatives to advance understanding and build international consensus about the international legal framework governing the use of lethal force abroad in counter-terrorism operations outside of armed conflicts, including by the use of armed drones.

6.18 Specifically, we recommend that, in addition to bringing forward its own understanding of the legal framework within three months of this Report, the Government:

- i) Includes a detailed response to the questions posed to states by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in his 2014 Report to the UN Human Rights Council and in particular the following questions:
 - How is the requirement of imminence to be applied in the international law of self-defence in the new context?
 - If it is possible for a State to be engaged in a non-international armed conflict with a non-State armed group operating transnationally, does this imply that a non-international armed conflict can exist which has no finite territorial boundaries?
- ii) Initiates an urgent discussion in the UN Human Rights Council on the need for greater international consensus about the applicability and requirements of the legal frameworks that govern the use of lethal force abroad for counter-terrorism purposes, outside of armed conflict;
- iii) Takes active steps to build international support for a further Human Rights Council resolution mandating the relevant UN Special Rapporteurs to draw up UN Guidance for States on the use of lethal force abroad for counter-terrorism purposes outside of armed conflict and setting out the core principles which apply to such use of lethal force;
- iv) Takes the lead on this issue in the Committee of Ministers of the Council of Europe by inviting it to reconsider its Reply to the Parliamentary Assembly in the light of our Report, with a view to taking forward the recommendation of the Parliamentary Assembly that the Committee of Ministers draft guidelines for member States on targeted killings, with special reference to armed drones, reflecting States' obligations under international humanitarian and human rights law, in particular the standards laid down in the ECHR, as interpreted by the European Court of Human Rights;
- v) Invites the Committee of Ministers to consider what scope there is for requesting an advisory opinion from the European Court of Human Rights under Article 47 ECHR, seeking guidance on the application and interpretation of the right to life in Article 2 ECHR where lethal force is used abroad for counter-terrorism purposes outside armed conflict, or support is given to a third country facilitating such use of force;

- vi) **Supports any request the Parliamentary Assembly of the Council of Europe may make for an Opinion from the Venice Commission for Democracy Through Law about the requirements of the ECHR when a Council of Europe Member State uses lethal force abroad outside armed conflict for counter-terrorism purposes or facilitates such use of lethal force by a third country.**

6.19 We have explained in our Report why clarification of the legal position is so urgently needed, and why this will require strong leadership internationally. We will follow up on these recommendations by every means that is open to us, including at the international level. We recently visited the Council of Europe institutions in Strasbourg and we will discuss how best to take forward our recommendations with our sister committee, the Committee on Legal Affairs and Human Rights, in the Parliamentary Assembly and other relevant Council of Europe bodies such as the Commissioner for Human Rights. We also intend to raise our recommendations with the UN High Commissioner for Human Rights and the relevant UN Special Rapporteurs.

Conclusions and recommendations

Introduction

1. We thank the Ministry of Defence for facilitating our visit to RAF Waddington, and the serving officers there who made the visit so informative. We also thank the Secretary of State for Defence for giving oral evidence to us. We were disappointed, however, by the Government's failure to answer a number of important questions that we asked of them, particularly about the Government's understanding of the applicable legal frameworks that govern the use of lethal force abroad outside of armed conflict. We fully acknowledge the inevitable limits to transparency in relation to intelligence-based military and counter-terrorism operations, but the need to protect sensitive information cannot explain the Government's reluctance to clarify its understanding of the relevant legal frameworks. (Paragraph 1.59)
2. Because the issue of taking a life in order to protect lives is so important, we hope the Government will respond positively and transparently to this Report. (Paragraph 1.60)

The Government's policy

3. We welcome the Government's commitment to the recently established constitutional convention that, other than in exceptional emergencies, the Government will not use military force abroad without first giving the House of Commons an opportunity to debate it. We welcome too the fact that the Prime Minister came to the House of Commons at the earliest opportunity on 7 September to explain the exceptional use of force in Syria. In our view, his statements that the drone strike in Syria on 21 August was a "new departure" and was not part of an armed conflict must be read in the context of that domestic constitutional convention. (Paragraph 2.28)
4. We accept that the action taken against ISIL/Da'esh in Syria was part of the same armed conflict in which the UK was already involved in Iraq. Whether the Law of War applies depends on the proper characterisation of the situation from the point of view of international law, not domestic rules of constitutional law governing when the Government will use military force. We are satisfied that the strike on Reyaad Khan was a new departure in terms of the domestic constitutional convention governing the use of military force abroad. It was not, however, a new departure in the sense of being a use of lethal force outside of armed conflict, because we accept, as a matter of international law, that it was part of the wider armed conflict with ISIL/Da'esh already taking place in Iraq and spilling over into Syria. (Paragraph 2.29)
5. Our inquiry has therefore secured a second important clarification of the Government's position: it has established that it is the Government's policy to use lethal force abroad against suspected terrorists, even outside of armed conflicts, as a last resort, if certain conditions are satisfied. (Paragraph 2.38)
6. Despite the sometimes confusing explanations offered by the Government, we are now clear about what the Government's policy is. Although the Government says

that it does not have a “targeted killing policy”, it is clear that the Government does have a policy to use lethal force abroad outside armed conflict for counter-terrorism purposes. We understand why the Government does not want to call its policy a “targeted killing policy”. In our view, however, it is important to recognise that the Government’s policy on the use of lethal force outside of areas of armed conflict does contemplate the possibility of pre-identified individuals being killed by the State to prevent a terrorist attack. (Paragraph 2.39)

7. We welcome the Government’s recognition that such use of lethal force abroad outside of armed conflict should only ever be “exceptional”. As we make clear later in this Report, we accept that in extreme circumstances such uses of lethal force abroad may be lawful, even outside of armed conflict. Indeed, in certain extreme circumstances, human rights law may even impose a duty to use such lethal force in order to protect life. How wide the Government’s policy is, however, depends on the Government’s understanding of its legal basis. Too wide a view of the circumstances in which it is lawful to use lethal force outside areas of armed conflict risks excessively blurring the lines between counter-terrorism law enforcement and the waging of war by military means, and may lead to the use of lethal force in circumstances which are not within the confines of the narrow exception permitted by law. (Paragraph 2.40)

Legal Basis

8. We understand the sensitivity around the matters which we are investigating in this inquiry and respect the legitimate requirements of national security which make this different from our regular scrutiny work on legislation brought forward by the Government. However one of our roles as a select committee is to give careful and detailed scrutiny to Government policy which has significant implications for human rights, including those of our armed forces who are involved in such actions. In order to fulfil this important function, it is vital that the Government engage with the detailed questions which we ask about its understanding of the legal frameworks in which the policy is situated. (Paragraph 3.8)
9. The legal basis of the Government’s policy appears to be that the use of lethal force abroad outside of armed conflict for counter-terrorism purposes is lawful if it complies with (1) the international law governing the use of force by States on the territory of another State, and (2) the Law of War. In the Government’s view, it is not necessary to consider whether human rights law applies, or what it requires, because compliance with the Law of War, it argues, is sufficient to discharge any obligations that apply under international human rights law. (Paragraph 3.19)
10. We accept, as does the UN Security Council, that the attacks on the UK already mounted by ISIL/Da’esh satisfy the requirement that there must be an armed attack on the UK which entitles it to invoke the right to self-defence. However, to provide certainty for the future, we recommend that in its response to our Report the Government provide clarification of its view about the threshold that needs to be met in order for a terrorist attack or threatened attack to constitute an “armed attack” which entitles the Government to invoke its right of self-defence in international law. (Paragraph 3.29)

11. The Government's interpretation of the concept of "imminence" is crucial because it determines the scope of its policy of using lethal force outside areas of armed conflict. Too flexible an interpretation of imminence risks leading to an overbroad policy, which could be used to justify any member of ISIL/Da'esh anywhere being considered a legitimate target, which in our view would begin to resemble a targeted killing policy. (Paragraph 3.40)
12. We therefore recommend that the Government provides, in its response to our Report, clarification of its understanding of the meaning of "imminence" in the international law of self-defence. In particular, we ask the Government to clarify whether it agrees with our understanding of the legal position, that while international law permits the use of force in self-defence against an imminent attack, it does not authorise the use of force pre-emptively against a threat which is too remote, such as attacks which have been discussed or planned but which remain at a very preparatory stage. (Paragraph 3.41)
13. Subject to the two questions we have raised above about the Government's understanding of the meaning of "armed attack" and "imminence", we accept the Government's understanding of the international law of self-defence which forms the first part of the legal basis for its policy of using lethal force abroad outside of armed conflict. (Paragraph 3.42)
14. We welcome the unequivocal statement by the Secretary of State for Defence in his evidence to us that the Government does not consider the UK to be in a non-international armed conflict with ISIL/Da'esh wherever it may be found. This disavowal of the controversial US position according to which it considers itself to be in a single, global non-international armed conflict with Al Qaida and its associates goes some way towards meeting concerns that the Government's policy is now so wide as to seek to justify using lethal force against any person it considers to be a member of ISIL/Da'esh wherever they are. (Paragraph 3.53)
15. In our view, the Secretary of State's position that the Law of War applies to the use of lethal force abroad outside of armed conflict, and that compliance with the Law of War satisfies any obligations which apply under human rights law, is based on a misunderstanding of the legal frameworks that apply outside of armed conflict. In an armed conflict, it is correct to say that compliance with the Law of War is likely to meet the State's human rights law obligations, because in situations of armed conflict those obligations are interpreted in the light of humanitarian law. Outside of armed conflict, however, the conventional view, up to now, has been that the Law of War, by definition, does not apply. We recommend that the Government, in its response to our Report, clarifies its position as to the law which applies when it uses lethal force outside of armed conflict. (Paragraph 3.55)
16. We note that any future derogation from the ECHR will not affect the Government's policy in relation to the use of lethal force abroad outside of armed conflict. Derogation from the right to life in Article 2 ECHR is only possible in relation to "deaths resulting from lawful acts of war". States can therefore choose to be bound by the more permissive rules of the Law of War, rather than the more restrictive rules of human rights law, in times of war or public emergency. However, the Government will not be able to derogate from the right to life in Article 2 where

it uses lethal force abroad outside of armed conflict: such deaths will not be the result of “acts of war” because by definition they will have taken place outside armed conflict. The right to life in Article 2 ECHR therefore inescapably applies to uses of lethal force abroad outside of armed conflict. (Paragraph 3.62)

17. In our view, there is scope to spell out the Government's interpretation of what the right to life in Article 2 ECHR requires in this particular context and we ask the Government to set out its understanding in its response to our Report. The issue which would particularly benefit from clarification by the Government is how it understands the requirement that the use of force to protect life must be no more than is absolutely necessary, having regard to the nature of the threat posed by ISIL/ Da'esh. It would be useful if the Government's response could spell out the sorts of considerations which will be relevant to assessing whether resort to lethal force really is the only option to prevent the threatened violence, and no other means such as capture or some other means of incapacitation is practical. (Paragraph 3.79)
18. We also consider there to be scope for internationally agreed guidance as to how the right to life in Article 2 ECHR should be interpreted and applied in this context, and in Chapter 6 we consider what role the Government could play in seeking to achieve such international consensus. (Paragraph 3.80)
19. We therefore also ask the Government to clarify, in its response to this Report, its understanding of the legal basis on which it provides any support which facilitates the use of lethal force outside of armed conflict by the US or any other country adopting the same or a similar view with regard to the use of lethal force. (Paragraph 3.89)
20. In our view, the Government's assertion that the Law of War applies to a use of lethal force outside of armed conflict demonstrates the necessity of the Government clarifying, in its response to our Report, its understanding of the legal position. The tests which are to be satisfied before such force is used, the safeguards required in the decision-making process and the necessary independent and effective mechanisms for accountability all flow from the legal framework which governs such uses of lethal force. We call on ministers to avoid conflating the Law of War and the ECHR and to remove the scope for such legal confusion by setting out the Government's understanding of how the legal frameworks are to be interpreted and applied in the new situation in which we find ourselves. (Paragraph 3.90)
21. We therefore recommend that the Government provides clarification of its position on the following legal questions: (Paragraph 3.92)
 - its understanding of the meaning of the requirements of “armed attack” and “imminence” in the international law of self-defence; (Paragraph 3.92)
 - the grounds on which the Government considers the Law of War to apply to a use of lethal force outside armed conflict; (Paragraph 3.92)
 - its view as to whether Article 2 ECHR applies to a use of lethal force outside armed conflict, and if not why not; (Paragraph 3.92)

- its understanding of the meaning of the requirements in Article 2 ECHR that the use of force be no more than absolutely necessary, and that there is a real and immediate threat of unlawful violence, in the context of the threat posed by ISIL/Da'esh; and (Paragraph 3.92)
- its understanding of the legal basis on which the UK takes part in or contributes to the use of lethal force outside armed conflict by the US or any other country adopting the same or a similar view with regard to the use of lethal force. (Paragraph 3.92)

The decision-making process

22. We recommend that the ISC should consider whether it should have a role in keeping under review any list which may exist of pre-identified targets against whom lethal force might be used outside of armed conflict, as happens in the US. (Paragraph 4.17)
23. We recommend that the Government should make clear, in its response to our Report, precisely when legal advice is sought and from whom prior to use of lethal force outside armed conflict, and that legal advice should always be sought from senior Foreign Office lawyers on any question of international law. (Paragraph 4.21)
24. The applicability of the ECHR to uses of lethal force abroad outside of armed conflict has some important implications for the decision-making process. To be compatible with the right to life, operations which result in the use of lethal force outside armed conflict must have been planned and controlled in such a way as to minimise the risk of loss of life. The decision-making process for more conventional uses of lethal force in armed conflict is designed to secure compliance with the Law of War. (Paragraph 4.22)
25. In our view, the applicability of the ECHR to uses of lethal force outside of armed conflict means that the decision-making process for more conventional uses of lethal force in armed conflict may not be sufficient to ensure compliance with the relevant standards on the use of lethal force. The Government should consider whether any changes to the process are required for what the Government acknowledges to be a wholly exceptional situation which is likely to arise very infrequently. (Paragraph 4.23)
26. For the Government's policy to command public confidence, and to make it more likely that decisions pursuant to it do not lead to breaches of the right to life, the decision-making process must be robust, with sufficient challenge built into the process, rigorous testing of intelligence to minimise the risk of mistakes, and access to the requisite advice including legal advice at the appropriate stages in the process. (Paragraph 4.24)
27. It is also important that there is provision for constant review of whether or not the relevant conditions continue to be satisfied. As Mark Field MP said in the Westminster Hall debate on drones, "[t]he notion that an individual is on a list until such time as they are eliminated or assassinated seems to be at odds with article 51 [of the UN Charter]. There needs to be a process whereby the question

of whether a person is still an imminent threat to the UK is regularly turned over in people's minds." The same applies to the other main condition which has to be satisfied: whether the use of force is no more than absolutely necessary to protect life. (Paragraph 4.25)

28. We also consider that there could be greater clarity about the level within Government at which exceptional decisions to use lethal force outside armed conflict are made. The Prime Minister told the Liaison Committee on 12 January that "these decisions are in no way made lightly. It is one of the most difficult decisions that any Prime Minister has to make". Our understanding is that the Prime Minister is only involved at the "in principle" stage of authorising a target for a lethal strike. The level of decision-making at the later operational stage should also, in our view, reflect the extraordinary seriousness of such a use of lethal force outside areas of armed conflict. Uses of lethal force pursuant to the policy will, we presume, be extremely rare, and we do not think it is unreasonable to expect ministerial involvement in the operational decision. We look forward to the Government's clarification of these matters in its response to our Report. (Paragraph 4.26)

Accountability

29. We welcome the Prime Minister's acknowledgment of the importance of independent scrutiny of such extraordinary acts. Accountability is important for a number of reasons: it is a means of ensuring that decision-makers keep to standards; it is a safeguard against the danger of mission-creep when broad powers are exercised in ever wider circumstances; and it gives the public the confidence that is necessary to entrust such exceptional powers to ministers. It is also necessary in order to comply with the requirements of the ECHR. (Paragraph 5.3)
30. We recommend that the Government should establish clear independent accountability mechanisms in relation to the future use of lethal force abroad outside of armed conflict, capable of carrying out effective investigations into whether particular uses of lethal force were justified and lawful, including: (Paragraph 5.30)
- automatic referral to the ISC of any such use of lethal force;
 - a revised Memorandum of Understanding between the Prime Minister and the ISC making clear that the Government accepts that the ISC has the power to consider intelligence-based military operations, and that the MoD must provide the ISC with all the relevant information about such an operation that the ISC needs to make its investigation effective;
 - access to independent legal advice rather than legal advice from the Government's lawyers.
31. We agree with the Government about the importance of political accountability, and ask the Government to reconsider its apparent position that there should be no accountability through the courts for any action taken pursuant to its policy of using lethal force outside areas of armed conflict. (Paragraph 5.38)

Developing international consensus

32. We therefore would not expect the Government to maintain its opposition to the UN Human Rights Council considering the subject of how the international legal frameworks apply to the use of armed drones for counter-terrorism purposes (Paragraph 6.6)
33. We welcome the Government's recent restatement of its commitment to "strengthen the rules-based international order and its institutions." In light of that commitment, we recommend that the Government not only engages fully but now takes the lead in international initiatives to advance understanding and build international consensus about the international legal framework governing the use of lethal force abroad in counter-terrorism operations outside of armed conflicts, including by the use of armed drones. (Paragraph 6.17)
34. Specifically, we recommend that, in addition to bringing forward its own understanding of the legal framework within three months of this Report, the Government: (Paragraph 6.18)
 - i) Includes a detailed response to the questions posed to states by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in his 2014 Report to the UN Human Rights Council and in particular the following questions:
 - How is the requirement of imminence to be applied in the international law of self-defence in the new context?
 - If it is possible for a State to be engaged in a non-international armed conflict with a non-State armed group operating transnationally, does this imply that a non-international armed conflict can exist which has no finite territorial boundaries?
 - ii) Initiates an urgent discussion in the UN Human Rights Council on the need for greater international consensus about the applicability and requirements of the legal frameworks that govern the use of lethal force abroad for counter-terrorism purposes, outside of armed conflict;
 - iii) Takes active steps to build international support for a further Human Rights Council resolution mandating the relevant UN Special Rapporteurs to draw up UN Guidance for States on the use of lethal force abroad for counter-terrorism purposes outside of armed conflict and setting out the core principles which apply to such use of lethal force;
 - iv) Takes the lead on this issue in the Committee of Ministers of the Council of Europe by inviting it to reconsider its Reply to the Parliamentary Assembly in the light of our Report, with a view to taking forward the recommendation of the Parliamentary Assembly that the Committee of Ministers draft guidelines for members States on targeted killings, with special reference to armed drones, reflecting States' obligations under international humanitarian and human rights law, in particular the standards laid down in the ECHR, as interpreted by the European Court of Human Rights;

- v) Invites the Committee of Ministers to consider what scope there is for requesting an advisory opinion from the European Court of Human Rights under Article 47 ECHR, seeking guidance on the application and interpretation of the right to life in Article 2 ECHR where lethal force is used abroad for counter-terrorism purposes outside armed conflict, or support is given to a third country facilitating such use of force;
 - vi) Supports any request the Parliamentary Assembly of the Council of Europe may make for an Opinion from the Venice Commission for Democracy Through Law about the requirements of the ECHR when a Council of Europe Member State uses lethal force abroad outside armed conflict for counter-terrorism purposes or facilitates such use of lethal force by a third country.
35. We have explained in our Report why clarification of the legal position is so urgently needed, and why this will require strong leadership internationally. We will follow up on these recommendations by every means that is open to us, including at the international level. We recently visited the Council of Europe institutions in Strasbourg and we will discuss how best to take forward our recommendations with our sister committee, the Committee on Legal Affairs and Human Rights, in the Parliamentary Assembly and other relevant Council of Europe bodies such as the Commissioner for Human Rights. We also intend to raise our recommendations with the UN High Commissioner for Human Rights and the relevant UN Special Rapporteurs. (Paragraph 6.19)

Declaration of Lords' interests

Baroness Buscombe

Has a son who is a trainee observer in the Fleet Air Arm.

A full list of members' interests can be found in the [Register of Lords' Interests](#)

Formal Minutes

Wednesday 27 April 2016

Members present:

Ms Harriet Harman, in the Chair

| | |
|-----------------|--------------------------------|
| Fiona Bruce | Baroness Buscombe |
| Karen Buck | Baroness Hamwee |
| Jeremy Lefroy | Lord Henley |
| Mark Pritchard | Baroness Lawrence of Clarendon |
| Amanda Solloway | Baroness Prosser |
| | Lord Woolf |

Draft Report (*The Government's Policy on the Use of Drones for Targeted Killing*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 6.19 read and agreed to.

Summary agreed to.

Annexes to the Report agreed to.

Resolved, That the Report be the Second Report of the Committee to the House.

Ordered, That the Chair make the Report to the House of Commons and the Report be made to the House of Lords.

Written evidence was ordered to be reported.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134 of the House of Commons.

[Adjourned till Wednesday 4 May at 3.00pm.]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 9 December 2015

Question number

Jennifer Gibson, Reprieve, **Professor Sir David Omand**, Chair, Birmingham Policy Commission, and **Professor Thomas Simpson**, Associate Professor of Philosophy and Public Policy, University of Oxford

[Q1–18](#)

Wednesday 16 December 2015

Rt Hon Michael Fallon MP, Secretary of State for Defence, Ministry of Defence

[Q19–36](#)

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

DRO numbers are generated by the evidence processing system and so may not be complete.

- 1 Caroline Lucas MP ([DRO0020](#))
- 2 Clive Stafford-Smith ([DRO0016](#))
- 3 Colin Murray ([DRO0022](#))
- 4 Columbia Human Rights Clinic ([DRO0023](#))
- 5 Dapo Akande ([DRO0024](#))
- 6 Dr Noelle Quenivet ([DRO0010](#))
- 7 Dr William Boothby ([DRO0004](#))
- 8 Drone Wars Uk ([DRO0007](#))
- 9 Mr Alex Batesmith ([DRO0006](#))
- 10 Mr Joseph Savirimuthu ([DRO0013](#))
- 11 Ms Konstantina Tzouvala ([DRO0014](#))
- 12 Professor Michael Newman ([DRO0011](#))
- 13 Professor Nicholas Wheeler ([DRO0009](#))
- 14 Professor Richard Ekins ([DRO0021](#))
- 15 Professor Robert McCorquodale ([DRO0008](#))
- 16 Professor Simon Gardner ([DRO0002](#))
- 17 Professor Sir David Omand ([DRO0025](#))
- 18 Reprive ([DRO0017](#))
- 19 Reprive ([DRO0026](#))
- 20 Reverend Nicholas Mercer ([DRO0005](#))
- 21 Rights Watch Uk ([DRO0019](#))
- 22 Verity Adams ([DRO0015](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website.

Session 2015–16

First Report

Legislative Scrutiny: Trade Union Bill

HL Paper 92/HC 630

Annex 1: The Relevant Legal Frameworks

(1) International law on the Use of Force²¹⁵

General prohibition

1. International law prohibits States from using force in the conduct of their international relations: Article 2(4) of the UN Charter provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

2. As well as being recognised in the UN Charter, this general prohibition is so well established as to be generally agreed to be part of customary international law.

3. While international treaties and other sources of international law are not generally part of UK law until they have been transformed into domestic law by, for example, incorporation by statute, customary international law is automatically part of UK law.

4. In keeping with its status as a norm of customary international law, the International Court of Justice has interpreted the general prohibition on the use of force in Article 2(4) of the UN Charter very strictly.

Exceptions

5. The international law prohibition on the use of force by states in the territory of another state is, however, subject to certain exceptions. There are three well established exceptions:

- (1) Consent (or invitation)
- (2) UN Security Council authorisation
- (3) Self-defence.

6. Each of these three exceptions is explained in more detail below. The International Court of Justice insists on the exceptions being interpreted very narrowly, and is generally resistant to arguments that would widen the scope of the exceptions. The most relevant exception for the purposes of the Committee's inquiry is the third exception, self-defence, as this is the justification relied on by the Government for its new policy on the use of lethal force abroad.

7. A fourth exception, humanitarian intervention, is arguably emerging, but there continues to be disagreement amongst states, and between international lawyers, as to whether or not it has attained the status of a recognised exception. The UK Government claims that the use of force for humanitarian intervention is a lawful exception. Indeed, this was the basis of the Government's argument in favour of air strikes against the Assad

²¹⁵ For a useful overview see [Legal basis for UK military action in Syria](#), Briefing Paper, House of Commons Library, November 2015

regime in Syria in 2013, to protect the Syrian people against the future use of chemical weapons.²¹⁶ Humanitarian intervention has not, however, been invoked by the Government to justify its use of lethal force abroad by drones and it is therefore not considered further here.

Exception (1): Consent/invitation

8. In international law, the government of a state can consent to another state using force on its territory, or can invite another state to use force on its territory.

9. This is the legal basis on which the UK Government is already using force against ISIL/Da'esh in Iraq, following the request of the Iraqi government for international assistance to combat ISIL/Da'esh.²¹⁷ It also appears to be the basis on which Russia is using force in Syria, at the request of President Assad. The UK Government has not, however, been asked for assistance by Syria to defend itself against ISIL/Da'esh, nor, it appears, has the Government asked the Syrian Government to agree to the use of force on its territory.

10. Consent of the state on whose territory the force is used may be implied from that state's acquiescence in the use of force on its territory. However, while there may have been a period during which Syria was arguably acquiescing in the use of force on its territory against ISIL/Da'esh by coalition forces, it is clear that this has not been the case since September 2015 when Syria expressly invited Russia to assist. Consent, express or implied, therefore cannot be the legal basis for the use of force by the UK Government in Syria.

Exception (2): UN Security Council authorisation

11. The UN Security Council can authorise states to use force under Chapter VII of the UN Charter (Articles 39 to 51). Once the Security Council has determined that there is a threat to the peace, a breach of the peace or act of aggression, it can authorise states under Article 41 of the UN Charter to use force "to maintain or restore international peace or security" when it considers that other measures would be inadequate or have proved to be inadequate. Such Security Council resolutions usually authorise states to "take all necessary measures" rather than explicitly authorise the use of force.

12. There is currently no Security Council resolution authorising the use of force in Syria or Iraq. UN Security Council Resolution 2249 (2015) on ISIL/Da'esh in Syria and Iraq, which was passed by the Security Council on 20 November 2015 in the wake of the attacks in Paris, is not a Chapter VII resolution authorising the use of force and therefore does not provide a legal basis for the use of force in Syria. In this resolution, the Security Council determines that ISIL/Da'esh "constitutes a global and unprecedented threat to international peace and security" and "calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL/Da'esh in Syria and Iraq, to redouble and co-ordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL/Da'esh [...] and to eradicate the safe haven they have established over significant parts of Iraq and Syria."

²¹⁶ See summary of AG's opinion, 2013.

²¹⁷ See letter to UN Security Council September 2014.

13. The resolution therefore does not purport to authorise the use of force, but provides the Security Council's implicit support for the other legal basis states are invoking to justify their use of force in Syria and Iraq: self-defence.

14. The Government does not rely on Security Council Resolution 2249 as providing legal authority for using force in Syria. Both the Prime Minister and the Attorney General have clearly stated that the legal basis for using force in Syria is not the Security Council resolution but the right of self-defence, which is “underscored” or “underlined” by the Security Council in its resolution.²¹⁸

Exception (3): Self-defence

15. The third exception to the general prohibition on the use of force is self-defence. This is an “inherent right”, recognised in Article 51 of the UN Charter which provides:

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.

16. Self-defence may be individual (in defence of the State itself) or collective (in defence of another State at its request).

17. The Prime Minister told the House of Commons on 7 September that the drone strike against Reyaad Khan in Syria on 21 August was in defence of the UK against a threat of imminent terrorist attack—that is, in individual self-defence.

18. The UK's Permanent Representative to the UN told the Security Council by letter dated 8 September that the drone strike was *also* in the collective self-defence of Iraq.

19. The Government's position is that the drone strike in Syria on 21 August was a lawful use of force on the territory of another State because it was an exercise of the inherent right of both individual self-defence of the UK and collective self-defence of Iraq. The Government similarly relies on both individual self-defence of the UK against terrorist attack by ISIL/Da'esh and collective defence of Iraq against attack by ISIL/Da'esh to justify future such uses of force in Syria. There is nothing necessarily contradictory about these claims: a single act of self-defence can serve both purposes of individual and collective self-defence.

20. However, a number of conditions must be satisfied for a state to be entitled to invoke the right of self-defence: there must be (1) an “armed attack” which must be (2) actual or imminent and the resort to force must be both (3) necessary and (4) proportionate.

Armed Attack

21. For a State to invoke the right of self-defence there must be an “armed attack”. To constitute an “armed attack” for the purposes of the right of self-defence the attack must

²¹⁸ See [Prime Minister's Response](#) to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria (26 November 2015); Prime Minister HC Deb 26 Nov 2015 [col 1491](#); and Attorney General HC Deb 26 Nov 2015 [col 1468](#).

cross a certain threshold of seriousness or intensity. A series of minor attacks is not necessarily enough to constitute an armed attack. The scale and effect of the attack must reach a certain threshold of gravity.

22. The Prime Minister told the House of Commons that “It is [...] clear that ISIL’s campaign against the UK and our allies has reached the level of an ‘armed attack’, such that force may lawfully be used in self-defence to prevent further atrocities being committed by ISIL.”

Non-state actors

23. Whether the right of self-defence can be exercised where the threat of armed attack emanates from non-state actors who are not acting under the control or direction of another state is an issue which is not clearly settled in international law. Some international lawyers appear to take the view that the right of self-defence can only be invoked against another State, relying on the judgment of the ICJ in the Israeli Wall case. Others, including the Government, take the view that a State’s inherent right of self-defence extends to attacks originating from non-state actors such as ISIL/Da’esh. State practice since 9/11 certainly supports the view that a State’s right of self-defence includes the right to respond with force to an actual or imminent armed attack by a non-State actor, and the most recent UN Security Council Resolution 2249 (2015) lends support to this view.

24. To be entitled to rely on self-defence against non-state actors, the State from whose territory the armed attack is being launched or prepared for must be unable or unwilling to prevent the attack. Again, the legal status of the unwilling or unable test is disputed.

25. The Government’s position is that the right of self-defence can be invoked against non-state actors operating in another state which is unwilling or unable to prevent the attack by the non-state actors. The Prime Minister told the Commons that “there is a solid basis of evidence on which to conclude, first, that there is a direct link between the presence and activities of ISIL/Da’esh in Syria and its ongoing attack on Iraq, and secondly, that the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL/Da’esh’s continuing attack on Iraq, or indeed attacks on us.”²¹⁹

Imminence

26. A State’s right of self-defence can be invoked preventively, to prevent an imminent armed attack. However the meaning of imminence is disputed. At one extreme the US position is that there is a right of pre-emptive self-defence. Under the long established “Caroline test” (so called after a 19th century case on the use of force), the need to use force in self defence must be “instant, overwhelming, leaving not choice of means and no moment for deliberation.” However, others argue that the Caroline test is too narrow in the light of modern conditions.

27. The Prime Minister did not refer to the requirement of “imminence” at all in his Response to the Foreign Affairs Committee Report nor in his statement to the House of Commons on 26 November. Instead, he referred to ISIL’s “ongoing” and “continuing” attack on Iraq. The Government treats the armed attack on Iraq by ISIL/Da’esh as an actual attack which is ongoing. However, the Government appears to rely on the armed

²¹⁹ HC Deb 26 Nov 2015 [col 1491](#).

attack on the UK being “imminent”. Both the Attorney General and the Defence Secretary have suggested in oral evidence that the Government favours a more expansive definition of “imminence” which would entitle the UK to act in self-defence where an identified individual is involved in an ongoing way in plotting terrorist attacks on the UK.

Necessity

28. The use of force in self-defence must also satisfy the requirement of necessity: it must be a last resort after all other options have been exhausted. This requirement can be given effect by building certain conditions into the decision-making process. The US policy, for example, requires the decision-maker to determine that capture is not an option before lethal force is authorised. In the context of the use of force in self-defence against non-state actors, the requirement that the host State is either unable or unwilling to prevent attacks is in effect a specific application of the necessity requirement.

Proportionality

29. The final requirement is that any resort to force must be proportionate: the degree of force used must be no greater than necessary to end the armed attack or to avert the threat of such attack, and the harm caused by the use of force must be in proportion to the scale of the threat that the action was designed to avoid. A use of lethal force which resulted in large numbers of civilian casualties, for example, would be unlikely to be proportionate if the scale of the threatened attack was relatively small.

Relationship with other international law frameworks

30. Compliance with international law on the use of force does not exhaust all the legal questions about the lawfulness of the drone strike in Syria on 21 August or the Government's policy. The fact that a use of lethal force is lawful under the international law on the use of force, for example because it was taken in self-defence, does not mean that the use of force is necessarily lawful under the other relevant international legal frameworks: the Law of War (otherwise known as the law of armed conflict or international humanitarian law) and international human rights law.²²⁰ Any use of force in lawful exercise of the right of self-defence must also comply with those other legal frameworks where they apply. Those legal frameworks must also therefore be addressed, separately and in turn.

(2) The Law of War²²¹

What is it?

31. The Law of War consists of a set of international rules the purpose of which is to limit the suffering caused by armed conflict by regulating its conduct.²²² The Law of War does not determine whether a State does or does not have the right to resort to armed force: that is the business of the branch of international law on the use of force considered in

²²⁰ International Law Commission Commentary to Article 21 of the Articles on the Responsibility of States for Wrongful Acts.

²²¹ For a useful introductory guide to The Law of War, see [International Humanitarian Law: a primer](#), Briefing Paper 7429, House of Commons Library 8 January 2016

²²² See [Handbook for Parliamentarians: Respect for The Law of War](#) (ICRC/IPU, 1999)

section (1) above. The Law of War governs the way in which armed conflict is conducted.²²³ It is premised on the idea that even in wartime some things are not permitted. It seeks to temper military necessity with principles of humanity.

Sources

32. The Law of War is to be found in customary international law and various international treaties, the most important of them the four Geneva Conventions of 1949 and their additional protocols. Every State in the world has ratified the Geneva Conventions.

33. There is no specific court to ensure the observance of States' obligations under the Law of War. The International Committee of the Red Cross is the "guardian and promoter" of the Law of War. It issues interpretive guidance on the Law of War, but it is not a court and its interpretations of the Law of War are therefore not legally binding on States.

Applicability

34. The Law of war applies where there is an armed conflict (which is why it is often colloquially referred to as "the law of war" or "the law of armed conflict").

35. Armed conflicts are of two types: international and non-international. The classification of an armed conflict as one type or another depends on the parties to the conflict:

- International armed conflicts, between two or more States;
- Non-international armed conflicts, or internal armed conflicts, between the State and an organised non-state armed group, or between several such non-state actors within a state.

36. Today, most armed conflicts are non-international armed conflicts. A non-international armed conflict can take place across State boundaries: the conflict is "non-international" because one of the parties is a non-State actor, even though the territorial scope of the conflict may cross State boundaries. So, the Government considers itself to be involved in a non-international armed conflict with ISIL/Daesh which is taking place in both Iraq and Syria.

37. The classification of an armed conflict as international or non-international affects the legal standards that apply to the conflict, because the applicable law depends on which type of armed conflict is taking place. A more basic set of rules applies to non-international armed conflicts compared to international armed conflicts. For example, in a non-international armed conflict, there is no prisoner-of-war status, and no combatant immunity.

38. Certain threshold conditions must be satisfied in order for a non-international armed conflict to exist and for the Law of War therefore to apply. The first threshold condition concerns the intensity of the violence. Armed violence should not be sporadic or isolated: there must be "protracted armed violence between governmental authorities and organised armed groups or between such groups within a State." The second condition is

²²³ IHL is often referred to as the *ius in bello* (the law which applies in war), in contrast to the *ius ad bellum* (the law which determines whether a State is entitled to resort to force).

that the conflict must be with an armed group that satisfies the criteria of being sufficiently organised (there must be a command structure, headquarters and an ability to plan and carry out military operations).

Relevant legal standards on lethal force

39. The Law of War permits targeted killing in an armed conflict, provided certain principles and conditions are complied with.

40. The first Law of War principle that must be complied with is the principle of “distinction”: targeting must distinguish between lawful military targets and civilians. A person is a lawful target in an international armed conflict if he or she is a combatant or a directly participating civilian. A person is a lawful target in a non-international armed conflict if he or she is a member of an armed group or a civilian directly participating in hostilities.

41. The second Law of War principle is the principle of proportionality: a lawful military target can be attacked only after an assessment concluding that the military advantage outweighs the risk of civilian casualties. Civilian casualties are therefore contemplated by the Law of War, provided they are not disproportionate to the military advantage to be gained from the use of force.

42. The third Law of War principle that applies to the use of lethal force in armed conflict is the principle of “precaution”: constant precautions must be taken to spare civilians when choosing targets, means and methods of attack. This means that care must be taken to minimise the danger to civilians; any use of force must be abandoned if it becomes clear that harm to civilians will outweigh the military objective.

Accountability

43. Apart from in the extreme case of alleged war crimes there is no obligation to conduct an *ex post* investigation of the use of lethal force in armed conduct. Most of the legal constraints imposed by the Law of War operate prior to the decision whether or not to use lethal force.

Comparison with human rights law

44. Compared to international human rights law (see section (3) below), the Law of War is more permissive towards the use of lethal force. Deliberate targeted killing is permitted, provided the individual in question is a lawful military target and the principles of proportionality and precaution are complied with. *Ex post* accountability obligations are weak in the Law of War compared to those imposed by human rights law.

(3) Human Rights Law

The most relevant human right

45. The human right most relevant to the Committee's inquiry is the right to life. The right to life is often referred to as the most fundamental human right, or the supreme right.²²⁴

Sources

46. The right to life is proclaimed in the Universal Declaration of Human Rights of 1948,²²⁵ and the rule against the arbitrary deprivation of life is a rule of customary international law. The right is also recognised in the main human rights treaties to which the UK is a party. Article 6 of the International Covenant on Civil and Political Rights ("ICCPR"), for example, provides:

"6(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

47. Article 2 of the European Convention on Human Rights ("ECHR") also recognises the right to life. Article 2(1) provides that "Everyone's right to life shall be protected by law", while Article 2(2) contains an exhaustive list of grounds on which lethal force may be used:

"2(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purposes of quelling a riot or insurrection."

48. The right to life in Article 2 ECHR is also part of UK law by virtue of the Human Rights Act. Public authorities are therefore under a statutory duty to act compatibly with the right to life, as interpreted by the European Court of Human Rights, and that duty is directly enforceable against public authorities in UK courts.

49. The common law has also long recognised and protected the right to life, as demonstrated, for example, in the common law criminal offences of murder and manslaughter.

Applicability

50. International human rights law is referred to by Cristof Heyns, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, in his written evidence,

²²⁴ See, for example, UN Human Rights Committee General Comment on the Right to Life in Article 6 ICCPR.

²²⁵ Article 3 UDHR provides: "Everyone has the right to life ...".

as “the default, generally applicable regime.”²²⁶ The International Court of Justice has confirmed in a number of decisions that human rights treaties apply not only in peacetime but also in armed conflict.²²⁷

51. The general applicability of human rights obligations, even in armed conflict, is shown by the fact that the relevant human rights treaties provide for derogations during times of war or public emergency. Under the ICCPR Article 4, for example, in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, States can derogate from their obligations under the Covenant to the extent strictly required by the exigencies of the situation. There can be no derogation from the right to life under the ICCPR, however. States can similarly derogate from ECHR rights “in time of war or other public emergency threatening the life of the nation” (Article 15). However, no derogations are permitted from the right to life in Article 2 ECHR “except in respect of deaths resulting from lawful acts of war” (Article 15(2)).

52. The applicability of the right to life in Article 2 ECHR depends on the victim being within the jurisdiction of the UK. Jurisdiction under the ECHR is primarily territorial, but the ECHR also has extraterritorial application in certain circumstances, including the exercise of power and control over the person in question.²²⁸ On the current state of the case-law, the use of lethal force abroad by a drone strike is sufficient to bring the victim within the jurisdiction of the UK: in the recent case of *Al Sadoon v Secretary of State for Defence*, the High Court held that “whenever and wherever a state which is a contracting party to the [ECHR] purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights.”²²⁹ The judge found it difficult to imagine a clearer example of physical control over an individual than when the State uses lethal force against them.

53. The assumed applicability of IHRL to action taken extraterritorially against ISIS/Da'esh is also evident from the terms of the UN Security Council Resolution 2249 (2015) on ISIS/Daesh in Syria and Iraq, which calls on States to take all necessary measures “in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law”.

Relevant legal standards on lethal force

54. The protection human rights law gives to the right to life is multi-faceted and has been elaborated by the monitoring and enforcement mechanisms which States have created under the human rights treaties to give effect to the human rights recognised in the treaties: in particular the UN Human Rights Committee which monitors compliance with the ICCPR and the European Court of Human Rights which was established to ensure the observance of the obligations assumed by States in the ECHR.

55. The right to life imposes on States a negative obligation, not to deprive a person of their life arbitrarily. The use of lethal force may be lawful under human rights law, but

226 Christoph Heyns, Dapo Akande, et al, ([DRO0024](#)), *The International Law Framework Regulating the Use of Armed Drones*.

227 See e.g. the ICJ's advisory opinions on *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep, para. 25, and *Legal Consequences of the Construction of a Wall in the Occupied Territory* [2004] ICJ Rep 136 para. 106.

228 *Al Skeini v UK*, applied by the UK Supreme Court in *Smith v MOD*.

229 [2015] EWHC 715 (Admin) para. 106 (17 March 2015). The Government is appealing against the judgment to the Court of Appeal.

only as a last resort: it must be absolutely necessary in the sense that there is no other means, such as capture or non-lethal incapacitation, of preventing the threat; and it must be proportionate in the sense that it is strictly required to avert an imminent threat to life. The State is also under an obligation to ensure that any law enforcement operation which may culminate in the use of lethal force is subject to careful planning and control.²³⁰

56. Some of the principles derived from international human rights law's protection of the right to life have been distilled into the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Principle 9 provides that "intentional lethal use of firearms may be made only when strictly unavoidable in order to protect life." Under human rights law, therefore, the intentional, premeditated killing of an individual outside of armed conflict will only be lawful if it is the only way to protect against an immediate threat to life, such as in a hostage situation in which the life of a hostage is threatened.

57. The right to life also imposes various positive obligations on States. The obligation to respect and secure the rights enshrined in human rights treaties such as the ICCPR and the ECHR places States under an obligation to protect the lives of individuals against threats from other individuals such as criminals and terrorists. The duty to protect the right to life by law also requires the State to have a legal framework which provides effective protection for the right to life, for example by criminalising murder, and also regulating the use of lethal force by law enforcement officials.

58. In armed conflict, although human rights law applies, its substantive protections, including for the right to life, are to be read in the light of the requirements of the Law of War²³¹. Compliance with the Law of War in armed conflict is therefore likely to be sufficient to discharge the State's obligations under human rights law.

Accountability

59. The right to life also imposes procedural obligations on the State: to carry out an independent and effective investigation into any credible allegation that there has been an unlawful deprivation of life, capable of giving rise to accountability for any such violation of the right to life. This obligation requires State to investigate deprivations of life following use of lethal force by the State.

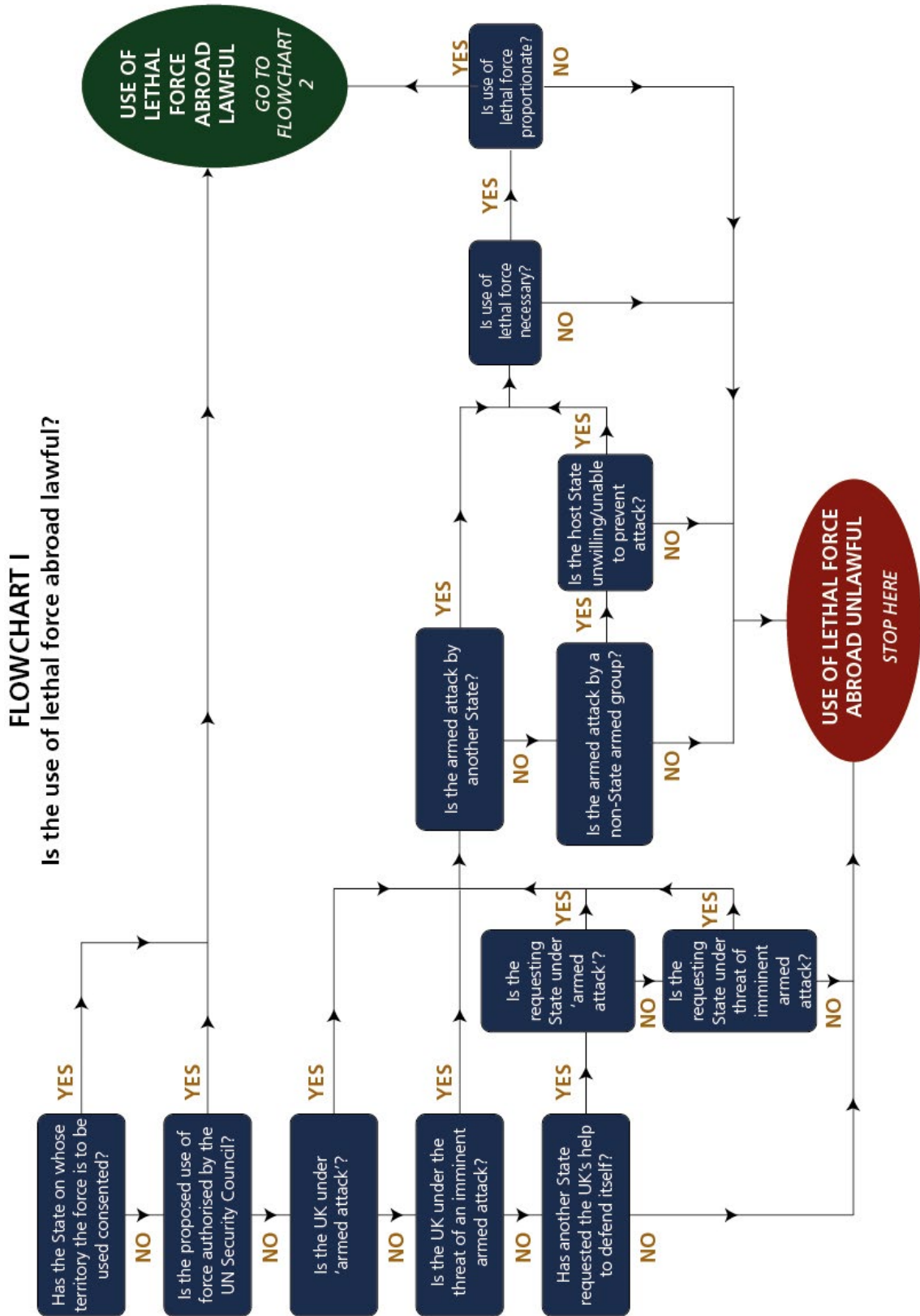
Comparison with the Law of War

60. Compared to the Law of War (see section (2) above), international human rights law is more widely applicable: like the Law of War it applies in armed conflict, but it also applies outside of armed conflict (when the Law of War does not apply). It provides higher protection for the right to life by imposing higher legal standards which must be satisfied before lethal force can be used: life can only be deliberately taken if it is absolutely necessary in order to protect life and if the degree of force used is strictly proportionate to the threat to be averted. Civilian casualties are therefore more difficult to justify under international human rights law. International human rights law also imposes a stronger procedural obligation on the State to carry out an independent and effective investigation and to hold to account for any unlawful deprivations.

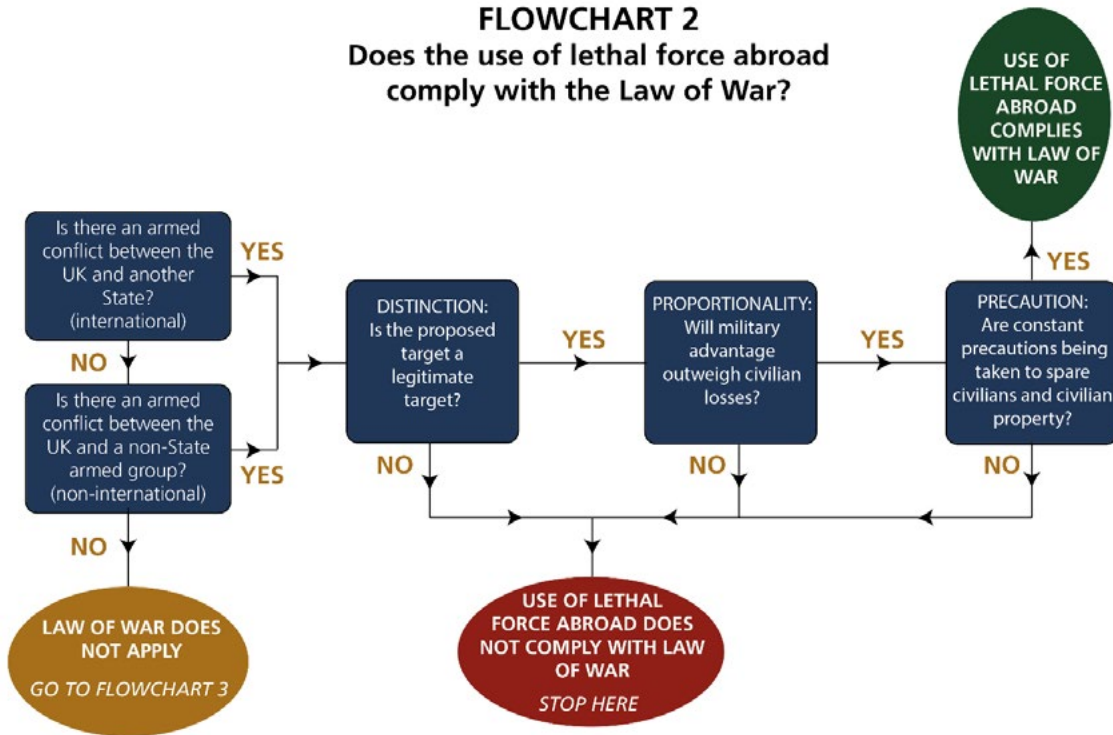
²³⁰ *McCann v UK*.

²³¹ *Al Skeini v UK*, applied by the UK Supreme Court in *Smith v MOD*

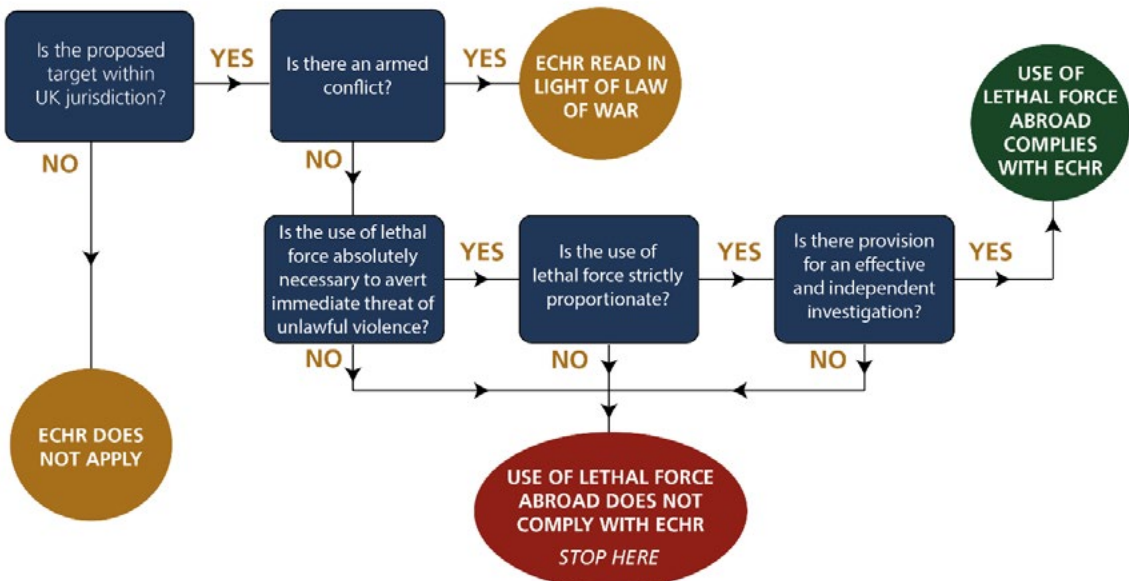
Annex 2: Flowcharts for assessing the lawfulness of the use of lethal force abroad



FLOWCHART 2
Does the use of lethal force abroad comply with the Law of War?



FLOWCHART 3
Does the use of lethal force abroad comply with the ECHR?



Annex 3: Law of War and Human Rights Law compared

| The Law of War | Human Rights Law |
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| <p>Sources:</p> <p>Customary international law</p> <p>Geneva Conventions</p> <p>Interpretive statements of the International Committee of the Red Cross</p> | <p>Sources:</p> <p>Right to life recognised and protected by:</p> <p>Customary international law (including Universal Declaration on Human Rights)</p> <p>International Covenant on Civil and Political rights (ICCPR)</p> <p>European Convention on Human Rights (ECHR)</p> <p>Case law of the European Court of Human Rights</p> <p>Decisions of the UN Human Rights Committee</p> |
| <p>Applicability:</p> <p>Only applies where there is an armed conflict</p> <p>By its nature applies extra-territorially</p> | <p>Applicability:</p> <p>Applies generally in relation to any person within UK's jurisdiction</p> <p>Applies extra-territorially where the state exercises legal authority or uses physical force</p> <p>Applies whether or not there is an armed conflict</p> <p>Does not apply if State has derogated</p> <p>Derogation from right to life only permitted for "deaths resulting from lawful acts of war"</p> |
| <p>Relevant standards on lethal force:</p> <p>Use of lethal force in armed conflicts permissible if satisfies principles of:</p> <ul style="list-style-type: none"> • distinction (civilians not a legitimate target) • proportionality • necessity • humanity <p>No requirement of imminence</p> <p>Targeting rules depend on whether armed conflict is international or non-international</p> | <p>Relevant standards on lethal force:</p> <p>Use of lethal force only permissible if:</p> <ul style="list-style-type: none"> • absolutely necessary • to avert imminent threat of unlawful violence to self or others • strictly proportionate to the threat <p>In armed conflict, human rights law standards are interpreted in light of specific standards in the Law of War</p> <p>Outside armed conflict, only human rights law standards apply</p> |

| The Law of War | Human Rights Law |
|--|---|
| <p>Accountability:</p> <p>Obligation to conduct at least preliminary investigation of most serious cases (eg. alleged war crimes)</p> | <p>Accountability:</p> <p>Obligation to conduct independent and effective investigation capable of leading to accountability for violations of right to life</p> |
| <p>Comparison with Human Rights Law:</p> <p>The Law of War more permissive towards use of lethal force</p> <p>More scope for civilian casualties to be justifiable</p> <p>Lighter accountability obligations</p> <p>= Lower protection of right to life</p> | <p>Comparison with Law of War:</p> <p>Stricter standards of necessity and proportionality</p> <p>Civilian casualties more difficult to justify</p> <p>More onerous obligation to investigate and hold to account</p> <p>= Higher protection of right to life</p> |

Annex 4: The U.S. Policy

U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism operations outside the United States and areas of active hostilities

Since his first day in office, President Obama has been clear that the United States will use all available tools of national power to protect the American people from the terrorist threat posed by al-Qa'ida and its associated forces. The President has also made clear that, in carrying on this fight, we will uphold our laws and values and will share as much information as possible with the American people and the Congress, consistent with our national security needs and the proper functioning of the Executive Branch. To these ends, the President has approved, and senior members of the Executive Branch have briefed to the Congress, written policy standards and procedures that formalize and strengthen the Administration's rigorous process for reviewing and approving operations to capture or employ lethal force against terrorist targets outside the United States and outside areas of active hostilities. Additionally, the President has decided to share, in this document, certain key elements of these standards and procedures with the American people so that they can make informed judgments and hold the Executive Branch accountable.

This document provides information regarding counterterrorism policy standards and procedures that are either already in place or will be transitioned into place over time. As Administration officials have stated publicly on numerous occasions, we are continually working to refine, clarify, and strengthen our standards and processes for using force to keep the nation safe from the terrorist threat. One constant is our commitment to conducting counterterrorism operations lawfully. In addition, we consider the separate question of whether force should be used as a matter of policy. The most important policy consideration, particularly when the United States contemplates using lethal force, is whether our actions protect American lives.

Preference for Capture

The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots. Capture operations are conducted only against suspects who may lawfully be captured or otherwise taken into custody by the United States and only when the operation can be conducted in accordance with all applicable law and consistent with our obligations to other sovereign states.

Standards for the Use of Lethal Force

Any decision to use force abroad—even when our adversaries are terrorists dedicated to killing American citizens—is a significant one. Lethal force will not be proposed or pursued as punishment or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission. Lethal force will be used only to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively. In particular, lethal force will be used outside areas of active hostilities only when the following preconditions are met:

First, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks.

Second, the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons. It is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons; if a terrorist does not pose such a threat, the United States will not use lethal force.

Third, the following criteria must be met before lethal action may be taken:

- 1) Near certainty that the terrorist target is present;
- 2) Near certainty that non-combatants²³² will not be injured or killed;
- 3) An assessment that capture is not feasible at the time of the operation;
- 4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
- 5) An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.

Finally, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally—and on the way in which the United States can use force. The United States respects national sovereignty and international law.

U.S. Government Coordination and Review

Decisions to capture or otherwise use force against individual terrorists outside the United States and areas of active hostilities are made at the most senior levels of the U.S. Government, informed by departments and agencies with relevant expertise and institutional roles. Senior national security officials—including the deputies and heads of key departments and agencies—will consider proposals to make sure that our policy standards are met, and attorneys—including the senior lawyers of key departments and agencies—will review and determine the legality of proposals.

These decisions will be informed by a broad analysis of an intended target's current and past role in plots threatening U.S. persons; relevant intelligence information the individual could provide; and the potential impact of the operation on ongoing terrorism plotting, on the capabilities of terrorist organizations, on U.S. foreign relations, and on U.S. intelligence collection. Such analysis will inform consideration of whether the individual meets both the legal and policy standards for the operation.

²³² Non-combatants are individuals who may not be made the object of attack under applicable international law. The term "non-combatant" does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.

Other Key Elements

U.S. Persons. If the United States considers an operation against a terrorist identified as a U.S. person, the Department of Justice will conduct an additional legal analysis to ensure that such action may be conducted against the individual consistent with the Constitution and laws of the United States.

Reservation of Authority. These new standards and procedures do not limit the President's authority to take action in extraordinary circumstances when doing so is both lawful and necessary to protect the United States or its allies.

Congressional Notification. Since entering office, the President has made certain that the appropriate Members of Congress have been kept fully informed about our counterterrorism operations. Consistent with this strong and continuing commitment to congressional oversight, appropriate Members of the Congress will be regularly provided with updates identifying any individuals against whom lethal force has been approved. In addition, the appropriate committees of Congress will be notified whenever a counterterrorism operation covered by these standards and procedures has been conducted.