House of Commons
House of Lords

Joint Committee on Human Rights

The Government's policy on the use of drones for targeted killing: Government Response to the Committee's Second Report of Session 2015–16

Fourth Report of Session 2016–17

Report, together with formal minutes relating to the report

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The current staff of the Committee are Robin James (Commons Clerk), Donna Davidson (Lords Clerk), Murray Hunt (Legal Adviser), Alexander Horne (Deputy Legal Adviser), Ami Breen (Legal Assistant), Penny McLean (Committee Specialist), and Miguel Boo Fraga (Senior Committee Assistant).

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Introduction

1. Our Report on *The Government's policy on the use of drones for targeted killing* was published on 10 May 2016.[1] The Government's response was received on 7 September 2016 and is appended to this Report.

2. The Government says that it has carefully considered our report and the issues that it raises and its paper sets out the Government's response to our recommendations.

3. A further letter from the Secretary of State for Defence, Rt Hon Michael Fallon MP, was received on 23 September, to update the Government's response in light of the judgment of the Court of Appeal in the case of *Al Saadoon*, which was handed down on 9 September.[2] A copy of the letter is also appended to this Report.

4. In this Report we comment briefly on some aspects of the Government's response which we expect to continue to be live issues as we follow up on our earlier Report.

Legality of the drone strike on Reyaad Khan on 21 August 2015

5. We preface our comments on the Government's response with an important clarification. The Government says in its response that it "welcomes the Committee's acceptance of the fact that the air strike on 21 August 2015 was in principle justifiable in the context of the prevailing armed conflict (against Daesh in the collective self-defence of Iraq) and international humanitarian law." This suggests that we went rather further in expressing a view about the legality of the 21 August strike than in fact we did in our Report. To be clear, what we said in our Report was:[3]

> **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.**

1 Joint Committee on Human Rights, Second Report of Session 2015–16, The Government's policy on the use of drones for targeted killing, HL Paper 141/HC 574

2 *Al-Saadoon v Secretary of State for Defence and Rahmatullah v Secretary of State for Defence* [2016] EWCA Civ 811 (9 September 2016).

3 Joint Committee on Human Rights, Second Report of Session 2015–16, The Government's policy on the use of drones for targeted killing, HL Paper 141/HC 574, para 2.29

6. In other words, we accepted that the Law of War applied to the drone strike in Syria on 21 August, because it was part of the wider armed conflict with ISIL/Da'esh already taking place in Iraq and spilling over into Syria. However, this acceptance was confined to the question of whether the Law of War is the relevant legal framework in which the justification for the strike is to be assessed. Our Report did not go further and express a view on whether the strike was "in principle justifiable" or compatible with the Law of War. Indeed, our Report made clear that "[w]e 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"[4] and "we also made clear that … 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".[5] As the Government's response itself indicates, the report of the Intelligence and Security Committee is still awaited.

7. **While we accepted that the Law of War applies to the drone strike in Syria on 21 August 2015, we did not make any comment on whether that strike was justifiable or compatible with the Law of War: that judgment can only be made by those who have full access to the intelligence on which the decision to launch the strike was based.**

Scope of the Government response

8. The scope of the Government's response to our Report is circumscribed by an important qualification at the beginning of the response:

> "It should be noted that, while high level answers have been given to the Committee's questions, many of the questions are hypothetical (for example, seeking clarification of the Government's position in relation to the use of force outside of armed conflicts) and the answers should not be taken as representing the Government's detailed and developed thinking on these complex issues. The need to take any future action would be considered according to the circumstances of each operation."

9. **We are disappointed that the Government's response does not contain a full explanation of the Government's "detailed and developed thinking on these complex issues". We had hoped that the work we did in our inquiry, and our reasoned Report, deserved such an explanation. Rather, the Government declines to state its understanding of the law that applies to lethal drone strikes outside of armed conflict on the basis that this is "hypothetical". We do not find this a satisfactory response.**

The meaning of "armed attack" in the international law of self-defence

10. In our Report we asked the Government to 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-

4 Joint Committee on Human Rights, Second Report of Session 2015–16, The Government's policy on the use of drones for targeted killing, HL Paper 141/HC 574, para 1.11

5 *Ibid.*, para 1.52

defence in international law.[6] We accepted in principle that terrorist attacks by non-State actors such as ISIL/Da'esh are capable of amounting to an "armed attack" on a State for the purposes of the right of self-defence. Our question was about the threshold of seriousness or intensity that must be reached in order for such terrorist violence to constitute an "armed attack."

11. The Government's response is that the threshold is reached "where terrorist violence reaches a level of gravity such that were it to be perpetrated by a State it would amount to an armed attack". **We welcome this clarification of the Government's position, which we do not think was clear from the Government's previous explanations for its use of lethal force in Syria on 21 August 2015. It makes clear that in order for the right of self-defence to be invoked against non-State actors, the same level of gravity must be reached as if the armed attack were by another State. This statement therefore provides a degree of greater certainty than was previously provided by the Government's statement of its position.**

The meaning of "imminence"

12. In our Report we asked the Government for clarification of its understanding of the meaning of "imminence" in the international law of self-defence.[7] In particular, we asked 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."**

13. The Government's response does not directly answer our specific question. However, the response does usefully make clear that the Government's understanding of the relevant legal framework remains as set out by the then Attorney General, Lord Goldsmith, in his statement to the House of Lords on 21 April 2004. The passage cited by the Government includes the part quoted and relied on by us in our Report,[8] 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." This was said by the then Attorney General in order to distinguish 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. **We welcome this clarification that the Government's view of the underlying legal framework has not changed since it was set out by the Attorney General in 2004.**

14. However, the Government's response goes on to muddy the waters somewhat in its further explanation of the meaning of "imminence":

> imminence must be interpreted in the light of the circumstances and threats that are faced. As new forms of attack and new means of delivery of such attacks develop, so must our ability to take lawful action to defend ourselves. Combating an enemy which may have covertly infiltrated our country,

6 *Ibid,* para 3.29

7 Joint Committee on Human Rights, Second Report of Session 2015–16, The Government's policy on the use of drones for targeted killing, HL Paper 141/HC 574, paras 3.41 and 3.92

8 *Ibid,* HL Paper 141/HC 574, para 3.32

> and can control attacks from abroad with sophisticated communications technology means that it will be a rare case in which the Government will know in advance with precision exactly where, when and how an attack will take place. *An effective concept of imminence cannot therefore be limited to be assessed solely on temporal factors. The Government must take a view on a broader range of indicators of the likelihood of an attack*, whilst also applying the twin requirements of proportionality and necessity. (italics not in original)

15. The Government says that this interpretation of imminence is in line with the Attorney General's 2004 statement. In our view, however, the italicised sentences require careful scrutiny. It is entirely correct that the Attorney General in 2004 said that the concept of what constitutes an 'imminent' armed attack will develop to meet new circumstances and new threats, and that States must be able to act in self-defence where there is evidence of further imminent attack by terrorist groups, even if there is no specific evidence of where such an attack will take place or the precise nature of the attack. We accepted as much in our Report.

16. But the Attorney-General's continued reference to "imminence" shows that what the Government describes as "temporal factors" are still important. In other words, evidence of *when* an attack is likely to take place must still be relevant to any decision as to whether there is a right to use force in self-defence. **On the Government's formulation in its response, it is not clear what it considers to be the relevance of when a threatened attack might take place. We will be seeking further explanation from the Government of the relevance of the timing of any possible future attack when deciding whether the right to self-defence is triggered.**

Applicability of the Law of War outside armed conflict

17. We asked the Government to clarify its position as to the law which applies when it uses lethal force outside of armed conflict.[9] As we indicated above, the Government's response does not address this important question in detail on the basis that it is a hypothetical question which would require "detailed analysis of the law and all the facts" if it were to arise as a live issue. It adds, however, that "the Government considers that in relation to military operations, the law of war would be likely to be regarded as an important source in considering the applicable principles."

18. **We do not find this to be a satisfactory answer, given the importance of the question of what law applies to the use of lethal force for counter-terrorism purposes outside armed conflict. In our view, the response comes close to asserting that the applicable law follows the choice of means by the State to deal with a particular threat to its security: that if the State chooses to deal with it by military means, the relevant principles and standards are the Law of War, even if the military operation is carried out in an area which is outside armed conflict. In this response the Government has failed to answer one of the most important questions identified in our Report.**

9 Joint Committee on Human Rights, Second Report of Session 2015–16, The Government's policy on the use of drones for targeted killing, HL Paper 141/HC 574, para 3.55

Applicability of the ECHR right to life outside armed conflict

19. We asked the Government to clarify its view as to whether Article 2 ECHR (which protects the right to life) applies to a use of lethal force outside armed conflict.[10]

20. The Government's response of 7 September said that this issue is awaiting judgment from the Court of Appeal in the case of *Al Saadoon*. It made clear that "the Government's position in that litigation is that the European Convention on Human Rights (ECHR) is not automatically engaged extra-territorially by the use of military force abroad; and that the use of force of this kind is not sufficient of itself to bring a person within the jurisdiction of the United Kingdom."

21. The Court of Appeal's judgment in *Al-Saadoon* was handed down on 9 September, two days after we received the Government's response.[11] The Secretary of State for Defence wrote to us on 23 September to update the Government's response to our Report in light of the judgment, arguing that as a result of the Court of Appeal's judgment "the legal position has moved on since the Committee produced its Report - in particular as regards the jurisdiction of the UK for the purposes of the ECHR."

22. The Government argues:

> The Court of Appeal's judgment has supported the position of the Government, by ruling that a person does not fall within the jurisdiction of the UK for the purposes of the ECHR on the basis simply that force, including lethal force, is used. There needs to be control of the individual prior to the use of lethal force for jurisdiction to apply.
>
> It is clear, therefore, that the use of lethal force of the kind the report considered - outside the *espace juridique* of the Convention and absent any effective control of an area or assumption of public powers - would fall outside the reach of the ECHR. The result is that Article 2 does not apply to such use whether within or outside an existing armed conflict.

23. **We accept that the judgment adopts a narrower reading of the scope of extra-territorial jurisdiction than that of the High Court Judge in the court below. However, the judgment does not go as far as the Government suggests in its letter of 23 September.**

24. The High Court Judge in *Al-Saadoon* had ruled that the use of lethal force against a person outside a state's territory was in and of itself sufficient to bring that person within the state's jurisdiction and therefore within the scope of the Convention. The Court of Appeal disagreed with this view. It decided that the Strasbourg Court "did not intend to extend this category of extra-territorial jurisdiction to cases where the only jurisdictional link was the use of lethal or potentially lethal force and that this is, therefore, insufficient to bring the victim into the acting State's jurisdiction for this purpose."[12] "[…] in laying down this basis of extra-territorial jurisdiction, the Grand Chamber required a greater

10 Joint Committee on Human Rights, Second Report of Session 2015–16, The Government's policy on the use of drones for targeted killing, HL Paper 141/HC 574, para 3.92

11 *Al-Saadoon v Secretary of State for Defence and Rahmatullah v Secretary of State for Defence* [2016] EWCA Civ 811 (9 September 2016).

12 *Al-Saadoon*, para [67]

degree of power and control than that represented by the use of lethal or potentially lethal force alone. […] the intention of the Strasbourg Court was to require that there be an element of control of the individual prior to the use of lethal force."[13]

25. The Court of Appeal accepted that, as a result of its decision, it will be necessary to distinguish between different types and degrees of physical power and control, and that difficulties will inevitably arise in defining the degree of physical power or control which must be exercised.[14] Moreover, the Government itself conceded that an individual did not need to be formally detained in order to be within the State's jurisdiction, and "accepts that there may be more difficult cases which do not strictly involve detention but where, nevertheless, the situation is so closely linked to the exercise of authority and control of the state as to bring it within its jurisdiction for this purpose." The Court of Appeal observed that this concession was rightly made.

26. Whether the victim of a lethal drone strike abroad was within the UK's jurisdiction will therefore depend on a careful analysis of the degree of physical power and control exerted over the individual prior to the use of lethal force. Reyaad Khan was a UK citizen who was likely to have been under close surveillance by the UK authorities. In addition to visual surveillance by drone, was his location discovered by the exercise by the authorities of extensive powers to intercept his communications, including possibly with family and associates in the UK, available to the authorities because of their powers over UK nationals and those in the UK? We do not know the answers to any of these questions, but, even after the Court of Appeal's judgment in *Al-Saadoon,* it is necessary to consider such factual questions to determine whether, in the words of the Court of Appeal, his situation was so closely linked to the exercise of authority and control of the state as to bring him within its jurisdiction.

27. **We therefore do not accept the Government's assertion, in the final paragraph of the letter dated 23 September, that the judgment establishes that Article 2 ECHR does not apply to such uses of lethal force whether within or outside an existing armed conflict. Rather it is a matter of fact and degree, to be determined on all the relevant material by those with full access to it (in this case the ISC).**

28. We also note that elsewhere in the Government's response, the Government cites its statement to the UN Human Rights Council in a Panel Discussion on Drones in 2014 in which it said:

> *The UK expects other States to act lawfully in accordance with the applicable legal framework including when using RPAS [Remotely Piloted Aircraft Systems] against terrorist targets. If armed RPAS were to be used outside the scope of an armed conflict, their use must be in accordance with international human rights law.*

29. ***We recommend that the Government clarify whether it maintains its 2014 position that the use of drones outside the scope of an armed conflict must be in accordance with international human rights law and, if not, what has changed to justify its change of position.***

13 Al-Saadoon, para [69]

14 *Ibid.*, para [71]

The requirements of the right to life in Article 2 ECHR

30. We asked the Government to spell out its interpretation of what the right to life in Article 2 ECHR requires in the particular context of the threat from ISIL/Da'esh and in particular how it understands the requirement that the use of force to protect life must be no more than is absolutely necessary, and that there is a real and immediate threat of unlawful violence, having regard to the nature of the threat posed by ISIL/Da'esh.[15]

31. The Government's response is a brief assertion of its view that, because the requirements of Article 2 ECHR are "fact and context specific", its requirements can be no higher than those of the Law of War when applied in the context of military activity:

> "If, and to the extent that Article 2 may be in play in the sphere of military activity, the Government would expect that it would impose no greater constraints on the effective pursuit of military activity than are clearly imposed by international humanitarian law."

32. The Government also confirms that "it would only use lethal force in response to an imminent armed attack where it is necessary to prevent that attack; in that event other means of preventing the attack would have been considered. For example, whether there is a Government in the country where the threat originates that we could work with to prevent the attack is a potential consideration."

33. **We call on the Government to elaborate further on its understanding of what the right to life in Article 2 requires if it applies. For example, does the Government also apply an "impossibility of capture" test such as that set out in the US written policy?**

Legal basis for UK support of other States using lethal force outside armed conflict

34. We asked the Government to clarify its understanding of the legal basis on which the UK provides any support which facilitates the use of lethal force outside armed conflict by other States, such as the US, which have a wider view about the circumstances in which such lethal force may lawfully be used.[16]

35. The Government accepts that the relevant law is that set out in Article 16 of the International Law Commission's Articles on State Responsibility, as suggested in our Report, but asserts that "the Government seeks to ensure that its actions remain lawful at all times."

36. **We expect the Government to provide a more detailed response to an important question raised in our Report, which is highly relevant to whether the Government is complying with international law and whether there is sufficient legal certainty for UK personnel to reassure them that they are not at risk of criminal prosecution for complicity in unlawful acts.**

15 *Al-Saadoon*, paras 3.79 and 3.92

16 *Ibid,* paras 3.89 and 3.92

Developing international consensus

37. We called on the Government to take the lead in international initiatives to build consensus about how the international legal frameworks apply to the use of lethal force abroad in counter-terrorism operations outside armed conflict, and made a number of specific suggestions as to how it could do so.

38. The Government's response states that the Government "takes the view that the existing legal frameworks, including both applicable international humanitarian law (IHL) and international human rights law (IHRL) are adequate to govern the use of Remotely Piloted Aircraft Systems and, therefore, that there is no need to develop a special regime for the use of these weapons."

39. **Our Report did not advocate the development of a special legal regime for the use of drones as the Government suggests, so this part of the Government's response addresses a recommendation which we did not make. We advocated the building of international consensus in how the existing legal frameworks should be interpreted and applied. We will point out and correct this misunderstanding in any forthcoming debates about our Report and the Government response, and will seek to ensure that our recommendation is not mischaracterised in the various international fora in which the issue will be considered**.

Conclusions and recommendations

Legality of the drone strike on Reyaad Khan on 21 August 2015

1. While we accepted that the Law of War applies to the drone strike in Syria on 21 August 2015, we did not make any comment on whether that strike was justifiable or compatible with the Law of War: that judgment can only be made by those who have full access to the intelligence on which the decision to launch the strike was based. (Paragraph 7)

Scope of the Government response

2. We are disappointed that the Government's response does not contain a full explanation of the Government's "detailed and developed thinking on these complex issues". We had hoped that the work we did in our inquiry, and our reasoned Report, deserved such an explanation. Rather, the Government declines to state its understanding of the law that applies to lethal drone strikes outside of armed conflict on the basis that this is "hypothetical". We do not find this a satisfactory response. (Paragraph 9)

The meaning of "armed attack" in the international law of self-defence

3. We welcome this clarification of the Government's position, which we do not think was clear from the Government's previous explanations for its use of lethal force in Syria on 21 August 2015. It makes clear that in order for the right of self-defence to be invoked against non-State actors, the same level of gravity must be reached as if the armed attack were by another State. This statement therefore provides a degree of greater certainty than was previously provided by the Government's statement of its position. (Paragraph 11)

The meaning of "imminence"

4. We welcome this clarification that the Government's view of the underlying legal framework has not changed since it was set out by the Attorney General in 2004. (Paragraph 13)

5. On the Government's formulation in its response, it is not clear what it considers to be the relevance of when a threatened attack might take place. We will be seeking further explanation from the Government of the relevance of the timing of any possible future attack when deciding whether the right to self-defence is triggered. (Paragraph 16)

Applicability of the Law of War outside armed conflict

6. We do not find this to be a satisfactory answer, given the importance of the question of what law applies to the use of lethal force for counter-terrorism purposes outside armed conflict. In our view, the response comes close to asserting that the applicable

law follows the choice of means by the State to deal with a particular threat to its security: that if the State chooses to deal with it by military means, the relevant principles and standards are the Law of War, even if the military operation is carried out in an area which is outside armed conflict. In this response the Government has failed to answer one of the most important questions identified in our Report. (Paragraph 18)

Applicability of the ECHR right to life outside armed conflict

7. We accept that the judgment adopts a narrower reading of the scope of extra-territorial jurisdiction than that of the High Court Judge in the court below. However, the judgment does not go as far as the Government suggests in its letter of 23 September. (Paragraph 23)

8. We therefore do not accept the Government's assertion, in the final paragraph of the letter dated 23 September, that the judgment establishes that Article 2 ECHR does not apply to such uses of lethal force whether within or outside an existing armed conflict. Rather it is a matter of fact and degree, to be determined on all the relevant material by those with full access to it (in this case the ISC). (Paragraph 27)

9. *We recommend that the Government clarify whether it maintains its 2014 position that the use of drones outside the scope of an armed conflict must be in accordance with international human rights law and, if not, what has changed to justify its change of position.* (Paragraph 29)

The requirements of the right to life in Article 2 ECHR

10. We call on the Government to elaborate further on its understanding of what the right to life in Article 2 requires if it applies. For example, does the Government also apply an "impossibility of capture" test such as that set out in the US written policy? (Paragraph 33)

Legal basis for UK support of other States using lethal force outside armed conflict

11. We expect the Government to provide a more detailed response to an important question raised in our Report, which is highly relevant to whether the Government is complying with international law and whether there is sufficient legal certainty for UK personnel to reassure them that they are not at risk of criminal prosecution for complicity in unlawful acts. (Paragraph 36)

Developing international consensus

12. Our Report did not advocate the development of a special legal regime for the use of drones as the Government suggests, so this part of the Government's response addresses a recommendation which we did not make. We advocated the building of international consensus in how the existing legal frameworks should be interpreted and applied. We will point out and correct this misunderstanding in any forthcoming

debates about our Report and the Government response, and will seek to ensure that our recommendation is not mischaracterised in the various international fora in which the issue will be considered (Paragraph 39)

1 Appendix: Government Response

Introduction

On 10 May 2016, the Joint Committee on Human Rights published their report The Government's policy on the use of drones for targeted killing. The report followed an inquiry by the Committee, which sought evidence from the Secretary of State for Foreign and Commonwealth Affairs, the S07 September 2016

On 10 May 2016, the Joint Committee on Human Rights published their report *The Government's policy on the use of drones for targeted killing*. The report followed an inquiry by the Committee, which sought evidence from the Secretary of State for Foreign and Commonwealth Affairs, the Secretary of State for Defence, and the Attorney General. In response, the Government provided a consolidated Memorandum to the Committee which outlined the Government's right to use force in self defence; the legality of the air strike on 21 August 2015; and the processes of decision-making and accountability which surround this activity. The Secretary of State for Defence also gave evidence at a hearing of the Committee.

The Government has carefully considered the Committee's report and the issues that it raises, and this paper sets out the Government's response to the Committee's recommendations. The Government welcomes the Committee's acceptance of the fact that the air strike on 21 August 2015 was in principle justifiable in the context of the prevailing armed conflict (against Daesh in the collective self-defence of Iraq) and international humanitarian law.

It should be noted that, while high level answers have been given to the Committee's questions, many of the questions are hypothetical (for example, seeking clarification of the Government's position in relation to the use of force outside of armed conflicts) and the answers should not be taken as representing the Government's detailed and developed thinking on these complex issues. The need to take any future action would be considered according to the circumstances of each operation.

As the Secretary of State for Defence made clear during his evidence session, the Government does not have a 'policy on targeted killing'. Rather it has a policy to defend the UK and its citizens against threats to their security. In implementing that policy the Government may draw on a wide range of tools, including *in extremis* the use of military force to remove such threats when there is no other effective option. If the Government does resort to the use of military force (which of course is not confined to the use of Remotely Piloted Air Systems (RPAS) or 'drones'), then the Government will act in accordance with the requirements of international law.

Every situation would be considered on its merits and in many cases different options might be available. However, in the case of the air strike on 21 August 2015, this action was the only feasible means of effectively disrupting the attacks planned and directed by Reyaad Khan due to the prevailing circumstances in Syria. There was no realistic prospect that Khan would travel outside Syria so that other means of disruption could be attempted. Nor was there any prospect of the Syrian Government being willing or able to deal with the imminent threat he posed.

Legal Basis

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 (para 3.92)**

The Government's policy is to defend the United Kingdom from terrorism using all lawful means necessary to do so. Where the threat of terrorism emanates from overseas, our response will be calibrated by the situation. At one end of the spectrum the threat may be dealt with through engagement between law enforcement agencies, followed by arrest, trial and incarceration. At the other end of the spectrum there may be situations where the use of military force is the only feasible response to avert a threat.

The legal basis for the use of force in the latter situation (in the absence of a UN Security Council Resolution authorising such force) is the international law right of self-defence. The law on self-defence is long-standing, but is recognised in Article 51 of the UN Charter. As is clear from the text of Article 51, the right of self-defence can be exercised by a State individually where it seeks to repel an armed attack against itself, or collectively where it seeks to assist an ally in repelling an armed attack. The Government's position is that grave terrorist violence can constitute an "armed attack" so as to justify the recourse to force to repel the armed attack. In the words of one leading writer, where terrorist violence reaches a level of gravity such that were it to be perpetrated by a State it would amount to an armed attack, "it would be a strange formalism that regarded the right to take military action against those who caused or threatened such actions as dependent upon whether or not their acts could be imputed to a State".[17]

The legal framework underlying the Government's position was set out to Parliament on 21 April 2004 by the then Attorney General in the following terms:

"[…] it has been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent. It is clear that the language of Article 51 was not intended to create a new right of self-defence. Article 51 recognises the inherent right of self-defence that states enjoy under international law. That can be traced back to the "Caroline" incident in 1837. … It is not a new invention. The Charter did not therefore affect the scope of the right of self-defence existing at that time in customary international law, which included the right to use force in anticipation of an imminent armed attack.

The Government's position is supported by the records of the international conference at which the UN Charter was drawn up and by state practice since 1945. It is therefore 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 strike against a threat that is more remote. However, those rules must be applied in the context of the particular facts of each case. That is important.

The concept of what constitutes an "imminent" armed attack will develop to meet new circumstances and new threats. For example, the resolutions passed by the Security

17 Sir Christopher Greenwood KCMG, QC "War, Terrorism and International Law" in Essays on War in International Law (2006), pp409–432 at p.419. Sir Christopher is now a Judge of the International Court of Justice.

Council in the wake of 11 September 2001 recognised both that large-scale terrorist action could constitute an armed attack that will give rise to the right of self-defence and that force might, in certain circumstances, be used in self-defence against those who plan and perpetrate such acts and against those harbouring them, if that is necessary to avert further such terrorist acts. It was on that basis that United Kingdom forces participated in military action against Al'Qaeda and the Taliban in Afghanistan. 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.

Two further conditions apply where force is to be used in self-defence in anticipation of an imminent armed attack. First, military action should be used only as a last resort. It must be necessary to use force to deal with the particular threat that is faced. Secondly, the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat. … "

The Committee has asked the Government to provide further clarification of its understanding of "imminence". In line with the position set out by the Attorney General in 2004 and quoted above, the Government's view continues to be that imminence must be interpreted in the light of the circumstances and threats that are faced. As new forms of attack and new means of delivery of such attacks develop, so must our ability to take lawful action to defend ourselves. Combating an enemy which may have covertly infiltrated our country, and can control attacks from abroad with sophisticated communications technology means that it will be a rare case in which the Government will know in advance with precision exactly where, when and how an attack will take place. An effective concept of imminence cannot therefore be limited to be assessed solely on temporal factors. The Government must take a view on a broader range of indicators of the likelihood of an attack, whilst also applying the twin requirements of proportionality and necessity.

- **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)**

As indicated in the introduction, this is a hypothetical question and if this scenario arose as a live issue it would require detailed analysis of the law and all the facts. However, the Government considers that in relation to military operations, the law of war would be likely to be regarded as an important source in considering the applicable principles.

- **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)**

The Report states:

> *"3.58 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. 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." 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. […] jurisdiction arose through the exercise of physical power and control over the individual who was shot and killed."*
>
> *3.59 The right to life in the ECHR therefore clearly applies to the use of lethal force abroad outside of armed conflict."*

As footnote 134 in the report recognises, the Secretary of State for Defence has appealed the High Court judgment in the *Al Saadoon* case to the Court of Appeal. The hearing of the appeal was in May and judgment is awaited. Accordingly, the matter is still being considered as a live and contentious issue by the courts. For the avoidance of doubt the Government's position in that litigation is that the European Convention on Human Rights (ECHR) is not automatically engaged extra-territorially by the use of military force abroad; and that the use of force of this kind is not sufficient of itself to bring a person within the jurisdiction of the United Kingdom.

- **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/Daesh; and (Paragraph 3.92)**

The requirements of Article 2 are fact and context specific. As is now well-established, the interpretation of ECHR rights can be informed and shaped by international law. If, and to the extent that Article 2 may be in play in the sphere of military activity, the Government would expect that it would impose no greater constraints on the effective pursuit of military activity than are clearly imposed by international humanitarian law.

- **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)**

In cooperating with other States the Government seeks to ensure that its actions remain lawful at all times. The circumstances in which a State can be found responsible in international law for aiding or assisting another State in committing an unlawful act are set out in Article 16 of the International Law Commission's *Articles on the Responsibility of States for Internationally Unlawful Acts*. Although the Articles have not been adopted as a treaty, the Government considers Article 16 as reflecting customary international law. Article 16 provides:

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:

(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.

We ask that the Government sets out its understanding of what the right to life requires in this particular context e.g. what considerations are relevant to assessing whether resort to lethal force really is the only option to prevent the threatened violence. (para 3.79)

The Government confirms that it would only use lethal force in response to an imminent armed attack where it is necessary to prevent that attack; in that event other means of preventing the attack would have been considered. For example, whether there is a Government in the country where the threat originates that we could work with to prevent the attack is a potential consideration. Moreover, when the use of lethal force is considered necessary for the prevention of an armed attack the requirement of proportionality is such that the level of force used should not be excessive.

Developing international consensus

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. (para 6.17)

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 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. (para 6.18)

The Government takes the view that the existing legal frameworks, including both applicable international humanitarian law (IHL) and international human rights law (IHRL) are adequate to govern the use of RPAS and, therefore, that there is no need to develop a special regime for the use of these weapons.

The Government set out its position on the UN Special Rapporteurs' reports clearly in a panel discussion at the UN Human Rights Council on 22 September 2014, which included the following statement:

"The UK's position on RPAS is clear. In our foreign relations, and particularly regarding the potential use of military force, the UK acts within the letter and spirit of applicable international law, and expects others to do so too. This applies to RPAS as to any other military asset or weapon.

The UK expects other States to act lawfully in accordance with the applicable legal framework including when using RPAS against terrorist targets. If armed RPAS were to be used outside the scope of an armed conflict, their use must be in accordance with international human rights law. Adherence to these values stands in stark contrast to the daily atrocities committed by terrorists, who as we have been reminded by the actions of ISIL and the Al-Nusrah Front in Syria and Iraq, kill, rape, maim and torture indiscriminately to spread fear amongst communities. Yet we cannot, and should not let our standards drop as we combat the scourge of international terrorism.

While RPAS are a relatively new military asset, the potential of which is still to be fully realised, the existing strict legal framework at the international level is fully capable of ensuring that they are used lawfully in appropriate circumstances. RPAS are not by their nature an indiscriminate weapon and nor are they more likely to cause civilian casualties

than other military options. Indeed, as the Special Rapporteur Ben Emmerson cited in his interim report in October 2013, the opportunity to inspect a target before deciding to attack it creates the opportunity for RPAS fire to be more discriminate and reduce the risk.

In summary, we do not need to rewrite the laws of war in order to be confident that, when used in such lawful circumstances, RPAS operate in the same legal environment as other military means. On the contrary, their capabilities allow for a more considered approach to battlefield decision-making that can and will save lives."

The Government seeks to uphold IHL in relation to its own actions in situations of armed conflict and believes strongly in the need to improve compliance by others with IHL. The Government works closely with other states and the Red Cross Movement to promote compliance with IHL. The Government calls on states and non-state actors engaged in armed conflict to respect IHL and act in accordance with their obligations under it. The International Committee of the Red Cross (ICRC) has a special role to play under the Geneva Conventions, and as one of the largest and oldest humanitarian organisations, is able to access areas and provide assistance where often states cannot reach. The Government is proud to be one of their greatest supporters.

The Government is actively involved in and will continue to support the Swiss/ICRC initiative to strengthen mechanisms of compliance with IHL This initiative is important to ensure IHL remains relevant and that issues of compliance are dealt with in appropriate international fora. The Government supports the establishment of a new forum of states to address such issues. The Government encourages all states to participate in the initiative and contribute to ongoing discussions on exactly how such a forum might work.

The United Kingdom participated in the 32nd quadrennial International Conference of the Red Cross and Red Crescent in December 2015 in Geneva. The focus was to further UK and international objectives on a range of pressing humanitarian challenges, including tackling sexual violence in conflict. In support of the Conference themes, the UK made a number of pledges on actions that the Government intends to take in coming years, including jointly with the British Red Cross, and our partners in the EU and Commonwealth.

The Government regularly discusses issues relating to international law on the use of force (*ius ad bellum*) and the law of armed conflict (*ius in bello*) with close allies. In such discussions the Government is able to explain and test its legal positions *vis à vis* those of allies and ensure that its own positions are understood and remain within the accepted framework of international law.

Decision making process

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. (para 4.17)

The Government strengthened the role of the Intelligence and Security Committee of Parliament (ISC) in the last Parliament, making it a committee of Parliament and strengthening its powers. It is for the ISC to determine their work programme and

priorities within the powers they are afforded under the Justice and Security Act 2013. The Act and associated Memorandum of Understanding make clear that the ISC is able to look at the expenditure, administration, policy and operations of the intelligence agencies.

The then Prime Minister made clear to the House on 9 September 2015 that responsibility for current operations must lie with the Government and not with the ISC. The Government believes that this remains the appropriate framework for ISC oversight of the work of the intelligence agencies.

We recommend that the Government should make clear 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. (para 4.21)

It is standard practice for the Government to ensure that legal advice is sought from Government lawyers with the relevant departmental interest as well as consulting the Law Officers on critical decisions involving legal considerations. For example, the Ministry of Defence legal team would inevitably be heavily involved in advising on the use of lethal force by the military, liaising closely with FCO legal advisers on matters of international law, in particular the law on the use of force (*ius ad bellum*), and, as appropriate, with lawyers from the Security and Intelligence Agencies. The Armed Forces have access to legal officers trained in IHL when planning and conducting operations.

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. (para 4.23)

The Government does not consider that any change in process is required.

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. (para 4.25)

The Government has been consistently clear that in the case of Reyaad Khan it was satisfied through a careful process in which all relevant considerations (including considerations of fact, law and policy) were weighed, that he posed an imminent threat to the UK and that military action would have been necessary and proportionate. There was a process in place to ensure that this was reviewed on a regular basis.

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. (para 4.26)

It is the Secretary of State for Defence, not the Prime Minister or Attorney General, who can authorise military force, and that authorisation is then passed down the chain of command.

This was explained by the Secretary of State for Defence to the Committee during his evidence session: Ministers set the rules of engagement and policy directives which govern the use of force in a given situation. Ministers therefore set the rules as to how an operation, including an air strike, is to be conducted. If at any time during the operation, the military believe that the proposed action would breach these rules, then that action will not go ahead. As the Committee will no doubt have seen during their visit to RAF Waddington, our military operators are clear on what they can and cannot do. They can of course seek advice at any point from their commanders. Legal advisers and policy advisers, deployed both in headquarters in the UK and on operations across the globe, are on hand to advise at any time.

More broadly, the creation of the National Security Council (NSC) in 2010 allows frequent and thorough Ministerial scrutiny of decisions relating to national security, such as whether to use military force. Supported by the National Security Secretariat, which sits at the heart of Government in the Cabinet Office, the NSC integrates at the highest level the work of key departments including the Foreign Office, Ministry of Defence, Home Office and Department for International Development. It ensures that expert advice from across Government can be called upon when decisions are taken by senior Ministers. These advisers include the heads of the intelligence agencies and the military, and also the Attorney General who, as a full member of the NSC, provides expert legal advice in relation to decisions about the use of military force. In the case of the airstrike on 21 August 2015, it was at a meeting of the most senior members of the NSC that it was agreed that, should the right opportunity arise, military action should be taken. The Attorney General was present at the meeting and confirmed that there was a legal basis for action.

Accountability

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:

- **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. (para 5.30)**

The Government is accountable for its actions to Parliament. The then Prime Minister reported the airstrike of 21 August 2015 to Parliament at the first available opportunity, and subsequently asked the ISC to provide independent scrutiny of the intelligence that led to the action and the threat that was posed.

The Government is co-operating fully with the ISC in its examination of the 21 August 2015 airstrike, after agreeing the scope of their investigation under the terms of the existing Memorandum of Understanding. It is open to the ISC, should it wish to do so, to seek independent legal advice in any aspect of its work, subject to the usual national security safeguards being applied. The ISC will report on its findings in due course.

As previously stated, the Government strengthened the role of the ISC in the last Parliament, making it a committee of Parliament and strengthening its powers. It is for the ISC to determine their work programme and priorities within the powers they are afforded under the Justice and Security Act 2013. The Act and MoU make clear that the ISC is able to look at expenditure, administration, policy and operations of the intelligence agencies but not ongoing intelligence or security operations unless specifically requested to do so by the Prime Minister.

In terms of Parliamentary oversight, the House of Commons Defence Committee plays a vital role in scrutinising military operations and defence policy. However, the Government reserves the right to take lawful action in self-defence to address an identified, imminent threat to the United Kingdom and to report to Parliament after it has done so.

We 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. (para 5.38)

The Government will continue to deploy such arguments as it decides are appropriate, on advice, in individual cases. It is for the courts to rule on those arguments and to apply the law.

2 Appendix: Letter from Rt Hon Michael Fallon MP, Secretary of State for Defence

I wanted to update your Committee following the Court of Appeal's judgment on 9 September in the *Al Saadoon* case, given its clear relevance to the Committee's report and the Government's response (sent on 7 September before the judgment was handed down). As a result of the Court of Appeal's judgment, the legal context has moved on since the Committee produced its report–in particular as regards the jurisdiction of the UK for the purposes of the European Convention on Human Rights (ECHR).

As you know, the Government had appealed the High Court judgment in *Al Saadoon* and the hearing was in May this year. Our position, as set out in our response to your report, was that the ECHR does not automatically apply extra-territorially when military force is used abroad; and that the use of force of this kind is not sufficient of itself to bring a person within the jurisdiction of the United Kingdom.

The Court of Appeal's judgment has supported the position of the Government, by ruling that a person does not fall within the jurisdiction of the UK for the purposes of the ECHR on the basis simply that force, including lethal force, is used. There needs to be control of the individual prior to the use of lethal force for jurisdiction to apply.

It is clear, therefore, that the use of lethal force of the kind the report considered - outside the *espace juridique* of the Convention and absent any effective control of an area or assumption of public powers - would fall outside the reach of the ECHR. The result is that Article 2 does not apply to such use whether within or outside an existing armed conflict.

23 September 2016

Formal Minutes

Wednesday 12 October 2016

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP	Baroness Hamwee
Ms Karen Buck MP	Lord Henley
Amanda Solloway MP	Baroness Lawrence of Clarendon
	Lord Trimble

Draft Report (*The Government's policy on the use of drones for targeted killing: Government response to the Committee's Second Report of Session 2015–16*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 39 read and agreed to.

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

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

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

[The Committee adjourned.

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
Second Report	The Government's policy on the use of drones for targeted killing	HL Paper 141/HC 574
Third Report	Appointment of the Chair of the Equality and Human Rights Commission	HL Paper 145/HC 648

Session 2016–17

First Report	Legislative Scrutiny: Investigatory Powers Bill	HL Paper 6/HC 104
Second Report	Counter-Extremism	HL Paper 39/HC 105
Third Report	Legislative Scrutiny: (1) Children and Social Work Bill; (2) Policing and Crime Bill; (3) Cultural Property (Armed Conflict) Bill	HL Paper 48/HC 739