

# ASSESSING SOF TRANSPARENCY AND ACCOUNTABILITY

The use of Special Operations Forces  
by the UK, US, Australia, and Canada

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**REMOTE CONTROL**

Examining changes in military engagement

This report has been commissioned by **Remote Control**, a project of the Network for Social Change hosted by Oxford Research Group. The project examines changes in military engagement, with a focus on remote control warfare. This form of intervention takes place behind the scenes or at a distance rather than on a traditional battlefield, often through drone strikes and air strikes from above, with special forces, intelligence operatives, private contractors, and military training teams on the ground.

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## Executive Summary

As the former head of US Joint Special Operations Command (JSOC) said on his retirement, we are in a Golden Age for Special Operations Forces (SOF).

In 2010 SOF forces from the United States were estimated to be operating in just seventy-five countries.<sup>1</sup> By 2013 this had risen to 134.<sup>2</sup> UK SOF have been active in Sierra Leone, Afghanistan, Iraq and Libya. There are current reports of UK and US SOF operating in Syria on reconnaissance and targeted killing missions.<sup>3</sup>

These forces have played a major role in the conflicts that have occurred since 2001. Special forces from the US, UK, Australia and Canada have played important roles in the global 'war on terror', while Russian special forces have been integral to operations and conflict in Chechnya, South Ossetia, Georgia and Ukraine. Special forces from the UK, France and Qatar played crucial roles in the overthrow of the Gaddafi regime in Libya in 2011.

SOF operate as forward air controllers, combat forces, as trainers for local SOF, and as mentors to local formal and informal paramilitary groups, making them an

important part of remote control warfare. This report assesses the transparency and accountability surrounding the use of SOF in four of the countries with the biggest SOF footprints – the UK, US, Australia, and Canada.

SOF have played positive roles in conflict. They have tracked suspected war criminals (e.g. in the former Yugoslavia), engaged in hostage rescue, and assisted in stopping Iraq's descent into full civil war in the 2005-2007 period. In some scenarios, their deployment may be preferable to the use of large-scale conventional forces, which can have their own drawbacks.

However, concern has been raised by SOF activity in the war on terror, particularly their role in assisting the compilation and execution of 'kill lists' of suspected terrorists and insurgents developed by JSOC in Afghanistan and elsewhere. SOF use by Russia has played an important role in its unlawful actions in the Ukraine and Crimea.

SOF are operating in and around the overlap between security, counter terror, counter insurgency and conventional conflict. The legal basis for some of their operations remains unclear. This is more of a legal issue for European states as they are more tightly bound into European human rights law, which exacts more stringent demands from countries operating outside of declared combat zones.

The activities of SOF have always been clouded. The US, with its more open political system and investigative media has reported most widely on the activities of US SOF. Even so, many of their activities take place away from political and public scrutiny. In the UK, Australia and Canada the situation is even more limited. The British government is the most tight-lipped of all. "We never comment on the disposition of our special forces anywhere in the world and that will remain our policy" Philip Hammond, UK Defence Secretary, stated in 2014.<sup>4</sup>

1 Andrew Feickert and Thomas Livingston, 'U.S. Special Operations Forces (SOF): Background and Issues for Congress' Congressional Research Service 2010 p6.

2 Nick Turse, 'US Special Forces Are Operating in More Countries Than You Can Imagine' The Nation January 20 2015 <http://www.thenation.com/article/us-special-forces-are-operating-more-countries-you-can-imagine/>; These countries include Afghanistan; Iraq; Pakistan; Algeria; Chad; Djibouti; Niger; Liberia; Mauritania; Madagascar; Senegal; Somalia; Mali; Ivory Coast; Thailand; Philippines and Indonesia. See Tara McKelvey 'Special Operators in Action' <http://nationalsecurityzone.org/specialops/interactive-maps/>

3 Loulla-Mae Eleftheriou-Smith, "SAS troops 'dressed in US uniforms and joined special forces on Isis Abu Sayyaf overnight raid in Syria'" Independent 10 August 2015; Peter Baker, Helen Cooper and David Sanger, 'Obama Sends Special Operations Forces to Help Fight ISIS in Syria' New York Times October 30 2015 [http://www.nytimes.com/2015/10/31/world/obama-will-send-forces-to-syria-to-help-fight-the-islamic-state.html?\\_r=0](http://www.nytimes.com/2015/10/31/world/obama-will-send-forces-to-syria-to-help-fight-the-islamic-state.html?_r=0)

4 Richard Norton-Taylor 'If UK special forces are in Iraq, how will we know?' Guardian Defence and Security blog September 22 2014 <http://www.theguardian.com/world/defence-and-security-blog/2014/sep/22/sas-iraq-syria>

This golden age for special forces raises a number of issues which are addressed in this report. SOF can play positive roles in preventing violence and limiting violence. But the use of SOF on the scale which is occurring at the moment raises other issues which require attention, particularly due to the secrecy under which they operate. The report examines why SOF have become so prominent in the tool box of modern states, what issues are raised by their use, and what might be done to make the use of SOF more accountable.

## Policy implications for the UK Government

UK SOF have been in operation near-continuously over the last 15 years. This has received limited parliamentary or public scrutiny. SOF should not be over-used and seen as a solution to all and any security problems. UK SOF are small in size (in total 3,500 compared to 75,000 or above in US SOF). They should be integrated into a coherent overall strategy and not used just because they can be quickly deployed and have an effect without being subject to the same oversight as the rest of the armed forces.

This leads to five recommendations:

1. An inquiry into the effectiveness of British SOF over the last 15 years would be an appropriate response to their near-continuous operation during this time. Where necessary, closed hearings could ensure proper operational secrecy and the protection of SOF personnel.
2. In addition to strategic and operational matters, it is recommended that the legal framework within which SOF conduct operations be examined, not only to see whether SOF are being deployed lawfully but also to protect them after they are deployed from unreasonable investigation and prosecution.
3. The role and operation of SOF could also be permanently incorporated into the existing parliamentary system of scrutiny. The Joint Select Committee on Defence might be an appropriate venue. Closed hearings could ensure proper

operational secrecy and the protection of SOF personnel.

4. In administrative terms and considering the role and intensity of SOF deployments, it might be appropriate for SOF budgetary matters to be subject of specific parliamentary oversight.
5. While an issue broader than SOF, this could be the moment to re-examine the use of UK SOF as trainers, including whether there is a need for a formal US-like system such as the Leahy Laws - which ban US personnel from working with local force personnel or units who have been implicated in human rights abuses. This would also have implications for Defence Engagement and military training teams.

Special forces have long been seen as a credible exemption to normal oversight and accountability, which may make these recommendations seem radical. However, as the use of SOF across the globe grows, so does the proportion of military action and defence expenditure that is unaccountable to parliaments and populations. In this golden age of special forces, it is harder to see the sense behind allowing all SOF deployments to bypass scrutiny. Indeed, these recommendations are largely in line with the oversight and accountability currently being applied to US SOF, which is explored later in this report.

## Introduction: the Golden Age of special forces

*[We are in] the Golden Age of special operations.*<sup>5</sup>

As the former head of the US Joint Special operations said on his retirement, this is a Golden Age for special operations forces.

In 2010 Special Operations Forces (SOF) from the United States were estimated to be operating in just seventy-five countries.<sup>6</sup> By 2013 this had risen to 134.<sup>7</sup> In addition, SOF from Australia and Canada have been operating in a number of jurisdictions, including Afghanistan and Iraq, while French SOF have been operating in Libya and Mali. UK SOF have operated in Sierra Leone, Afghanistan, Iraq and Libya. Russian SOF have been operating in South Ossetia, Georgia and the Ukraine including Crimea. There are current reports of UK and US SOF operating in Syria in reconnaissance and targeted killing missions.<sup>8</sup>

5 William McRaven on his retirement as head of the United States Joint Special Operations Command quoted in Dan Lamothe, 'Retiring top Navy SEAL: 'We are in the golden age of Special Operations' Washington Post August 29 2014 <https://www.washingtonpost.com/news/checkpoint/wp/2014/08/29/retiring-top-navy-seal-we-are-in-the-golden-age-of-special-operations-2/>

6 Andrew Feickert and Thomas Livingston, 'U.S. Special Operations Forces (SOF): Background and Issues for Congress' Congressional Research Service 2010 p6.

7 Nick Turse, 'US Special Forces Are Operating in More Countries Than You Can Imagine' The Nation January 20 2015 <http://www.thenation.com/article/us-special-forces-are-operating-more-countries-you-can-imagine/>; These countries include Afghanistan; Iraq; Pakistan; Algeria; Chad; Djibouti; Niger; Liberia; Mauritania; Madagascar; Senegal; Somalia; Mali; Ivory Coast; Thailand; Philippines and Indonesia. See Tara McKelvey 'Special Operators in Action' <http://nationalsecurityzone.org/specialops/interactive-maps/>

8 Loulla-Mae Eleftheriou-Smith, "SAS troops 'dressed in US uniforms and joined special forces on Isis Abu Sayyaf overnight raid in Syria'" Independent 10 August 2015; Peter Baker, Helen Cooper and David Sanger, 'Obama Sends Special Operations Forces to Help Fight ISIS in Syria'

SOF are able to perform functions that large numbers of troops operating conventionally have not. As recently defined by the United Nations:

*"Special Operations are military activities conducted by specifically designated, organized, trained and equipped forces, manned with selected personnel using unconventional tactics, techniques, and courses of action."*<sup>9</sup>

These activities cover classic SOF tasks: intelligence and reconnaissance, hostage rescue, disrupting, neutralising or disabling high value targets, and providing training and other forms of assistance to other forces.<sup>10</sup> These forces may be local regular units or local special forces units; or they may be local irregular paramilitary units. SOF tend not to operate in a vacuum:

*"SOF, often alongside coalition special operations forces, will frequently operate in close proximity to, and in cooperation with, land forces. SOF are a scarce and valuable resource, and are employed according to enduring principles: used for strategic effect; commanded at the highest appropriate level; employed using higher level directives to maximise freedoms; committed in a timely manner; given access to the highest levels of intelligence and subject to high levels of operational security."*<sup>11</sup>

If they are not operating alongside conventional forces, they often function as part of remote warfare, operating in conjunction with drones or other forms of airpower, local forces and intelligence operatives.

New York Times October 30 2015 [http://www.nytimes.com/2015/10/31/world/obama-will-send-forces-to-syria-to-help-fight-the-islamic-state.html?\\_r=0](http://www.nytimes.com/2015/10/31/world/obama-will-send-forces-to-syria-to-help-fight-the-islamic-state.html?_r=0)

9 United Nations, United Nations Peacekeeping Missions Military Special Forces Manual (January 2015) p 9.

10 United Nations Peacekeeping Missions pp 18-21.

11 British Army, Operations (Shrivenham: Development Concepts and Doctrine Centre 2010) p4-18

It is important to note that 'special' does not mean 'small' in absolute terms. It refers to small relative to the size of the conventional forces. US and Chinese special forces, for example, are the size of most countries' regular infantries. The US Special Operations Command has approximately 75,000 combatants; Chinese special forces approximately 85,000. In Russia they may number 12-15,000 under the general title spetnaz (short for special purpose forces).<sup>12</sup> Nevertheless, for most countries special forces are few in number and deployments by the US are individually small in number. In Australia, Canada and the UK special forces number approximately 2-3,000. Alongside the US, these countries are the subject of this study because they have been the most regularly deployed in the last 15 years, particularly as part of the 'war on terror' in which remote warfare plays such a prominent role.

SOF can play positive roles in preventing and limiting violence. But the use of SOF on the scale which is occurring at the moment raises other issues which require attention, particularly due to the secrecy under which they operate. The report examines why SOF have become so prominent in the tool box of modern states, what issues are raised by their increasing use and what might be done to make the use of SOF more accountable.

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12 Moscow Defence Brief, 'Russian "Spetsnaz" Forces — from Saboteurs to Court Bailiffs' <http://mdb.cast.ru/mdb/1-2014/item4/article2/>

## The Rise of Special Operations Forces

*[In Vietnam] at their peak, less than 2,300 US special forces soldiers skillfully controlled and led about 69,000 indigenous fighters.<sup>13</sup>*

There are four reasons why SOF have become so prominent in contemporary security operations. The first is tactical. UK military doctrine describes SOF as being “a critical force multiplier for the operational commander and ... particularly useful in shaping the environment or creating the conditions for theatre entry.”<sup>14</sup> SOF can ‘punch above their weight’ in terms of their specialist warfighting skills, but also because they can provide leadership, confidence and training to local forces which might otherwise crumble.

The second is strategic: SOF may function, as arguably they are at the moment, as a method of maintaining counter-insurgency and counter-terrorism operations ‘under the radar’ without the publicity that accompanies conventional operations. For example, a US congressional report advises that when the US deploys the CIA’s SOF, “There may be occasions when having to acknowledge an official US role would preclude operations that were otherwise considered vital to the national security; the CIA can provide the deniability that would be difficult, if not impossible, for military personnel.”<sup>15</sup> This might be the case in terms of direct SOF operations or when local paramilitary groups are tasked and guided by CIA or other SOF operatives.<sup>16</sup>

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13 Comment, Maj Gen Michael Healy (Ret), Comment, in Frank Barnett, B. Hugh Tovar and Richard Schultz (eds) *Special Operations in US Strategy* (NDUP: 1984) p159

14 British Army Operations (Shrivenham: Development Concepts and Doctrine Centre 2010) p4-18

15 Richard Best and Andrew Feickert ‘Special Operations Forces and CIA Paramilitary Operations: Issues for Congress’ CRS Report for Congress (2009) pp4-5.

16 See generally Richard Pious, ‘White House Decision Making Involving Paramilitary Forces’ *Journal of National Security Law and*

The third is political. SOF deployments may be employed where conventional operations are not possible, due to legal restrictions, or political or civil society opposition. In a recently leaked document, the UK Ministry of Defence argued that one solution to the risk-averse nature of the British public was “Investing in greater numbers of SF. The use of SF brings two factors into play, namely the likelihood of large numbers being lost is small, and the public appear to have a more robust attitude to SF losses.”<sup>17</sup>

The fourth is cost. In Vietnam, operations could be “carefully thought out, deliberately and superbly executed by 10 to 12 US Special Forces soldiers with several hundred ethnic/religious minority groups at a cost of \$3.16 a day per fighter. The cost of a US PFC rifleman in Vietnam was over \$100 a day, prorated cost, plus pain at home.”<sup>18</sup> The same principle holds even more intensely in the current neoliberal environment. As a recent report on Australian SOF put it: “In times of fiscal austerity, the special operations capability offers the Australian Government a cost-effective tool to support national security objectives.”<sup>19</sup>

### The recent growth of special forces: four examples

**Australia** had its own Special Air Service regiment, established in the late 1950s, but it became part of a wider capacity following the war on terror. Thus the Special Operations Command (SOCOMD) was created by the Liberal government of John Howard in 2003. This fourth command was in addition to army, navy, and air force, covering not only the Special Air Service Regiment but also the 1st and 2nd Commando Regiments; the Special Operations Engineer Regiment; the Special Operations Logistics Squadron; and

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Policy Vol 5 2012 pp465-80

17 Ministry of Defence, Risk. *The Implications of Current Attitudes to Risk for the Joint Operations Concept*, p7.

18 Comment, Maj Gen Michael Healy (Ret), Comment, in Frank Barnett, B. Hugh Tovar and Richard Schultz (eds) *Special Operations in US Strategy* (NDUP: 1984) p160

19 Andrew Davies, Peter Jennings and Benjamin Schreer, *A versatile force. The future of Australia’s special operations capability* (Australia Strategic Policy Institute 2014) Page 8



the Special Forces Training Centre. Overall Australian SOCOMD stand at around 2,200 strength.<sup>20</sup>

Australian Special Operations Forces' aims are as follows:

*Special reconnaissance (SR) operations are used for intelligence collection, including reconnaissance, surveillance and other techniques. They're designed to obtain or verify information concerning the capabilities, intention and activities of an actual or potential enemy. They're also used to secure information about meteorological, hydrographic or geographic characteristics of a particular area.*

*Precision strike/direct action (PS/DA) operations typically include short-duration strikes and other small-scale offensive operations designed to seize, destroy, capture and inflict damage on personnel or materiel. Tactics used include the conduct of raids or ambushes, the placement of mines and other munitions, the use of standoff weapons, the provision of terminal guidance for precision guided munitions, and so on.*

*Special recovery operations (SRO) are undertaken to rescue personnel or seize equipment from permissive, uncertain or hostile environments. They include domestic and offshore counterterrorism (CT) operations and non-combatant evacuation operations, as well as personnel recovery. For high-risk CT operations that are beyond the capability of civilian authorities, SOCOMD created so-called tactical assault groups (TAGs).<sup>21</sup>*

In **Canada**, historically the Royal Canadian Mounted Police played the leading role in domestic counter-terrorism operations. However, they were replaced by Canadian SOF in 1993 in the form of Joint Task Force-2 (JTF-2), which after the 9/11 terrorist attacks was deployed abroad in counter-

terrorism operations in cooperation with the US. In addition to JTF-2 other SOF elements were reorganised, and comprise the Canadian Special Operations Regiment (CSOR); the Canadian Joint Incident Response Unit – Chemical, Biological, Radiological and Nuclear (CJIRU-CBRN); and the 427 Special Operations Aviation Squadron (427 SOAS), which supports the other three elements. These are all under the Canadian Special Operations Forces Command (CANSOFCOM) and stand at nearly 2000 personnel (including support and civilian staff) on a budget of \$53 million in 2014.

To an extent, the **United Kingdom** led the way in the development of special forces. Churchill's famous instruction to 'set Europe ablaze' when it was occupied by Nazi forces led to the development of the Special Operations Executive (SOE) with its units aimed at gathering intelligence, reconnaissance, assassination and sabotage.<sup>22</sup> In the western desert of North Africa, the Long Range Desert Group (LRDG) engaged in similar activities behind Afrika Korps lines. Churchill also encouraged the development of commando units to engage in raids on German and Italian occupied territory, units which remain part of the Royal Marines. SAS units had been operating in World War 2 but after the war were deactivated.

By the 1950s what is now recognised as the SAS re-emerged in the Malayan Emergency, in which British and colonial forces fought a communist insurgency. The 22nd Special Air Service was retained as a permanent force (other special forces like the LRDG had been disbanded, although the Royal Marine Commandos had not). The SAS subsequently played a role in a series of conflicts in places such as Oman, Northern Ireland, the Falklands, the first Gulf War, Kosovo and the invasions of Afghanistan and Iraq.

It was in Northern Ireland that a wider special operations capacity was developed. In combatting republican terrorist groups, the SAS was seen to lack effectiveness and was in one sense superseded by the

20 See Davies, Jennings and Schreer, A versatile force p12 and <http://www.army.gov.au/Our-people/Units/Special-Operations-Command>  
21 [https://www.aspi.org.au/publications/a-versatile-force-the-future-of-australias-special-operations-capability/Special\\_operations\\_capability.pdf](https://www.aspi.org.au/publications/a-versatile-force-the-future-of-australias-special-operations-capability/Special_operations_capability.pdf) pp 9-10

22 David Stafford, Churchill and Secret Service (London: Abacus 2000) chapters 14-16.

establishment of the 14th Detachment, an intelligence and reconnaissance unit that worked undercover.<sup>23</sup>

Following peace in Northern Ireland in 1998 and the invasion of Iraq in 2003 the UK government reorganised special forces. The 14th Detachment was renamed the Special Reconnaissance Regiment and units from the 1st Parachute Regiment, Royal Marine Commandos, and a Royal Air Force gunnery detachment were grouped together as the Special Forces Support Group (SFSG). This total force comprises approximately 3-3,500 personnel.

The **US** Special Operations Command is a relatively recent innovation, stemming from the 1980s. Previously the US armed forces had viewed special forces and special operations negatively, preferring instead to concentrate on conventional forces. However, after Iranian revolutionaries had kept US citizens as hostages in 1979-80 and a US rescue attempt had failed it was felt that the US required a more developed specialist capacity. The US Special Operations Command (SOCOM) was created.<sup>24</sup> It joined the other major commands of the US armed forces, with the difference that they were geographically rooted.<sup>25</sup> In the mid-1980s Joint Special Operations Command (JSOC) was created under SOCOM to facilitate training, innovation and cooperation between the special forces of army, navy and air force.

JSOC rose from a relatively minor role to become the leading organisation in the US 'war on terror.' In the 2004 Unified Command Plan, "USSOCOM was given the responsibility for synchronizing Department of Defense (DOD) plans against global terrorist networks and, as directed,

conducting global operations against those networks." And in 2008 JSOC received DOD responsibility for assistance and training globally.<sup>26</sup> Donald Rumsfeld as Defence Secretary had led this development. He felt that the CIA were unreliable and conventional US army commanders were too risk averse. Rumsfeld and Cheney increased the resources devoted to JSOC, as well as its independence, setting JSOC outside the existing military chain of command and having it report directly to the President and the DOD.

JSOC coordinated the 'elites of the elites' in terms of special forces: Delta Force, DevGru (Navy SEALs), USAF 24th Special Tactics Squadron, the Army 160th Special Operations Aviation Regiment, 75th Ranger Regiment and intelligence support units. Special forces overall may number 75-80,000. The JSOC component (which concentrates on covert black operations) is much smaller but still eclipses the special forces of any other powers except Russia and China.

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23 Mark Urban, *Big Boy's Rules. The SAS and the Secret Struggle Against the IRA* (London: Faber 1992) chapter 18

24 See Jennifer Kibbe, 'Covert Action and the Pentagon' *Intelligence and National Security* Vol 22 No 1 (2007) pp59-60 and generally for a good overview of JSOC.

25 For example AFRICOM, EUCOM which covers Europe and some of Eurasia; and CENTCOM, which covers twenty countries in South Asia, Central Asia and the Middle East. See <http://www.defense.gov/Sites/Unified-Combatant-Commands>

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26 Andrew Feickert and Thomas Livingston, 'U.S. Special Operations Forces (SOF): Background and Issues for Congress' Congressional Research Service (2010) pp 1-2

# What are Special Operations Forces used for?

## Intelligence, Surveillance and Reconnaissance (ISR)

Special forces, including the British SAS were employed prior to 9/11 in a variety of operations including reconnaissance for conventional NATO forces and later the tracking down of suspected war criminals in the new territories of Bosnia and Serbia.<sup>27</sup>

## Intelligence Preparation of the Battlefield

SOF are often active in Intelligence Preparation of the Battlefield, scoping the territory, conditions and enemy displacements before operations, be they hostage rescue or combat operations. In 2005, the year before the UK deployed to Helmand province in Afghanistan, the SAS was tasked with a reconnaissance survey.<sup>28</sup> Both under presidents Bush and Obama, the task of preparing the battlefield involved deploying US SOF forces across the globe, often coordinating strikes against terrorist groups.<sup>29</sup>

## Forward Air Control

SOF may act as Forward Air Controllers or provide support to other FACs from air force or local forces. US SOF acted as forward air controllers in Afghanistan after 2001 and in Iraq.<sup>30</sup> The UK SAS acted as forward air controllers in Libya in 2011. Indeed, SAS soldiers and private security company operators assisted forward air targeting in Misrata, passing details of movements

27 Julian Borger, 'The hunt for the former Yugoslavia's war criminals: mission accomplished' Guardian Aug 3 2011. Operations Tango (1997) and Ensue (1998) were aimed at capturing suspected Serbian war criminals

28 Moran p119

29 Scahill, p282

30 Conventional units such as the US Marine Corps also used dedicated FACs from air force and other units. Operators from the CIA also acted as FACs.

and locations which were verified by aerial surveillance to assist the rebels in breaking off the siege by loyalist forces.<sup>31</sup> In Iraq, by early 2015 seventy Canadian SOF had been deployed. They directed some of the air strikes against IS forces and briefly engaged in firefights whilst on reconnaissance.<sup>32</sup>

## Targeted killing

From 2003, SOF were involved in the invasion and occupation of Iraq, securing important tactical facilities and then engaging in the hunt for the 'pack of cards' - High Value Targets of the Saddam state. However, as Iraq descended into civil war, US and UK special forces undertook the most expansive and concentrated operations in their histories. In order to gain some semblance of stability in central Iraq JSOC decided to tackle the car bomb networks through which Al Qaeda in Iraq were attacking Shias and creating deepening sectarian conflict. This involved the development of what would be termed 'industrial counter terrorism' through which JSOC would assemble intelligence packages that would be used to mount raids on suspected terrorist cells. During these raids, intelligence would be gathered and used to mount further raids.

As JSOC commander Gen Stanley McChrystal put it, with 'intelligence-driven operations, [and] very precise targeting ... you can hit the network as many times as the intelligence will support.'<sup>33</sup> The British (SAS) element in these operations killed 400 insurgents and captured 3,000. The operations overall may have killed 3000 and captured 11,000.<sup>34</sup>

31 'Libya: SAS veterans helping NATO identify Gaddafi targets in Misrata', Guardian May 31 2011 <http://www.guardian.co.uk/world/2011/may/31/libya-sas-veterans-misrata-rebels>

32 Stephen Chase, 'Canadian soldiers engaged in more firefights against Islamic State, military says' Globe and Mail January 26 2015 <http://www.theglobeandmail.com/news/politics/breaking-jan-26/article22633741/>

33 Jon Moran, From Northern Ireland to Afghanistan. British Military Intelligence Operations, Ethics and Human Rights (Farnham: Ashgate 2013) p95

34 Mark Urban, Task Force Black (London: Little Brown 2010) p243 and p271

Following the later large-scale nation building operation in Afghanistan from 2006 under the framework of ISAF, SOF became more prominent and long-term, engaging in surveillance and reconnaissance, forward air control and search and destroy missions against High and Medium Value Taliban targets. From around 2009 these attacks developed into a targeted killing programme under JSOC commander Stanley McChrystal. SOF from the US, UK and Canada under effective United States control and coordination developed a 'kill list' by which senior Taliban commanders would be eliminated. The logic behind this was that the tactic would force the Taliban to the negotiating table.

At the same time, mid-level Taliban leaders who were involved in leading attacks on ISAF personnel, IED or car bomb attacks would also be selected for elimination. This element of ISAF operations became increasingly important as first the British drew down troop levels and then the US reduced its combat power in Afghanistan.<sup>35</sup> The organisational template for SOF in Iraq and Afghanistan was to combine different special forces and intelligence units (from different countries) in Task Forces, backed up by supporting Quick Reaction Forces and airpower.

## Undermining or overthrowing regimes

Following the 2001 terrorist attacks on the United States SOF from the United States, Canada, Australia and the United Kingdom were sent to Afghanistan and led the initial ground attacks against the Taliban and Al Qaeda, acting alongside local militias from the Northern Alliance. They also supported indigenous forces under Hamid Karzai, which alongside air power allowed him to establish a base in Tarin Kowt, then take Kandahar and then the capital, Kabul. Karzai later became head of the Afghan government.<sup>36</sup>

<sup>35</sup> Moran, From Northern Ireland to Afghanistan pp131-146

<sup>36</sup> Moran, From Northern Ireland to Afghanistan pp117-119

The overthrow of the Taliban was an overt operation conducted as part of the US response to the 9/11 terrorist attacks, but SOF can also function covertly. For example, in Libya in the defeat of the Gaddafi regime, where:

*[US] Administration officials claimed that they were there only to 'assess the situation.' In fact, they were helping direct air strikes against Qaddafi's forces and helping British and French intelligence personnel funnel arms shipments to the Libyan rebels, as well as trying to determine if any of the Libyan rebels were allied with Al Qaeda or other Muslim militant organisations.<sup>37</sup>*

In addition, SOF from Qatar, Britain and France were sent on a joint covert mission to assist the rebels in training, command and coordination,<sup>38</sup> following which SOF from France, Jordan and Qatar began to covertly assist the rebels. This was not only in the final phases in August but generally, according to a NATO spokesman, 'helping them get better organised to conduct operations' and 'improve their tactics.'<sup>39</sup> The conflict was at a stalemate when they arrived. But French and Qatari units helped in the attack on Benghazi and the British in the attack on Sirte, before assisting in the taking of Misrata and finally Tripoli.<sup>40</sup> Within weeks of Gaddafi's death the SOF units departed.<sup>41</sup>

As part of Russia's foreign and security policy, both presidents Putin and Medvedev covertly deployed spetsnaz in a series of conflicts in Chechnya, South Ossetia, Ukraine and Crimea.<sup>42</sup> Spetsnaz forces from the Black Sea fleet and other districts may have been operating in the Crimean

<sup>37</sup> Matthew M Aid, *Intel Wars* (London: Bloomsbury 2012) p195.

<sup>38</sup> Urban 'Libya. Britain's Secret War'

<sup>39</sup> CNN 'Foreign forces in Libya helping rebel advance' August 24 2011 <http://edition.cnn.com/2011/WORLD/africa/08/24/libya.foreign.forces/>

<sup>40</sup> Sean Rayment, 'How the special forces helped bring Gaddafi to his knees' Daily Telegraph August 28 2011

<sup>41</sup> Mark Urban 'Libya. Britain's Secret War' Newsnight BBC 2 broadcast January 18 2012

<sup>42</sup> Mark Galeotti, *Spetsnaz. Russia's Special Forces* (Oxford Osprey 2015)

peninsula as the crisis escalated. This was discussed as another example of the model which has been so successful for Russian forces in the last 15 years:

*Soldiers in unmarked uniforms at airports and military bases. Supply routes cut off. Expansive – and supposedly unrelated – army manoeuvres clouding the picture on the current status and deployment of Russian troops...a familiar playbook.*<sup>43</sup>

## Training and mentoring

The SAS may have been involved in training elements of the Kosovo Liberation Army in its campaign for independence from Serbia in 1999<sup>44</sup> and similar tactics were used later in Libya, as mentioned earlier in this report. In breaking the siege of rebel-held Misrata, British special forces coordinated air strikes and trained and advised rebels.<sup>45</sup> Training continued, as well as the provision of communications and other equipment, and 200 militiamen who had been trained by SOF were able to infiltrate Tripoli.<sup>46</sup> The loyalist forces did not mount a widespread resistance and the capital was taken in a week falling in late August 2011.<sup>47</sup>

Throughout the 2000s, US SOF training and mentoring (including intelligence, surveillance and reconnaissance support) was vital in assisting the Philippine security forces to kill, capture or disrupt the operators of the Al Qaeda-linked group, Abu Sayyaf, as well as Jemaah Islamiyah and the Moro Islamic Liberation Front.<sup>48</sup> SOF have also

been involved in training local Iraqi units to resist ISIS in Iraq,<sup>49</sup> and may have played an important role in stiffening resistance there.

According to a recent report, “the U.S.’s most elite troops trained in 77 foreign nations alongside nearly 25,000 foreign troops under the JCET program in just 2012 and 2013.”<sup>50</sup> Although US forces are prohibited from training with local forces accused of human rights abuses under the ‘Leahy Laws’,<sup>51</sup> the US continued training in Saudi Arabia and Bahrain (where both countries’ security forces have been accused of abuses against human rights and democracy protestors) and in other nations where security forces are regularly accused of unlawful actions against civilians, including Algeria, Colombia, Chad and Tajikistan.<sup>52</sup> The Australian SAS was involved in training and supplying the Indonesian SOF organisation Detachment 88, a counter terrorist unit formed after the Bali bombings in 2002. The unit has been accused of torture and other unlawful acts against separatists.<sup>53</sup>

43 Sam Jones, Kathrin Hille Roman Olearchuk, ‘Russian troops stick to a tried and tested script’ FT.com March 2 2014 <http://www.ft.com/cms/s/0/938ce33e-a227-11e3-a621-00144feab7de.html#axzz3tp4JDAGV>

44 Christian Jennings, ‘Details emerge of SAS actions in Kosovo’ Scotland on Sunday August 29 1999; Christian Jennings, ‘Terrorism hits world support for Kosovo’ Daily Telegraph Feb 22 2001

45 M. Urban ‘Libya. Britain’s Secret War’

46 Sean Rayment, ‘How the special forces helped bring Gaddafi to his knees’ Daily Telegraph August 28 2011

47 Aid, Intel Wars, p123

48 Thomas Lum and Ben Dolven, ‘The Republic of the Philippines and U.S. Interests—2014’ Congressional Research Service May 2014 pp13-14

49 See Claire Mills, Ben Smith and Louisa Brooke-Holland, ‘ISIS/Daesh: the military response in Iraq and Syria’ UK Parliamentary Briefing Paper Number 06995, 16 March 2016 pp2021 and 40-41 for details on the UK role.

50 Nick Turse, ‘Secret Warfare: U.S. Special Forces Expand Training to Allies with Histories of Abuse’ The Intercept September 9 2015 <https://theintercept.com/2015/09/09/u-s-special-forces-expand-training-allies-histories-abuse/>

51 (Leahy Law) 22 U.S. Code § 2378d - Limitation on assistance to security forces. No assistance shall be furnished under this chapter or the Arms Export Control Act [22 U.S.C. 2751 et seq.] to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.

See <https://www.law.cornell.edu/uscode/text/22/2378d>

52 Nick Turse, ‘Secret Warfare’

53 Human Rights Watch, ‘Australia: Press Indonesian Security Forces on Accountability’ October 27 2010 <https://www.hrw.org/news/2010/10/27/australia-press-indonesian-security-forces-accountability>

## Transparency and accountability of the use of SOF by the UK, US, Canada and Australia

The deployment of SOF may bring great benefits. These include providing intelligence, which has in the past brought alleged war criminals to trial in various jurisdictions. SOF deployments may also avoid the mass civilian casualties that might result from large-scale troop deployments, for example in Panama in 1989 and Somalia in 1993.

Having made this point, this increasing use of special forces raises a number of important issues. These include: the decision to deploy SOF, the rules of engagement they operate under and their coverage (or not) by oversight and accountability. The latter is particularly acute if SOF are deployed precisely because they have lesser scrutiny and accountability than conventional forces. Further, a focus on the legal and ethical context of SOF is important because despite the recent focus on drones and robotic killing it is important to point out that much of the killing done in counter-insurgency and counter-terrorism operations is done so by human beings in the same battlespace.

These issues are addressed below largely by reference to Australian, Canadian, UK and US special operations, four of the countries with the biggest SOF footprints. However, they are even more acute for other jurisdictions with less developed mechanisms for accountability in foreign policy or national security matters. In Russia and Qatar, for example, the decisions and deployment of SOF are outside all meaningful scrutiny.

## The decision to deploy SOF

*We never comment on the disposition of our special forces anywhere in the world and that will remain our policy.<sup>54</sup> – the UK position*

Even in democracies, the decision to deploy SOF is often taken at the highest political levels and without scrutiny.

In **Australia** there is meant to be a more consensus-driven approach to the deployment of SOF<sup>55</sup> although recent decisions appear to have increasingly excluded its parliament from consultation.<sup>56</sup>

In **Canada**, the decision to deploy SOF is taken at the highest levels of the armed forces in conjunction with the relevant political authority. Canadian SOF are accountable to the head of the Canadian Special Operations Forces Command [CANSOFCOM], who in turn is accountable to the Minister of Defence and Prime Minister. They are not, however, accountable to its parliament. This secrecy has been commented upon by the Canadian parliament:

*There have been unsubstantiated rumours of JTF2 operating in a number of foreign locations. And that is the problem. Canadians do not know where our JTF2 is operating, under what authorities, and under what rules of engagement.<sup>57</sup>*

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54 Philip Hammond, UK Defence Secretary, quoted in Richard Norton-Taylor 'If UK special forces are in Iraq, how will we know?' Guardian Defence and Security blog September 22 2014 <http://www.theguardian.com/world/defence-and-security-blog/2014/sep/22/sas-iraq-syria>

55 Ian Langford, 'Australian Special Operations: Principles and Considerations' Australian Army Research paper No.4 (Australian Army: 2004) p10

56 Deirdre McKeown and Roy Jordan, 'Parliamentary involvement in declaring war and deploying forces overseas' Parliament of Australia Background Note March 22 2010 [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/0910/ParliamentaryInvolvement#\\_Toc257028836](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/ParliamentaryInvolvement#_Toc257028836)

57 Standing Senate Committee on National Security and Defence (2006) quoted in Michael Skinner, 'Canada's Ongoing Involvement in Dirty Wars' Canadian Centre for Policy Alternatives July 1 2013 <https://www.policyalternatives>.

In the **USA** there are two different streams of accountability for the deployment of SOF from the military and from the CIA. SOF from the CIA's paramilitary wing (which is often composed of ex-military SOF) can be deployed after a Presidential 'finding' and with notice to the eight leaders of the relevant intelligence committees in Congress.

JSOC is accountable via the JSOC commander to the Chiefs of Staff and the Secretary of State for Defense or the President. But it does not require the level of Congressional oversight that the CIA does before deployment<sup>58</sup> and since 2001 JSOC has been given a prominent global strike role whilst operating as an independent entity outside the standard military chain of command, an organisational development led by Secretary of Defense Donald Rumsfeld and Vice President Dick Cheney<sup>59</sup>

*Under President George W. Bush, JSOC's operations were rarely briefed to Congress in advance — and usually not afterward — because government lawyers considered them to be “traditional military activities” not requiring such notification. President Obama has taken the same legal view, but he has insisted that JSOC's sensitive missions be briefed to select congressional leaders.<sup>60</sup>*

This increased oversight occurred whilst a major expansion of SOF activity took place<sup>61</sup> and has not prevented JSOC and the CIA acting as powerful military forces

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ca/publications/monitor/canadas-ongoing-involvement-dirty-wars Specific details on funding for the four CANSOFCOM units is classified.

58 Spencer Ackerman, 'How the Pentagon's Top Killers Became (Unaccountable) Spies' Wired February 13 2012 <http://www.wired.com/2012/02/jsoc-ambinder/>

59 Colonel John Macgregor, then on the Pentagon planning staff for the Gulf war stated, 'I stayed away from it [JSOC] I didn't want to be involved with it, and I wasn't interested in participating in it, because I had this fear that we were ultimately breaking laws. Whether those laws were our own or they turned out to be the Geneva convention.' Quoted in Jeremy Scahill, *Dirty Wars* (London: Serpent's Tail 2013), p100

60 Dana Priest and William Arkin 'Top Secret America' Washington Post September 2 2011

61 Scahill, *Dirty Wars*, p252 and pp282-83

with a global reach. The President stands as commander-in-chief of all the armed forces and the Authorisation for the Use of Military Force, passed by Congress after the 9/11 attacks effectively declared a state of war between the United States and international terrorist forces.<sup>62</sup>

There is also some debate about the authority under which SOF from the CIA have been deployed in the war on terror. CIA activities are apparently covered by Title 50, which authorises covert action by the US to support clear foreign policy aims of the US. However, a more detailed examination of Title 50 shows that this expressly does not cover 'traditional military activities' since these are covered by the laws of war and imply an identifiable armed conflict. Further, covert activity does not allow the President to violate 18 USC 1119 (the prohibition on foreign murder).<sup>63</sup> CIA activities in Afghanistan and elsewhere remain shrouded in mystery.

The **British** government is the most tight-lipped of all. "We never comment on the disposition of our special forces anywhere in the world and that will remain our policy" Philip Hammond, UK Defence Secretary, stated in 2014.<sup>64</sup> Decisions to deploy SOF are taken by the Prime Minister and Defence Secretary in conjunction with the Director of Special Forces. Further, SOF are exempt from the Freedom of Information Act and from the 30-year rule on the public disclosure

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62 S.J.Res.23 — 107th Congress (2001-2002): 'Authorization for Use of Military Force - Authorizes the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.'

63 Kevin John Heller, Why Title 50 Does Not Provide the CIA with a Public Authority Justification Opinion Juris <http://opiniojuris.org/2014/09/06/title-50-provide-cia-public-authority-justification/>

64 Richard Norton-Taylor 'If UK special forces are in Iraq, how will we know?' Guardian Defence and Security blog September 22 2014 <http://www.theguardian.com/world/defence-and-security-blog/2014/sep/22/sas-iraq-syria>

of government documents. In Libya in 2011 there was confusion over whether SOF were in Libya at all and what their mission was, as illustrated in this parliamentary exchange:

Toby Perkins, MP: I would like to associate myself with the Secretary of State's comments on the work done by our armed forces in Libya. Will he tell the House who in the Ministry of Defence authorised the use of special forces in the operation that started on 2 March, and what advice led to that decision?

Dr Liam Fox, Secretary of State for Defence: The Foreign Secretary has already set out the circumstances in which—[ Interruption. ] I have no intention of commenting further on special forces.<sup>65</sup>

Tom Greatrex MP: I am not sure that the Secretary of State's earlier answer was entirely clear, so perhaps he will try again. Will he tell us who specifically in his Department authorised the involvement of special forces in Libya on 2 March?

Dr Liam Fox, Secretary of State for Defence: I have already made it clear that the Foreign Secretary set out the exact details, as far as we are able to disclose them, on that particular operation. When force protection is to be offered to the sort of diplomatic mission that was undertaken, it is quite usual for the Ministry of Defence to be asked and to agree to do it.<sup>66</sup>

In the UK in 2011 it was only revealed that UKSOF were in Libya through their being seen on film by al Jazeera journalists.<sup>67</sup>

65 Hansard, Col. 15 14 March 2011  
66 Hansard, Col. 18 14 March 2011  
67 "Al Jazeera video captures 'western troops on the ground' in Libya" Al Jazeera May 30 2011 <http://www.mediaite.com/tv/al-jazeera-video-captures-western-troops-on-the-ground-in-libya/> Department of Defense Inspector General [http://www.dodig.mil/about\\_us/index.html](http://www.dodig.mil/about_us/index.html)

## General oversight

The general oversight of Special Operations Forces is in effect limited across these countries.

In the **US**, the Department of Defense Inspector General has a wide remit to examine operations including those of the SOF<sup>68</sup> as does the General Accounting Office (which produced a recent report on the increased deployment of SOF.<sup>69</sup>) But after 2006, the Department of Defense exempted SOCOM from the normal budget-justification requirements. The House Appropriations Committee therefore stated it:

*"is unable to conduct meaningful oversight of SOCOM's budget requirements as the current justification does not include the necessary level of detail," and thus 'Due to the failure of the budget justification to provide such information, the Committee is unable to analyze changes and trends over time in SOCOM's budget requirements, conduct comparative analysis with similar Department of Defense budget requirements, or have any understanding or visibility into changing requirements in the year of execution.'*<sup>70</sup>

The **Australian** National Audit Office has not conducted an audit on SOF but they are mentioned in reports dealing with reserve forces and army learning.<sup>71</sup>

In **Canada** the Assistant Deputy Minister (Review Services) is tasked to:

*To perform review services on behalf of the Deputy Minister (DM) and the Chief of the Defence Staff (CDS); promote improvements in Department of National Defence/Canadian Armed Forces (DND/*

68 Department of Defense Inspector General [http://www.dodig.mil/about\\_us/index.html](http://www.dodig.mil/about_us/index.html)

69 General Accounting Office, Special Operations Forces: Opportunities Exist to Improve Transparency of Funding and Assess Potential to Lessen Some Deployments (2015) <http://www.gao.gov/products/GAO-15-571>

70 Quoted in Nick Schwellenbach 'Congress Says Special-Ops Budget Top Too Secret' The Economist June 26 2013 <http://nation.time.com/2013/06/26/congress-says-special-ops-budget-too-secret/>

71 <http://www.anao.gov.au/Publications>



*CAF) policies, programs, operations and activities; and enhance the abilities of members and employees to perform their duties to the highest ethical standard.<sup>72</sup>*

But from 2011-2015 neither the DND or CAF performed an audit of Canadian SOF.<sup>73</sup>

**UK** scrutiny of special forces is also limited. The Director of Special Forces is accountable to the Ministry of Defence and the MoD might be inspected by the National Audit Office. But in the last 17 years the NAO has not conducted an audit on UKSOF.<sup>74</sup>

## SOF and Rules of Engagement

Rules of Engagement (ROE) are the most sensitive issue with regard to SOF operations because they set the framework on who might be engaged with lethal force and in what circumstances. ROE were first developed in the Korean War in the area of US air targeting<sup>75</sup> but then expanded to cover all forms of armed conflict. They are perhaps most clearly defined in a recent British document:

*(ROE) are commanders' directives - in other words policy and operational guidance - sitting within the legal framework rather than law themselves. They are expressed as permissions and prohibitions which govern where armed forces can go, what they can do and, to an extent, how and when certain actions can be carried out. They are designed to ensure that action taken by UK forces is*

*lawful and consistent with government policy. They are also used to enhance operational security, avoid fratricide and to avoid counter-productive effects which could destabilise a campaign. ROE do not by themselves guarantee the lawfulness of action; it remains the individual's responsibility in law to ensure that any use of force is lawful. Moreover, ROE do not restrict the inherent and inalienable right of an individual to act in self-defence.<sup>76</sup>*

The ROE under which special forces operate will be dependent on the context in which they are deployed and the function being performed: for example, whether SOF are conducting surveillance and reconnaissance; are acting as mentors and trainers to other security forces; or are acting as mentors but expected to engage in conflict; or are directly tasked with capture and/or kill missions.

What complicates the picture is that the ROE under which SOF operate are usually classified.

**Australian** special operations ROE are not disclosed.<sup>77</sup> The Ministry of Defence of the **British** Government does not disclose the ROE under which the SAS and SBS and associated units operate and **Canada's** Joint Task Force-2 works under undisclosed ROE set by the Chief of the Defence Staff.<sup>78</sup> The **US** is probably the most open authority with regard to the operations of its SOF, but it does not provide information about their ROE.

72 <http://www.forces.gc.ca/en/about-org-structure/chief-review-services.page>

73 Further, 'Like any other CAF unit, internal oversight bodies such as the Chief of Review Services, the Military Police Complaints Commission, the Pay and Allowances Review Board, the Access to Information Office and the CAF Ombudsman all have access to JTF 2, if required, to carry out their duties.' Joint Task Force 2 (JTF 2) <http://www.forces.gc.ca/en/operations-special-forces/jtf2.page>

74 From consulting the record of reports on the NAO website <https://www.nao.org.uk/search/type/report/sector/defence/page/12/>

75 Jeffrey Addicott 'The Strange Case of Lieutenant Waddell: How Overly Restrictive Rules of Engagement Adversely Impact the American War Fighter and Undermine Military Victory' St. Mary's Law Journal Vol.45 No.1 2013 pp14-15

76 British Army, Operations (Shrivenham: DCDC 2010) p2-14

77 Australian Minister for Veteran's Affairs and Minister Assisting the Minister of Defence to House of Representatives in 2005: 'divulgence of these details could lead to mission failure and/or place the lives of ADF personnel in danger unnecessarily' quoted in Peter Rowe, 'The Rules of Engagement in Occupied Territory. Should they be Published?' Melbourne Journal of International Law Vol.8 2007, page 330. See also the documents under 'Rules of Engagement – Afghanistan and Iraq' Nautilus <http://nautilus.org/publications/books/australian-forces-abroad/afghanistan/rules-of-engagement-afghanistan-and-iraq/>

78 Joint Task Force 2 (JTF 2) <http://www.forces.gc.ca/en/operations-special-forces/jtf2.page>

It can however be surmised that the basic ROE are the same as those covering regular forces: the killing of those engaged in combat is permitted, as is killing to prevent loss of life and for self-defence,<sup>79</sup> whilst the killing of those *hors de combat* is prohibited.<sup>80</sup>

The only other information that we can glean about these countries' SOF ROE comes from examining case studies of their use. These tend to suggest that SOF require or are granted wider ROE than other units. For example, during the SAS deployment to Iraq,

*“British special forces went into Iraq with rules of engagement closer to those of their green [regular] army colleagues. For a long time the DSF [Director Special Forces] and CJO [Chief of Joint Operations] would not authorise the bombing of a house unless its occupants had shown signs of resistance, most obviously by shooting at Coalition troops but even in some cases, simply by revealing weapons. Even then, if an assault had been ordered for intelligence-gathering purposes they could not necessarily shoot anyone inside who offered resistance. This produced much negative comment from Task Force*

79 It should be noted that even the seemingly basic term ‘self-defence,’ particularly when the idea of proximity of threat is employed, can and has been used at the state and individual level as the justification for many uses of force. See Robert Chesney ‘Military Intelligence Convergence and the Law of the Title 10/Title 50 Debate’ *Journal of National Security Law and Policy* Vol 5 2012 pages 549-554

80 Australian army rules state this clearly: Persons ‘hors de combat’ are ‘Those who do not participate in hostilities must not be the direct object of an attack. Soldiers who are ‘out of combat’ and civilians are to be treated in the same manner and cannot be made the object of attack. A person is hors de combat if that person: is under the control of an enemy; clearly expresses an intention to surrender; or has been rendered unconscious, or is otherwise incapacitated by wounds or sickness, and therefore incapable of defending himself. Provided that person abstains from any hostile act and does not attempt to escape.’ (7.8.) ‘Other persons who are not taking a direct part in hostilities are also considered to be out of combat.’ (7.9.) See <http://www.defence.gov.au/adfwc/documents/doctrinelibrary/addp/addp06.4-lawofarmedconflict.pdf>

*Knight operators. Over time, Task Force Knight’s rules of engagement had in fact been brought closer to those of the Americans. By 2007 they were, under certain circumstances, allowed to attack a house or car if they believed those inside to be terrorists about to perpetrate an act of violence.’<sup>81</sup>*

The SAS later operated in a very similar way to the US Delta Force.<sup>82</sup> As mentioned, the context is important. Here, SOF were operating in an emergency situation of near civil war and being despatched on rolling missions in hostile urban areas in which they were immediately at risk. The issues are different when SOF are not operating in a situation of public emergency, where their missions are fewer and planned in greater detail; or alternatively if SOF are on ranging missions pro-actively seeking out targets that they can choose to engage or not.

This was evident in operations in Afghanistan where logs released by Wikileaks show that SOF ROE were possibly contributing to civilian deaths. For example in March 2007 in Malakshay village on the Afghan border, Shum Khan, a deaf man who fled at the entry of a CIA paramilitary unit was fired on and killed according to ‘escalation of force’ provisions in CIA ROE.<sup>83</sup> Australian SOF had also seemingly implemented ROE which were wide in scope. In 2012 in Uruzgan province, during a joint Afghan-Australian operation to track a ‘mid-level Taliban commander’ an Australian commando shouted (in local language) to two men to stop. The men ignored this and the soldier opened fire, also hitting a 13 year-old boy who was transferred to hospital. The Australian Defence Force report exonerated the soldier since the ROE stated that, as well as cases of self-defence and the prevention of injury or loss of life, those exhibiting ‘hostile intent’ could be fired on.<sup>84</sup>

81 Mark Urban Task Force Black, pp232-33. Task Force Knight was formerly named Task Force Black.

82 Urban, Task Force Black pp 253-54

83 David Leigh ‘Afghanistan war logs: Secret CIA paramilitaries’ role in civilian deaths’ *Guardian* July 25 2010 <http://www.theguardian.com/world/2010/jul/25/afghanistan-civilian-deaths-rules-engagement>

84 Rory Callinan and David Wroe

Even more acute issues were raised by the pro-active development of 'kill lists' by ISAF in Afghanistan in an attempt to force the Taliban to the negotiating table. This process was in full flow by the time it was described by the media:

*"500 British special forces soldiers are engaged in intense operations designed to kill as many Taliban commanders as possible. That such operations are of questionable legality is clear from the special (and secret) legal advice given to special forces, different to that given to the rest of the British armed forces."*<sup>65</sup>

The kill list approach clearly raises the issue of whether this constitutes assassination. As defined in Australian doctrine for example, assassination is the unlawful sudden or secret killing by treacherous means of an individual who is not a combatant, by premeditated assault, for political or religious reasons.<sup>86</sup> The kill list targeting in Afghanistan was/is not for religious or political reasons - although the distinction between military and political reasoning in a COIN or counter-terror situation is always murky. However, it was/is status-based rather than threat-based.<sup>87</sup> Those killed were so because of classification as a 'Taliban commander' or some even looser designation. This also explains why the UK was challenged in 2013 over the fact that the kill list its forces were working through did not specify whether the targets were engaged in hostilities – for example it included some fifty drug dealers, held to be supporting the Taliban through narcotics.<sup>88</sup>

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'Australian soldier shot a child in Afghanistan' Sydney Morning Herald May 5 2014 <http://www.smh.com.au/federal-politics/political-news/australian-soldier-shot-a-child-in-afghanistan-20140505-zr4qa.html>

85 Richard Norton-Taylor and Ewan Macaskill 'Talking about Taliban killers is taboo in the UK' Guardian December 6 2011 <http://www.theguardian.com/world/defence-and-security-blog/2011/dec/06/sas-afghanistan>

86 <http://www.defence.gov.au/adfwc/documents/doctrinelibrary/addp/addp06.4-lawofarmedconflict.pdf>

87 Robert Chesney 'Rules of Engagement for the War in Afghanistan in 2015' Lawfare December 3 2014 <https://www.lawfareblog.com/rules-engagement-war-afghanistan-2015>

88 Moran, From Northern Ireland to

The use of status-based targeting appears to be a method of getting around the prohibitions on killing those who are hors de combat by defining them as a type of combatant (but without the protection that a formal definition of combatant would bring) and thus still permitted to be targeted under international humanitarian law.<sup>89</sup>

There remains debate and indeed confusion over the US justification for the use of lethal force abroad in non-warfare situations, but after 9/11 organisational and tactical developments led the way beyond any deeply thought-out legal framework. The Authorisation for the Use of Military Force (AUMF) seemed to carry the day, whilst Title 50 was employed as a catch-all justification for the CIA. In many cases self-defence is invoked as the justification for many US actions, including the stretching of the idea of proximity of threat.<sup>90</sup>

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Afghanistan, p157; see also Leigh Day "Afghan 'Kill list' Legal Challenge" <https://www.leighday.co.uk/News/2013/July-2013/Afghan-Kill-List-Legal-Challenge>

89 For a justification of this approach see The Canadian Yearbook of International Law (University of British Columbia Press 2010) pages 120-121. There may be scope in UK and US law if not Canadian and Australian for assassination. For MI6, section 7 of the 1994 Intelligence Services Act provides for an authorisation to be given by the Secretary of State for acts committed outside the U.K. where the person would otherwise be liable in the U.K. under the criminal or civil law of any part of the U.K. For example MI6 agents involved in bugging, burglary, or bribery – if properly authorised - may be effectively exempt from prosecution. Such activities may remain illegal both under the laws of the country of commission and under international law. However, international law – as further implemented in domestic law by the Human Rights Act 1998 – may rule out some further activities even if committed abroad; for example, section 7 could perhaps still provide a "license to kill" but probably not a license to torture. Further, this might give scope for individual assassination by UKSOF acting under MI6 instruction, but not industrial targeting. I am grateful to Professor Clive Walker for this point.

90 Robert Chesney, 'Military Intelligence Convergence and the Law of the Title 10/Title 50 Debate' Journal of National Security Law and Policy pp549-554

These issues are even more acute regarding nations such as Australia, Canada and the UK which could not credibly claim they were in a form of international armed conflict resulting from a large scale attack on their territories. As a result, “it is possible, if not probable, that a growing set of exceptionally sensitive operations – up to and including the use of lethal force on an unacknowledged basis on the territory of an unwitting and non-consenting state – may be beyond the reach of these rules.”<sup>91</sup>

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91 Chesney ‘Military Intelligence Convergence’ p540

## Implications of a lack of transparency and accountability in SOF deployments

Low democratic oversight over SOF has implications for the way that states wage war. As their use grows, a greater proportion of military action and defence expenditure becomes unaccountable to parliaments and populations. This trend towards opaque interference abroad can result in the use of special forces as a substitute for conventional force, where complex conflicts drag SOF troops on the ground into combat, even against their original mandates.

In terms of mentoring, SOF theoretically have the duty to remain within the parameters of their mission, using force only when absolutely necessary for self-defence or to prevent the loss of life. However, in practice training and mentoring roles can see SOF engaging in combat with little scrutiny. In Libya in 2011 NATO forces were supposedly constrained by UN Security Council Resolution 1973 which stipulated the protection of civilian and civilian areas against the forces of the Colonel Muammar Gaddafi, the then head of state<sup>92</sup> but in practice SOF units from the UK, US and Canada acted as military trainers, advisers, intelligence gatherers and forward air controllers and played a crucial role in the overthrow of the Libyan state.

Currently SOF are in advisory roles in Syria but it is difficult to see how SOF assistance would not bring them into combat situations. For example, Canadian Defence Minister

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92 UNSC Res. 1973 'Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory' [http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_03/20110927\\_110311-UNSCR-1973.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110927_110311-UNSCR-1973.pdf)

Rob Nicholson stated with regard to operations in Syria... "I am not sure we could train troops without accompanying them. We have been very clear that we would be in the business of assisting and training these individuals."<sup>93</sup> Similarly a former US adviser argued:

*The issue is really situational. You're advising and assisting but put in situations that are much closer to engagement and combat. In those circumstances, I suspect the line becomes a very fine one – a matter of metres. We're playing roles where we're advising in forward positions. One man's floor is another man's ceiling. There's a very fine distinction.*<sup>94</sup>

Finally, even acting in conjunction with official local forces in a more stable situation, such as drugs interdiction, SOF may see 'mission creep.' Officially they will be subject to relevant international and local criminal law and follow local security forces' use of ROE. Nevertheless, this role of SOF in 'policing' situations raises important questions about ROE when special forces are assisting the civil power in jurisdictions where the rule of law and institutions are weak viz. Afghanistan, Pakistan, Philippines, Yemen. The issues mentioned above are even more acute if the SOF are training and also mentoring more informal local paramilitary groups who are tasked with aggressively taking the war to the enemy.<sup>95</sup>

If SOF become even more prominent in operations around the globe, including what has become the long 'war' against terrorist groups, accountability issues will become even more prominent, and are likely to see greater legal challenge at least in the UK and USA.

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93 Stephen Chase 'Canadian soldiers engaged in more firefights against Islamic State, military says' *Globe and Mail* January 26 2015 <http://www.theglobeandmail.com/news/politics/breaking-jan-26/article22633741/>

94 Quoted in Fazel Hawramy, Shalaw Mohammad and David Smith Kurdish fighters say US special forces have been fighting Isis for months <http://www.theguardian.com/us-news/2015/nov/30/kurdish-fighters-us-special-forces-isis-combat>

95 Jon Moran State Crime, Irregulars and Counter Insurgency' *State Crime Vol 4 No 2* 2015

## Duties owed to SOF

*We were under a cloak of secrecy... far too much... There was an upside if we were better understood.*<sup>96</sup>

The points made above also imply that duties are owed to SOF operators. For example, If SOF are seen as the 'go-to' organisation for an increasing range of missions, they may find themselves lacking in protection both operationally and legally. In response to the revelations that Australian SOF were operating undercover in Africa, a former Deputy Secretary of Defence, stated: '[Such an operation] deprives the soldier of a whole lot of protections, including their legal status and in a sense their identity as a soldier. I think governments should think extremely carefully before they ask soldiers to do that.'<sup>97</sup>

Further, if deployed on combat missions, overly restrictive ROE may put soldiers' lives unnecessarily at risk. Addicott makes the strong point that ROE for US forces have been confusing and graft a bureaucratic process onto the urgency of combat which may actually end up costing lives on the ground either combatants or civilians.<sup>98</sup> SOF by nature operate in high-risk situations in which support may be far away, even with a Quick Reaction Force stationed nearby.

This links to the next point, that SOF should be accorded the proper rules of justice for investigations to which they may be subjected. If SOF are deployed on high-risk aggressive missions by politicians and are then investigated or prosecuted, the missions' framework should be adduced in defence, particularly if the ROE are unclear or particularly broad. Other rules of justice include keeping the length of investigations of suspected SOF malfeasance to a reasonable timeframe.<sup>99</sup> Finally, SOF operatives, like other personnel in sensitive roles who face the likelihood of retribution, should not have their identities revealed inappropriately.

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96 Jon Moran State Crime, Irregulars and Counter Insurgency' State Crime Vol 4 No 2 2015

97 Australia's SAS4 Squadron had been operating out of uniform, without Australian Security Intelligence Service officers present and without official cover in Kenya, Nigeria and Zimbabwe. Apparently they have been collecting intelligence on terrorism and areas where Australians might be taken hostage. Rafael Epstein and Dylan Welch, 'Secret SAS teams hunt for terrorists' Sydney Morning Herald March 13 2012 <http://www.smh.com.au/national/secret-sas-teams-hunt-for-terrorists-20120312-1uwhy.html#ixzz3r6JrZOzO>

98 Jeffrey Addicott, 'The Strange Case of Lieutenant Waddell: How Overly Restrictive Rules of Engagement Adversely Impact the American War Fighter and Undermine Military Victory' St. Mary's Law Journal Vol.45 No.1 2013 p7 and pp20-21

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99 See James Brown. 'A Disconnect between Policy and Practice: Defence Transparency in Australia' Security Challenges Vol. 11, No. 1 (2015), pp. 29-38 <http://www.regionalsecurity.org.au/Resources/Documents/11-1%20-%20Brown.pdf>

## Conclusions

UK SOF have been in operation near-continuously over the last 15 years. This has received limited parliamentary or public scrutiny. SOF should not be over-used and seen as a solution to all and any security problems. UK SOF are small in size (in total 3,500 compared to 75,000 or above in US SOF). They should be integrated into a coherent overall strategy and not used just because they can be quickly deployed and have an effect without being subject to the same oversight as the rest of the armed forces.

SOF are operating in and around the overlap between security, counter terror, counter insurgency and conventional conflict. The legal basis for some of their operations remains unclear. SOF may function, as arguably they are at the moment, as a method of maintaining counter-insurgency and counter-terrorism operations ‘under the radar’ without the publicity that accompanies conventional operations. In a recently leaked document, the UK Ministry of Defence argued that one solution to the risk-averse nature of the British public was “Investing in greater numbers of SF. The use of SF brings two factors into play, namely the likelihood of large numbers being lost is small, and the public appear to have a more robust attitude to SF losses.”<sup>100</sup>

The British government is the most tight-lipped of all of the countries studied when it comes to discussing and disclosing special force operations. Further, SOF are exempt from the Freedom of Information Act and from the 30-year rule on the public disclosure of government documents. This makes it difficult to understand government strategy when they are deployed, or assess their effectiveness as a tool of remote warfare.

This golden age for special forces raises a number of issues which are addressed in this report. SOF can play positive roles in preventing violence and limiting violence. But the use of SOF on the scale which is occurring at the moment raises other issues

which require attention, particularly due to the secrecy under which they operate. The nature and intensity of modern SOF deployments and their actions effectively constitute a form of long-term warfare. This challenges their traditional exemption from scrutiny. SOF activities require oversight and accountability to ensure both their effectiveness and their compliance with international norms.

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100 Ministry of Defence, Risk. The Implications of Current Attitudes to Risk for the Joint Operations Concept, p7.

## Recommendations to the UK Government

1. An inquiry into the effectiveness of British SOF over the last 15 years would be an appropriate response to their near-continuous operation during this time. Where necessary, closed hearings could ensure proper operational secrecy and the protection of SOF personnel.
2. In addition to strategic and operational matters, it is recommended that the legal framework within which SOF conduct operations be examined, not only to see whether SOF are being deployed lawfully but also to protect them after they are deployed from unreasonable investigation and prosecution.
3. The role and operation of SOF could also be permanently incorporated into existing parliamentary system of scrutiny. The Joint Select Committee on Defence might be an appropriate venue. Closed hearings could ensure proper operational secrecy and the protection of SOF personnel.
4. In administrative terms and considering the role and intensity of SOF deployments, it might be appropriate for SOF budgetary matters to be subject of specific parliamentary oversight.
5. While an issue broader than SOF, this could be the moment to re-examine the use of UK SOF as trainers, including whether there is a need for a formal US-like system - the Leahy Laws - which bans US personnel from working with local force personnel or units who have been implicated in human rights abuses. This would also have implications for Defence Engagement and military training teams.

Special forces have long been seen as a credible exemption to normal oversight and accountability, which may make these recommendations seem radical. However, as the use of SOF across the globe grows, so does the proportion of military action and defence expenditure that is unaccountable to parliaments and populations. In this golden age of special forces, it is harder to see the sense behind allowing all SOF deployments to bypass scrutiny. Indeed, these recommendations are largely in line with the oversight and accountability currently being applied to US SOF, as described in this report.



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