



University of Essex

Accountability and Oversight of UK Special Forces

Human Rights Centre Clinic

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About the Project

This research project was undertaken through the University of Essex Human Rights Centre Clinic in collaboration with the All-Party Parliamentary Group (APPG) on Modern Conflict.

The APPG on Modern Conflict is an informal, cross-party group formed by Members of Parliament (MPs) and Members of the House of Lords who share a common policy interest in examining the capabilities and commitments driving contemporary warfare. This includes examining conventional oversight mechanisms and safeguarding regimes. APPGs have no official status within Parliament.

The University of Essex Human Rights Centre (HRC) is one of the leading academic human rights institutions globally since 1983. The HRC Clinic was founded in 2009 as part of the HRC. This research project was conducted by HRC Clinic researchers Hamza Bozkurt, Greta Ciucci, Jack Millar, and Vanessa Topp under the supervision of Dr Erin Pobjie (Principal Investigator and Co-Deputy Director of the HRC Clinic) and with the support of Dr Kaleigh Heard acting as focal point (Director of the APPG on Modern Conflict).

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Abstract

The United Kingdom holds a 'no comment' policy in relation to its Special Forces, meaning no external investigations can be made into their actions, nor can tribunals adjudicate on potential violations of human rights or humanitarian laws committed by UK Special Forces. The UK's current lack of external oversight and accountability framework for its Special Forces is singular among allies. In light of both shifts among allies towards strengthening their own external oversight and accountability mechanisms, as well as the emergence of credible allegations of violations of international law committed by UK Special Forces, the continued reliance on the blanket 'no comment' policy has led to significant criticism.

This report will consider the current state of oversight and accountability over UK Special Forces operations, highlight potential issues and protective gaps, and make policy recommendations with a view to strengthening external oversight mechanisms. To fulfil this intention, the UK's relevant legal obligations under international humanitarian law and international human rights law will be identified in relation to existing oversight standards. This will be followed by case studies showcasing the approach of UK allies and a risk and benefit analysis of strengthened external oversight and accountability. Finally, this report will provide policy recommendations inspired by legal systems of UK's allies, advocating for enhanced parliamentary oversight and accountability over the UK Special Forces.

Executive Summary

The principal objectives of this report are to (i) highlight concerns associated with the continued use of the 'no comment' policy held by the UK in relation to its Special Forces; and (ii) provide a series of evidence informed policy recommendations with a view towards strengthening the existing framework into one that promotes better oversight and accountability. To facilitate these objectives, this report is split into the following sections:

- Background context of the UK Special Forces
- Legal Obligations
- Case Studies of Allied States
- Perceived Risks and Potential Benefits
- Conclusion and Policy Recommendations

For ease of readership, the core findings of each section are relayed in this executive summary with more in-depth analysis presented in the full report.

Background Context of the UK Special Forces – Existing Oversight & Accountability Mechanisms

Understanding the UK's current stance on oversight and accountability over its Special Forces is a crucial starting point that must preclude any discussion on how existing mechanisms could be adapted and strengthened. It is particularly important to note that:

- The UK Special Forces play a vital role in the overall military strategy of the UK. Strategic decisions regarding their deployment and operationalisation, however, are not subject to the same extent of consultation with the House of Commons as deployment authorisations for the regular Armed Forces. In contrast to other branches of the Armed Forces, any strategical decision related to Special Forces is taken alone by the Prime Minister, the Defence Secretary, and the Director of Special Forces. This appears to be at odds with what is clearly stated in the authoritative statement of how the MoD operates.
- The Special Forces are the only branch of the UK military not subject to external oversight mechanisms. In addition, a lack of transparency over internal oversight and accountability mechanisms, including investigations conducted by the Royal Military Police, raises concerns over their ability to operate independently and effectively.
- This lack of transparency surrounding the UK Special Forces derives from Section 23(3) of the 2000 Freedom of Information Act which broadly exempts any information directly or indirectly related to the Special Forces and effectively implements a blanket 'no comment' policy.

Concerns arising from the above noted points have been exacerbated in recent years due to a growing reliance by the UK on Special Forces, who are increasingly deployed to conduct operations previously performed by units of the regular Armed Forces. This apparent shifting role of the UK Special Forces may risk creating an environment in which personnel are subject to overstretch. Increased oversight and accountability embedded into the decision-making process for how Special Forces deployments are authorised could protect from such overstretch. It could thus also have an added benefit for promoting the overall well-being of Special Forces personnel.

Legal Obligations

Considering the relevant legal obligations of the UK under international humanitarian law, international criminal law, and international human rights law provides a strong foundation for justifying why concerns related to the 'no comment' policy should be addressed. This brings to light questions regarding the extent to which the obligation to investigate potential violations of international humanitarian law committed by UK Special Forces might be at risk of not being fully met. Ensuring that the UK meets its legal obligations under international law is necessary for promoting impartial investigations and ensuring effective accountability when harm may have taken place.

- The UK is State Party to the Geneva Conventions, the Rome Statute of the International Criminal Court, and multiple international human rights treaties – these treaties enshrine the obligation to investigate potential violations of international law. The UK has enacted its obligations under these international treaties into its domestic law. If these obligations to investigate are not fulfilled domestically, there is a risk of international investigations being triggered.
- An additional concern arises in relation to victims' right to remedies under international law, which includes the following (a) equal and effective access to justice; (b) adequate, effective, and prompt reparation for harm suffered; (c) access to relevant information concerning violations and reparation mechanisms, with an emphasis set on transparency.

Case Studies – Allied States

As noted previously, the UK is singular among its allies in its 'no comment' policy and lack of external oversight and accountability framework regarding Special Forces. Given the frequency of joint operations conducted alongside allies, it is important to ensure practice aligns. The range of external accountability and oversight mechanisms employed by allied States for their Special Forces varies and includes both proactive and reactive measures. Important lessons can be drawn from the experiences of allied States, here Australia and the United States (US), and applied to the UK context. Notably, these experiences directly contradict the oft-cited justification for the UK's 'no comment' policy based on a need for tactical secrecy. They demonstrate that it is indeed possible to find a more balanced approach - allowing an extent of transparency and external oversight while still ensuring a sufficient degree of secrecy to protect security of operations and personnel.

Australia:

Australian policy regarding Special Forces oversight and accountability mechanisms was previously similarly opaque as that of the UK.

- Following the emergence of allegations that war crimes had been committed by Australian forces in Afghanistan, Australia launched an in-depth inquiry (through the Inspector-General of the Australian Defence Force Afghanistan Inquiry Report, commonly referred to as the Brereton Report).
- While the Brereton Report largely represented a reactive measure, enacted in response to specific events, it marked an important step demonstrating Australia's commitment to more transparent policy.

The United States:

In contrast, the US has implemented an approach regarding oversight and accountability for its Special Forces which combines more proactive measures with reactive ones. The example of the US approach demonstrates that consistently implemented external oversight and accountability measures can play a key role without compromising security interests or jeopardising operations.

- US Senate and House Committees on Armed Services have the authority to conduct hearings, request reports, and conduct independent investigations into any aspects of Special Forces operations.
- The US Government Accountability Office, an independent and non-partisan agency, can evaluate US government programmes and activities. It has the authority to conduct audits and investigations into USSOF activities.

The findings of the Australia and US case study analysis show that external oversight for Special Forces is feasible, both in reactive and proactive manners, and does not sacrifice operational success.

Perceived Risks and Potential Benefits

There appears to be hesitancy to strengthen external oversight and accountability frameworks over the UK Special Forces, primarily stemming from a perceived risk of this potentially jeopardising the need for tactical secrecy. This risk, however, can be mitigated. The examples of both reactive and proactive frameworks employed by allied States, as well as examples drawn from the domestic context such as the experience of the Intelligence and Security Committee of Parliament, demonstrate that a favourable balance can be struck.

In addition to the possibility of mitigating perceived risks, there are numerous benefits associated with increased external oversight and accountability.

Potential benefits:

- In the context of their expanding role, increased parliamentary oversight over the deployment of UK Special Forces could reduce the risk of overstretch with an overall benefit to the wellbeing of personnel and thus likely carrying strategic benefits for operational success.
- Improved external oversight could help to ensure obligations under international law to investigate and prosecute credible allegations of war crimes and other violations are fully met. This avoids international investigations (for example through the International Criminal Court) into UK affairs, which would likely have damaging consequences for the UK's international reputation.
- The current 'no comment' policy and lack of external oversight mechanisms over Special Forces is in stark contrast with the practice of its allies. Strengthening parliamentary oversight and accountability frameworks would better align UK practice with that of its allies with benefits to effective cooperation on the ground.

Finally, any discussion of potential benefits must also note that in the UK there is a requirement for the Defence Secretary to be accountable to Parliament. Strengthening external oversight and accountability over the UK Special Forces is thus not only beneficial from the perspectives highlighted above but also crucial for Parliament to exercise an important and necessary democratic function.

Conclusion and Policy Recommendations

While it is important to acknowledge the existing barriers to strengthening external oversight and accountability mechanisms for UK Special Forces, this report nevertheless concludes that the benefits outweigh the risks. The demonstrated success of proactive and reactive frameworks implemented by UK allies can be translated into a range of possible means for expanding oversight and accountability over UK Special Forces. To facilitate change, these could also be implemented progressively with a view of supporting and complementing existing internal mechanisms rather than replacing them.

Policy Recommendations:

- **Implementing Reactive and Proactive Accountability Measures Together** - Proactive measures are essential in maintaining a high level of operation standards as they can anticipate and prevent potential breaches. Simultaneously, reactive measures are needed to ensure accountability, addressing, and learning from any incidents that occur. Together, these approaches enhance the oversight and accountability of Special Forces.
- **Establishing a Robust Reporting Mechanism** – To foster a culture of accountability and transparency within the UKSF, a confidential reporting mechanism should be established. Members of the Special Forces should be able to report any suspected wrongdoing without fear of reprisal.
- **Establishing an External Auditor** - This independent, non-partisan agency would conduct audits and rigorous investigations into Special Forces activities and serve as an additional layer of oversight.
- **Establishing a Dedicated Parliamentary Committee** – inspired by the US Senate and House Committees on Armed Services, this committee would be responsible for accurately scrutinising UKSF operations, policies, budget, and administration of UKSF.
- **Security Clearance for Relevant Members of Parliament** – Similar to the United States' current system, granting certain MPs access to classified information ensures a bipartisan approach to the oversight of classified matters but also preserves operational confidentiality and security.
- **Training and Development** - Training programs should be initiated for the members of the dedicated parliamentary committee, the MPs with security clearances, and the external auditors. They should be fully briefed and knowledgeable about operational protocols, international law, and the ethical implications associated with Special Forces operations.

By adopting these recommendations, the UK can significantly strengthen oversight over its Special Forces, instilling a system that is not only comprehensive and multi-layered but also respects the principles of transparency, accountability, and the rule of law. This would result in more effective operations from Special Forces, aligning UK practice to that of its allies, and further boosting public trust and safeguarding national security.

List of Acronyms

ADF	Australian Defence Forces
API	Protocol Additional to the Geneva Conventions of 12 August 1949
APPG	All-Party Parliamentary Group
BBC	British Broadcasting Corporation
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Centre
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ISC	Intelligence and Security Committee of Parliament
IHL	International Humanitarian Law
KII	Key Informant Interview
MoD	Ministry of Defence
MP	Member of Parliament
OSCE	Organisation for Security and Cooperation in Europe
RMP	Royal Military Police
SAS	Special Air Service
SBS	Special Boat Service
SFSG	Special Forces Support Group
SRR	Special Reconnaissance Regiment
UKSF	United Kingdom Special Forces
USSOF	United States Special Operations Forces
USSOCOM	United States Special Operations Command

Introduction

“A defining characteristic of a democratic society is our trust in our institutions and democratic oversight by parliamentarians of those who work so hard to keep us safe. We have that oversight with our police and with our security services, but we do not yet have it with UK Special Forces under the Intelligence and Security Committee (ISC) or the Defence Committee.”

- Angus Robertson Member of Parliament (MP), member of the ISC¹

Background Context: UK Special Forces

The United Kingdom Special Forces play an essential role in protecting national security interests. As a directorate comprising the Special Air Service Regiment (SAS); Special Boat Service (SBS); Special Forces Support Group (SFSG); Special Reconnaissance Regiment (SRR); Reserve Components, they have been involved in crucial operations worldwide, including counter-terrorism, hostage rescue, and intelligence gathering.² The Directorate of Special Forces conducts high risk operations in support of UK interest,³ and forms part of the Strategic Command; one of the four Military Commands of the Ministry of Defence, which manages joint capabilities across the land, sea, air, cyber and space domain.^{4,5} The Defence Operating Model sets out clearly and definitively how the elements of Defence operate and fit together. In theory, this should ensure that the MOD is accountable to Parliament, both as a Department of State and for the military operations that it directs and carries out.⁶

In practice, however, already the deployment authorisation indicates a difference in terms of accountability between regular Armed Forces and Special Forces. Regular Armed Forces such as the Royal Navy, Royal Air Force, and the British Army, are deployed based on the decision of the Prime Minister and the Cabinet acting on behalf of the Sovereign, as part of the prerogative executive powers. Through the War Power Convention, the Government consults the House of Commons to ensure that the will of the House is supportive of the critical strategic decision-making – however such decision is relative only to critical strategic decisions. The House of Commons is not involved in operational and tactical decision-making of the Armed Forces.⁷ **In contrast, any strategic decision related to Special**

¹ Angus Robertson MP, quoted in HC Deb 23 March 2016, vol. 607, col 1567.

² Greg Allwood, 'British Special Forces – where they came from and what they do' (*Forces*, 20 January 2022) <<https://www.forces.net/services/special-forces/british-special-forces-where-they-came-and-what-they-do>> accessed 17 March 2023.

³ Strategic Command, 'Our Organisation' (*Ministry of Defence*) <<https://www.gov.uk/government/organisations/strategic-command/about#our-organisation>> accessed 17 March 2023.

⁴ The other three Military Commands are: Royal Air Force, British Army and Royal Navy. Ministry of Defence, *How Defence Works* (2020).

⁵ Special Forces need to be distinguished from Specialised Operations Capable Forces, such as the Army Special Operations Brigade. The Brigade is supported by the four Ranger battalions and the Joint Counter Terrorist Training and Advisory Team (JCTTAT).

British Army, 'The Army Special Operations Brigade' <<https://www.army.mod.uk/who-we-are/formations-divisions-brigades/6th-united-kingdom-division/army-special-operations-brigade/>> accessed 6 June 2023.

⁶ Ministry of Defence (n 4).

⁷ The Public Administration and Constitutional Affairs Committee, *'The Role of Parliament in the UK Constitution: Authorising the Use of Military Force'* (6 August 2019) <<https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1891/1891.pdf>> accessed 17 March 2023.

Forces is taken alone by the Prime Minister, the Defence Secretary, and the Director of Special Forces.^{8 9} This appears to be at odds with what is clearly stated in the authoritative statement of how the MoD operates. Noting that the Defence Secretary must be accountable to Parliament for the activities of the MoD and the Armed Forces, this should also include the UK Special Forces.¹⁰

Existing Oversight Mechanisms (Or Lack Thereof)

The Special Forces are the only branch of the UK military not subject to any form of external oversight mechanism, for example through parliamentary scrutiny of operations.^{11,12} Meanwhile, for the regular Armed Forces, several existing oversight mechanisms are available and are crucially embedded within the decision-making process. This includes the National Security Council established in 2010: a cross-cutting cabinet committee coordinating the Government's security objectives and reviewing national security strategies. It benefits from the involvement of different ministries, i.e., as the Secretary of State for Defence, yet nevertheless faced critiques of lacking transparency related to its precise role and the secrecy of discussions.¹³ Another oversight mechanism available to the Armed Forces is the Service Complaints Ombudsman, to whom complaints for harassment, discrimination or biased behaviour can be filed. The Ombudsman works with the MoD but is independent from the services it investigates to provide more impartial oversight.¹⁴

The current lack of parliamentary oversight over Special Forces operations is indicative of the long-standing secretive stance taken by the MoD regarding the UK Special Forces. One of the reasons often given to exonerate Special Forces from this control is that any comment may compromise its personnel, operations, or national security.¹⁵ While there are existing internal oversight and accountability mechanisms through the Royal Military Police (RMP) and its Special Investigation

⁸ Jon Moran, *Assessing SOF transparency and accountability - The use of Special Operations Forces by the UK, US, Australia, and Canada (Remote Control 2016)* p 15.

⁹ The Defence Secretary forms part of the Ministry of Defence, as well as the Director of Special Forces, which is held by a senior officer of the Armed Forces.

Murray Jones, 'Defence Review 2021: accountability is the first victim of UK Special Forces expansion' (*Action on Armed Violence*, 23 March 2021) <<https://aoav.org.uk/2021/defence-review-2021-accountability-is-the-first-victim-of-uk-special-forces-expansion/>> accessed 17 March 2023.

¹⁰ Ministry of Defence (n 4) p 7.

¹¹ Emily Knowles and Abigail Watson, *All Quiet on the ISIS Front? British Secret Warfare in an Information Age (Remote Control 2017)* p 1.

¹² Liam Walpole and Megan Karlshøj-Pedersen, *Britain's Shadow Army: Policy Options for External Oversight of UK Special Forces (Remote Warfare Programme 2018)* p 1.

¹³ The secrecy of the discussions was contested in relation to how the event in Afghanistan in 2021 were handled. Joint Committee on the National Security Strategy, *The UK's National Security Machinery (House of Lords 2021)* HC 231/HL 68.

¹⁴ Service Complaints Ombudsman for the Armed Forces, 'Mission Statement' (SCOAF) <<https://www.scoaf.org.uk/mission-statement>> accessed 6 June 2023.

¹⁵ HC Deb 14 April 2016 C 34119W. The former Secretary of State for Defence Michael Fallon made the following statement: *"UK Special Forces are a world class force capable of conducting short notice, high risk operations in the most challenging environments around the world in support of UK interests and the safety and security of our people. To maintain their ability to conduct these types of operation it is critical that the security of personnel, equipment and tactics, techniques and procedures is maintained. The long-standing policy of not commenting on UK Special Forces has been upheld by successive Governments and is reflected in legislation in the form of the Freedom of Information Act. I have no intention of changing this policy."*

Branch,^{16,17} there is no transparency over how operational decisions are made or the outcomes of investigations when they are conducted.¹⁸ **This opacity has made it difficult to know the extent to which internal oversight and accountability mechanisms are effective or may be affected by internal bias.**^{19,20} The lack of transparency surrounding the UK Special Forces is further reinforced by the 2000 Freedom of Information Act in Section 23(3), which exempts any information directly or indirectly related to the Special Forces and effectively implements a blanket 'no comment' policy.²¹

Increasingly, the UK Special Forces are employed to conduct operations that in previous years fell under the task of conventional units, including through expanded cooperation with foreign military partners.^{22,23} When Special Forces carry out these operations, they no longer fall under the purview of the Defence Select Committee.^{24,25} **This shifting and expanding role of the UK Special Forces therefore risks leading to a comparative loss of parliamentary oversight over a range of military activities for which such scrutiny previously existed when operations were conducted by other military branches.**²⁶ Despite their importance, the UK Special Forces continues to be exempt from any parliamentary oversight.²⁷ In this context, a core priority of the All-Party Parliamentary Group (APPG) on

¹⁶ Walpole and Karlshøj-Pedersen (n 10) p 14.

¹⁷ The Special Investigations Branch of the RMP focuses on investigations of offences or incidents that by their nature, gravity or complexity require to be examined by specially trained personnel, both within the UK and during overseas operations. British Army, 'RMP Specialist Roles' (Army, 2021) <<https://www.army.mod.uk/who-we-are/corps-regiments-and-units/adjutant-generals-corps/provost/royal-military-police/specialistroles/>> accessed 17 March 2023.

¹⁸ As part of the RMP investigation to Operation Northmoor in 2014, the MoD had to release documents, which not only were heavily redacted, but also highlighted incomprehensible oversights and a lack of investigation. Murray Jones, *Killing in the Shadows: Investigating allegations of British Special Forces extrajudicial killings in Afghanistan* (Action on Armed Violence 2022) chapter 4.

¹⁹ The Director of Special Forces for example is accountable to the Ministry of Defence and the MOD might be inspected by the National Audit Office. Moran (n 8) p 17.

²⁰ However, when in 2017 Paul Flynn MP asked '*whether the National Audit Office has inspected the account of the Director of Special Forces since it was established in 1987*', the Government responded that '*the National Audit Office has a thorough process for inspecting all aspects of the Department's accounts. The Department does not routinely comment on any aspect of Special Forces*'. HC Deb 5 December 2017 C 117554.

²¹ Freedom of Information Act 2000.

The Act defines Special Forces as '*those units of the armed forces of the Crown the maintenance of whose capabilities is the responsibility of the Director of Special Forces or which are for the time being subject to the operational command of that Director*'. *ibid.*, Section 84.

²² Megan Karlshøj-Pedersen, 'ORG Explains #14: The UK's Special Forces' (*Saferworld*, May 2020) <<https://www.saferworld.org.uk/resources/publications/1327-org-explains-14-the-ukas-special-forces>> accessed 17 March 2023.

²³ A recent publication by Action on Armed Violence listed the different countries in which UK Special Forces have been active since 2011, conducting i.e., joint-training operations in Senegal as part of the US-led Flintlock exercises, or in Jordan training together with French SF Syrian rebels.

Murray Jones, 'Analysis: the 19 countries where UK Special Forces have been actively deployed since 2011' (Action on Armed Violence, 22 May) <<https://aoav.org.uk/2023/the-19-countries-where-uk-special-forces-have-been-reported-to-have-been-deployed-operationally-since-2011/>> accessed 6 June 2023.

²⁴ The Defence Select Committee is appointed by the House of Commons and examines the expenditure, administration and policy of the MOD. UK Parliament, 'Defence Committee' (Committees) <<https://committees.parliament.uk/committee/24/defence-committee/role/>> accessed 17 March 2023.

²⁵ The Defence Select Committee can also request information, take expert evidence and question ministers and officials. National Audit Office, *A Short Guide to the Ministry of Defence* (National Audit Office 2017) <<https://www.nao.org.uk/wp-content/uploads/2017/09/A-short-guide-to-the-Ministry-of-Defence.pdf>> accessed 18 March 2023) p 7.

²⁶ All-Party Parliamentary Group on Drones and Modern Conflict, *Written evidence submitted, Foreign Affairs Committee Inquiry: UK Policy on Afghanistan* (November 2021) and Murray Jones, 'A Decade of UK Special Forces Operations Examined' (*Action on Armed Violence*, 19 July 2022) <<https://aoav.org.uk/2022/a-decade-of-uk-special-forces-operations-examined/>> accessed 17 March 2023.

²⁷ All-Party Parliamentary Group on Drones, 'Evidence on The Role of Parliament in the UK Constitution: Authorising the Use of Military Force' <<https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public->

Modern Conflict is strengthening external oversight and accountability mechanisms governing the Special Forces with the aim of preventing oversight gaps over UK military operations from growing.

Emerging Concerns

This topic has become increasingly contentious and publicly debated following numerous allegations of potential abuses and violations carried out by UK and allied Special Forces in their overseas deployments. Reports and investigations by the British Broadcasting Corporation (BBC) into the UK Special Forces' tours in Afghanistan and Iraq in 2010-2012 uncovered credible evidence of serious violations and war crimes committed against civilians.^{28,29} Similar investigations had been carried out addressing international humanitarian law (IHL) violations by Australian SAS during their Afghanistan tours and led to a formal charge of a war crime against a former SF soldier.³⁰ Among the most striking revelations was that although the Ministry of Defence carried out internal reviews, the evidence and internally produced documents resulting from these reviews were kept secret and not reported to the RMP.^{31,32} While this is not standard practice, since the RMP was tasked to conduct such an investigation, not having access to a full disclosure of facts presented a significant obstacle.

Despite these serious allegations, and the public attention they garnered, the UK continues to maintain the position that any comment or public scrutiny regarding the Special Forces would endanger not only operations but also the security of the personnel involved. **This lack of transparency and accountability highlights the importance of an external parliamentary oversight mechanism, which could examine allegations of wrongdoing through independent inquiries and allow Parliament to exercise necessary oversight of all MOD and Armed Forces activities.**³³

It can be challenging for those advocating for increased external oversight to stay informed on the tools available for Parliament to exercise this important function. Against this background, this report provides a comprehensive overview by contextualising oversight within the applicable legal frameworks. It outlines Special Forces oversight mechanisms employed by allied States and incorporates the perspectives of a range of relevant stakeholders regarding the risks and benefits of increased parliamentary oversight of UK Special Forces units. Finally, the report presents several policy recommendations covering the potential avenues for expanding external oversight over the UK Special Forces.

administration-and-constitutional-affairs-committee/the-role-of-parliament-in-the-uk-constitution-authorising-the-use-of-military-force/written/97823.html> accessed 16 March 2023.

²⁸ Matt Bardo and Hanna O'Grady, 'Did UK Special Forces execute unarmed civilians?' (BBC, 1 August 2020) <<https://www.bbc.co.uk/news/uk-53597137>> accessed 17 March 2023.

²⁹ Richard Bilton, 'SAS Death Squads Exposed: A British War Crime?' (BBC, 12 July 2022) <<https://www.bbc.co.uk/programmes/m0019707>> accessed 17 March 2023.

³⁰ Simon Atkinson, 'Australian former SAS soldier Oliver Schulz held over alleged war crime in Afghanistan' (BBC, 20 May) <<https://www.bbc.co.uk/news/world-australia-65010345>> accessed 6 June 2023.

³¹ Hannah O'Grady and Joel Gunter, 'SAS unit repeatedly killed Afghan detainees, BBC finds' (BBC, 12 July 2022) <<https://www.bbc.co.uk/news/uk-62083196>> accessed 17 March 2023.

³² Action on Armed Violence, 'British Special Forces hid evidence of Afghan killings' (*Action on Armed Violence*, 11 November 2021) <<https://aoav.org.uk/2021/special-forces-hid-evidence-of-afghan-killings/>> accessed 17 March 2023.

³³ HC Deb, UK Special Forces: Iraq and Afghanistan, Vol 669, 7 January 2020.

Literature Review

Several journalistic reports were published in recent years bringing to light allegations that war crimes and human rights abuses were committed by UK Special Forces and allied States' Special Forces units deployed in Iraq and Afghanistan, bringing this debate more firmly into the public eye.³⁴ **These reported alleged incidents in Afghanistan, Iraq and other countries demonstrate the need for proactive and preventative external oversight mechanisms to ensure Special Forces operations are compliant with the UK Government's domestic and international human rights obligations. They also demonstrate the need for better reactive accountability mechanisms to address violations when they may have been committed.** Furthermore, given the reputational damage of the evidence uncovered by the BBC investigations, reform of oversight and accountability frameworks could prove a crucial steppingstone for rebuilding public trust in the elite Special Forces. The incidents in question highlight the potential risks of Special Forces operating without adequate scrutiny.³⁵

With respect to the UK Secret Intelligence Service there exists independent oversight carried out both by the Parliament and the Judiciary: the Investigatory Powers Commissioner's Office; the Investigatory Powers Tribunal and the Intelligence and Security Committee (ISC).³⁶ The ISC, as opposed to the Defence Select Committee, not only examines expenditure, administration and policy,³⁷ it also oversees the operations of UK Intelligence bodies.³⁸ Parliamentary accountability over intelligence through the ISC was established through the Intelligence Services Act 1994. **Although the Secret Intelligence Service also works secretly in overseas operations and carries out sensitive operations, parliamentary oversight and accountability nevertheless exist.**

The working manner employed by the ISC is especially of interest, as its inquiries focus on current events and issues of concern and relate to operational and policy matters. When conducting the inquiries, the Committee does not set terms of references so as not to limit the scope of collecting evidence. Such evidence is taken from the Ministers of the Government, the Heads of Intelligence, as well as Senior Officials from the UK Intelligence Community. Due to the sensitive and classified nature of the interrogated subject matters, evidence sessions are held in private.³⁹

This report builds upon previous research⁴⁰ and makes the case for external oversight measures for UK Special Forces to be strengthened by increasing parliamentary oversight over the Special Forces and

³⁴ BBC, 'UK Government and Military Accused of War Crimes Cover-Up' *BBC News* (17 November 2019) <<https://www.bbc.com/news/uk-50419297>> accessed 16 March 2023.

³⁵ Bardo and O'Grady (n 28).

³⁶ Secret Intelligence Service, 'About us' (SIS, 23 March 2021) <<https://www.sis.gov.uk/about-us.html>> accessed 17 March 2023.

³⁷ Intelligence and Security Committee of Parliament, 'How the Committee works' (ISC, 2021) <<https://isc.independent.gov.uk/how-the-committee-works/#differences-between-the-isc-and-select-committees-of-parliament>> accessed 17 March 2023.

³⁸ Previously, the Security Service Act 1989 confirmed that accountability would function by ministerial responsibility to Parliament.

³⁹ Intelligence and Security Committee of Parliament (n 37).

⁴⁰ Previously conducted research refers to the following publications: Oxford Research Group Programme on Remote Warfare, 'Britain's Shadow Army: Policy Options for External Oversight of UK Special Forces' (2018); Saferworld, 'Assessing SOF Transparency and Accountability: The Use of Special Operations Forces by the UK, US, Australia, and

their operations. It addresses the role of international law obligations and explores the implications of the shifting role of UK Special Forces with the aim of identifying how oversight, accountability and transparency might be improved. To begin, the shifting and expanding role of UK Special Forces in recent years will be examined. Next, this report briefly sets out the applicable international legal frameworks and identifies the potential legal risks of a lack of external oversight and accountability mechanisms. It then presents case studies from Australia and the US to showcase methods of both proactive and reactive external oversight of Special Forces adopted by allied countries that balance risks to tactical operational security and the safety of personnel. Then, this report sets out the potential perceived risks and benefits of reform of oversight frameworks, including the perspectives of key informants from diverse stakeholders. Bringing together the legal analysis, perceived risks and benefits, and examples from allied countries, the conclusion of the report provides several policy recommendations for how increased parliamentary oversight for the Special Forces could be implemented in the United Kingdom without jeopardising security or operational success.

Canada (2016); Action on Armed Violence, *'Killing in the Shadows: Investigating allegations of British Special Forces extra-judicial killings in Afghanistan'* (2020).

Findings

Shifting Operational Role of the UK Special Forces

The authorisation of the use of military force and the decision to deploy Armed Forces was historically a royal prerogative, meaning the Crown could act where authority had not been set out in or curtailed by an Act of Parliament.⁴¹ Nowadays, there is a clear consensus that deployment of military force is a necessary responsibility and function of the Executive.⁴² The Prime Minister, together with the Cabinet, exercises the power to use military force on behalf of the Monarch. In terms of balance of power and responsibility between the Executive and Parliament, this has resulted in Parliament having no legal role in authorising the use of military force due to a lack of direct legislative power. However, Parliament authorises defence expenditure,⁴³ and has the power to examine, approve or reject it but such power does not include budgets of military operations abroad.⁴⁴

The power to deploy Armed Forces remains under the royal prerogative unless an Act of Parliament is passed, which sets out a new legal basis for the use of that power.⁴⁵ According to judicial rulings from 1985, the exercise of the deployment power is immune from judicial review: this implies that acts by individual members of the Armed Forces during deployment are themselves lawful under domestic law.⁴⁶ In the case of overseas deployment, a 2006 Report by the House of Lords Constitution Committee concluded that although the royal prerogative formed the basis, House of Commons' approval before taking major military action should be sought.^{47,48} There are only four situations in which Government might not seek such prior authorisation: '(i) it could compromise the effectiveness of UK operations and the safety of British service men and women; (ii) to protect UK's sources of secret intelligence; (iii) so as not to undermine the effectiveness or security of operational partners; (iv) and where the legal basis for action has previously been agreed by Parliament.'^{49,50}

⁴¹ The Public Administration and Constitutional Affairs Committee (n 7) chapter 2, para 10.

⁴² *ibid.*, para 21.

⁴³ *ibid.*, chapter 5.

⁴⁴ Sandra Dieterich and others, *Parliamentary War Powers: A Survey of 25 European Parliaments* (Geneva Centre for the Democratic Control of Armed Forces 2010) p 70.

⁴⁵ The Public Administration and Constitutional Affairs Committee (n 7), chapter 2.

⁴⁶ House of Lords Select Committee on the Constitution, *Fifteenth Report of the Session 2005-6, Waging War: Parliament's Role and Responsibility*, HL 236-I, chapter 2.

⁴⁷ The Public Administration and Constitutional Affairs Committee (n 7), chapter 3.

⁴⁸ The constitutional convention mentioned refers to the post 2003 War Convention. By 2011 this practice was acknowledged by the government through the War Powers Convention, a convention that emerged by which the House of Commons would have the opportunity to debate the deployment of military forces, prior to doing so, except in the event of an emergency. House of Commons, *Briefing Paper 8 May 2018 CBP 7166*, p 24.

⁴⁹ The Public Administration and Constitutional Affairs Committee (n 7), chapter 3, para. 64.

⁵⁰ An example for seeking no prior authorisation is given by the Mali involvement in 2013, which did not foresee any combat role for the British military and was in response to an emergency request by the French government. Another example is the military action taken against the Syrian government in April 2018: the Government of the time argued that Parliament had prior opportunity to discuss the issue and the Government acted in order to protect national interest and the operational security. House of Commons (n 48), p 27-28, 37.

Parliamentary approval for military action provides the Parliament with a crucial role and ensures government's ability to act. However, if the House of Commons is not involved in the discussion, yet alone has no indication of the type of operation that is to be carried out, difficulties arise. Given the need for operational and tactical secrecy in Special Forces operations, there is no contemporary official document that delineates the operational context of deployment or UKSF responsibilities.⁵¹ A leaked Ministry of Defence memo from 1969 outlined some of the Special Air Service's tasks.⁵² Amongst these were ambush and harassment of insurgents, border surveillance, liaison with, and organisation, training and control of friendly guerrilla forces operating against the common enemy.⁵³ Yet recent developments show that capacity building in terms of counter-terrorism and training of foreign forces has become a significant pillar of Special Forces operations.⁵⁴ Additionally, although UKSF are intended as a complementary force, they often seem to be the only UK force involved in certain operations.^{55, 56}

If Special Forces are tasked to carry out operations that usually belong to regular Armed Forces, parliamentary authorisation or notification is not required, allowing them thus to operate in combat roles also in countries where Parliament has not voted on any military action.⁵⁷ Special Forces are not intended as semi-permanent presences on the ground and using them as substitute of regular Forces, poses a great risk to accountability of UK forces abroad.⁵⁸ This raises the question of the extent to which Parliament can or should oversee such deployments to ensure that oversight and accountability are met and the democratic legitimacy of decisions is maintained.⁵⁹

Expanding Roles, Overstretch and Wellbeing of Members of the UK Special Forces

Duty of care towards personnel may be different in a military setting than a civilian setting. Nevertheless, increased parliamentary oversight and accountability mechanisms over operations could offer protection against unsustainable and risky overstretch, providing benefits in terms of both operational effectiveness

⁵¹ On the UK Government's webpage it is clearly stated that strict rules regulate the publication of any information pertaining to the UKSF. No modern information on current tasks, strategies or responsibilities is available on the official websites. See also, Emily Knowles and Abigail Watson, (n 11) p 16.

⁵² The Special Air Service Regiment, a corps of the British Army, is a part of the UK Special Forces and refers to three regiments: 21st SAS Regiment, 22nd SAS Regiment and 23rd SAS Regiment. SAS Regiment, 'About the SAS Regiment' (*SAS Regiment*, 2021) <<https://www.sasregiment.org.uk/>> accessed 17 March 2023.

⁵³ Watson and Knowles (n 11), p 17.

⁵⁴ Murray Jones, 'An analysis of where UK Special Forces have been deployed since 2011' (Action on Armed Violence, 19 July 2022) <<https://aoav.org.uk/2022/the-19-countries-where-uk-special-forces-have-been-reported-to-have-been-deployed-operationally-since-2011/>> accessed 17 March 2023.

⁵⁵ Knowles and Watson (n 11), p 17.

⁵⁶ A recent article published by Action on Armed Violence summaries all deployments of the UKSF since 2011 and lists at least 19 countries where significant issues were raised about their presence. Jones (n 23).

⁵⁷ Emily Knowles, 'We need greater transparency on UK's military operations in Libya' (Remote Control 2016) <<https://www.saferworld.org.uk/resources/publications/1315-we-need-greater-transparency-on-uk-military-operations-in-libya->> accessed 17 March 2023.

⁵⁸ *ibid.*, p 2.

⁵⁹ The argument can be applied also vice-versa to when special operations capable forces, like the Army Special Operations Brigade, conduct special operations to train, advise and accompany partners. It raises the questions whether the no comment policy can be extended also to such regular units. Ministry of Defence, CP 411 - Defence in a competitive age (2021) p 46.

and individual health and wellbeing.⁶⁰ Any discussion on the UK's human rights obligations in military operations should therefore also address its obligations towards members of the Armed Forces (including the UK Special Forces). Notably, the Organisation for Security and Cooperation in Europe (OSCE) in its report on "Human Rights of Armed Forces Personnel" has highlighted that the enjoyment of just and favourable conditions of work' includes the right to the 'highest attainable standards of physical and mental health'.⁶¹ **Given the shifting role outlined in the previous section, concerns have been raised that this more expansive role played by the UK Special Forces in the overall defence strategy could lead to overstretch and compound concerns such as emotional trauma, issues of fatigue and physical injuries suffered by the UK Special Forces members during operations.**⁶²

The risks posed by overstretch, particularly negative impacts on mental health, have been studied in the context of the UK Armed Forces with the finding that 'monitoring of cumulative length of deployment might reduce mental illness in the UK military'.⁶³ This is of particular relevance to the UK Special Forces, where a lack of external oversight combined with a developing shift to increasingly deploy Special Forces where conventional troops may have previously been used, is particularly likely to lead to frequent and long deployments.⁶⁴ As affirmed by the OSCE, parliaments can include a range of tools and mechanisms within their frameworks for military accountability to ensure the protection of the human rights of Armed Forces personnel.⁶⁵ **This kind of overstretch may also have negative implications for the overall mission success by miscalculating what is within the realm of possible military achievement.**⁶⁶ **Stretching the UK Special Forces too thinly can have adverse effects also on joint operations with Allied Forces.**⁶⁷

⁶⁰ Walpole and Karlshøj-Pedersen (n 12) p 8.

⁶¹ OSCE Office for Democratic Institutions and Human Rights and Geneva Centre for Security Sector Governance. 'Human Rights of Armed Forces Personnel: Compendium of Standards, Good Practices, and Recommendations' (OSCE/ODIHR and DCAF, 2021) p 265.

⁶² Murray Jones and Ian Overton, 'Killing in the Shadows: AOAV exposes allegations British SAS killed Afghan civilians' (*Action on Armed Violence*, 12 July 2022) <<https://aoav.org.uk/2022/killing-in-the-shadows-the-report/>> accessed 17 March 2023.

⁶³ Roberto J. Rona and others, 'Mental health consequences of overstretch in the UK Armed Forces, 2007-09: a population-based cohort study' (2014) *The Lancet: Psychiatry* 531

⁶⁴ Walpole and Karlshøj-Pedersen (n 12) p 11.

⁶⁵ OSCE/ODIHR and DCAF (n 61) p 69.

⁶⁶ Walpole and Karlshøj-Pedersen, (n 12) p 8.

⁶⁷ *ibid.*

Legal Obligations

Beyond the domestic mechanisms governing oversight and accountability of its Special Forces, the United Kingdom has certain obligations under relevant international law frameworks including international humanitarian law (IHL), international human rights law, and international criminal law. **Given the United Kingdom's role championing respect for international law in armed conflict,⁶⁸ ensuring that its own international law obligations are met is of the utmost importance for the UK's positioning in the international community.** This section of the report will focus on the following key aspects: (a) the extent to which obligations to investigate and prosecute potential war crimes are enshrined in international law and how this might impact oversight over Special Forces; (b) accountability mechanisms and victim's rights to remedy under international human rights law when violations are found to have taken place. Understanding the relevant international law obligations provides a crucial tool for advocating for increased parliamentary oversight and accountability of the Special Forces.

Obligations in International Humanitarian Law, International Criminal Law, and International Human Rights Law to Investigate and Prosecute

The UK must be careful not to be perceived as reluctant to investigate or prosecute its own Armed Forces personnel when violations of international law have taken place. Public criticism of the UK in this regard has already been raised following the closure of Operation Northmoor, an investigation launched by the RMP in 2014 into alleged war crimes committed by British Armed Forces, including the UK Special Forces, in Afghanistan. After six years of investigations, Operation Northmoor was closed without investigating in detail all incidents concerned and without resulting in a single prosecution.⁶⁹

The obligation to investigate and prosecute serious violations, including potential of war crimes against civilians such as those allegedly committed by UK Special Forces in Afghanistan and Iraq, is enshrined in international law through the 1949 Geneva Conventions and the 1998 Rome Statute to the International Criminal Court. Under international humanitarian law, the United Kingdom has obligations to prosecute grave breaches of the 1949 Geneva Conventions and Additional Protocol I of 1977 (AP I).⁷⁰ International criminal law further enshrines the obligation to investigate and prosecute war crimes through the United Kingdom being Party to the Rome Statute of the International Criminal Court.⁷¹ Under Article 17(1)(a) of the Rome Statute, which sets out the principle of complementarity, States must be genuinely willing and

⁶⁸ For example, through its recent expansion of financial support to the International Criminal Court for investigations of war crimes. See UK Government, Press Release, 'London hosts major international war crimes meeting as UK boosts support for ICC' (UK Government, 20 March 2023) <<https://www.gov.uk/government/news/london-hosts-major-international-war-crimes-meeting-as-uk-boosts-support-for-international-criminal-court>>accessed 25 March 2023.

⁶⁹ Action on Armed Violence (n 32).

⁷⁰ Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [hereinafter "API"], 8 June 1977, 1125 UNTS Article 85. For customary law see Henckaerts, J.M. and Doswald-Beck, L., ICRC Customary International Humanitarian Law [hereinafter "ICRC Customary Law Study"] Rule 158.

⁷¹ Rome Statute of the International Criminal Court (2002) [hereinafter also referred to simply as the "Rome Statute"] Article 8. Article 8(a) repeats the grave breaches provisions of the four Geneva Conventions.

able to carry out investigations and prosecutions into alleged crimes covered by the Statute to preclude the Court's jurisdiction.⁷²

As a State Party to these treaties, the UK has given domestic effect to its international treaty obligations through the Geneva Conventions Act 1957 (amended in 1995 to include Additional Protocols I and II) and the International Criminal Court Act 2001.⁷³ A perceived failure to carry out genuine domestic investigations into alleged war crimes carried out by the UK Special Forces could therefore allow the Prosecutor of the ICC to investigate and prosecute them at the international level.⁷⁴ **Given the UK's State Party referral of ICC cases and financial support of the ICC's investigations into war crimes committed by other actors, becoming itself the subject of an ICC investigation for a failure to adequately investigate allegations or prosecute war crimes could risk seriously damaging the UK's international influence and reputation.**⁷⁵

Concerns about meeting international obligations to investigate were noted also in communications that took place in 2021 between the Prosecutor of the ICC with the UK government regarding the Overseas Operations (Service Personnel and Veterans) Act 2021.⁷⁶ As affirmed by the Prosecutor, a lack of 'willingness and/or ability of the UK authorities to carry [investigations] out genuinely' has consequences 'not only for how the UK approaches its duties under international law, but more generally for how States uphold their primary responsibility to investigate and prosecute such crimes or yield their jurisdiction to the ICC.'⁷⁷

Several international human rights law treaties also explicitly contain a duty to investigate specific violations, notably Article 12 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified by the UK in 1988.⁷⁸ Other human rights mechanisms, to which the United Kingdom is Party, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) have also been interpreted to contain an implied requirement to investigate violations.⁷⁹

The UK's obligation under Article 2 (Right to Life) of the ECHR⁸⁰ to investigate potential human rights violations in situations of armed conflict was affirmed by the European Court of Human Rights in the 2011 case *Al-Skeini and Others v. the United Kingdom*. In its *Al-Skeini* judgment, the Court determined that

⁷² Rome Statute (n 71), Articles 17(1)(a).

⁷³ UK Government Geneva Conventions Act 1957, UK Government Geneva Conventions Act Amendment 1995, and UK Government International Criminal Court Act 2001.

⁷⁴ When those crimes fall under the scope of crimes covered by the Rome Statute.

⁷⁵ UK Government, Press Release(n 68).

⁷⁶ Fatou Bensouda, 'Letter from ICC Prosecutor to the Chair of the Joint Committee on Human Rights' (*International Criminal Court*, 5 March 2021) <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/iraq/20210305-IRQUK-Letter-from-ICC-Prosecutor-to-the-Chair-of-the-JCHR.pdf>> accessed 10 March 2023 and Bensouda F, 'Response of the Prosecutor to Rt Hon David Davis MP' (International Criminal Court, 23 April 2021) <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/iraq/20210423-Letter-to-Rt-Hon-David-Davis-MP-UK-House-of-Commons.pdf>> accessed 10 March 2023.

⁷⁷ *ibid.*

⁷⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UNTS 1465, Article 6.

⁷⁹ ICRC, Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice (September 2019) para 18; International Covenant on Civil and Political Rights [hereinafter "ICCPR"] (1966) UNTS 999, Article 2.2 as interpreted by the Human Rights Committee in "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (26 May 2004), CCPR/C/21/Rev.1/Add.13, paras 8 and 15 and Article 2 of the ECHR.

⁸⁰ Effected into UK domestic legislation through the Human Rights Act 1998.

the procedural obligation under Article 2 continues to apply in a context of armed conflict and that such investigations must be 'independent and effective'.⁸¹ **The Court further noted that 'it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command'**.⁸² This highlights the important role played by independent external oversight and accountability mechanisms, which can provide a crucial supplement to existing internal mechanisms.

Victim's Rights under International Law

The international law obligations to investigate are closely tied to victim's rights to remedy – a right recognized through numerous international treaties to which the UK is Party.⁸³ Victims' right to remedies under international law includes the following (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; (c) access to relevant information concerning violations and reparation mechanisms.⁸⁴ The question of how to address harm caused by armed conflict and how to provide reparations to those who suffered harm as a consequence remains contested and debated.⁸⁵ Beyond the provision of reparations, the right to remedy, however, is also established as being closely linked to a need for transparent information sharing.⁸⁶ The UK's opaque 'no comment' policy regarding its Special Forces, including a lack of transparency over how investigations into alleged war crimes are conducted, raises several concerns in this regard.

With transparency and access to information seen as a key element of satisfaction for victims of serious violations of international humanitarian and human rights law, a balancing act must be found. Currently, however, tactical secrecy regarding Special Forces operations comes at the expense of transparency and oversight of their operations. Certain details may necessarily need to be withheld from the public due to perceived operational risks or potentially jeopardising future investigations. Strengthening accountability and oversight mechanisms within the Parliament could offer several benefits in this regard while still maintaining the required level of confidentiality. **Parliamentary oversight mechanisms would be more likely to be considered impartial and could therefore help to build public trust into investigative processes, making them overall more meaningful for the British public and affected communities abroad.**

⁸¹ *Al-Skeini and Others v. United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) paras 164-166.

⁸² *ibid.*, paras 168-169.

⁸³ See Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and Articles 68 and 75 of the Rome Statute of the International Criminal Court.

⁸⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005).

⁸⁵ Elizabeth Salmón and Juan-Pablo Pérez-León-Acevedo, 'Reparation for victims of serious violations of international humanitarian law: New developments' [2022] 104(919) *International Review of the Red Cross*, p 1315.

⁸⁶ Basic Principles and Guidelines (n 84), para 24.

External Oversight Frameworks in Allied States

Other countries have also encountered challenges with oversight and accountability of their Special Forces. Exploring these case studies demonstrates how UK allies, notably Australia and the US, have implemented external oversight and accountability measures for their Special Forces. Acknowledging that allied States have been able to successfully strengthen external oversight while maintaining operational confidentiality and security provides a strong assurance to counter many of the perceived associated risks. In addition, modern military operations are often undertaken jointly with allied partners. As such, it is especially crucial to ensure UK practice evolves to remain compatible with that of its allies.

Regardless of where they take place and under whose auspices, Special Forces operations are subject to a high level of tactical security and secrecy. The UK, however, remains singular among its allies in its highly opaque approach and blanket 'no comment' policy regarding its Special Forces. **The approach taken by allied States demonstrates that external oversight mechanisms can be successfully implemented without compromising operational success or security.**

Case Study – Australia

This section of the report presents the case study of Australia, showcasing the 2020 Inspector-General of the Australian Defence Force Afghanistan Inquiry Report (referred to hereafter as the Brereton Report). This case study represents a successful example of reactive external oversight or accountability being implemented by spotlighting how concerns related to the conduct of Australian Special Forces in Afghanistan were investigated and addressed. This includes first describing the events that sparked this inquiry – including mention of the applicable IHL and domestic law provisions violated. Next, this will be followed by a discussion of how Australia was able to adapt their accountability and oversight mechanisms for Special Forces because of this inquiry. Finally, relevant lessons learned from the Australia case study that could be beneficial to the British context will be elaborated.

Prior to the publication of the Brereton Report, Australia's accountability and oversight policy for its Special Forces was similar to that of the UK. The Australian Government adopted a 'no comment' policy when issues arose with their Special Forces. Reforms to this policy were adopted when Australia was faced with significant accusations of alleged war crimes committed by the Australian Defence Force (ADF), including the Australian Special Forces, during the War in Afghanistan from 2005 to 2016. These allegations were intensively and independently investigated through the Brereton Report. Although the Brereton Report found that some claims were unsubstantiated, it also determined that several claims regarding the inhumane treatment or killing of individuals unable to perform a combat function were credible.⁸⁷ Through its investigation, the Brereton Report uncovered evidence of at least thirty-nine unlawful deaths of Afghan civilians and prisoners of war (POWs) perpetrated by twenty-five members of the Australian Special Forces.⁸⁸

⁸⁷ Australian Government Defence, Afghanistan Inquiry Report (Public Release Version) 2020, Executive Summary, p 28.

⁸⁸ *ibid.*, p 29.

The events investigated in the Brereton Report were in clear violation of the IHL provisions enshrining the protected status of civilians and POWs. Furthermore, these events were in breach of Australian domestic law, including Part 1 Section 7 of the Defence Force Discipline Act of 1982, which translated Australia's responsibility under the Geneva Conventions (including matters on the treatment and identification of POWs) into domestic law.⁸⁹ The Australian War Crimes Act of 1945 further states that serious crimes performed in times of war by Australian nationals can be considered a war crime under domestic jurisdiction.⁹⁰

Publication of the Brereton Report and Subsequent Policy Changes

"In Australia, [The Brereton Report] has been a shattering wake-up call for the armed forces...the Australian report very much affects and implicates British personnel, albeit not directly."⁹¹

The policy reform measures adopted by Australia to strengthen accountability and oversight over its Special Forces as a result of the Brereton Inquiry demonstrate clearly the feasibility of adopting such measures without sacrificing tactical and operational security.⁹² **Alongside the Brereton Report, the Australian Government made publicly available its plan for reform which specifically included strengthening 'accountability and oversight'. In addition, public apologies were issued by the Chief of Defence and translated into Dari and Pashtu – an apparent acknowledgement of the importance of victims' right to accessing information.**

The Afghanistan Inquiry Reform Plan developed by the Australian Government following the investigations conducted through the Brereton Report includes several recommendations specifically pertaining to the Special Forces. **These include an independent study of the Special Forces to determine root causes of failures and wrongdoings to prevent recurrence.**⁹³ As a result of the inquiry, structural command and accountability reforms of Special Operations are in progress, alternative confidential reporting mechanisms for allegations of serious operational incidents will be established, and training of ADF personnel on the law of armed conflict was reviewed. The recommendations also featured discussion on improving and strengthening frameworks and processes for managing partnerships in allied coalitions.

Lessons Learned and Relevance to the UK Special Forces

While the Brereton Inquiry was concerned with the actions of the ADF, it should be noted that the UK was featured throughout the inquiry, as several of the incidents being investigated occurred during joint operations. One specific incident referred to in the report involved the alleged killing of an Afghan individual by members of the British SAS.⁹⁴ While this incident falls outside of the scope of

⁸⁹ Australian Government, Defence Force Discipline Act 1982, Section 7.

⁹⁰ Australian War Crimes Act 1945 Section 11.

⁹¹ Frank Ledwidge, 'Australia is reckoning with its war crimes allegations. Now the UK must step up' (23 November 2020) <<https://www.theguardian.com/commentisfree/2020/nov/23/australia-war-crimes-allegations-uk-brereton-report-special-forces-afghanistan-british-personnel>> accessed 19 March 2023.

⁹² Australian Government Defence, Afghanistan Inquiry Reform Plan 2021, Commander's Intent, p 7.

⁹³ *ibid.*, Objective 2, p 3.

⁹⁴ Australian Government Defence (n 87), Annex B to Chapter 1.12, p 323.

Australian domestic law jurisdiction, it was nevertheless determined to have breached IHL obligations.⁹⁵ The UK was thus found to be a responsible party in the Brereton Report. The implication of members of the UK Special Forces in the alleged crimes investigated by the Brereton Report resulted in calls on the UK to conduct its own independent investigation.⁹⁶ **To date, there has been little acknowledgement from the UK government and no measures have been taken to change oversight or accountability frameworks in the UK.**

This is in stark contrast to Australia’s transparent and public acknowledgment of harm done and substantive steps taken to prevent such harm from occurring in the future. The long-standing avoidance of the UK to address similar concerns regarding its own Special Forces creates a risky dynamic for future joint-operations likely to take place between the UK and its allies. **Given the observed change in stance among allied countries like Australia, the UK must carefully consider how standing by its ‘no comment’ policy may negatively impact its position among allies and reputation within the international community.** The example of the Australian Brereton Report further demonstrates that such a change in stance is feasible and can be achieved while still retaining an element of necessary tactical secrecy related to operations.

Case Study – United States

The Australian case study demonstrates how independent investigations into serious allegations can lead to reactive policy reform. While this is an important step towards acknowledging wrongdoings and abuses of human rights and violations of IHL, it may not function as a reliable preventative measure before these incidents occur. Furthermore, investigations (such as the Brereton Report) based on particular cases are resource intensive and take a long time to complete, with questionable broader long-term benefits beyond addressing specific incidents. **Therefore, considering that Special Forces operate almost continuously, it may be advantageous to consider oversight and accountability frameworks that consist of both reactive and consistent proactive mechanisms.**

For example, States like the US, Denmark,⁹⁷ and Norway⁹⁸ have some level of parliamentary oversight of their Special Forces operations that allows for a more consistent and systematised approach. By examining the longstanding congressional oversight mechanisms for Special Forces in the US, as a major close ally of the UK, important insights into how such mechanisms can benefit and protect UK Special Forces throughout shifts in their operational roles can be derived. This case study will thus first consider how the role of US Special Forces has shifted in recent years before discussing the benefits of existing congressional oversight mechanisms. Finally, relevant applicable aspects of US oversight mechanisms will be considered in the context of the UK Special Forces. Given the resemblance between

⁹⁵ Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules (ICRC and Cambridge University Press 2005), Rule 1.

⁹⁶ Rory Callinan, 'Calls for UK to investigate possible war crimes in Afghanistan' (20 November 2020) <<https://www.theguardian.com/australia-news/2020/nov/20/calls-for-uk-to-investigate-possible-war-crimes-afghanistan-australian-report>> accessed 28 March 2023.

⁹⁷ For more information about the Danish oversight model, see Walpole and Karlshøj-Pedersen (n 12), p 21.

⁹⁸ For more information about the Norwegian oversight model, see Walpole and Karlshøj-Pedersen (n 12), p 23.

the bicameral political systems and historical parallels, the potential to replicate the American model and apply it to the UK system, particularly through a specialist parliamentary group, is strong.

Made up of several specialised units, each with its own unique capabilities and missions, the US Special Operations Forces (USSOF) operates under the unified US Special Operations Command (USSOCOM) and (USSOCOM) consists of over 70,000 active duty and reserve personnel.⁹⁹ It is a unified combatant command charged with overseeing the various Special Operations Component Commands of the Army, Marine Corps, Navy, and Air Force of the United States Armed Forces and consists of Special Forces: Delta Force, SEAL Team Six, Green Berets, US Air Force Special Tactics Squadrons (STS), US Marine Corps Forces Special Operations Command (MARSOC), Joint Special Operations Command (JSOC), 75th Ranger Regiment. **Given its undisputed status as the most populous Special Forces command unit globally, the USSOF provides a particularly compelling case study for not only the importance but also the feasibility of external oversight and accountability.**

Shifting Role of the US Special Forces

USSOF have played a crucial strategic role in post-9/11 US counter-terrorism operations in Iraq and Afghanistan. Their greatest utility was observed during the Obama administration, due to a combination of declining military budgets, greater domestic resistance to US troops on the ground, and continued prevalence of irregular threats to national security.¹⁰⁰ While cutting budgets and withdrawing more than 200,000 conventional troops from Iraq and Afghanistan, financial resources allotted to USSOF continued to increase, as did their use for deployments.¹⁰¹ Given the political and economic costs of deploying conventional troops, and the changing character of asymmetric modern warfare, the deployment of USSOF has become increasingly advantageous. This is largely because of their ability to conduct missions that conventional Armed Forces cannot undertake, including those that require operating in a low-profile manner, behind enemy lines, or in particularly politically sensitive contexts.¹⁰² With the onset of the so-called War on Terror, waged against a nebulous enemy spread across the globe, the demand for such covert operations tracing and capturing or killing high-value targets has grown. Accordingly, the US budget allocations for Special Forces operations more than quadrupled between 2001 and 2017.¹⁰³

Regarding this apparent shifting and expanding role of the USSOF, USSOCOM commander General Raymond 'Tony' Thomas has stated that 'we are not a panacea, we are not the ultimate solution to every problem' when testifying to the US Senate Armed Services Committee in 2017.¹⁰⁴ General Thomas further highlighted that although Special Forces represented only two percent of the entire Department

⁹⁹ Andrew Feickert, 'U.S. Special Operations Forces (SOF): Background and Issues for Congress', (Congressional Research Service 2022), p 1.

¹⁰⁰ Abigail Watson, 'The Golden Age of Special Operations Forces' (*E-International Relations*, 28 November 2017) 2 <<https://www.e-ir.info/2017/11/28/the-golden-age-of-special-operations-forces/>> accessed 9 March 2023.

¹⁰¹ Linda Robinson, 'SOF's Evolving Role: Warfare "By, With, and Through" Local Forces' (9 May 2017) <<https://www.rand.org/blog/2017/05/sofs-evolving-role-warfare-by-with-and-through-local.html>> accessed 9 March 2023.

¹⁰² The Council on Foreign Relations, 'The Future of U.S. Special Operations Forces' (2013) Report No. 66 6, available at <<https://www.cfr.org/report/future-us-special-operations-forces>>.

¹⁰³ Murray Jones, 'Special Forces Around the World: Conduct, Oversight, and Opacity' (AOAV, 12 July 2022) <<https://aoav.org.uk/2022/special-forces-around-the-world-conduct-oversight-and-opacity/>> accessed 15 March 2023.

¹⁰⁴ Statement of General Raymond A. Thomas, III, U.S. Army Commander United States Special Operations Command before the Senate Armed Services Committee (4 May 2017), available at <https://www.armed-services.senate.gov/imo/media/doc/Thomas_05-04-17.pdf>, p 5.

of Defense's manpower, 8,000 USSOF personnel were deployed in 80 different countries in 2017.¹⁰⁵ This expansion of the role of USSOF raised questions regarding possible policy revisions on oversight with a goal of promoting effectiveness and avoiding overstretch or overuse.¹⁰⁶ Due to the existing congressional oversight mechanism, which has been consistently applied in the US, new measures to react to or prevent the excessive use of Special Forces are able to be quickly implemented.

As discussed in the section 'Shifting Operational Role of UK Special Forces' of this report, the operational use of the UK Special Forces appears to be expanding in a similar fashion and concerns have also been raised regarding the potential overstretch of UK Special Forces. As such, the external oversight frameworks employed in the US could provide a valuable basis for designing and implementing mechanisms in the UK.

US Special Forces - External Oversight Mechanisms

Established in 1816, the United States Senate Committee on Armed Services has a long history and thorough institutional experience overseeing all military service branches in the US.¹⁰⁷ Through its specialised Subcommittee on Emerging Threats and Capabilities, the Senate Committee on Armed Services can examine the USSOF. The Subcommittee has the authority to conduct hearings, request reports, and conduct independent investigations into any aspects of Special Forces operations.¹⁰⁸ **These congressional external oversight mechanisms play a critical role in ensuring that USSOF operate within the frameworks of domestic and international law and remain accountable to the US public.**

The committee frequently holds hearings where top military officials, including those in charge of Special Forces, are invited to testify. During these hearings, senators can ask questions about Special Forces operations, policies, and procedures. These sessions provide an opportunity for committee members to scrutinize and evaluate the actions of these forces. If there is suspicion of wrongdoing or mismanagement within the Special Forces, the Committee can initiate investigations to examine these issues in more detail. They can call witnesses, request documents, and otherwise gather information to understand the situation better. The Committee is also responsible for confirming high-level Department of Defence and military officials, including those who might have authority over Special Forces. Through this process, they can exert influence over the leadership and direction of these units. These elements are all crucial parts of their function, as they enable the confirmation that these groups are working efficiently, maintaining ethical standards, and complying with US regulations.¹⁰⁹ A similar body exercising oversight on Special Operation Forces can be found in the House of Representatives. The Subcommittee on Intelligence and Special Operations of the House Committee on Armed Services also serves as a control mechanism over the Special Forces in line with its legal competencies.¹¹⁰

¹⁰⁵ Statement of General Raymond A. Thomas, III. (n 104), p 3.

¹⁰⁶ Watson (n 100), p 3.

¹⁰⁷ United States Senate Committee On Armed Services, 'Committee History' (*History & Jurisdiction*) <<https://www.armed-services.senate.gov/about/history>> accessed 19 March 2023.

¹⁰⁸ *ibid.*, 'Subcommittees' <<https://www.armed-services.senate.gov/subcommittees>> accessed 19 March 2023.

¹⁰⁹ *ibid.*, 'Rules of Procedure' <<https://www.armed-services.senate.gov/about/committee-rules>> accessed 19 March 2023.

¹¹⁰ United States House Committee on Armed Services, 'Intelligence and Special Operations' (*Subcommittees*, 2020)

The importance of this external oversight and accountability framework is well-exemplified through a tragic and unsuccessful USSOF operation in Niger in 2017, in which four US Army Special Operations soldiers were killed and several civilians lost their lives.¹¹¹ This incident led to a call for increased scrutiny and for more information on Special Operations to be made available to the US Congress. The House Committee on Armed Services organised hearings and prepared a 6,000 page highly detailed and classified report investigating the incident.¹¹² An eight-page declassified summary was made publicly available, detailing the mistakes that led to the ill-fated raid that left dozens of Nigerien civilians dead and recommending possible safeguards to be implemented to prevent the same mistakes from being repeated.¹¹³ **As demonstrated by this example, even in the most sudden and tragic failures, the congressional oversight mechanism in the United States enables clear identification of problems and rapid policy changes to be made regarding Special Forces during times of trouble that may arise unexpectedly.**

As an additional external oversight mechanism, the Government Accountability Office, an independent and non-partisan agency, can evaluate US government programmes and activities. With the authority to conduct audits and investigations into USSOF activities, the Government Accountability Office provides an avenue for making recommendations for improvements which may inform the Congressional Committees in strengthening their oversight.¹¹⁴

Overall, the framework used by the US to oversee its Special Forces contains several components that could also be suitable for the UK, especially given their close cooperation on the ground and the considerable use of Special Forces by both countries. In particular, the United States Senate and House Committees on Armed Services, with its Subcommittee on Special Forces, has been 'field tested' and has demonstrated its ability to successfully sustain oversight over the Special Forces through a proactive and consistent mechanism. **A permanent and reliable body is informed by the frequent hearings and meetings, with the appropriate qualifications to conduct and investigate findings backed up by supporting evidence. This committee system in the US might serve as an informative comparison for the UK.**

<<https://armedservices.house.gov/subcommittees/intelligence-and-special-operations-118th-congress>> accessed 28 June 2023.

¹¹¹ Liam Walpole, 'The US Congress Understands the Importance of Special Forces Oversight, Why Doesn't the UK Parliament? | USAPP' (LSE, 23 March 2019) <<https://blogs.lse.ac.uk/usappblog/2019/03/23/the-us-congress-understands-the-importance-of-special-forces-oversight-why-doesnt-the-uk-parliament/>> accessed 9 March 2023.

¹¹² Ellen Mitchell, 'Classified Niger Probe Finds Multiple Flaws in Deadly Mission: Report' (*The Hill*, 26 April 2018) <<https://thehill.com/policy/defense/385029-classified-niger-probe-finds-multiple-flaws-in-deadly-mission-report/>> accessed 9 March 2023.

¹¹³ Liam Walpole, 'Out from the Shadows: The Case for External Oversight of UK Special Forces' (*Democratic Audit*, 4 June 2018) <<https://www.democraticaudit.com/2018/06/04/out-from-the-shadows-the-case-for-external-oversight-of-uk-special-forces/>> accessed 9 March 2023.

¹¹⁴ United States Government Accountability Office, 'Better Data Necessary to Improve Oversight and Address Command and Control Challenges' (Report to Congressional Committees 2022) GAO-23-105163 available at <<https://www.gao.gov/assets/gao-23-105163.pdf>>.

Summarising the Lessons of the Case Studies: Proactive and Reactive Measures

Responses to arising issues can either be reactive, like Australia's response after the findings of the Brereton Report, or they can be more proactive and preventative, such as the approach taken by the US Senate and House Committees on Armed Services. Reactive measures, while capable of providing important avenues for oversight and accountability, have their limitations. One of the major criticisms is that these mechanisms can only be implemented post-facto, after a breach within the Special Forces is exposed. **Consequently, the focus of reactive measures is primarily on accountability for past events, thereby potentially neglecting real-time or forward-looking oversight.**

Conversely, proactive measures can enhance oversight and accountability pre-emptively, prior to an event taking place. This allows for more effective application in the context of Special Forces operations. However, their forward-looking nature may limit their utility in learning lessons and fostering overall improvement within the Special Forces, particularly when a human rights or IHL breach occurs. **Thus, proactive measures are typically more efficient at oversight, but less so at ensuring accountability.**

Given the strengths and limitations of both approaches, an optimal solution might involve a balanced blend of proactive and reactive measures. In most cases, proactive measures could be applied during Special Forces operations. For example, if a breach of human rights law or IHL were to occur, more investigation-oriented reactive measures could then be implemented. These inquiries, made available to the public (with at least some degree of transparency), should underscore accountability. Their findings should be considered as instrumental in refining future proactive strategies. Having the mechanisms and systems in place for such inquiries to be launched prior to a potential violation occurring would ensure that investigations are cohesively structured and conducted in a timely and efficient manner.

Risks and Benefits

Perceived Associated Risks to Increased Parliamentary Oversight

There are numerous challenges and perceived risks associated with increased parliamentary oversight over the UK Special Forces that may be creating political barriers for such a change to take place. The hesitancy to adopt external oversight mechanisms and loosen the current 'no comment' policy is often justified by citing operational concerns regarding a need for tactical secrecy, concerns related to excessive or 'vexatious' investigations.¹¹⁵ **As demonstrated by the case study examples of UK allies Australia and the US, however, such risks can be mitigated when the appropriate balance between external oversight, transparency, and the need for tactical secrecy is found.**

Risk: *Increased parliamentary oversight would require additional individuals to be informed on details regarding Special Operations, creating a potential risk that the spread of such information could jeopardise operational success or security of personnel.*

By nature, the Special Forces are elite military units trained to perform high-risk operations, consequently requiring a high degree of secrecy for operational security and tactical success. These units often operate in environments where they face significant threats and risks, both to themselves and to the mission they are tasked with. To mitigate these perceived risks, UK Special Forces have so far operated under an umbrella of secrecy, which has resulted in a lack of external oversight and accountability for these units.

Increased external oversight can provide much-needed accountability and benefit tactical coordination, yet it may also be perceived as potentially compromising the operational effectiveness and strategic secrecy of Special Forces operations. **Indeed, the perception that any degree of external oversight would risk the operational success or jeopardise the safety of Special Forces troops during covert activities is often used to justify the continuation of the 'no comment' policy. There is precedent, however, both in UK intelligence practice and external oversight established by allied States to counter and refute this narrative.** These examples demonstrate that when external oversight mechanisms are systematised, and those responsible are briefed on security requirements, external oversight would not inherently jeopardise operational success or security.

¹¹⁵ As stated by the Minister for Veterans and Defence People following the closure of Operation Northmoor: "We now know that none of the historical allegations from Afghanistan have led to prosecutions, and that most of the compensation claims were eventually withdrawn. I recognise this has meant that many of our remarkable Armed Forces have been living under the unique burden of vexatious claims and a cycle of seemingly endless reinvestigation." Cited in Robert Mendick, 'British troops will not face courts over Afghan conflict, says minister' (The Telegraph, 20 June 2020) <<https://www.telegraph.co.uk/news/2020/06/20/british-troopswill-not-facecourts-overafghan-conflict-says-minister/>> accessed 31 March 2023.

Under the Intelligence and Security Committee of Parliament (ISC) an effective framework for parliamentary oversight with statutory responsibility over the UK intelligence community has been implemented. This significant degree of parliamentary oversight and scrutiny of intelligence activities has not compromised the effectiveness of these agencies or their ability to maintain operational security.¹¹⁶

Considering the existing parliamentary mechanisms that successfully oversee intelligence activities through the ISC is an encouraging avenue for potentially applying a similarly structured external oversight mechanism to UK Special Forces operations.

This argument is further supported by looking more closely at the congressional oversight mechanisms established by the US to oversee its Special Forces operations. Considering the UK parliamentary oversight over intelligence, which by nature also require a very high degree of secrecy to be maintained, and the fact that close allies of the UK can employ effective external oversight frameworks over their Special Forces, it appears clear that a balance can be struck between the need for tactical secrecy and the need for improved oversight and accountability.

Risk: *Strengthening parliamentary oversight and accountability frameworks could perhaps lead to an excessive increase in the number of investigations into allegations of war crimes or other violations committed by UK Special Forces, creating a cycle of reinvestigations into claims already internally investigated by the MoD and placing an undue burden on service personnel and veterans.*

Concerns have been cited that the public attention drawn to UK military operations, through for example the BBC investigation, could lead to excessive investigations and reinvestigations of the same incidents due to vexatious claims based on 'unjustified conclusions'.¹¹⁷ This is perceived not only as negatively impacting UK service personnel and veterans, subjecting them to an undue burden, but also as damaging public trust and morale.¹¹⁸

Strengthening parliamentary oversight and accountability mechanisms, however, rather than contributing to these concerns could be a means of countering them and mitigating such risks. As highlighted previously throughout this report, it is a legal obligation to investigate and prosecute allegations of breaches of international human rights law and IHL. Rather than leading to excessive reinvestigations of incidents, parliamentary oversight mechanisms would be more likely to be considered impartial and could therefore help to build public trust into investigative processes, making them overall more meaningful for the British public and affected communities abroad. In addition, as highlighted in the section on Legal Obligations, there is a risk of the ICC launching international investigative processes if allegations of crimes are not perceived as being properly investigated. Finally, any investigations conducted through external oversight and accountability frameworks should complement and strengthen internal investigations rather than duplicate their efforts.

¹¹⁶ Intelligence and Security Committee of Parliament, Annual Report 2021-2022 (Intelligence and Security Committee, 13 December 2022) HC 922.

¹¹⁷ MoD Press Office, Statement on Twitter (UK Government, 11 July 2022) <https://twitter.com/DefenceHQPress/status/1546521612018765827?s=20&t=SGO3zhR_YneqjawNLHXNRw> accessed 26 March 2023.

¹¹⁸ Mendick (n 115).

Benefits of Strengthening Parliamentary Oversight and Accountability Mechanisms

Indeed, while there may be perceived risks associated with strengthening parliamentary oversight over the UK Special Forces, the UK's current policy regarding external oversight and accountability regarding its Special Forces in itself raises concerns. These concerns range from more internal issues relating to the overuse of the Special Forces, to more external risks, including potential reputational damage within the international political sphere. While these risks may vary in both implied likelihood and severity, they can be potentially mitigated through strengthening external oversight mechanisms. The inherent benefits of strengthened parliamentary oversight over the Special Forces therefore could be observed at numerous levels – from preventing overstretch through improved standards of operation for the Special Forces themselves, to ensuring compliance with domestic and international legal obligations, to building public trust at the domestic level.

Benefit: *Improved external oversight over UK Special Forces could help to ensure obligations under international law to investigate and prosecute war crimes and other violations are fully met. This avoids the ICC potentially launching its own investigations, which would have negative consequences for the UK's international reputation.*

Increased parliamentary oversight and accountability mechanisms could decrease the likelihood of an investigation into allegations of war crimes committed by UK Special Forces being launched by an international legal body. As highlighted in the legal analysis section, if the UK's current stance on oversight and accountability and model for investigating allegations of potential breaches of international humanitarian law or international criminal law is perceived as not satisfactory enough for an international legal level on par with other nations, this could lead to the ICC launching its own investigations.

Such international investigations could have potentially serious reputational consequences within the international community regarding the UK's ability and willingness to meet its obligations under international law. This is of particular significance given the UK's recent expansion of financial support to the ICC for investigations into alleged war crimes committed in other contexts of armed conflict. In addition, this contradicts the claim addressed in the previous sub-section that increased external oversight at the domestic parliamentary level would lead to excessive investigations. Instead, clearly demonstrating that effective domestic oversight and accountability mechanisms are in place and allowing some degree of public transparency for such investigations would void the need for international bodies to become involved and avoid reinvestigations.¹¹⁹

Benefit: *The UK's current 'no comment' policy and lack of external oversight mechanisms over Special Forces is in stark contrast with the practice of many of its most important allies. Strengthening parliamentary oversight and accountability frameworks would align UK practice with that of its allies, which could strengthen effective cooperation during operations undertaken jointly.*

An additional benefit of increased oversight and accountability measures, is the increase in effectiveness when it comes to modern operations, including those involving Special Forces, are increasingly

¹¹⁹ Rome Statute, Article 17, Section 1(b).

undertaken jointly with allied States.¹²⁰ Consequently, policies such as the blanket 'no comment' approach taken by the UK towards its Special Forces should be evaluated alongside relevant allied practice. Its current stance places the UK at odds with several of its allies, which could have serious practical consequences for joint operations in future potential engagements. Aligning more closely with allied practice in this regard would not only have reputational benefits for the UK's international standing, as they would no longer be potentially perceived as less compliant than allied States but could in the future also allow the UK to operate more effectively alongside its allies in situations of armed conflict.

Benefit: *Given the requirement that the Defence Secretary be accountable to Parliament, increased parliamentary oversight over the Special Forces would allow Parliament to exercise an important democratic function.*

Increased parliamentary oversight and accountability over the UK Special Forces has benefits both for investigations into alleged serious violations of international humanitarian law or gross human rights violations, and for safeguarding the well-being of the Special Forces themselves. Parliamentary investigative oversight would ensure that the UK fully meets its international law obligations under the frameworks of international human rights law, international humanitarian law, and international criminal law. Such a process might also be perceived as more trustworthy and independent by the UK public. In addition, investigations are not only beneficial as a means for holding those responsible to account, - but can also serve as an important tool for learning lessons and improving future operations. Finally, increased parliamentary oversight over the operations and budget of the UK Special Forces – while ensuring the necessary level of confidentiality is maintained – could serve as an important protective measure for the safety and well-being of the Special Forces themselves. Creating an appropriate parliamentary oversight framework could also help to prevent overstretch. This would not only have benefits for the mental and physical wellbeing of the Special Forces personnel but would also carry inherent strategic benefits.

Benefit: *In the context of the expanding role of Special Forces, increased parliamentary oversight over how UK Special Forces are deployed could reduce the risk of overstretch and therefore carries strategic benefits for operational success.*

External oversight could ensure that the Special Forces are not overstretched and being used to engage in shadow operations that could undermine the Government's legitimacy or international standing. There is further potential for increased oversight to allow for better coordination between the Special Forces and other military branches, which could enhance the overall effectiveness of military operations. Keeping in mind the increasing and shifting role of UK Special Forces, external parliamentary scrutiny would create a greater sense of accountability over decisions and authorisation related to the deployment of Special Forces.

¹²⁰ Robison (n 99).

Conclusion

While acknowledging challenges and barriers to their implementation, the findings of this report nevertheless highlight the importance of strengthening external scrutiny over the UK Special Forces through parliamentary oversight and accountability mechanisms. Despite increasing attention being drawn to this topic, including in the media and public sphere, reform has not yet taken place. The hesitancy to implement reform may in part be due to a flawed perception that such external parliamentary oversight would pose operational risks due to the high level of tactical secrecy required. As demonstrated through the comparable examples, however, such risks can be mitigated and there is very little evidence to support such a viewpoint.

The case studies of Australia and the United States have shown that addressing the issue of external oversight of Special Forces can be approached through different means. The reactive measures following the investigations and outcomes of the Australian Brereton Report, or the more proactive and a preventive US measures through the US Senate and House Committees on Armed Services. **Both examples show that consistent external oversight, when formalised and implemented carefully, does not compromise tactical secrecy.** The Brereton Report investigated and uncovered several violations related to inhumane treatment and killings, resulting in a transparent acknowledgment of the harm done. Most importantly, it led to the adoption of new policy and structural command reform through the openly accessible Afghanistan Inquiry Reform Plan. The mechanisms employed by the US provide a useful example of how a more proactive approach can be structured, and how oversight could promote operational effectiveness and avoid overstretch of Special Forces personnel. The Committees play an important role in exercising congressional oversight through conducting consistent hearings and systematic independent reviews into any aspects related to the US Special Forces.

While the findings of the case study analysis already demonstrate that external oversight for Special Forces is feasible, this is further supported by an existing domestic precedent within the UK. The Intelligence and Security Committee (ISC) establishes a framework for external parliamentary mechanisms for the sensitive activities of the intelligence community and oversees the intelligence activities – endeavours that without doubt deal with sensitive matters and require a high threshold of secrecy. In practice Intelligence and Special Forces operate at the same level of classification and often work collaboratively on joint missions. **Through their link to intelligence activities, Special Forces are therefore already exposed to some degree of external oversight, if indirectly. Shifting this oversight to a more specialised committee tasked with Special Forces issues only would hence be advantageous, as committee members could be specifically trained on Special Forces matters – adding a layer of protection to the handling of sensitive information.**

Opponents of increased parliamentary oversight may voice fears related to a perceived risk to operational success and security or express concerns that external oversight might duplicate investigations into alleged violations already addressed through internal processes. Such concerns, however, can be reduced by establishing a more balanced approach to transparency and necessary tactical secrecy within oversight mechanisms. Current internal oversight mechanisms are opaque and entirely lacking in transparency. By raising questions about their effectiveness and the degree of accountability, additional external oversight mechanisms would still need to maintain a sufficiently high threshold of secrecy. The benefits of strengthening parliamentary oversight are multi-faceted: by holding the Defence Secretary accountable through Parliament a democratic function is ensured. Holding the Government accountable

for how Special Forces are deployed is vital – both for ensuring that international law obligations are met and for protecting the well-being and safety of personnel.

Furthermore, the case studies have highlighted that the UK stance is lagging behind that of its allied partners regarding both proactive and reactive oversight and accountability. **Noting the frequency of joint allied operations, adopting similar external oversight frameworks would allow the UK to realign its practice with that of its allies and ensure cohesive standards are met.** The implementation of better safeguarding measures can counterbalance and reduce the risk of overstressing UK Special Forces due to growing deployments. Increased parliamentary oversight also ensures compliance with international law obligations to investigate and prosecute.

While the ‘no comment’ policy regarding Special Forces is intended to protect operational security, it has resulted in a gap in oversight and scrutiny that poses risks to the UK Special Forces themselves. With the role of the UK Special Forces shifting and expanding, this gap and the need to address it through policy reform, is growing. In its current form, the lack of external oversight over the Special Forces risks leading to overstretch and misuse thereof, hindering accountability and improvement when violations of international law obligations occur. It may also be exacerbating public mistrust following a series of recent investigative reports.

To address this expanding gap, the following range of possible policy recommendations have been developed through a combination of the findings from the literature review conducted and the insights gained through interviews with key experts.¹²¹ The policy recommendations should be understood as a gradual process to implement progressively and build towards achieving strengthened external oversight and accountability. For such oversight to be effective, it is crucial that those who would exercise it understand the topic and are aware of related issues. **The value of internal oversight and accountability mechanisms, and the primary function they hold, must be recognised. Rather than replacing such existing internal mechanisms, external mechanism and parliamentary oversight should function as an additional safety net, overcoming the limitations, obstacles, bias, or other malfunctions that might exist within internal frameworks.**

¹²¹ Key informant experts who participated in interviews for this project represented a range of involved stakeholders. This included retired military personnel (from both the UK and allied States), researchers and academics, and international humanitarian law experts.

Policy Recommendations

The starting point for developing policy recommendations is hence relying on the already existing internal mechanisms functioning as a checks and balance of the Ministry of Defence and the regular Armed Forces. Such mechanisms can be found in the form of:

- the Service Complaints Ombudsman for the Armed Forces, who provides independent and impartial oversight of the complaint service.
- the National Audit Office and the Defence Select Committee that carry out independent budget and expenditure controls and jointly examine the MoD's spending and performance.

Ideally, to ensure they function independently, impartially and can be robust, internal mechanisms should be taken out of the chain of command. To build upon these internal mechanisms, this report recommends a progressive series of combined proactive and reactive measures be adopted.

Implementing Proactive & Reactive Oversight Measures Together: The proposed oversight mechanism should integrate both proactive and reactive measures. Proactive measures are essential in maintaining a high level of operation standards, they can anticipate and prevent potential breaches. Simultaneously, reactive measures are needed to ensure accountability, addressing and learning from any incidents that occur. Together, these approaches enhance the oversight and accountability of Special Forces, ensuring operational integrity and preventing the recurrence of any adverse incidents. Therefore, when establishing a new policy, it is important to incorporate both these approaches concomitantly.

Establishing a Robust Reporting Mechanism: To facilitate internal oversight and a culture of accountability and transparency within the Special Forces, a confidential reporting mechanism should be established. Members of the Special Forces should be able to report any suspected wrongdoing without fear of reprisal. This mechanism would work alongside the external oversight systems to ensure adherence to the highest standards of conduct.

Establishing an External Auditor: Drawing from the US model of the Government Accountability Office, the UK could introduce an independent, non-partisan agency. This agency, armed with the authority to conduct audits and rigorous investigations into Special Forces activities, would serve as an additional layer of oversight. It would provide a checks and balances system, ensuring alignment of Special Forces operations with both domestic and international laws, and pre-set policies. Recommendations based on these audit reports could then be used to enhance the function of the dedicated parliamentary committee, allowing them to execute their oversight role more effectively.

Establishing a Dedicated Parliamentary Committee: Modelled after the United States Senate and House Committees on Armed Services, a dedicated UK parliamentary committee would hold the responsibility of accurately scrutinising the operations, policies, budget, and administration of Special Forces. This committee would ensure the thorough review of relevant legislation, enforcing transparency and accountability from key decision-makers. Crucial to its function would be the authority to conduct special hearings, including summoning those in charge of special forces to testify. The establishment of a reliable and permanent committee like this could significantly enhance the proactive oversight of Special Forces, ensuring that they operate within a legal and ethical framework. Routine reporting to Parliament from this committee would provide a level of public transparency, creating an essential

balance between safeguarding national security and upholding the democratic principle of the public's right to know.

Security Clearance for Relevant Members of Parliament: Implementing a system similar to the United States would involve granting certain MPs access to classified information concerning the activities of the Special Forces. This not only ensures a bipartisan approach to the oversight of classified matters but also preserves operational confidentiality and security. As a part of the proposed dedicated parliamentary committee, these MPs would provide insightful input based on their exclusive access to intelligence, thus promoting informed decision-making processes and more efficient oversight.

Training & Development: To fully comprehend and scrutinise the complexity of Special Forces operations, intensive training programs should be initiated for the members of the dedicated parliamentary committee, the MPs with security clearances, and the external auditors. They should be fully briefed and knowledgeable about operational protocols, international humanitarian laws, and the ethical implications associated with Special Forces operations. This understanding will significantly enhance their ability to scrutinise, question, and hold the Special Forces accountable.

By adopting these recommendations, the UK can significantly strengthen oversight over its Special Forces, instilling a system that is not only comprehensive and multi-layered but also respects the principles of transparency, accountability, and the rule of law. This would result in more effective and ethical operations from Special Forces, further boosting public trust and safeguarding national security.

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