

**EVIDENCE SUBMISSION BY REPRIEVE TO THE DEFENCE COMMITTEE'S
INQUIRY INTO THE WITHDRAWAL FROM AFGHANISTAN**

October 2021

Reprieve is a legal action charity which seeks to uphold the rule of law and the rights of individuals around the world. Over the past 20 years Reprieve has provided legal and investigative support to hundreds of prisoners on death row; the families of people killed in lethal drone strikes; victims of torture and extraordinary rendition; and scores of prisoners in Guantanamo Bay. In June 2020 the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions cited our work in her annual report and a German court decision in the case of a Yemeni family we represent, referring to it as “watershed” in accountability with “critical findings”.

Overview

1. Reprieve welcomes the opportunity to submit evidence to the Defence Committee’s inquiry into the withdrawal from Afghanistan. This submission aims to address the Committee’s question of what effect the withdrawal will have on future operations. Specifically, it examines recent comments by the Defence Secretary about the future use of drone strikes in Afghanistan, the role Parliament should play in future operations and the legal risk of aiding similar actions taken by our allies, such as the United States.
2. In the waning days of the withdrawal from Afghanistan, at least ninety-five people lost their lives and over 150 were injured when a suicide bomber detonated an explosion just outside a gate at Kabul Airport.ⁱ Thirteen US service personnel and dozens of desperate families hoping to be evacuated were killed in the attack.
3. Three days later, fearing another attack, the US launched a drone strike at a car parked outside of a house in Kabul. The strike killed ten members of the Ahmadi family, including seven children, the youngest of whom was just two years old. Zemari Ahmadi, the driver of the car, worked for a US agricultural NGO. He, like those killed at the airport, was hoping to be evacuated along with his family. None of them had ties to ISIS-K.
4. Despite this, in the days and weeks after the strike, the US continued to persist with the narrative that those killed were ISIS-K – even in the face of overwhelming evidence to the contrary. US General Frank McKenzie went so far as to call it a “righteous strike”.ⁱⁱ It was only when the *New York Times* published CCTV footage showing conclusively that Zemari had loaded water canisters into his car – not explosives – that the US apologised for what they called a “tragic mistake”.ⁱⁱⁱ
5. While the apology was a first, very little else about the strike was unique. For two decades, the US has used drones to target and kill suspected terrorists, often outside of traditional battlefields. Not only are these strikes unlawful, but there is overwhelming evidence that while the drone itself may be precise, the intelligence behind strikes is anything but. As a result, innocent men, women and children are killed and communities are left traumatized and angry by the ensuing lack of accountability.
6. Amidst concerns about the legality of the US drone programme and UK involvement in it, Parliament has repeatedly asked the government for clarification of the UK’s own Targeting Policy and the legal frameworks governing its assistance to the US’s drone programme. It has also sought and received assurances from the Government that the UK does not itself carry out so-called ‘targeted killings’.^{iv}
7. Reprieve is therefore very concerned by comments made by the Secretary of State for Defence, Ben Wallace, stating the UK would not hesitate to launch drone strikes in Afghanistan in future and suggesting such strikes might be carried out under the doctrine of self-defence thus circumventing Parliamentary scrutiny of military action.^v

8. In light of the above, Reprieve's submission addresses the following four areas:
 - i. The urgent need for clarification of the UK's own Targeting Policy
 - ii. The need for parliamentary oversight of future use by the Government of drones in Afghanistan
 - iii. The risk of UK complicity in future US strikes in Afghanistan
 - iv. The dangers of targeted killings to the rules-based international order.

The UK's Own Targeting Policy and the Need for Clarification

9. In September 2021, just over a week after the US mistakenly struck and killed the Ahmadi family, the Defence Secretary, Ben Wallace, was asked whether he would be prepared to launch drone strikes in Afghanistan. He responded: *"I'll do whatever I have to do to protect citizens' lives and our interests and our allies, when we're called upon to do so, wherever that may be."* According to at least one report, he went further. Parliamentary approval would be required for the UK to re-engage militarily in Afghanistan. The Defence Secretary, however, suggested instead that the UK might carry these out under the guise of self-defence, thereby avoiding consultation: *"One of the options is to deploy anywhere in the world where there is an imminent threat to life, British life or our allies, where international law enables us to take action."*^{vi}
10. The Defence Secretary's comments are concerning. Not only does he appear to adopt an expansive interpretation of self-defence – one that would have the UK striking not just to protect the UK and British citizens, but also undefined UK "interests" and "our allies" – but he also appears to suggest that these deployments might be geographically unbounded, much like the US's own controversial drone programme.
11. The definition of self-defence has been at the heart of Parliamentary concerns in recent years when it comes to the UK's own use of drones and the assistance it provides to the US drone programme. In its 2016 inquiry into the government's use of drones for targeted killing, the Joint Committee on Human Rights found that the then Defence Secretary had shown in his evidence a *"misunderstanding of the legal frameworks that apply outside of armed conflict"*. It called upon the Government to set out its *"understanding of how the legal frameworks are to be interpreted and applied in the new situation in which we find ourselves"*.^{vii}
12. The Committee noted that despite repeated requests, key questions relevant to understanding the Government's legal framework still required *"urgent clarification"*. These included its understanding of the meaning of the requirement of 'imminence' in the international law of self-defence and its understanding of the legal basis on which the UK takes part in or contributes to the use of lethal force outside armed conflict by the US or any other country adopting the same or a similar view.^{viii}
13. In January 2017, then-Attorney General Jeremy Wright suggested in a speech that the UK would abandon the internationally-agreed understanding that lawful self-defence outside armed conflict must be in response to a threat that is *"imminent"* in that it is *"instant, overwhelming, and leaving no choice of means, and no moment for deliberation."*^{ix} In his speech, Mr Wright appeared to sketch out an alternative definition of imminence that mimics the US Government's position that the law permits 'preventative' attacks in respect of distant or unconfirmed threats, rather than self-defence.^x
14. Since then, the Government has done little to clarify UK policy and instead maintained a position of ambiguity. Further adding to this confusion, the Government has claimed that it has *"no guidance"* on the use of lethal force outside areas of armed conflict, but that it has provided documentation to the armed forces setting out *"in what circumstances and against whom the UK military may use force"*.^{xi}
15. Reprieve believes this documentation is contained in part in Joint Service Publication 900: The UK's Targeting Policy (JSP900), a document Parliament has repeatedly requested and to which it has been denied access.^{xii} As a result of a complaint under the Freedom of Information Act, the Government recently released a heavily redacted copy of the 2015 version. It has, however, refused further disclosures on the basis that the UK's

Targeting Policy incorporates elements of US targeting policy.^{xiii} A decision is currently pending before the First Tier Information Tribunal.

16. The UK's involvement in armed conflict in Afghanistan has formally ended. Any future strikes in Afghanistan – or elsewhere – will therefore be strikes taken outside of an armed conflict and in areas where Parliament has not authorised military action. Given this, and in light of the Defence Secretary's comments, there is an ever more urgent need for the Government to fully disclose its targeting policy and the legal frameworks underpinning it. Parliament cannot provide proper oversight of future operations in Afghanistan and elsewhere without it. Further, there is an urgent need to reaffirm and protect Parliament's right to participation and oversight in any decision regarding potential military action.

The Need for Parliamentary Oversight of Future Uses of Force in Afghanistan

17. Parliament has been concerned about the UK's use of force abroad, and in particular, its use of drone strikes, for more than a decade. This interest has manifested itself in dozens of parliamentary questions, three Parliamentary inquiries, and repeated concerns that the Government has impeded Parliament's efforts to gain a full understanding of the policy frameworks and the safeguards governing such actions and assistance.
18. Although there is an established convention that the Government will inform Parliament before engaging the UK in an armed conflict, the current Government has increasingly skirted this by using deployment methods which are not subject to Parliamentary scrutiny, including special forces, light footprint "provision of capabilities" operations, and lethal drone operations.
19. To the extent future operations in Afghanistan involve the use of force – whether through drone strikes or otherwise – it is imperative that Parliament have an oversight role in the use of such force. As the Public Administration and Constitutional Affairs Committee ("PACAC") noted in its recent inquiry into the role of Parliament in authorising military force, *"scrutiny performs a vital constitutional role as it ensures that the actions taken by the Government...are checked and where necessary adapted or halted."*^{xiv}
20. When PACAC looked into Parliament's role in authorising military force in May 2019, the Committee called for a *"fundamental shift in the interaction between the Government and Parliament on these critical issues, highlighting a need for regular information sharing, rather than ad hoc, selective disclosure"*.^{xv} The Committee recommended that Parliamentary committees be given *"greater and, in some instances, full access to information [to] strengthen both the scrutiny and development of policy in relation to foreign affairs and defence"*.^{xvi} PACAC also noted the *"legitimate concern that the Government remains the sole arbiter of what military action requires prior approval"* and that this was *"of particular importance in respect of clandestine operations and other areas of sub-conflict confrontation which are becoming much more frequent"*.^{xvii}

UK Assistance to Future US Strikes in Afghanistan Puts Personnel at Risk

21. For almost two decades now, successive US administrations have used lethal force, including weaponised drones and raids, to target and kill suspected 'terrorists' outside of armed conflict. While the first drone strike was carried out in Yemen in 2000,^{xviii} it was not until 2009 under President Obama that a clear policy of 'targeted killings' was put in place – a policy that led to a dramatic increase in the number of drone strikes and, correspondingly, the number of people killed.^{xix} Over the course of his two terms, President Obama authorised 551 strikes in Pakistan and Yemen, killing potentially as many as 4,481 people.^{xx} One study in Pakistan found that only 4% of those killed were members of Al Qaeda.^{xxi}
22. When President Trump came into office, he loosened the rules even further, leading to a dramatic increase in drone strikes in Somali, Yemen and elsewhere,^{xxii} as well as the high profile assassination by drone of the

Iranian General, Qassem Soleimani, while he was in Iraq in January 2020.^{xxiii} Then-President Trump sought to justify the assassination by invoking self-defence, despite the Administration failing to provide evidence in support of a tangible threat.^{xxiv} For weeks, there were concerns that the strike might set off an actual war between Iran and the US, especially when Iran retaliated.^{xxv}

23. There is overwhelming evidence to suggest the UK has assisted the US drone programme in Yemen, Pakistan and Somalia – countries in which the UK is not a party to an armed conflict. This support has come in the form of:

- i. intelligence sharing;^{xxvi}
- ii. physical participation in a “joint operations room” in Yemen which “identifies in advance the individuals that are ‘going to be targeted’”,^{xxvii}
- iii. the US use of bases in the UK,^{xxviii} and
- iv. embedding of UK personnel in US drone units.^{xxix}

24. Shortly after resigning as Foreign Secretary, now-Prime Minister Boris Johnson wrote in *The Spectator* that the UK had “connived in straightforward extrajudicial killings... that are retributive... and scarcely mask[ed]” in a preventative legal rationale.^{xxx} Former Attorney General Dominic Grieve remarked that if these comments are true, “not only has [Boris Johnson] put the United Kingdom in breach of international law then he has put himself in breach of criminal law”.^{xxxi}

25. In its 2016 report, the JCHR noted with concern the evidence of UK assistance to US strikes and warned that it was putting UK personnel at risk of criminal liability:

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

26. The strike against the Ahmadi family in the waning days of the withdrawal shows only too well the risks of assisting the US programme. Those risks only increase now that the withdrawal is complete and as our intelligence on the ground significantly diminishes. As our access to reliable intelligence diminishes, so too does both the US and UK’s abilities to carry out thorough post-strike investigations, as required by international law.

The Dangers of Targeting Killing to the Rules Based International Order

27. Reprieve has serious concerns that the Defence Secretary’s comments signal the UK’s policy is moving far closer to the US’s widely condemned programme of ‘targeted killing’ across the world. The US’s policy not only breaches human rights, but represents a failed strategy that will damage UK national security interests.

28. The US programme has come to be widely criticised not only by legal and human rights groups, but by senior military and intelligence figures. This includes General Stanley McChrystal – who led coalition forces in Afghanistan – who has warned that it creates “resentment” towards “American arrogance.”^{xxxiii} Proscribed armed groups instrumentalise US drone strikes that have killed civilians to drive recruitment. Amongst UK allies, the US is an outlier in its approach to international law and highly militarised foreign policy. Any such UK strike programme would tarnish the UK’s international reputation, undermine the international rules-based system and risk destabilising the *jus cogens* prohibition of the use of force as a peremptory norm of international law. If the UK uses force outside of armed conflict, other states will follow. For example, Turkey has already threatened to conduct drone strikes against leaders of the Kurdish PKK movement, justifying its

threatened actions with reference to US drone strikes.^{xxxiv} Any attempt to loosen the constraints on the use of force damages international security and stability for all.

29. In addition, estimates suggest that, due to intelligence failures, the US programme has resulted in the deaths of thousands of civilians. Reprieve's research has found that over 1,100 unknown people have been killed in multiple US attempts to target just 41 alleged 'militants', with some targets reportedly being 'killed' as many as seven separate occasions.^{xxxv} These deaths, occurring outside armed conflict, may amount to grave human rights abuses committed against innocent civilians. The UK risks repeating this if it goes down a similar path in Afghanistan, especially given the intelligence challenges it will face.
30. Further, the UK's international reputation is one of a country that proudly stands against the death penalty worldwide. With the Government's lack of clarity over its policy outside armed conflict, the UK risks conducting strikes against individuals who should be arrested and tried for their crimes and in effect, imposing the death penalty without trial.
31. Reprieve is deeply concerned that any UK drone programme that mirrors the US model will have the same costs – leaving scores of civilians dead, corroding the international rules-based system, and damaging the UK's security interests at home and abroad.

Recommendations

32. In light of the concerns above, Reprieve recommends the Defence Committee urge the UK Government to:
 - i. Immediately clarify its policy on the use of drones outside armed conflict, allowing public and Parliamentary scrutiny over any activity that would fall under this policy;
 - ii. Immediately publish a full, unredacted current copy of the UK's Targeting Policy (JSP900), so the public and Parliament can be assured that it does not contain loopholes that put the UK, and its personnel, at risk of assisting partner with unlawful strikes;
 - iii. Commit to seeking Parliament's consent prior to taking any future strikes in Afghanistan. In the rare instance where self-defence is needed, commit to notifying Parliament as soon as is reasonably practicable, and providing in full the evidence, decision-making process and legal advice underpinning the attack so that Parliament can carry out proper scrutiny.
33. If you require further information, please contact Jennifer Gibson (jennifer.gibson@repreive.org.uk).

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- ^{ix} Referred to as the 'Caroline test', after the diplomatic incident out of which the test arose in 1837.
- ^x Attorney General's Speech at International Institute for Strategic Studies, *The Modern law of self-defence*, 11 January 2017, page 13, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminent_Ce_Speech_.pdf. See for analysis: EJIL: Talk!, *What is an Imminent Armed Attack? A Hopefully Helpful Typo*, 12 January 2017, available at: <https://www.ejiltalk.org/what-is-an-imminent-armed-attack-a-hopefully-helpful-hypo>.
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