

## TIME TO MOVE OUT OF THE SHADOWS? SPECIAL OPERATIONS FORCES AND ACCOUNTABILITY IN COUNTER-TERRORISM AND COUNTER-INSURGENCY OPERATIONS

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### I INTRODUCTION: THE 'GOLDEN AGE' OF SPECIAL FORCES

On his retirement as head of the United States ('US') Joint Special Operations Command, Admiral William McRaven argued that the US was in 'the golden age of Special Operations'.<sup>1</sup> Indeed, according to one 2010 estimate special operations forces ('SOF') from the US were present in 75 countries<sup>2</sup> and by 2013 this had risen to 134.<sup>3</sup> In addition, SOF from Australia, Canada and the United Kingdom ('UK') have been operating in a number of jurisdictions. There are four reasons why SOF have become so prominent in contemporary counter-terrorism and counter-insurgency operations. The first is tactical. In the current context SOF have been better able to perform functions that large numbers of troops operating conventionally have not. These include reconnaissance, forward air control, hostage rescue, training and mentoring local forces and, perhaps most controversially, targeted killing. These types of functions have become core to the latest phase of the counter-terrorism operations which began after the 2001 terrorist attacks on the US. In this area SOF operations can be either 'white' (openly acknowledged combat, kill or capture missions, and/or the training and mentoring of local forces) or 'black' (covert or clandestine kill or capture missions and/or assistance to local forces).<sup>4</sup> The second reason is strategic. SOF may function, as they arguably are at the moment, as a method of maintaining counter-insurgency and counter-terrorism operations 'under the radar' – reducing the publicity and 'mission creep' that accompanies conventional operations. In

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1 Dan Lamothe, 'Retiring Top Navy SEAL: "We Are in the Golden Age of Special Operations"', *The Washington Post* (online), 29 August 2014 <<https://www.washingtonpost.com/news/checkpoint/wp/2014/08/29/retiring-top-navy-seal-we-are-in-the-golden-age-of-special-operations-2/>>.

2 Andrew Feickert and Thomas K Livingston, 'US Special Operations Forces (SOF): Background and Issues for Congress' (Congressional Research Service, United States Congress, 2010) 6.

3 Nick Turse, 'US Special Forces Are Operating in More Countries than You Can Imagine', *The Nation* (online), 20 January 2015 <<https://www.thenation.com/article/us-special-forces-are-operating-more-countries-you-can-imagine/>>.

4 Jennifer D Kibbe, 'Covert Action and the Pentagon' (2007) 22 *Intelligence and National Security* 57, 59–60.

this sense SOF deployments also avoid the greater civilian casualties that might result from large-scale troop deployments.<sup>5</sup> The third reason is political. SOF may be employed where conventional operations are not possible, due to legal restrictions or political or civil society opposition.<sup>6</sup> For example, in a recently leaked document, the UK Ministry of Defence argued that one solution to the risk-averse nature of the British public was: ‘[i]nvesting in greater numbers of [special forces]. The use of [special forces] brings two factors into play, namely the likelihood of large numbers being lost is small, and the public appear to have a more robust attitude to [special forces] losses.’<sup>7</sup> Finally, SOF are seen as a way of maintaining a military option that costs less than the regular deployment of conventional forces. As a recent Australian report pointed out, ‘[i]n times of fiscal austerity, the special operations capability offers the Australian Government a cost-effective tool to support national security objectives.’<sup>8</sup>

If the deployment of SOF may bring great benefits to the government concerned, this increasing use of special forces raises a number of issues in domestic and international law. This is especially the case since, despite the focus on drones and other forms of airpower, it is important to recognise that much of the killing in counter-insurgency and counter-terrorism operations is done by human beings in close combat. This article argues that oversight and accountability mechanisms are lacking concerning the decision to deploy SOF, the rules of engagement they operate under and the general evaluation of their operations. This article addresses these issues largely by reference to Australian, Canadian, UK and US special operations, of which there is some information available. The organisations discussed in this paper include Canada’s Special Operations Command and its elite unit Joint Task Force 2 (‘JTF-2’); Australia’s Special Operations Command and its elite unit the Special Air Service Regiment (‘SASR’); the UK’s Special Air Service (‘SAS’) and its Special Forces Support Group; and the US’s Joint Special Operations Command (‘JSOC’) which directs elite units such as the US Delta Force and Navy SEAL teams. JSOC has often been the coordinating and commanding force in SOF operations involving all the nations discussed here.

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5 For example, in Somalia in 1993, an SOF operation might have been a more appropriate tactic than sending in a large detachment of US Rangers to arrest a local warlord, Mohammad Aided. This operation ended with the death of 18 US Rangers and perhaps 1500 Somalis in an intense gun battle. For an ‘on the ground’ account, see Mark Bowden, *Black Hawk Down* (Bantam Press, 1999).

6 For example, in the 1970s the British SAS were employed in Oman ostensibly as trainers but in a mission which sustained the government of Oman against domestic insurgents: see John Akehurst, ‘Dhofar: The Unknown War’ in Julian Thompson (ed), *The Imperial War Museum Book of Modern Warfare: British and Commonwealth Forces at War 1945–2000* (Pan Books, 2003) 251; US special forces were also employed secretly in Laos and Cambodia during the Vietnam War: See Richard H Shultz Jr, *The Secret War Against Hanoi: Kennedy’s and Johnson’s Use of Spies, Saboteurs and Covert Warriors in North Vietnam* (Harper Perennial, 2000).

7 Development, Concepts and Doctrine Centre, Ministry of Defence (UK), ‘Risk: The Implications of Current Attitudes to Risk for the Joint Operational Concept’ (Conceptual Paper, 24 August 2012) 7.

8 Andrew Davies, Peter Jennings and Benjamin Schreer, ‘A Versatile Force: The Future of Australia’s Special Operations Capability’ (Report, Australian Strategic Policy Institute, April 2014) 8.

## II SPECIAL OPERATIONS FORCES IN THE CONTEMPORARY CONTEXT

Following the end of the Cold War, SOF were employed in a variety of operations including reconnaissance for conventional North Atlantic Treaty Organisation ('NATO') forces in Bosnia and Serbia and later the tracking down of suspected war criminals in these territories.<sup>9</sup> Later, the British SAS may also have been involved in training elements of the Kosovo Liberation Army in its campaign for independence from Serbia in 1999.<sup>10</sup> At around the same time, the Australian and New Zealand SAS Regiments acting under United Nations ('UN') authority assisted in stabilising the peace in East Timor following its independence from Indonesia in 1999.<sup>11</sup> However, it is following the terrorist attacks on the US in September 2001 that the 'golden age' mentioned previously commenced. SOF from the US, Australia, Canada and the UK were involved in the initial ground attacks in Afghanistan. Small-scale US and UK SOF deployments linked up with the Northern Alliance (the militias opposed to Taliban rule), removed the Taliban and pursued the al-Qaeda leadership until it crossed into Pakistan. Other SOF and Central Intelligence Agency ('CIA') elements supported indigenous forces under a local leader, Hamid Karzai, which alongside air power allowed him to establish a base in Tarin Kowt, then capture Kandahar and the capital, Kabul. Following the later large-scale nation-building operation in Afghanistan from 2006 under the framework of the International Security Assistance Force ('ISAF'), SOF became more prominent and long-term, engaging in surveillance and reconnaissance, providing targets for airpower and engaging in search and destroy missions against Taliban personnel classed as high and medium-value targets.<sup>12</sup> From around 2009 these attacks developed into an effective 'kill list' which will be detailed below.

In addition, from 2003 SOF were involved in the invasion and occupation of Iraq, securing important tactical facilities and then engaging in the hunt for the approximately fifty high-value-targets of the Saddam regime (identified in the

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- 9 Julian Borger, 'The Hunt for the Former Yugoslavia's War Criminals: Mission Accomplished', *The Guardian* (online), 4 August 2011 <<https://www.theguardian.com/world/2011/aug/03/former-yugoslavia-war-crimes-hunt>>. For example, Operations Tango (1997) and Ensue (1998) were aimed at capturing Serbian officials suspected of committing war crimes against Bosnian Muslims in the early 1990s.
  - 10 Christian Jennings, 'Details Emerge of SAS Actions in Kosovo', *Scotland on Sunday* (Edinburgh), 29 August 1999; Christian Jennings, 'Terrorism Hits World Support for Kosovo', *The Telegraph* (online), 22 February 2001 <<http://www.telegraph.co.uk/news/worldnews/europe/1323700/Terrorism-hits-world-support-for-Kosovo.html>>.
  - 11 Australian troops comprised nearly half of the UN authorised International Force in East Timor ('INTERFET') force of 11 000 at one stage. Australian troop numbers dropped to between 1500–2000. Australian SOF were an important part of the cutting edge of the operation which tackled the local pro-Indonesian militias which opposed East Timor's independence. Australian SOF were amongst those who returned to East Timor in 2006 after instability in the capital, Dili: Australian Army, 'East Timor Peacekeeping Mission To Conclude' (Press Release, December 2012) <<http://www.army.gov.au/Our-work/News-and-media/News-and-media-2012/News-and-media-December-2012/East-Timor-peacekeeping-mission-to-conclude>>.
  - 12 Leigh Neville, *Special Operations Forces in Afghanistan* (Osprey, 2008); Leigh Neville, *Special Operations Forces in Iraq* (Osprey, 2008).

form of a deck of playing cards issued to military personnel) whilst conventional forces overwhelmed the Iraqi state. However, as Iraq descended into civil war, US and UK special forces undertook the most sustained and concentrated operations in their history. The expertise of SOF as force multipliers became evident in 2005–07 in a clear public emergency situation. In order to gain some semblance of stability in central Iraq, JSOC decided to attack the car bomb networks by which al-Qaeda in Iraq were attacking Shia civilians and creating deepening sectarian conflict. This involved the development of what would be termed ‘industrial counter-terrorism’ by which JSOC would assemble intelligence packages<sup>13</sup> which would be used to mount raids on suspected terrorist cells. During these missions more intelligence would then be gathered and used to mount further raids. As JSOC commander General Stanley McChrystal put it, these were ‘intelligence-driven operations [with] very precise targeting ... so you can hit the network as many times as the intelligence will support’.<sup>14</sup> The British (SAS) element in these operations killed 400 insurgents and captured 3000. The operations overall may have killed 3000 and captured 11 000.<sup>15</sup> This succeeded in stabilising Iraq in the short-term.<sup>16</sup>

When attention returned to Afghanistan, General McChrystal applied the same model of targeted killing as had been used in Iraq. Under JSOC control and co-ordination, SOF from the US, UK, Australia (working as the Special Operations Task Group), and Canada (centered on its JTF-2 unit) worked through a ‘kill list’ by which senior Taliban commanders would be eliminated. The logic behind this tactic was to force the Taliban to the negotiating table. At the same time mid-level Taliban leaders who were involved in leading attacks on ISAF personnel, or improvised explosive device or car bomb attacks would also be selected for elimination. This element of ISAF operations became increasingly important as first the British drew down troop levels and then following the ‘surge’ of US troops ordered by President Obama, the US also reduced its combat power in Afghanistan.<sup>17</sup> The organisational template for SOF in Iraq and Afghanistan was to combine different special forces and intelligence units from different countries in task forces, backed up by other specialist troops in quick-reaction forces and supported by air power. These task forces and their sub-units targeted terrorist or insurgent leaders on a sustained basis. By mid-2013 there were still 13 000 special operations and support units in Afghanistan.<sup>18</sup>

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13 The packages would be assembled from various sources including communications data, the interception of communications, aerial imagery, telephone tips or informants: see Mark Urban, *Task Force Black: The Explosive True Story of the SAS and the Secret War in Iraq* (Little, Brown, 2010) ch 5.

14 Jon Moran, *From Northern Ireland to Afghanistan: British Military Intelligence Operations, Ethics and Human Rights* (Ashgate, 2013) 95.

15 Urban, *Task Force Black*, above n 13, 243, 271.

16 Steven Simon, ‘The Price of the Surge: How US Strategy Is Hastening Iraq’s Demise’ (2008) 87(3), *Foreign Affairs* 57 accurately predicted that these counter-insurgency operations would only stabilise Iraq for a short period at the risk of increasing sectarianism and state weakness in the longer term.

17 Moran, *From Northern Ireland to Afghanistan*, above n 14, ch 4.

18 Amnesty International, ‘Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan’ (Research Report No ASA 11/006/2014, 11 August 2014) 16.

Following these deployments, SOF units appeared in the conflict in Libya where they had a much lower profile. By April 2011, a small unit of British military officers and intelligence personnel were despatched to Libya to assist rebel forces, and ‘were actively working in Benghazi to build capacity – an embryo defence ministry and a command structure.’<sup>19</sup> This was followed by the provision of crucial intelligence support and training to the rebels, allowing them to become credible internationally and overthrow the Gaddafi regime.<sup>20</sup> SOF from Qatar, Britain and France were sent on a joint mission to assist the rebels in training, command and coordination,<sup>21</sup> following which SOF from France, Jordan and Qatar began to assist the rebels, not only in the final phases in August but generally ‘helping them get better organized to conduct operations’ and ‘improve their tactics’, according to a NATO spokesperson.<sup>22</sup> The conflict was at a stalemate when they arrived. But French and Qatari units within days helped in the attack on Benghazi and the British assisted in the attack on Sirte. SOF were also important in finally breaking the siege of Misrata in May 2011 with British special forces coordinating air strikes and soldiers training and advising rebels.<sup>23</sup> Indeed, SAS soldiers and private security company operators assisted in forward air targeting in Misrata, passing details of movements and locations which were verified by aerial surveillance to assist the rebels in breaking off the siege.<sup>24</sup> In May, the training of selected Libyan rebels in fighting techniques for the taking of Tripoli began, following which 200 trained rebel fighters infiltrated back in. At a signal from the National Transition Council they began uprisings and recruited further fighters. Once the operation was underway SOF and drones provided intelligence to the rebels whilst NATO air forces attacked strategic targets. The loyalist forces did not mount a widespread resistance and the capital was taken in a week, falling in late August 2011.<sup>25</sup> Within weeks of Gaddafi’s death, the SOF units departed.<sup>26</sup>

Currently there are reports of SOF operating in Syria in reconnaissance and targeted killing missions, and this is likely to increase now that states have increased the numbers of SOF there.<sup>27</sup> By early 2015, 70 Canadian special forces

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19 BBC, ‘Libya: Britain’s Secret War’, *Newsnight*, 18 January 2012 (Mark Urban) <<http://www.bbc.com/news/world-africa-16624401>>.

20 Interview with undisclosed interviewee (London, 24 October 2014).

21 BBC, above n 19.

22 Barbara Starr, ‘Foreign Forces in Libya Helping Rebel Forces Advance’, *CNN* (online), 24 August 2011 <<http://edition.cnn.com/2011/WORLD/africa/08/24/libya.foreign.forces/>>.

23 BBC, above n 19.

24 Richard Norton-Taylor and Chris Stephen, ‘Libya: SAS Veterans Helping Nato Identify Gaddafi Targets in Misrata’, *The Guardian* (online), 1 June 2011 <<http://www.guardian.co.uk/world/2011/may/31/libya-sas-veterans-misrata-rebels>>.

25 Sean Rayment, ‘How the Special Forces Helped Bring Gaddafi to His Knees’, *The Telegraph* (online), 28 August 2011 <<http://www.telegraph.co.uk/news/worldnews/africaandindianocan/libya/8727076/How-the-special-forces-helped-bring-Gaddafi-to-his-knees.html>>.

26 BBC, above n 19.

27 Loulla-Mae Eleftheriou-Smith, ‘SAS Troops “Dressed in US Uniforms and Joined Special Forces on ISIS Abu Sayyaf Overnight Raid in Syria”’, *The Independent* (online), 10 August 2015 <<http://www.independent.co.uk/news/uk/home-news/sas-troops-dressed-in-us-uniforms-and-joined-special-forces-on-isis-abu-sayyaf-overnight-raid-in-10448018.html>>.

personnel had been deployed and were involved in directing air strikes against Islamic State forces and briefly engaged in firefights whilst on reconnaissance.<sup>28</sup> By late 2015, US President Obama had ordered a small number of SOF deployed to Syria on an open-ended mission of support to anti-Assad forces.<sup>29</sup> SOF also continued to play major roles in hostage rescue including recently in operations to free captives held by Islamic State and other extremist organisations.<sup>30</sup>

The use of SOF is of course not limited to Western states. Qatari SOF have been active in Libya and elsewhere, whilst United Arab Emirates SOF worked with US and Afghani forces from 2003 until recently.<sup>31</sup> Elsewhere, as part of Russia's foreign and security policy, both President Putin and President Medvedev deployed 'spetsnaz' (a general term for military and intelligence SOF groups in the Russian Army) in a series of conflicts in Chechnya, South Ossetia, Ukraine and Crimea.<sup>32</sup> Spetsnaz forces from the Black Sea fleet and other districts may have been operating in the Crimean peninsula as the crisis escalated. Indeed, this was framed as another example of the model which has been so successful for Russian forces in the last 15 years: 'Soldiers in unmarked uniforms at airports and military bases. Supply routes cut off. Expansive – and supposedly unrelated – army manoeuvres clouding the picture on the current status and deployment of Russian troops ... a familiar playbook'.<sup>33</sup> Russian SOF have apparently also been operating in Syria, providing reconnaissance, forward air control and tactical advice.<sup>34</sup>

Information on the deployment of SOF from Russia, Qatar, Saudi Arabia and China is sparse. This exacerbates the issues seen in relation to Western SOF

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- 28 Steven Chase, 'Canadian Soldiers Engaged in More Firefights against Islamic State, Military Says', *The Globe and Mail* (online), 26 January 2015 <<http://www.theglobeandmail.com/news/politics/breaking-jan-26/article22633741/>>.
- 29 Peter Baker, Helene Cooper and David E Sanger, 'Obama Sends Special Operations Forces to Help Fight ISIS in Syria', *The New York Times* (online), 30 October 2015 <[http://www.nytimes.com/2015/10/31/world/obama-will-send-forces-to-syria-to-help-fight-the-islamic-state.html?\\_r=0](http://www.nytimes.com/2015/10/31/world/obama-will-send-forces-to-syria-to-help-fight-the-islamic-state.html?_r=0)>.
- 30 Sean Rayment, 'How the British Hostages Were Rescued in Afghanistan', *The Telegraph* (online), 3 June 2012 <<http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/9307833/How-the-British-hostages-were-rescued-in-Afghanistan.html>>; Martin Chulov, Fazel Hawramy and Sabrina Siddiqui, 'US Forces Rescue Iraqi Hostages Facing "Imminent Execution" by ISIS', *The Guardian* (online), 23 October 2015 <<https://www.theguardian.com/world/2015/oct/22/us-special-forces-free-kurdish-hostages-isis-iraq>>.
- 31 Rajiv Chandrasekaran, 'In the UAE, the United States Has a Quiet, Potent Ally Nicknamed "Little Sparta"', *The Washington Post* (online), 9 November 2014 <[https://www.washingtonpost.com/world/national-security/in-the-uae-the-united-states-has-a-quiet-potent-ally-nicknamed-little-sparta/2014/11/08/3fc6a50c-643a-11e4-836c-83bc4f26eb67\\_story.html](https://www.washingtonpost.com/world/national-security/in-the-uae-the-united-states-has-a-quiet-potent-ally-nicknamed-little-sparta/2014/11/08/3fc6a50c-643a-11e4-836c-83bc4f26eb67_story.html)>.
- 32 Mark Galeotti, *Spetsnaz: Russia's Special Forces* (Osprey, 2015).
- 33 Sam Jones, Kathrin Hille and Roman Olearchyk, 'Russian Troops Stick to a Tried and Tested Script', *Financial Times* (online), 3 March 2014 <<http://www.ft.com/cms/s/0/938ce33e-a227-11e3-a621-00144feab7de.html#axzz3tp4JDAGV>>; Simon Saradzhyan, 'A Victory for Russia's Special Forces', *The Moscow Times* (online), 6 April 2014 <<http://www.themoscowtimes.com/opinion/article/a-victory-for-russia-s-special-forces/497600.html>>; Thomas Gibbons-Neff, 'How Russian Special Forces Are Shaping the Fight in Syria', *The Washington Post* (online), 29 March 2016 <<https://www.washingtonpost.com/news/checkpoint/wp/2016/03/29/how-russian-special-forces-are-shaping-the-fight-in-syria/>>.
- 34 John Davison, 'Russian, Syrian Special Forces Rescue Russian Pilot: Syrian Media', *Reuters* (online), 25 November 2015 <<http://www.reuters.com/article/us-mideast-crisis-syria-idUSKBN0TE0ZS20151125>>.

which are relatively more amenable to research. The next part of the article discusses these issues.

### III POLITICAL ACCOUNTABILITY AND OVERSIGHT

Political accountability (the ability of political representatives to question officials, examine their actions and recommend change) for agencies concerned with foreign and domestic security has increased in recent years.<sup>35</sup> The US pioneered this following the Watergate revelations and Australia, Canada and the UK have slowly followed.<sup>36</sup> Parliamentary committees in all three countries examined the role of intelligence and security agencies, and the heads of agencies may appear before these committees. However, political accountability for special forces, who increasingly work with these agencies, has not followed suit, as the discussion below on the decision to deploy SOF indicates. The US has been more proactive in this area<sup>37</sup> and special operations commanders may be called to give evidence before the relevant congressional committees dealing with defence and intelligence. In Australia, Canada or the UK, while the actions

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35 A basic relationship of accountability can be defined as follows:

Accountability is first a relationship between two sets of actors (actually, most of it is played out not between individuals, but between organizations) in which the former accepts to inform the other, explain or justify his or her actions and submit to any pre-determined sanctions that the latter may impose.

Philippe C Schmitter, 'Political Accountability in "Real-Existing" Democracies: Meaning and Mechanisms' (Working Paper, Department of Political and Social Sciences, European University Institute, January 2007) 4 <<http://www.eui.eu/Documents/DepartmentsCentres/SPS/Profiles/Schmitter/PCSPoliticalAccountabilityJan07.pdf>>.

- 36 The Watergate scandals concerned the activities of the Committee to Re-Elect the President ('CREEP') which aimed to secure Republican Richard Nixon's re-election as President of the United States in 1972. CREEP operatives either acted themselves or sub-contracted others in a number of illegal activities, including a burglary at the headquarters of the Democratic Party. The attempted cover-up of this scandal led to investigations into the Nixon administration and over time these resulted in Congressional probes into the activities of the CIA. This led to substantial reform of the CIA itself and the introduction of new forms of CIA accountability to Congress: Loch K Johnson, 'Governing in the Absence of Angels: On the Practice of Intelligence Accountability in the United States' in Hans Born, Loch K Johnson and Ian Leigh (eds), *Who's Watching the Spies: Establishing Intelligence Service Accountability* (Potomac Books, 2005) 57. See also Loch K Johnson, *National Security Intelligence: Secret Operations in Defense of the Democracies* (Polity, 2012). For accountability in Australia, Canada and the UK, see Christopher Michaelsen, 'Law, Intelligence and Politics in Australia's "War on Terror"' in Jon Moran and Mark Phythian (eds), *Intelligence, Security and Policing Post-9/11: the UK's Response to the 'War on Terror'* (Palgrave MacMillan, 2008) 159; David Martin Jones and Carl Ungerer, 'Australia' in Stuart Farson et al (eds), *PSI Handbook of Security and Intelligence: National Approaches: The Americas and Asia* (Praeger Security International, 2008) vol 1 165; Stuart Farson, 'Canada's Long Road from Model Law to Effective Oversight of Security and Intelligence' in Hans Born, Loch K Johnson and Ian Leigh (eds), *Who's Watching the Spies: Establishing Intelligence Service Accountability* (Potomac Books, 2005) 99; Ian Leigh, 'Accountability of Security and Intelligence in the United Kingdom' in Hans Born, Loch K Johnson and Ian Leigh (eds), *Who's Watching the Spies: Establishing Intelligence Service Accountability* (Potomac Books, 2005) 79.
- 37 The Senate Committee on Intelligence and the Senate and Congress Committees on Armed Services inquire into activities which involve the SOF or relevant activities: see, eg, Senate Committee on Armed Services, United States Congress, *Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan* (2010).

of SOF may be briefly mentioned in the relevant committees on intelligence, they have not been specifically scrutinised from 2001 until the present.<sup>38</sup> Considering the role of SOF in counter-terror operations over the last 15 years this is a gap that should be filled.

### A Deployment of Special Operation Forces

The decision to deploy SOF, like the decision to deploy conventional combat forces, is a political one. However, unlike the latter, it is made without wide debate or public knowledge.<sup>39</sup> According to one study in Australia, the decision to deploy military assets including SOF is more consensual than either the US or the UK: ‘This decision architecture means that Australian [special forces] are more often beholden to consensus-driven government decision processes that are necessarily more protracted than a US-style approach’.<sup>40</sup> In Canada, the decision is taken by the Prime Minister in conjunction with the Minister of Defence and the head of the Canadian Special Operations Forces Command. This secrecy was commented upon by the Canadian Parliament in 2006: ‘There have been unsubstantiated rumours of [JTF-2] operating in a number of foreign locations. And that is the problem. Canadians do not know where our [JTF-2] is operating, under what authorities, and under what rules of engagement’.<sup>41</sup> The British government is equally opaque. In 2014, the then UK Foreign Secretary, Phillip Hammond, stated that ‘[w]e never comment on the disposition of our special forces anywhere in the world and that will remain our policy’.<sup>42</sup> In 2011, it was revealed that UK SOF were in Libya when they were caught on film by Al

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- 38 Presently there are no reports on the use of SOF by the Canadian Select Committee on National Security and Defence, the Australian Joint Standing Committee on Foreign Affairs, Defence and Trade, the Australian Parliamentary Joint Committee on Intelligence and Security or its predecessors, the Australian Joint Committee on Human Rights, the UK Parliament Intelligence and Security Committee, the UK Parliament Defence Committee, and the UK Joint Committee on Intelligence and Security.
- 39 On occasions, politicians may announce the deployment publicly, as when Harold Wilson announced the SAS would be sent to Northern Ireland in order to unsettle the Provisional Irish Republic Army (‘IRA’). ‘The introduction of the SAS in Ulster was a political act’: Mark Urban, *Big Boys’ Rules: The SAS and the Secret Struggle against the IRA* (Faber and Faber, 1992) 7.
- 40 Ian Langford, ‘Australian Special Operations: Principles and Considerations’ (Australian Army Research Paper No 4, October 2014) 10. Other sources argue that the decision has increasingly excluded parliament from consultation. Deirdre McKeown and Roy Jordan, ‘Parliamentary Involvement in Declaring War and Deploying Forces Overseas’ (Background Note, Parliamentary Library, Parliament of Australia, 2010) <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/0910/ParliamentaryInvolvement#\\_Toc257028836](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/ParliamentaryInvolvement#_Toc257028836)>.
- 41 Standing Senate Committee on National Security and Defence, Parliament of Canada, *Managing Turmoil: The Need To Upgrade Canadian Foreign Aid and Military Strength To Deal with Massive Change* (2006) 86, quoted in Michael Skinner, ‘Canada’s Ongoing Involvement in Dirty Wars’ on Canadian Centre for Policy Alternatives, *The Monitor* (1 July 2013) <<https://www.policyalternatives.ca/publications/monitor/canadas-ongoing-involvement-dirty-wars>>. Funding for the Special Operations Forces Command and its four units is classified.
- 42 Richard Norton-Taylor, ‘If UK Special Forces Are in Iraq, How Will We Know?’ on *The Guardian, Defence and Security Blog* (23 September 2014) <<http://www.theguardian.com/world/defence-and-security-blog/2014/sep/22/sas-iraq-syria>>.



Jazeera journalists.<sup>43</sup> Decisions to deploy UK SOF are made by the Prime Minister and Defence Secretary in conjunction with the Director of Special Forces.<sup>44</sup>

The US Special Operations Command and within this the JSOC is accountable via the JSOC commander to the Chiefs of Staff and the Secretary of State for Defence or the President. But it does not require the level of congressional oversight that the CIA does before deployment<sup>45</sup> and since 2001 JSOC has been given a prominent global strike role whilst operating as an independent entity outside the standard military chain of command, an organisational development led by then Secretary of Defence Donald Rumsfeld and Vice President Dick Cheney.<sup>46</sup> These operations were defined as intelligence collection, or as actions in connection with anticipated or ongoing hostilities and thus not requiring congressional oversight.<sup>47</sup>

Under President George W Bush, JSOC's operations were rarely briefed to Congress in advance – and usually not afterward – because government lawyers considered them to be 'traditional military activities' not requiring such notification. President Obama has taken the same legal view, but he has insisted that JSOC's sensitive missions be briefed to select congressional leaders.<sup>48</sup>

This was strengthened in 2013 with a formal legislative requirement to inform in writing the relevant committees in Congress of any military activities JSOC conducts outside theatres of major hostilities.<sup>49</sup>

Clearly, states should have the right to engage in actions in the pursuit of self-defence and national security. However, if SOF are regularly deployed on a long-term basis in intensive combat operations, an issue becomes apparent as to whether this constitutes a state of permanent armed hostilities and should require some sort of public debate or system of review. There is greater oversight before deployment in the US but this does not seem to have prevented JSOC and the CIA acting as powerful military forces with a global reach, since the President

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43 Mark Joyella, 'Al Jazeera Video Captures "Western Troops on the Ground" in Libya', *Mediaite* (online), 30 May 2011 <<http://www.mediaite.com/tv/al-jazeera-video-captures-western-troops-on-the-ground-in-libya/>>.

44 Mark Urban, *Big Boys' Rules*, above n 39; Alastair Finlan, *Special Forces, Strategy and the War on Terror: Warfare by Other Means* (Routledge, 2008) ch 4.

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

46 Colonel John Macgregor, then on the Pentagon planning staff for the 2003 Iraq War stated, 'I stayed away from [JSOC]. I didn't want to be involved with it, and I wasn't interested in participating in it, because I had this fear that we were ultimately breaking laws ... Whether those laws were our own or they turned out to be the *Geneva Convention*': Jeremy Scahill, *Dirty Wars: The World Is a Battlefield* (Serpent's Tail, 2013) 100.

47 Andru E Wall, 'Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action' (2011) 3 *Harvard National Security Journal* 85, 85.

48 Dana Priest and William M Arkin, "'Top Secret America": A Look at the Military's Joint Special Operations Command', *The Washington Post* (online), 2 September 2011 <[https://www.washingtonpost.com/world/national-security/top-secret-america-a-look-at-the-militarys-joint-special-operations-command/2011/08/30/gIQAvYuAxJ\\_story.html](https://www.washingtonpost.com/world/national-security/top-secret-america-a-look-at-the-militarys-joint-special-operations-command/2011/08/30/gIQAvYuAxJ_story.html)>.

49 10 USC § 130f (2015). See Robert Chesney, 'Eliminating the Afghanistan Exception to the Oversight Regime for Military Kill/Capture Ops' on *Lawfare* (19 June 2015) <<https://www.lawfareblog.com/eliminating-afghanistan-exception-oversight-regime-military-killcapture-ops>>.

stands as commander-in-chief of all the armed forces and the *Authorization for the Use of Military Force* ('AUMF'), passed by Congress after the September 2001 terrorist attacks, effectively declared a state of war between the US and international terrorist forces.<sup>50</sup> Since 2001 the AUMF has been continually renewed by Congress and used to justify actions against a wide range of terrorist groups 'around the world' and 'on the high seas'.<sup>51</sup> Under this authority, as mentioned, the roles of SOF have expanded markedly and in a sustained manner without the scrutiny which a formal declaration of hostilities would have invoked. Indeed, it is estimated that the course of the first decade of the war on terror, including the conventional operations in Iraq, has cost perhaps 225 000 lives.<sup>52</sup>

#### IV LEGAL ACCOUNTABILITY

In terms of legal accountability for actions in combat, all three services have structures of military justice which cover SOF as they would other military units. Following internal investigation, the result might be disciplinary hearings, courts martial or in appropriate circumstances the transfer of the case to civilian criminal courts.<sup>53</sup> However the secrecy under which SOF operate may complicate matters. For example, with regard to Canadian special forces, difficulties in accountability were highlighted by a case stemming from 2005 at a forward operating base in Kandahar, Afghanistan, when a warrant officer in JTF-2 attacked a fellow member of the unit, strangling him for 45 seconds until pulled off by three other JTF-2 personnel. The rank of the accused and the seriousness of the offence meant he was despatched for full court martial in Canada. However, he was never brought to trial allegedly because of the problem that military courts in the Canadian armed forces are open, but JTF-2 identities and operations are classified. The Chief Military Judge declined to proffer charges

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50 Authorization for Use of Military Force, SJ Res 23, 107<sup>th</sup> Congress (2001) § 2(a):

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

51 This includes actions in Afghanistan, the Philippines, Georgia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, Iraq, and Somalia: see Matthew Weed, 'The 2001 Authorization for Use of Military Force: Background in Brief' (Memorandum to Barbara Lee, Congressional Research Service, United States Congress, 2013) 2.

52 Brown University, "'Costs of War' Project: Estimated Cost of Post-9/11 Wars: 225 000 Lives, up to \$4 Trillion', *News from Brown* (online), 29 June 2011 <<https://news.brown.edu/articles/2011/06/warcosts>>.

53 For more detail, see Department of Defence, Australian Government, *About the Judge Advocate General* <<http://www.defence.gov.au/jag/>>; National Defence and the Canadian Armed Forces, *Judge Advocate General (JAG)* <<http://www.forces.gc.ca/en/about-org-structure/judge-advocate-general.page>>; Courts and Tribunals Judiciary (UK), *Judge Advocate General* <<https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/judge-advocate-general/>>. If these authorities cannot provide appropriate investigation or restitution, the International Criminal Court ('ICC') may be the subject of an application. The US does not cooperate with the ICC. It has Judge Advocate General Branches for each main service (Army, Airforce, Navy, Marine Corps).

and the Military Prosecution challenged this decision but the Judge's delay was supported by the Federal Court on appeal. Charges were eventually allowed to go ahead, then dropped.<sup>54</sup> It is to the credit of military prosecutors that they persevered with this case but it does raise the problem of accountability where secret operations are concerned, particularly since this was an internal and obvious case.<sup>55</sup> These issues may be even more acute when combat takes place.

For example, article 12 of the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* protects the sick or wounded situating them in the 'care of the party to the conflict in whose power they might be'<sup>56</sup> and articles 7 and 8 of *Protocol Additional to the Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) ('AP I)* ('AP I') contain a duty to help the sick and wounded whether or not they have taken part in hostilities.<sup>57</sup> SOF standard operating procedure of leaving the site of a contact as soon as possible may conflict with this obligation. In 2006, near Tarin Kowt in southern Afghanistan, Australian troops fired on a car they apparently believed was a taxi ferrying Taliban fighters in the area. The attack killed one and seriously wounded four others. The soldiers departed without helping the injured. After officials had denied any role in the incident, it transpired that Australian military authorities had knowledge that Australian SAS soldiers were in the area and that they were in an engagement and fired their weapons.<sup>58</sup>

We know little if anything about cases where civilian injury or death may have occurred unlawfully as a result of SOF operations. Amnesty International, the American Civil Liberties Union and journalists have filed a number of freedom of information requests on US investigations and prosecutions for deaths caused by SOF in Afghanistan with no result.<sup>59</sup>

Finally, it must be noted that accountability in SOF missions becomes even more tenuous when SOF are acting as trainers or advisers in areas with little or no local legal frameworks or where local authorities refuse to investigate abuses. During the war on terror, SOF have recruited and led local paramilitary groups

54 James Cudmore, 'Soldier Who Choked Fellow JTF2 Commando Avoided Courts', *CBC News* (online), 26 October 2012 <<http://www.cbc.ca/news/politics/soldier-who-choked-fellow-jtf2-commando-avoided-courts-1.1199942>>.

55 Similarly, an incident in which an Australian SAS soldier pointed a weapon at an Australian Secret Intelligence Service officer during a drinking session was mentioned in a report by the Inspector General but the Department of Defence stated: 'It would not be appropriate for Defence to make comment on investigations undertaken by, or involving, other government agencies.' No further information has been forthcoming: Chris Uhlmann, 'Special Forces Soldier Pulled Handgun on Australian Spy during Drinking Session in Afghanistan', *ABC News* (online), 21 October 2014 <<http://www.abc.net.au/news/2014-10-21/soldier-pulled-gun-on-spy-while-drinking-in-afghanistan/5828160>>.

56 Opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Fionnuala Ní Aoláin, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Blackstaff, 2000) 243.

57 Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) arts 7–8.

58 Nick McKenzie and Ash Sweeting, 'Military in Afghan Cover-Up', *The Age* (online), 11 May 2009 <<http://www.theage.com.au/national/investigations/military-in-afghan-coverup-20090510-az9p.html?page=1>>.

59 Amnesty International, *Left in the Dark*, above n 18, 81–2.

which are accused of unlawful killings of insurgents and civilians. This was the case when US SOF trained local regular and irregular security forces in Iraq, where the US personnel trained and mentored Iraqi SOF and other security units while they were committing abuses, and Afghanistan, where units of the Afghan local police have reportedly executed and extorted suspected insurgents and their supporters.<sup>60</sup> Similar concerns have been raised over the Australian SAS's training of Indonesian special forces (Kopassas and Detachment 88) whilst these groups have been accused of committing human rights abuses. In 1998, Australia ceased its involvement in training such forces but resumed it in 2005, inappropriately according to critics.<sup>61</sup> Under *API*, SOF commanders bear responsibility if units over which they have official or de facto control commit unlawful acts.<sup>62</sup>

## V GENERAL OVERSIGHT

Currently, the main form of general oversight of SOF is financial. This form of oversight remains limited, since it focuses on monetary issues. Nevertheless, this still could be an area where the effectiveness of SOF is scrutinised but reviews have been sporadic. The Australian National Audit Office has not conducted an audit on SOF but they are mentioned in reports dealing with reserve forces and army learning.<sup>63</sup> In Canada, the Assistant Deputy Minister (Review Services) is tasked to:

perform review services on behalf of the Deputy Minister (DM) and the Chief of the Defence Staff (CDS); promote improvements in Department of National Defence/Canadian Armed Forces (DND/CAF) policies, programs, operations and activities; and enhance the abilities of members and employees to perform their duties to the highest ethical standard.<sup>64</sup>

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60 For a discussion of these issues, see Kate Hofstra and Elizabeth Minor, 'Losing Sight of the Human Cost: Casualty Recording and Remote Control Warfare' (Briefing Paper, Oxford Research Group, August 2014) 14–17; Jon Moran, 'State Crime, Irregulars and Counter-Insurgency' (2015) 4 *State Crime* 154.

61 See Clinton Fernandes, *Military Links between Australia and Indonesia: An Amoral Assessment* (1 March 2007) Nautilus Institute for Security and Sustainability <<http://nautilus.org/apsnet/military-links-between-australia-and-indonesia-an-amoral-assessment/>>; Letter from Elaine Pearson, Human Rights Watch to Prime Minister Julia Gillard, 27 October 2010 <<https://www.hrw.org/news/2010/10/27/australia-press-indonesian-security-forces-accountability>>; Matt Brown, 'SAS Training with Kopassas despite Rights Concerns', *ABC News* (online), 28 September 2010 <<http://www.abc.net.au/news/2010-09-28/sas-training-with-kopassas-despite-rights-concerns/2276586>>.

62 *API* arts 86(2), 87.

63 See, eg. Australian National Audit Office, *The Australian Defence Force's Mechanisms for Learning from Operational Activities* (Audit Report No 1 of 2011–12, 12 July 2011); Australian National Audit Office, *Army Reserve Forces* (Audit Report No 31 of 2008–09, 8 May 2009) 65–6. Search conducted on the Australian National Audit Office website on 10 February 2016: <<http://www.anao.gov.au/Publications>>.

64 National Defence and the Canadian Armed Forces, *Assistant Deputy Minister (Review Services)* (14 June 2016) <<http://www.forces.gc.ca/en/about-org-structure/chief-review-services.page>>.

But from 2011–15 neither the DND or CAF performed an audit of Canadian SOF.<sup>65</sup> In the US, the Department of Defense Inspector General has a wide remit to examine operations including those of the SOF,<sup>66</sup> as does the General Accountability Office, which recently produced a report on the increased deployment of SOF.<sup>67</sup> UK scrutiny of special forces is limited. The Director of Special Forces is accountable to the Ministry of Defence, which may be inspected by the National Audit Office. But in the last 17 years, the Office has not conducted an audit on UK SOF.<sup>68</sup>

## VI ISSUES RAISED BY SPECIAL OPERATIONS FORCES ACTIVITY

As mentioned SOF can perform a number of important roles with a positive impact, including conflict prevention or stabilisation, hostage rescue and assistance to war crimes investigators. Having made these points, the secrecy and specialised nature of SOF activities also raise the negative effects of their deployment.

### A Special Operations Forces and Rules of Engagement

Rules of engagement ('ROE') were first developed in the Korean War in the area of US air targeting<sup>69</sup> but then expanded to cover all forms of armed conflict. They are perhaps most clearly defined in a recent British government document:

[ROE] are commanders' directives – in other words policy and operational guidance – sitting within the legal framework rather than law themselves. They are expressed as permissions and prohibitions which govern where armed forces can go, what they can do and, to an extent, how and when certain actions can be carried out. They are designed to ensure that action taken by UK forces is lawful and consistent with government policy. They are also used to enhance operational security, avoid fratricide and to avoid counter-productive effects which could destabilise a campaign. ROE do not by themselves guarantee the lawfulness of action; it remains the individual's responsibility in law to ensure that any use of

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65 Further, '[l]ike any other CAF unit, internal oversight bodies such as the Chief of Review Services, the Military Police Complaints Commission, the Pay and Allowances Review Board, the Access to Information Office and the CAF Ombudsman all have access to JTF 2, if required, to carry out their duties': National Defence and the Canadian Armed Forces, *Joint Task Force 2 (JTF 2)* (1 October 2014) <<http://www.forces.gc.ca/en/operations-special-forces/jtf2.page>>.

66 Office of Inspector General, Department of Defense (US), *About Us* <[http://www.dodig.mil/about\\_us/index.html](http://www.dodig.mil/about_us/index.html)>.

67 Government Accountability Office (US), 'Special Operations Forces: Opportunities Exist To Improve Transparency of Funding and Assess Potential To Lessen Some Deployments' (Report to Congressional Committees, 16 July 2015) <<http://www.gao.gov/products/GAO-15-571>>.

68 From consulting the record of reports on the National Audit Office website on 12 February 2016 <<https://www.nao.org.uk/search/type/report/sector/defence/>>.

69 Jeffrey F Addicott, 'The Strange Case of Lieutenant Waddell: How Overly Restrictive Rules of Engagement Adversely Impact the American War Fighter and Undermine Military Victory' (2013) 45 *St Mary's Law Journal* 1, 14–15.

force is lawful. Moreover, ROE do not restrict the inherent and inalienable right of an individual to act in self-defence.<sup>70</sup>

Therefore, adhering to, or alternatively breaking ROE does not imply legality or illegality. ROE may be illegal in themselves (for example, an instruction to execute enemy prisoners of war)<sup>71</sup> or may be legal but effectively ignored. The ROE under which special forces operate depend on the context in which they are deployed. For example:

- in an international armed conflict or an UN-authorized context, such as French, Qatari, UK and US operations in Libya in 2011;
- by units acting as part of an occupying power, such as Coalition forces in Iraq after 2003;
- in national self-defence, such as US operations after the September 2001 attacks;
- in a domestic conflict in aid of the civilian power facing an insurrection, such as the US, UK and other forces in Iraq after the transfer of sovereignty, or US forces in the Philippines; or
- in an emergency situation such as hostage rescue.

ROE also depend on the function being performed within this context: for example, whether SOF are conducting surveillance and reconnaissance; are acting as mentors and trainers to other security forces; are acting as mentors but expected to engage in conflict; or are directly tasked with capture and/or kill missions.

What complicates the picture is that unlike in many conventional operations, the ROE under which SOF operate are usually classified. Australian special operations ROE are not disclosed.<sup>72</sup> The UK Ministry of Defence does not disclose the ROE under which the SAS and Special Boat Service and associated units operate. Canada's JTF-2 works under undisclosed ROE set by the Chief of the Defence Staff.<sup>73</sup> The US is probably the most open authority with regard to the operations of its SOF, but here there is scope for ambiguity and US ROE tend

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70 Development, Concepts and Doctrine Centre, Ministry of Defence (UK), 'Operations' (Army Doctrine Publication, November 2010) 2-14 [0227].

71 Instructions to execute prisoners of war would contravene art 13 of the *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

72 This is because 'divulgence of these details could lead to mission failure and/or place the lives of ADF personnel in danger unnecessarily': Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2005, 177 (De-Anne Kelly, Minister for Veterans' Affairs and Minister Assisting the Minister for Defence), quoted in Peter Rowe, 'The Rules of Engagement in Occupied Territory: Should They Be Published?' (2007) 8 *Melbourne Journal of International Law* 327, 330. See also Nautilus Institute for Security and Sustainability, *Rules of Engagement – Afghanistan and Iraq* (December 2010) <<http://nautilus.org/publications/books/australian-forces-abroad/afghanistan/rules-of-engagement-afghanistan-and-iraq/>>.

73 National Defence and the Canadian Armed Forces, *Joint Task Force 2 (JTF 2)* (1 October 2014) <<http://www.forces.gc.ca/en/operations-special-forces/jtf2.page>>.

to be wider than other forces, even in joint operations.<sup>74</sup> It can however be surmised that the basic ROE are the same as those covering regular forces: the killing of those engaged in combat is permitted, as is killing to prevent loss of life and for self-defence,<sup>75</sup> whilst the killing of those not engaged in combat is prohibited.<sup>76</sup> However, it is also evident that either due to the situations into which SOF are deployed or the missions they are given, SOF are continually being ordered to put themselves into contexts in which the identification of those who are in or out of combat is particularly difficult. This leads to SOF requiring or being granted wider ROE than other units. For example, during the SAS deployment to Iraq as part of Task Force Black, British special forces were constrained during their assaults on residences containing suspected terrorists – not being able to fire on even those who offered resistance.<sup>77</sup> However these rules were eased since during the raids it became evident that operators were immediately at mortal risk. Since the raids were based on reliable intelligence and SOF personnel were regularly engaging individuals wearing suicide vests and/or carrying automatic weapons and hand grenades,<sup>78</sup> it became reasonable to assume that anyone inside had hostile intent unless there was clear evidence to the contrary. The SAS then operated in a more assertive way similar to the US Delta Force.<sup>79</sup> As mentioned, the context is important. Here, SOF were operating

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74 As a formal US view puts it, consensus on ROE is to be welcomed but is not essential:

Complete consensus or standardization of ROE should be sought but may not be achievable. In any event, the [Multinational Force Commander] should reconcile differences as much as possible to develop and implement simple ROE that can be tailored by member forces to their national policies and law ... US forces retain the right of self-defence.

Joint Chiefs of Staff, 'Multinational Operations' (Joint Publication 3-16, United States Armed Forces, 16 July 2013) III-12.

75 It should be noted that even the seemingly basic term 'self-defence' can and has been used at the state and individual level as the justification for many uses of force, for example, when the US incorporated, in its self-defence justification, the practice of using force to prevent even the *possibility* of any attack developing: see Robert Chesney, 'Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate' (2012) 5 *Journal of National Security Law & Policy* 539, 549–54.

76 Australian Defence Force doctrine states this clearly:

Those who do not participate in hostilities must not be the direct object of an attack. Soldiers who are 'out of combat' and civilians are to be treated in the same manner and cannot be made the object of attack. A person is *hors de combat* if that person:

- is under the control of an enemy;
- clearly expresses an intention to surrender; or
- has been rendered unconscious, or is otherwise incapacitated by wounds or sickness, and therefore incapable of defending himself;

[p]rovided that person abstains from any hostile act and does not attempt to escape.

Other persons who are not taking a direct part in hostilities are also considered to be out of combat. Those persons include medical personnel, chaplains and any person parachuting from an aircraft in distress.

Australian Defence Force, 'Law of Armed Conflict' (Executive Series ADDP 06.4, Department of Defence, 11 May 2006) 7-3 [7.8]–[7.9] <<http://docplayer.net/1051779-Executive-series-addp-06-4-law-of-armed-conflict.html>>.

77 Urban, *Task Force Black*, above n 13, 232–3. Task Force Black was composed of troops from the UK SAS, the UK Special Boat Service, the US Delta Force and British troop, signals and reconnaissance support. It operated primarily against al-Qaeda in Baghdad and its environs.

78 I am grateful to Mark Urban for this point.

79 Urban, *Task Force Black*, above n 13, 253–4.

in an emergency situation of near civil war and being despatched on rolling missions in hostile urban areas in which they were immediately at risk. The issues are different when SOF are not operating in a situation of public emergency like Iraq<sup>80</sup> where their missions are fewer and planned in greater detail, or when SOF are proactively seeking out targets that they can choose to engage or not, as when Australian special forces implemented ROE which were wide in scope in 2012 in Uruzgan province. During a joint Afghan-Australian operation to track a mid-level Taliban commander, an Australian soldier shouted in the local language to two men to stop. The men ignored this and the soldier opened fire, also hitting a 13-year-old boy who was transferred to hospital. The post-operation report exonerated the soldier since the ROE stated that, as well as cases of self-defence and the prevention of injury or loss of life, those exhibiting 'hostile intent' could be fired upon.<sup>81</sup>

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

500 British special forces soldiers are engaged in intense operations designed to kill as many Taliban commanders as possible. That such operations are of questionable legality is clear from the special (and secret) legal advice given to special forces, different to that given to the rest of the British armed forces.<sup>82</sup>

The 'kill list' approach clearly raises the issue of whether this constitutes assassination. As defined in Australian Defence Force doctrine, assassination is the unlawful 'sudden or secret killing by treacherous means of an individual who is not a combatant, by premeditated assault, for political or religious reasons.'<sup>83</sup> The 'kill list' targeting in Afghanistan was not for religious or political reasons, although the distinction between military and political reasoning in a counter-insurgency or counter-terror situation is always murky. It was status-based rather than threat-based<sup>84</sup> in that people were listed and killed because of their classification as a 'Taliban commander' or some even looser designation. The UK was challenged in 2013 over the fact that the 'kill list' its forces were working through did not specify whether the targets were engaged in hostilities –

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80 As defined in art 4 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976): 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. See also Dominic McGoldrick, 'The Interface between Public Emergency Powers and International Law' (2004) 2 *International Journal of Constitutional Law* 380, 388. For example, with regard to SOF ROE, in a public emergency situation such as near civil war involving intense and sustained conflict, troops may be deployed with wider (but still lawful) ROE to battle insurrectionists, wider than may be the case on more planned and focused missions to capture insurgents in a limited counter-insurgency in one region of a territory.

81 Rory Callinan and David Wroe, 'Australian Soldier Shot a Child in Afghanistan', *The Sydney Morning Herald* (online), 5 May 2014 <<http://www.smh.com.au/federal-politics/political-news/australian-soldier-shot-a-child-in-afghanistan-20140505-zr4qa.html>>.

82 Richard Norton-Taylor, 'Talking about Taliban Killers Is Taboo in the UK' on *The Guardian, Defence and Security Blog* (7 December 2011) <<http://www.theguardian.com/world/defence-and-security-blog/2011/dec/06/sas-afghanistan>>.

83 Australian Defence Force, above n 76, 7-6 [7.25].

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



for example, it included some 50 drug dealers, held to be supporting the Taliban through narcotics.<sup>85</sup> The use of status-based targeting appears to be a method of getting around the prohibitions on killing those who are not actively engaged in combat by defining them as a *type* of combatant (but without the protection that a formal definition of combatant would bring) and thus still permitted to be targeted under international humanitarian law.<sup>86</sup> However, as one authority bluntly points out:

Merely being a 'member' of [a] terrorist organisation, financing or recruiting terrorists, or providing political or spiritual leadership does not equate to 'direct' fighting. Such acts may indeed be necessary to sustain the fighting capacity of the organisation, but they are not so dangerous in a *direct* military sense as to justify killing.<sup>87</sup>

## B Special Operations Forces Training and Mentoring

Away from combat or a conflict situation, SOF theoretically have the duty to remain within the parameters of their mission, using force only when absolutely necessary for self-defence or to prevent the loss of life. However, in practice, training and mentoring roles can see SOF engaging in combat with little scrutiny. In Libya, in 2011 NATO forces were supposedly constrained by UN Security Council *Resolution 1973* which stipulated the protection of civilian and civilian areas against the forces of Colonel Muammar Gaddafi, the then head of state.<sup>88</sup> However, in practice, SOF units from the UK, US and Canada acted as military trainers, advisers, intelligence gatherers and forward air controllers and in these roles played a crucial role in the overthrow of the Gaddafi regime.<sup>89</sup> Currently SOF are in advisory roles in Syria but it is difficult to see how SOF assistance would not bring them into combat situations. For example, Canadian Defence Minister Rob Nicholson stated that, with regard to operations in Syria, 'I am not sure we could train troops without accompanying them. We have been very clear that we would be in the business of assisting and training these individuals'.<sup>90</sup> Similarly, Aaron Miller, a former US State Department advisor, stated:

85 Moran, *From Northern Ireland to Afghanistan*, above n 14, 157; see also Leigh Day, 'Afghan "Kill List" Legal Challenge' on *Leigh Day* (17 July 2013) <<https://www.leighday.co.uk/News/2013/July-2013/Afghan-Kill-List-Legal-Challenge>>.

86 For a sympathetic analysis of this approach, see Michael Elliot, 'Where Precision Is the Aim: Locating the Targeted Killing Policies of the United States and Israel within International Humanitarian Law' (2009) 47 *Canadian Yearbook of International Law* 99.

87 Ben Saul, 'Killing Terrorists: Assassination or Lawful Targeting?', *ABC News* (online), 24 November 2010 <[http://www.abc.net.au/news/2010-11-24/killing\\_terrorists3a\\_assassination\\_or\\_lawful\\_targeting3fkilli/41434](http://www.abc.net.au/news/2010-11-24/killing_terrorists3a_assassination_or_lawful_targeting3fkilli/41434)> (emphasis in original).

88 SC Res 1973, UN SCOR, 66<sup>th</sup> sess, 6498<sup>th</sup> mtg, UN Doc S/RES/1973 (17 March 2011) para 4:

[a]uthorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.

89 Jon Moran, 'Remote Warfare (RW): Developing a Framework for Evaluating Its Use' (Remote Control Project Research Report, Oxford Research Group, March 2015) 6–8.

90 Chase, above n 28.

The issue is really situational. You're advising and assisting but put in situations that are much closer to engagement and combat. In those circumstances, I suspect the line becomes a very fine one – a matter of metres. We're playing roles where we're advising in forward positions. One man's floor is another man's ceiling. There's a very fine distinction.<sup>91</sup>

Finally, even acting in conjunction with official local forces in a more stable situation, SOF may see 'mission creep'. Officially, they are subject to relevant international and local criminal law and follow local security forces' use of ROE.<sup>92</sup> Nevertheless, this role of SOF in 'policing' situations raises important questions. As Ní Aoláin put it in her detailed work on state violence in Northern Ireland in the 1970s and 1980s, deploying special forces and specialist police units in a civilian context risks forcing a militarised approach into a civilian framework. The law may be unable to cope when, for example, SOF and those police units trained by them adopt more aggressive ROE automatically, in place of arrest.<sup>93</sup> If this was the case in a relatively stable jurisdiction such as the UK, then problems are likely to be even more acute when special forces are assisting the governments in jurisdictions where the rule of law and institutions are weak, namely, Afghanistan, Pakistan, the Philippines and Yemen.

## VI PROTECTION FOR SPECIAL OPERATIONS FORCES

The fact that SOF are expected to operate in situations of high risk does not mean that they are owed no duty of care. This duty might be said to run from their deployment to their operations and finally their return. For example, with regard to deployment, Australia's SAS4 Squadron has been operating out of uniform, without Australian Security and Intelligence Service officers present and with no official cover in Kenya, Nigeria and Zimbabwe. Apparently, they have been collecting intelligence on terrorism and areas where Australians may be taken hostage. However, Hugh White, a former Deputy Secretary of Defence stated: '[Such an operation] deprives the soldier of a whole lot of protections, including their legal status and in a sense their identity as a soldier. I think governments should think extremely carefully before they ask soldiers to do that.'<sup>94</sup>

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91 Quoted in Fazel Hawramy, Shalaw Mohammad and David Smith, 'Kurdish Fighters Say US Special Forces Have Been Fighting ISIS for Months', *The Guardian* (online), 30 November 2015 <<http://www.theguardian.com/us-news/2015/nov/30/kurdish-fighters-us-special-forces-isis-combat>>.

92 For example, US operations in aid of the Philippine government after the September 2001 attacks to tackle the terrorist group Abu Sayaf took place officially in accordance with the *Mutual Defense Treaty between the United States of America and the Republic of the Philippines*, signed 30 August 1951, 177 UNTS 133 (entered into force 27 August 1952): Stuart L Farris, 'Joint Special Operations Task Force – Philippines' (Monograph, School of Advanced Military Studies, United States Army Command and General Staff College, 21 May 2009) 45.

93 Ní Aoláin, above n 56, 57–71, ch 5.

94 Rafael Epstein and Dylan Welch, 'Secret SAS Teams Hunt for Terrorists', *The Sydney Morning Herald* (online), 13 March 2012 <<http://www.smh.com.au/national/secret-sas-teams-hunt-for-terrorists-20120312-1uwhy.html#ixzz3r6JrZOzO>>.

Once deployed, overly restrictive ROE may put soldiers' lives unnecessarily at risk. Addicott makes the strong point that ROE for US forces have been confusing and have grafted a bureaucratic process onto the urgency of combat which may actually end up costing lives on the ground.<sup>95</sup> Further, '[w]hile there is no argument that US forces should not uphold the law of war, much of the current self-imposed ROE leave service members with rules that simply cannot be applied in a practical manner to defeat the enemy.'<sup>96</sup>

However, Addicott's argument is clearly heading in the direction of the use of maximum force to overcome the difficulties of battling insurgents. Indeed, at one point, he cites the restrictive ROE of the US in the air and ground war in Vietnam as evidence that ROE may undermine military aims.<sup>97</sup> This seems surprising considering a large quantity of recent historical evidence suggests that not only were US troops engaged in practices of mass killing from the air and ground under extremely wide ROE, but that even these ROE were ignored, often as a matter of policy.<sup>98</sup> It is certainly the case that ROE in situations of counter-terrorism and counter-insurgency require more debate, but using the example of US operations in Vietnam as an argument for widening them is unlikely to produce a framework that respects combatant or civilian rights. Alternatively, Pennekamp suggests adopting a 'standard of engagement' rather than a 'rules of engagement' model. A standards model concentrates on outcomes rather than rule following.<sup>99</sup> This is based on the idea that in a counter-insurgency conflict it is difficult to identify the insurgents as they often wear civilian clothing. They also use surprise tactics which are difficult to frame in a bureaucratic ROE which might be based on linear principles of the escalation of force.<sup>100</sup> Therefore, a focus on overall patterns of behaviour and results might allow a conflict to be managed better than an ever more confusing set of specific regulations and orders. However, any framework that argues that ROE should be judged on results rather than process might end up legitimising an 'ends-justifies-the-means' approach which will overlook individual lapses.

Certainly, the ROE issue requires clarification, because at the moment the confusion around its operation not only puts civilians at risk but also has in some cases led to affronts to the natural rules of justice as SOF soldiers are held to changing standards or left in limbo for long periods of time whilst investigations into their conduct take place.<sup>101</sup> Both were illustrated by the case in which two members of the Australian 1<sup>st</sup> Commando Regiment (as part of the Special Operations Task Group) were charged with manslaughter by criminal negligence despite having followed the lawful ROE in an engagement in Uruzgan province,

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95 Addicott, above n 69, 20–1.

96 Ibid 7.

97 Ibid 6.

98 Bernd Greiner, *War without Fronts: The USA in Vietnam* (Vintage, 2010); Nick Turse, *Kill Anything That Moves: The Real American War in Vietnam* (Metropolitan Books, 2013).

99 Aaron Pennekamp, 'Standards of Engagement: Rethinking Rules of Engagement to More Effectively Fight Counterinsurgency Campaigns' (2013) 101 *Georgetown Law Journal* 1619, 1620, 1638

100 Ibid 1623–8.

101 See Ibid 1620; James Brown, 'A Disconnect between Policy and Practice: Defence Transparency in Australia' (2015) 11(1) *Security Challenges* 29.

Afghanistan. They had come under automatic fire in a compound, returned fire and civilians had been killed. Charges were laid under the concept of negligence – a principle in Australian domestic criminal law, and after one year the charges were dismissed as being not relevant to the laws of war.<sup>102</sup>

## VII CONCLUSION

In the last 15 years, SOF from Australia, Canada, the UK and US have been deployed in multiple roles in a significant number of theatres. To some commentators this is not an issue:

As a combat veteran of Afghanistan – even with no prior Special Forces experience – I cannot stress enough that working in complete secrecy is paramount, both for the security of our operators and for the success of the mission. Our operators are silent professionals, they will do anything to get the mission done; a mission issued and authorized by the Canadian government.<sup>103</sup>

Clearly SOF by their nature are often meant to operate in secret and as a uniquely effective weapon in conflict. However, at issue is whether the expanded deployment of SOF as fighters, mentors and trainers, along with the use of drones and local militias constitutes, in effect, a new way of warfare that does in fact require greater scrutiny from parliaments and discussion in public. This issue is even more acute regarding nations such as Australia, Canada and the UK which cannot claim, as the US did, that these operations were in a form of recognised international armed conflict resulting from a large-scale attack on their territories.

Some SOF operations are fairly clear. In the public emergency of Iraq, the use of SOF in ‘industrial counter-terrorism’ in a situation of near civil war appeared to justify aggressive operations and wide rules of engagement. In Afghanistan, the use of SOF to grind through a ‘kill list’ of suspected insurgents is much less clear-cut. In other areas such as Libya, SOF seemed to have been used to recklessly undermine UN Security Council Resolution 1973 and enable the toppling of a regime. In other jurisdictions such as Afghanistan and Iraq, SOF are acting as trainers or mentors for local regular and irregular forces which commit human rights abuses with no accountability. Therefore, it is arguable that reforms in the areas of political accountability and oversight are required.

It might be accepted that the decision to deploy special forces be kept flexible – a large-scale parliamentary debate on whether SOF should be deployed for hostage rescue or in other situations of extreme public emergency abroad would be inappropriate. However, the planned deployment of SOF in major counter-terrorism or combat operations or in assistance to local forces should require some sort of information being given to parliamentary representatives. This should be particularly the case if SOF are to be, or become, deployed in the long-

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102 Tim McCormack, ‘Commandos Finally Get Justice’, *The Age* (Melbourne), 25 May 2011.

103 Jonathan Wade, ‘Veteran’s Shocking Claim: Canadian Media Puts Our Soldiers at Risk’ on *The Rebel* (4 March 2015) <[http://www.therebel.media/veteran\\_s\\_shocking\\_claim\\_canadian\\_media\\_puts\\_our\\_soldiers\\_at\\_risk](http://www.therebel.media/veteran_s_shocking_claim_canadian_media_puts_our_soldiers_at_risk)>.

term. The parliamentary authority might be a specific committee dealing with intelligence or the armed forces. Secondly, during or following deployment some form of review should be instituted. The deployment of SOF, when it is discussed in public is usually surrounded by an aura of awe and appreciation, often fed by accounts from former SOF operators. However, evidence as to their effectiveness is much more difficult to come by. It might therefore be time for reviews to be made of their deployment and use, reviews which have been lacking in all the political systems discussed in this article. The same committees already mentioned might pursue this function. Or as in the Australian system, an Inspector General of Special Forces modelled on the Inspector General of Intelligence and Security might take such a role, or the role could be incorporated into the office of Inspector General of the Australian Defence Force.<sup>104</sup> The hearings could take place on camera and the reports by these committees could be redacted where necessary. To some, this might seem a radical departure from current practice, but this is already the basic system in the US. In the context of long-term military deployments of a serious nature, now is an appropriate time to consider introducing systems of accountability for SOF in Australia, Canada and the UK, and strengthening them in the US.

In operational terms, SOF actions raise further debate in three legal areas. First, whether their actions contravene international law, for example, in assisting in the overthrow of regimes without UN authorisation. The campaign against the Gaddafi regime in Libya raises questions in this area. Secondly, the rules under which SOF engage opponents require more clarity. The danger overall, whether in direct combat, training and mentoring or assisting civilian security forces, is that: 'it is possible, if not probable, that a growing set of exceptionally sensitive operations – up to and including the use of lethal force on an unacknowledged basis on the territory of an unwitting and non-consenting state – may be beyond the reach of [ROE]'.<sup>105</sup> This raises a clear issue about whether current ROE are appropriate to the current phase of counter-terrorist or counter-insurgency operations in which conflict is confused and staccato rather than clear and sustained, and in which enemies are difficult to identify.

Finally, and linked to the previous point, there are issues of the duty of care owed to SOF. They should not be deployed as all-purpose 'super-warriors' without proper consideration of their legal status. Their ROE should not be overly broad, but neither should they be despatched on missions with ROE which are impossible to adhere to in practice and which may cost them their own lives. This issue is particularly important as armed forces in operations other than war are increasingly becoming 'juridified' – subject to the relevant international human rights law.<sup>106</sup>

After 15 years of counter-terrorism and counter-insurgency operations the issues raised by SOF have paled somewhat in comparison to the attention and debates paid to drones and potential automated methods of killing. Yet SOF have

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104 I am grateful to an anonymous reviewer for suggesting this innovation.

105 Chesney, 'Military-Intelligence Convergence', above n 75, 540.

106 Anthony Forster, 'British Judicial Engagement and the Juridification of the Armed Forces' (2012) 88 *International Affairs* 283.

been central to nearly all the operations conducted by states such as Australia, Canada, the UK and US since the terrorist attacks on the US in 2001. In terms of accountability, it may be time in modern democracies for a proper debate about how far SOF should step out of the shadows.