Parliamentary scrutiny of counter-terrorism targeted killings: democratic accountability challenges of, and for, the political constitution[1]

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Abstract
This article explores the challenges of parliamentary scrutiny of counter-terrorism "targeted killings" carried out by UK armed forces abroad. The article unfolds in three sections. The first section maps the contours of what can be seen to represent a contemporary UK counter-terrorism targeted killing "policy" in all but name. It discusses the controversial nature and extent of that "policy", and the expansive (international) legal arguments that underpin it, such that it endorses the use of lethal force against suspected terrorists not only within but also outside active areas of armed conflict. The second section highlights two key democratic accountability challenges arising in this context. First, it outlines the limitations of existing parliamentary scrutiny arrangements currently organised around the so-called "War Powers Convention", the use of drones and Special Forces—often the methods of choice for the carrying out of counter-terrorism targeted killings—crucially appearing to have been carved out of those arrangements. Second, it highlights the ways in which the UK Government emphasises the role of international law in "guiding" its contemporary approach to counter-terrorism targeted killings—what I describe as the effective "outsourcing" of the domestic legal basis for authorising such killings to the international legal framework. This, I argue, works to radically suppress very important questions about the authority structures—involving crucial political mechanisms of accountability—within which the legitimacy of such practices might otherwise be scrutinised in the domestic constitution. The final section of the article explores the broader, conceptual implications of these challenges for the UK's "political constitution". I argue that these challenges raise difficult questions from the perspective of political constitutionalism, for it is not clear that the ostensible "democratic" politics of (re)accommodating a counter-terrorism policy of targeted killing to domestic sites of accountability are truly of the sort embraced within that scholarship.

Keywords
Counter-terrorism; Drones; Targeted killing; War Powers Convention; Political constitutionalism

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No UK government has ever formally adopted a counter-terrorism policy of "targeted killing":

> "the intentional, premeditated and deliberate use of lethal force, by [a State or its agents] acting under colour of law … against a specific individual who is not in the physical custody of the perpetrator."[2]

As Nils Melzer writes:

> "Traditionally, public debate in the United Kingdom never seriously considered that targeted killing could be a legitimate method of law enforcement, even in the face of decades of terrorist activities related to the conflict in Northern Ireland."[3]

Indeed, the UK's position historically has been to denounce targeted killing as "contrary to international law".[4] Yet in recent years there have been several significant developments which, taken together, cast doubt on this position. These include multiple reports of apparent targeted killings of suspected terrorists carried out by UK armed forces abroad, involving the use of remotely piloted aircraft ("drones") and/or Special Forces. These reports have coincided with a marked ramping-up of political rhetoric from Government Ministers, appearing ever more openly to endorse such practices—whether within or, controversially, outside active areas of armed conflict—as part of a broader, increasingly aggressive military response to the global terrorist threat.

The challenges that this poses for democratic accountability mechanisms in the UK are stark. For in addition to many questions that have so far gone unanswered—regarding, for instance, the UK Government's criteria for identifying, tracking and eliminating viable "targets"—questions are also raised as to the role that Parliament could (or perhaps *should*) play in scrutinising the relevant decision-making processes, whether before or after the fact. After all, these are questions of fundamental constitutional importance: the accountability of the executive to Parliament is a core principle of the UK constitution,[5] while House of Commons oversight has, over the last decade, become a central aspect of domestic scrutiny arrangements concerning the exercise of war powers derived from the royal prerogative.[6]

This article explores these questions. It is structured as follows. The first section maps the possible contours of what can be seen to represent a contemporary UK counter-terrorism targeted killing "policy" in all but name. It discusses the controversial nature and extent of that "policy" in the light of recent developments in practice, recent ministerial endorsement of an

[2] UNGA, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston" (2010) UN Doc A/HRC/14/24/Add.6, para.1.
[3] N. Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), p.23.
[4] "United Kingdom Materials on International Law 2005" (2006) 76 B.Y.I.L. 683, 903.
[5] *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41; [2020] A.C. 373 at [46].
[6] V. Fikfak and H.J. Hooper, *Parliament's Secret War* (Oxford: Hart Publishing, 2018).

expansive approach to counter-terrorism targeted killings, and the contentious (international) legal basis upon which that approach appears to rest.

The second section develops two main lines of argument concerning the key democratic accountability challenges that emerge in this context. First, it outlines the so-called "War Powers Convention", the principal mechanism by which use-of-force decision-making is currently subjected to democratic (parliamentary) scrutiny in the UK constitution. I argue that the UK's targeted killing practices expose the limitations of existing scrutiny arrangements, particularly where such killings occur outside armed conflict situations, as this cannot by definition be covered by any prior authorisation Parliament might have given. That the carrying out of targeted killings typically involves the use of drones and/or Special Forces is also of consequence. Both methods of deploying lethal force appear to have been carved out of the procedures of (*ex ante*) parliamentary scrutiny instituted by the Convention, either in line with its broad and increasingly many exceptions, or rather altogether, on the basis that they are uniquely unsuited to strong political oversight or control of the kind envisaged for Parliament within the Convention's framework.

Secondly, this section discusses the ways in which the UK Government emphasises the role of international law in "guiding" its contemporary approach to counter-terrorism targeted killing. I argue that this has further democratic accountability-frustrating implications: it purports to "constitutionalise" targeted killing practices by, in effect, "outsourcing" domestic legal arrangements for authorising the use of force to the international legal framework. This entrenches as the predominant legitimating factors in this area both targeted killing's "international" and "legal" implications, and thus works to radically suppress very important questions about the authority structures—involving crucial *political* mechanisms of accountability—within which the legitimacy of such practices might otherwise be scrutinised in the domestic constitution.

The final section of the article explores the broader, conceptual implications of these democratic accountability challenges, and their potential solutions, for the UK's "political constitution".[7] I argue that these challenges reveal the potential limits of democratic political decision-making—the leitmotif of political constitution*alism*.[8] Rather, the "democratic" character of politics seems unable to condition the exercise of public power such as that explored in this article—not only in practice, political (parliamentary) scrutiny of the relevant decision-making appearing to have been rendered ineffective, but crucially also in principle. Beyond the fact of their being taken by an elected Government Minister, the high-stakes and controversial nature of these decisions—in this context, involving matters of state-sponsored deprivation of life—make it hard to establish how, exactly, they could alternatively be made "democratic". This raises difficult questions from the perspective of political constitutionalism, therefore, not least as to whether a counter-terrorism policy of targeted killing the legitimisation

[7] J.A.G. Griffith, "The Political Constitution" (1979) 42 M.L.R. 1.

[8] See, e.g., A. Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005); R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); G. Gee and G.C.N. Webber, "What Is a Political Constitution?" (2010) 30 O.J.L.S. 273.

of which purportedly takes place *beyond* domestic democratic sites of accountability could, in fact, be (re)accommodated to those sites. It is not clear that the ostensible "democratic" politics of this process are truly of the sort embraced within that scholarship.

The UK Government's contemporary "policy" of counter-terrorism targeted killing

Recent developments

On 23 December 2021, the Ministry of Defence (MOD) published the following statement on its website:

> "The crew of a remotely piloted Reaper, armed with Hellfire missiles, tracked a known terrorist in northern Syria, near the city of Ras al Ayn, and at a safe moment, when the individual was alone in a field, carried out a successful attack."[9]

No further details were given, other than the date on which the incident occurred: 25 October 2021, some eight weeks prior. Yet on 6 January 2022, *The Guardian*, citing investigations carried out on the ground by the Syrians for Truth and Justice Group, reported that the individual in question was in fact Abu Hamza al-Shuhail, "a well-known arms dealer in the region" with links to the terrorist group Islamic State/Da'esh.[10]

On 10 January 2022, then-Secretary of State for Defence, Ben Wallace, faced questions about these developments from one MP in the House of Commons, who said:

> "We now know that on 25 October [2021], the RAF carried out a targeted drone killing in Syria. Is that not a major shift in policy? Why was Parliament not informed? When will the Secretary of State set out the legal basis and criteria for that strike?"

In response, the Defence Secretary confirmed that the strike was part of "Operation Shader"—the UK's decade-long military contribution to the international coalition against Islamic State/Da'esh in Iraq and Syria—offering only the following comment:

> "Periodically we come to this House—either myself or the Foreign Secretary—to update the House overall on Op Shader, and we periodically inform the House of all strikes we make. If it has not happened yet, it will happen very soon through the Cabinet Office."[11]

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[9] Ministry of Defence, "RAF Airstrikes in Iraq and Syria: January to December 2021", *https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list/raf-air-strikes-in-iraq-and-syria-january-to-december-2021*.

[10] D. Sabbagh, "UK Accused of 'Targeted Killing' after Drone Strike on Arms Dealer to IS" (*The Guardian*, 6 January 2022), *https://www.theguardian.com/world/2022/jan/06/uk-accused-of-targeted-killing-after-drone-strike-on-arms-dealer-to-is*.

[11] Hansard, HC Vol.706, col.280 (10 January 2022).

Once again, no further details about this specific attack have been forthcoming, despite the Defence Secretary's assurance.

It is, however, unsurprising that this brief exchange appears to be the extent of parliamentary scrutiny of these developments. Indeed, this episode serves to reiterate a general truth of contemporary state responses to the global terrorist threat involving the use of drones and apparent "targeted killing": these are practices characterised by decision-making that invariably takes place in secret, behind closed doors, and thus with minimal (if any) possibility for transparency and/or accountability as to the relevant processes or stakeholders involved, whether before or, as in this case, after the fact. And this is notwithstanding—although, no doubt a consequence of—the intense legal, constitutional, political, moral, and ethical controversy that surrounds state-sponsored deprivation of life in counter-terrorism contexts.

Yet this is by no means a unique development. That UK armed forces are routinely engaged in military operations of this nature overseas is clearly borne out by a range of factors. For instance, it is reported that between August 2014 and September 2022, some 11,500 UK missions were carried out under Operation Shader, over 5,000 of which involved the use of armed "Reaper" drones.[12] And that at least some of those missions involved lethal airstrikes that might reasonably be characterised as targeted killings is clear even from the (brief) details provided by the MOD. Targeted killings may "take place in a variety of contexts and may be committed by governments and their agents in times of peace as well as armed conflict"; they are characterised by lethal force that is "intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance of the perpetrator"; and that "the specific goal of [a targeted killing] operation is to use lethal force" is key, for this distinguishes such action from "unintentional, accidental, or reckless killings, or killings made without conscious choice".[13]

Consider the details of two recent airstrikes published by the MOD in March 2023. The circumstances of the first airstrike, said to have taken place on 10 October 2022, are described thus:

> "A Reaper remotely piloted aircraft, armed with Hellfire missiles, tracked and, when it was safe to do so without posing a risk to civilians, successfully engaged one … terrorist who was on a motorcycle in northern Syria, near Hamman At Turkumen."

Details of the second airstrike, reportedly carried out on 20 December 2022, read:

> "A Reaper remotely piloted aircraft kept close observation on a building near Al Bab in northern Syria where at least one active Daesh terrorist was known to be present. Great care was taken to ensure that any potential risks to civilians were understood and

[12] Drone Wars, "UK Drone Strike Stats", *https://dronewars.net/uk-drone-strike-list-2/*.

[13] UNGA, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston", paras 8-9.

> minimised before the Reaper's crew fired a salvo of two Hellfire missiles which both struck the target accurately."[14]

References to the "tracking" of the individuals in question, the keeping of relevant locations (at which "active" terrorists are "known to be present") under "close observation", and the taking of "great care" to understand and minimise risks posed to civilians are all indicative of the pre-meditated and deliberate nature of the use of lethal force in each of the circumstances described above. That the use of such force was itself the goal of both operations is also clear. The "success" of the 10 October drone strike, in particular, was described in terms of the "engagement"—for which read "killing"—of the individual in question.

These developments perpetuate a recent trend in the UK, marking a significant escalation both of the UK's military response to the contemporary terrorist threat and—in a clear departure from past practice—of ministerial endorsement of targeted killing for counter-terrorism purposes. Several senior Cabinet Ministers have issued statements with which it is increasingly difficult to square the UK Government's "official" position, which is—and always has been—to deny that it operates a "policy" of targeted killing, equally rejecting claims that the UK maintains a secret "kill list" of high-profile terrorist suspects.[15]

In December 2017, then-Defence Secretary Gavin Williamson signalled the UK Government's apparent embrace of targeted killing as a key strand of its broader strategy towards dealing with the threat posed by "foreign terrorist fighters"—"individuals who have travelled from their home states to other states to participate in or support terrorist acts".[16] Williamson stated in an interview with the *Daily Mail* that British citizens who travel abroad in support of terrorist groups such as Islamic State/Da'esh should, in no uncertain terms, be "hunted down" and "eliminated"; after all, "[a] dead terrorist can't cause any harm to Britain".[17] Then-Prime Minister Theresa May also expressed support in Parliament for so-called "precision airstrike[s]" against terrorist suspects operating in foreign countries, albeit as "the last resort in a host of counter-terrorism measures to prevent and disrupt plots against the UK at every stage in their planning".[18] Of particular note are the comments of the former Defence Secretary, Ben Wallace, prompted by the resurgence of the Taliban in Afghanistan, in 2021, and the risk of a growing terrorist threat in the region. Wallace reiterated the UK Government's (increasingly favourable) approach to the use of lethal drone strikes as a viable response to this threat, stating,

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[14] Ministry of Defence, "RAF Air Strikes in Iraq and Syria: January to December 2022", *https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list/raf-air-strikes-in-iraq-and-syria-january-to-december-2022*.

[15] N. Watt, "The 'Kill List': RAF Drones Have Been Hunting UK Jihadis for Months" (*The Guardian*, 8 September 2015), *https://www.theguardian.com/uk-news/2015/sep/08/drones-uk-isis-members-jihadists-syria-kill-list-ministers*.

[16] OSCE Office for Democratic Institutions and Human Rights, *Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework* (OSCE/ODIHR, 2018), p.8.

[17] L. Brown, "Defence Secretary is Accused of Dreaming Up a Netflix-Style Plot by Threatening to 'Eliminate' UK Jihadis Before They Can Return to Britain" (*Daily Mail*, 6 December 2017), *https://www.dailymail.co.uk/news/article-5153613/Gavin-Williamson-Brits-fighting-be.html*.

[18] Hansard, HC Vol.633, col.61WS (20 December 2017).

"[o]ne 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".[19]

Despite the UK Government's long-professed opposition to counter-terrorism targeted killing, statements such as these can be taken to map the possible contours of a contemporary UK policy position in this regard. In particular, Ben Wallace's remarks very clearly—if controversially—hint at the expansive nature of that policy in principle, appearing to confirm that which the UK Government has previously dismissed as "hypothetical":[20] that its willingness to sanction the use of lethal force for counter-terrorism purposes extends to situations *outside* active areas of armed conflict. This raises important questions as to the precise legal basis, under international law, on which such uses of lethal force might rest.

The international legal basis of UK counter-terrorism targeted killings

If the apparent targeted killings carried out under Operation Shader form part of the UK's involvement in a non-international armed conflict with the Islamic State group in Iraq and Syria, it seems reasonable to assume that the relevant legal basis for such action is the law of armed conflict / international humanitarian law (LOAC/IHL). However, this does not, of itself, render those killings lawful. Neither is this without controversy: the repurposing of legal norms that traditionally governed armed conflict between nation-states, in service of legitimising such military responses to a homogeneous and legally-ambiguous "global" terrorist threat, has its roots in the contentious US "War on Terror" legal paradigm.[21] Under LOAC/IHL, the use of lethal force is subjected to more permissive legal thresholds than might otherwise apply to state-sponsored deprivation of life—namely, those of the United Nations Charter framework (*jus ad bellum*) and international human rights law (IHRL). The principles according to which the lawful use of such force is to be determined include the restriction of force to only that which is necessary to achieve legitimate military objectives; which is proportionate to the achievement of those objectives; and which crucially distinguishes between enemy combatants actively engaged in hostilities and civilians who are not.

Whilst more general theoretical debates as to applicability of LOAC/IHL principles to counter-terrorism contexts will no doubt endure, in any event it remains difficult in practice to establish whether those principles have been complied with. Information upon which crucial decisions are made in these contexts is most often precluded from domestic democratic scrutiny mechanisms for reasons of national security. Yet far less certain—indeed, far more controversial, and thus far more compelling the case for the need for such scrutiny—is the question of whether there exists a legal basis in international law for counter-terrorism targeted

[19] D. Sabbagh and A. Gentleman, "UK Would Be Prepared to Launch Afghanistan Drone Strikes, Says Wallace" (*The Guardian,* 9 September 2021), *https://www.theguardian.com/politics/2021/sep/09/uk-would-be-prepared-to-launch-afghanistan-drone-strikes-says-wallace*.

[20] Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015-16*, Fourth Report of Session 2016-17, HL 49, HC 747.

[21] C. Gray, "Targeted Killings: Recent US Attempts to Create a Legal Framework" (2013) 66 C.L.P. 75.

killings occurring *outside* areas of armed conflict, to which LOAC/IHL does not—certainly on any conventional reading of that framework—apply.

This has been a matter of some debate in the UK, in recent years, following separate parliamentary inquiries conducted by the Joint Committee on Human Rights (JCHR)[22] and the Intelligence and Security Committee (ISC)[23] into the circumstances and legal basis of UK drone strikes in Syria, in August 2015, killing British terrorist suspects Reyaad Khan and Ruhul Amin. Recent developments highlighted in this article prompt reconsideration of the legal arguments defended by the UK Government during those inquiries, particularly as to its policy on the use of lethal force outside areas of armed conflict, which, the JCHR concluded then, "does contemplate the possibility of pre-identified individuals being killed by the State to prevent a terrorist attack", and:

> "The legal basis of the Government's policy appears to be that the use of lethal force abroad outside of armed conflict for counter-terrorism purposes is lawful if it complies with (1) the international law governing the use of force by States on the territory of another State, and (2) the Law of War. In the Government's view, it is not necessary to consider whether human rights law applies, or what it requires, because compliance with the Law of War, it argues, is sufficient to discharge any obligations that apply under international human rights law."[24]

However, the viability of each of the key arguments underpinning this legal position have since been contested.

Particularly tenuous is the view that the framework of LOAC/IHL extends to situations outside areas of armed conflict. That would seem to align the UK to the "War on Terror" legal paradigm it has historically eschewed. Although, when pressed on the matter, Ministers refused to clarify the Government's understanding of the relevant legal principles that apply in such circumstances—beyond, that is, merely indicating that "the law of war would be likely to be regarded as an important source in considering the applicable principles". In doing so, the JCHR emphasised, the Government failed to answer "one of the most important questions" identified in the Committee's report.[25] It remains unclear, therefore, whether LOAC/IHL is indeed a—if not *the*—framework of "international law" to which the former Defence Secretary alluded (above) in stating the UK's position on deployment of armed drones "anywhere in the world". This is an important point which ought to be pursued in further parliamentary scrutiny of that position.

Another questionable aspect of the legal position elicited by the JCHR concerns the claim that compliance with LOAC/IHL in situations involving the use of force outside areas of armed

[22] Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing*, Second Report of Session 2015-16, HL 141, HC 574.
[23] Intelligence and Security Committee, *UK Lethal Drone Strikes in Syria*, HC 1152, 2017.
[24] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing*, paras 2.39-2.40.
[25] JCHR, *Government Response to the Committee's Second Report of Session 2015-16*, para.18.

conflict sufficiently discharges obligations that might arise under IHRL. That holds—if at all—only to the extent that LOAC/IHL applies in such circumstances; though, again, there are reasons to doubt that this truly reflects the UK Government's understanding of (the extent of) that framework. Moreover, the extraterritorial reach (including to areas of armed conflict) of IHRL norms such as those protected under the European Convention on Human Rights (ECHR) is far from clear-cut. The Strasbourg Court's jurisprudence on this issue—central to which is the concept of the "jurisdiction" of High Contracting Parties within the meaning of Article 1 of the ECHR—remains somewhat nebulous. The Court has held that while "[j]urisdiction is presumed to be exercised normally throughout the State's territory", one of several "defining principles" of the Convention's extraterritoriality is that "in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction"; "[w]hat is decisive in such cases," the Court has noted, "is the exercise of physical power and control over the person in question".[26]

The use of drones—often the context in which the deployment of lethal force in counter-terrorism operations abroad is implicated today—reveals the complexity of this notion as a basis for determining the extent to which States are bound by ECHR obligations. It is unclear whether a targeted drone strike can be said to constitute an "exercise of physical power and control over the person in question" for the Convention's jurisdictional purposes. On the domestic plane, the High Court in *Al-Saadoon and Others v Secretary of State for Defence* appeared to endorse such an approach, Leggatt J having held that a contracting state's obligations to act compatibly with the Convention arise "whenever and wherever a state … purports to exercise legal authority or uses physical force".[27] Yet that proposition was subsequently rejected by the Court of Appeal, which indicated that something *more* than the mere use of lethal force was required for these purposes, but stopped short of clarifying this point; rather, it was held that the "controversial nature" of this issue meant that it ought to be left for the Strasbourg Court to decide.[28] The Court of Appeal's decision nevertheless prompted the Government to perform a U-turn on the position the JCHR took it to defend (above); the Government has since taken the view that the right to life under Article 2 of the ECHR does not apply to lethal force used "whether within or outside an existing armed conflict".[29]

The correctness of that interpretation has yet to be reviewed by a superior appellate court. However, recent developments in the case law of the European Court of Human Rights seem to compound rather than clarify the question of whether use of force alone—including the use of drones—establishes "jurisdiction" under Article 1 of the ECHR. In *Georgia v Russia (II),* the Court appeared to deny that either "effective control by the State over an area" (termed a "spatial concept of jurisdiction") or "State agent authority and control over individuals" (a "personal concept of jurisdiction") apply in "active phases" of armed hostilities.[30] The Court

[26] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18, paras 131-136.
[27] *Al-Saadoon and Others v Secretary of State for Defence* [2015] EWHC 715 (Admin); [2015] 3 W.L.R. 503 at [106].
[28] *Al-Saadoon and Others v Secretary of State for Defence* [2016] EWCA Civ 811; [2017] 2 W.L.R. 219 at [69].
[29] JCHR, *Government Response to the Committee's Second Report of Session 2015-16*, para.22.
[30] *Georgia v Russia (II)* (2021) 73 E.H.R.R. 6, para.126.

accepted that in previous cases "concerning fire aimed by the armed forces/police of the States concerned" it had applied the concept of ""State agent authority and control" over individuals to scenarios going beyond physical power and control exercised in the context of arrest or detention", yet it noted that those cases "concerned isolated and specific acts involving an element of proximity".[31] This has been criticised as "an extraordinarily vague statement", the focus on proximity "wholly unconvincing as a principled boundary of jurisdiction"; it remains unclear, on this basis, whether a targeted drone strike—or other such "kinetic uses of force that are not artillery shelling and aerial bombardment, but are more 'proximate' or 'specific' (whatever those words mean exactly)"—would be captured by such a "personal notion of jurisdiction".[32] Thus, unless and until this specific issue is clarified further, the UK's policy of counter-terrorism targeted killing involving the use of drones might well continue to be regarded as "occurring in a legal black hole in so far as the ECHR is concerned".[33]

The international law governing the use of force by States on the territory of another State (*jus ad bellum*) is equally potentially problematic in the context of counter-terrorism targeted killings. Under Article 51 of the United Nations Charter, States are entitled to use force on foreign territory in individual self-defence, or in defence of another State, either in response to an "armed attack" or to forestall an "imminent" such attack. In a memorandum to the JCHR, the Government cited UN Security Council Resolutions 1368 (2001) and 1373 (2001) as authority in support of its position that "[i]ndividual terrorist attacks, or an ongoing series of terrorist attacks, may give rise to the level of an "armed attack" for these purposes if they are of sufficient gravity". It also noted:

> "Where the UK determines that it faces an imminent armed attack from [Islamic State/Da'esh], it is entitled to use necessary and proportionate force to repel or forestall that attack in exercise of the inherent right of individual self-defence."[34]

In its response to the JCHR's initial report, the Government argued that "[a]n effective concept of imminence cannot … be limited to be assessed solely on temporal factors"; a view must be taken "on a broader range of indicators of the likelihood of an attack, whilst also applying the twin requirements of proportionality and necessity".[35] Although, this interpretation of factors considered relevant in determining whether an armed attack is "imminent", the JCHR suggested, "muddy the waters somewhat": "[o]n the Government's formulation … it is not clear what it considers to be the relevance of when a threatened attack might take place".[36]

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[31] *Georgia v Russia (II)* (2021) 73 E.H.R.R. 6, paras 131-132.

[32] Marko Milanovic, "Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos" (EJIL:Talk!, 25 January 2021), *https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/*.

[33] L. Halewood, "Avoiding the Legal Black Hole: Re-evaluating the Applicability of the European Convention on Human Rights to the United Kingdom's Targeted Killing Policy" (2019) 2 Goettingen Journal of International Law 301, 305.

[34] *https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/Government_Memorandum_on_Drones.pdf.*

[35] JCHR, *Government Response to the Committee's Second Report of Session 2015-16*, appendix.1.

[36] JCHR, *Government Response to the Committee's Second Report of Session 2015-16*, para.16.

The Government's position was outlined further in 2017 by then-Attorney General Jeremy Wright. Wright endorsed the view of Sir Daniel Bethlehem,[37] taking this to entail "the right factors to consider in asking whether or not an armed attack by non-state actors is imminent", namely:

> "(a) The nature and immediacy of the threat;
>
> (b) The probability of an attack;
>
> (c) Whether the anticipated attack is part of a concerted pattern of continuing armed activity;
>
> (d) The likely scale of the attack and the injury, loss or damage likely to result therefrom in the absence of mitigating action; and
>
> (e) The likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss or damage."[38]

Of Bethlehem's view, also, that the "imminence" of an armed attack cannot be precluded by "[t]he absence of specific evidence of where an attack will take place or of the precise nature of an attack", Wright said that this "reflects and draws upon what has been a settled position of successive British Governments".[39] While perhaps providing some useful clarification, therefore, to the question raised by the JCHR, the result is nevertheless a very broad interpretation of the legality of (pre-emptive) counter-terrorism targeted killings carried out in the UK's self-defence.

The nature and extent of the legal threshold of "imminence" was later revisited by the ISC. Yet perhaps the most important aspect of the ISC's inquiry is that the Committee had been refused access to crucial intelligence and evidential material concerning the Government's assessment of the threat posed to the UK in the particular case of Reyaad Khan. Consequently, the ISC was unable to comment on "the process by which Ministers considered the question of imminence, and how it might have been considered in relation to the decision to conduct a lethal strike".[40] On the evidence provided, the ISC reported that "[t]he question of imminence … appears to centre not on one specific attack about to take place but a broader concern that – due to gaps in coverage – a plot might go undetected".[41] The ISC's inquiry was equally inconclusive as to whether the requirements of "necessity" and "proportionality" had been

[37] D. Bethlehem, "Principles Relevant to the Scope of a State's Right to Self-Defence Against an Imminent or Actual Armed Attack by Non-state Actors" (2012) 106 A.J.I.L. 769.

[38] J. Wright, *The Modern Law of Self-Defence* (International Institute for Strategic Studies, 11 January 2017), *https://www.justsecurity.org/wp-content/uploads/2017/01/United-Kingdom-Attorney-General-Speech-modern-law-of-self-defense-IISS.pdf*.

[39] Wright, *The Modern Law of Self-Defence*.

[40] ISC, *UK Lethal Drone Strikes in Syria*, para.38.

[41] ISC, *UK Lethal Drone Strikes in Syria*, para.40.

satisfied in the specific circumstances of the Khan strike. Still, the Committee reiterated the importance of those requirements in such contexts. It noted (in relation to the former) that "[a] lethal strike conducted outside participation in a military campaign should be considered only as a last resort",[42] and (as to the latter) that "[w]hile the possibility of collateral damage cannot always be avoided in military engagements, it must always be properly assessed beforehand".[43]

A counter-terrorism targeted killing "policy" in all but name?

The elicitation of a coherent legal and policy position of counter-terrorism targeted killing has proven to be an incremental, if at times tortuous process, but one in which parliamentary scrutiny—even if somewhat hampered, as the ISC's inquiry certainly was—has been essential. Many important questions remain unanswered, not least as to what, precisely, might justify the Government's ongoing (strong) denials that it operates any such policy, seemingly contrary to recent developments in practice and recent ministerial endorsement of targeted killing in all but name. Yet two key themes can be seen to have emerged throughout this process, which speak more broadly to crucial accountability challenges arising in this context.

First is that of the resistance shown by the UK Government toward regarding its approach to counter-terrorism targeted killing in terms of "policy". That might be explained as a concerted attempt to entrench the exceptionality of that approach—despite, clearly, the regularity with which such action is carried out in practice. However, this matters, fundamentally, for reasons of democratic accountability and transparency. That it would be characterised as such would, in turn, demand a greater level of scrutiny—especially by Parliament, to whom the Government is accountable for the development and implementation of public policy as a matter of constitutional principle—than has otherwise been achieved only on an ad hoc basis in recent years.

The second theme concerns the apparently crucial role of international law in establishing the nature and scope of any such UK "policy" of targeted killing. That, in other words, the ostensible legal basis in international law of counter-terrorism targeted killing has so far been the key focus of parliamentary scrutiny of the UK's contemporary position in this regard has important ramifications both in terms of "internationalising" and indeed "legalising" the terms on which domestic democratic scrutiny might more generally be achieved. For this establishes the pretext of a broader accountability-frustrating dynamic, involving what I describe as the effective "outsourcing" to the international legal framework of domestic arrangements for authorising the use of force in this particular context. It is to this issue that I turn in the next section.

The challenges of parliamentary scrutiny of counter-terrorism targeted killings

[42] ISC, *UK Lethal Drone Strikes in Syria*, para.47.
[43] ISC, *UK Lethal Drone Strikes in Syria*, para.55.

Recent instances of apparent targeted killings carried out by UK armed forces abroad raise a number of questions as to the nature and scope of parliamentary oversight of these practices—not only after, but crucially *before* the fact. This requires consideration of the War Powers Convention, now the principal mechanism by which decisions authorising the deployment of UK armed forces to conflict situations overseas are, or now ought to be, scrutinised and legitimated by Parliament within the contemporary constitution.

The War Powers Convention

The terms of Parliament's scrutiny role under the War Powers Convention are outlined in the Cabinet Manual, which states that "before troops [are] committed the House of Commons should have an opportunity to debate the matter … except where there [is] an emergency and such action would not be appropriate".[44] The emergence of the Convention in recent years has been described as having "critically changed"[45] the complexion of pre-existing arrangements whereby the decision to deploy UK armed forces was, to all intents and purposes, one for the Government alone to make, exercising legal powers derived from the royal prerogative.[46] For that is, by any measure, a supremely undemocratic source of legal authority, conferring powers of extraordinary breadth, the exercise of which—certainly in this context—has historically been characterised both by executive dominance and unfailing judicial deference.[47] And although this is a *legal* reality that remains undiminished by developments concerning the War Powers Convention, certainly initial impressions of these developments were such as to suggest that a fundamental shift in power-relations—"from government towards the Commons"[48]—had nevertheless been effected as a matter of *constitutional* orthodoxy.

Yet where once the Convention might have been lauded as heralding a new and crucially more democratic arrangement for authorising and scrutinising the deployment of UK armed forces than that which obtained before, there is a growing consensus, which is evinced by various contemporary developments in practice and by increasingly sceptical critiques in the academic literature, that the Convention once promised much but now ultimately delivers far less. Concerns have been raised, for instance, as to the broad(ening) range of circumstances in which it seems permissible to deploy armed forces in accordance with the Convention's "emergency" exception—that which has been described as the Government's right to "act immediately and explain to the House of Commons afterwards", such as in circumstances where "there were a critical British national interest at stake or there were the need to act to prevent a humanitarian catastrophe".[49] In particular, the Convention is said to have been "weakened"[50] as a result of

[44] Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (London: Cabinet Office, 2011), para.5.38.
[45] T. Chowdhury, "Taming the UK's War Prerogative: The Rationale for Reform" (2018) 38 L.S. 500, 503.
[46] House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force*, Second Report of Session 2013-14, HL 46, para.5.
[47] See, e.g., *China Navigation Co Ltd v Attorney General* [1932] 2 K.B. 197.
[48] Fikfak and Hooper, *Parliament's Secret War*, p.1.
[49] Hansard, HC Vol.585, col.1265 (26 September 2014).
[50] J. Strong, "Did Theresa May Kill the War Powers Convention? Comparing Parliamentary Debates on UK Intervention in Syria in 2013 and 2018" (2022) 75 Parl.Aff. 400.

the Government's use of that exception, in 2018, to justify the bypassing of prior parliamentary debate of UK military intervention in Syria, in circumstances in which it appeared that such debate might reasonably have been permitted.[51]

Debates concerning the (in)adequacy of the War Powers Convention may well now move to a phase in which the key question becomes that of whether the present status quo is truly any sort of improvement on what went before; and, perhaps, whether there is genuine prospect of an improvement of that (present) position. If, above all, the purpose of the Convention is to enable the House of Commons to prevent a course of action proposed by the UK Government that a majority of MPs do not support, episodes such as the Syria vote in 2013[52]—in which the Government was infamously forced to back down on proposed military action—suggest that this must be an improvement on previous arrangements, whereby MPs were not given the chance to affect the exercise of royal prerogative powers either way. But given the range of circumstances in which the House of Commons is patently unable to oversee (much less constrain) the Government in this respect, it appears that the Convention has proven only to be any sort of improvement in a very narrow sense—confined principally to conventional, though increasingly rare, mobilisation of "boots on the ground".

The use of drones and Special Forces

It is therefore crucial, in terms of its implications for Parliament's scrutiny role under the War Powers Convention, that either the use of drones or the deployment of Special Forces is likely to be the method of choice for the carrying out of counter-terrorism targeted killings abroad. It is widely accepted that operations involving UK Special Forces (UKSF) do not fall under the Convention at all. Perhaps this would change, it has been suggested, "if a future mission went wrong—leading to large-scale military or civilian casualties, for example, or if a future government significantly expanded the range and scope of Special Forces deployments".[53] Indeed, the MOD's recent confirmation that UKSF are currently the subject of an inquiry into historic allegations of unlawful killings perpetrated in Afghanistan might provide the catalyst for such change, although the Defence Secretary was at pains to emphasise the "exceptional circumstances of [the] inquiry" as the reason for the MOD's apparent reversal of its long-standing policy of non-disclosure of information concerning the activities of UKSF.[54] These developments perhaps highlight a degree of uncertainty regarding this policy, which might also be seen to reflect uncertainty as to the precise content of the War Powers Convention (specifically as to whether there are, in fact, certain (exceptional) circumstances in which parliamentary oversight of UKSF can or should be covered by the Convention). For now,

[51] M. Bennett, "The Ever-Expanding 'Emergency' Exception: Syria, the War Powers Convention, and the Bypassing of Prior Parliamentary Debate" (UK Constitutional Law Association Blog, 25 April 2018), *https://ukconstitutionallaw.org/2018/04/25/mark-bennett-the-ever-expanding-emergency-exception-syria-the-war-powers-convention-and-the-bypassing-of-prior-parliamentary-debate/*.

[52] Hansard, HC Vol.566, cols 1551–1555 (29 August 2013).

[53] J. Strong, "The War Powers of the British Parliament: What Has Been Established and What Remains Unclear?" (2018) 20 B.J.P.I.R. 19, 27.

[54] Hansard, HC Vol 735, cols 39WS-40WS (5 July 2023).

though, it seems, that policy remains as stated by the Defence Secretary in 2020, which is "not to comment on the operations activity of the UK's special forces, as to do so would put personnel and operations at risk"; instead, "[a]ll military operations are overseen and scrutinised by Ministers, who are accountable to this Parliament".[55]

Although this statement characterises the accountability of UKSF in terms of overarching (constitutional conventional) principles of ministerial responsibility, it is in fact illustrative of an accountability paradox that prevails in this particular context: Ministers oversee and scrutinise military operations involving UKSF, and it is they who shall be held accountable to Parliament; yet, by refusing to comment on the activity of UKSF as a general rule, even when asked specific questions by MPs, Parliament cannot hold those Ministers—and through them, UKSF—to account. And there are important matters to be addressed by Ministers regarding the role of UKSF particularly in operations involving counter-terrorism targeted killings. Reportedly, in recent years UKSF have been given "carte blanche" by Ministers to kill or capture targets in Islamic State-held territory,[56] in addition to having been deployed in operations—the precise nature of which is unknown—in many countries with which the UK is not in armed conflict.[57]

Perhaps the most obvious challenge presented by the use of drones, on the other hand, is that this method of deploying lethal force exposes the dissonance between the language reflected in the Cabinet Manual, stating the principle of the War Powers Convention, and the outer boundaries of that framework in practice. The Cabinet Manual refers only to operation of the Convention in matters involving "troops" being "committed", thus suggesting that drones are fundamentally outwith the terms on which Parliament's *ex ante* scrutiny role is engaged under this framework. In 2016, when asked whether the requirement of prior parliamentary debate under the Convention applies specifically to "the lethal use of armed drones", the then-Defence Secretary Michael Fallon simply reiterated the wording of the Cabinet Manual—thus implying that it did not—adding, "[t]he convention does not apply to British military personnel embedded in the armed forces of other nations".[58] That, on this basis, there appears to be very limited scope for parliamentary scrutiny of lethal drone strikes, including the role of UK armed forces in co-ordinating such operations with foreign allies, is a matter of some concern. In response to a Freedom of Information request in 2020, the MOD acknowledged that the use of drones outside armed conflict situations that were the subject of prior parliamentary authorisation nevertheless continues to happen.[59] It is certainly possible that this might involve the deployment of lethal force that has *not* been the subject of prior parliamentary scrutiny

[55] Hansard, HC Vol.680, col.615 (21 September 2020).
[56] M. Hookham, "SAS Gets 'Carte Blanche' on ISIS" (*The Times*, 5 July 2015), *https://www.thetimes.co.uk/article/sas-gets-carte-blanche-on-isis-l52q3gz7nlh*.
[57] D. Sabbagh, "UK Special Forces Have Operated Secretly in 19 Countries since 2011" (*The Guardian*, 23 May 2023), *https://www.theguardian.com/uk-news/2023/may/23/uk-special-forces-have-operated-secretly-in-19-countries-since-2011*.
[58] *https://questions-statements.parliament.uk/written-questions/detail/2016-07-13/42596*.
[59] C. Cole, "FoI Reveals UK Flying Reaper Drone Missions Outside of Operations Against ISIS in Iraq and Syria" (Drone Wars, 2 March 2020), *https://dronewars.net/2020/03/02/foi-reveals-uk-flying-reaper-drone-missions-outside-of-operations-against-isis-in-iraq-and-syria/*.

under the War Powers Convention, and it is consequently a key source of tension concerning the enforcement of the Convention's norms and processes in this context.

There are reasons to doubt, however, that drones—or, perhaps, UKSF—are inevitably to be excluded from the Convention on the basis that this framework distinguishes between discrete *methods* of deploying armed force. In an area in which, as James Strong notes, there are in fact "no hard and fast rules", what matters in practice "is whether a particular operation is politically contentious"—though, of course, "[w]hat makes an operation contentious varies".[60] This speaks to a crucial point raised in the scrutiny proceedings of the Public Administration and Constitutional Affairs Committee (PACAC) in 2019: it appears to be the Government's understanding that it is principally the *degree* of armed force (likely to be) used that triggers the requirement for a parliamentary vote on UK military intervention overseas. In evidence to the Committee, the Minister for the Armed Forces suggested that "there was a conflict threshold or line and that any military activity that fell below this line, and so was sub-conflict military action or deployment, would not be covered by the convention".[61]

Quite where that line is to be drawn in principle is unclear. In practice, the consensus that tends to prevail on the matter of drones and associated targeted killing practices is one that appears more likely than not to position the relevant degree of lethal force on the side of that line marked "sub-conflict". For underpinning that consensus are several enduring notions, including that the use of drones in conflict situations eliminates the risk otherwise borne by military personnel, in relation to whom they remain equally well placed in any event to "target" enemy combatants—minimising collateral damage (most obviously the loss of civilian life) in the deployment of lethal force—and to achieve limited or short-term military objectives without risk of escalating into full-scale armed conflict. Yet these notions belie the realities of drone warfare. Civilian casualties are all too frequent a result of UK drone strikes.[62] And the fact that UK drones have been engaged in military operations against Islamic State/Da'esh in Iraq and Syria for now almost a decade clearly runs contrary to any suggestion that they are used only in limited circumstances: the use of drones may in fact expand, rather than limit, recourse to lethal force in the UK's contemporary counter-terrorism endeavours.

PACAC accepted that prior parliamentary deliberation on the use of force might be neither desirable nor possible in certain circumstances, specifically those involving the use of drones and UKSF. Indeed, it is generally acknowledged that there needs to remain a degree of flexibility in the operation of the War Powers Convention; that the Government should not be forced to make prior assessments of how such competing demands—between the need for operational discretion on one hand and that of constitutional certainty as to Parliament's scrutiny role in a contentious area of public policy on the other—can or should be managed.

[60] Strong, "The War Powers of the British Parliament", 26.

[61] House of Commons Public Administration and Constitutional Affairs Committee, *The Role of Parliament in the UK Constitution: Authorising the Use of Military Force*, Twentieth Report of Session 2017-19, HC 1891, para.87.

[62] See, e.g., D. Sabbagh, "UK Refuses to Say If It Investigated Reports of Syria Drone Strike Casualties" (*The Guardian*, 14 March 2023), *https://www.theguardian.com/world/2023/mar/14/uk-refuses-to-say-if-it-investigated-reports-of-syria-drone-strike-casualties*.

However, the Committee also emphasised that this does not, of itself, obviate the need for democratic accountability in this context. It was recommended that "the principle of how special forces and drones are utilised should be considered by the House [of Commons]"—that is, "even if specific instances of deployment cannot be debated openly"—as this would "both hold the Government to account for its general policy and give the Government guidance in relation to the types of policy which the House of Commons would, in principle, tolerate and support".[63]

Given the ambiguities that continue to surround the UK's contemporary policy of counter-terrorism targeted killing, further parliamentary scrutiny is no doubt required. Yet scrutiny of that policy on the terms suggested by PACAC might be seen to represent a meagre offer in the round. It seems doubtful that debate over abstract principle(s)—which might only divert attention away from the manner in which that policy is currently implemented in practice—will yield the kind of searching scrutiny so lacking in this area. It also reflects the general paucity of current proposals aimed at enhancing parliamentary scrutiny in this area that these proposals broadly acquiesce to a version of existing accountability arrangements organised around the War Powers Convention, and which seek to preserve, rather than confront, the limitations of this mechanism. A more effective, if more radical approach might be one that involves strengthening the role of, say, the ISC—taking the manner in which its evidence-gathering capabilities have previously been undermined as a starting point for reform—or establishing a new parliamentary select committee altogether, with a specific and ongoing oversight remit including drones, UKSF and their use in counter-terrorism operations of this nature.

The "outsourcing" of domestic use-of-force arrangements to the international legal framework

It is in the light of the various limitations of Parliament's scrutiny role under the War Powers Convention framework that the UK Government's consistent attempts to foreground the *international* dimensions of its approach to counter-terrorism targeted killings ought to be read. Claims that the Government is "guided by international law" in this context are now commonplace in ministerial statements endorsing this strand of the UK's contemporary counter-terrorism strategy.[64] This is also reflected in the UK Government's counter-terrorism strategy document, "CONTEST", which states:

> "Where there is an imminent terrorist threat to the UK from overseas, and where all other options have been exhausted, we are prepared to use lethal force to prevent UK nationals coming to harm. This would always be done in accordance with international law, and we would report to Parliament after we have done so."[65]

[63] PACAC, *The Role of Parliament in the UK Constitution: Authorising the Use of Military Force*, para.119.
[64] See, e.g., Hansard, HC Vol.612, col.15 (27 June 2016).
[65] HM Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism 2023*, CP.903 (London: TSO, 2023), para.94.

It is also significant that Parliament's scrutiny role in this area is explicitly characterised here as occurring after the fact. That is both a clear contradiction of the War Powers Convention's model of *ex ante* parliamentary scrutiny, and yet further entrenchment of the purported exceptionality of lethal force used for counter-terrorism purposes, such as this would place it within the broad "emergency"—"act first, explain later"—exception to that form of scrutiny.

Much has been written about how this sort of (domestic) engagement with international law is used to legitimise otherwise legally dubious military action—at the risk, it has been argued, of "hollowing out" safeguards under the UN Charter regime.[66] As Andrea Birdsall writes, "[s]tates aim to justify their conduct within the reference frame of international law for their actions to be perceived as legitimate", although "[i]n this way, states aim to transform law in order to better fit their policy choices into the changed environment in which they are acting".[67] It is also of note that the predominance of international legal argumentation in parliamentary debates furnished by the War Powers Convention has been shown to have a subversive effect on the nature and quality of those debates. Where the international legal basis for military action is relatively secure (such as clearly establishes the lawfulness of proposed military intervention under the UN Charter framework), it is said that this "appears to give the Government the basis to define its action as 'international' and therefore present it before Parliament as already 'legal' and 'legitimate' as a direct consequence of this";[68] thus, "Parliament is not used as a true forum for political discussion, but more covertly as a surrogate Security Council".[69]

Yet the use of international law in ways highlighted in this article, in the specific context of counter-terrorism targeted killings, crucially does not take place *within* the context of (*ex ante*) parliamentary debate, but instead seeks to preclude such debate altogether. This offers several important insights as to the role of international law in purporting to "constitutionalise" the UK's counter-terrorism targeted killing practices *beyond* domestic sites of democratic accountability. Clearly, the UK Government's approach is such as to indicate that it is only seriously willing to make the case for the targeted killing of suspected terrorists (seemingly including those of British nationality) in overseas locations. And this would suggest that the Government conceives of the constitutional position of targeted killing as contingent on the *international* dimension of that action—that, in other words, the international dimension of the use of lethal force is determinative of the extent to which its targeted killing policy may be legitimately implemented as a matter of UK constitutional law. If this is the case, though, it results in a peculiar situation in which the domestic legal basis, plainly an essential factor in establishing the constitutionality of the exercise of public (executive) power, has in effect been "outsourced" to the international legal framework.

[66] C.R.G. Murray and A. O'Donoghue, "Towards Unilateralism? House of Commons Oversight of the Use of Force" (2016) 65 I.C.L.Q. 305.
[67] A. Birdsall, "New Technologies and Legal Justification: The United Kingdom's Use of Drones in Self-Defence" (2022) 11 G.Cons. 197, 204.
[68] Fikfak and Hooper, *Parliament's Secret War*, p.37.
[69] Fikfak and Hooper, *Parliament's Secret War*, p.65.

It could be said that ministerial statements such as those noted above speak to a broadly orthodox account both of the availability, in law, of the right to use lethal force and of the relationship (and priority accorded) between the relevant domestic and international legal frameworks within the UK's constitutional arrangements. It is, after all, a truism that questions concerning the lawfulness of the use of force (including targeted killing) in international law are independent of those relating to the propriety of legal and/or constitutional arrangements in accordance with which that use of force may be authorised on the domestic plane.[70] And it may well be that the examples given in this article are merely indicative of the UK Government's acceptance of the international legal framework's monopoly on the legitimacy of such action. There are, however, many compelling reasons to question the commitment of recent (Conservative) UK governments to abide by international legal obligations. This is in addition to the fact that—as discussed above—successive administrations have endorsed increasingly expansive, and seemingly self-serving, interpretations of several international legal frameworks governing the use of force. Take, for example, the excision (in 2015) of the explicit commitment included in previous iterations of the Ministerial Code, that Ministers "comply with the law including international law and treaty obligations".[71] The recent controversy surrounding the UK Government's proposal to "break international law in a very specific and limited way"[72] in relation to the EU Withdrawal Agreement serves only to raise further doubts in this regard.

From a constitutional perspective, the effective "outsourcing" of domestic legal arrangements for authorising the use of force to the international legal framework has (at least) two tangible consequences, both of which diminish the scope for domestic accountability. First, it has the effect of shifting questions of legal authority for the use of force onto frameworks that fundamentally govern inter*state* armed conflict—namely, the *jus ad bellum* and LOAC/IHL—to the exclusion of IHRL (specifically the ECHR, with which Government Ministers must comply in international as well as domestic law),[73] which governs relations between the state and the individual. Yet under IHRL, deprivation of life is subjected to (arguably) the most stringent of legal thresholds: the state is obliged to prove that the use of lethal force properly falls within the limited scope of possible derogations from the protections afforded to the targeted individual. Secondly, questions concerning the conduct of international relations and national security are customarily treated as non-justiciable by domestic courts in the UK. These are matters for the executive alone, exercising political judgment.[74] This "outsourcing" dynamic therefore works to exclude the possibility of domestic legal oversight.

The upshot is an anomalous state of affairs in which the UK Government's current approach is such as to deem it constitutionally legitimate to target and kill individuals for counter-terrorism

[70] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] I.C.J. Rep 14 at [263].
[71] Cabinet Office, *Ministerial Code* (London: TSO, 2010), para.1.2.
[72] Hansard, HC Vol.679, col.509 (8 September 2020).
[73] Human Rights Act 1998 s.6.
[74] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] A.C. 61 at [49].

purposes, notwithstanding unintended civilian casualties, whether or not as part of an existing armed conflict situation, and without any real possibility of domestic judicial scrutiny, so long as this takes place overseas—simply "out there", somewhere other than the UK. Very dubious assumptions of constitutionality flow from (mere) questions of legality here. On one hand: better, it seems, to argue that the legal power to authorise counter-terrorism targeted killings derives from and is conditioned by the international legal framework rather than the royal prerogative. The former, ostensibly founded on promotion of human rights, mutual respect for the sovereignty of individual nation-states, and the principle of reciprocity, among other things, is seemingly taken to confer a degree of constitutional legitimacy upon such an egregious exercise of public power that the latter—an ancient, undemocratic source of the constitution—plainly cannot achieve alone. Yet, on the other hand, this sustains the conditions in which Parliament's scrutiny role—especially under the War Power Convention—is shown to be rendered ineffective. Rather, the Government's framing of counter-terrorism targeted killings as an essentially *international* legal issue—and an exclusively "legal" issue at that—radically suppresses very important questions about the authority structures, including crucial mechanisms of political accountability, within which that framing might otherwise be challenged in the domestic constitution.

Democratic accountability challenges of, and for, the political constitution

The democratic accountability challenges highlighted in this article raise important questions about the effectiveness of the UK's "political constitution". In many ways, parliamentary scrutiny of the kind envisaged under the War Powers Convention represents the archetypal political constitutionalist arrangement. Not least, that is, as far as J.A.G. Griffith's famous exposition is concerned: here is a mechanism that realises a fundamental (normative) proposition of the political constitution, that "political decisions should be taken by politicians" (namely the elected Members of Parliament), or as Griffith put it, "by people who are removable". We have, therefore, at least on the face of things, a mechanism by which "the responsibility and accountability of our rulers" appears to be "real and not fictitious", which strengthens the position of the House of Commons in scrutinising and legitimating these decisions, and which, in doing so, forces the Government increasingly "out of secrecy and into the open". This, after all, is key. For as Griffith remarked:

> "Governments are too easily able to act in an authoritarian manner. But the remedies are political. It is not by attempting to restrict the legal powers of government that we shall defeat authoritarianism. It is by insisting on open government."[75]

That the operation of a mechanism like the War Powers Convention might thus serve as a microcosm of the political constitution is clear: the Convention has emerged in recent years as one such political remedy, appearing to militate against historic executive dominance of domestic war powers and, in turn, the potential for authoritarianism that such dominance inevitably entails. And as Strong notes, constitutional conventions such as this one, the manner

[75] Griffith, "The Political Constitution", 16.

of their formation and development, and the ways in which they work (or perhaps fail to work) in practice to condition the behaviour of political actors within the constitution, "epitomise Griffith's maxim that 'the constitution is no more and no less than what happens'"; they are, in other words, "the 'political' constitution's centrepiece".[76]

It is perhaps no surprise, then, that the idea(l) of the political constitution has emerged as a key theme of the recent literature in this area.[77] The strengths of Parliament's scrutiny role in the context of domestic war powers might well be seen to highlight the strengths of the political constitution in practice, and as such vindicate the distinctive theoretical approach with which it is synonymous—one that foregrounds, and fundamentally espouses, the essential constitutional, and constitution*alising*, role of such democratic-political mechanisms of accountability. And so, I argue, it proves in the context of the specific issues addressed in this article. The critical perspective of political constitutionalism encourages us to problematise the dubious legitimating role of (international) legality and rule-of-law lip service in the face of difficult constitutional questions to which neither, alone, provides a comprehensive response. It is only from this perspective that these issues, and their broader constitutional implications, are properly given the attention that they deserve.

Yet so too may the challenges of such parliamentary scrutiny arrangements be read as potential limitations of the working political constitution, and thereby raise questions about its conceptual apparatus. In this section, I discuss two such (related) questions which emerge from the key democratic accountability challenges discussed in this article. In attempting to flesh out the various lines of conceptual inquiry to which they may lead, it is hoped that this section will prompt further reflection amongst public lawyers who would seek to develop an account of the political constitution—whether in theory or as it can be seen to operate in practice; whether of the UK constitution generally or more specifically, in areas of constitutional study such as that explored here.

(International) law and (domestic) politics

The first question stems from a key dynamic that very clearly plays out in the context of the UK's contemporary approach to counter-terrorism targeted killing: that of the inter-relation of domestic and international legal frameworks, and in particular the role that appears to have been carved out of existing democratic accountability arrangements for the latter as an ostensibly self-standing source of constitutional legitimacy in such (albeit legally uncertain) uses of force. The question this raises is: how, from the distinctive perspective of political constitutionalism—within which the interplay of law and politics is otherwise most often framed in *domestic* terms—is the status of *international* law in the domestic constitution to be conceived? This speaks to a more fundamental conceptual point, concerning political constitutionalism's distinctive conception of "law" as merely "one means, one process, by

[76] Strong, "Did Theresa May Kill the War Powers Convention?", 402.
[77] M. Bennett, "Book Review: Parliament's Secret War" (2019) 39 L.S. 735.

which [political] conflicts are continued or may be temporarily resolved".[78] From the perspective of "legal" constitutionalism, one would perhaps naturally perceive international law—inasmuch as domestic law—as a discrete source of constitutional legitimacy for the actions of domestic institutional actors. A political constitutionalist critique of the role of international law, however, as effectively denoting *international politics* by some other means, might be sceptical of the democratic credentials of those politics.[79] This is particularly the case where they can be seen to penetrate—or, indeed, as I argued in the previous section, to *circumscribe*—crucial domestic sites of political scrutiny.

The way in which the UK Government frames its contemporary approach to counter-terrorism targeted killing as an exclusively international legal issue might be characterised as the use of "law" as a means to resolve the controversial political conflicts that surround such action. It exposes a potentially key weakness of the political constitution in practice, moreover, that domestic democratic-political accountability mechanisms are shown to have very little, if any, impact in terms of counteracting this effective "outsourcing" (to the international legal framework) of the legal basis for targeted killing. Those previous instances in which parliamentary scrutiny has been achieved in this regard—namely, the inquiries of the JCHR and ISC in 2016 and 2017, respectively, discussed in the first section—might be seen to demonstrate the role of those mechanisms in positively reinforcing this "outsourcing" dynamic. Both inquiries focused primarily on the international legal implications of targeted killing in the specific case of Reyaad Khan. The JCHR was ultimately willing to accept the (albeit exceptional) legality of such action, despite the undermining of Parliament's prior role, in 2013, under the War Powers Convention—explicitly refusing to endorse UK military intervention in Syria, the location of the relevant use of force in question—in which this appeared to result. The effectiveness of the ISC's inquiry, on the other hand, was undermined by its having been denied access to crucial intelligence material upon which an informed view of the matter might have been taken. Not only might it be said, therefore, that very dubious assumptions as to the constitutionality of targeted killing are being made on the narrow basis of its (purported) legality in international law; rather, important questions about the authority structures within which these powers fundamentally exist—not least as to Parliament's role therein—are being diminished in the process, for which key democratic-political accountability mechanisms might also be said to bear some responsibility.

This leads to further questions as to how the political constitution might (better) function otherwise. It may well be "unsurprising", for reasons Paul Scott has suggested, that the formal political response to the targeted killing of Khan "focused upon the procedure by which the decision was taken, and the international law compatibility of that decision":

[78] Griffith, "The Political Constitution", 20.

[79] For an alternative perspective, see Murray and O'Donoghue, "Towards Unilateralism? House of Commons Oversight of the Use of Force".

> "there is little evidence of, and little prospect of, substantive opposition to the targeted killing of those considered to pose a threat to the UK and its citizens, but merely a desire to regularise the endeavour."[80]

Indeed, targeted killing's "international" and "legal" implications have been entrenched as the predominant legitimating factors in a government narrative that seeks to consolidate the constitutional position of such action; and this, I have argued, has constrained the nature and extent of domestic democratic scrutiny that might be achieved, more generally, in this area. Nothing considered here suggests that it will not continue to do so in practice, at least for the foreseeable future. Yet the "democratic" constitutional politics of this context are placed in a difficult position, unable, it seems, to condition the exercise of the relevant public power not only in practice but crucially, from the perspective of political constitutionalism, also in principle.

How might present arrangements be squared with the principles of political constitutionalism? The decision to authorise counter-terrorism targeted killings is taken by an elected government minister. There is at least a plausible argument to be made that the sort of democratic legitimacy envisaged in Griffith's conception of the political constitution—both in terms of *ex ante* decision-making and *ex post facto* accountability—appears to be satisfied by this arrangement: the ostensible legitimacy-enhancing role of international law aside, this is a "political decision" taken by a "politician", who is in principle "removable" upon the loss of confidence of the Prime Minister, the political party that they represent, or, ultimately, the electorate. Yet this requires us to conceptualise the political constitution in arguably its most rudimentary democratic form. It overlooks the more roundly democratic principles underpinning Griffith's political constitutionalism, which clearly prioritises a meaningful role for Parliament in its demands that we "create situations in which groups of individuals make their political claims and seek to persuade governments to accept them", and that we have, among other things, "greater opportunities for discussion, more open government, less restriction on debate, weaker Official Secrets Acts, more access to information, stronger pressure from backbenchers".[81] It also tends to overlook the crucial role that Government Ministers play in maintaining the secrecy of the evidence base upon which such "democratic" decisions are made: the withholding of key intelligence (for all-encompassing reasons of national security) clearly counteracts the principle of "open government" upon which Griffith develops an account of the political constitution's capacity to forestall authoritarianism.

However, whether there are alternative arrangements in this area that might more faithfully reflect the sort of "democratic" decision-making and scrutiny embraced within the conceptual framework of political constitutionalism is debatable. It is unclear—even if highly unlikely ever to come to pass in reality—that opening-up the decision-making process involved in authorising targeted killings of suspected terrorists to debate on the floor of the House of Commons, say, or perhaps even to a select committee of appropriately security-cleared MPs,

[80] P.F. Scott, *The National Security Constitution* (Oxford: Hart Publishing, 2018), p.148.
[81] Griffith, "The Political Constitution", 18.

is any more compelling a "democratic" arrangement than that which currently prevails. This therefore presents an important challenge about how we conceptualise political constitutional accountability in this context—or potentially other such difficult contexts—which any further development of the theory of political constitutionalism might do well to confront.

Democratising executive power

The second key question raised here follows on from this tension. In foregrounding the democratic character of political accountability mechanisms as an empowering and legitimating force in the UK constitution, political constitutionalism offers a vital corrective to legalistic analyses which otherwise unduly focus on the constitution's capacity to *limit* or *constrain* (ultimately by legal and judicial means) the exercise of public power. Thus: how might political constitutionalism be reconciled with such mechanisms that can be seen to empower state actors in ways that might be considered undesirable from a democratic perspective?

This highlights another fundamental—perhaps irresolvable—tension underpinning an approach to the study of the constitution that recognises as "constitutional" that which simply "happens", and that the same must be true where nothing "happens".[82] This might be a valuable approach to understanding how the legitimating role of "democratic" politics in and of the UK constitution actually operates in practice. Yet there is perhaps no way of distinguishing from this perspective "between a failed process or mechanism of political accountability and one which has operated as it should, but in relation to which the background political sentiment is such as to allow something to happen unopposed".[83] Drone warfare and associated targeted killing practices, and their place within (or, perhaps more accurately, absence from) parliamentary scrutiny arrangements currently organised around the War Powers Convention, very clearly exemplify this:

> "Drone strikes … demonstrate an important limit upon the ability of the political process to provide meaningful accountability (however that concept is understood): that outcome relies on there being some opposition to what has happened, either within the formal political process (meaning, most obviously, amongst the Opposition or Members of Parliament generally) or in the broader, all-encompassing domain of informal politics (amongst the press, or public, or some section thereof). Where no meaningful opposition exists, political accountability can be worth very little."[84]

It is one thing, therefore, to accept the ebb and flow of "democratic" politics as a viable—maybe desirable—explanation for the contestability and contingency of the UK's constitutional arrangements. But in the context of the issues explored in this article, in which the power of the state is at its coercive peak, and in which standard democratic justifications for the exercise

[82] Griffith, "The Political Constitution", 19.
[83] Scott, *The National Security Constitution*, pp.148-149.
[84] Scott, *The National Security Constitution*, p.148.

of such power are increasingly excluded from the only existing mechanisms in which they might meaningfully be scrutinised and legitimated in practice, there is clearly scope to question the extent to which political constitutionalism might simply "threate[n] to cloak irresponsible, unaccountable and even authoritarian government power in the reassuringly respectable garb of the British constitutional tradition".[85]

The political constitution empowers the executive to act in ways of which we might both approve and disapprove. Yet, most often, there is plausible accountability for decisions taken by the executive—whether legal or political. A second key challenge that can be seen to emerge here, then, is whether the democratic norms of political constitutionalism can nevertheless be served by arrangements that not only bolster rather than constrain executive power, but which do so in ways that seem either resistant to accountability, or, in principle, uniquely unsuited to strong political oversight or control. To that end, the issues highlighted in this article provide an important example of the sorts of areas of the UK constitution in which further development of the political constitutionalist scholarship—such that it continues to shed light on "what actually happens"—might generate important, if confronting, insights as to the democratic credentials of executive power. For it is plainly a matter of fundamental constitutional concern that there exists within the UK a source of executive power that can be, and is, used to authorise the targeted killings of suspected terrorists—including, in some cases, British nationals—*without* either legal or political oversight of, it seems, any meaningful sort on the domestic plane.

Conclusion

This article has outlined the key challenges of parliamentary scrutiny of counter-terrorism targeted killings carried out by UK armed forces abroad. I have argued that these challenges can be seen to undermine the effectiveness of the UK's political constitution in practice, and that this raises questions of broader conceptual significance for the political constitution in theory: the frustration of parliamentary scrutiny in ways highlighted in this article very clearly creates problems for a conceptual framework that places primary reliance on such constitutional mechanisms of democratic-political accountability; and yet it remains unclear how the "outsourcing" dynamic I have described here—purporting to situate the legitimisation of the UK's counter-terrorism targeted killing policy *beyond* these mechanisms on the domestic plane—could be counteracted in ways that (better) reflect the norms embraced within that scholarship. If we are to take the idea(l) of the political constitution seriously—if we accept, in other words, that there are sites of the UK constitution that are, whether by accident or by design, regulated predominantly by political spheres of influence—these questions deserve our attention. The good health of the UK's political constitution—both in and of itself, and as a key theme of the burgeoning literature in this area of constitutional study—requires us to grapple with the potential limitations of political constitutionalism as much as its strengths.

[85] A. Kavanagh, "Recasting the Political Constitution: From Rivals to Relationships" (2019) 30 K.L.J. 43, 49.