



Roundtable

UK assistance to the US Drone Programme: Putting in place safeguards to protect human rights

Monday, 23 April 2018

INTRODUCTION

This roundtable discussion was held under the Chatham House Rule, but the summary has been agreed on by the main speakers. The discussion was organised to facilitate further debate following the publication of the Amnesty International Report *Deadly Assistance: The role of European States in US drone strikes*.¹

THE US'S ARMED DRONE PROGRAMME AND INTERNATIONAL LAW

Amnesty International and other NGOs have documented potentially unlawful US drone strikes over the course of more than a decade, and have consistently questioned the US's legal justification for drone strikes under successive administrations. A 2013 report by Amnesty International investigating US drone strikes in Pakistan between January 2012 and August 2013 found that the USA appeared to have killed people who were not directly participating in hostilities or posed no imminent threat to life.² It therefore concluded that the USA had carried out what appeared to be unlawful drone killings in Pakistan, some of which could amount to war crimes or extrajudicial executions. It also concluded that the USA had justified the targeted killing of individuals or groups suspected of involvement in any kind of terrorism against the USA, by adopting an overly expansive re-interpretation of the concept of "imminence" under the purported right of self-defence, in violation of international human rights law.

Further, the USA's use of armed drones outside areas of recognized armed conflict has been marked by a lack of transparency around the legal and policy standards and criteria the USA applies to the use of armed drones. This has both impeded an objective assessment of the relevant facts surrounding drone strikes, including the applicable legal framework, and prevented accountability and access to justice and effective remedies for victims of potentially unlawful US drone strikes. There has been no accountability for any US drone strikes, despite very clear documentation of civilian casualties.

Whilst President Obama undertook some limited reforms to the drone programme, there have been a number of concerning developments since President Donald Trump took office, including a massive expansion in drone strikes, particularly in Somalia and Yemen where airstrikes are said to have doubled and tripled respectively in 2017 compared to 2016.³ The Central Intelligence Agency (CIA) has also reportedly been given expanded

¹ Amnesty International, *Deadly Assistance: The role of European States in US drone strikes*, 19 April 2018, <https://www.amnesty.org/en/documents/act30/8151/2018/en/>

² Amnesty International, *'Will I be next?': US drone strikes in Pakistan*, October 2013, p.49, (Index: ASA 33/013/2013), www.amnesty.org/en/documents/ASA33/013/2013/en/

³ Bureau of Investigative Journalism, *US counter terror air strikes double in Trump's first year*, 19 December 2017, <https://www.thebureauinvestigates.com/stories/2017-12-19/counterterrorism-strikes-double-trump-first-year>

authority to carry out drone strikes⁴ which, it was suggested, will present challenges for transparency because the CIA does not acknowledge when strikes have been carried out. Further, President Obama's Presidential Policy Guidance (PPG), which put in place limited restrictions on drones and the use of lethal force, has been replaced by the Principles Standards and Procedures (PSP). Whilst they are yet to be made public, the new policy guidelines reportedly remove the 'continuing, imminent threat' standard for drone strikes, meaning that unidentified, so-called foot soldiers are now targetable.⁵

OUTCOMES OF DISCUSSION:

It was asserted that we are not seeing pushback from European States, as we would traditionally see, against the US's problematic policy and practice. European States, including the UK, are key to ensuring checks and balances on the expansion of the use of lethal force and their inertia, it was asserted, may allow for the US's practice to become increasingly embedded in the way lethal force is used and discussed in the US and beyond. It was further suggested that we are at a critical threshold for customary international law moving in a negative direction: the US has extended its definition of 'battlefield' and other States, either through their silence or, in some cases, through unclear statements, appear to be condoning its legal interpretations. The worry is that the US may interpret this international inaction as agreement with, and therefore a shift in, customary international law on the use of force.

This view was contested, however, by the assertion that it is only a small minority of powerful states perpetuating this inertia, and that a large group of States, including Brazil and other non-aligned States have voiced their opposition to the US position and legal interpretation.⁶ It was further contended that whilst the UK may appear to be articulating a position similar to that of the US, it has not yet acted on it. This is a watershed moment and the UK is crucial to holding the line on international law.

THE ROLE OF THE UK IN THE US DRONE PROGRAMME

The UK provides assistance to the US drone programme in three main ways.⁷

1. *The UK shares with the US intelligence that is used in its drone programme.*

The case of Noor Khan, whose father was killed in a US drone strike in Pakistan in 2011 and who in 2012 brought a case against the then Secretary of State for Foreign and Commonwealth Affairs⁸ on his father's behalf, demonstrates this. The legal challenge argued that the provision of locational intelligence to the USA posed a significant risk that GCHQ officials could be implicated in murder and crimes against humanity and/or war crimes under English law. It was noted that although the court chose not to adjudicate on the case,⁹ it did find that it was "certainly not clear" that UK personnel

⁴ The Wall Street Journal, *Trump Broadens CIA Powers, Allows Deadly Drone Strikes*, 13 March 2017, <https://www.wsj.com/articles/trump-gave-cia-power-to-launch-drone-strikes-1489444374>

⁵ The New York Times, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, 21 September 2017, www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html?_r=0; and The New York Times, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, 28 October 2017, www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html

⁶ Just Security, *Brazil's Robust Defense of the Legal Prohibition on the Use of Force and Self Defense*, 20 April 2018, <https://www.justsecurity.org/55126/brazils-robust-defense-legal-prohibition-force/>

⁷ For further discussion of the UK's assistance to US drone operations, see: Amnesty International, *Deadly Assistance: The role of European States in US drone strikes*, 19 April 2018, Pp. 36 - 50 <https://www.amnesty.org/en/documents/act30/8151/2018/en/>

⁸ *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs [2014] EWCA Civ 24*, https://www.reprive.org.uk/wp-content/uploads/2015/04/2014_01_20_PUB-Noor-Khan-Court-of-Appeal-judgement.pdf

⁹ *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs [2014], EWCA Civ 24*, para. 37.

complicit in US drone strikes would be immune from prosecution for murder.¹⁰

Another investigation by VICE News revealed how intelligence provided by the UK to the USA was instrumental in the killing of a senior field commander in al-Qa'ida in the Arabian Peninsula (AQAP) in a drone strike in Yemen on 6 May 2012. The drone strike was also reported to have killed a 19-year-old student who had returned home between school terms and who bore no relation to the commander.¹¹

2. *The UK allows the USA to utilise bases on its territory for surveillance and intelligence operations.*

For example, RAF Croughton in Northamptonshire, has a direct communications link through a fibre-optic communications system with Camp Lemonnier, a US military base in Djibouti.¹² This is the primary base of operations for the US Africa Command in the Horn of Africa and from where most drone strikes on Yemen and Somalia are carried out. This communications link-up allows analysis of video footage taken by drones to identify potential targets.

RAF Menwith Hill in Yorkshire, which is owned by the UK Ministry of Defence and “made available”¹³ to the US Department of Defense, also plays a significant role in the US drone programme. In particular it is a crucial element of the targeting of individuals in US “capture-kill operations” across the Middle East and North Africa, through the use of surveillance technology that is able to collect data from more than 300 million emails and phone calls per day.¹⁴ Confidential documents from 2010 and released by Edward Snowden describe how the NSA developed a new technique at RAF Menwith Hill to allow the targeting of suspected al-Qa'ida fighters in Yemeni cafes, primarily based on metadata.¹⁵

The UK role is unclear, but a leaked document describing the new technique developed to geolocate targets in Yemeni cafes boasts “In the short time that results from this technique have been available, many targets have been located to these cafes, including targets tasked by several target officers at NSA and GCHQ.”¹⁶

RAF Molesworth and RAF Digby are also integral to the US drone programme, and are both reported to have hosted US personnel. US personnel serving in RAF Molesworth are reported to have been assisting in the identification of targets for US drone strikes, and in RAF Digby, documents leaked by Edward Snowden show that US personnel work closely with UK personnel to “produce critical intelligence on an amazing variety of targets, all tasked by GCHQ”.¹⁷

¹⁰ *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs [2014]*, EWCA Civ 24, para. 19.

¹¹ VICE News, *Britain's Covert War in Yemen: A VICE News Investigation*, 7 April 2016, www.news.vice.com/article/britains-covert-war-in-yemen-a-vice-news-investigation; and The Bureau of Investigative Journalism, *Yemen: Reported US covert action 2012*, www.thebureauinvestigates.com/drone-war/data/yemen-reported-us-covert-action-2012#YEM046

¹² The Independent, *Washington spends £200m creating intelligence hub in Britain*, 17 May 2014, <http://www.independent.co.uk/news/uk/politics/washington-spends-200m-creating-intelligence-hub-in-britain-9391406.html>

¹³ See: www.raf.mod.uk/organisation/rafmenwithhill.cfm

¹⁴ The Intercept, *Inside Menwith Hill: The NSA's British Base at the Heart of U.S. Targeted Killing*, 6 September 2016, www.theintercept.com/2016/09/06/nsa-menwith-hill-targeted-killing-surveillance/

¹⁵ See: <https://www.documentcloud.org/documents/3089514-New-technique-geolocates-targets-active-at.html>

¹⁶ See: www.documentcloud.org/documents/3089514-New-technique-geolocates-targets-active-at.html

¹⁷ See: www.theintercept.com/snowden-sidtoday/3991133-the-other-end-to-end-sigint-site-in-the-uk/ and; www.theintercept.com/document/2017/09/12/uk-airhandler-trainees/

3. *UK personnel take part in US drone operations.*

Media investigations have uncovered the decade-long involvement of UK forces in ‘finding and fixing’ targets for the CIA’s drone strikes, including by carrying out assessments of the effect of strikes and providing training to Yemeni intelligence agencies for the location and identification of targets for the US drone programme. One example was highlighted in which a British Secret Intelligence Service (SIS) agent who had infiltrated AQAP was found to have provided the CIA with an AQAP leader’s location, allowing a US armed drone to target him in a strike.¹⁸ Further, it was highlighted that a Memorandum of Understanding between the UK and US governments showed that British RAF pilots had been assigned to the command of the US Air Force’s 432d wing, which operates drones out of Creech Air Force Base in Nevada for operations in Afghanistan and Pakistan.¹⁹

OUTCOMES OF DISCUSSION:

Concerns were raised regarding the activities of UK personnel operating from US bases, with specific concern that this form of assistance may implicate UK personnel in potentially unlawful US operations. Based on a visit to the base, one discussant clarified that the presence of UK personnel at Creech Airforce Base, Nevada was only to enable normal working hours through utilising the different timezones offered by RAF Waddington and Creech.

Amnesty International’s new report, it was asserted, demonstrates the current weaponization of data. Drone strikes are just the tip of the iceberg masking the ‘data machine’ behind attacks and the UK is a key partner in the intelligence-sharing infrastructure for ‘find, fix, finish’; helping the US in gathering data, analysing information, identifying targets and carrying out strikes.

Very little is actually known about this ‘data machine’. It was asserted that not only is there secrecy and unanswered questions on the use of armed drones in general; in addition the UK continually refuses to answer questions on its provision of assistance to the USA’s operations. It was acknowledged that operational issues necessitate some level of secrecy, however there was consensus that there is vital benefit to political and legal issues being debated publicly.

In response, it was suggested that alliances could be formed with those working on issues around data sharing to raise awareness of data gathering and sharing for drone strikes, as this is an urgent issue in governments all over the world.

Further, it was acknowledged that we are on the cusp of seeing many new drone users. Currently nine states and non-state actors are using armed drones, but this is set to double to 20 within the next two years. The UK, it was asserted, should utilise this opportunity to take the lead on setting standards on transparency.

It was suggested that when it comes to national security, the intelligence services are having to put pieces of a jigsaw together and in doing so have to deal with people and countries whose legal systems don’t match but who have the relevant information needed to keep the UK safe.

It was further suggested that within the UK military and government, there is a lot of will to improve and release safeguards, and transparency is seen as a means of reassuring the British public. The UK’s new manual on International Humanitarian Law has now been drafted and there is an opportunity for productive engagement.

The question of whether the US targets people on the basis of metadata, and therefore essentially targets

¹⁸ VICE News, *Britain’s Covert War in Yemen: A VICE News Investigation*, 7 April 2016, <https://news.vice.com/article/britains-covert-war-in-yemen-a-vice-news-investigation>

¹⁹ Ministry of Defence, Response to a Freedom of Information Act request, 8 September 2015, www.gov.uk/government/uploads/system/uploads/attachment_data/file/462375/20150908-UK_Personnel_stationed_Creech_Air_Force_Base.pdf

mobile phones, was raised. In response it was suggested that metadata forms only one part of the intelligence that is gathered and analysed for targeting. It was emphasised, however, that a former CIA director stated clearly “we kill people based on metadata”. Further, algorithms used to analyse metadata have been found to be unreliable and even human intelligence is fallible - there have been many instances when the US has been ‘played’ into targeting a source’s political rivals. Currently there is no publicly available information regarding what – if any - safeguards are in place in to ensure the UK is not providing assistance for potentially unlawful US drone strikes.

A recent amendment to the UK’s data protection bill, it was asserted, made explicit the link between intelligence sharing and UK complicity in the US drone programme. The amendment lost by just one vote, further indicating that there is concern and willingness to address this issue in Parliament.

THE LEGAL FRAMEWORK ON ASSISTANCE

The rules on state responsibility are rules of customary international law and are reflected in the International Law Commission’s (ILC) Articles on State Responsibility. Under these rules, a State bears direct responsibility if its organs or agents violate international human rights or humanitarian law, including extraterritorially.

According to Article 16 of the Articles on State Responsibility, a State can be considered to be responsible for assisting, or complicit in, a violation of international human rights or humanitarian law if:

1. When providing assistance, the assisting State “does so with knowledge of the circumstances of the internationally wrongful act”;
2. The act is such that it would have been wrongful had it been committed by the assisting State itself.

The degree of knowledge that an assisting State (State A) needs to possess is actual knowledge of the relevant circumstances, meaning “near-certainty”, or something approaching practical certainty as to the circumstances of the wrongful act would be sufficient. The degree of knowledge required needs to take account of the fact that the assisting State is assessing whether relevant events will occur in the future and therefore there can never be absolute certainty. There may be “knowledge” of an internationally wrongful act, without the need for a court (whether international or domestic) to have determined the wrongfulness of State B’s conduct.

Where the assisting State is considered ‘wilfully blind’ – that is, it makes a deliberate effort to avoid knowledge of illegality on the part of the State being assisted, in the face of credible evidence of present or future illegality – that is also sufficient to satisfy the ‘knowledge’ requirement.

The assisting State does not need to know the motivation or objective of carrying out such strikes for it to be responsible for assisting any unlawful strike. Similarly, it does not need to desire or intend that assistance to be used in an unlawful drone strike; it is sufficient that it has foreseen that its assistance would be used in an unlawful drone strike.

The assistance provided also need not be essential to the performance of an internationally wrongful act; it is sufficient if it contributed significantly to the wrongful act.

Assistance in the context of drone strikes could include making available territory for bases; sharing intelligence, for example to locate targets for attack by armed drone; and providing other operational support such as vital communications and satellite technology that facilitate attacks. Additionally, as a party to both the International Covenant on Civil and Political Rights and the European Convention on Human Rights, the UK may violate its own obligations under international human rights law if it assists in violations of human rights by others – such as a violation of the right to life – when it knows or should have known of the violations (including when those violations occur outside its jurisdiction or territory). As a party to the Geneva Conventions, the UK should also not encourage, aid or assist in violations of international humanitarian law by

parties to an armed conflict as part of its obligation under Common Article 1.²⁰

UK ASSISTANCE TO US DRONE STRIKES: RECOMMENDATIONS

It was asserted that concerns around the US drone programme have been extensively documented by many credible organizations and UN bodies for more than a decade and the UK is therefore providing assistance to the USA in the knowledge that this could assist potentially unlawful drone strikes. A lack of transparency around this assistance means that it is unclear what safeguards, if any, are in place to ensure that provision of assistance to the US does not violate UK domestic or international law.

The UK government has stated that the US can make its own interpretation of what it is permitted to do under international law, and that it is a matter for the US administration to ensure its actions are lawful.²¹ This approach, it was suggested, seems to be one which grants a wide margin of discretion to the US government, despite the extremely problematic nature of the US drone programme. It was asserted that the UK is therefore at risk of being responsible under international law for assisting in unlawful drone strikes by the USA and at risk of violating its own obligations under international human rights law and international humanitarian law.

It was further suggested that the UK turns a blind eye to the issue of its potential complicity in unlawful killings because it doesn't consider such assistance to be illegal and therefore doesn't consider it to be a risk to the UK.

In this context, Amnesty International is making the following recommendations to the UK:

- Refrain from assisting in any way in US drone strikes that may amount to or result in a violation of international human rights law or international humanitarian law – including by allowing the use of military bases, the sharing of intelligence or other information, or the provision of personnel;
- Initiate a full public inquiry into the State's assistance to the US drone programme, including intelligence sharing arrangements with the USA;
- Provide urgent public clarification on the safeguards it has in place to ensure it is not aiding and assisting in potentially unlawful US drone strikes;
- Train UK officials to recognise risks of assistance and put in place mitigating measures.

How the Netherlands has dealt with concerns on its assistance to the US drone programme was raised as an example of good-practice. An extensive inquiry into the risk of Dutch data contributing to unlawful use of force, including through drones has led the Dutch government to implement a number of safeguards in this regard.²² Subsequently, the Dutch intelligence services must assess the risk that the sharing of intelligence could contribute to a violation of international law; seek legal advice if it is unclear whether the recipient State is engaged in unlawful use of force; include in each provision of assistance a written condition that such intelligence cannot be used for violations; and if there is suspicion that any intelligence data provided by the Dutch intelligence services has contributed to another State's unlawful use of force, an investigation must be carried out and a reassessment of risks conducted before further information is shared with the recipient State.

²⁰ For further discussion of the international legal framework on assistance, see: Amnesty International, *Deadly Assistance: The role of European States in US drone strikes*, 19 April 2018, Pp. 28 – 24, <https://www.amnesty.org/en/documents/act30/8151/2018/en/>

²¹ See: <https://publications.parliament.uk/pa/cm201213/cmhansrd/cm121106/halltext/121106h0001.htm>

²² Review Committee on the Intelligence and Security Services, *Review Report on contributions of the MI6 to targeting*, 3 August 2016, <https://english.ctivd.nl/documents/reports/2017/02/23/index> See also the response of the Dutch Government to Amnesty International's report, in annex I of Amnesty International, *Deadly Assistance: The role of European States in US drone strikes*, 19 April 2018, <https://www.amnesty.org/en/documents/act30/8151/2018/en/>