

APPG on Drones Meeting Notes

The Government's policy on the use of drones for targeted killing

Wednesday 25 May 2016

Speakers:

Rt Hon Harriet Harman MP, *Chair, Joint Committee on Human Rights*

Professor Phillipe Sands QC, *Professor of International Law, University College London*

Jennifer Gibson, *Staff Attorney, Reprieve*

Chair: Baroness Vivien Stern

Introduction

The report of the Joint Committee on Human Rights, published on 10 May 2016, on 'The Government's policy on the use of drones for targeted killing' found that 'although the Government says that it does not have a "targeted killing policy", it is clear that the Government does have a policy to use lethal force abroad outside armed conflict for counter-terrorism purposes.' The APPG on Drones held an expert briefing meeting to consider the key findings and recommendations of the report.

The following is a summary of the points made by the speakers and comments raised from the audience.

Speakers

Harriet Harman MP

The Joint Committee on Human Rights (JCHR) was established when the Human Rights Act was passed. It is unlike most select committees in that it is a joint committee of the House of Commons and House of Lords.

When the Prime Minister announced in September that Reyaad Khan had been killed by UK military forces acting on intelligence, the JCHR announced, on the basis that it was a new departure, that it would conduct an inquiry into the strike. The committee wanted to establish the legal basis for the strike, as a life had been taken in an area where the government had said the UK was not engaged in an armed conflict as there had been no vote in the House of Commons. The vote to authorise airstrikes in Iraq expressly stated that there was to be no military action in Syria. That said, Khan's life, along with that of two others, was taken. The Prime Minister said that Khan was dangerous, planning an attack, and that the strike was taken to protect British citizens. In addition to seeking the legal basis, the JCHR also sought to establish what accountability mechanisms exist. If a police officer takes a life on the streets of the UK then automatically the matter is referred to the Independent Police Complaints Commissioner, not on the basis that there is an assumption of wrongdoing, but just in recognition that if the state has taken a life there must be a proper inquiry into it.

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The JCHR thought that, bearing in mind the government took the action that it did, the government would have decided on the legal framework before acting. However there appeared to have been a level of confusion about the legal basis. Different things were said by the PM to the House of Commons than by the Permanent Representative to the UN Security Council. After having heard a great deal of evidence, the JCHR established what it thought the government's view of the legal basis was: that we were in armed conflict in Syria, as we had approval for armed conflict in Iraq and the Khan strike was an extension of that armed conflict. Rather than individual self-defence of the UK, the government was actually arguing that it was collateral in relation to the armed conflict in Iraq. This is important because if there is armed conflict, international humanitarian law (IHL) applies. If it is not armed conflict, the stricter standards of the ECHR and Human Rights Act apply.

The government has indicated that it will respond to the report in September.

Despite finding that the Khan strike was part of an armed conflict, the government told the JCHR that it would be prepared to use lethal force by drone strike in areas where there is no armed conflict overspill from Iraq, such as in Libya or Yemen. The JCHR has asked the government to acknowledge that the higher standards should apply to such a strike. For example, the question of imminence has a different role in relation to situations that are not armed conflict and the HRA applies.

The legal framework is based on a distinction between crime fighting at home against terrorism, in which it is a crime and the criminal law and ECHR apply, or it is a war situation. However we are in a different situation now. The ability of others to mount attacks in the UK is massively enhanced by the internet. Similarly, technology has affected what our armed forces can do, as they can carry out lethal attacks by drone from the other side of the world. Therefore the legal frameworks are maybe not suited to this situation. Secondly, the normal assumption is that abroad is war against a state, and at home it is crime against criminals. However what is happening with Da'esh is that their activities are without territorial limit. Therefore the issue of at home vs abroad is challenging for the legal framework. For example, the question of imminence. If it concerns a police officer in the UK, imminence means immediate. How does that apply to the generalised imminence of an attack being planned abroad but is not known when it will happen in the UK. The legal framework needs to be looked at again.

Rather than waiting to be taken to the European Court of Human Rights (ECtHR) and be judged to be in breach of the ECHR, there are mechanisms to ask courts to issue a declaratory, advisory judgment. The JCHR has called for a specific dialogue with the courts, and also with the UN and the Council of Europe.

Regarding accountability, if someone is killed by a drone in Libya there is no accountability. It is just done by the military full stop. No one considers whether it was justified and whether the law was complied with. The JCHR recommended automatic referral to a reviewing body so that those who carry out targeted killing know that someone will look over their shoulder afterwards to see whether or not their action was justified. There is a problem that such

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strikes involve sensitive intelligence. However we have the ISC whose members are security cleared. The problem with the ISC is that they are only able to scrutinise the intelligence services, but the killing is carried out by the military. The Terms of Reference of the ISC would therefore need to be changed. Currently the ISC is looking into the intelligence that led to the Khan strike, but they then have to stop because the military carried out the strike, even though the military is effectively carrying out an intelligence operation. The JCHR therefore recommended that the ISC's remit be extended so that they can automatically look at any future targeted killing. Accountability isn't just a good policy action, it is a legal requirement under the ECHR. Nobody wants the government to stand by, but if they are taking a life they have to be absolutely sure that it was necessary and there is no alternative.

The final point is that the Offences against the Persons Act states that murder is the single crime whereby an individual may be tried in the UK even if they commit the act abroad. Therefore if our military kills someone in Libya they must have a clear defence. It is not good enough to say that they wouldn't be prosecuted because of prosecutorial discretion. Military personnel cannot be left in a situation where they can be vulnerable to a charge or accusation of murder, just because the government thought the strike was the right thing to do but didn't have a clear legal basis.

The JCHR members were disappointed that the government appeared resentful that they were calling the Defence Secretary to answer questions. But in fact it is beneficial for states to have proper accountability. There is always the temptation when in government to just do what you think is right. But when it comes to taking a life, the government should have been happy that the JCHR was looking into it.

Professor Phillipe Sands QC

The report of the JCHR is welcome. It is very powerful and useful, though Philippe is not in absolute agreement with everything in it.

In August, the UK moved for the first time to a situation in which it will kill its own nationals. If we go back to World War II, in 1944 and 45 a situation arose regarding what would happen when the Nazis were defeated. Churchill wanted to have the senior figures lined up and shot. However he was dissuaded by Roosevelt and Stalin, and eventually contributed to the creation of the Nuremburg trials.

The events in August seemed to be a step change from 1945 to 2015. The UK appeared to be on the cusp of abdicating its commitment to a rules based system. A system in which the application of criminal law is the primary tool to deal with people who pose a fundamental threat. No one should be under any illusions as to the threat. Philippe met with sexual violence victims of ISIL and took two to three days just to re-centre himself.

However, the key point is that, as we were after the events of 9/11, we may fight with one hand tied behind our back, but it is about remaining true to our fundamental values, which is a rules based system under the Rule of Law in which justice is delivered by courts, not drones. Though clearly there may be some instances where one has to depart from that.

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The singular contribution the JCHR makes is that it jumpstarts the process of requiring the government to give a proper account of what happened with the Khan strike. The policy that emerged in August appeared to be made on the hoof. There was no articulated substantive structure about how we were to pursue this policy. The announcement of the strike deflected from domestic issue. Many members of the bar read with astonishment when the Attorney General appeared before the Justice Committee and said he was in agreement with everything the Prime Minister said. That is not the function of an Attorney General. The function of an Attorney General is to say that advice was given and it was followed, not to publicly agree with the Prime Minister.

That is the broad context. The strike was a new departure and it is a policy of targeted killing. It may or may not be an armed conflict. These are complex issues.

Former Deputy Director of the CIA Michael Hayden has put forward a defence of the Bush administration in terms that the US does not even do what the UK does as it doesn't kill its own nationals as a result of its constitutional order. The concern therefore is that other people are noticing. The UK is a global leader on the Rule of Law and if the UK wobbles on this, it can set a dangerous precedent.

The conclusion of the JCHR that the Khan strike was part of a wider armed conflict is controversial. It would be immensely surprising if everyone adhered to that view. It's not immediately apparent that it is a persuasive conclusion. Parliament had not authorised the use of force in Syria; they had voted against it. One can see why the JCHR made the conclusion that they did, but it may have far reaching consequences. Once there is spillage from Iraq into Syria, it is not a great leap to have spillage into Yemen, Libya and other parts of the world. Phillippe is not aware of any spillage doctrine in international law, which remains primarily territorial focused. That is the advice the Foreign Office would give: that conflicts exist within internationally recognised states. The spillage argument is very worrying, and the government may be rather pleased that the JCHR has made that conclusion as it opens the door to more drone strikes. It also opens the door to treating terrorists in Syria not as criminals but as warriors. If we say that there is an armed conflict in Syria and we can therefore kill our own nationals, there is a principle of reciprocity that means they can kill us. So the JCHR has unwittingly legitimised the activity of ISIL. In relation to IRA, there was always cross party support that at no point, as a matter of law or policy, would the troubles in Northern Ireland be treated as an armed conflict. Part of this was a policy choice as the moment you call it an armed conflict you legitimise actions and turn individuals into warriors. The JCHR has thus fallen into the trap with ISIL that we avoided with the IRA.

Regarding imminence, the idea that taking out a couple of low grade individuals somewhere in the middle of Syria because they posed an imminent threat of an armed attack against the UK stretches the bounds of plausibility. The government's response to the report will need to articulate the test of imminence.

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One beneficial aspect of the JCHR report is that it swats away the government's argument that human rights law applies. There are no legal black holes, and the JCHR makes this clear. This is important, we cannot have a legal black hole, and it is unlikely that one exists.

Finally, in relation to accountability, this is extremely important. The JCHR rightly knocks on the head the suggestion that there should be no accountability in the courts. The government's position on this is an abdication of the historic position taken by the UK. There is no reference to the International Criminal Court (ICC) in the report. However if the government is to embark on a program of targeted killing of its own nationals that is not lawful in accordance with international law, that may be a crime against humanity. This may bring UK ministers within the jurisdiction of the ICC. Those who take these decisions should be aware that the book stops with them in the ICC.

Jennifer Gibson

One of the things in the report that is immensely useful but so far has been missed is the highlighting of the UK's involvement in the US drone program. We keep talking of the Prime Minister's statement as a new departure. In some way it is. But the reality is that for a number of years now the UK government has worked hand in glove with the US in its covert targeted killing in countries like Yemen, Somalia and Pakistan. All this has been done under the radar and without any accountability at all. This is effectively because the UK was doing the find and fix part – finding the targets – rather than pressing the button. In fact, the find and fix part is far more difficult and crucial to the mission than pressing the button at the end.

A report recently came out by VICE news that showed direct British involvement in the US drone program in Yemen. This was not just by sharing intelligence or adding targets to the US kill list, but by actually sending in their own hit squads to identify targets. There is evidence of direct British involvement in at least nine drone strikes, some of which killed civilians. One such strike took out a high level target but also took out a 19 year old. This was a strike which by all accounts was driven by the British rather than US government.

Some of the complicity highlighted in the JCHR report involves US bases being used to fly US missions in places like Libya. The Defence Secretary merely said that yes he authorised it and yes we think it is legal, without any sort of explanation of why he took this view.

Intelligence sharing has occurred for a number of years. There are British officials on record saying they are proud of the intelligence sharing that led to, for example, US targeted drone strikes in Pakistan. That complicity opens up the same legal can of worms that pushing the button does. In this sense therefore it can be questioned whether the Khan strike was in fact a new departure, or was just a new departure in that the government is openly admitting what it is doing.

Why is accountability so crucial? What we have seen with the US program, 7 and a half years later with no accountability, is what happens. There is a program that has taken over 500 strikes outside of declared warzones, has killed upwards of 5000 people, where the government first denied it existed, then said it does exist but don't worry because we're not

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killing any civilians, and then said three years ago that it would give transparency. What in fact the US published effectively amounted to a press release on what the standards are for killing abroad. That press release is what is now known as the near certainty test – that a strike would not be taken unless there was near certainty that there were no civilians in the area. Unfortunately, what came out two years later was that the administration simultaneously passed a number of executive classified orders that exempted Pakistan and Yemen from the near certainty test. What we have then is a drone program targeting people on the basis of patterns of behaviour, on the basis of whether people are coming to the aid of others, a program that has targeted funerals, all without any accountability. The standard has therefore slipped to the point where this weekend the US rationale for taking a strike in Pakistan against the Afghan Taliban leader seemed to employ a standard that he should face the consequences of his refusal to negotiate. That is not a legal standard. That's not even a standard that gives the American people a standard to make a judgment as to whether this is a strategically smart thing to be doing.

Senior members of the military have called it a failed strategy, but because there has been no accountability and transparency, those judgments by the military are being ignored.

Promises to release basic levels of transparency in the US were recently made: how many strikes have been taken and how many people have been killed. The administration, 12 weeks on from making those commitments, still haven't released the numbers because they can't actually work out how many people they've killed, including how many were civilians. That raises huge problems. Forget the legal problems. How do we judge whether this strategy is helping the US and making the situation worse?

Comments from the audience

Mark Pritchard MP

The Taliban leader was presumably killed because he has been involved directly or indirectly in the death of British and American citizens. Also some sources relied upon alleging UK complicity may have their own motives. Regarding imminence, John Kerry referenced that word two or three times in relation to the killing of the Taliban leader.

Regarding the role of the Attorney General, the criticisms of the current Attorney General doesn't reflect on recent history. For example Lord Goldsmith, Tony Blair and the resignation of the legal officer in the FCO vis a vis the Iraq war. There is a difference between the Attorney General agreeing with the Prime Minister because of the advice, and the Attorney General agreeing just because he agrees with the Prime Minister's policy which may also reflect his advice.

The key thing for him as the most junior member of the JCHR was to ensure protect military, protect intelligence officers, and protect Ministers. Consider the Jack Straw case in relation to Libya. And most of all protect British citizens, whether at home or abroad. There is a clear

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legal framework and there is legal and parliamentary oversight. The extension of the ISC's powers is a recommendation he hopes the government will take on board.

Regarding Michael Hayden, of course the UK Prime Minister came to Parliament when a UK national was killed in a drone strike. The CIA may or may not kill US citizens, but they won't be going to congress to explain it.

Emily Thornberry MP

The JCHR report is timely and important. We are at a time when technology is moving ahead. There will be increased use of drones. If there is technology that can protect our troops and put us on the front foot, that is fine in principle. It is preferable to see a drone involved in an attack than five frightened 19 year olds. But we have to be absolutely clear about how we use drones and in what circumstances. We must be completely confident that what we are doing is on a certain legal basis. One of the great British values is the way in which we have been largely responsible for the development of international law, in particular human rights law. There have been a few slips, but we have promoted it across the world.

There must be accountability. At the moment, being pragmatic, the ISC might be the best place to do it. But in the long term we need a different group, possibly of privy counsellors, so that there is accountability but not purely limited to drones. We are moving into circumstances whereby the great 'Robin Cook moment' of having a vote in Parliament before going to war is slipping because we are increasingly using Special Forces in circumstances where nobody in Parliament is talking about it. We have the king of Jordan gossiping with congressmen in the US about the use of Special Forces in Libya, but we are not told about it. The foreign secretary is saying we're thinking of sending troops to train forces in Libya, there would be no accountability in relation to that. If we do send troops to train in Libya, who will defend them if lethal force is necessary. There seems to be a sufficient amount of work to ensure that a particular committee is established to whom the government is made accountable for this type of hybrid situation. There can't be an all or nothing approach to this. Such a committee should also have access to the legal advice upon which such action is taken, and it could bring a matter to Parliament if necessary.

David Davis MP

The UK Special Forces ran into a host of legacy trials a few years ago regarding action in Northern Ireland. This made them sensitive as to the legal basis upon which they were acting. . One of the side effects of that was regarding operations by Special Forces in Baghdad against al-Qaeda in Iraq, British Special Forces, who operated in conjunction with the Americans, acted under British legal principles, not American ones. This was to protect personnel involved. This standard seems to be slipping. It is unlikely that what is going on in Yemen is being done under British legal principles. We need to establish whether there has been a change of the principle that was applied for operations in Baghdad in Iraq.

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Harriet Harman MP

The JCHR didn't ask for the specific legal advice for the Khan strike, but rather asked for the legal framework, so they could understand at which point in the decision-making process the advice was coming in. However the government declined to do so.

The JCHR was also clear that if you help someone kill someone else by providing intelligence and being part of the plan, then you are part of the murder. Therefore providing shared bases or intelligence makes us equally complicit in what the Americans are doing. We therefore need to be absolutely clear that by our standards what the Americans are doing is lawful. We can't say we didn't push the button and so it's alright.

Regarding killing our own nationals, there is little difference between killing our citizens and killing someone else's. We killed a Belgian at same time we killed Khan. We're not more or less culpable.

Regarding the spill over armed conflict argument, that conclusion was on the basis that there was an established geographical linkage, but will wait to see what the Government responds and at that point hope can work together to at least get some accountability.

Phillipe Sands

If it smells like on the hoof and looks like was on the hoof, the action probably was done on the hoof. We also need to ask what lessons we have learned since Iraq.

Jennifer Gibson

The US has killed 3 Americans, one intentionally and two accidentally. There was immense outcry in the US and they haven't done it again. The US cares a lot more about killing own citizens than do about killing own citizens, as a result of its written constitution.

It is difficult for the US to put any more US citizens on the kill list because they would have the right to challenge their inclusion on that list.

One of concerns about the kill list and imminence is that the idea of a kill list is completely at odds with the idea of imminence. The idea that you can create a list and have it for months and that person still poses an imminent threat does not work.

Regarding the evidence of complicity, there is mounting evidence from a number of sources of British involvement. It is coming from CIA and British sources and CIA documents. The paper trail and source trail is raising to level where it is becoming hard to deny.