



Written by [Joe Wolverton, II, J.D.](#) on October 24, 2012

Lawsuit Claims U.K. Participation in U.S. Drone War Could be 'War Crime'

On Tuesday, October 23, the British High Court heard arguments that the United Kingdom's participation in and cooperation with the U.S. drone war in Pakistan may amount to war crimes or complicity in murder.

Lawyers representing Noor Khan presented evidence in a case filed by Khan after his father and at least 40 other people were killed in a U.S. drone strike in North Waziristan on March 17, 2011.



At issue in Khan's legal challenge is the sharing by the U.K. intelligence services with their U.S. counterparts. Khan claims that this information is critical in the United States' destroying targets inside the sovereign territory of Pakistan.

[An article in the Guardian \(U.K.\) reports](#) that during Tuesday's proceedings in the London courtroom, "The British government has declined to state whether or not its signals intelligence agency GCHQ passes information in support of the CIA drone operations over Pakistan, although the court heard that media reports suggest that it does."

In a timely coincidence, the Royal Air Force announced a significant ramp up in the number of drones it will soon have airborne in Afghanistan. Again, [the Guardian reports](#):

The UK is to double the number of armed RAF "[drones](#)" flying combat and surveillance operations in [Afghanistan](#) and, for the first time, the aircraft will be controlled from terminals and screens in Britain.

In the new squadron of unmanned aerial vehicles (UAVs), five Reaper drones will be sent to Afghanistan, the *Guardian* can reveal. It is expected they will begin operations within six weeks.

Until now, American airmen stationed in Creech Air Force Base, Nevada, have piloted the British drone fleet. When the new drones are ready to fly, they will be guided by RAF pilots stationed in Great Britain.

Martin Chamberlain is Khan's lead attorney, and during the two-day hearing he presented evidence he believes will be sufficient to compel the high court judges to require U.K. Foreign Secretary William Hague to disclose the scope of the British government's cooperation with the United States.

Hague will neither confirm nor deny any intelligence sharing with the CIA.

The highlights of the hearing were provided by the *Guardian*:

Martin Chamberlain, counsel for Khan, said that a newspaper article in 2010 had reported that GCHQ [Government Communications Headquarters] was using telephone intercepts to provide the US authorities with locational intelligence on leading militants in Afghanistan and Pakistan. The report suggested that the Cheltenham-based agency was proud of this work, which was said to be "in strict accordance with the law".



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On the contrary, Chamberlain said, any GCHQ official who passed locational intelligence to the CIA knowing or believing that it could be used to facilitate a drone strike would be committing a serious criminal offence.

Chamberlain stated that any “participation of a UK intelligence official” in the U.S. drone war in Pakistan may amount to “encouraging or assisting murder.”

Anticipating the claim by Foreign Minister Hague and the GCHQ that any assistance given by the British to the Americans is protected from prosecution by a shield of “combat immunity,” Chamberlain insisted that his client was not seeking to hold any one individual responsible for the deaths, rather he “was seeking a declaration by the civil courts that such intelligence sharing is unlawful.”

According to a British legal blog: “Combat immunity is a defence, or more specifically, an exemption from tortious liability that applies to members of the armed forces or the Government, within the context of actual or imminent armed conflict.”

It might behoove Chamberlain to attempt to hold Hague, the U.K. Ministry of Defense, and the GCHQ accountable for the death of Khan’s father and challenge the “combat immunity” defense in light of a persuasive ruling handed down by the High Court in 1994.

The case of *Bici v. Ministry of Defense* (1994) is a U.K. High Court case in which two Kosovar Albanians sued the British Defense Ministry for the actions taken by British soldiers involved in the United Nations peacekeeping operation in Kosovo. The claimants and other Kosovar Albanians had been traveling in a car when the soldiers shot and killed two of the car’s occupants.

In this case, the High Court held in part:

Combat immunity was not strictly a defence. Where it applied, its effect was to render certain kinds of disputes non-justiciable. Given that the defence of self defence failed, the principle of combat immunity could not be engaged. The instant incident was far from any kind of situation where the courts would permit the executive by reason of state necessity to act free from any legal fetters for negligent or intentional acts. It was at most an incident of disorder in the streets. The soldiers had not claimed that they were in a combat situation and they were plainly not. It could not sensibly be said that the claimants had, by their conduct, shared in the responsibility for their injuries. Any imprudence on their part was dwarfed by the acts of the soldiers. It would not be just or equitable to reduce the damages on grounds of contributory fault. Had the soldiers been acting in lawful self defence, their firing, inaccurate as it was, would not have been considered negligent in the circumstances.

Using the *Bici* decision as precedent, Chamberlain could apply these principles to Hague and officials of British intelligence to show that their actions breached the duty of care as defined by the High Court in *Bici*.

For their part, the lawyers representing Hague refused to comment on the British government’s assistance in the U.S. drone war. Government counsel argued that any information they could give — if they even had it — would be “prejudicial to the national interest.” In American challenges to intelligence community activities, this procedural parry is known as a Glomar response. In such a maneuver, the agency that is the subject of the inquiry “neither confirms nor denies” the existence of the material requested.

Named for [a ship built by the Central Intelligence Agency \(CIA\)](#) to covertly recover a sunken Soviet



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submarine, a Glomar response typically is given in two scenarios.

First, where a refusal to forward the documents would have the effect of admitting that they actually exist, thus compromising national security.

Second, intelligence agencies will give a Glomar response when producing the requested information would stigmatize a person named in the documents being sought.

One fact that the British government cannot deny is that the number of Pakistanis killed in drone strikes has spiked significantly under the Obama administration.

According to [data published by the Bureau of Investigative Journalism](#), “drone strikes killed between 2,562 and 3,325 people in Pakistan, of whom between 474 and 881 were civilians, including 176 children.”

Also, given the tragic trajectory of the U.S. death-by-drone program, it is all but certain that the death toll will rise and the number of families robbed of mothers, fathers, sons, and daughters will increase in direct proportion to the number of drones filling the skies of Pakistan.

As for the likelihood that Khan’s lawsuit will bear fruit, the *Guardian* reports:

The court would need to be satisfied that there is no international armed conflict in Pakistan, with the result that anyone involved in drone strikes was not immune from the criminal law, and that there had been no tacit approval for the strikes from the Pakistan government — another matter that the British government will neither confirm nor deny.

The court would also need to consider, and reject, the US government’s own legal position: that drone strikes are acts of self-defence. It would also need to be satisfied that the handing over of intelligence amounted to participation in hostilities.

As the case carries on, [statements made in Monday night’s presidential candidate debate](#) make clear that regardless of who occupies the Oval Office in January, there will be no change in the U.S. commitment to drone-delivered death in Pakistan.

Photo of Predator drone: AP Images



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