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Author

Medeiros, Christopher Paul Kailani

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Neither Legal nor Justiciable: Targeted Killings and De Facto Immunity within the War on Terror

By: Christopher Paul Kailani Medeiros

ABSTRACT

This article seeks to highlight and discuss many of the legally problematic aspects of the US's War on Terror targeted killing policies and programs, namely drone strikes and "capture/kill" missions. First, the US has sought to characterize the War on Terror, in its entirety, as a "non-international armed conflict of international scope" as a result, governed by the paradigm of International Humanitarian Law (IHL). While the factual basis of this definition is dubious at best, it is exceedingly more permissive of the sort of lethal force that central to the targeted killing program. Suspending disbelief, however, it seems equally questionable that the US actually respects the legal provisions of a non-international armed conflict. Though current disregard for transparency impedes a more thorough analysis, what information is available strongly suggests that targeted killing policy explicitly violates the IHL principles of proportionality and distinction. Finally, domestic law, unfortunately, does not appear any more capable of constraining targeted killing policy's inherent potential for widespread abuse, with current juridical dogmas regarding questions of standing, political questions doctrine, and state secrets privilege cumulatively effectively rendering the program non-justiciable.

Keywords: Targeted Killing, Unmanned Aerial Vehicle, Principle of Distinction, Principle of proportionality

INTRODUCTION

Though a fundamental part of US tactics in the War on Terror since as early as 2002, the practice of targeted killings has represented, until recently, one of the War's most troubling, yet least scrutinized aspects. From early on, practices such as "extraordinary" rendition, indefinite detention, and "enhanced" interrogation, as well as the War's very *raison d'être* have been subjected to intense examination and harsh criticism. The US's reliance on targeted killings, by

unmanned drone or other means, however, has only just begun to receive comparable attention. This article will argue that from the perspective of international and domestic law, US targeted killing policy is extremely problematic, with a wide potential for abuse and few accountability safeguards. First, targeted killings highlight the manner in which the US has tended towards a characterization of the War on Terror under international law that is not only largely erroneous, but also highly permissive of lethal force. US targeted killing policy also suffers from a complete lack of transparency that, in turn, renders impossible any assessment of its compliance with international law. Despite its highly objectionable status, however, the targeted killing program seems to exist in a void of justiciability, with neither domestic nor international law truly capable of demanding accountability of its architects or offering redress to its victims. The sum of these factors is a US foreign policy that in addition to displaying a remarkable potential for abuse, also operates with complete impunity.

This article will proceed in the following manner. The remainder of this introductory section will seek to elaborate upon the exact meaning of “targeted killing,” offering background information on drone strikes and kill/capture raids, the two most common targeted killing tactics. The following section will highlight some of legal issues inherent in US targeted killings from the perspective of international law. After showing that the US violates, yet is not accountable to international law in any meaningful sense, the article will demonstrate that domestic law is not a forum any better suited to addressing the targeted killing program’s utter disregard for legal principles.

WHAT ARE TARGETED KILLINGS?

The recent surge in interest in targeted killings is due in part to two occurrences. First, on the 20th of September, 2011, a pair of Predator Drones carrying Hellfire missiles attacked and killed American citizen Anwar Al-Aulaqi in Yemen. The Obama Administration described Al-Aulaqi, a US citizen who had allegedly played an important role in the planning of the attempted Christmas day bombing of a Northwest Airlines flight in 2009, as a key member of al Qaeda leadership.¹ On May 2 in the same year, a US Special Forces unit succeeded in killing Osama Bin Laden during a raid on his compound in Abbottabad, Pakistan. While the specifics of these two incidents remain shrouded in uncertainty, they serve as the best publicized examples of one of the Obama Administration’s most heavily favored tactics in the War on Terror. The targeted killing program as a whole is characterized by secrecy and government denial, in addition to vague and unsubstantiated assertions of compliance with the appropriate bodies of law. To date, the government has disclosed remarkably little information as to who exactly is charged with carrying out these killings, how individuals are ultimately approved as targets, and how many civilian casualties have resulted from the program. Furthermore, prior to the February 2013 leak of the Department of Justice “White Paper,” which lays out the US’s legal rationale for the

¹ *Islamist Clerk Anwar Al-Aulaqi Killed in Yemen*, BBC News (Sept 30, 2011), online at <http://www.bbc.co.uk/news/world-middle-east-15121879>.

targeted killing of citizens,² knowledge of the program's legal basis was based almost entirely on speculation.

International law has yet officially define "targeted killing," due in part to the wide range of operations to which this term might potentially apply. Noting this, former UN Special Rapporteur on extrajudicial, summary, or arbitrary executions Phillip Alston remarks: "The common element in all these contexts is that lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator."³ As the name "targeted killing" suggests, lethality, as opposed attempted capture, is the crucial common element. With respect to US policy in the War on Terror, targeted killings are most commonly performed in one of two ways, via either kill/capture raids, such as that employed against Bin Laden, or unmanned areal vehicle (UAV) attacks, as was the case with al-Aulaqi.

WHAT ARE DRONE STRIKES?

The US, acting through both the CIA, and the Department of Defense's Joint Special Operations Command (JSOC), is known to have conducted UAV or "drone" strikes in Afghanistan, Iraq, Pakistan, Yemen, Libya, and Somalia.⁴ The terms "unmanned areal vehicle" and "unmanned drone" generally refer to General Atomics' Predator or Reaper models, the UAV's most commonly utilized by the US. These aircraft are capable of flying for extended periods at high altitude and are equipped not only to perform video surveillance, but also to launch Hellfire missiles at targets. The Reaper is additionally capable of carrying and dropping 500lb laser guided bombs.⁵ The first recorded US drone strike took place in 2002, when a CIA piloted UAV succeeded in killing Salim Sinan al-Harthi, who had allegedly planned the 2000 attack on the USS Cole, in Yemen.⁶

On an attack-to-attack basis, UAV's do not differ drastically from traditionally employed, areal-based weapons of war. UAV's are not capable of capturing a target or accepting its surrender, but are not distinct from helicopters or planes in this respect either. Therefore, taken strictly as a weapon of war, there is nothing particularly novel about UAV's that merits a unique legal basis. Arguments such as those made by England's Lord Bingham⁷ that UAV's represent an intrinsically inhumane class of weapon, such as mustard gas or dum-dum bullets have yet to prove themselves viable. Certain issues do arise, however, when one considers a more extensive, large-scale use of UAV's over the course of a protracted conflict, as has come to be the case in

² United States Department of Justice, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, online at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

³ Phillip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 Harv. Nat'l Sec. J. 283, 298 (2011).

⁴ Micah Zenko, *Reforming U.S. Drone Strike Policies* 28 (Council of Foreign Relations 2013).

⁵ Mark Thompson and Bobby Ghosh, *The CIA's Silent War in Pakistan*, TIME (June 1, 2009), online at <http://www.time.com/time/magazine/article/0,9171,1900248,00.html>.

⁶ Tony Karon, *Yemen Strike Opens New Chapter in War on Terror*, TIME (Nov 5, 2002), online at <http://www.time.com/time/world/article/0,8599,387571,00.html>.

⁷ Robert Verkaik, *Top judge: 'use of drones intolerable'*, The Independent (July 6, 2009), online at <http://www.independent.co.uk/news/uk/home-news/top-judge-use-of-drones-intolerable-1732756.html>.

the War on Terror. Many argue that UAV's, in permitting their operators to perform deadly strikes across international borders, while running minimal risk of detection, and zero risk of personal endangerment, allow the US to resort to lethal force far too easily, and consequentially, with troubling frequency.⁸

While the US does not officially record or report civilian casualties resulting from drone strikes, there are a handful of documented cases of UAV attacks resulting in horrifying collateral damage. A strike in Afghanistan in 2010, for instance, left 23 civilians dead when drone operators mistook three minibuses for a convoy carrying insurgent militants.⁹ With regard to such grave errors, General Stanley A. McChrystal has remarked that UAV strikes, in engendering such fierce resentment, actually undermine their intended policy goals. In an interview in early 2013, he explained "They are hated on a visceral level, even by people who've never seen one or seen the effects of one."¹⁰

WHAT ARE KILL/CAPTURE RAIDS?

Kill/capture raids represent the other main component of the US's targeted killing program. These operations are often conducted as night raids during which armed forces invade private property with the singular objective of lethal force, as the shooting of Bin Laden categorically demonstrates. Like drone strikes, these raids have also shown an enormous potential for error. In 2011, flawed intelligence led US Special Forces to raid a family home in a relatively peaceful area of Afghanistan not known to have any Taliban activity, shooting and killing Afghan president Hamid Karzai's cousin and capturing his nephew, who they believed to be Taliban operatives.¹¹ While the US forces claimed to have shot Haji Yar Mohammad Karzai because he was holding an AK-47, eyewitness accounts offered an alternative version of events, maintaining that the Special Forces agents dragged the unarmed 63-year-old out of his home to shoot him. It is believed that an individual wishing to gain revenge on the former tribal leader for an incident that occurred thirty years earlier offered Karzai's name to US intelligence officials in hopes that such an operation would be carried out on him. No doubt with events such as this in mind, General McChrystal has also weighed in on kill/capture raids, stating: "nearly every Afghan I talk to mentions (night raids) as the single greatest irritant."¹²

⁸ Afsheen John Radsan and Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J Nat'l Sec. L. & Pol'y 439, 442 (2011-2012).

⁹ Dexter Filkins, *Operators of Drones Are Faulted in Afghan Deaths*, New York Times (May 29, 2010), online at http://www.nytimes.com/2010/05/30/world/asia/30drone.html?_r=0

¹⁰ Alexis C. Madrigal, *General McChrystal on Drones: 'They are Hated on a Visceral Level'*, The Atlantic (Jan 7, 2013), online at <http://www.theatlantic.com/technology/archive/2013/01/general-mcchrystal-on-drones-they-are-hated-on-a-visceral-level/266914/>

¹¹ Jon Boone, *US Troops' Killing of Hamid Karzai's Cousin Brings Claim of 'Deep Conspiracy'*, The Guardian (Mar 10, 2011), online at <http://www.guardian.co.uk/world/2011/mar/10/hamid-karzai-cousin-nato-death-conspiracy-afghanistan>.

¹² ISAF Issues Guidance on Night Raids in Afghanistan, International Security Assistance Force (Mar 5, 2010), online at <http://isaflive.webdrivenhq.com/article/isaf-releases/isaf-issues-guidance-on-night-raids-inafghanistan.html>.

ISSUES IN INTERNATIONAL LAW

This section will begin by detailing the nature of the legal frameworks of International Humanitarian and International Human Rights Law, which are key to any understanding of US compliance with international law. The following sub-section will focus on the US's characterization of the War on Terror as non-international armed conflict and pointing out the possible erroneous nature of such a definition. It will afterwards be shown that even in the case of a non-international armed conflict, the US's total disregard for transparency makes it impossible to determine the extent to which targeted killing policy obeys the applicable international legal provisions. However, while the US has proven reluctant to share information about matters such as which agencies are conducting the killings, how "kill lists" are compiled, and how many civilian casualties the program effects, the limited information collected independently to date is singularly suggestive of gross violations of international law.

WHAT ARE THE RELEVANT BODIES OF INTERNATIONAL LAW?

International law is comprised of two distinct, though related, legal frameworks. International Humanitarian Law (IHL) is the law of armed conflicts. It exists to enumerate the laws of war and ensure that the parties to an armed conflict conform to these laws, particularly with regard to the treatment of civilians. IHL features both treaty-based and customary components, with the former drawing largely from the Geneva Conventions and the latter codified in international court opinions and also summarized and presented by organizations such as the International Committee of the Red Cross. International Human Rights Law (IHRL), the other side of international law, is not limited to the context of armed conflict and applies generally to governments at all times. The legal regime of IHRL, sometimes referred to as the "law enforcement paradigm," is also based both in custom and treaty, International Covenant on Civil and Political Rights (ICCPR) representing its primary codified source.

CHARACTERIZING THE CONFLICT

In *Hamdan v. Rumsfeld*, the US Supreme Court ruled that the War on Terror represents a "non-international armed conflict of international scope."¹³ The recently leaked White Paper, in turn, relies heavily on the *Hamdan* Court's characterization in arguing for the legality of the targeted killing of US citizens.¹⁴ In addition to governing conflicts between states, the Geneva Conventions provide for armed conflicts "not of an international character," suggesting that the Obama administration views IHL as the relevant legal framework here. The US thus appears to believe that the War on Terror meets the Conventions' requirements for an armed conflict. Following this line of reasoning, IHRL's much more restrictive law enforcement paradigm thus would not have any bearing on targeted killings within the War on Terror. A look at the provisions of the Geneva Conventions, which do allow for targeted killings, albeit in a

¹³ *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31(2006).

¹⁴ *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force* at 3.

constrained sense, however, casts doubt on the status of the war as non-international armed conflict. This has serious ramifications for what actions the US may legally engage in, particularly with regard to the treatment of civilians and the determination of who and what constitutes a legal target.

WHAT IS A NON-INTERNATIONAL ARMED CONFLICT?

Characterizing the “Global War on Terror” as a non-international armed conflict is an option attractive to the US for a number of reasons. First, as Alston notes this legal paradigm permits a degree of expanded executive power that would be forbidden under IHRL.¹⁵ Additionally, while IHL does regulate the use of lethal force, it is far more permissive than IHRL with respect to what targets it deems legitimate. While IHRL only permits the use of lethal force as an absolute last resort, IHL not only allows the targeted killing of enemy combatants, but also civilians, for such time as they directly participate in hostilities. All intentionally lethal attacks under IHL must satisfy the conditions of necessity, proportionality, distinction, and humanity. Though a different section of this article will question US compliance with the principles of distinction and proportionality, it is thus clear why the Obama administration would want at least to maintain a façade of compliance with IHL.

While the Geneva Conventions simplify the task of classifying an international armed conflict, its test for a non-international armed conflict (NIAC) is markedly less categorical. This is due primarily to the originally intended purpose of the classification. The Geneva Conventions originate from a period when the existence of an internationally operating, non-state actor such as al-Qaeda was unimaginable. It was thus envisioned that the Conventions’ provisions for NIACs would apply to civil wars and other internal conflicts.¹⁶ This renders the application of Common Article III, which describes the responsibilities of a state party to an NIAC, to the War on Terror, slightly problematic. Notwithstanding, Special Rapporteur Alston, relying on precedent set by the International Criminal Tribunals for Rwanda and Yugoslavia, opinions from the International Court of Justice, and the Inter-American Commission on Human Rights, and information from the ICRC, has proposed that a three-prong test be used in considering the existence of an NIAC.¹⁷ The test’s three criteria are organization of the non-state party, the intensity of the conflict, and its territorial confines.

IS THE WAR ON TERROR A NON-INTERNATIONAL ARMED CONFLICT?

First to be considered is the organizational structure of the non-state party, in this case al-Qaeda. Alston states: “The non-state armed group must be identifiable as such, based on criteria that are objective and verifiable. This is necessary for IHL to apply meaningfully, and so that States may comply with their obligation to distinguish between lawful targets and civilians.”¹⁸

¹⁵ Phillip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* at 16 (Human Rights Council 2010).

¹⁶ Carla Crandall, *Ready... Fire... Aim! A Case for Applying American Due Process Principles Before Engaging in Drone Strikes*, 24 Fla. J. Int’l L 55, 72 (2012).

¹⁷ Alston, *Report of the Special Rapporteur* at 17 (cited in note 15).

¹⁸ *Id.*

Among these criteria are a “Minimal level of organization of the group such that armed forces are able to identify an adversary”¹⁹ and the “Capability of the group to apply the Geneva Conventions (i.e., adequate command structure, and separation of military and political command).”²⁰ With respect to al-Qaeda and its associated groups, Alston argues that these claims are rather dubious, explaining “With respect to the existence of a non-state group as a ‘party,’ al-Qaeda and other alleged ‘associated’ groups are often only loosely linked, if at all. Sometimes they appear to be not even groups, but a few individuals who take ‘inspiration’ from al Qaeda. The idea that, instead, they are part of continuing hostilities that spread to new territories as new alliances form or are claimed may be superficially appealing but such ‘associates’ cannot constitute a ‘party’ as required by IHL.”²¹

With respect to intensity and duration of the conflict, violence must be “protracted,” and “beyond the level of intensity of internal disturbances.”²² In the event of an isolated incident, “the incident itself should be of a high degree of intensity, with a high level of organization on the part of the non-state armed group.”²³ Accordingly, Alston does not find the conflict against al-Qaeda and its associates to meet these criteria.²⁴ Taking the third factor, territorial confines, into account, Alston argues that while NIACs are not necessarily confined to the borders of a single state, even in transnational conflicts, there is still a “territorial nexus requirement.”²⁵ This would appear to seriously contradict the past two presidential administrations’ advancements of a “Global War on Terror.” Alston concludes: “Taken cumulatively, these factors make it problematic for the US to show that – outside the context of the armed conflicts in Afghanistan or Iraq – it is in a transnational non-international armed conflict against ‘al Qaeda, the Taliban, and other associated forces’ without further explanation of how those entities constitute a ‘party’ under the IHL of non-international armed conflict, and whether and how any violence by any such group rises to the level necessary for an armed conflict to exist.”²⁶

In conclusion, the three-factor test that Special Rapporteur Alston has outlined casts serious doubt on the War on Terror’s status as a NIAC, especially in countries such as Pakistan or Yemen. It would appear the US’s non-state opponent does not display the organizational cohesion necessary to be party to an NIAC. It is likewise questionable that the violence initiated by al-Qaeda and its associated groups surpasses the necessary threshold of an armed conflict, especially in light of the above-mentioned lack of organizational structure. Finally, the US’s conducting of targeted killings outside of Afghanistan also threatens to violate the territoriality requirements of an NIAC. In advancing the argument that the War on Terror represents a non-international conflict of international scope, the US has pushed to legitimize the use of lethal force against a loosely affiliated, geographically dispersed network of individuals, whose acts,

¹⁹ Id.

²⁰ Id.

²¹ Id at 18.

²² Id at 17.

²³ Id at 18.

²⁴ Id.

²⁵ Id.

²⁶ Id.

while violent, do not cumulatively make for a full fledged armed conflict. By characterizing the conflict as an NIAC in the face of these factors, the US reserves for itself the right to employ lethal force against a broad category of individuals it says are associated with al-Qaeda, regardless of their geographic location, a policy that promises serious abuse, especially when paired with an abject lack of transparency or accountability.

TRANSPARENCY AND INTERNATIONAL LAW

A total disregard for any notion of transparency or accountability represents another problematic aspect of the targeted killing program. After outlining the transparency related obligations outlined in international treaty law, this section will describe two ways in which the US effectively evades these responsibilities. The practice of “double hatting,” that is, making unclear whether it is the CIA or DOD that carries out a particular killing, allows the US to act with a remarkable degree of impunity. Furthermore, even if we accept that the War on Terror represents an NIAC and is thus governed by IHL, the US’s outright apathy towards its transparency obligations makes it impossible to assess its compliance with this framework, as the secrecy that surrounds the creation and use of “kill lists,” along with the vacuum of official data regarding civilian casualties and collateral damage effectively precludes an evaluation of US compliance with the IHL principles of distinction and proportionality. Given this lack of transparency, it is impossible to definitively know whether targeted killings adequately distinguish between legitimate military and protected civilian targets, and whether the level of collateral damage surpasses that which the nature of the conflict allows for.

INTERNATIONAL TRANSPARENCY AND ACCOUNTABILITY OBLIGATIONS

International law contains a number of obligations concerning transparency and accountability. In 2011, the UN Secretary General’s expert panel on Sri Lanka remarked that accountability for violations of IHL and IHRL is in and of itself “a duty under international law.”²⁷ Furthermore, the Geneva Conventions hold numerous accountability provisions. Common Article I compels all High Contracting Parties to “ensure respect for the present Convention in all circumstances.” More specifically, the Fourth Geneva Convention requires that High Contracting Parties take action to prevent “grave breaches” of the covenant and impose sanctions against individuals who commit such breaches. “Willful killing” is enumerated as grave breach and can be assumed to include the protections against “indiscriminate acts” on civilian populations provided in article 51 of the First Additional Protocol. Summarizing IHL’s accountability provisions, the International Committee of the Red Cross (ICRC) has concluded that “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.”²⁸

IHRL holds similar provisions. Though accountability for violations is not expressly

²⁷ *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka* at iv, online at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.

²⁸ *Customary IHL* Rule 158 (ICRC), online at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule158.

mentioned in the ICCPR, article 6 does protect “the inherent right to life.” Furthermore, both custom and relevant case law suggest that parties to the covenant are required to investigate violations of this right. Likewise, the *Wall* opinion of the International Court of Justice²⁹ as well as the case *Lopez Burgos v. Uruguay*³⁰ hold that parties are responsible for violations committed outside their borders. The US, as Alston notes, is also at the forefront of advancing customary accountability obligations, as it regularly demands, without referring to any specific treaty, that other countries investigate right to life violations.³¹

There can be no accountability without transparency, the key element in verifying respect for international obligations. This notion is reflected in customary international law, as evident in the US’s request that Sri Lanka submit a report of its own inquiry into violations committed during the civil war to the UN, emphasizing that self-auditing is an insufficient safeguard.³² It is ironic then, that while the US routinely offers assertions that its targeted killing programs do not violate international law, it has yet to provide any actual evidence in support of this claim. The exigencies of the War on Terror are not sufficient to warrant blind faith in such assurances. A good faith assumption of US compliance with international law would also be particularly ill advised in light of what is known about other War on Terror staples. For example, the US has lost about 75% of all habeas corpus cases emanating from Guantanamo Bay, indicating that despite the government’s strong assurances, the majority of those imprisoned there are not legitimately or lawfully detained.³³

DOUBLE HATTING

In February of 2013 the Obama administration refused yet again to confirm what is widely acknowledge as established fact. That is, the existence of a CIA Special Forces targeted killing program, of which UAV strikes represent a significant component. Responding to a lawsuit filed by the ACLU demanding that the government release information about the program under the Freedom of Information Act, the CIA not only declined to produce the requested documents, but also to confirm their very existence.³⁴ This, it should be noted, occurred just prior to the leaking of the White Paper, which establishes the legal rationale for this same program. This short period of time also saw Secretary of Defense Leon Panetta allude to the existence of a CIA drone program on “60 minutes.” The conclusion to be drawn from this is obvious: the CIA, along with the Department of Defense, is clearly involved in targeted killings, though the Obama administration would prefer that the details of this arrangement remain as unclear as possible.

²⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion*, 9 July 2004, 54 I.C.L.Q. 1003 (2005).

³⁰ *Lopez Burgos v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88 (1984).

³¹ Alston, 2 Harv. Nat’l Sec. J. at 13 (cited in note 3).

³² Id at 15.

³³ *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 Vand J. Transnat’l L 1353, 1375 (2011).

³⁴ Charlie Savage, *Court Says CIA Must Yield Some Data on Drones*, New York Times (Mar 15, 2013), online at <http://www.nytimes.com/2013/03/16/us/court-says-cia-must-yield-some-data-on-drones.html?hp&r=0>.

Comparatively speaking, much more is known about the Department of Defense's targeted killing program. Within the DOD, Special Operations Command, made up of Special Forces units from the Army, Air Force, Navy, and Marines, is charged with executing these strikes and reports, in turn, to JSOC. DOD Special Forces are known to have been involved in a wide range of targeted killing activities in a variety of countries throughout the War on Terror. In 2010, Wikileaks provided a cache of diplomatic cables that offers the most comprehensive look into the operations of JSOC controlled forces to date. The cables focus on "Task Force 373," which carried out targeted killings in Afghanistan, working from a kill list over 2,000 names long. Most interestingly, the cables document a number of incidents in which erroneous intelligence resulted in extensive civilian casualties. A rocket attack on targets in the village of Nagar Khel, for example, failed to kill any terrorist operatives, though it did successfully leave seven children dead.³⁵

What are the advantages of dividing targeted killing responsibilities between these two organizations? For one, the DOD and CIA are subject to entirely separate sets of laws. Title 10 of the US code covers traditional military activities and by extension, the JSOC. The military activities to which this section corresponds are relatively simple to initiate, as they do not require explicit executive approval and are not subject to extensive congressional review.³⁶ In the context of the War on Terror, however, they are subject to territorial restrictions, permissible only within the geographic confines articulated in the Authorization of Military Force. Title 50, which covers covert intelligence and the CIA, features a number of important differences. On one hand, the initiation of CIA activities supposedly requires both executive finding and congressional approval. However, once underway, these activities are not subject to the same of territorial and jurisdictional restraints as those carried out by the DOD.³⁷ Given the respective advantages of each agency, the attractiveness of such a mixed regime to the Obama administration is clear, especially considering that it is often impossible to know which agency is behind any particular strike.

In addition to significantly complicating questions of who is responsible for what, CIA involvement in paramilitary targeted killing activities raises a number of legal concerns. The primary function of the CIA, after all, is to perform covert operations, which by definition are never to be officially acknowledged. Likewise, it is generally assumed that covert intelligence activities are to violate international law, hence their need for secrecy in the first place. One troubling aspect of US targeted killing policy thus stems from the CIA's growing involvement in military and paramilitary operations, while assuming that the de facto immunity the organization enjoys in conducting its more traditional functions carries over. The blurred boundaries between CIA covert intelligence and DOD military operations has serious ramifications for the transparency of targeted killings, as the Obama Administration may juggle using the two

³⁵ Nick Davies, *Afghanistan war logs: Task Force 373 – special forces hunting top Taliban*, The Guardian (25 July, 2010), online at <http://www.guardian.co.uk/world/2010/jul/25/task-force-373-secret-afghanistan-taliban>.

³⁶ Alston, 2 Harv. Nat'l Sec. J. at 29 (cited in note 3).

³⁷ Id.

organizations based on their particular legal advantages in order to evade compliance with accountability and transparency obligations. As the US clearly has no desire to release information about which organization is involved in what, this mixed regime represents a serious barrier to holding the government accountable for whatever violations of international law the targeted killing program may result in.

KILL LISTS

Related to the Obama's administration's reluctance to provide information about who exactly is conducting targeted killings is its unwillingness to comment on the process by which individuals are selected and approved as targets. The term "kill list" refers to what is officially known as a "joint integrated prioritized target list." The JOCS and CIA each maintain their own separate lists, with Wikileaks having revealed that one JSOC list included over 2,000 different individuals.³⁸ With regard to who exactly is on these lists and how they arrive there, a report to the Senate's foreign relations committee indicated that individuals are put on the JSOC list on the basis of "two verifiable human sources" and "substantial additional evidence."³⁹ While CIA legal council John Rizzo has made the assurance that the CIA employs much more stringent criteria in compiling its lists, overall, there is also much less known about CIA kill lists.⁴⁰ Rizzo himself has claimed that he has the final say in signing off on targeting decisions, though recent evidence has come suggest that the executive branch has become increasingly involved here as well.⁴¹ All things considered, there is a painful absence of information about these lists, with little known about the means through which individuals are selected and ultimately approved for targeting. This, consequently, seriously complicates any attempts towards evaluating US compliance with the IHL principle of distinction.

a) Kill lists and distinction. Common Article Three of the Geneva Conventions provides that Parties to the convention must treat humanely "Persons taking no active part in the hostilities." The principle of distinction is also developed in the First Additional Protocol to the Conventions, which requires that "the Parties to the conflict shall at all times distinguish between the civilian population and combatants." The First Additional Protocol further states that civilians "shall not be the object of attack." Additional sources of IHL treaty law cover distinction as well. Article 8(2)(b)(v) of the Rome statute prohibits attacks on the civilian population, as well as "towns, villages, dwellings, or buildings which are undefended and not military objectives," while Article 25 of the Fourth Hague Convention similarly outlaws the bombardment of undefended civilian targets. Indeed, the protection of civilians is one of IHL's primary reasons for existence, further underscoring the importance of the principle of distinction. Understandable, then, is the gravity of arguments that US conducted drone strikes and night raids

³⁸ Davies, *Afghanistan war logs*, Guardian (cited in note 35).

³⁹ Jane Mayer, *The Predator War*, The New Yorker (Oct 26, 2009), online at http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

⁴⁰ *Inside the Killing Machine*, The Daily Beast (Feb 13, 2011), online at <http://www.thedailybeast.com/newsweek/2011/02/13/inside-the-killing-machine.html>.

⁴¹ *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions* at 9 (Columbia Law School Human Rights Clinic 2012).

fail to adequately distinguish protected civilians from legally targetable combatants, resulting in an intolerable civilian death toll.

There are a number of arguments as to how best to apply the classifications of “combatant” and “civilian” to the War on Terror. Article 51(3) of the First Additional Protocol states that, in an NIAC, civilian’s shall be protected, “unless and for such time as they take a direct part in hostilities.” How exactly to categorize members of al-Qaeda, who are clearly not combatants in the traditional uniform-wearing sense, within this framework, remains a topic of intense debate. The US appears to operate under the assumption that membership alone in an organization such as al-Qaeda is sufficient to forfeit one’s protected civilian status. This definition, however, raises several issues, given the varying degrees with which individuals can be involved with al-Qaeda.

The ICRC has also weighed on this problem, asserting that members of armed combat groups in NIACs are in fact combatants. However, they subsequently set a high bar for membership in such an armed group. Membership, they assert, cannot “depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse,”⁴² but requires rather that “the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-state party to the conflict.”⁴³ The principal criteria, the ICRC argues, is that of the “continuous combat function,” as this separates “members of the organized fighting forces of a non-state party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.”⁴⁴ Applying this test to targeted killings against al-Qaeda, Ryan J. Vogel concludes that based on the ICRC’s criteria for combatant status, many US targeted killing strikes fail to distinguish, resulting in casualties among supposedly protected civilians.⁴⁵

Though it would seem that US targeting policy violates the principle of distinction, a deplorable lack of transparency as to the development of kill lists makes it impossible to know for certain if the US satisfactorily distinguishes between permissible and protected targets. Simply put, as we are unsure of who is on these lists and how their identities are confirmed, there is no way of knowing if they do in fact exhibit a continuous combat function, or have a more peripheral or extra-military relationship with al-Qaeda. Reports of unintended civilian casualties resulting from faulty intelligence underscore the importance of this thus unreleased information. Until the US can provide a more satisfactory view into the target selection process, it is prudent, given what is known about targeted killing operations in practice, to assume that US fails to properly distinguish between civilians and true members of al-Qaeda who perform a continuous combat function.

⁴² Nills Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* at 33 (International Committee of the Red Cross 2009).

⁴³ *Id.*

⁴⁴ *Id.* at 26.

⁴⁵ Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *Denv. J. Int’l L & Pol’y* 101, 122 (2010-2011).

CIVILIAN CASUALTIES

Statistics on civilian casualties differ greatly. While government assertions that civilian casualties are negligible, if not nonexistent, should surely be met with skepticism, third party accounts are also quite variable. Unfortunately, concrete figures are of maximum importance if one wishes to verify US respect for IHL. This section will show that it is impossible to determine whether targeted killing operations uphold the IHL principles of distinction and proportionality, given such scant transparency considerations regarding civilian casualties. Taking into account what *is* known, however, all signs point to the conclusion that US targeted killings do not pass muster with respect to either of these principles.

a) *What do we know about civilian casualties?* In his February 2013 Google Plus “hangout,” President Obama responded to a question about civilian casualties, stating “actually, drones have not caused a massive amount of civilian casualties.” His use of the word “actually” suggests that such a proposition contrasts with common perceptions of the program, which, it in fact does. What little we know about civilian casualties in drone strikes and kill/capture missions comes from a handful of third party sources, which while offering differing figures, all report a higher rate of collateral damage than does the government. Indeed, a report issued by Columbia’s Center for Civilians in Conflict, citing input from former US military officials, notes that “Estimates of extremely low civilian harm would be unprecedented in the history of combat air operations.”⁴⁶

Regarding drone strike casualties, figures come primarily from three journalistic sources, the Bureau of Investigative Journalism, the New America Foundation, and the Long War Journal. While all three report a civilian casualty rate much higher than that provided by the government, there is also considerable variation among these sources. In the case of Pakistan, another study from Columbia’s Human Rights Clinic has attempted to make sense of this discrepancy, independently verifying the figures cited by each organization. The study concludes that drone strikes have killed between 456 and 661 militants in Pakistan, with total civilian casualties from these strikes falling somewhere between 72 and 115.⁴⁷ There exist, however, a number of factors that complicate the verification of civilian casualties. For one, a significant percentage of drone strikes and kill/capture missions in Pakistan take place in within the Federally Administered Tribal Areas of Pakistan (which include Northern and Southern Waziristan), a region essentially off limits to journalists and researchers.⁴⁸ Necessary reliance on non-verifiable Pakistani government sources for information,⁴⁹ and the less than concrete nature of the terms “militant” and “civilian” similarly frustrate the task of accurately recording casualties.⁵⁰ The Human Rights Clinic study on civilian casualties furthermore clarifies that these statistics come only from strikes known to have occurred, readily admitting to the possibility of

⁴⁶ *Civilian Impact* at 30 (cited in note 41).

⁴⁷ *Drone Strike Deaths* at 2 (Columbia Law School Human Rights Clinic 2012).

⁴⁸ *Id* at 1.

⁴⁹ *Id* at 5.

⁵⁰ *Id* at 2.

strikes going unreported entirely.⁵¹

While independent investigation into civilian casualties has been most thorough in Pakistan, there also exists information from other countries where UAV programs operate.⁵² The New America Foundation has reported that, through 2012, 42 strikes have killed 611 militants and 44 civilians in Yemen, with The Long War Journal reporting 59 strikes killing 302 militants and 82 civilians, while the Bureau of Investigative Journalism claims that 59 attacks have left 602 militants and 122 civilians dead. The Bureau of Investigative Journalism also investigates UAV operations in Somalia, where it has reported 17 strikes killing 82 militants and 34 civilians.

As for kill/capture operations, which have yet to come under the same investigative scrutiny as drone strikes, there is comparatively less information available. The Wikileaks cables describing TF 373's botched operations, however, are not encouraging. One of the cables' most startling revelations concerns an attack that occurred four months after the previously discussed one in Nagar Khel. The cables report that during the attack, the Task Force called in for air support, despite the Taliban fighters having already retreated. The cable then catalogues the effects of the 500lb bomb dropped on the house where the identified targets had been prior to their retreat: "12 US wounded, two teenage girls and a 10-year-old boy wounded, one girl killed, one woman killed, four civilian men killed, one donkey killed, one dog killed, several chickens killed, no enemy killed, no enemy wounded, no enemy detained." Even worse, the initial official statement concerning the attack falsely claimed that militants had been killed and made no mention of any civilian casualties.⁵³

b) Civilian casualties and distinction. Though the picture that begins to emerge from this information is far from clear, one finds scarce evidence supporting the Obama Administration's assertions regarding the minimal extent of collateral damage from targeted killing operations. Civilian casualties of the quantity reported by these journalistic sources are certainly suggestive of a failure on the part of the CIA and JSOC to satisfactorily distinguish between civilians and militants prior to initiating attacks. The available corpus of information also leads one to believe that the US is not fulfilling its treaty obligations vis-a-vis the targeting of civilian objects such as private homes. As the example of the accidental murder Haji Yar Mohammad Karzai indicates, the US may also be violating the principle of distinction by allowing flawed intelligence to lead to civilian casualties.

The practice of "signature strikes" also raises a number of distinction related questions. Contrasted with "personality strikes," which target individuals selected from kill lists, a signature strike is a drone strike carried out on an individual or individuals, whose exact identities are unknown, but display certain "terrorist-like" traits.⁵⁴ This practice, also known as "crowd killing" appears by definition to violate the principle of distinction. In the case of signature strikes, the only known check against the arbitrary killing of civilians is a post-mortem confirmation of militant status, which as many correctly point out, does nothing to actually

⁵¹ Id at 2.

⁵² Zenko, *Drone Strike Policies* at 13 (cited in note 4).

⁵³ Davies, *Afghanistan war logs*, Guardian (cited in note 35).

⁵⁴ *Civilian Impact* at 7 (cited in note 41).

prevent civilians from being killed. As a New York Times article has explained, this practice “in effect counts all military-age males in a strike zone as combatants... unless there is explicit intelligence posthumously proving them innocent.”⁵⁵ One would struggle to find a better example of a violation of the principle of distinction than the killing individuals on the basis of a suspicion of militant activity, their identities only verified once it is too late.

As with kill lists, a truly satisfactory settling of this debate, however, depends solely on verifiable, transparent, government provided statistics. With respect to the determination of whether or not the US properly distinguishes civilians from militants as required by international law, the burden of proof rests squarely upon the government. Until the Obama administration presents strongly compelling evidence that it carries out drone strikes and kill/capture operations out exclusively against militants and military targets, we can only, based on this lack of official information to the contrary, assume that the US violates IHL by neglecting the principle of distinction. What little information is currently known about civilian casualties stemming from these operations, is also strongly suggestive of this conclusion.

c) *Civilian casualties and proportionality.* Like distinction, proportionality represents another crucial arm of the laws of “just war.” The principle of proportionality recognizes that, in the context of an NIAC, there are situations in which collateral damage is inevitable and thus acceptable. The principle requires, however, that whatever collateral damage incurred during a specific military operation be proportionate to the objective of the operation and its overall importance within the conflict. Stated differently, proportionality would prohibit attacks that result in extensive civilian casualties in order to achieve a military objective of little importance. Civilian casualties and collateral damage must be proportionate to the military advantage gained.

Article 51(5)(1) of the First Additional protocol forbids attacks that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Proportionality is also entrenched in the Rome Statute, article 8(2)(b)(iv) of which forbids “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” Citing the precedent set in numerous tribunals and international court opinions, the ICRC finds proportionality to be a central pillar of customary IHL as well, further underscoring its importance.⁵⁶

Determining whether US targeted killings adhere to the principle of proportionality, two related complicating factors quickly stand out. First, as with distinction, a lack of transparency *visa vie* civilian casualties precludes such an assessment. In short, it is impossible to know if the US is killing a proportionate number of civilians when we have no concrete notion of how many civilians are actually being killed. Secondly, if we are to weigh whether the civilian casualties that arise from targeted killings are proportionate to the program’s “direct military

⁵⁵ Jo Becker and Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, New York Times (May 29, 2012).

⁵⁶ *Customary IHL* Rule 14 (cited in note 28).

advantage,” we also need to know what the objectives of the program are. Though it is difficult to pinpoint any explicitly stated objectives of the program, we may surmise that they would be related to the destabilization of al-Qaeda and minimizing of potential threats to national security. Indeed, the central argument of the White Paper is that the US may lawfully target a citizen who poses an “imminent threat of violent attack to the United States.”⁵⁷ While the document goes on to develop a rather novel interpretation of “imminence,”⁵⁸ its authors nonetheless admit that al-Qaeda’s high level leaders represent the greatest cause for concern. The picture that emerges from this, then, is one of a targeted killing program employed to achieve the objective of eliminating al-Qaeda’s senior cadre, or those who pose the greatest threat to the US. This proposition, however, receives little to no factual support when held up against what we actually know about targeted killing casualties.

As Special Rapporteur Alston remarks in his report on targeted killings, “there is strong evidence to contradict the assumption that drone strikes are principally used to kill high-level leaders.”⁵⁹ Detailed information of this sort comes primarily from Pakistan, where the New America Foundation has reported that only one out of every seven drone attacks kills a military leader.⁶⁰ Reuters has likewise claimed that 90% of all militants killed in Pakistan are “low level.”⁶¹ These figures make for a grim picture of US targeted killing practice with regard to the principle of proportionality. Though a lack of official statistics again impedes any degree of certainty, a general conclusion does begin to take shape. While a program dedicated to the elimination of high profile threats to national security that resulted in the above listed rates of civilian casualties would already be problematic from the point of view of distinction, the program’s actual lesser strategic importance casts increased doubt on the notion that US targeted killings uphold this principle of IHL.

CONCLUSION

At best, the legality of US targeted killing policy in the War on Terror is questionable under international law. At worst, of course, many aspects of US policy arguably constitute full blown war crimes. First, the US has rushed to categorize the conflict as an NIAC subject to the jurisdiction of IHL. That the War on Terror does reach the threshold of armed conflict, however, is debatable, with the IHRL’s “law enforcement” model appearing more appropriate in a number of respects. Applying the three-pronged test for an NIAC, Alston reasons that “the territorial nexus” and “intensity of conflict” requirements do not point to the existence of an armed conflict outside of Iraq and Afghanistan, while the “organization of non-state party” prong casts doubt on the interpretation of the entire War on Terror as an NIAC. If this is the case, then IHRL is the proper legal paradigm, and targeted killings are, consequently, intolerable.

Assuming, however, that the War on Terror *is* a NIAC, one does not find the international

⁵⁷ United States Department of Justice, *Lawfulness of a Lethal Operation* at 1 (cited in note 2).

⁵⁸ *Id.* at 7.

⁵⁹ Alston, 2 Harv. Nat’l Sec. J. at 21 (cited in note 3).

⁶⁰ Peter Bergen and Katherine Tiedmann, *Washington’s Phantom War*, Foreign Affairs (July/Aug 2011).

⁶¹ Adam Entous, *Drones kill low-level militants, few civilians: U.S.*, Reuters (May 3, 2010).

legal issues surrounding US targeted killings summarily resolved. Transparency is not a hallmark of the targeted killing program. The government's refusal to report civilian casualties, along with the controversial practice of double hatting, appears to violate IHL's many transparency and accountability obligations. The Obama Administration's indifference towards transparency additionally renders impossible any complete appraisal of its compliance with IHL, specifically with the principles of distinction and proportionality. The limited information regarding kill lists and civilian casualties that is currently available, however, does not give the general impression that US targeted killings uphold these principles in any meaningful sense.

Moreover, though the Obama Administration has clearly stated it believes IHL to be the appropriate legal framework governing targeted killings in the War on Terror, there is little evidence suggesting that the US is actually accountable to this body of law. The status of international law in the US is highly contested, with many pointing out that international treaties such as the ICCPR and the Geneva Conventions, having never been officially ratified by congress, are "non-self executing" and thus unenforceable in US courts. While it has been convincingly argued that these treaties regardless have a legitimate place in domestic courts,⁶² official jurisprudence is a long way off from acknowledging this and enforcing treaties such as the ICCPR in court. Regarding the possibility of the Obama Administration being held accountable for these violations in a court beyond its borders, history strongly suggests that the US enjoys de facto immunity from war crimes charges. Considering CIA involvement in targeted killings, one must also remember that it is the assumed role of an intelligence agency to violate international law, further diminishing the substantive applicability of this legal paradigm here. Therefore, in identifying international law as the framework governing the War on Terror, the Obama administration has consented to a legal regime to which it owes essentially zero accountability. This is not without serious consequences, given that targeted killings expressly violate IHL and US targeted killings in the War on Terror appear to violate many of IHL's key provisions as well.

ISSUES IN DOMESTIC LAW

As the Obama administration's targeted killing program categorically violates international law, and is also minimally, if at all accountable to this legal framework, domestic law therefore represents only remaining forum for addressing the many legally problematic aspects of War on Terror targeted killings. Unfortunately, this body of law is similarly plagued with barriers obstructing its enforcement in this context. While the targeted killing program's constitutionality is as questionable as its validity under international law, especially when carried out against US citizens, prospects of accountability in the domestic legal area appear comparably bleak.

⁶² See generally Fiona de Londras, *What Human Rights Law Could Do: Lamenting the Absence of an International Human Rights Law Approach in Boumediene & Al Odah*, 41 Isr. L. Rev. 562 (2008).

The case *Al-Aulaqi v. Obama*,⁶³ dismissed by the DC District Court in 2010, underscores the three principal factors that prevent a domestic court from addressing targeted killings. Anwar al-Aulaqi's father, Nasser al-Aulaqi, filed the suit on behalf of his son, prior to his eventual death by drone strike, who he claimed was in hiding in Yemen due to his inclusion in a JSOC or CIA kill list.⁶⁴ The plaintiff contended that in placing Anwar al-Aulaqi on a kill list, the US had violated his 4th and 5th amendment rights.⁶⁵ The government, citing issues of standing, political questions doctrine, and state secrets doctrine, argued that the case was nonjusticiable and thus moved for dismissal. The court acquiesced and Al-Aulaqi was killed in a drone strike a year later. This case is significant in that it illustrates how factors of standing, political questions doctrine, and state secrets privilege may cumulatively allow the executive branch to carry out targeted killings with de facto impunity, despite the highly legally objectionable nature of such actions.

STANDING

In *Al-Aulaqi v. Obama*, the DC District Court dismissed the plaintiff's complaint partially due to Anwar al-Aulaqi's father's lack of standing, or legal right to appear in court on behalf of his son.⁶⁶ Standing requires the petitioning party to have suffered "some actual or threatened injury as a result of the putatively illegal conduct of the defendant."⁶⁷ Nasser al-Aulaqi, the court explained, was not in any physical danger, nor did his "general emotional harm" stemming from the potential severing of his relationship with his son amount to injury either.⁶⁸ The Court also rejected the plaintiff's claim that he was acting in the "best interests" of his son, arguing that had Anwar al-Aulaqi himself objected to the legality of being put on a kill list, nothing would have prevented him from "peacefully presenting himself at the US Embassy in Yemen and expressing a desire to vindicate his constitutional rights in US courts."⁶⁹ According to the court, al-Aulaqi had no such wish to assert his constitutional rights, referencing the public statements he released while in hiding, in which he "decried the U.S. legal system and suggested that Muslims are not bound by Western law" and stated "[i]f the Americans want me, [they can] come look for me."⁷⁰

The Court's interpretation of the requirements of standing suggest that the only individuals legally fit to challenge the constitutionality of targeted killings are those who are themselves targets. As Richard D. Rosen summarizes, "absent a client who is or was a target of a drone strike, those opposed to the nation's targeted-killing policy will be unable to challenge the policy in federal court."⁷¹ A number of logistical difficulties, however, stand in the way of such a hypothetical client ever having his day in court. Given the awesome secrecy surrounding kill

⁶³ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (DDC 2010).

⁶⁴ *Id.* at 2.

⁶⁵ *Id.*

⁶⁶ *Id.* at 21.

⁶⁷ *Id.* at 22.

⁶⁸ *Id.* at 46.

⁶⁹ *Id.* at 29.

⁷⁰ *Id.* at 44.

⁷¹ Richard D. Rosen, *Drones and the U.S. Courts*, 37 Wm. Mitchell L. Rev. 5280, 5282 (2010-2011).

lists, it is far from certain that a targeted individual would even become aware of his inclusion on a list, an obvious prerequisite for being able to challenge the constitutionality of this fact. This is doubly unlikely given the particular time constraints that identified targets face (that is, before they are reduced to dust by a Hellfire missile). The DC District Court's interpretation of the requirements of standing thus severely constrains the possibility of litigating US targeted killings.

POLITICAL QUESTIONS DOCTRINE

Considerations of political questions doctrine also contributed to the District Court's decision to dismiss the case. The matter at hand, it reasoned, represented a "non-justiciable political question," as a ruling on this aspect of US military and foreign policy would amount to a violation of separation of powers.⁷² As the court stated, "national security, military matters and foreign relations are "quintessential sources of political questions.""⁷³ The Court further maintained that the judicial branch is "ill-equipped 'to assess the nature of battlefield decisions,'"⁷⁴ and cannot "'define the standard for the government's use of covert operations,'"⁷⁵ which is, of course, precisely what the petitioners had hoped it *would* do.

A judicial branch incapable of reviewing the decisions and policies of the DOD and CIA does not offer much hope of being able to reign in the abuses with which the US targeted killing program is rife, as these transgressions are intrinsically linked to "battlefield decisions," as well as matters of national security, the military, and foreign relations. While it rationalized its argument by citing separation of powers, the DC District Court's appeal to political questions doctrine amounts to an abdication of its responsibility to provide checks and balances on the power of the executive. After all, history has made it resoundingly clear that within the realm of military policy and foreign relations is where the executive is *most* likely to commit the sort of constitutional violations that can only be rectified via judicial review.

STATE SECRETS DOCTRINE

Questions of standing and political questions doctrine already requiring dismissal, the *Al-Aulaqi* court did not find it necessary to rule on the government's claim that hearing the case would violate state secrets privilege,⁷⁶ which serves to prevent the disclosure of state secrets in the name of national security interests. State secrets privilege is applicable in two distinct ways. First, the *Reynolds* Privilege, if successfully invoked by the government, prohibits excludes specific evidence that is sensitive from a national security standpoint.⁷⁷ The *Totten* Bar, however, renders nonjusticiable entire cases that involve secret contracts with the government.⁷⁸ Though

⁷² *Al-Aulaqi*, 727 F. Supp. 2d at 114.

⁷³ *Id* at 116.

⁷⁴ *Id* at 118.

⁷⁵ *Id*.

⁷⁶ *Id* at 140.

⁷⁷ *United States v. Reynolds*, 35 U.S. 1, 9 (1953).

⁷⁸ *Totten v. United States*, 92 U.S. 105, 107 (1876).

courts such as those in *Hepting v. AT&T Corp*⁷⁹ and *In re United States*,⁸⁰ provide important examples of the correct application of the two distinct arms of the privilege,⁸¹ cases such as *El Masri v. United States*⁸² and *Mohamed v. Jeppesen Dataplan*⁸³, both of which pertain to extraordinary rendition abuses, illustrate a disturbing trend in state secrets jurisprudence within the War on Terror.⁸⁴ That is, courts, in conflating *Reynolds* and *Totten*, are increasingly prone to the *Totten* style dismissal of entire proceedings involving *Reynolds* evidence.⁸⁵ Though the *Al-Aulaqi* court did not explicitly side with the defendant's claim that state secrets doctrine would necessitate dismissal, its brief exploration of the topic is certainly suggestive of its concurrence with the notion that mere existence of evidence potentially sensitive to national security effectively renders the entire case nonjusticiable.⁸⁶

Ultimately, state secrets privilege may prove to be the most insurmountable barrier to the domestic judicial review of drone policy. As *Totten* requires the dismissal of all proceedings involving secret government contracts, which seem to abound in the drone program, and the prevalent interpretation of *Reynolds* pointing towards the nonjusticiability of cases involving any sort of sensitive evidence, prospects for reigning in drone program abuses within domestic courts do not overwhelm, especially considering the program's intrinsic ties to national security interests. That the government's invocation of privilege supersedes the due process rights of any individual, no matter how grave the abuses they may have suffered, is particularly evident in *El Masri*. In this case, the petitioner, subjected to astoundingly gruesome treatment⁸⁷ and denied access to US courts, brought his claims before the European Court of Human Rights, which ruled 17-0 that the actions of the CIA constituted torture.⁸⁸ While certainly a victory, this ruling also serves to emphasize that in the War on Terror, US courts are no friend of human rights.

CONCLUSION

This article sought to outline some of the factors that make the Obama administration's targeted killing program so legally objectionable. Beginning with the very characterization of the conflict in which the program exists, though the Obama Administration contends that all targeted killings conducted within the War on Terror fall under IHL, it may in fact be overextending the projection of armed conflict. In locales such as Yemen, Somalia, and arguably Pakistan, IHRL's

⁷⁹ *Hepting v. AT&T Corp*, 671 F.3d 881 (9th Cir 2011).

⁸⁰ *In re United States*, 872 F.2d 472 (D.C. Cir 1989).

⁸¹ Stephanie A. Fichera, *Compromising Liberty for National Security: The Need To Rein in the Executive's Use of the State-Secrets Privilege in Post-September 11 Litigation*, 62 U. Miami L. Rev. 625, 632 (2007-2008).

⁸² *El Masri v. United States*, 479 F.3d 296 (4th Cir 2007).

⁸³ *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070 (9th Cir 2010).

⁸⁴ See generally Jeffrey L. Vagle, *A Kind of Hydraulic Pressure: Extraordinary Rendition, State Secrets, and the Limits of Executive Power*, 22 Temp. Int'l & Comp. L.J. 523 (2008).

⁸⁵ See generally Daniel J. Huyck, *Fade to Black: El Masri v. United States Validates the Use of the State Secrets Privilege to Dismiss "Extraordinary Rendition" Claims*, 17 Minn. J. Int'l L. 435 (2008).

⁸⁶ *Al-Aulaqi*, 727 F. Supp. 2d at 141.

⁸⁷ *El Masri v. Tenet*, 437 F. Supp 2d 530, 533 (ED Va).

⁸⁸ Nicholas Kulish, *Europe Court Finds Violation in C.I.A. Rendition*, New York Times (Nov 13, 2012).

law enforcement paradigm is clearly the correct framework and targeted killings are consequently strictly forbidden. Additionally, even if IHL were the sole framework governing the conflict, it is far from clear that the Obama administration fulfills its obligations under this body of law. The Administration, for example, appears to disregard entirely IHL's many transparency related provisions. Such an abject lack of transparency, in turn, renders impossible any satisfactory determination of US compliance with the principles of distinction and proportionality, key elements of IHL's law of war. Absent official government figures on civilian casualties, however, it appears unlikely that these principles are being adhered to in any meaningful sense.

A review of possibilities for redress within domestic law does not inspire any greater optimism. Though hypothetically feasible, it is unlikely that any US court will be issuing any sort of ruling on the Obama Administration's compliance with IHL or IHRL, given current dogmas about non-self executing treaties and the general dismissiveness towards international law that permeates within the judicial branch. Though this article did not attempt to assess the legality of targeted killings under the US constitution, the constitutionality of the entire program seems questionable at best, especially in the case of US citizens such as Anwar al-Auluqi. In any event, the *Al-Aulaqi* ruling shows that questions of standing, political questions doctrine, and state secrets privilege effectively provide the judicial branch with a pretext to avoid addressing the numerous legal issues that targeted killings in the War on Terror pose.

Optimism, though in decidedly short supply, is to be found in a handful of places. Not wanting to run the risk of further solidifying the DC District ruling, the ALCU has elected not to appeal *Al-Aulaqi*. One must remember, though, that the case was only dismissed at the district level. Obama's drone war alarming rate of escalation, combined with the administration's belief that it is legally justified in targeting citizens provides hope that a plaintiff with a more favorable fact situation than Anwar al-Auluqi may one day arise. Recent congressional interest in drone strikes also offers a glimmer of promise that legislative action is what will ultimately curb the program's enormous potential for abuse. Perhaps the greatest hope, however, lies in the Obama Administration ultimately comprehending that targeted killings simply amount to poor policy, not only setting a dangerous precedent at a time when drone technology is poised to rapidly diffuse to other nations and non-state actors alike, but also engendering the kind of intense resentment that contributes to the program's very own reason for existence.