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International Law Issues in the Department of Justice White Paper on Targeted Killing

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ASIL Insights, international law behind the headlines, informing the press, policy makers, and the public.

Introduction

On February 4th, NBC published a Department of Justice paper entitled, “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” (“White Paper”).^[1] Produced in 2011, the White Paper is the first official document publicly released to spell out the Obama Administration’s legal position regarding the overseas targeted killing of U.S. citizens alleged to be al-Qa’ida leaders.^[2] This *Insight* introduces and briefly describes some of the international law issues addressed or implicated by the White Paper; it is neither a defense nor a critique of the White Paper, and it does not address the paper’s treatment of U.S. constitutional or other domestic legal issues.^[3]

Structure, Scope, and Conclusion of the White Paper

The White Paper likely summarizes detailed legal analyses conducted by the Obama administration from 2009 to 2011. It begins with an introduction that limits its scope and highlights the conditions that the Justice Department believes must be met to use force within that scope. Its first sentence indicates that its analysis is limited to “the circumstances in which the U.S. government could use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa’ida or an associated force of al-Qa’ida – that is, an al-Qa’ida leader actively engaged in planning operations to kill Americans.” It concludes that such an operation would be lawful where:

- (1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States;
- (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and
- (3) the operation would be

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conducted in a manner consistent with applicable law of war principles.^[4]

DOJ sets forth its analysis in four substantive parts. The first part addresses the authority to use force against al-Qa'ida in a foreign country, under domestic and international law. The second part examines U.S. constitutional issues raised by the targeting of a person, focusing in particular on the Fourth and Fifth Amendments. The third and fourth parts of the White Paper address federal criminal law, in particular whether such a killing would amount to an unlawful killing of an American by an American under Section 1119 of Title 18 of the U.S. Code or a war crime under the War Crimes Act.

International Law in the White Paper

Domestic law is more central in the White Paper than international law. The citations to international law are limited compared to domestic law, there is no discussion of state practice apart from that of the United States, and the analysis is relatively slight, much of it occurring under the rubric of domestic constitutional analysis. A clearer international law defense of U.S. targeted killing policy in general may be found in the 2010 keynote speech of then-State Department Legal Adviser Harold Koh, made at the Annual Meeting of the ASIL and cited in the White Paper.^[5]

The White Paper is mainly concerned with two categories of international law questions: First, may the United States lawfully use lethal force against al-Qa'ida outside of the zone of active hostilities, Afghanistan, and if so, under what conditions? And second, what principles govern the targeting of a particular person? These are mainly questions of international humanitarian law and the law governing resort to the use of force; the White Paper does not address, for instance, the potential applicability of international human rights law. While the Justice Department limited the paper's scope to the targeted killing of a U.S. citizen alleged to be an operational leader of al-Qa'ida, much of the international law analysis would seem to apply in the case of non-American targets of lethal force as well.

Following are several, but hardly all, of the international law questions raised or implicated by the White Paper:

Authority to resort to armed force against al-Qa'ida. The Justice Department rests domestic authority to use force on the Authority for the Use of Military Force ("AUMF") of September 14, 2001, and "the President's constitutional responsibility to protect the nation." Like the AUMF and the Koh speech, the White Paper also asserts the international law right of self-defense arising out of the 9/11 attacks.^[6] Although unclear from the published draft, the White Paper may also be preserving an independent right of self-defense apart from the 9/11 attacks. Generally speaking, the White Paper assumes the lawfulness of using force as a matter of national self-defense and analyzes the specific targeting questions under the law of armed conflict.

Article 2(4) of the UN Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state." The Charter recognizes two exceptions to the prohibition: authorization of force by the UN Security Council and exercise of the "inherent right of self-defense" under Article 51 of the Charter. The White Paper, and the Koh Speech before it, rest on the second exception. Both also acknowledge that the use of force against any particular person would need to account for the sovereignty of the state where force is used. Sovereignty concerns may be avoided if the United States obtains "the consent of the host nation's government," a customary exception to the prohibition on the use of force. In the absence of such consent, the White Paper asserts the need, before using force, for "a determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted."^[7]

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In addition, while there is much scholarly debate over the extent to which imminent armed attacks may trigger the right of self-defense under Article 51, the White Paper treats imminence not as a self-defense issue under international law but as one of due process under the Fifth Amendment of the U.S. Constitution.[8]

Existence of an armed conflict with al-Qa'ida. The White Paper suggests in the introduction that “[t]he President has authority to respond to the imminent threat posed by al-Qa’ida and its associated forces, arising from . . . the existence of an armed conflict with al-Qa’ida under international law.”[9] An armed conflict is the state of hostilities – something more than isolated and sporadic acts of violence[10] – existing between two or more parties during which some behavior, otherwise unlawful, is permissible. If the force contemplated by the White Paper involves an armed conflict between the United States and al-Qa’ida, then the rules governing targeting would be drawn from the law of armed conflict, which generally permits the use of lethal force against combatants.[11]

If, however, the force contemplated in the White Paper does not involve an armed conflict with al-Qa’ida, then the applicable rules may be less clear. The United States may justify force in that context as self-defense under the U.N. Charter, in which case principles of distinction and proportionality would apply.[12] It is possible that others would argue that law enforcement norms of necessity, imminence, and proportionality would govern. Outside of armed conflict, a targeted individual may have a stronger claim to the protection of international human rights law, which contains strict limits on the authority of a state to take life.[13]

Conflict beyond Afghanistan. The White Paper presents the issue of using force outside Afghanistan as a question of “the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is party to the conflict.”[14] It acknowledges the argument that force may be used in a location outside Afghanistan only where “hostilities become sufficiently intense and protracted in the new location.”[15] It asserts, however, that “[t]here is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict...”[16] Adopting a standard not found in international law, but drawing on some of its principles by analogy, the Justice Department takes the view that a lethal operation would be part of the non-international armed conflict with al-Qa’ida if the terrorist group “has a significant and organized presence” in a country from which its leaders “plan attacks against U.S. persons and interests...”[17]

Authority to use force against operational leaders of al-Qa'ida. The White Paper takes the position that the United States is in a non-international armed conflict with al-Qa’ida, in which Common Article 3 of the Geneva Conventions applies.[18] Under Common Article 3, basic humanitarian rules, including the prohibition of “violence to life and person,” protect “[p]ersons taking no active part in the hostilities.” However, a person who takes an active (or direct) part in the hostilities would be subject to attack. Relying in part on a major 2009 study by the International Committee of the Red Cross, the White Paper takes the position that an operational commander of al-Qa’ida would be subject to attack as a person taking an active part in hostilities.[19]

Principles of the law of armed conflict. In the discussion of Fifth Amendment Due Process, the White Paper notes as a “premise” that four law of war principles – “necessity, distinction, proportionality, and humanity (the avoidance of unnecessary suffering)” – apply in the circumstances it describes. The paper does not explain the first two principles but emphasizes proportionality – noting that casualties should not be “excessive in relation to the anticipated military advantage,” the basic law of armed conflict standard. It also notes

that the law of armed conflict would require the United States to “accept a surrender if it were feasible to do so.”^[20]

In this context, the White Paper also asserts the generally accepted principle that the law of war does not prohibit, but regulates, the use of “technologically advanced weapons systems” such as drones or “smart bombs.” In what appears to be a nod to the use of such weapons, the White Paper states that “stealth or surprise” in an attack would be lawful.^[21]

Conclusion

The White Paper has generated a substantial amount of debate over the use of force not only against U.S. citizens alleged to be members of al-Qa’ida but more generally over the U.S. use of force against alleged terrorists outside of Afghanistan. One comes away from the White Paper thinking that a fuller explication of the international law case for such targeted killing remains to be made (or disclosed). But the debate is rapidly moving beyond the White Paper itself toward other matters, such as the idea of a “drone court” to assess uses of force against U.S. citizens (and perhaps others) abroad.^[22] Because the White Paper left open many issues – for instance, the position of the high-level official who makes such determinations, the steps that should be taken to demonstrate infeasibility of capture, and the process for holding officials accountable for violations of the conditions set forth – public observers are left to wonder how, if at all, such issues are treated in the actual conduct of the U.S. counter-terrorism program.^[23]

To the extent the White Paper is seen as failing to address adequately the international legal rules or to provide for mechanisms of accountability, international discomfort with targeted killings could increase.^[24] Should that happen, the international law questions may gain in prominence in at least two situations: one, other states are likely to challenge U.S. behavior in international institutions, such as the UN Human Rights Council, pressuring the United States to account more fully for the program; and two, those states that have universal or territorial jurisdiction could consider applying criminal or civil sanctions to U.S. officials responsible for a program they could find inconsistent with international law.

About the Author:

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Endnotes:

[1] See Michael Isikoff, *Justice Department memo reveals legal case for drone strikes on Americans*, NBC News, Feb. 4, 2013, http://openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite. For the paper itself, see *Department of Justice White Paper: 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*, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter *White Paper*]. A version without the NBC watermarks, dated as a draft of November 8, 2011, is available at <https://www.documentcloud.org/documents/602342-draft-white-paper.html>.

[2] Much of the substance of the position taken by the Justice Department had previously appeared in reporting and in official speeches. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 8, 2011, http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all&_r=0; Harold Hongju Koh, *Keynote Address: The Obama Administration and International Law*, 104 ASIL Proc. 214, 207-221 (2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> [hereinafter *Koh Speech*]; Department of Justice, *Attorney General Eric Holder Speaks at Northwestern University School of Law*, Mar. 5, 2012, available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>. This

Insight adopts the White Paper's transliteration of al-Qa'ida.

[3] This *Insight* is designed for generalists rather than specialists in the law of armed conflict. Those interested in detailed international law analyses should look especially to the [Opinio Juris](#) and [Lawfare](#) blogs.

[4] *White Paper*, *supra* note 1, at 1.

[5] See *Koh Speech*, *supra* note 2. Targeted killings have been the subject of considerable debate, scholarship, and some adjudication, during the several years before the date of the White Paper, though none of it is referenced in the White Paper. The fullest academic treatment of the subject is Nils Melzer, *Targeted Killings in International Law* (2008), and numerous law journal articles on the subject have been published. The Israeli High Court considered the issue in detail, refusing to ban such killings in all circumstances. See *H CJ 769/02 Public Committee Against Torture v. Israel*, [2006] (Isr.), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, delivered a much-cited study to the Human Rights Council in 2010. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on targeted killings*, Human Rights Council, A/HRC/14/24/Add.6 (May 28, 2010), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

[6] *White Paper*, *supra* note 1, at 2.

[7] For both principles, see *id.* at 5. The “unwilling or unable” standard has proven somewhat controversial. Philip Alston, as UN Special Rapporteur, acknowledged its existence. See *supra* note 5; see also Ashley Deeks, “Unwilling or Unable”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 *Va. J. Int'l L.* 483 (2012); cf. Kevin Jon Heller, *Ashley Deeks' Problematic Defense of the 'Unwilling or Unable' Test*, *OpinioJuris.org*, <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> (last visited Feb. 13, 2013).

[8] *White Paper*, *supra* note 1, at 7-8. For a recent analysis of the debate over imminence in the law governing national self-defense, see Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 *AJIL* 731, 769 (2012), available at http://www.asil.org/pdfs/ajil/Daniel_Bethlehem_Self_Defense_AJIL_ARTICLE.pdf.

[9] *White Paper*, *supra* note 1, at 1.

[10] See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art. 1(2), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978.

[11] For instance, as Harold Koh put it in his 2010 ASIL speech, “a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force.” *Koh Speech*, *supra* note 2; *But see* Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 *Eur. J. Int'l L.* (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213960.

[12] This is a possible implication of the Harold Koh's statement that a state could be “engaged in an armed conflict or in legitimate self-defense,” and his subsequent reference to principles of distinction and proportionality. See *Koh Speech*, *supra* note 2.

[13] That said, the United States has long taken the position that the human rights treaties to which it is a party – such as the International Covenant on Civil and Political Rights – do not apply beyond the territory of the United States. See, e.g., John Bellinger, *Administration Submits ICCPR Report, Punts on Extraterritorial Application*, *Lawfareblog.com*, (Jan. 19, 2012), <http://www.lawfareblog.com/2012/01/administration-submits-iccpr-report-punts-on-extraterritorial-application/>. This view is not widely held among human rights treaty bodies. See, e.g., John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq*, *ASIL Insights*, Oct. 25, 2005, <http://www.asil.org/insights051025.cfm>.

[14] *White Paper*, *supra* note 1, at 4. It is widely agreed that hostilities in Afghanistan are active and constitute an armed conflict.

[15] *Id.* The language draws from customary international humanitarian law, and the White Paper expressly refers to the *Tadic* case before the International Criminal Tribunal for the former Yugoslavia and the work of Mary Ellen O'Connell.

[16] *White Paper*, *supra* note 1, at 4.

[17] *Id.* at 5.

[18] As the White Paper notes, this is the same position taken by the Supreme Court in *Hamdan v. Rumsfeld*. Common Article 3 becomes essential in the White Paper's discussion of the federal War Crimes Act, which provides criminal sanctions for "grave breaches" of Common Article 3 and other rules of the law of armed conflict.

[19] *White Paper*, *supra* note 1, at 16; see ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (May 2009), <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

[20] *White Paper*, *supra* note 1, at 8.

[21] *Id.* (citing *Koh Speech*, *supra* note 2).

[22] Dianne Feinstein raised the issue during the confirmation hearing of John Brennan to be Director of Central Intelligence. See Scott Shane, *Debating a Court to Vet Drone Strikes*, N.Y. Times, Feb. 8, 2013, http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html?_r=0.

[23] See Rosa Brooks, *Death by Loophole*, ForeignPolicy.com, Feb. 5, 2013, http://www.foreignpolicy.com/articles/2013/02/05/death_by_loophole.

[24] International pressure is almost certain to increase. See, e.g., Press Release, Office of the High Commissioner for Human Rights, UN Counter-Terrorism Expert to launch inquiry into the civilian impact of drones and other forms of targeted killing (Jan. 22, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12943&LangID=E>.