

USA

**THE DEVIL IN THE
(STILL
UNDISCLOSED)
DETAIL**

**DEPARTMENT OF JUSTICE
'WHITE PAPER' ON USE OF
LETHAL FORCE AGAINST U.S.
CITIZENS MADE PUBLIC**

**AMNESTY
INTERNATIONAL**



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INTRODUCTION

These [drone] strikes are legal, they are ethical and they are wise
White House Press Secretary, press briefing, 5 February 2013

A newly released document outlining the legal framework relating to an aspect of the US administration's "targeted killing" programme is silent on human rights and does nothing to alleviate Amnesty International's concern that the programme as a whole allows for the use of lethal force that violates the right to life under international law.

The US Department of Justice "white paper", which "sets forth a legal framework for considering the circumstances in which the US government could use lethal force in a foreign country outside the area of active hostilities against a US citizen who is a senior operational leader of al-Qa'ida or an associated force of al-Qa'ida", was first made public by NBC News.¹ The document adds little new substance to what various administration officials have already said publicly on this issue.² It again ignores the USA's international human rights obligations, and expands the notion of "imminent attack" to which the USA might respond with lethal force.³ It provides no case detail, and considers the lethal force question mainly under US constitutional and statutory law.

The fact that the document makes no express reference to international human rights law is unsurprising – this has become the norm for officials outlining policy and practice under the USA's notion of a global armed conflict with al-Qa'ida. The silence on human rights is no less regrettable by its predictability.

The Justice Department paper, "an unclassified document prepared for some members of Congress"⁴, apparently summarizing a longer legal memorandum that remains classified and undisclosed, addresses specifically the legality of the "targeted" killing in a "foreign country" of US citizens by the USA. It should not be forgotten that the vast majority of those killed by US forces in such operations in recent years, principally in drone attacks, have been foreign nationals. While the white paper concludes that "the US citizenship of a leader of al-Qa'ida or its associated forces...does not give that person constitutional immunity from attack", it is not clear whether the case of a US citizen assessed as the possible target for lethal force would receive a greater degree of scrutiny and caution from decision-makers than an identically placed foreign national.⁵ As outlined below, there is certainly greater domestic political pressure on the administration to make clear its full legal opinions on the "targeted killing" of US nationals. Amnesty International reminds the US government not to allow the domestic focus on US nationals to distract from a fundamental concept of universal human rights, namely that the right to life, to liberty, and to fair trial of every human being is to be respected without discrimination on the basis of their nationality.

While the White House has responded to the release of the white paper by stressing that it is an unclassified document that contains a set of "general principles" already in the public domain, Amnesty International calls on the US administration to adopt an approach of far greater transparency than it has to date in relation to its use of lethal force in policy and practice. Such an approach should be one that facilitates independent assessment of the lawfulness of particular attacks, accountability for any attacks that are unlawful, and full reparations for victims of violations and their families.

The 16-page Department of Justice document concludes that it would be lawful for the US government to conduct a lethal operation outside the USA "against a US citizen who is a senior operational leader of al-Qa'ida or an associated force of al-Qa'ida" in "at least" the following circumstances:

- 1) an informed, high-level official of the US 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 is conducted in a manner consistent with the four fundamental principles of the laws of war governing the use of force – necessity, distinction, proportionality, and humanity.

Use of lethal force in such circumstances would not amount to murder and would not violate the US ban on assassination, the Justice Department asserts, but would be “a lawful act of national self defense”.⁶ At the same time, the paper emphasizes at the outset that it does “not attempt to determine the minimum requirements necessary to render such an operation lawful”.

The devil as ever must be in the detail. While official case detail is still entirely missing, what policy detail has so far been provided continues to raise serious concerns.

‘GLOBAL WAR’ WITH AL-QA’IDA ET AL

The white paper restates as an overarching concept what by now has become something of a mantra for US officials. That is, that “the United States is in an armed conflict with al-Qa’ida and its associated forces”, and that the US Congress, by passing the Authorization for Use of Military Force (AUMF) in the immediate aftermath of the attacks of 11 September 2001, had authorized the President to use “all necessary and appropriate force” in response.⁷ The armed conflict has no geographical or temporal limits under the AUMF. The Justice Department paper asserts that “none of the three branches of the US Government has identified a strict geographical limit on the permissible scope of the AUMF’s authorization”.

This is not to say that no official has expressed concern about the AUMF’s broad scope. According to a US federal judge in 2008, the AUMF is “the most far-reaching bestowal of power upon the Executive since the Civil War... The broad language of the AUMF, literally construed, gives the President *carte blanche* to take any action necessary to protect America against any nation, organization, or person associated with the attacks on 9/11 who intends to do future harm to America.... I am cognizant that the Commander-in-Chief must be able to conduct a war without undue interference from a co-equal branch of government... However, an independent judiciary is obliged to preserve the fundamental building blocks of our free society”.⁸ As noted below, the Justice Department paper asserts that there can be no judicial oversight of this lethal force policy.

The fact that the USA’s global war paradigm has gained acceptance across the three branches of its government renders it no less an unacceptably unilateral departure from the very concept of the international rule of law in general, and the limited scope of application of international humanitarian law (IHL, the law of armed conflict) in particular. The message sent is that a government can ignore or jettison its human rights obligations and replace them with rules of its own whenever it decides that the circumstances warrant it. Under its global war framework, the USA has at times resorted, among other things, to enforced disappearance, torture, secret detainee transfers, indefinite detention, and unfair trials, as well as this policy that plays fast and loose with the concept of “imminence” and appears to permit extrajudicial executions. As the global war theory has gained acceptance across the three branches of government, truth, accountability and remedy have been sacrificed. As Amnesty International has previously pointed out, the AUMF was passed with little substantive debate and considerable apparent confusion among legislators about what they were voting for.⁹ The organization has since 2006 called for the AUMF to be withdrawn and for the USA to abandon its global war framework.

The white paper goes into some detail on the USA's theory of the armed conflict with al-Qa'ida. Pointing to the 2006 *Hamdan v. Rumsfeld* ruling of the US Supreme Court which reversed President George W. Bush's 2002 decision that Article 3 Common to the four Geneva Conventions was not applicable to Taliban or al-Qa'ida detainees, the paper asserts that "the United States is currently in a non-international armed conflict with al-Qa'ida and associated forces" and that "any US operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities". It continues:

"Particularly in a non-international armed conflict, where terrorist organizations may move their base of operations from one country to another, the determination of whether a particular operation would be part of an ongoing armed conflict would require consideration of the particular facts and circumstances in each case, including the fact that transnational non-state organizations such as al-Qa'ida may have no single site serving as their base of operations.

If an operation of the kind discussed in this paper were to occur in a location where al-Qa'ida or an associated force has a significant and organized presence and from which al-Qa'ida or an associated force, including its senior operational leaders, plan attacks against US persons and interests, the operation would be part of the non-international armed conflict between the United States and al-Qa'ida that the Supreme Court recognized in *Hamdan*. Moreover, such an operation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government or after a determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted. In such circumstances, targeting a US citizen of the kind described in this paper would be authorized under the AUMF and the inherent right to self-defense."

The white paper does not satisfactorily address the fundamental question of how the administration's global armed conflict paradigm complies with the international legal definition of armed conflict. Amnesty International recognizes that the USA has, over the past decade, participated in a number of actual armed conflicts, both of an international and non-international character, on the territory of several states, some of which continue today. Where it is a party to such an armed conflict, the USA's use of intentional lethal force against individuals who are directly participating in hostilities would not necessarily violate international law, if it acted in conformity with the rules of IHL. However, Amnesty International remains unpersuaded and

"We have acknowledged, the United States, that sometimes we use remotely piloted aircraft to conduct targeted strikes against specific al Qaeda terrorists in order to prevent attacks on the United States and to save American lives. We conduct those strikes because they are necessary to mitigate ongoing actual threats, to stop plots, prevent future attacks, and, again, save American lives. These strikes are legal, they are ethical and they are wise... It is a matter of fact that Congress authorized the use of military force against al Qaeda. It is a matter of fact that al Qaeda is in a state of war against us and that senior leaders, operational leaders of al Qaeda are continually plotting to attack the United States... I'm not going to talk about individual operations that may or may not have occurred... The fact of the matter is that the white paper that we've discussed was provided – was developed and produced in an unclassified manner precisely so that those general principles could be spelled out and elaborated... [W]hat we cannot do is discuss classified operations. It would compromise what tend to be called sources and methods, and would do harm to our national security interests"

White House Press Secretary, press briefing 5 February 2013¹⁰

deeply troubled by the white paper's assertion that the USA is engaged in a global and pervasive armed conflict against a diffuse network of non-state actors which provides its forces, under international law, with license to kill individuals anywhere in the world at any time, whenever it deems, based on secret information, such actions to be appropriate. To accept such a theory would obviously be to twist international human rights and humanitarian law and other basic rules of public international law to their breaking points. It would also fundamentally undermine crucial protections for human rights of civilians that have been painstakingly developed over more than a century of international law-making.

A BROADER CONCEPT OF IMMINENCE

Amnesty International pointed out in its June 2012 report on the USA's "targeted killing" policy that the administration's self-defence justification appears to be just another variant of the "global war" theory. The organization was particularly concerned by the USA's radical reinterpretation of the concept of "imminence" when invoking the right to use lethal force in self-defence. If anything, the white paper's treatment of the imminence question has only heightened concern about the administration's distortion of this concept.

Under international human rights law, the intentional use of lethal force is lawful only if it is "strictly unavoidable" in order to meet an "imminent threat of death" in self-defence or defence of others. The only exception to the ordinary "law enforcement" rules in relation to the use of lethal force and the right to life is in the exceptional situation of zones of armed conflict. In the context of an international armed conflict, a person who is a member of the armed forces of a state, or a civilian who is at the relevant time directly participating in hostilities, may be lawfully targeted for attack (and killed), if the attack complies with the rules of international humanitarian law. Applying this rule to non-international armed conflict may, at least in some circumstances, require attempting to capture, rather than kill, members of armed groups wherever practically possible.¹¹

Adopting a much looser notion of imminence than human rights law, and international law more generally requires, the white paper asserts that, given the nature of international terrorism:

"the condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on US persons and interests will take place in the immediate future... By its nature...the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging whether a person continually planning terror attacks presents an imminent threat, making the use of force appropriate. In this context, imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans."

With this in mind, the Justice Department asserts that for a US official to make an assessment of whether a specific al-Qa'ida leader presents an imminent threat, he or she must take into account certain generalities, namely that "certain members of al-Qa'ida" are "continually plotting attacks against the United States"; that "al-Qa'ida would engage in such attacks regularly to the extent it were able to do so"; that the US authorities "may not be aware of all al-Qa'ida plots"; and that, in view of the above, "the nation may have a limited window of opportunity within which to strike".

The paper provides an example. An operational leader of al-Qa'ida or an associated force would constitute an "imminent threat" if:

- ❖ he or she has been “personally and continually involved in planning terrorist attacks against the United States”;
- ❖ he or she has “recently been involved in activities posing an imminent threat of violent attack against the United States”; and
- ❖ there is “no evidence suggesting that he has renounced or abandoned such activities”.

In other words, an individual could be designated as posing an “imminent threat” (and therefore subject to “targeted” killing) in the absence of intelligence about a specific planned attack or the individual’s personal involvement in planning or carrying out a specific attack. This notion stretches the concept of imminence in a manner that is potentially disastrous for the protection of human rights and the international rule of law.

The quality of intelligence needed to make such determinations is not the subject of the white paper – needless to say, intelligence is not a precise science. Just how accurate it may or may not be in any particular situation is made even more difficult to independently assess by the secrecy surrounding executive decision-making on this issue.

An individual can be killed based on a determination that he or she represents an imminent threat, and their capture “could not be physically effectuated during the relevant window of opportunity” or if the country where the individual is located declined to “consent to a capture operation”, according to the white paper. Also relevant to the question of resort to lethal force would be whether a capture operation would pose an “undue risk” to US personnel. The paper does not elaborate on what would amount to “undue risk”.

Finally, the paper states that the decision to kill the individual would have to comply with the “four fundamental law of war principles”, necessity, distinction, proportionality, and humanity. Under this framework, the Justice Department adds, the USA would “be required to accept a surrender if it was feasible to do so”. The white paper does not elaborate on how a surrender might be offered or recognized in the world of remote-controlled drone attacks.

OUT OF JUDICIAL SIGHT

On the question of judicial review, the Department of Justice asserts that “there exists no appropriate judicial forum” to assess the constitutional considerations raised in this context:

“Were a court to intervene here, it might be required inappropriately to issue an ex ante command to the President and officials responsible for operations with respect to their specific tactical judgment to mount a potential lethal operation against a senior operational leader of al-Qa’ida or its associated forces. And judicial enforcement of such orders would require the Court to supervise inherently predictive judgments by the President and his national security advisors as to when and how to use force against a member of an enemy force against which Congress has authorized the use of force”.

The notion that the judicial branch should defer in matters of war, national security and foreign policy to the political branches of government has become familiar in the post-9/11 context, for example with judicial remedy for human rights violations in the counter-terrorism context being systematically blocked by courts generally deferring to executive invocation of secrecy, or to notions of immunity for executive officials, or to the concept of “special factors” – such as national security and war-making – preventing the creation of a judicial remedy in the absence of congressional authorization.¹²

TRANSPARENCY

The emergence into the public realm of this Department of Justice paper comes at a time when the US administration's use of lethal force, via drones in particular, is the subject of ever-growing media scrutiny, and is receiving some congressional attention in relation to the nomination of a new Secretary of Defense and of a new Director of the CIA. A bipartisan group of 11 US Senators have written to President Obama in this context to ask that he "direct the Justice Department to provide Congress, specifically the Judiciary and Intelligence Committees, with any and all legal opinions that lay out the executive branch's official understanding of the President's authority to deliberately kill American citizens". The Senators suggest that the administration's "cooperation on this matter will help avoid an unnecessary confrontation that could affect the Senate's consideration of nominees for national security positions".¹³

In recent interviews, for example, the outgoing Secretary of Defense (and former Director of the CIA), Leon Panetta, has stressed that "We are in a war. We're in a war on terrorism and we've been in that war since 9/11" and that the use of lethal force, including by drone attacks, has been an "important part of our operations against Al-Qaeda, not just in Pakistan, but also in Yemen, in Somalia and I think it ought to continue to be a tool we ought to use where necessary", not only by military forces but CIA as well. He added that "we always need to continue to look at it, to make sure we develop the right standards, that we're abiding by the laws of this country, that we're doing it in a way that hopefully can be a little more transparent with the American people."¹⁴

The troubling absence of transparency in relation to the administration's lethal force policy was likewise recognized by a US federal judge in New York in early January 2013, even as she decided that she could not order the executive to disclose documents relating to that policy:

"The Administration has engaged in public discussion of the legality of targeted killing, even of citizens, but in cryptic and imprecise ways, generally without citing to any statute or court decision that justifies its conclusions. More fulsome disclosure of the legal reasoning on which the Administration relies to justify the targeted killing of individuals, including United States citizens, far from any recognizable 'hot' field of battle, would allow for intelligent discussion and assessment of a tactic that (like torture before it) remains hotly debated. It might also help the public understand the scope of the ill-defined yet vast and seemingly ever-growing exercise in which we have been engaged for well over a decade..."

District Judge Colleen McMahon nevertheless ruled that the administration had not violated the Freedom of Information Act (FOIA) by refusing to disclose documents relating to its policy of "targeted killing". She acknowledged the "Alice-in-Wonderland" and "Catch-22" nature of the situation, but said she could do nothing about it: "I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusions a secret."¹⁵

The Department of Justice's 16-page white paper is believed to summarize a longer legal memorandum written by the Office of Legal Counsel at the US Department of Justice addressing the use of lethal force against Anwar Al-Awlaki, a US citizen who was killed in a drone attack in Yemen in September 2011, reportedly involving CIA-operated drones flown from a secret base in Saudi Arabia.¹⁶ Disclosure of that memorandum and other materials is currently being pursued in FOIA litigation brought by two journalists with the New York Times, and by the American Civil Liberties Union (ACLU). The New York Time journalists and the ACLU have filed notice that they

will be appealing Judge McMahon's ruling to the US Court of Appeals for the Second Circuit.

The Justice Department's success so far in this litigation does not prevent the executive from adopting a far more transparent approach to its lethal force policy.

THE WAR CRIMES ACT

The final part of the white paper asserts that the intentional use of lethal force, outside the USA, "against a US citizen who is a senior operational leader of al-Qa'ida or an associated force" would not violate the USA's War Crimes Act:

"The only applicable provision of section 2441 to operations of the type discussed herein makes it a war crime to commit a 'grave breach' of Common Article 3 of the Geneva Conventions when that breach is committed 'in the content of and in association with an armed conflict not of an international character.' As defined by the statute, 'a grave breach' ...includes '[m]urder', described in pertinent part as "[t]he act of a person who intentionally kills, or conspires or attempts to kill...one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause."

The paper concludes that "an operation against a senior operational leader of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States would target a person who is taking an active part in hostilities and therefore would not constitute a grave breach of Common Article 3."

This analysis is problematic for several reasons. As already noted, the USA is applying IHL to situations that are not actually armed conflicts (war crimes can only be committed in the context of an armed conflict). Even if (for that reason – rather than the one asserted in the paper) it would be correct to say that such operations are not war crimes, the question of whether they otherwise violate international law, including international criminal law, is left unaddressed. And, where such operations are conducted in actual situations of armed conflict, the paper does not address the responsibility of US forces in the event of other serious violations of IHL which may constitute war crimes, such as disproportionate attacks, or the possibility of their liability in other jurisdictions.

CONCLUSION

Amnesty International remains gravely concerned about the USA's policy on intentional use of lethal force, including against individuals suspected of involvement in terrorism. The Department of Justice white paper only confirms the organization's fears that the administration is operating outside the bounds of international law.

In light of the continuing lack of official information about the policy and its implementation, which precludes accountability for violations of international human rights law, Amnesty International reiterates its calls on the US administration, Congress and the courts:

- To disclose further legal and factual details about US policy and practices for so-called "targeted killings", "signature strikes", and "Terrorist Attack Disruption Strikes", including the full legal memorandum that the white paper apparently summarised.
- To end claims that the USA is authorized by international law to use lethal force anywhere in the world under the theory that it is involved in a "global war" against al-

Qa'ida and other armed groups and individuals.

- To recognize the application of international human rights law to all US counterterrorism operations, including those outside US territory.
- To bring US policies and practices in line with the USA's international human rights obligations, particularly, by:
 - ensuring that any use of lethal force outside of specific recognized zones of armed conflict complies fully with the USA's obligations under international human rights law, including by limiting the use of force in accordance with UN standards for the use of force in law enforcement;
 - ensuring that any use of lethal force within a specific recognized zone of armed conflict complies fully with the USA's obligations under international human rights and humanitarian law, including by recognizing and respecting the rule that if there is doubt as to whether a person is a civilian, the person is to be considered a civilian.
 - ensuring independent and impartial investigations in all cases of alleged extrajudicial executions or other unlawful killings, respect for the rights of family members of those killed, and effective redress and remedy where killings are found to have been unlawful.

ENDNOTES

¹ For a copy of the white paper, entitled 'Lawfulness of a lethal operation directed against a US citizen who is a senior operational leader of al-Qa'ida or an associated force', see 'Justice Department memo reveals legal case for drone strikes on Americans', NBC News, 4 February 2013, http://openchannel.nbcnews.com/_news/2013/02/04/16843014-exclusive-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite

² Indeed, the White House has referred journalists asking questions about the leaked Department of Justice paper back to the various speeches made by administration officials including the Attorney General, Deputy National Security and Counterterrorism Advisor John Brennan, State Department Legal Advisor Harold Koh, and former Department of Defense General Counsel Jeh Johnson. Press briefing by Press Secretary Jay Carney, 5 February 2013, <http://www.whitehouse.gov/the-press-office/2013/02/05/press-briefing-press-secretary-jay-carney-2513>

³ For a fuller outline of Amnesty International's concerns on this issue, please see USA: 'Targeted killing' policies violate the right to life, 15 June 2012, <http://www.amnesty.org/en/library/info/AMR51/047/2012/en>

⁴ Press briefing by Press Secretary Jay Carney, 5 February 2013, *op.cit.*

⁵ To the extent that US citizens must be 'senior operational leaders', it would seem to be a higher threshold than mere membership for non-US members of al-Qa'ida and associated groups.

⁶ Section 2.11 of Executive Order 12333 – United States intelligence activities, states, "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." Available at <http://www.archives.gov/federal-register/codification/executive-order/12333.html>

⁷ The AUMF authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The resolution gave the president the freedom to decide who was connected to the attacks, who might be implicated in future attacks, and what level of force could be used against them. At the same time, he was unconfined by any temporal or geographical limits.

⁸ See USA: Many words, no justice: Federal court divided on Ali al-Marri, mainland 'enemy combatant', 4 August 2008, <http://www.amnesty.org/en/library/info/AMR51/087/2008/en>

⁹ USA: Doctrine of pervasive 'war' continues to undermine human rights, 15 September 2010, <http://www.amnesty.org/en/library/info/AMR51/085/2010/en>

¹⁰ Press briefing by Press Secretary Jay Carney, 5 February 2013, *op. cit.*

¹¹ See discussion of discussion of imminence, international law and the *Caroline* case in USA: 'Targeted killing' policies violate the right to life, *op. cit.*

¹² See, for example, USA: Chronicle of immunity foretold: Time for change on counter-terrorism violations after another year of blocking truth, remedy and accountability, 17 January 2013, <http://www.amnesty.org/en/library/info/AMR51/003/2013/en>

¹³ Letter to President Obama signed by Senators Ron Wyden, Mike Lee, Mark Udall, Chuck Grassley, Jeff Merkley, Susan Collins, Dick Durbin, Patrick Leahy, Tom Udall, Mark Begich and Al Franken, dated 4 February 2013, available at <http://www.wyden.senate.gov/news/press-releases/wyden-statement-on-doj-memo-on-the-killing-of-americans-during-counterterrorism-operations>

¹⁴ US needs to keep up drone war against Qaeda: Panetta. Agence France Presse, 2 February 2013

¹⁵ *New York Times Company, Charlie Savage and Scott Shane v. US Department of Justice; American Civil Liberties Union v. US Department of Justice, US Department of Defense, and Central Intelligence Agency*, US District Court for the Southern District of New York, 2 January 2013.

¹⁶ Brennan nomination exposes criticism on targeted killings and secret Saudi base. The Washington Post, 5 February 2013.