



Deutscher Bundestag

Ausschuss f. Menschenrechte u.
humanitäre Hilfe

Ausschussdrucksache

17(17)177

**Statement of the American Civil Liberties Union to the
Committee on Human Rights and Humanitarian Aid of the Deutscher Bundestag**

27 February 2013

Distinguished Members of the Committee:

I am here today to tell you about one of the worst-kept secrets in the world: The United States government, through its Central Intelligence Agency (“CIA”) and its military’s Joint Special Operations Command (“JSOC”), regularly engages in so-called targeted killings of terrorism suspects through lethal strikes by unmanned and manned aircraft in Pakistan, Yemen, Somalia, and elsewhere. In the past several years, these strikes, which often use “drones,” have reportedly resulted in the deaths of thousands of people, including hundreds of civilian bystanders.¹ Yet, astonishingly, the government takes the position that it cannot officially confirm or deny the CIA’s role in the U.S. targeted killing program.

In 2010, the U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions, Professor Philip Alston, reported to the international community on this extraterritorial targeted-killing program, describing it as a “strongly asserted but ill-defined licence to kill without accountability.”² Nearly three years later, that self-issued license remains ill-defined and unaccountable. The United States continues to shroud its targeted killing strikes in secrecy, shielding their legal and factual bases, as well as information about their consequences, from public scrutiny. The government has also failed to provide any form of accountability and redress for civilian bystander deaths and injuries resulting from strikes outside of Afghanistan. In his report, Professor Alston

¹ *Covert War on Terror – The Data*, The Bureau of Investigative Journalism, <http://www.thebureauinvestigates.com/category/projects/drone-data/> (last visited Feb. 14, 2013).

² Special Rapporteur on extrajudicial, summary or arbitrary executions, *Addendum: Study on targeted killings*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>; Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, U.N. Doc. A/HRC/20/22 (Apr. 10, 2012) (by Christof Heyns) available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-22_en.pdf.

warned that “[t]argeted killings pose a rapidly growing challenge to the international rule of law.” But that challenge can no longer said to be merely growing; today, it is here.

The American Civil Liberties Union (“ACLU”) shares the concern of the international community—including this Committee, and the United Nations High Commissioner for Human Rights—that the U.S. targeted killing program violates international-law requirements that narrowly constrain the use of lethal force and that mandate the protection of civilians.³

To be clear, under international law, so-called targeted killings, including by drone strikes, may be lawful under exceptional circumstances. In the context of an actual armed conflict against an organized armed group, for example, a state may only use lethal force against a specific civilian who is directly participating in hostilities and if the humanitarian law requirements for the protection of civilian bystanders are met. Outside of an armed conflict situation, the use of force is governed by international human rights law, which permits lethal force to be used only as a last resort to avert an imminent threat to life or serious bodily injury, and if bystanders are afforded strict protections against harm.⁴

But these are not the rules the United States is applying. From the little the United States has disclosed, largely through a series of public (though sometimes anonymous) statements by U.S. officials over the past few years, it is apparent that the United States has cobbled together its own legal framework for targeted killing, with ever-shifting and elastic standards that are far less stringent than those that U.S. and international law permit.

The United States overly-expansive claim of killing authority is premised on two rationales. First, the government claims that an Act of Congress --- the Authorization for the Use of Military Force (“AUMF”) --- passed in the immediate aftermath of the attacks of September 11, 2001 to authorize the war in Afghanistan also authorizes the President, years later, to use “all necessary and appropriate force” against Al Qaeda and undefined “associated forces” far from Afghanistan.⁵ In our view, that claim is not justified. The AUMF was a narrowly tailored grant of authority against those who are a part of, or actually fight alongside Al Qaeda and the Taliban in Afghanistan or directly participate in attacks against U.S. forces there. The AUMF authority cannot be read more broadly than that.

The U.S. government states that international law principles “inform” its interpretation of its claimed AUMF authority to use lethal force abroad, far from

³ Ms. Navi Pillay, United Nations High Commissioner for Human Rights, Opening Statement at the 20th session of the U.N. Human Rights Council, Geneva (June 18, 2012).

⁴ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Addendum: Study on targeted killings*, *supra* note 2.

⁵ Authorization for the Use of Military Force (“AUMF”), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

recognized battlefields. But at a threshold level, it does not appear to be applying, let alone abiding by, the international legal standards for determining whether the United States is in a non-international armed conflict against a non-state armed group. Under international law, those factors include the intensity and duration of hostilities and the level of organization of the non-state armed group.⁶ Simply put, the government is impermissibly claiming international humanitarian law authority to use lethal force where that authority does not exist.

While we can all acknowledge that the threat of terrorism is a global problem, it is not only an unlawful, but a dangerous proposition to accept that potentially the entire world could be a battlefield. We are very wary of any policy that starts from the premise that suspected terrorists far from any battlefield can be killed. If the international community does not want a world in which nations assume a license to declare people enemies of the state and carry out their killing outside the strict limits of international law it should be very concerned about the precedent the United States is setting by claiming that very authority.

The second basis for the U.S. government's claim of authority to use lethal force extraterritorially is that its use of force is an exercise of its right to national self-defense. But the self-defense provision of the U.N. Charter⁷ and the international law self-defense doctrine only relate to the question whether one state's use of lethal force in the territory of another state violates the second state's sovereignty. Invocation of self-defense does not address the question whether the use of lethal force against particular individuals is lawful. And the answer to that question is provided by human rights law or, in the context of an actual armed conflict, international humanitarian law.

The most recent U.S. government articulation of the justification for its targeting killing program was made public earlier this month. The document, authored by the U.S. Department of Justice, is a leaked summary of a legal memorandum addressing the legality of the U.S. government's targeted killing of U.S. citizens overseas, outside of so-called "hot battlefields".⁸

In general, the arguments in the document are familiar because they have been made by various administration officials, but the document provides additional legal

⁶ See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber, Oct. 2, 1995); *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-4-84-T, Judgment, ¶ 38 (Int'l Crim. Trib. for the Former Yugoslavia, Trial Chamber, Apr. 3, 2008).

⁷ U.N. Charter art. 2(4) and art. 51.

⁸ Charlie Savage & Scott Shane, *Memo Cites Legal Basis for Killing U.S. Citizens in Al Qaeda*, N.Y. TIMES, Feb. 5, 2013, available at <http://www.nytimes.com/2013/02/05/us/politics/us-memo-details-views-on-killing-citizens-in-al-qaeda.html>. 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*, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

analysis.⁹ It concludes that it would be lawful for the U.S. government to conduct a lethal operation outside the United States “against a U.S. citizen who is a senior operational leader of al-Qa’ida or an associated force of al-Qa’ida” if an “informed, high level official” determines that the individual poses an imminent threat to the United States, that capture is infeasible, and the operation is conducted in a manner consistent with the law of war requirements governing the use of force.

However, these apparent limitations on the use of lethal force --- imminence, feasibility of capture, etc.--- are later defined so vaguely and with such elasticity, that they lose their plain meaning. The requirement of “imminence” for example “does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”¹⁰ In other words, what appear to be limitations become akin to permissions.

It is also important to note for the Committee that the summary only discusses standards that the United States asserts apply to *U.S. citizens*. It does not discuss standards the United States is applying when it uses lethal force against non-U.S. citizens overseas, and we are deeply concerned that those standards are even more lax. Of course, the U.S. government is also keeping the specifics of those legal standards secret. We note that four U.S. citizens have been publicly reported killed in targeted killing operations, but the number of non-citizens killed is credibly reported by media organizations to be approximately 4,000.

We do know, based on media reports, that in Pakistan, the U.S government conducts so-called signature strikes through which it targets individuals when it does not know their exact identities, but based on undisclosed patterns of behavior.¹¹ In addition, in May 2012, the *New York Times* reported that in some parts of the world, the United States “counts all military-age males in a strike zone as combatants . . . unless there is explicit intelligence” proving them innocent—after they are dead.¹² These reports may help explain the gulf between U.S. government claims that civilian-bystander casualties

⁹ Harold Koh, Legal Adviser of the U.S. Department of State, Remarks at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) *available at* <http://www.cfr.org/international-law/legal-adviser-kohs-speech-obama-administration-international-law-march-2010/p22300>; John O. Brennan, Chief Counterterrorism Adviser to U.S. President Barack Obama, *Strengthening our Security by Adhering to our Values and Laws*, Speech at Harvard Law School (Sept. 16, 2011) *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; Eric Holder, U.S. Attorney General, Speech at Northwestern University School of Law (Mar. 5, 2012) *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

¹⁰ Department of Justice White Paper, *supra* note 8, at 7.

¹¹ Greg Miller, *Whitehouse Approves Broader Yemen Drone Campaign*, WASH. POST, Apr. 25, 2012, *available at* http://articles.washingtonpost.com/2012-04-25/world/35452363_1_signature-strikes-drone-strikes-qaeda.

¹² Jo Becker and Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principle and Will*, N.Y. TIMES, May 29, 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.

have been minimal, and independent media reports that document nearly one thousand such casualties, primarily in Pakistan and Yemen.¹³ Recent reports have indicated that the CIA will continue to use signature strikes in Pakistan for at least the next two years.¹⁴

Select government disclosures aside, little is officially known about the U.S. targeted-killing program, despite legal challenges that the ACLU and others have brought to compel the release of government documents on the program and to seek accountability for specific deaths. To date, in response to these transparency-seeking and accountability lawsuits (see addendum for details), the U.S. government has taken the official position that targeted-killing operations by the CIA are classified, and that U.S. courts have no role to play in determining the legality of killings, even of American citizens. Transparency and accountability are the hallmarks by which the lawfulness and legitimacy of any state's action may be determined, and by those measurements alone, the United States' targeted-killing program has been, and remains, a complete failure.

Of course, the world knows that the United States is conducting these targeted killings on a regular basis, and the absurd fiction that the program is too secret for open discussion is increasingly untenable. In on- and off-the-record statements to the media, senior government officials have taken credit for particular killings, sought to minimize the number of civilian casualties, and defended the legality of the program. Given these disclosures, there should be no reason that the United States cannot provide meaningful transparency on legal standards, evidence, and the process for its targeted-killing decisions, in order to enable meaningful scrutiny of those claims by the American public and the international community. The government must also disclose who it has killed, and the number of civilian bystander deaths.

From what we do know about the U.S. targeted killing program, mistakes have been made, and there have also been a high number of deaths of civilian bystanders. We also know that even government officials who act in good faith can --- and will --- make mistakes. After all, time and again, the U.S. government has labeled people terrorists only to find later that the evidence was weak, wrong or non-existent. Guantanamo, for instance, housed hundreds of men and children whom the government initially labeled as terrorists and the "worst of the worst" but later cleared and released.

U.N. human rights experts have rightly expressed concern that the United States is violating international law in its targeted killing program. Other states should also be wary of being implicated in the program through, for example, provision of intelligence information identifying the location of targets. Significantly, under international law, any state that knowingly participates or assists another in human rights violations may also bear responsibility for these violations. The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts provide that "[a] State which

¹³ *Covert War on Terror – The Data*, The Bureau of Investigative Journalism, *supra* note 1.

¹⁴ Greg Miller, Ellen Nakashima, & Karen DeYoung, *CIA Drone Strikes Will Get Pass in Counterterrorism 'Playbook,' Officials Say*, WASH. POST, Jan. 19, 2013, available at http://www.washingtonpost.com/world/national-security/cia-drone-strikes-will-get-pass-in-counterterrorism-playbook-officials-say/2013/01/19/ca169a20-618d-11e2-9940-6fc488f3fecf_print.html.

aids or assists another State in the Commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with the knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”¹⁵

Moreover, the deaths of civilian bystanders fuels anti-U.S. sentiments in the countries in which targeted killing operations have taken place. Any short-term gain there might be from targeted killing is outweighed by the longer-term damage to national security interests that this hostility creates. As Robert Grenier, the head of the CIA’s counter-terrorism center during the Bush administration said recently: “we have been seduced” by drones, and drone killings “are creating more enemies than we are removing from the battlefield.”¹⁶

We at the ACLU are working hard to force the U.S. government to provide both transparency and accountability for its targeted killing program, and there is mounting public pressure, both at home and abroad, for it to do so. The pressure also includes requests from U.S. legislators for all the secret legal memos created by the government to justify its killing authority claims, domestic litigation, a call for transparency from the U.N. High Commissioner for Human Rights and the launch of an investigation into targeted killings by the U.N. Special Rapporteur for Counterterrorism and Human Rights. We ask the United States’ friends and allies to join these efforts, both to protect against the unlawful and arbitrary deprivation of life, and in furtherance of the international legal system that upholds the rule of law.

¹⁵ Int’l Law Commission (“ILC”), Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 16, U.N. Doc. A/RES/56/83 (Aug. 9, 2001) *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

¹⁶ Paul Harris, *Drone attacks create terrorist safe havens, warns former CIA official*, THE GUARDIAN, June 5, 2012 *available at* <http://www.guardian.co.uk/world/2012/jun/05/al-qaida-drone-attacks-too-broad>.

Addendum: ACLU Lawsuits Seeking Transparency and Accountability for Targeted Killing

In two lawsuits brought under the United States' Freedom of Information Act ("FOIA"), the ACLU is seeking documents from the government that would shed light on the U.S. targeted-killing program and whether these operations comply with U.S. and international law.

The ACLU filed the first of these lawsuits in 2009, seeking records related to the government's claimed domestic and international legal bases upon which U.S. drone aircraft can be used to carry out targeted killings.¹⁷ The documents sought civilian casualty counts, and any agreements with foreign countries related to the operation of drones by the United States. Although some of the government agencies produced some documents in response, the CIA claimed that it could not even confirm or deny its role in targeted killing operations. A lower court upheld this claim, finding that despite widespread disclosures and leaks of information, no U.S. executive official had publicly and specifically confirmed the CIA's involvement in the drone program. Our appeal of this decision is pending.

A similar position was taken by the CIA and the Justice Department's Office of Legal Counsel ("OLC") in response to a second FOIA lawsuit, seeking documents concerning the legal and factual bases for the killings of Anwar Al-Aulaqi, Samir Khan, and 16-year-old Abdulrahman Al-Aulaqi—three U.S. citizens killed in Yemen by drone strikes in 2011. In that case, a federal judge stated she felt "constrained" by precedent that led to "a veritable Catch-22": the executive branch could "proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret." The ACLU is appealing that ruling as well.¹⁸

Compounding its refusal to provide transparency about the program, the United States has also sought the dismissal of a lawsuit brought by the ACLU and the Center for Constitutional Rights seeking accountability for the deaths of the three U.S. citizens killed by drone strikes in Yemen.¹⁹ The suit is brought under the U.S. Constitution against high-ranking government officials who, we assert, bear direct responsibility for the killings. In response, the defendants have argued that U.S. courts have no role to play at all, either before or after the fact, in adjudicating the legality of the Executive Branch's

¹⁷ See *Am. Civil Liberties Union v. Dep't of Justice*, No. 11-5320 (D.C. Cir. oral argument held Sept. 20, 2012). More information is available at <http://www.aclu.org/national-security/predator-drone-foia>.

¹⁸ See *N.Y. Times Co. v. U.S. Dep't of Justice*, Nos. 11 Civ. 9336 & 12 Civ. 794, 2013 WL 50209 (S.D.N.Y. Jan. 3, 2013). More information is available at <http://www.aclu.org/national-security/anwar-al-awlaki-foia-request>.

¹⁹ See *Al-Aulaqi v. Panetta*, No. 12-cv-01192 (D.D.C. filed July 18, 2012). More information is available at <http://www.aclu.org/national-security/al-aulaqi-v-panetta>.

actions in conducting targeted killings abroad. Oral argument in this case is expected to take place this spring before a federal judge in Washington D.C.