

U.S., Lethal Operations against Al-Qa'ida Leaders

Case prepared by Ms. Danielle Breitenbücher, Master student at the Faculties of Law of the Universities of Geneva and Basel (Switzerland), under the supervision of Professor Marco Sassòli and Ms. Gaetane Cornet, research assistant.

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. Department of Justice White Paper on Lethal Operations Against Al-Qa'ida Leaders

[Source: 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, no date, document leaked in February 2013; footnotes partly omitted; numbering of the paragraphs added by us; available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf]

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

[1] This white paper sets forth a legal framework for considering 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. The paper does not attempt to determine the minimum requirements necessary to render such an operation lawful; nor does it assess what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances, including an operation against enemy forces on a traditional battlefield or an operation against a U.S. citizen who is not a senior operational leader of such forces. Here the Department of Justice concludes only that where the

following three conditions are met, a U.S. operation using lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force would be lawful: (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 conducted in a manner consistent with applicable law of war principles. This conclusion is reached with recognition of the extraordinary seriousness of a lethal operation by the United States against a U.S. citizen, and also of the extraordinary seriousness of the threat posed by senior operational al-Qa'ida members and the loss of life that would result were their operations successful.

[2] The President has authority to respond to the imminent threat posed by al-Qa'ida and its associated forces, arising from his constitutional responsibility to protect the country, the inherent right of the United States to national self defense under international law, Congress's authorization of the use of all necessary and appropriate military force against this enemy, and the existence of an armed conflict with al-Qa'ida under international law. Based on these authorities, the President may use force against al-Qa'ida and its associated forces. As detailed in this white paper, in defined circumstances, a targeted killing of a U.S. citizen who has joined al-Qa'ida or its associated forces would be lawful under U.S. and international law. Targeting a member of an enemy force who poses an imminent threat of violent attack to the United States is not unlawful. It is a lawful act of national self defense. Nor would it violate otherwise applicable federal laws barring unlawful killings in Title 18 or the assassination ban in Executive Order No 12333. Moreover, a lethal operation in a foreign nation 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.

[3] Were the target of a lethal operation a U.S. citizen who may have rights under the Due Process Clause and the Fourth Amendment, that individual's citizenship would not immunize him from a lethal operation. Under the traditional due process balancing analysis of *Mathews v. Eldridge*, we recognize that there is no private interest more weighty than a person's interest in his life. But that interest must be balanced against the United States' interest in forestalling the threat of violence and death to other Americans that arises from an individual who is a senior operational leader of al-Q'aida or an associated force of al-Q'aida and who is engaged in plotting against the United States.

[4] The paper begins with a brief summary of the authority for the use of force in the situation described here, including the authority to target a U.S. citizen having the characteristics described above with lethal force outside the area of active hostilities. It continues with the constitutional questions, considering first whether a lethal operation against such a U.S. citizen would be consistent with the Fifth Amendment's Due Process Clause. As part of the due process analysis, the paper explains the concepts of "imminence," feasibility of capture, and compliance with applicable law of war principles. The paper then discusses whether such an

operation would be consistent with the Fourth Amendment's prohibition on unreasonable seizures. It concludes that where certain conditions are met, a lethal operation against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces – a terrorist organization engaged in constant plotting against the United States, as well as an enemy force with which the United States is in a congressionally authorized armed conflict – and who himself poses an imminent threat of violent attack against the United States, would not violate the Constitution. The paper also includes an analysis concluding that such an operation would not violate certain criminal provisions prohibiting the killing of U.S. nationals outside the United States; nor would it constitute either the commission of a war crime or an assassination prohibited by Executive Order 12333.

I.

[5] The United States is in an armed conflict with al-Qa'ida and its associated forces, and Congress has authorized the President to use all necessary and appropriate force against those entities. See Authorization for Use of Military Force ("AUMF"). In addition to the authority arising from the AUMF, the President's use of force against al-Qa'ida and associated forces is lawful under other principles of U.S. and international law, including the President's constitutional responsibility to protect the nation and the inherent right to national self defense recognized in international law (see, e.g., U.N. Charter art. 51). It was on these bases that the United States responded to the attacks of September 11, 2001, and "[t]hese domestic and international legal authorities continue to this day."

[6] Any operation of the sort discussed here would be conducted in a foreign country 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. A use of force under such circumstances would be justified as an act of national self-defense. In addition, such a person would be within the core of individuals against whom Congress has authorized the use of necessary and appropriate force. The fact that such a person would also be a U.S. citizen would not alter this conclusion. The Supreme Court has held that the military may constitutionally use force against a U.S. citizen who is a part of enemy forces. See *Hamdi*, 542 U.S. 507, 518 (2004) (plurality opinion); *id.* at 587, 597 (Thomas, J., dissenting); *Ex Parte Quirin*, 317 U.S. at 37-38. Like the imposition of military detention, the use of lethal force against such enemy forces is an "important incident of war." [See Case No. 99, *United States, Ex Parte Quirin et al.*] *Hamdi*, 542 U.S. at 518 (plurality opinion) (quotation omitted). [...] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) § 4789 (1987)* ("Those who belong to armed forces or armed groups may be attacked at any time."); [...]). Accordingly, the Department does not believe that U.S. citizenship would immunize a senior operational leader of al-Qa'ida or its associated forces from a use of force abroad authorized by the AUMF or in national self-defense.

[7] In addition, the United States retains its authority to use force against al-Qa'ida and associated forces

outside the area of active hostilities when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans. The United States is currently in a non-international armed conflict with al-Qa'ida and its associated forces. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2006) (holding that a conflict between a nation and a transnational non-state actor, occurring outside the nation's territory, is an armed conflict "not of an international character" (quoting Common Article 3 of the Geneva Conventions) because it is not a "clash between nations") [see Case No. 263, United States, *Hamdan v. Rumsfeld*]. Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities. For example, the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes. None of the three branches of the U.S. Government has identified a strict geographical limit on the permissible scope of the AUMF's authorization. [...] *Bensayah v. Obama*, 610 F.3d 718, 720, 724-25, 727 (D.C. Cir. 2010) (concluding that an individual turned over to the United States in Bosnia could be detained if the government demonstrates he was part of al-Qa'ida) [...] [8] Claiming that for purposes of international law, an armed conflict generally exists only when there is "protracted armed violence between governmental authorities and organized armed groups," *Prosecutor v. Tadic*, Case No. IT-94-1AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 70 (Int'l Crim. Trib. for the Former Yugoslavia, App. Chamber Oct. 2, 1995) [see Case No. 211, ICTY, *The Prosecutor v. Tadic*, p. 1758], some commenters have suggested that the conflict between the United States and al-Qa'ida cannot lawfully extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself. There is little judicial or other authoritative precedent that speaks directly to the 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 a party to the conflict. Thus, in considering this potential issue, the Department looks to principles and statements from analogous contexts.

[9] The Department has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict, unless the hostilities become sufficiently intense and protracted in the new location. That does not appear to be the rule of the historical practice, for instance, even in a traditional international conflict. 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. See also, e.g., Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 *Temp. L. Rev.* 787, 799 (2008) ("If... the ultimate purpose of the drafters of the Geneva Conventions was to prevent 'law avoidance' by developing de facto law triggers—a purpose consistent with the humanitarian foundation of the treaties—then the myopic focus on the geographic nature of an armed conflict in the context of transnational counterterrorist combat operations serves to frustrate that purpose.").

[10] 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 U.S. 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 U.S. citizen of the kind described in this paper would be authorized under the AUMF and the inherent right to national self-defense. Given this authority, the question becomes whether and what further restrictions may limit its exercise.

II.

[11] The Department assumes that the rights afforded by Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, attach to a U.S. citizen even while he is abroad.. The U.S. citizenship of a leader of al-Qa'ida or its associated forces, however, does not give that person constitutional immunity from attack. This paper next considers whether and in what circumstances a lethal operation would violate any possible constitutional protections of a U.S. citizen.

A.

[12] The Due Process Clause would not prohibit a lethal operation of the sort contemplated here. In Hamdi, a plurality of the Supreme Court used the Mathews v. Eldridge balancing test to analyze the Fifth Amendment due process rights of a U.S. citizen who had been captured on the battlefield in Afghanistan and detained in the United States, and who wished to challenge the government's assertion that he was part of enemy forces. The Court explained that the "process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." Hamdi, 542 U.S. at 529 (plurality opinion) (quoting Mathews v. Eldridge, 424 U.S. 319,335 (1976)). The due process balancing analysis applied to determine the Fifth Amendment rights of a U.S. citizen with respect to law-of-war detention supplies the framework for assessing the process due a U.S. citizen who is a senior operational leader of an enemy force planning violent attacks against Americans before he is subjected to lethal targeting.

[13] In the circumstances considered here, the interests on both sides would be weighty. An individual's interest in avoiding erroneous deprivation of his life is "uniquely compelling.". No private interest is more substantial. At the same time, the government's interest in waging war, protecting its citizens, and removing the threat posed by members of enemy forces is also compelling.. As the Hamdi plurality observed, in the "circumstances of war," "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient

process ... is very real," and, of course, the risk of an erroneous deprivation of a citizen's life is even more significant. But, "the realities of combat" render certain uses of force "necessary and appropriate," including force against U.S. citizens who have joined enemy forces in the armed conflict against the United States and whose activities pose an imminent threat of violent attack against the United States - and "due process analysis need not blink at those realities.". These same realities must also be considered in assessing "the burdens the Government would face in providing greater process" to a member of enemy forces.

[14] In view of these interests and practical considerations, the United States would be able to use lethal force against a U.S. citizen, who is located outside the United States and is an operational leader continually planning attacks against U.S. persons and interests, in at least the following circumstances: (1) where 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) where a capture operation would be infeasible—and where those conducting the operation continue to monitor whether capture becomes feasible; and (3) where such an operation would be conducted consistent with applicable law of war principles. In these circumstances, the "realities" of the conflict and the weight of the government's interest in protecting its citizens from an imminent attack are such that the Constitution would not require the government to provide further process to such a U.S. citizen before using lethal force.

[15] Certain aspects of this legal framework require additional explication. First, 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 U.S. persons and interests will take place in the immediate future. Given the nature of, for example, the terrorist attacks on September 11, in which civilian airliners were hijacked to strike the World Trade Center and the Pentagon, this definition of imminence, which would require the United States to refrain from action until preparations for an attack are concluded, would not allow the United States sufficient time to defend itself. The defensive options available to the United States may be reduced or eliminated if al-Qa'ida operatives disappear and cannot be found when the time of their attack approaches. Consequently, with respect to al-Qa'ida leaders who are continually planning attacks, the United States is likely to have only a limited window of opportunity within which to defend Americans in a manner that has both a high likelihood of success and sufficiently reduces the probabilities of civilian casualties. Furthermore, a "terrorist 'war'" does not consist of a massive attack across an international border, nor does it consist of one isolated incident that occurs and is then past. It is a drawn out, patient, sporadic pattern of attacks. It is very difficult to know when or where the next incident will occur.". Delaying action against individuals continually planning to kill Americans until some theoretical end stage of the planning for a particular plot would create an unacceptably high risk that the action would fail and that American casualties would result.

[16] By its nature, therefore, the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging when 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. Thus, a decision maker determining whether an al-Qa'ida operational leader presents an imminent threat of violent attack against the United States must take into account that certain members of al-Qa'ida (including any potential target of lethal force) 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 U.S. government may not be aware of all al-Qa'ida plots as they are developing and thus cannot be confident that none is about to occur; and that, in light of these predicates, the nation may have a limited window of opportunity within which to strike in a manner that both has a high likelihood of success and reduces the probability of American casualties.

[17] With this understanding, a high-level official could conclude, for example, that an individual poses an imminent threat of violent attack against the United States where he is an operational leader of al-Qa'ida or an associated force and is personally and continually involved in planning terrorist attacks against the United States. Moreover, where the al-Qa'ida member in question 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, that member's involvement in al-Qa'ida's continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat.

[18] Second, regarding the feasibility of capture, capture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation. Other factors such as undue risk to U.S. personnel conducting a potential capture operation also could be relevant. Feasibility would be a highly fact-specific and potentially time-sensitive inquiry.

[19] Third, it is a premise here that any such lethal operation by the United States would comply with the four fundamental law-of-war principles governing the use of force: necessity, distinction, proportionality, and humanity (the avoidance of unnecessary suffering). For example, it would not be consistent with those principles to continue an operation if anticipated civilian casualties would be excessive in relation to the anticipated military advantage. An operation consistent with the laws of war could not violate the prohibitions against treachery and perfidy, which address a breach of confidence by the assailant. These prohibitions do not, however, categorically forbid the use of stealth or surprise, nor forbid attacks on identified individual soldiers or officers. And the Department is not aware of any other law-of-war grounds precluding use of such tactics. Relatedly, "there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict – such as pilotless aircraft or so-called smart bombs – as long as they are employed in conformity with applicable laws of war." Further, under this framework, the United States would also be required to accept a surrender if it were feasible to do so.

[20] In sum, an operation in the circumstances and under the constraints described above would not result in a violation of any due process rights.

B.

[21] Similarly, assuming that a lethal operation targeting a U.S. citizen abroad who is planning attacks against the United States would result in a "seizure" under the Fourth Amendment, such an operation would not violate that Amendment in the circumstances posited here. The Supreme Court has made clear that the constitutionality of a seizure is determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Even in domestic law enforcement operations, the Court has noted that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Thus, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

[22] The Fourth Amendment "reasonableness" test is situation-dependent. What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations differs substantially from what would be reasonable in the situation and circumstances discussed in this white paper. But at least in circumstances where the targeted person is an operational leader of an enemy force and an informed, high-level government official has determined that he poses an imminent threat of violent attack, against the United States, and those conducting the operation would carry out the operation only if capture were infeasible, the use of lethal force would not violate the Fourth Amendment. Under such circumstances, the intrusion on any Fourth Amendment interests would be outweighed by the "importance of the governmental interests [that] justify the intrusion," – the interests in protecting the lives of Americans.[...]

III.

[...]

C.

[23] A lethal operation against an enemy leader undertaken in national self-defense or during an armed conflict that is authorized by an informed, high-level official and carried out in a manner that accords with applicable law of war principles would fall within a well-established variant of the public authority justification and therefore would not be murder [prohibited under U.S. domestic legislation].

[24] The United States is currently in the midst of a congressionally authorized armed conflict with al-Qa'ida and associated forces, and may act in national self-defense to protect U.S. persons and interests who are under continual threat of violent attack by certain al-Q'aida operatives planning operations against them. The public authority justification would apply to a lethal operation of the kind discussed in this paper if it were

conducted in accord with applicable law of war principles. As one legal commentator has explained, "if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder," whereas, for example, if that soldier intentionally kills a prisoner of war - a violation of the laws of war - "then he commits murder." Moreover, without invoking the public authority justification by its terms, this Department's OLC has relied on the same notion in an opinion addressing the intended scope of a federal criminal statute that concerned the use of potentially lethal force.

[25] The fact that an operation may target a U.S. citizen does not alter this conclusion. As explained above, the Supreme Court has held that the military may constitutionally use force against a U.S. citizen who is part of enemy forces. Similarly, under the Constitution and the inherent right to national self-defense recognized in international law, the President may authorize the use of force against a U.S. citizen who is a member of al-Qa'ida or its associated forces and who poses an imminent threat of violent attack against the United States.

[26] In light of these precedents, the Department believes that the use of lethal force addressed in this white paper would constitute a lawful killing under the public authority doctrine if conducted in a manner consistent with the fundamental law of war principles governing the use of force in a non-international armed conflict. Such an operation would not violate the assassination ban in Executive Order No. 12333. Section 2.11 of Executive Order No. 12333 provides that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." A lawful killing in self-defense is not an assassination. In the Department's view, a lethal operation conducted against a U.S. citizen whose conduct poses an imminent threat of violent attack against the United States would be a legitimate act of national self-defense that would not violate the assassination ban. Similarly, the use of lethal force, consistent with the laws of war, against an individual who is a legitimate military target would be lawful and would not violate the assassination ban.

IV.

[27] The War Crimes Act, 18 U.S.C. § 2441 (2006) makes it a federal crime for a member of the Armed Forces or a national of the United States to "commit[] a war crime." The only potentially 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 context of and in association with an armed conflict not of an international character." As defined by the statute, a "grave breach" of Common Article 3 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."

[28] Whatever might be the outer bounds of this category of covered persons, Common Article 3 does not alter the fundamental law of war principle concerning a belligerent party's right in an armed conflict to target individuals who are part of an enemy's armed forces or eliminate a nation's authority to take legitimate action

in national self-defense. The language of Common Article 3 "makes clear that members of such armed forces [of both the state and non-state parties to the conflict]... are considered as 'taking no active part in the hostilities' only once they have disengaged from their fighting function ('have laid down their arms') or are placed hors de combat; mere suspension of combat is insufficient." International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law 28 (2009). 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

V.

[29] In conclusion, it would be lawful for the United States 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 without violating the Constitution or the federal statutes discussed in this white paper under the following conditions: (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 is conducted in a manner consistent with the four fundamental principles of the laws of war governing the use of force. As stated earlier, this paper does not attempt to determine the minimum requirements necessary to render such an operation lawful, nor does it assess what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances. It concludes only that the stated conditions would be sufficient to make lawful a lethal operation in a foreign country directed against a U.S. citizen with the characteristics described above.

B. Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities

[Source: Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, The White House, Office of the Press Secretary, 23 May 2013; footnote omitted; available at <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>]

[...]

This document provides information regarding counterterrorism policy standards and procedures that are either already in place or will be transitioned into place over time.

[...]

Standards for the Use of Lethal Force

Any decision to use force abroad – even when our adversaries are terrorists dedicated to killing American citizens – is a significant one. Lethal force will not be proposed or pursued as punishment or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission. Lethal force will be used only to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively. In particular, lethal force will be used outside areas of active hostilities only when the following preconditions are met

First, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks.

Second, the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons. It is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons; if a terrorist does not pose such a threat, the United States will not use lethal force.

Third, the following criteria must be met before lethal action may be taken:

1. Near certainty that the terrorist target is present;
2. Near certainty that non-combatants will not be injured or killed;
3. An assessment that capture is not feasible at the time of the operation;
4. An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
5. An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.

Finally, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally – and on the way in which the United States can use force. The United States respects national sovereignty and international law.

U.S. Government Coordination and Review

Decisions to capture or otherwise use force against individual terrorists outside the United States and areas of active hostilities are made at the most senior levels of the U.S. Government, informed by departments and agencies with relevant expertise and institutional roles. [...]

Other Key Elements

U.S. Persons. If the United States considers an operation against a terrorist identified as a U.S. person, the Department of Justice will conduct an additional legal analysis to ensure that such action may be conducted against the individual consistent with the Constitution and laws of the United States. [...]

Discussion

I. Classification of the situation and geographical scope of application of IHL

1. (Doc. A, Paras [7]-[10])
 - a. How does the author of the White Paper qualify the conflict between the U.S. and Al-Qa'ida and its associated forces in various states? (GC I-IV, Art. 3)
 - b. What conditions have to be met for a non-international armed conflict to exist? Are these conditions met in Afghanistan? Are they met in Pakistan? In Yemen? In Bosnia or other countries?
 - c. May Al-Qa'ida as a "transnational non-state organization" be considered a party to a non-international armed conflict under IHL? Does it have the necessary characteristics to be one single armed group? Or should the existence of the conflict be assessed in relation to every branch of Al-Qa'ida?
2. (Doc. A, Paras [7]-[11])
 - a. What is the geographical scope of application of IHL in non-international armed conflicts? Does IHL apply only in the area where there are active hostilities? In the territory of states where the requirements for a non-international armed conflict are fulfilled? Also in states where the operations of Al-Qa'ida and its associated forces have a link with a non-international armed conflict in a neighbouring state? Even where they have a link with a conflict in any other state? In any State where Al-Qa'ida and its associated forces are active? (GC I-IV, common Art. 3)
 - b. According to the U.S., what are the particularities of its armed conflict with Al-Qa'ida? To what extent is its referral to historical practice relevant for the present case? According to the U.S., which conditions have to be met for its operations to be part of a non-international armed conflict in a specific location?
 - c. Is it true that the "myopic focus on the geographic nature of an armed conflict in the context of transnational counterterrorist combat operations serves to frustrate" the humanitarian purpose of the drafters of the Geneva Conventions? What rules apply when there is no armed conflict? Are these rules less protective of humanitarian values than those applicable during an armed conflict? Would your answer have been different if the question at stake was not whether people may be killed, but whether wounded enemies must be cared for? Do the U.S. have to respect international human rights law in foreign countries? Under what circumstances? Does your answer change with regard to the human rights of their own nationals? What is the U.S.' opinion on this matter?
3. (Para. [10]) Do the legal principles of sovereignty and neutrality as well as the authorisation of an attack by Congress and the inherent right to national self-defence have any effect on the qualification of the conflict under IHL?

II. The criteria defined by the U.S. for the use of lethal force

1. (Doc. A)
 - a. According to the U.S., under which circumstances could the government 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?
 - b. When can lethal force be used? Which rules have to be examined to decide whether the U.S. can target one of its nationals in a foreign country? *Ius ad bellum*? *Ius in bello*? International human rights law? National law?

III. The right of the U.S. to national self-defence

1.
 - a. (Doc. A, Paras [1]-[2], [5]-[6]) Given the first criterion defined by the U.S. (“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”), which body of law do the U.S. consider applicable? (UN Charter, Art. 51 [available on <http://www.un.org>.])
 - b. Is it possible to make use of the right to national self-defence against an armed group? If yes, could the U.S. use force against al-Qa'ida on the territory of a non-consenting invoking the right to national self-defence?
 - c. (Doc. A, Para. [2]) What impact does it have on IHL that a lethal operation in a foreign state is consistent with international legal principles of sovereignty and neutrality if it is conducted “with the consent of the host nation’s government”? What is the impact of such consent on IHL? What changes for IHL if the operation is conducted after a “determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted”? (GC I-IV, common Art. 2)
2. Does the fact that the U.S. is acting in self-defence have any influence on the qualification of the conflict?
3. Is the notion of “armed conflict” under IHL equivalent to that of “armed attack” in article 51 of the UN Charter?

IV. Imminent threat of violent attack

1. (Doc. A, Paras [15]-[17]) What is the U.S.’ interpretation of the notion of “imminent threat of violent attack”? Is this a *ius ad bellum* or *ius in bello* issue? Does it impact on the legality of deliberately killing a person in an armed conflict? Outside an armed conflict?

V. Compliance with fundamental law-of-war principles (Doc. A)

1. (Doc. A, Paras [1], [7], [19] and [23]-[26])
 - a. Given the third criterion defined by the U.S. (“the operation would be conducted in a manner consistent with applicable law of war principles”) and their qualification of the conflict, which body of law does the U.S. consider applicable?
 - b. (Para. [19]) Which main principles of IHL have to be respected when conducting an attack in a non-international armed conflict? What is the difference between perfidy and lawful methods of

warfare? (CIHL, Rules 1, 14, 57, 65 and 70)

- c. (Para. [19]) Is there a principle of necessity in IHL? Is it explicitly stated in one of the Conventions or Protocols? Is it a customary principle? What does it involve?
- d. Does the U.S. examine whether a senior operational leader of Al-Qa'ida is a legitimate target under IHL? What is its reasoning? Under which circumstances is a senior operational leader of Al-Qa'ida a legitimate target? If he is "outside the area of active hostilities" but "actively engaged in planning operations to kill Americans"? Does the distinction between civilians and combatants exist in the law of non-international armed conflicts? (CIHL, Rules 1, 5 and 6; see Document, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities)

2.

- a. (Doc. A, Para. [25]) Is the fact that the targeted person is a U.S. national of any relevance in this discussion? Does IHL protect the national who is part of the enemy forces against attacks from his own country? (P I, Arts 43 and 48; P II, Art. 13; CIHL, Rules 1, 4 and 5)
- b. In the context of an international armed conflict, would such an individual be entitled to prisoner of war status if captured by his own State? Would his or her own state be allowed to try him or her for participation in the hostilities? For treason? (CG III, Art. 4)

VI. Right to due process and feasibility of capture (Doc. A)

1. (Doc. A, Paras [11]-[14], [21]-[22])

- a. Regarding the discussion of the Fifth Amendment's Due Process Clause and the Fourth Amendment as well as the second criterion constituting the lawfulness of a lethal operation as discussed in the paper, which body of law does the U.S. apply? What, if anything, would be different under international human rights law?
- b. Under what circumstances does the U.S. have to apply international human rights law outside their own territory? Can it draw a distinction between its own and foreign nationals in applying human rights law the extraterritorially?

2.

- a. Assuming there is a non-international armed conflict, are human rights applicable generally? Under which circumstances do they prevail over IHL?
- b. Does IHL require trying to capture a person before targeting him/her? If yes, in which cases? If not, in which cases could the stricter standards of human rights law prevail? May the U.S. grant the right to due process even if it were not applicable under international law in the present case? (GC I-IV, Art. 3; P II, Arts 4 and 13; CIHL, Rules 1, 5, 6 and 47; see Document, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities)

3.

- a. (Doc. A, Paras [11]-[14]) Assuming that the operations discussed by the U.S. are law enforcement operations, under which circumstances would a U.S. official have the right to kill a person? Which factors have to be taken into account when weighing the private interests of the targeted person and the interest of the government to kill the person without granting the right to due process? How does the U.S. balance these interests?
- b. ((Doc. A, Para. [18]) How does the U.S. establish whether capturing a person is feasible in a specific situation? To what extent may the factor of "undue risk to U.S. personnel conducting a potential capture operation" be taken into account under international human rights law?

VII. War crimes in non-international armed conflicts

1. (Doc. A, Paras [27]-[28]) How is a war crime defined? Does IHL define grave breaches of Article 3 common to the Conventions? Is it possible to commit a war crime in a non-international armed conflict? (CIHL, Rule 156)

VIII. New policy standards and procedures

1. (Document B)
 - a. What new elements does the Fact Sheet released by the White House from May 2013 introduce when compared to the White Paper?
 - b. Why does the U.S. distinguish between warzones and areas outside active hostilities? How are these areas defined? According to their argumentation, does the U.S. apply IHL outside areas of active hostilities?
 - c. Do the five criteria elaborated by the White House in order to allow the use of lethal force against terrorist targets outside the United States and outside areas of active hostilities comply with IHL? Are they more restrictive than IHL? More permissive? In your opinion, are they realistic?
 - d. What is the U.S.' position concerning the protection of civilians who are undisputedly not legitimate targets? Does it apply the principles of proportionality and precaution as defined by IHL? In the decision to use drone strikes instead of conventional military methods? When setting a standard to avoid civilian casualties from drone strikes? Can this standard be respected in practice? (CIHL, Rules 14-21)
 - e. Does the U.S. follow a different policy depending on the nationality of the targeted individual? Do IHL and international human rights law draw a similar distinction? Do they allow a state to draw such a distinction?