

# STATEMENT ON BEHALF OF AMNESTY INTERNATIONAL USA

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## “DRONE WARS: THE CONSTITUTIONAL AND COUNTERTERRORISM IMPLICATIONS OF TARGETED KILLING”

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

APRIL 16, 2013

### 1. Introduction

Mr. Chairman and members of the Committee, I am honored to submit this testimony for the record on behalf of Amnesty International USA. I will focus my remarks on the human rights concerns and recommendations made in Amnesty International reports "*USA: 'Targeted Killing' Policy Violates the Right to Life*" (Index AMR 51/047/2012) and "*The Devil in the (Still Undisclosed) Detail: Department of Justice 'White Paper' on the Use of Lethal Force Against U.S. Citizen's Made Public*" (Index AMR 51/006/20123).

Amnesty International is a worldwide human rights movement with more than 3 million members and supporters in more than 150 countries and territories. Amnesty International's vision is for every person to enjoy all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. Amnesty International's mission is to conduct research and take action to prevent and end grave abuses of all human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. The organization is funded by individual members; no funds are sought or accepted from governments for investigating and campaigning against human rights abuses.

Amnesty International fully recognizes the US government's duty to take robust action to protect the life and physical integrity of people within its jurisdiction, and to bring to justice perpetrators of crimes under international law. But in doing so, the US government must respect its obligations under international human rights law, which applies in peacetime and in armed conflict, and under international humanitarian law (the law of armed conflict) which applies only in situations of armed conflict.

Those responsible for the attacks in the USA on September 11<sup>th</sup>, 2001, attacks that deliberately targeted civilians and which Amnesty International has repeatedly condemned as a crime against humanity, should be brought to justice through fair criminal trials without recourse to the death penalty, as should anyone responsible for carrying out or planning further such attacks. This is a realistic aim that can and should be achieved through cooperation between states in accordance with their international obligations.

Under the law enforcement standards applicable in such circumstances, situations can arise where the intentional use of lethal force might be justified in the course of attempts to arrest such persons, i.e. where strictly unavoidable to protect against immediate threats to the life of the persons carrying out the arrests, or to the lives of others, posed by individuals who resist arrest.

Amnesty International also recognizes that where the US government is a party to a specific armed conflict, lethal attacks conducted within the zone of the conflict that comply with the laws of armed conflict generally will not violate the right to life as protected under international human rights law.

However, current US administration policies and practices on intentional use of lethal force, including against individual suspected of involvement in terrorism, appear to go substantially beyond what is permitted under the rules of international law.

## **2. International Law & Lethal Force**

International human rights law and, in the exceptional circumstances where it applies, international humanitarian law (the law of armed conflict) as well, address the use of lethal force by states.

Deliberate killings that do not comply with the relevant rules of international law are often referred to as “extra-legal, arbitrary or summary executions” or “extra-judicial executions.” Principle 1 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides:

*“Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.”*

Where the state deliberately kills someone, the onus is on the state to demonstrate that the killing is lawful. Family members of a person who is killed have the right to receive the results of an independent and impartial investigation, including a judicial process.

### **2.1 International Human Rights Law**

It is a fundamental rule of international human rights law that no-one may be arbitrarily deprived of his or her life. Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), for instance, provides as follows:

*“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”*

This is a provision of international human rights law that can never be suspended or otherwise derogated from even “in time of public emergency which threatens the life of the nation.” Indeed even in situations of full-blown armed conflict, the right not to be arbitrarily deprived of one’s life continues to apply, including in respect of acts outside a state’s ordinary territory, though in zones of armed conflict what is “arbitrary” generally is to be determined by international humanitarian law.

The fact a person may have been responsible for murder, even mass murder, or may be planning such crimes, does not in itself legally justify his or her killing at the hands of state authorities without a criminal trial. The circumstances in which international human rights law allows an individual to be lawfully deprived of his or her life are very restricted.

In general, the intentional use of lethal force is lawful only if, at the time of its use, it is "strictly unavoidable" in order to meet an "imminent threat of death" in self-defense or defense of others. Principle 9 of the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states as follows:

*“Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”*

Even where such circumstances exist, there are additional requirements for the use of force to be lawful. Principle 10 of the Basic Principles provides that:

*“In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.”*

The UN Basic Principles reflect the legal obligations of states under, for instance, article 6 of the ICCPR. As such, while framed in terms of “law enforcement officials,” they apply equally to “military authorities, whether uniformed or not” and “State security forces” when those authorities are exercising “police powers” (including any use of force outside of a situation of armed conflict).

## **2.2 International Humanitarian Law (the Law of Armed Conflict)**

The only exception to the ordinary “law enforcement” rules in relation to the use of lethal force and the right to life, as set out above, 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.

Among the fundamental rules of international humanitarian law, binding on all parties to an armed conflict –whether international or non-international, are the prohibition of indiscriminate attacks (i.e. those that are of a nature to strike military objectives and civilians or civilian property without distinction) and the prohibition of attacks that are disproportionate (i.e. those that may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian property, that would be excessive in relation to the concrete and direct military advantage anticipated).

Under international humanitarian law, if there is doubt as to whether a person is a civilian, the person is to

be considered a civilian. In the conduct of military operations, states must take “constant care” to “spare the civilian population, civilians and civilian objects”; specifically, “all feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.”

### **3. Current US Policy and Practice Violate the Right to Life**

While some of the administration’s killings in question, if conducted in the context of specific armed conflicts, for instance in Afghanistan or at some times in some parts of Pakistan, Yemen or Somalia, may not violate international human rights or international humanitarian law, the administration’s policy appears also to permit extrajudicial executions in violation of international human rights law, virtually anywhere in the world.

Among the particular concerns of Amnesty International are:

- The administration's continued reliance on a "global war" legal theory that treats the entire world as a battlefield between the USA and certain armed groups, on which lethal force may apparently be used without regard to human rights standards;
- The administration’s invocation of the right to use force in self-defense to justify the deliberate killing of virtually anyone suspected of involvement of any kind in relation to a range of armed groups and/or terrorism against the USA, particularly through the adoption of a radical re-interpretation of the concept of "imminence";
- The reported practice of “signature strikes” which appears to allow targeting of individuals on the basis of patterns of behavior and requires no specific knowledge about an individual’s direct participation in hostilities or an imminent threat;
- The fact that key factual and legal details of the killing program remain shrouded in secrecy.

These aspects of US policy and practice are not only contrary to international law and result in deaths and injuries to an unknown number of civilians. They also weaken the credibility of the US government as an advocate for respect for human rights by other states; they set dangerous precedents that other states may exploit to avoid responsibility for their own unlawful killings; and if unchecked there is a real risk that the US “global war” doctrine will further corrode the foundations of the international framework for protection of human rights. There has also been widespread speculation that current US policies and practices with respect to such killings may inadvertently be building support for the very armed groups and terror attacks that US officials say provide its justification.

### **4. The “White Paper”**

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. The document added little new substance to what various administration officials had already said publicly on this issue. It ignores the US government’s international human rights obligations, and expands the notion of “imminent attack” to which the USA might respond with lethal force. 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 US government's notion of a global armed conflict with al-Qa'ida and associated forces.

## 4.1 Non-Discrimination

The Justice Department paper, "an unclassified document prepared for some members of Congress," which apparently summarizes 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 US government. 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. 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.

## 4.2 'Global War' with Al-Qa'ida et al

The white paper restates an overarching concept employed by the USA in the counter-terrorism context. 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. 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." The Justice Department paper asserts that there can be no judicial oversight of this lethal force policy.

The fact that the US government'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 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 US government 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. 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 noninternational armed conflict, even if it were to take place away from the zone of active hostilities." It continues:

*"Particularly in a noninternational 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 US government 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 international humanitarian law. However, Amnesty International remains unpersuaded and 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.

### **4.3 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-defense 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-defense. If anything, the white paper's treatment of the imminence question has only heightened concern about the administration's distortion of this concept.

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 surrender might be offered or recognized in the world of remote-controlled drone attacks.

## **5. A ‘Kill Court’ is Not a Solution**

If “global war” thinking hadn’t permeated so much of the way the USA thinks and talks about how to deal with the threat of terrorism, the proposal by some to establish a special court that would secretly review and approve government proposals to kill US citizens would immediately be rejected as a non-starter that misses the point.

As discussed above, the general rule is that lethal force is only lawful when, under international human rights law, it is necessary to prevent a truly imminent threat to life. If there is time for the government to go to a court to seek and obtain judicial approval for killing a particular person, then by definition the threat can’t ever be so imminent that the use of lethal force would be lawful under the general “law enforcement” standards. On the other hand, if the use of drones or other means for “targeted killings” was properly restricted to attacks on valid military targets in the heat of battle of hostilities in an actual armed conflict, it is not clear that even the proponents of the secret drone death-warrant courts would still regard them as practical or necessary. It seems likely that it is only because the administration is currently claiming for itself such a broad authority to kill outside of battlefield situations, and with such little transparency, that some have responded with the “solution” of a secret drone court to approve the killings.

The very fact a secret court to approve secret and officially denied drone killings, including of US citizens, could be viewed as a matter worthy of serious public debate is a chilling marker of just how far the “global war” way of thinking about countering terrorism corrodes the most basic human rights principles and values. What is urgently needed is not blind faith in secret courts, but full public disclosure and debate about the substantive issue: the implications of the sweeping scope the Obama administration is claiming to maintain “kill lists” and carry out other “targeted killings” without regard to human rights.

## **6. Recommendations for Reform**

In light of the continuing lack of official information about US drone 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 judiciary:

- 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 summarized, as well as the names and other relevant information about individuals it knows have been killed in such strikes, its estimates of the total number of deaths, the number of civilians killed, and its criteria for making such assessments.
- To end claims that the US government 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, and to withdraw the 2001 Authorization for Use of Military Force.



- 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.

## **7. What the Senate Judiciary Committee Can Do**

- Press the Obama administration to publicly disclose further legal and factual details
- Ensure that the US government follows international human rights law and, in the exceptional circumstances where it applies, international humanitarian law as well.
- Ensure that any legislation meets the US government's obligations under international human rights law
- Ensure that any legislation does not discriminate on the basis of citizenship. International human rights law explicitly prohibits discrimination on grounds of national origin when it comes to respect for the rights to life, to liberty and to fair trial
- Reject calls for a "kill court," but require the administration to stop blocking judicial review of "targeted killings"; and ensure 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.

We respectfully refer you to the Amnesty International reports "*USA: 'Targeted Killing' Policy Violates the Right to Life*" (Index AMR 51/047/2012) and "*The Devil in the (Still Undisclosed) Detail: Department of Justice 'White Paper' on the Use of Lethal Force Against U.S. Citizen's Made Public*" (Index AMR 51/006/20123) for more detailed information, including all citations.

Thank you for the opportunity to testify on this important human rights issue.