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Lawfare and Armed Conflict:

Comparing Israeli and US Targeted Killing Policies and Challenges Against Them

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Executive Summary

The term *lawfare*, an amalgamation of "law" and "warfare," is used in reference to various kinds of legal challenges to state policies and practices in the realm of national security. Unsurprisingly, it has a negative connotation among those who oppose efforts to legally constrain state prerogatives, to fetter the discretion of officials in their pursuit of national security goals, and to pursue accountability for violations. This article engages the concept of lawfare to focus comparatively on legal contestations over Israeli and US policies and practices in their twenty-first century armed conflicts, the second intifada and the global "war on terror," respectively. Part I traces the contemporary relationship between law and conflict, and political debates arising from these developments. In order to name a phenomenon integral to evolving uses of law, I use "state lawfare" to describe the ways in which government officials construct interpretative edifices to project the lawfulness of policies that deviate from international interpretations of *international* humanitarian law (IHL). Part II focuses on state lawfare efforts by both governments to assert the legality of their targeted killing policies. Part III addresses legal challenges to Israeli and US targeted killing as exemplary of lawfare.

Introduction

"Lawfare" was coined at the turn of this century to describe the expanding role of law in relation to warfare. Examples of this expansion include the establishment of United Nations ad hoc tribunals to prosecute perpetrators of war crimes, genocide, and crimes against humanity in the former Yugoslavia (1993) and Rwanda (1994); the passage of a treaty to establish an International Criminal Court (1998); and the "Pinochet precedent" (1999) which signaled a new shelf-life for the doctrine of universal jurisdiction to prosecute people accused of core crimes under international law in foreign national courts.

Despite a lack of unanimity over the term's meaning,[1] these days *lawfare* most commonly is invoked in reference to various kinds of legal challenges to state policies and practices in the realm of national security.[2] Unsurprisingly, it has a negative connotation among those who oppose efforts to legally constrain state prerogatives, to fetter the discretion of officials in their pursuit of national security goals, and to pursue accountability for violations.

This article engages the concept of lawfare to focus comparatively on legal contestations over Israeli and US policies and practices in their respective twenty-first century armed conflicts.[3] Part I traces the contemporary relationship between law and conflict, and political debates arising from these developments. In order to name a phenomenon integral to evolving uses of law, I use "state lawfare" to describe the ways in which government officials construct interpretative edifices to project the lawfulness of policies that deviate from *international* interpretations of international humanitarian law (IHL).[4] Part II focuses on state lawfare efforts by both governments to assert the legality of their targeted killing policies. Part III addresses legal challenges to Israeli and US targeted killing as exemplary of lawfare.

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1 See Leila N. Sadat and Jing Geng, "On Legal Subterfuge and the So-called 'Lawfare Debate,'" *Case Western Reserve Journal of International Law* 43 (2011): 153-161. John Comaroff, writing about colonial conquests and imperial projects in Africa, ascribed a different meaning to the term to describe "the resort to legal instruments, to the violence inherent in the law, to commit acts of political coercion, even erasure." "Colonialism, Culture and the Law: A Foreword," *Law and Social Inquiry* 26 (2001), p. 306. See also John Comaroff and Jean Comaroff, eds., Law and Disorder in the Post-colony (Chicago: University of Chicago Press, 2006), pp. 29-30.

2 For example, the Lawfare blog (www.lawfareblog.com), established in 2010, has become a popular cyber-venue for interventions and debates about "hard national security choices" (its subtitle).

3 This article extends the comparative analysis of Israeli and US efforts to "legalize" torture in Lisa Hajjar, "International Humanitarian Law and 'Wars on Terror': A Comparative Analysis of Israeli and American Doctrines and Policies," *Journal of Palestine Studies* 36/1 (Autumn 2006).

4 A similar argument is made by David Luban, "Lawfare and Legal Ethics in Guantánamo," *Stanford Law Review* 60 (2004): 1981-2026.

B. US Targeted Killings: From Strategic Secrecy to the Disposition Matrix

In the US, political assassination was prohibited by executive orders signed by every president since 1977.[46] That prohibition ended in September 2001 when President Bush secretly authorized the CIA, a civilian organization, to capture or kill suspected terrorists around the world. The first drone strike outside of Afghanistan occurred on 3 November 2002 when a CIA-operated Predator launched from Djibouti shot a Hellfire missile into a car in Yemen. The target was Qa'id Salim Sinan al-Harithi. One of the other six passengers killed in the strike, Kamal Darwish, was a US citizen.[47] Afterwards, officials utilized Israeli-like reasoning to justify the operation, proclaiming that because Harithi was a member of al-Qaeda and allegedly involved in the 2000 bombing of the USS Cole, and because his arrest was not possible, targeted killing was a legitimate tactic, even against a person located in a country not at war with the US. However, the UN Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions concluded that the Yemen strike "constitutes a clear case of extrajudicial killing."[48]

In Afghanistan, the first drone strike targeting individuals when they were not taking direct part in hostilities or during hot pursuit occurred in February 2002.[49] When the "war on terror" was extended to Iraq in 2003, Israelis were employed to provide kill-operation training to US forces.[50]

During the Bush administration, targeted killing by drones was done primarily by the CIA.[51] But capture was the preferred option because of the national security imperative to elicit actionable intelligence. Tens of thousands of people were arrested, detained and interrogated by the US military, and an estimated 100 "high value detainees" (HVDs) by the CIA. The strategic choice between capturing and killing terror suspects and militants began to shift in 2006. This followed the Supreme Court's *Hamdan v. Rumsfeld* decision which concluded that Common Article 3 of the Geneva Conventions does apply to the treatment of prisoners in US custody and that torture and other violations are prosecutable offenses. The Bush administration condemned the decision, but nevertheless emptied the CIA black sites and relocated fourteen HVDs to Guantánamo. After that, transfers to Guantánamo tapered off, and halted entirely in 2008. That year, there was a ninety-four percent increase in drone strikes from the year before.[52]

Since 2009 when Barack Obama assumed the presidency, targeted killing has escalated dramatically in terms of the number of strikes per month and the widening geographic scope.[53] Under the Obama administration, separate but overlapping kill lists and drone fleets are maintained by the CIA and the military's Joint Special Operations Command (JSOC). Targeted raids by JSOC, first introduced in Iraq in 2006, were transported, along with the drones, to Afghanistan in 2009. By April 2011, they were occurring at a rate of 1,000 a month.[54] According to John Rizzo, former acting general counsel for the CIA, "The Predator is the weapon of choice, but it could also be someone putting a bullet in your head."[55]

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46 On the history of US targeted killing that long predates the "war on terror," see Doug Noble, "Fifty Years of Targeted 'Kill Lists': From the Phoenix Program to Predator Drones," *The Nation*, November 8, 2012, available at http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/international/20-Jul-2012/fifty-years-of-us-targeted-kill-lists-from-the-phoenix-programme-to-predator-drones.

47 See Seymour Hersh, "Manhunt: The Bush Administration's New Strategy in the War against Terror," *New Yorker* 23 and 30 December 2002.

48 Special Rapporteur for extrajudicial, summary or arbitrary executions, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions,* Commission on Human Rights, UN Doc. E/CN.4/2003/3, paragraph 39 (13 January 2003), available at http://www.extrajudicialexecutions.org/application/media/59%20Comm%20HR%20SR%20Report%20%28E-Cn.4-2003-3%29.pdf.

49 See John Sifton, "A Brief History of Drones," *The Nation,* 7 February 2012, available at http://www.thenation.com/article/166124/brief-history-drones#.

50 See Julian Borger, "Israel Trains U.S. Assassination Squads in Iraq," *Guardian* 9 December 2003.

51 Under IHL, civilians have no right to fight except in extremely limited circumstances. The para-militarization of the CIA in the "war on terror" has become a topic of increasing debate. See Jane Mayer, "The Predator War: What Are the Risks of the CIA's Covert Drone Program?" *New Yorker,* 26 October 2009, 38.

52 Noah Shachtman, "Drone 'Surge'; Predator Flights Up 94% in 2008," *Wired,* February 5, 2009, available at http://www.wired.com/dangerroom/2009/02/drone-surge-pre/.

53 See Karen DeYoung, "Secrecy Defines Obama's Drone War," *Washington Post*, December 19, 2011; Greg Miller, "Under Obama, An Emerging Global Apparatus for Drone Killing," *Washington Post*, December 27, 2011.

54 Gareth Porter, "How McChrystal and Petraeus Built an Indiscriminate 'Killing Machine,'" *Truthout,* 26 September 2011.

55 Tara Mckelvey, "Inside the Killing Machine," *Newsweek,* 13 February 2011.

US claims about the "legality" of targeted killing hew to the same lines of argument as those of Israel, namely the legitimacy of executing people who pose an ostensibly imminent threat and cannot be arrested. However the geographic scope and the rates of attacks and casualties differ significantly.[56] The Obama administration justifies its globalized prerogative to kill suspects on the basis of the Authorization To Use Military Force (AUMF). This legislation, passed by Congress days after the 9/11 attacks, set no territorial (or temporal) limits on the government's response to terrorism. Citing the authority of the AUMF is a means of dodging criticism of executive branch overreach.

One other significant difference between the two countries' policies is that the US has claimed the right to target citizens abroad. On 27 January 2010, the *Washington Post* reported that at least three citizens had been designated for extra-judicial execution.[57] The first name on the list was Anwar al-Awlaki, an American-born Muslim cleric residing in Yemen who was characterized as a leader of al-Qaeda in the Arabian Peninsula. The *Post* reported that al-Awlaki's name had been added in late 2009, on the heels of two incidents to which he was reportedly linked—but never indicted. These incidents were the 5 November armed rampage by Major Nidal Malik Hasan at Fort Hood in Texas that killed thirteen and wounded twenty-nine people, and the 25 December attempt by a Nigerian, Umar Farouk Abdulmutallab, to detonate a bomb hidden in his underwear on a transatlantic flight bound for Detroit.

The revelation that the government intended to lethally target citizens spurred criticisms and more questions about expanding drone warfare. Top officials in the Obama administration were dispatched to make public statements about the legality and efficacy of targeted killing in general terms while maintaining that the planning and conduct of such operations are classified.[58] State Department Legal Advisor Harold Koh, who decried drone strikes as extra-judicial killings prior to joining the Obama administration,[59] became a chief articulator of their legality. In a 25 March 2010 speech to the American Society of International Law, he stated:

> [I]n this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks… Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses. In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including [distinction and proportionality].[60]

On 1 May 2011, in a joint CIA-JSOC operation, a team of Navy Seals raided the compound in central Pakistan where Osama bin Laden was hiding. Several hours later, President Obama addressed the nation, stating,

> Tonight, I can report to the American people and to the world that the United States has conducted an operation that killed Osama bin Laden, the leader of al-Qaeda, and a terrorist who's responsible for the murder of thousands of innocent men, women, and children…Justice has been done… The cause of securing our country is not complete. But tonight, we are once again reminded that America can do whatever we set our mind to.

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56 See Jake Heller, "Josh Begley Tweets Entire History of US Drone Attacks," *The Daily Beast,* 11 December 2012, available at http://www.thedailybeast.com/articles/2012/12/11/josh-begley-tweets-entire-history-of-u-s-drone-attacks.html.

57 Dana Priest, "US Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes," *Washington Post,* January 27, 2010.

58 See Kenneth Anderson, "Readings: The Canonical National Security Law Speeches of Obama Administration Senior Officials and General Counsels," 11 June 2012, available at http://www.lawfareblog.com/2012/06/readings-the-canonical-national-security-law-speeches-of-obama-administration-senior-officials-and-general-counsels/. Officials' speeches and statements have become evidentiary materials in FOIA litigation pertaining to the targeting of citizens; see www.aclu.org/files/assets/al-awlaki_foia_ruling.pdf.

59 Tara Mckelvey, "Interview with Harold Koh, Obama's Defender of Drone Strikes," *The Daily Beast,* April 8, 2012.

60 http://www.state.gov/s/l/releases/remarks/139119.htm.

Most Americans, including many law of war experts, endorsed the legality of this operation because bin Laden was a legitimate military target, although some bemoaned that killing rather than capturing him deprived victims of 9/11 of the kind of justice that prosecution would provide. While the operation seemed to vindicate the claim that targeted killing was effective in eliminating terrorists, bin Laden's unique status did it did not resolve debates about the legality of the policy in general.

Five days after the bin Laden operation, the US launched a drone attack in Yemen targeting al-Awlaki. That mission failed to kill him but two others died. On 30 September 2011, a joint CIA-JSOC drone strike killed al-Awlaki and another US citizen, Samir Khan, along with two others. As he had done after the killing of bin Laden, Obama made a public address declaring that the attack had dealt a "major blow" to al-Qaeda. On 14 October, another drone attack killed al-Awlaki's 16-year-old son 'Abd al-Rahman, his 17-year-old cousin and five others while they were dining in an open-air restaurant.

On 8 October 2011, the *New York Times* published an exposé, based on anonymous sources, about the contents of a secret Office of Legal Counsel (OLC) memo to the Defense Department authored in 2010.

> The legal analysis, in essence, concluded that Mr. Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans, as well as because Yemeni authorities were unable or unwilling to stop him.[61]

This national self-defense reasoning hinges on the assertion that the target poses an *imminent* and grave threat. However, the government has refused to provide information to substantiate the allegation that al-Awlaki's role, in the words of one official, had changed from "inspirational to operational." Critics pointed out that the forward-looking principle of imminence seems to be contradicted by fact that al-Awlaki was listed *after* the Fort Hood attack and the underpants bombing attempt, and that the legal authorization to kill him, produced in 2010, appeared to be a standing order for execution.

On 5 March 2012, Attorney General Eric Holder delivered a national security speech in which he addressed critics of the targeted killing policy:

> Some have called such operations "assassinations." They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings….[T]he US government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful…

On the targeting of citizens, Holder said,

> [T]he government must take into account all relevant constitutional considerations…Of these, the most relevant is the Fifth Amendment's Due Process Clause, which says that a government may not deprive a citizen of his or her life without due process of law.

He continued,

> Some have argued that the President is required to get permission from a federal court before taking action… This is simply not accurate. "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.[62]

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61 Charlie Savage, "Secret US Memo Made Legal Case To Kill a Citizen," *New York Times,* 8 October 2011.

62 http://www.mainjustice.com/2012/03/05/prepared-remarks-holders-address-at-northwestern-university/.

In late May 2012, the *Daily Beast* and the *New York Times* published exposés revealing new details about this "due process." According to the *Times*, "Mr. Obama has placed himself at the helm of a top secret 'nominations' process to designate terrorists for kill or capture, of which the capture part has become largely theoretical."[63] Obama "signs off on every strike in Yemen and Somalia and also on the more complex and risky strikes in Pakistan." Both articles describe "personality strikes," which target specific individuals, and "signature strikes," which target "groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren't known."[64] Both articles also explain the administration's method for deflecting criticism of civilian casualties by counting all military-age males in a strike zone as combatants "unless there is explicit intelligence posthumously proving them innocent."[65]

Two weeks later, twenty-six Democrats in Congress wrote to President Obama expressing concern about newly publicized information that the CIA and JSOC had been granted authority for signature strikes against unidentified targets. They wrote that drones "are faceless ambassadors that cause civilian deaths, and are frequently the only direct contact with Americans that the targeted communities have." The president's response, delivered three days later, blended boilerplate about the ongoing war against al-Qaeda, the Taliban, and associated forces with the first public acknowledgment of military operations in Somalia and Yemen.

In October 2012, the *Washington Post* broke the story that since 2010, the National Counter-Terrorism Center (NCTC) has been developing a secret blueprint, called a "disposition matrix," to coordinate the multiple targeting lists and drone programs. The disposition matrix

> is a single, continually evolving database in which biographies, locations, known associates and affiliated organizations are all catalogued. So are strategies for taking targets down, including extradition requests, capture operations and drone patrols.[66]

The names on the matrix and the criteria for being listed are secret. According to unnamed officials who spoke to the *Post*, the US has been building disposition capacities beyond Pakistan, Yemen, and Somalia where drone strikes are most feasible and frequent, to target suspected terrorists and militants in other parts of Africa and the Pacific. The NCTC is the hub through which targeted killing decisions are vetted and coordinated. Those knowledgeable about the disposition matrix anticipate that it will remain a counter-terrorism mainstay for years.

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63 Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *New York Times,* May 29, 2012.

64 Daniel Klaidman, "Drones: How Obama Learned To Kill," *Daily Beast,* 28 May 2012; this is an excerpt of *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Houghton Mifflin Harcourt, 2012). See also Kevin Jon Heller, "'One Hell of a Killing Machine': Signature Strikes and International Law," *Journal of International Criminal Justice* (forthcoming), available at http://ssrn.com/abstract=2169089.

65 Becker and Shane, "Secret 'Kill List.'" See also Tom Junod, "The Lethal Presidency of Barack Obama," *Esquire*, 9 July 2012.

66 Greg Miller, "Plan for Hunting Terrorists Signals US Intends To Keep Adding Names to Kill Lists," *Washington Post,* 24 October 2012.

3. Lawfare and Targeted Killing

A. The Israeli Context

In January 2001, the first petition challenging Israel's targeted killing policy was filed in the HCJ by Siham Thabet, the wife of the assassinated PA leader. A second petition was filed by Knesset Member Muhammad Barakeh for an order nisi and an interim injunction. Both were dismissed one year later with a brief statement: "The choice of means of warfare, used by the Respondents to preempt murderous terrorist attacks, is not the kind of issue the Court would see fit to intervene in."[67]

On 24 January 2002, another petition challenging targeted killing was filed by the Public Committee against Torture in Israel and LAW: The Palestinian Society for the Protection of Human Rights and the Environment.[68] The HCJ reconsidered its position of non-justiciability and requested briefs about the applicable laws and relevant rules of armed conflict. On 30 September 2003, the Israeli organization Yesh Gvul submitted a petition pressing for a criminal investigation of officials responsible for the Shehadeh operation. The HCJ accepted that petition but suspended consideration until it ruled on the legality of targeted killing.

The HCJ issued its targeted killing ruling on 15 December 2006. The decision, written by former Chief Justice Aharon Barak, begins with a section on the "factual background" which states: "A massive assault of terrorism was directed against the State of Israel, and against Israelis, merely because they are Israelis." The decision then proceeds to summarize the petitioners' and respondents' positions. The petitioners asserted the state's lack of the right of militarized self-defense (under Article 51 of the UN Charter) against an occupied civilian population by an occupying state, and the prohibition of arbitrary killing and execution without due process as violations of customary norms of international law. Moreover, the practice of targeted killing fails the "imminent threat" and the "proportionality" tests; most individuals were targeted at times when they were not taking a direct part in hostilities, and Israel has a "lesser harm" option of arresting them, as evidenced by ongoing arrests in Areas A. The last element of the petitioners' challenge was the secrecy in which the policy operates; targeted individuals have no opportunity to prove their innocence, a problem exacerbated by numerous "mistakes" and compounded by the fact that officials offer no evidence before or after targeted killings to prove claims of imminent threat.[69]

The respondents advanced arguments to persuade the HCJ of the legality of targeted killing. Israel's evolved doctrine that the territories are no longer occupied was elemental to the claim that the response to terrorism emanating from an "enemy entity" is not limited to law enforcement approaches. Despite the military's ability to pursue and arrest people alive, the respondents asserted that killing is an "exceptional step" performed only "when there is no alternative." On the issue of imminence, the respondents claimed that this does not reflect a rule of customary international law, and argued that the concepts of "direct part" and "hostilities" must be given wide berth to include planning, assisting, and abetting, and not be limited to the active use of violence and arms.

The HCJ summary of the petitioners' and respondents' positions illuminates the mutual influence of Israeli and US state lawfare. Both sides engaged with the question of whether "unlawful combatants" is a legally valid concept. The petitioners, in line with expert opinion on international law,[70] argued that everyone involved in or affected by armed conflict is either a combatant or a civilian; there is no third category in IHL. The respondents, following the US position, say that terrorists are not civilians because they fight, and therefore they can be lawfully killed but if captured alive have none of the rights of either combatants or civilians.

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67 Cited in Orna Ben-Naftali and Keren Michaeli, "Justice-ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings," *Journal of International Criminal Justice* 1 (2003): 368.

68 *PCATI et al. v. The Government of Israel et al.* HCJ 769/02.

69 See Neve Gordon, "Rationalising Extra-Judicial Executions: The Israeli Press and the Legitimisation of Abuse," *International Journal of Human Rights* 8 (2004): 305-324.

70 The petitioners filed an expert opinion by Antonio Cassesse, available at http://www.stoptorture.org.il/files/cassese.pdf.

In its judgment, the HCJ refers to the occupied territories as "the area" and "outside the bounds of the state," thereby evading the question of whether Palestinians are protected persons. The "armed conflict" at issue is described as between Israel and terrorist organizations, and the decision claims that there has been "a continuous situation of armed conflict…since the first *intifada*." Citing the US Supreme Court's *Quirin* decision upon which the Bush administration based its formulation of unlawful combatants (which was the model for Israel's 2002 unlawful combatant law), the HCJ addresses the validity of this category by *claiming* to side-step it:

> We shall take no stance regarding the question whether it is desirable to recognize this third category. The question before us is not one of desirable law, rather one of existing law. In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category…It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law. However, new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on a dynamic interpretation which adapts them, in the framework of accepted interpretational rules, to the new reality…

In fact, the HCJ does not side step the issue because of its embrace of the expansive interpretation of "hostilities" as ongoing and ceaseless, and "taking part" as inclusive of all kinds of activities deemed threatening to Israel's security. The refusal to contend with the actual status of the so-called "area" and their Palestinian inhabitants serves to endorse, by default, the category of unlawful combatants as persons who have no right to fight but who can be extra-judicially executed.

The conclusion the HCJ reaches in regard to the "the 'targeted killing'—and in our terms, the preventative strike causing the deaths of terrorists, and at times also of innocent civilians" is that neither are "such strikes…always permissible or that they are always forbidden." Some operations might be unlawful if, for example, a disproportionate amount of force was used to eliminate a legitimate target, but the policy as such is not illegal. This decision thus clearly provides another instance in which international law is interpreted by the state and endorsed by the HCJ to frame existing state practices as compatible with the law itself: "Indeed, in the State's fight against international terrorism, it must act according to the rules of international law."

Based on its judgment that the legality of each targeted killing operation must be examined retrospectively, the HCJ lifted its suspension of the Yesh Gvul petition and requested the state to investigate whether the Shehadeh operation comported with the ruling. A Special Investigatory Commission was established in January 2008, and announced its conclusion in February 2011 that the operation was a "legitimate targeted killing," but "in hindsight," the "difficult collateral consequences" were "disproportionate."[71] However, those consequences were "unintended, undesired and unforeseen" and, therefore, no disciplinary offences were committed and no criminal charges are warranted.

According to a 2008 investigative article in *Haaretz Magazine*, the "most noticeable thing the High Court ruling changed regarding the assassinations is the language used by the IDF in planning them."[72] Pre-planned kill operations were described as arrest operations that went awry and thus justified the deadly use of force. The investigation revealed that

> the IDF approved assassination plans in the West Bank even when it would probably have been possible to arrest the wanted men—in contradiction to the State's statement to the High Court…. Moreover, it turns out that the assassination of a target the defense establishment called part of a "ticking infrastructure" was postponed, because it had been scheduled to take place during the visit of a senior U.S. official.[73]

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71 Prime Minister's Office, "Salah Shehadeh - Special Investigatory Commission," 27 February 2011, available at http://www.pmo.gov.il/PMOEng/Communication/Spokesman/2011/02/spokeshchade270211.htm.

72 Uri Blau, "License To Kill," *Haaretz Magazine*, November 27, 2008, available at http://www.haaretz.com/license-to-kill-1.258378.

73 Ibid. On July 5, 2012, Uri Blau was convicted for publishing this information based on documents leaked to him by Anat Kamm, who was convicted in 2011. "Israel Convicts Journalist for Disclosing Assassinations," *Alakhbar English*, 5 July 2012, http://english.al-akhbar.com/content/israel-convicts-journalist-disclosing-assassinations.

B. The US Context

In the US, litigation pertaining to targeted killing is more recent because the policy began ramping up in 2009. To date, lawsuits have been filed over two kinds of issues: the legality of targeting citizens, and FOIA litigation to puncture the secrecy shrouding the policy.

The first case followed the news that Anwar al-Awlaki had been placed on a hit list. The American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR) filed a lawsuit on behalf of his father Nasser to challenge executive authorization to extra-judicially execute a citizen *(al-Aulaqi v Obama)*. The plaintiffs contended that this policy exceeds the president's authority under the Constitution and international law. The Justice Department's response brief urged the court to dismiss on procedural grounds, namely that the elder al-Awlaki lacks standing because the government was not planning to kill him. Two other reasons for dismissal were also offered: Either the court could toss out the case because any assessment of plaintiffs' claims would require the court to "decide non-justiciable political questions," or, even if the court deemed the claims to have merit, the information necessary to litigate them is "properly protected by the military and state secrets privilege." On 7 December 2010, the court dismissed the case on lack of standing grounds, while noting that the legality of the drone program is a "political question" that falls under the purview of the president and Congress. Less than a year later, al-Awlaki, his son, and Khan were killed.

On 18 July 2012, the ACLU and CCR filed a civil suit on behalf of Nasser al-Awlaki and Sarah Khan (mother of Samir) against Secretary of Defense Leon Panetta, then-CIA Director David Petraeus, Admiral William McRaven, and Lieutenant General Joseph Votel accusing them of violating the Constitution's fundamental guarantee against deprivation of life without due process of law.[74] The citizenship status of the three dead provides the opening to seek judicial review and unspecified damages. On 14 December, lawyers for the plaintiffs filed a motion to dismiss, and urged that "this Court should follow the well-trodden path the Judiciary—and particularly the D.C. Circuit—have taken in the past and should leave the issues raised by this case to the political branches." If this case is not dismissed, as the government has urged, it would raise larger questions about the vague legal standards and secretive decision making and mark the first attempt in the US to adjudicate the meaning of "direct participation in hostilities" and "imminent threat" in relation to the policy of targeted killing.

The other trajectory of lawfare is the quest for information. In response to the upsurge of drone warfare, in March 2010 the ACLU filed a FOIA request with four government agencies seeking information about the legal basis and scope of the targeted killing program; the training, supervision, oversight, or discipline of drone operators and others involved in decision making; and data about civilians and non-civilians killed in drone strikes.[75] The Departments of Defense, Justice, and State provided some records and withheld others, whereas the CIA refused to confirm or deny if it operates a drone program. The ACLU filed a suit against the CIA in July 2010 to compel disclosure. After the court accepted the CIA's refusal to respond on the basis of its FOIA exemptions, the ACLU appealed. As of this writing, the DC Circuit Court has not issued its ruling.

The legal and factual basis for targeting citizens is another track of FOIA activity. On 19 October 2011, the ACLU filed a request for records, including the 2010 OLC memo, and all evidentiary materials related to al-Awlaki and other citizens who have been killed or listed. After the government refused to provide records, on 1 February 2012, the ACLU sued to enforce the request, and the case was joined with a *New York Times* lawsuit. On 2 January 2013 the case was dismissed, albeit with some judicial hand-wringing:

74 See http://www.aclu.org/national-security/al-aulaqi-v-panetta.

75 http://www.aclu.org/national-security/predator-drone-foia.

> [T]his Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents…, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret.[76]

The most recent FOIA request, filed on 17 April 2012 by the ACLU and CCR, seeks records and information about a December 2009 attack in al-Majalah region of Yemen. One or two missiles fired from either a warship or a submarine killed forty-six people, including at least twenty-one children and fourteen women, five of whom were pregnant.[77] Initially, the Yemeni government claimed responsibility. The ruse was undermined when unnamed officials gave statements to the media confirming that it was a US strike. In January 2010, Wikileaks released a classified diplomatic cable about a meeting after the attack between then-head of US Central Command Petraeus and then-Yemeni president Ali Abdullah Saleh in which it was agreed that Yemen would claim responsibility for US attacks in the Abayan province. This FOIA request seeks records on the intelligence that prompted the strike, including whether officials were aware of the presence of civilians; what if any steps have been taken to investigate the killing of civilians and to compensate survivors and victims' families; and why a US official would plot with a foreign government to deceive the publics in both countries.

The US government's position on targeted killing is a paradoxical blend of secrecy, selective leaking, and public statements by top officials who have taken credit for the program's efficacy and legality and claimed minimal civilian casualties.[78] In response to litigation, the government maintains that this program is classified, including the criteria for being targeted and the decision making process that precedes strikes.[79] Under these circumstances, lawfare is a means of attempting to leverage the paradox to force court-ordered transparency and accountability for what has emerged as the centerpiece of US war and counter-terrorism policy.

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76 www.aclu.org/files/assets/al-awlaki_foia_ruling.pdf.

77 See the documentary video by Richard Rowley and Jeremy Scahill, "America's Dangerous Game," available at http://www.youtube.com/watch?v=m-eZ1x_qRAQ.

78 See Lena Groeger and Cora Currier, "Stacking up the Administration's Drone Claims," *ProPublica,* 13 September 2012, available at http://projects.propublica.org/graphics/cia-drones-strikes.

79 See Nathan Freed Wessler, "The Government's Pseudo-Secrecy Snow Job on Targeted Killing," *ACLU Blog*, June 26, 2012, available at http://www.aclu.org/blog/national-security/governments-pseudo-secrecy-snow-job-targeted-killing.

C. Lawfare in Other Venues

Does targeted killing, as practiced by the Israeli and US governments, comply with or violate IHL? Both governments have asserted that targeted killing is a legitimate form of national defense, and, as described above, national courts either actively endorsed its lawfulness or passively accepted its continuation. These positions do not enjoy much international endorsement, however. On the contrary, the legality of targeted killing is a matter of international controversy.

One way in which this controversy is playing out is through efforts to pursue accountability in foreign national courts. Under the doctrine of universal jurisdiction, some violations of international law, including war crimes, are so menacing to peace and security or degrading of human dignity that all countries have an interest in prosecuting foreign perpetrators.[80] The Geneva Conventions attach a similar principle of accountability because every state party has a duty to avail its courts for prosecutions when those responsible for grave breaches are not prosecuted in their own country or the country where the alleged crime(s) occurred *(aut dedere aut judicare)*.

Ironically, the US was one foreign legal system where accountability for Israeli targeted killing was pursued. Under US law, there is no avenue for privately-initiated criminal investigations for gross crimes, but there is the option to pursue civil action under the 1789 Alien Torts Statute, and the 1992 Torture Victims Protection Act which prohibits extra-judicial execution as well as torture.[81] On 8 December 2005, CCR filed *Matar et al v Dichter*, a class action lawsuit against Avraham Dicther, former head of Israel's General Security Service, alleging his responsibility for the Shehadeh operation and his role in escalating Israel's practice of targeted killings. The plaintiffs were Ra'ed Matar, whose wife, three children and three other relatives were killed; Mahmoud al-Huweiti, whose wife and two children were killed; and 150 others who were injured. The Gaza-based Palestine Center for Human Rights (PCHR) represented the victims. Dichter, at the time the lawsuit was brought, was residing in Washington, DC, as a fellow at the Brookings Institute.

The Bush administration submitted a "Statement of Interest" arguing that Dichter is immune under federal common law and customary international law for any official acts. In May 2007, the case was dismissed. The plaintiffs appealed on the grounds that there is no immunity for war crimes. However, on 16 April 2009, the Second Circuit affirmed the dismissal, deferring to the executive's position that it should decline to assert jurisdiction.[82]

Efforts to pursue accountability for the Shehadeh operation were mounted in other countries as well. In the United Kingdom, a magistrate assessed evidence provided by British lawyers Daniel Machover and Kate Maynard from the firm of Hickman and Rose, and PCHR, against Doron Almog, who headed Israel's Southern Command from 2000 to 2003, and issued an arrest warrant on the basis of the UK's Geneva Conventions Act 1957. When Almog landed at Heathrow airport on 10 September 2005, he was advised that police were waiting to take him into custody. However, political interference by the British and Israeli governments enabled Almog to depart the country without disembarking from the plane. Once he was gone, the warrant was cancelled.[83] Following several attempts to indict other Israelis in the UK, in 2011, Parliament narrowed the country's international law enforcement mechanisms by granting the Director of Public Prosecutions veto power over the issuance of warrants for suspects from certain "protected countries" (i.e., important allies).

80 See Itamar Mann, "The Dual Foundation of Universal Jurisdiction: Toward a Jurisprudence for the 'Court of Critique,'" *Transnational Legal Theory* 1 (2010): 485-521.

81 In a 1980 landmark decision, *Filártiga v. Peña-Irala*, the Second Circuit Court of Appeals ruled that "foreign nationals who are victims of international human rights violations may sue their malfeasors in federal court for civil redress, even for acts which occurred abroad, so long as the court has personal jurisdiction over the defendant." See http://www.ccrjustice.org/ourcases/past-cases/fil%C3%A1rtiga-v.-pe%C3%B1-irala.

82 For more general discussion of civil litigation in the US, see Noura Erekat, "Litigating the Arab Israeli Conflict: The Politicization of U.S. Federal Courtrooms," *Berkeley Journal of Middle Eastern Islamic Law* 2 (2009).

83 See Jamil Dakwar, "In the Name of Justice," *Adalah's Newsletter* 19 (October 2005), available at http://www.adalah.org/newsletter/eng/oct05/comi1.pdf.

In New Zealand, efforts were mounted to indict Moshe Ya'alon, Israeli Chief of Staff from 2002 to 2005. Local lawyers, using evidence provided by Hickman and Rose and PCHR, submitted a criminal complaint, and on 27 November 2006, a judge issued an arrest warrant on the basis of New Zealand's Geneva Convention Act 1958 and International Crimes and International Court Act 2000. Rather than acting on the warrant when Ya'alon arrived in the country, the police sought the advice of the solicitor general, who consulted the attorney general who quashed the warrant the following day.

On 24 June 2008, four Spanish lawyers partnering with PCHR and Hickman and Rose filed a lawsuit in the Spanish National Court on behalf of victims of the Shehadeh operation against Almog; Dichter; Ya'alon; Dan Halutz, former commander of the Israeli Air Force; Benjamin Ben-Eliezer, former Defense Minister; his military advisor, Michael Herzog; and Giora Eiland, former head of the Israeli National Security Council. The suit urged Spain to assert jurisdiction because there had been no prosecutions in Israel and the Special Investigatory Commission, established the previous January, was not impartial because it was composed entirely of former military and intelligence officials and had no power to recommend criminal indictments.[84]

Despite political pressure to dismiss the case, the investigating judge proceeded, and subsequently ruled that because Gaza is not part of Israel, Spanish criminal law does not accord Israel primary jurisdiction over alleged war crimes committed there. This led to more intense political pressure. On 19 May 2009, Parliament passed a resolution calling on the government to draft legislation that would limit the country's universal jurisdiction mechanisms to cases with a direct nexus to Spain (i.e., involving Spanish victims or accused who are present in the country). This law was rushed through without debate and went into effect the following November.[85] However, on 31 October 2010, Spanish authorities refused Dichter a grant of immunity prior to a planned visit because his presence would provide a nexus for the case to move forward. As of this writing, the Shehadeh case is under consideration in the Spanish Constitutional Court.

Legal challenges overseas to US targeted killing have focused primarily on civilian deaths. In Pakistan and Yemen, in particular, accelerating drone warfare and collateral damage have contributed to political instability and intensified anti-American sentiment. The London-based Bureau of Investigative Journalism (BIJ) has been tracking strikes and investigating the identity or status (militant or civilian) of those killed. As of 31 December 2012, for Pakistan BIJ estimates between 473 and 889 civilian casualties (176 children) among the 2,600 to 3,404 total; for Yemen between 72 and 171 civilians (27-35 children) among the 374 to 1,068 total; and for Somalia between 11 and 57 civilians (1-3 children) among the 58 to 170 total.[86]

An investigative study about drone warfare in Pakistan conducted by people affiliated with law clinics at Stanford and New York Universities, *Living under Drones*,[87] affirmed the quality of BIJ's figures, and generated new information about the destabilizing and debilitating effects on communities constantly under threat of attack. The report recommends "that the US conduct a fundamental re-evaluation of current targeted killing practices," and "also supports and reiterates the calls consistently made by rights groups and others for legality, accountability, and transparency in US drone strike policies."

In July-August 2011, an exhibition in London, "Gaming in Waziristan," featured Noor Behram's collection of images and footage of civilians killed and injured by twenty-eight CIA drone attacks over the previous four years. The exhibition, organized by the British organization Reprieve and Pakistani human rights lawyer Shahzad Akbar, was part of Reprieve's project, "Bugsplat," which "aims to inject transparency into the use of drones in Pakistan and elsewhere." (The term "bugsplat" is a description for humans killed by drones.)

84 See Expert Opinion by Adalah, available at http://www.pchrgaza.org/Library/adalah.pdf.

85 A similar narrowing of national law occurred in 2003 in Belgium as a result of US diplomatic pressure in response to cases against American officials.

86 http://www.thebureauinvestigates.com/category/projects/drones/.

87 http://livingunderdrones.org/.

On 28 October 2011, Reprieve and Akbar's Foundation for Fundamental Rights (FFR) organized the Waziristan Grand Jirga in Islamabad to open an international dialogue on drones. The gathering brought together tribal elders and victims' families with lawyers, activists and artists from many countries. At the meeting, Tariq Aziz, a 16-year-old who had come with his father, volunteered to collect evidence that might be helpful to protect his family and community from harm. Three days later he and his 12-year-old cousin were killed by a Hellfire missile.[88]

On 12 March 2012, Reprieve and solicitors from Leigh Day and Company introduced legal proceedings in the British High Court against Foreign Secretary William Hague on behalf of Noor Khan, whose father was one of dozens of civilians killed by a CIA drone strike on a *jirga* in Northwest Pakistan in March 2011. The case alleged that the General Communications Headquarters (GCHQ), which operates under Hague's authority, provided "locational intelligence" to the CIA that was used in the strike. "GCHQ employees who assist CIA employees to direct armed attacks in Pakistan are in principle liable under domestic criminal law as secondary parties to murder..."[89] This case aimed to get judicial review for the UK's intelligence-sharing policy in cases where this information might be used for drone strikes. On 22 December, the application was dismissed because, as Lord Justice Moses wrote,

The claimant cannot demonstrate that his application will avoid, during the course of the hearing and in the judgment, giving a clear impression that it is the United States' conduct in North Waziristan which is also on trial.[90]

He elaborated: "[T]he courts will not sit in judgment on the sovereign acts of a foreign state" because breaking with this principle would "imperil relations between the states." This decision coincided with an announcement that a parliamentary committee would investigate the legality and use of drone warfare.

In February 2012, BIJ reported that in Pakistan the CIA had resumed the practice of second strikes ("double-tapping") which have killed and injured rescuers, and strikes on funerals.[91] On 9 May, FFR filed two constitutional petitions in Pakistan's High Court challenging the government's failure to protect its citizens from US drone attacks. The petitioners asked the Court to order the government to bring the issue of drones before the UN Security Council and the ICC, to initiate criminal proceedings against Pakistanis and Americans responsible for civilian deaths, and to set up an independent commission to investigate civilian deaths by drone. On 6 June, UN Commissioner for Human Rights Navi Pillay, during a trip to Pakistan, called for an investigation of drone strikes in which civilians had died.

On 21 June at an ACLU-sponsored meeting held in conjunction with the UN Human Rights Council's discussion about the US war on terror, Christof Heyns, the Special Rapporteur for Extra-judicial, Arbitrary or Summary Executions, characterized the CIA's second strikes that imperil rescuers as a "war crime."[92] Pakistan's UN representative in Geneva, Zamir Akram, expressed agreement with Heyns, and urged the Council to investigate the use of drone strikes. He also called on the US "to respect the growing international opinion" that the use of drones "not only violates our sovereignty but also violates the UN charter in our view and also international law."[93]

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88 Clive Stafford Smith, "For Our Allies, Death from Above," *New York Times*, 3 November 2011.

89 Leigh Day & Co Solicitors, "High Court Challenge to Hague over UK Complicity in CIA Drone Attacks," March 12, 2012, available at http://www.leighday.co.uk/News/2012/March-2012/High-Court-Challenge-to-Hague-over-UK-complicity-i. See also Chris Woods, "Evidence in British Court Contradicts CIA Drone Claims," The Bureau of Investigative Journalism, April 24, 2012.

90 Alice K. Ross, "High Court Rejects First UK Challenge to CIA's Drone Campaign," *Bureau of Investigative Journalism*, 22 December 2012, available at http://www.thebureauinvestigates.com/2012/12/22/court-of-appeal-rejects-first-uk-challenge-to-cias-drone-campaign/.

91 Chris Woods and Christina Lamb, "Obama Terror Drones: CIA Tactics in Pakistan include Targeting Rescuers and Funerals," *Bureau of Investigative Journalism,* 4 February 2012, available at http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/.

92 Jack Serle, "UN Expert Labels CIA Tactic Exposed by Bureau 'a War Crime,'" *Bureau of Investigative Journalism,* 21 June 2012, available at http://www.thebureauinvestigates.com/2012/06/21/un-expert-labels-cia-tactic-exposed-by-bureau-a-war-crime/.

93 Ibid.

In a 25 October 2012 speech at Harvard Law School, Ben Emmerson, the Special Rapporteur on Counter-terrorism and Human Rights, announced that he and Heyns would establish an investigative unit in early 2013 "to inquire into individual drone attacks, and other forms of targeted killings conducted in counterterrorism operations, in which it has been alleged that civilian casualties have been inflicted."[94] Explaining this decision, he stated, "If the relevant states are not willing to establish effective independent monitoring mechanisms … then it may in the last resort be necessary for the UN to act." On the US stance that it has a global prerogative to execute people, Emmerson stated:

> [T]he global war paradigm has done immense damage to a previously shared international consensus on the legal framework underlying both international human rights law and international humanitarian law. It has also given a spurious justification to a range of serious human rights and humanitarian law violations… [This] war paradigm was always based on the flimsiest of reasoning, and was not supported even by close allies of the US.[95]

Emmerson's overarching point was that if there was a time during the first years of this century when it was acceptable or tolerable for state responses to terrorism to trump respect for human rights and the rules of IHL, that time is over.

94 The text of Emmerson's speech is available at http://harvardhumanrights.wordpress.com/tag/ben-emmerson/.

95 Ibid.

Conclusion

First Israel and then the US have attempted to reinterpret international law—and for the US, federal law as well—to project the legality of their targeted killing policies and practices. These attempts exemplify state lawfare because they deviate from and defy international consensus about what is lawful in the conduct of war and armed conflict. In the case of Israel, the asserted right to engage in targeted killing in Gaza and the West Bank hinges on the (internationally rejected) proposition that they are no longer occupied and therefore are legitimate sites of warfare, and that extra-judicial execution of people who ostensibly cannot be arrested is a legitimate form of national self-defense. The US also asserts the national self-defense right to execute people, including citizens, but applies this claimed prerogative on a vastly larger scale.

I refer to these as "attempts" to reinterpret international law because targeted killing has not gained international credibility. Were they to succeed, however, targeted killing would become an option for any government. Recall Daniel Reisner's words: "If you do something for long enough, the world will accept it . . . International law progresses through violations."

Lawfare has been a means of defending international consensus-based interpretations of IHL. In countries other than Israel or the US where lawsuits have been mounted, even when those cases have been dismissed—and even when national laws have been narrowed to impede such cases in the future—there has been no foreign governmental endorsement of the legal justifications for targeted killing. Rather, those judicial outcomes are the result of political pressure, diplomatic arm-twisting, or the desire not to offend allied governments.

Lawfare has not (yet) succeeded to achieve accountability for extra-judicial executions and civilian deaths, nor forced a decisive return to international consensus-based behavior by either the Israeli or the US government. Lawfare has, however, been a means of exposing the contents and rationales of these states' positions. This exposure, in turn, has contributed to making their targeted killing policies an issue of increasing international concern and activity. Thus, the value of lawfare should not be judged solely on the basis of judicial outcomes, but rather on the long-term significance of challenging law violations. Without such challenges, powerful states would be unhindered in their state lawfare efforts to rewrite the laws of war to make international consensus-defying policies they wish to employ appear legal. The law has not been rewritten.

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