By Katherine Iliopoulos

From Crimes of War Project | Original Article

The phenomenon of ‘targeted killings’ has become an indelible feature of the post-September 11 world. States continue to grapple with the question of how to respond to ‘cross-border’ threats and acts of terrorism from a variety of non-state armed groups, and to the challenges of ‘asymmetric warfare’. Targeted killings are one such response, carried out to eliminate those suspected of leading or masterminding terrorist acts. In recent years, a few States – particularly the United States, Israel and Russia – have adopted policies, either openly or implicitly, of using targeted killings, including in the territories of other States. Some condemn targeted killing as extra-judicial execution, while others accept it as a legitimate method of warfare against terrorists.

A targeted killing is the intentional, premeditated and deliberate use of lethal force by a State or its agents acting under colour of law, or by an organised armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator. The character of armed conflicts in the 21st century is markedly different from conventional warfare upon which the laws of armed conflict were based. As such, this military tactic – which is often used away from a ‘battlefield’ or disconnected from one altogether – constitutes one of the major ‘grey areas’ of international humanitarian law.

The case of U.S. citizen Nasser al-Aulaqi currently before the U.S. Supreme Court has attracted considerable media coverage in the last few weeks, and it certainly has not escaped the attention of international legal scholars either. Al-Aulaqi, who resides in Yemen, is the first US citizen to have been placed on a ‘kill list’ by the CIA with the endorsement of President Barack Obama for what intelligence officials say is membership of al-Qaeda in the Arabian Peninsula and for being linked to suspected Fort Hood shooter Major Nidal Malik Hasan and the would-be Christmas Day bomber, Nigerian national Umar Farouk Abdulmutallab, who attempted to detonate explosives on an American aircraft en route to Detroit last year.

The lawsuit, brought on behalf of al-Aulaqi by his father, gives rise to a fundamental question: When, if ever, is it lawful for a state to conduct a targeted killing? The question involves a consideration of international humanitarian law and human rights law, and the restrictions that

they impose on the conduct of military operations.

In the al-Aulaqi suit, the U.S. government has argued that the armed conflict against al-Qaeda is a global conflict, and that the law of armed conflict governs the detention, prosecution, and killing of suspected al-Qaeda associates, regardless of where they are found. In June 2010, Deputy National Security Advisor John Brennan responded to questions about the targeted killing program by stating, “If an American person or citizen is in Yemen or in Pakistan or in Somalia or another place, and they are trying to carry out attacks against U.S. interests, they will also face the full brunt of a U.S. response".

Yet it appears untenable to maintain that the U.S. is involved in a global armed conflict against al-Qaeda. Certainly the US is involved in a non-international armed conflict against al-Qaeda in Pakistan and Afghanistan, but the United States is not at war with Yemen or within it. That in itself would not pose an obstacle to the killing of al-Aulaqi if it could be shown that he was directly participating in the armed conflict in Pakistan or Afghanistan from his perch in Yemen. This is because while armed conflict is ‘territorial,’ it is not exclusively so. The problem lies in the fact that the U.S. has not said that he has anything to do with the wars in Pakistan and Afghanistan. Rather, he has been alleged to be participating in terrorism activities, which, according to ICTY jurisprudence, are outside the purview of ‘armed conflict.’ Al-Aulaqi’s membership of or association with al-Qaeda is simply not enough to make him legally targetable under international humanitarian law.

The Legal Adviser to the U.S. Department of State recently outlined the Government’s legal justifications for targeted killings. They were said to be rooted in its asserted right to self-defence, as well as on IHL, on the basis that the U.S. is “in an armed conflict with Al Qaeda, as well as the Taliban and associated forces".

International law scholar Kevin Heller has said that despite not characterising al-Aulaqi as a direct participant in the non-international armed conflict in Pakistan or Afghanistan, the U.S. cannot even invoke the principle of ‘co-belligerency’ because it only applies to international armed conflicts. The U.S. government claims that al-Aulaqi can be lawfully targeted because al-Qaeda in the Arabian Peninsula is “a co-belligerent of al-Qaeda that has directed armed attacks against the United States in the non-international armed conflict between the United States and al-Qaeda".

Because al-Aulaqi is not alleged to be participating in any armed conflict as such, IHL does not

apply to any assessment of whether the U.S. can conduct a targeted killing in his case—but human rights law does.

And in the absence of an armed conflict between the U.S. and another State with which al-Aulaqi is connected, the U.S. cannot realistically invoke the right to self-defence under Article 51 of the UN Charter.

Article 51 is an exception to the Article 2(4) prohibition on the use of force by one State against another. It is possible, however, for States to invoke the right to self-defence as justification for the extraterritorial use of force involving targeted killings in response to an "armed attack" by another State, so long as that force is necessary and proportionate. The International Court of Justice (ICJ) has held that States cannot invoke Article 51 against armed attacks by non-state actors that are not imputable to another State *('The Wall' Advisory Opinion*; *Armed Activities on the Territory of the Congo).*

In his report on Targeted Killings of May 2010, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Philip Alston appeared to endorse a looser interpretation of Article 51 that he said "appears to reflect State practice and the weight of scholarship." According to this theory, self-defence also includes the right to use force against a real and imminent threat when "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation".

According to Marko Milanovic, self-defence is a right that is engaged only when there is a situation involving the use of force and concomitant violation of the sovereignty and territorial integrity of another state. He says that "because self-defence operates as an exception to the prohibition on the use of force, it logically operates only when that prohibition is itself engaged." So, for example, if Yemen were to consent to the use of force on its territory – against al-Aulaqi – it would simply mean that the U.S. could not be accused of committing an act of aggression against Yemen. Self-defence is simply irrelevant in such a case.

In the case of the assassination of Hamas commander Mahmoud Mabhouh in Dubai by Mossad agents in January 2010, the United Arab Emirates had *not* consented to the use of force on its territory. And while Israel invoked self defence, it did not present evidence that an attack on its territory was imminent, nor that it sought the cooperation of the Dubai authorities – assuming Mossad was not capable on its own – to try and arrest and detain Mabhouh. The difference between the case of Mabhouh and al-Aulaqi is that there is a stronger case to argue that,

although Mabhouh was away from the 'battlefield' at the time of his killing, he remained a member of Hamas, a non-state actor engaged in an armed conflict with Israel. Even so, if the Israeli Supreme Court's reasoning were to be followed (see below), the circumstances demanded that Mabhouh be arrested – not killed – in his hotel room.

Anthony Dworkin of the European Council on Foreign Relations and the former Executive Director of the *Crimes of War Project* believes that it is unnecessary to deal with the question of whether there is an armed conflict taking place between the U.S. and al-Qaeda. He advocates a radically new approach to the question of the legality of targeted killings, which starts with "dismissing the technical question of whether there is an armed conflict with al-Qaeda" as irrelevant. Instead, he says that premeditated killing "would in all cases have to be justified on an exceptional and individual basis, depending on the gravity of the threat posed by that individual and the possibility of meeting it in other ways. In effect, the same kind of human rights judgements would have to be made whether or not an armed conflict was involved".

The central importance of human rights considerations in Dworkin's approach finds resonance in the judgment of the Israeli Supreme Court in the 2006 *Targeted Killings* case. Two human rights NGOs challenged the Israeli Defence Force's policy of targeted killings or assassinations on the basis that they constitute a violation of international humanitarian law and human rights law. The Court found that there was a continuous armed conflict between Israel and "various terrorist groups" in the OPT, which it characterised – for the first time – as international in nature, and occurring in the context of a state of occupation.

The Court ruled that a civilian taking a direct part in hostilities – which could include a civilian engaging in a 'chain of hostilities' as a member of a terrorist organisation – may be lawfully targeted, provided four conditions are met. The attacking State must have accurate and verifiable information about the target; any killing must be thoroughly investigated and if innocent civilians are killed compensation must be paid; and any killing must not violate the principle of proportionality. The final – and most remarkable – condition was that "a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, *if a less harmful means can be employed.*

It is this condition that Dworkin seems to endorse in his approach. That is, if a terrorist taking a direct part in hostilities can be detained, interrogated and brought before a court, then those are the means which should be utilised instead of resorting to the lethal use of force. According to the Court, "Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force." The Court also affirmed that Article 75 of Additional Protocol I is a rule of customary international law and therefore applicable to 'unlawful

combatants' such as 'terrorists': "unlawful combatants are not beyond the law. They are not 'outlaws.' God created them as well in his image; their human dignity as well is to be honoured; they as well enjoy and are entitled to protection, even if most minimal, by customary international law.

In effect, the Court was using human rights law and principles to 'moderate' the application of IHL to the 'abnormal' situation of an international armed conflict taking place in the context of occupation. It could be said that the rationale for this approach is that, by definition, an occupying State has the means to control the territory on which the targets are located, and therefore has other means at its disposal to meet its own security interests, unlike in a conventional international armed conflict.

In a similar vein, Alston states in his report that the basis for any consideration of whether a targeted killing is lawful is the principles of proportionality and necessity, which underlie both international humanitarian law and human rights law. A targeted killing is legal "only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or nonlethal incapacitation, of preventing that threat to life (making lethal force *necessary*
)." The proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others. The necessity requirement imposes an obligation to apply the minimal force necessary to eliminate that threat, for example, if warnings, restraint and capture can be used, then use of force causing injury or death would be unlawful.

The Israeli Supreme Court's judgment and the Alston report both contrast with the findings (or lack thereof) of the U.S. Supreme Court in the *Hamdan* case, which simply said that terrorist detainees are entitled to the protections afforded by Common Article 3 of the Geneva Conventions. The Court refused to deal with the U.S. Government's claim that the U.S. is engaged in a global war on terror with al-Qaeda on the grounds that the conflict is not one that is occurring between states (international), and so Article 3 applies. But regrettably, it went no further than that.

In the present case of al-Aulaqi, the plaintiff is arguing that targeted killings violate the Fourth and Fifth Amendments of the U.S. Constitution, as well as international law. He is also requesting a ruling that would compel the Administration to reveal the criteria that it uses to select American citizens for inclusion on its 'kill lists'. The Administration appears to be doing all it can to impede the litigation by alleging that al-Aulaqi's father has no standing and that proceeding with the case will jeopardise national security.

Although not specifically raised by either party, the Court will also have to answer a pivotal and precise question: whether a state of armed conflict exists between the U.S. and al-Qaeda in Yemen.

The al-Aulaqi case ought to serve as a reminder that it is of utmost importance that “a rule-of-law state” – as the U.S. purports to be – strives to adopt a rule of law approach to counterterrorism by basing its operations on human rights considerations, ensuring substantive or procedural safeguards to ensure the legality and accuracy of killings and putting into place accountability mechanisms. The Court in this case has an opportunity to ensure that the State-sanctioned killing of an American citizen away from any battlefield does not escape judicial scrutiny, and to base its examination not just on the U.S. Constitution, but on the principles of international law and human rights.