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Lethal sterility: innovative dehumanisation in legal justifications of Obama's drone policy

Jeff Bachman and Jack Holland

Introduction

Philip Alston defines 'targeted killing' as the "intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law…against a specific individual who is not in the physical custody of the perpetrator."[1] Less sanguine descriptions for the act of premeditatively targeting suspect individuals have included 'extrajudicial execution,' 'summary execution,' and 'assassination,' all of which, crucially, are legally prohibited.[2]

The Bush administration's initial use of Predator drones came in October 2001. It was an unmitigated disaster, with a murky and contentious chain-of-command leading to an errant and potentially unauthorized strike, enabling Mullah Omar to escape in Afghanistan.[3] Despite this flawed introduction, on November 3, 2002, the US used a Predator drone to kill six men travelling in a car in Yemen. These were America's first targeted killings by UAV outside of an active battlefield. It was also the first of fifty-seven strikes carried out under the Bush administration in Pakistan, Yemen and Somalia.[4] In her 2003 report to the Commission on Human Rights, Special Rapporteur Asma Jahangir strongly condemned the action, expressing concern that "an alarming precedent might have been set for extrajudicial execution by consent of Government."[5] She was right: the precedent set the ground for the rapid escalation of targeted assassination by drones throughout Bush's presidency and particularly from 2005 onwards.

That propensity would increase dramatically under Obama, in significant part because of UAV's elimination of risk to American life, in contrast to many other military means. **In significant part, that is because Obama came to office schooled in the Jeffersonian, rather than Jacksonian, tradition.**[6] Despite 'setbacks' of his own during his first year in office, President Obama authorized more drone strikes than took place throughout his predecessor's entire tenure. Indeed, President Barack Obama's proclivity for the use of unmanned aerial vehicles (UAVs) was sufficient for Fuller to label him as America's 'assassin in chief.'[7] By January 2017, the Obama administration had authorized 563 drone strikes in Pakistan, Yemen, and Somalia – over ten times more than were authorized under the Bush administration. The Bureau estimates that these strikes killed between 2,906 and 4,666 people, of whom between 380 and 801 were 'civilians'.[8] And these figures exclude the active battlefields of Afghanistan, Iraq and Syria. Obama's drone strikes peaked between 2009 and 2012. Significantly, in Pakistan, 305 out of 373 drone strikes, or 82 percent, were launched by the end of 2012; a four-year period which saw 86 percent of Pakistani casualties, along with 98 percent of civilian fatalities.[9]

Scrutiny of the killing program increased during this period. In May 2010, Special Rapporteur Philip Alston reported that "outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal" and that in the "legitimate struggle against terrorism, too many criminal acts have been re-characterized so as to justify addressing them within the framework of the law of armed conflict."[10] Also in 2010, Mary Ellen O'Connell testified to a Congressional subcommittee: "Combat drones are battlefield weapons. They fire missiles or drop bombs capable of inflicting very serious damage. Drones are not lawful for use outside combat zones."[11] Essentially, Alston and O'Connell asserted that Obama's killing program could not be lawfully implemented outside of Afghanistan; in spaces outside of the

legally recognized battlefield, killing individuals suspected of planning or participating in political violence against the US without first attempting to detain them constitutes a violation of international human rights law, as defined in such scenarios by the rules of law enforcement.[12] These criticisms were reinforced by the findings of a range of robust and reliable reports in 2012 and 2013, from the universities of Stanford and New York, Amnesty International and Human Rights Watch, as well as Special Rapporteurs Christof Heyns and Ben Emmerson.[13] Findings included 'double-tap' strikes against first responders, the targeting of funerals, and violations of human rights law and/or the law of armed conflict.

It is within the above context that Obama administration officials delivered six major speeches between 2010 and 2013, in which the legal case was made for the use of UAVs to target America's potential enemies. Importantly, the orators were predominantly lawyers and the majority of the speeches were delivered at legal venues. The speeches were delivered by: (i) Harold Koh, Legal Advisor of the US Department of State, at the 2010 Annual Meeting of the American Society of International Law; (ii) John Brennan, Assistant to the President for Homeland Security and Counterterrorism, and the only orator not formally trained in law, in 2011 at Harvard Law School; (iii) Jeh Johnson, General Counsel of the US Department of Defense, at Yale Law School in February 2012; (iv) US Attorney General Eric Holder at Northwestern University School of Law in March 2012; (v) Brennan at the Wilson Center in April 2012; and (vi) President Obama in May 2013 at National Defense University. In sum, each speech was made when the legality of Obama's killing program was being challenged and when most of the killing occurred. The Obama administration was attempting to normalize and legitimize the unprecedented. It did so while simultaneously implementing a systematized practice that was outside of international norms and recognized legal boundaries, delivering

speeches that explicitly expressed legal opinions in defense of the practice—legal opinion and state practice being key elements in the development of new customary international law.

We analyze the ways in which the Obama administration made the legal case for the use of drones through a two-step methodology, comprising of: (i) a close reading and detailed textual analysis of the six key Obama-era speeches, in which the legal case for the use of drones is made by prominent administration officials, during the crucial period between 2010 and 2013; and (ii) a broader discourse analysis of the emergent War on Terror, as articulated and constructed by President George W. Bush, between 2001 and 2003. In the first step, we deploy a textually oriented variant of discourse analysis, focused on an inter-discursive analysis of these key texts as social events, which helps to construct meaning and produce very real, material effects – in this instance, enabling drone strikes.[14] In analysing these speeches, we considered, in turn: (i) what are the key themes of legal argumentation in justifying drone strikes; and (ii) how are the issues of the law of armed conflict, processual secrecy, distinction / proportionality, and guilt addressed. For the second step, our textual analysis is situated within a broader discourse analysis of the emergent War on Terror, as articulated and constructed by Bush – as the conflict's principal orator – between September 11th, 2001 and mid-2003.[15] This emergent discourse was vital for early-stage constructions of enemy targets and countries of operation, within the broader post 9/11 spatial and temporal imagination of US-led conflict.

Our analysis shows how, to make the case that 'America's Actions Are Legal,'[16] the Obama administration drew upon the discursive foundations of the War on Terror that were established by their predecessors in order to situate the killing program within the existing armed conflict paradigm. Two discursive moves were particularly important for critical doctrinal assessments of change and continuity.[17] First, while Obama may have officially abandoned

Bush's War on Terror (banishing the very term), he nonetheless retained and reproduced the notion that America was engaged in a conflict unbounded by space or time, furthering Bush's discursive efforts.[18] Second, however, we show that continuity was married to change, as the Obama administration strategically opted to develop specific narrative themes in making the legal case for a preferred warfighting style. Our analysis shows how the administration employed innovative techniques of dehumanization, moving away from Bush's efforts to animalize enemies, instead adopting a sanguine, bureaucratic language to veil the act of killing.

The significance of our findings is two-fold. Our research contributes to critical complementary literatures on: (i) the role of dehumanization in US foreign policy, and (ii) the influence of power in the directional flows of law-making and law-receiving from West-to-East and North-to-South. Regarding dehumanization, as David Campbell has shown, a de-humanized enemy Other has long been at the heart of US foreign policy and American identity.[19] This is especially true in times of conflict, such as World War II and the wars in Korea and Vietnam.[20] In this, the US continues what other imperial nations have done before, constructing an image of Others – and particularly Others in the Global South – as inferior and less-than-fully-human. Significantly, in the context of the US killing program, dehumanization of the enemy is not simply a means to make killing easier, but rather to legitimate the act of killing itself. In contrast to starker foreign policy rhetoric, *the Obama administration's legal case for drones amounted to a particularly lethal sterility; murder through the mundane, with assassination enabled through the bureaucratically banal*. The silence on killing in the efficient and plentiful pursuit of death speaks volumes for Obama's foreign policy legacy and the liberal way of war.

In this way, dehumanizing the 'targets' of the killing program is part of a process of making legal that which was not before. Of course, some states are more capable of writing and

rewriting international law than others. As Anthea Roberts writes, "Powerful states wield disproportionate and often decisive influence in determining the content and application of custom."[21] In attempting to create a customary legal framework for a killing program outside of armed conflict and associated battlefields, the Obama administration was able to implement and maintain the program when no such legal framework existed and at the same time as its legality was being questioned. The ability to essentially disregard existing laws and norms, while claiming a legal right to act outside of them is a power limited to only a select few, with the US arguably chief among them. This finding contributes to our understanding of how new law is authored and by whom. Powerful states involved in legal interpretation of the use of force among states typically reside in the West and North.[22] Thus, according to George Galindo and César Yip, "the current framework of CIL is based on an undemocratic law-making process, which has been shaped mostly by powerful states to the disadvantage of the interests of developing countries."[23] Together, during Obama's killing program, dehumanization and law acted as complementary enablers of political violence perpetrated by the US against those residing in the Global South.

Analysis: dehumanization of the 'Other' from Bush's animals to Obama's objects

The act of dehumanizing one's 'enemy' is not a recent phenomenon. It has a long history due to the important psychological effects it has on one's ability to kill other humans. Campbell has shown that dehumanization featured prominently in discourses that helped to enable all of America's foundational conflicts, from the 'settling' of the West, to the horrors of both World Wars.[24] In 1971, during an investigation into potential war crimes committed by the US in

Vietnam, Sgt. Jamie Henry stated that "once the military has got the idea implanted in your mind that these people are not humans, they are subhuman, it makes it a little bit easier to kill 'em."[25]

Confirming Sgt. Henry's claims, Bandura et al write, "Inflicting harm upon individuals who are regarded as subhuman or debased is less apt to arouse self-reproof than if they are seen as human beings with dignifying qualities. The reason for this is that people are reduced to base creatures."[26] In this regard, dehumanization facilitates aggressive acts and is part of an active process that aims to reduce moral guilt or concern over the perpetration of such acts.[27] The process of dehumanization, therefore, has the capacity to convert humans into means to an end, making the victims instrumental tools in achieving some prescribed purpose.[28]

In Haslam's Dual Model of Dehumanization, one of the two basic forms the process of dehumanization takes involves reducing people to subhuman base creatures, typically through the portrayal of individuals or groups of people as animals. The other involves portraying individuals as mechanistic entities, or objects.[29] The former was the preferred method of the Bush administration, while the latter approach was innovatively employed by the Obama administration.

Dehumanization under Bush was explicit. America's enemies were portrayed in animalistic terms and their moral agency was stripped away. Descriptions of terrorists slithering around, hiding in holes, and attempting to save their hides were commonplace; they were parasites in an underworld.[30] As Jackson notes, "Such a formulation not only removes terrorists from the human community, it also functions to de-politicize their motivations while simultaneously re-writing their actions as the expression of primitive savagery. Implicit within this formulation is the notion that rational political dialogue is impossible; savages require control and suppression, not accommodation."[31]

For Bush, in his efforts to establish new and underpinning discourses of the war on terror, the language and mythology of the old (Wild) West was an important resource. The president was frequently mocked as aping the cowboys of his imagined Texan youth, even infamously misremembering a 'Wanted: Dead or Alive' poster when explaining his preferred stance on killing or capturing Osama bin Laden. His language between 2001 and 2003 was littered with western metaphors and phrases, as he constructed a discourse premised on particular understandings of good and evil that were founded in the mythology of 'frontier justice'.[32] In mining the language of frontier mythology, Bush described the pursuit of terrorists rounding them up, hauling them in, and calling their hand; smoking them out of their caves, hunting them down, and encircling them.[33]

Within this discourse, terrorists were ascribed an identity based on features such as animal cowardice but also sub-human hatred, even where these framings sat uneasily together. Fanaticism in the pursuit of a pure form of evil drew a clear and sharp divide between Bush's coalition of freedom-loving countries and the evil-doers.[34] And, of course, this framing was congruent with what most Americans have been taught. Defining the 'Other' as evil appeals to "the American's belief that their government is incapable of committing acts of 'evil'", which "has much to do with the fact that Americans have been hearing, throughout their lives, about the 'evil' that resides in 'other' places."[35]

Whereas the Bush administration amplified a commonplace and explicit form of dehumanization, the Obama administration innovatively employed Haslam's second form of dehumanization, which focuses on the use of mechanistic, sanguine, and bureaucratic language to veil human qualities in the conduct of questionable violence. In every way possibly conceived, the Obama administration used non-descriptive accounts to transform the individuals it killed

into objects and move the act of killing into the realm of the abstract. For the Obama administration, the act of killing was a sterile bureaucratic exercise. Non-descriptive accounts essentially hide the act of killing by using terminology that depicts something more benign. In their article on the killing of Osama bin Laden, Jarvis and Holland note how bin Laden's death was initially articulated in primarily descriptive phrasing. However, they write, "While the language of death and killing persisted throughout the following weeks, over time it was gradually, but perceptively, substituted with less strictly descriptive accounts."[36] In the six speeches analyzed, including the first in which its killing program was overtly acknowledged, the Obama administration did not proceed from descriptive to non-descriptive accounts. Instead, the act of killing was hidden behind a veil right from the start.

During 1991's revolution in military affairs, US officials described American air strikes as "surgical" in nature. "Smart" bombs were dropped with "pinpoint accuracy." As Knightley notes, describing the bombs as "smart" and the strikes that launch them as "surgical" painted a picture of "war almost without death, a sanitized version of what had gone on before."[37] With killing from above being central to the Obama administration's killing program, the death and destruction caused below required a healthy dose of disinfectant, which was achieved through the medicalization of the act of killing and the replacement of descriptive accounts with sterile terms.

Though it is not uncommon for military acts to be described as such, the Obama administration regularly referred to its acts of killing as "operations."[38] Operations are corrective. They seek to address an existing malady that is causing harm to the patient. In this case, the malady is al-Qaeda and its affiliates. Therefore, these individuals must be surgically removed. During operations, it is also important that little or no damage is caused to the patient. Just as

was done with the "surgical strikes" of "Operation Desert Storm," the Obama administration painted a picture of deadly force used so precisely that damage is caused only to the "military objective" through the ability to "pinpoint strike an al-Qaeda operative"[39], while the "risk of civilian casualties can be minimized or avoided altogether."[40] In explicitly medical terms, Brennan claimed, "It's this surgical precision—the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qa'ida terrorist while limiting damage to the tissue around it—that makes this counterterrorism tool so essential."[41]

There are multiple reasons behind these shifting types and modes of dehumanization. Moreover, the drivers of change interact complexly. However, most significantly, changes in dehumanizing rhetoric are inspired by presidential personality (Obama was a cautious president) and philosophy (Jeffersonian, not Jacksonian), in interaction with (new) technological capabilities (see, for example, literatures on the 'Revolution in Military Affairs', 'Fourth Generation Warfare', and new materialist analyses of foreign policy), as well as broader processes of identity construction (covering enemies generally and their deaths specifically). These elements combined to look more similar in the early 1990s and from 2008 onwards (cautious pragmatism and high-tech war), compared to the synergies of a post-9/11 Jacksonian moment, high-visibility weaponry ('shock and awe'), and two large, protracted wars that oftentimes appeared unwinnable.

Whereas non-descriptive language was used by the Obama administration to discuss its killing program, it used very descriptive language when describing acts of violence committed by al-Qaeda. For example, Brennan stated, "We are at war against a terrorist organization called al-Qa'ida that has brutally murdered thousands of Americans—men, women and children—as well as thousands of other innocent people around the world."[42] Thus, the US is "obliged to take

lives—the lives of terrorists" who are "intent on murdering Americans."[43] In this description, a number of distinctions can be made. First, the US passively takes the lives of terrorists, whereas al-Qaeda brutally murders innocent men, women, and children. Second, while the identities of those suspected of participation in political violence have been removed, the humanity of their victims is clearly present in identifying them as individuals with human identities—men, women, and children—and a nationality—American.

The same cannot be said for the Obama administration's victims who had no ties whatsoever to al-Qaeda or 'associated forces'. Their identities as Pakistanis and Yemenis—men, women, and children—are subsumed under the labels of 'collateral damage' and 'civilian casualties'.[44] Because both the US and al-Qaeda maintain killing programs, the former's goodness and the latter's evilness is maintained (primarily and perhaps only) based on the intentions behind their respective killings. As Tirman notes, "apologists for American behavior range across the political spectrum and typically settle on a few devices to ward off closer inspection: the U.S. military has rules in place to protect civilians...the enemy and its sympathizers exaggerate civilian casualties; the other side is worse, and so on…. Actual practices and consequences are thus shuffled to the side, and the conventional wisdom is secured."[45] Hence, when the Obama administration kills civilians it is made more acceptable by proclamations regarding how hard it tries to avoid killing them. "One reason for this is that concern is directed away from the civilians as dead individuals and toward such things as the issue of 'correct' or 'successful' targeting and at the intentions of those who target."[46] In other words, what is more important than the fact that civilians are killed is that the Obama administration does not intend to kill them. Thus, it retains its moral superiority over the enemy.

On numerous occasions, the Obama administration emphasized the lengths it goes to "avoid broader harm to civilians and civilian objects."[47] Such claims were reminiscent of Bush's appeals to humanitarianism in his insistence that, in Afghanistan, US forces would drop food at the same time as they were dropping bombs. In using "technologically advanced weapons," the Obama administration argued it was able to "ensure that the best intelligence is available for planning and carrying out operations, and that the risk of civilian casualties can be minimized or avoided altogether."[48] Such technology could be used, the Obama administration reiterated, to decide "against conducting a strike in order to avoid the injury or death of innocent civilians."[49] "This," according to Brennan, "reflects our commitment to doing everything in our power to avoid civilian casualties—even if it means having to come back another day to take out that terrorist, as we have done. And I would note that these standards—for identifying a target and avoiding the loss of innocent civilians—exceed what is required as a matter of international law on a typical battlefield. That's another example of the high standards to which we hold ourselves."[50]

Within this framing, whereas the Obama administration goes above and beyond what is required of it—a reflection of American values—al-Qaeda seeks only to "kill innocent Americans."[51] Obama implored Americans to "remember that the terrorists we are after target civilians, and the death toll from their acts of terrorism against Muslims dwarfs any estimate of civilian casualties."[52] And, moreover, these acts of killing had very different consequences for their perpetrators respective identities. Whereas "al-Qa'ida's killing of innocents—mostly Muslim men, women and children—has badly tarnished its image and appeal in the eyes of Muslims around the world"[53], when the US kills innocent men, women, and children, also known as "collateral damage," it does nothing to tarnish America's moral prestige. As Rediehs points

out, "we value human life; we don't intend to kill civilians; in fact we minimize rather than maximize the loss of innocent life"; they, on the other hand, "the evil enemies, *intend* to kill lots of innocent people and then gloat when they succeed. What differentiates the good people, then, from the evil ones is a difference of feelings and attitudes."[54] And it is surely easier to feel the right things, when the men, women, and children who are killed by the US are reduced to nonentities – nameless, faceless, and ageless – described merely as "collateral damage" or "civilian casualties."[55]

With the right feelings, it is easy to justify killing.[56] The right feelings include "regret" when individuals who were not intended to be are killed. It is typical for American officials to express that civilian deaths are tragic and regrettable.[57] Brennan acknowledged the "exceedingly rare" instances when "civilians have been accidently injured, or worse, killed in these strikes."[58] "When it does happen," according to Brennan, "it pains us and we regret it deeply, as we do any time innocents are killed in war…. This too is a reflection of our values as Americans."[59] Because the US intends only to kill "guilty" individuals and is remorseful when it kills "innocents," it can kill thousands of people and still proclaim: "Our greatest strength has long been not merely our military might but our moral authority. Our surest protection against assault from abroad has been not all our guards, gates and guns or even our two oceans, but our essential goodness as a people."[60] Quite simply, this defense amounted to the assertion that "We're better than them. We're Americans."[61]

The Obama administration's most significant technique of dehumanization was the systematic denial of the humanity of the people they killed by turning them into objects that were destroyed. While innovative, this language harked back to the techno-linguistic reasoning on display during the first Gulf War; when, for instance, an artillery captain noted, "I prefer not to

say we are killing other people. I prefer to say we are 'servicing the target'."[62] "Servicing" substitutes for the act of killing and the use of "target" transforms the humans being killed into objects, objects which are meant to be hit. As Neisser notes, "The language of targets thus helps move the actions of war into the realm of the abstract; it objectifies human life… Slowly, step by step, U.S. observers are inured to the obvious and awful loss of life taking place."[63]

The Obama administration's effort to dehumanize the individuals it sought to kill and to move its killing program into the abstract is evident in Jeh Johnson's address at Yale Law School. In transitioning to his discussion of the killing program, Johnson states, "I want to spend a moment on what some people refer to as 'targeted killing'."[64] What is obvious in Johnson's statement is that, while some do, the Obama administration does not refer to its policy in this manner. In fact, this is the only time "targeted killing" is used in the six speeches analyzed for this article. However, in total, 'target', 'targeted', and 'targeting' were used more than 100 times in these same six speeches. Thus, it is clear that the term 'targeted' is not what is problematic, but rather only the term 'killing'.

In its use of "target" and the term's variations, the Obama administration eliminates the act of killing and the human identity of the victims. The way in which individuals are identified and killed become "targeting practices"[65] or the "approach to targeting"[66]; the deliberations that determine who should be killed become "targeting decisions"[67]; the legal framework that regulates the act of killing are the "rules that govern targeting"[68]; implementation of the decision to kill someone becomes "the act of targeting"[69] or "targeting operations"[70]; individuals are not killed, they are "targeted"[71]; those who are "targeted" are not individuals, they are "targets"[72]; and all of the above form the "subject of targeting."[73]

The Obama administration's use of the word target to describe its victims and the act of killing was central to a dehumanization strategy that denied the individuals killed of the agency to be recognized as humans. This is true even of the individuals who were killed that never participated in any acts of violence against the US or did so as 'accidental guerrillas'—those who were radicalized only after a US attack killed family or community members.[74] Whereas 'civilians' are "an 'agentic' category of persons,"[75] targets "are the object of action by others."[76] The status of individuals the Obama administration sought to kill as subjects before the law and those who were 'accidentally' killed as victims is dismissed through the process of dehumanization and objectification. Indeed, systematic dehumanization was essential to the project of making legal Obama's killing program. As will be discussed later in the next section, use of the term target by the Obama administration to describe those they identified as 'terrorist suspects' and 'suspected terrorists' not only dehumanized the victims, but also portrayed them as guilty of wrongdoing, something that was key to the legal justification of killing.

Analysis: situating new practice in old law

As important as its use of innovative techniques of dehumanization was, the Obama administration's legal case for the use of drones centered, above all else, on the existence of a state of war, in which the law of armed conflict applied. The argument that the US remained bound by the laws of armed conflict – by the rules of war, rather than the rule of law – drew directly upon the discursive foundations of the war on terror established by Bush. In turn, this argument hinged on the existence of a state of war, as well as its subsequent temporality (its ongoing nature)[77] and spatiality (its extensive, enemy-driven location and potential globality).[78]

These discursive prongs, established by the previous government, helped the Obama administration to make the legal case for the use of drones.

Numerous authors pursuing a discourse analytic approach to explore the events of September 11th, 2001, have noted the scripting of that day as: exceptional, a moment of rupture, and an act of war.[79] Many, too, have noted the mutual discursive construction of a universal armed conflict: global in nature, targeted at freedom-loving nations everywhere, and likely to last a generation.[80] The war, these analyses have shown, was written as being unforeseen and driven by the hatred and fanaticism of a new and determined enemy, posing an omnipresent threat to western lives. Our own analysis confirms these framings of the day. In turn, we find that the events of September 11th, 2001, were framed explicitly as: an act of war; a potentially generational conflict; and a global military battle, all of which are significant and consequential for the means permissible within the US foreign policy toolkit, as well as the legal case for their choosing.

These framings were both consequential and resonant, for Bush and Obama alike. Jackson describes the Bush administration's redefining of "acts of terrorism, symbolic violence and political murder by non-state actors, to acts of 'war'" as "probably the most important discursive move of all."[81] It was a discursive move that helped to give references to 9/11 a special and unique power, justifying a perpetual right to use force in self-defence. In contrast to initial descriptions of the 9/11 attacks as "acts of terror" that involved "mass murder," the narration of 9/11 as an act of war placed far fewer limits on what was permitted in response. It was a framing that enabled the Bush administration's initial militaristic response and, in asserting the existence of an ongoing armed conflict, the Obama administration repeatedly adopted the core elements of a war narrative, rejecting the constraints a law enforcement paradigm might

have entailed. In this sense, the (re)construction of 9/11 as an act of war contributed significantly to the legal rationale for an ongoing military response regulated by the law of armed conflict, helping to enable the use of lethal force in ways that could not be justified under the rule of law except in the presence of exceptional circumstances.[82]

Beginning with Koh's speech in 2010, the Obama administration repeatedly asserted that the US is engaged in an armed conflict as a means to justify its killing program. Koh states that "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defence under international law."[83] Brennan confirmed, "Our ongoing armed conflict with al-Qa'ida stems from our right—recognized under international law—to self-defence."[84] Therefore, the Obama administration reinforced Bush-era framings: not only did the 9/11 attacks initiate an armed conflict between al-Qaeda and the US, but, moreover, continued efforts to attack the US makes the armed conflict an ongoing one.

In the same vein as their predecessor, the Obama administration's continued use of military force, situated in claims of the existence of an ongoing armed conflict, required a "ubiquitous narrative of threat and danger."[85] Within this frame, the threat of terrorist violence was pitched as perpetual, dramatic, and without precedent. Elevating the threat of terrorism to such heights makes, by implication, any measure the government prescribes as necessary appear prudent and necessary. This framing provided the Obama administration the requisite space to reject the application of the "loaded," "repugnant," and "pejorative term 'assassination'" to its killing program.[86] Within and supported by this resonant and enduring discourse, officials could feasibly argue that "the use of lawful weapons systems" in "self-defence against a leader of al

Qaeda or an associated force" is "consistent with the laws of war and does not, by definition, constitute an 'assassination'."[87]

Because the Obama administration's killing program has been implemented in numerous geographic spaces, within which traditional conceptions of what constitutes a "battlefield" would not apply, administration officials also sought to justify why the armed conflict extends to these territories. Central to the Obama administration's argument was that the location of an armed conflict is not determined by where the battlefield is; the location of the battlefield and, therefore, the armed conflict, is determined by where the participants in the armed conflict are located. The US does not view its "authority to use military force against al-Qa'ida as being restricted solely to "hot" battlefields like Afghanistan."[88] According to Holder "We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks – fortunately, unsuccessful – against us from countries other than Afghanistan."[89] The killing program, therefore, may be implemented "without a geographic limitation."[90]

The Obama administration's attempt to situate its killing policy in the settled law of armed conflict faces two significant hurdles. First, historically, acts of terrorism have been treated as criminal phenomena rather than acts of war. Thus, in drawing directly upon the discursive foundations of the war on terror established by Bush, Obama's assertion that it is engaged in an armed conflict contradicts both international law and historical precedent. It is worth repeating Alston's assessment here: in the "legitimate struggle against terrorism, too many criminal acts have been re-characterized so as to justify addressing them within the framework of the law of armed conflict."[91] Second, the claim to the existence of an armed conflict "without a geographic limitation" also fails to withstand scrutiny. As O'Connell made clear in her expert

testimony before US Congress, "Drones are not lawful for use outside combat zones. Outside such zones, police are the proper law enforcement agents and police are generally required to warn before using lethal force."[92] There is good reason for this. Outside active combat zones, combatants and civilians may be indistinguishable. Even when they are distinguishable, treating a civilian populated area as a warzone visits the associated risks upon the civilian population.

Killing 'suspected terrorists' and 'terrorist suspects'

In what could only have been a coordinated effort, Koh, Johnson, Holder, and Brennan attempted in their speeches to make a dubious comparison of US efforts to kill Admiral Yamamoto, following the attack on Pearl Harbor, to the Obama administration's killing program.[93] According to Koh, "American aviators tracked down and shot down the airplane…."[94] The major differences are obvious. First, the US had entered into World War II, within which the law of armed conflict applied. Second, Yamamoto was a combatant, one easily identifiable by his uniform and his presence in a Japanese military aircraft. Conversely, the victims of Obama's killing program "do not behave like a traditional military – wearing uniforms, carrying arms openly, or massing forces in preparation for an attack."[95] Individuals marked for death must, therefore, be selected based on some threshold of "evidence" that is known only to the members of the Obama administration who effectively act as judge and jury, if not the literal executioner. There is no avenue of recourse for suspects; they do not have the ability to surrender, seek a trial, or to challenge the evidence that allegedly implicates them. Suspects operate "while hiding among civilian populations."[96] Executions are therefore rarely carried out in a controlled environment, with individuals found "guilty" by the Obama administration executed by drones

while living and moving among people not suspected of any wrongdoing, but who nonetheless also risk injury or death.[97]

At the heart of the Obama administration's invocation of a right to kill individuals suspected of planning or having participated in political violence against the US lies a fundamental epistemological concern pertaining to the law of armed conflict: how can policy makers be certain of the military necessity of a pre-emptive drone strike? How certain are they that such action – killing a *suspect* – is proportionate? Such dilemmas come through in the speeches of the Obama administration, in three significant and related ways, as, whilst simultaneously asserting the implementation of its killing program is consistent with the laws of armed conflict, contentious statements repeatedly undermine the credibility of these insistence.

First, the Obama administration repeatedly referred to the individuals they sought to kill as "terrorist suspects" and "suspected terrorists." Most often, these labels were used by officials when challenging allegations that the administration preferred to kill individuals, rather than capture them. For example, Obama declared that, "as a matter of policy, the preference of the United States is to capture terrorist suspects."[98] Similarly, Brennan dismissed such accusations, arguing, "This is absurd, and I want to take this opportunity to set the record straight. So, I want to be very clear – whenever it is possible to capture a suspected terrorist, it is the unqualified preference of the Administration to take custody of that individual…"[99] In presenting it as a preference, however, it is clear that the Obama administration did not believe it was *required* to capture suspects. In this regard, Holder states that "we must also recognize that there are instances where our government has the clear authority…to defend the United States through the appropriate and lawful use of lethal force."[100] Of course, the problem with killing *suspects* is that they are just that; suspected wrongdoing likely fails to meet the legal threshold of danger

required to justify killing someone. This is true even in the context of an armed conflict. An individual cannot simply be assumed to be a participant in the armed conflict. The principle of distinction requires that "civilians" be distinguished from "combatants." When there is doubt, individuals must be assumed to be civilians unless there is clear evidence that they are participants in the armed conflict. Identifying individuals as "terrorist suspects" and "suspected terrorists" would seem to be insufficient, precisely because it confirms the existence of doubt. This conclusion is grounded in more than the parsing of words. Obama administration officials tasked with justifying the policy of killing individuals were predominantly lawyers; it is unlikely that these officials would use the terms "suspect" and "suspected" loosely (as anything but the way in which the terms are used in criminal law).

Second, and more significantly still, officials explicitly acknowledge that there were times when the Obama administration approved the execution of individuals even when they were not absolutely certain that the individual was a member of al-Qaeda or an associated group. Holder, for example, places his use of "suspected terrorists" directly in the context of meaning someone for whom there exists some uncertainty regarding guilt: "Here, the interests on both sides of the scale are extraordinarily weighty. An individual's interest in making sure that the government does not target him erroneously could not be more significant."[101] Nonetheless, according to Holder, "it is imperative for the government to counter threats posed by senior operational leaders of al Qaeda, and to protect the innocent people whose lives could be lost in their attacks."[102] Holder's clear implication is that there are times when an individual's interest in avoiding being wrongfully killed is superseded by America's national security, demonstrating a willingness to kill, even when there is doubt. As noted above, even under the lax restrictions on the use of deadly force found in the laws of armed conflict, killing individuals when there is

doubt regarding whether they are participants in the armed conflict fails to satisfy the principle of distinction.

Third, in a particularly troubling admission, Brennan went further still, stating explicitly that the Obama administration used deadly force even when it lacked certainty regarding the identity of the individual it sought to kill. According to Brennan, "we only authorize a particular operation against a specific individual if we have a high degree of confidence that the individual being targeted is indeed the terrorist we are pursuing."[103] This, Brennan argued, "is a very high bar."[104] But it was one that was frequently met, since the US "simply cannot afford to wait until deadly plans are carried out."[105] The logical demands imposed by a discourse of pre-emption in the cause of national security ultimately outweighed and overrode concerns to satisfy two crucial components of the law of armed conflict. In other words, the US, under Obama, used deadly force against "terrorist suspects" and "suspected terrorists" even when there was only a "high degree of confidence that the individual being targeted is indeed the terrorist we are pursuing"[106] and when there was only "near-certainty that no civilians will be killed or injured."[107] Doing so, the administration insisted, was "an indicator of our times – not a departure from our laws and our values."[108]

The Obama administration placed significant effort into mitigating the contradictions involved with killing suspects by ensuring they receive "due process." Obama stressed that this process does not involve "a bunch of folks in a room somewhere just making decisions"[109]; rather, it includes "rigorous standards and process of review."[110] Elaborating, Koh emphasized that the "procedures and practices for identifying lawful targets are extremely robust."[111] Officials produce a list of potential targets – suggesting individuals to be killed – and these proposals "go through a careful review and, as appropriate, will be evaluated by the most senior

officials in our government for decision."[112] The "views and opinions of the lawyers on the President's national security team are debated and heavily scrutinized."[113] These lengths, Americans were told, ensured that individuals targeted by Obama's drone policy did, more often than not, "deserve" to die; they were legitimate targets, arrived at following due and diligent process. Yet, that there was a process of determining guilt at all is illustrative of the difference between killing specific individuals during World War II and Obama's killing program. No such process was required in the case of the former to determine who could be killed and who had immunity.

As was shown above, killing 'terrorist suspects' and 'suspected terrorists' leaves open the very real possibility, one acknowledged by Obama administration officials, that individuals not suspected of any wrongdoing will be killed. This includes both individuals 'mistakenly' attacked and those who are killed in the process, that is 'collateral damage'. Dehumanizing the victims, then, is essential and is epitomized by the systematic use of 'target'. The fact that an individual is named a target legitimizes the use of lethal force by assigning guilt.[114] Gross asserts that the process of assigning guilt "proclaims soldiers outlaws," situating them "outside the law."[115] However, the Obama administration entered office with a promise to usher in "a new era of engagement" and "renewed respect for international law and institutions."[116] Therefore, it was not sufficient to simply place the victims of its killing program outside the law. Rather, the Obama administration sought to rewrite international law by in order to situate their killing program within.

Unilaterally writing the rules of customary international law

In the previous section, it was shown how the Obama administration's attempt to situate its killing program in existing international law could not withstand scrutiny. In this regard, Obama's legal argumentation could be analyzed as an attempt to write new rules of customary international law (CIL). CIL is developed through the combination of state practice and legal opinion (*opinio juris*). In other words, when we infer or deduce rules of CIL, it is necessary to examine both what states do and why they do it.[117] State practice can include acts of commission and omission. Similarly, legal opinion can include statements in support of an act or policy and objections to it. Though there are no set parameters regarding how many states must consistently practice or refrain from practicing a particular act and for how long, accompanied by expressed legal argumentation, before new customary law emerges, it is generally understood that new customary law requires some consensus among states.

The problem with justifying Obama's killing program by CIL is that the US was the one and only state to practice the widespread use of killing at the time Obama sought to make his legal case. Furthermore, at its peak, Obama's killing program was placed under intense scrutiny. As Christine Gray notes, the "express invocation of a new formula by one state is not enough to change the law."[118] Similarly, Alston states that implicit or explicit claims to a new legal right to maintain and implement a killing program outside of armed conflict and its associated battlefields must be evaluated against the practices and policies of the majority of states, "not those of the handful which have conveniently sought to create their own personalized normative framework."[119]

Accepting the emergence of new CIL based on the actions of one or two states is illustrative of the (problematic) role power plays in international relations. As Charles de Visscher notes, "Among the users are always some who mark the soil more deeply with their

footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way."[120] Daniel Bodansky poses a number of related questions about the customary process: "what economic, social, psychological, and political processes explain the emergence of customary norms? To what extent, for example, do customary norms emerge as a result of calculations by states of rational self-interest? To what extent are they imposed by powerful states (what international relations scholars refer to as 'hegemons')?"[121] Because of the lack of formalized procedures in the area of CIL, and the central role played by behavior in its development, maintenance and change of customary rules may easily digress to "might is right." More importantly, powerful States can do more than simply influence the behavior of weaker States, they can act, or not, in situations where weaker states may want to but do not have the capabilities or the claimed legal right to do so. Thus, as Leander and Aalberts note, it is simply not possible to de-politicise legal expertise and argument: the law is political.[122] And, as this article shows, during Obama's drone wars, foreign policy discourse and international legal justifications have been fully interwoven; their imbrication enabling the political possibility of drone strikes, by rendering war at the margins as conceivable, resonant, and legitimate, on the basis of apparent legality notwithstanding questionable morality.

By invoking international law in defense of their actions, US officials create a reality based on their interests. The law then is molded to this reality. In other words, it is the law that bends to the actions and justifications of the US rather than the US limiting its actions to those which comply with international law. As B.S. Chimni concludes, the doctrine of CIL was a "western construct, its rules came to be derived from western state practice on which the dominant positivist method placed great stress. Even today the lack of the ready availability of state practice in the instance of postcolonial states means that western states carry the day."[123]

Thus, states like the US determine how existing law is to be interpreted, even when the favored interpretation conflicts with previous interpretations, and create new law where even radical reinterpretation cannot make legitimate the actions of these states. Susan Marks' analysis of the Bush administration's exploitation of international law to justify their torture program is equally relevant to the Obama administration's killing program: "United States officials are busily engaged in their own hyper-technical interpretations […] Sometimes indeterminacy is their line; sometimes determinacy. Either way, international law is part of the strategic plan."[124] And international law, according to China Miéville, "is made actual in the modern international system" by "coercive political violence."[125]

Conclusion

Obama promised 'change we can believe in'. In foreign policy, however, change facilitated not only continuity but a ramping up of those policies that were frequently most vociferously denounced by his supporters. This change as continuity required first a rewriting of international law to permit the widespread and systematic use of lethal military force against 'suspected terrorists' and 'terrorist suspects' in areas populated by civilians, far away from the battlefield. In this instance, change also took the form of rhetorical innovation, as the administration strategically opted to dehumanize America's enemies in a language more palatable for liberal audiences. This language of processual thoroughness, bureaucratic oversight, and hyper-technologized accuracy reduced those suspected of wrongdoing to something less than fully human; a form of Agambian bare life, in a zone of murky grey jurisprudences, that can be killed. And they were killed, in numbers that dwarfed those of the previous administration, despite the

obvious brutality of a language designed to explicitly reduce enemies to animals. The lethality of the liberal western way of war is significant.

As we have hinted at, lethal sterility is not entirely new, having been on display during the first Gulf War, as heightened American superiority was on full televisual display. We note, therefore, then as now, the link between technological and linguistic innovation, as enhanced capabilities are met with technologized and mechanistic rhetoric. At this point of intersection, we see the nexus of the co-productivity of material and textual elements of discourse. This article's findings therefore link with those researching the effects of drone technology itself, which served to produce the target in ways cogent with the sterile language of the Obama administration.

Finally, we note the importance of remaining critical and vigilant. While perhaps easier in an era of MOAB and inflammatory hyperbole, that era will inevitably come to an end. This article has shown how the return of more palatable and diplomatic language might be used to facilitate the development of very troubling foreign policy.

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