

The Legality of Targeted Killing as an Instrument of War
:The Case of Qaed Salim Sinan al-Harethi

(Preliminary Draft, Please do not Quote Without the Author's Permission)

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On 3 November 2002 a CIA-controlled Predator unmanned aerial vehicle appeared over a car speeding along an isolated highway 100 miles east of Sanaa, the capital of Yemen.

The Predator launched a laser-guided hellfire missile which struck the target and exploded, leaving only charred remains. American and Yemeni officials claimed that the cars' occupants had been six members of al-Qaeda, including Qaed Salim Sinan al-Harethi, one of the terrorists the CIA believed to be responsible for the bombing of the US destroyer Cole in 2000. Based only on the carbonized remains, forensics specialists were unable to confirm the identity of the victims. (Calhoun 2003: 209-10)

Despite the difficulties with identification, Paul D. Wolfowitz, the then Deputy Secretary of Defense praised the venture as "a very successful tactical operation," and indicated that such operations would be a key element in America's arsenal in fighting the new war on terrorism. (BBC News 2002) In fact, American officials now acknowledge having carried out at least 19 successful targeting operations in the war on terror. (Meyer 2006)

Yet, the UN, the EU and many states, NGOs and legal experts denounced the American operation as an extrajudicial killing or assassination, both banned under international law. For example, the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions condemned the operation repeatedly in annual reports as "a clear case of extra-judicial killing. (e.g., UNCHR 2003, 2004) Swedish Foreign Minister Anna Lindh described the operation as "a summary execution that violates human rights." (Machon 2006: 2-3) Many influential legal scholars have argued that the action was not only illegal, but constituted assassination. (Gray 2004: 175; Duffy 2005: 243-4; Downes

2004: 279-80) Amnesty International has also condemned the American action as an extra-judicial execution. (Amnesty International 2005)

Nevertheless, the US and many other states and legal experts have argued that the al-Harethi targeting was a legitimate exercise of self-defense under international law. (e.g., UNCHR 2004) Indeed, not only have many of the most influential scholars of humanitarian law defended the operation, but in December 2006 the Israeli Supreme Court upheld the legality of terrorist targeting in certain circumstances, and outlined specific requirements for the legitimacy of such operations. (High Court of Justice 2006; Schmitt 1992: 644; Dinstein 2004: 94-5). Even the Director of Human Rights Watch, Kenneth Roth, has defended the targeting of al-Harethi, remarking “treating him as an enemy combatant and resorting to lethal force was appropriate.” (Roth 2006: 298) Moreover, the reluctance of much of the international community to condemn the American action in Yemen has been widely noted. (O’Connell 2005: 5; Downes 2004: 278; Byman 2006: 96) Finally, a number of scholarly articles have recently been published suggesting that in cases like that of al-Harethi, targeting may be both legally and morally defensible. (UNCHR 2004: par. 41)

This essay examines the legality of targeted killing under international law by focusing on this first clear and unambiguous US operation. It evaluates the known facts in terms of three potentially applicable bodies of law – criminal law, the law armed conflict relating to self-defense short of war, and humanitarian law. It concludes that while there is a strong case for the legality of the al-Harethi operation, this case relies on elements

that may not apply to many other cases. The al-Harethi case thus helps to define the legal limits of targeted killing.

Several legally pertinent aspects of the operation that warrant particular attention:

- the US acted with the permission of Yemen. (Downes 2004: 280-1)
- There was little doubt that al-Harethi was a Senior al-Qaeda leader. The US also claims that he had been a central figure in the attack on the USS Cole. The US has not made the evidence public, but the claim has been widely accepted.
- The other passengers in the SUV were either al-Qaeda members or known members of a terrorist organization closely affiliated with it, the Aden-Abyan Islamic Army. One passenger was also a US citizen: Kamal Derwish, an Arab-American who grew up near Buffalo and, according to the FBI, had recruited Americans for terrorist training at al-Qaeda camps. (Hersh 2002)
- No bystanders were harmed, nor does it appear that there was a significant danger of such injuries.
- A December 2001 attempt to arrest al-Harethi failed and resulted in the deaths of twenty people (including at least twelve Yemeni soldiers at the hands heavily armed tribesman allied with al-Harethi). (Whitaker 2002)
- The wreckage of the car revealed remnants of communication equipment and traces of explosives. (Banks 2007: 117)

There are at least three legal paradigms that could plausibly be applied to the targeted killing of al-Harethi: (i.) criminal law, (ii.) self-defense short of war, and (iii.) armed conflict. Each legal paradigm has its own implications for the legality of the operation:

(1) *Criminal law in Yemen*. In November 2002, Yemeni officials affirmed that they were working “in co-ordination” with the US. (Downes 2004: 281; Duffy 2005: 337) It appears then that the Yemen government at least consented to the US operation. The operation was therefore not an act of international aggression. Indeed, one way of interpreting it would be as a use of force at the invitation of, and in support of, the Yemeni government.

If the Yemen government invited US action, then there is a well-established legal framework in relation to which the al-Harethi targeting might be justified. There is little doubt that it is legal for a country that is having difficulty in enforcing criminal law at home to call upon the aid of another. This point was explicitly recognized by the International Court of Justice in the *Nicaragua* case. (Downes 2004: 280; Dinstein 2005: 112-6)

However, the in a case of invited intervention, the foreign country’s right to use force would extend no further than the local government’s authority. In other words, the country inviting action could not authorize the intervening power to use force in ways that it was itself not permitted.

At the time of the al-Harethi targeting, there was no situation of armed conflict in Yemen that would warrant the Yemeni government to resort to armed force within its own territory. The government of Yemen therefore had a right to pursue terrorists, but only within the framework of criminal law. The Yemeni government then only had the authority to use lethal force against al-Harethi if he posed an imminent danger of serious harm to others and there was no other means to neutralize the threat. For example, the Yemeni government – and by extension the US government - could legally use lethal force against al-Harethi if he violently resisted arrest and posed an immediate and substantial threat to bystanders or law enforcement agents.

It may be argued in defense of the US operation that al-Harethi did pose a substantial threat to others. In fact, al-Harethi had resisted an attempt to arrest him in December 2001, resulting in the death of around 20 persons. Although the incident was almost a year old at the time of his targeting, authorities appear to have been well within their rights to treat al-Harethi as a dangerous fugitive, and to be prepared to use lethal force if necessary.

But was the use of lethal force necessary at the time that it actually was used? More specifically, was the threat that he posed of sufficient urgency to resort to lethal force? After all, the car carrying al-Harethi was driving in an isolated stretch of desert at the time of his targeting, so it is difficult to see who was urgently threatened.

Still, defenders of the US operation may point out that even if al-Harethi did not pose an instantaneous danger at the moment that he was targeted, there appears to be some evidence that he may nonetheless have posed an imminent danger to others in the near future. Although official records are not available to the public, a number of commentators have reported the traces of explosives were found in the wreckage of the SUV. If this is so, then there may be reason to believe that al-Harethi was in an advanced stage of planning or even carrying out a terrorist attack. A case may also be made that he was attempting to flee Yemeni jurisdiction. Either or both of these circumstances could be offered as a rationale for the use of lethal force.

Still, neither of these explanations are entirely convincing for two reasons: (i.) al-Harethi was not alone in the vehicle, and even if it could be assumed that would violently and effectively resist arrest, the same cannot necessarily be assumed of the other passengers; (ii.) moreover, al-Harethi and his companions and his companions were not offered any chance to surrender – a possibility that cannot be discounted when menaced with hellfire missiles. In the context of a law-enforcement operation, it can be strongly argued that the standard of last resort is set very high, and that consequently criminals should always be given a chance to surrender except in cases where they pose an instantaneous threat. The argument appears to be especially applicable in the case of the al-Harethi targeting because it is possible that other passengers in the SUV may have been willing to surrender. If this argument is compelling, then it does not appear that the deliberate and intentional killing of al-Harethi would comply with applicable criminal law. This assessment, however, is based on what is known and reported about

the incident. It may be that there is further information about the incident that would clarify the urgency of the threat posed to other persons. In the absence of such information, however, his killing appears to have been illegal under the criminal law.

There is, however, a second legal framework that could potentially be applied to the targeting of al-Harethi – that is, (b.) *self-defense short of war*. The September 11th attack on the United States was widely recognized by states and international institutions (including the Security Council in resolutions 1368 and 1373) as constituting an armed attack triggering a right of self-defense under article 51 of the UN Charter. The right of self-defense permits the limited use of armed force against perpetrators of armed attacks. (Schmitt 2003: 11; Dinstein 2005: 206-7)

However, depending on the gravity of the attack, the use of self-defense may be restrained by a number of preconditions on the use of force (i.e., it may be limited to self-defense short of war). Interpreting the gravity of an armed attack is a grey area in the law and is subject to legitimate dispute. Assuming, however, that the attack is not seen as attaining to the level of gravity required to authorize wholesale warfare, the US would be limited to acts of self-defense short of war against al-Qaeda.

Acts of self-defense short of war are legitimate only if they meet certain preconditions. These conditions are not specified in the UN Charter or international conventions, but are largely a matter of established practice. There is correspondingly disagreement over exactly what preconditions apply. Two conditions, however, have been

recognized, as constituting customary law, specifically necessity and proportionality. (International Court of Justice 1996: 245; Dinstein 2005: 208) These terms are not defined in black letter law, but they are defined by the leading contemporary commentator on the law of self-defense (Yoram Dinstein) as follows:

- (a.) necessity (involves two conditions): first, “a repetition of the [terrorist] attack must be expected, so that the extra-territorial law enforcement can qualify as defensive and not purely punitive;” second, “[t]he absence of alternative means for putting an end to the operations of the armed bands or terrorists.” (Dinstein 2005: 250; Schmitt 2003: 36)
- (b.) proportionality: the state’s “operations are to be directed exclusively against the armed band or terrorists.” (Dinstein...)

These are the basic conditions on the limited use of armed force in self-defense.

Indeed, as Christine Gray of Cambridge notes in her *International Law and the Use of Force* (2004), in general state practice these “are often the *only* factors relied upon in deciding the legality of particular actions.” (Gray 2004: 124)

Two other preconditions are sometimes cited, although usually one or the other rather than together. These are immediacy and imminence. Dinstein, for example, insists on the condition of immediacy and defines it as follows: “there must not be an undue time lag between the armed attack and the exercise of self-defense.” (Dinstein 2005: 210; O’Connell 2002: 9) He notes, however, that this “condition ought not to be construed too strictly,” especially in cases of terrorist attack. States must be permitted the time to gather intelligence, pin the blame, find terrorists, and deal with them proportionately.

Michael Schmitt, on the other hand, insists on a standard of imminence rather than immediacy. Under an imminence standard, he argues, the right to use force in self-defense arises “at the point at which the threat can last be thwarted effectively.” (Schmitt 1992: 649) He also notes, however, that responding to terrorism constitutes a special case. Given the criminal and clandestine character of terrorists groups, the state will “seldom possess the war plans of their enemy.” In such cases, therefore, “circumstantial evidence of intent may be sufficient... to justify action.” (Schmitt 1992: 648)

Although once again the lack of details and public justification make it difficult to know for certain, it seems plausible that a case can be made that the targeting of al-Harethi met the established conditions for the use of armed force in self-defense short of war, and probably the additional contested conditions as well – although an element of speculation arises in relation to imminence, and in some degree with necessity.

The first question that needs to be answered is whether continued attacks could reasonably be expected. There is a strong case that the answer is “yes”, especially if the plausible charge that he had been personally involved in the attack on the USS Cole is accepted. Al-Harethi would then have shown his willingness and capacity to participate directly in armed terrorist attacks. He also appears to have remained an active al-Qaeda leader. The organization continued to promise further attacks. Al-Harethi had also resisted arrest with lethal consequences and become a fugitive from the law in Yemen. He was located traveling with known terrorists and al-Qaeda members, and, if reports from the scene are accurate, in possession of explosives. While all of this evidence is

circumstantial, together it strongly suggests that a further attack could reasonably be expected.

The next question (the second concerned with necessity) is whether there were “alternative means for putting an end to the operations of the armed bands or terrorists”? Following the failure to successfully arrest al-Harethi with 20 casualties, and despite the deployment of extensive force, it was reasonable conclude that arrest was not a plausible option - except perhaps under highly favorable circumstances. In the absence of such circumstances, it was reasonable, at least in the context of self-defense, to resort to the use of force.

The question raised by the precondition of proportionality is whether a military operation is “directed exclusively against the armed band or terrorists.” In relation to this criterion, the killing of al-Harethi himself does not raise difficulties, nor does that of the other al-Qaeda member traveling with him. A difficulty could be raised, however, over the Aden-Abyan Islamic Army members. Interestingly, legal critics of the American action have not pursued this argument. This reflects perhaps the widespread recognition that Aden-Abyan Islamic Army is widely believed to be a close operational affiliate of al-Qaeda and a participant in a range of operations including the attack on the USS Cole and the planned attack on the USS the Sullivans. Moreover, the Aden-Abyan is independently responsible for serious acts of terror including the 1998 kidnapping of 16 Westerners (resulting in the death of four of them). Nonetheless, even if the Aden-Abyan Islamic Army members do not raise a decisive objection in this case, they nonetheless point to a

troubling feature of combating terrorists with military force – i.e., it is sometimes difficult to define who should and who should not be treated as a combatant.

If the arguments outlined above are accepted, then it appears that the targeting of al-Harethi can meet the preconditions for the use of force in self-defense clearly established in international law. However, immediacy and imminence should also be considered because they also play an important role in the discourse over such uses of force,.

There seems to be a good case that the al-Harethi targeting could meet a standard of immediacy. Here the key question is whether the “time lag between the armed attack and the exercise of self-defense” was reasonable. The operation took place a little over a year after the 9/11 attack, and three years after the Cole attack. It is quite plausible that the intervening time was required to trace responsibility for the attacks, to locate a perpetrator, for alternative means to be attempted to apprehend the suspect and, having failed, to then gain permission for a military operation and to find an opportunity to conduct it in a way that would not endanger civilians (i.e., proportionately).

The issue of imminence is less clear, although again the circumstantial evidence is suggestive. The question raised is whether there was reason to believe that the targeting attack occurred at the last point that an attack could be “effectively thwarted.” Here the reports that al-Harethi was traveling with a group of closely affiliated terrorists and carrying plastic explosives is strongly suggestive. It may be that Yemeni and American

authorities have more information, but in its absence, the most that can be said is that such a charge looks plausible.

So it seems as if the targeting of al-Harethi meets the core customary requirements for an act of self-defense short of war, and at least one of the additional requirements.

However, the most that can be said of the other additional condition is that the circumstances suggest that a case could be made for imminent danger. In the absence of specific evidence, it must remain uncertain.

In sum then, the targeting appears on balance to meet the requirement for an act of armed self-defense short of war. It meets the core customary requirements, in addition to one contestable additional requirement. On the alternative additional criteria it is plausible but uncertain.

The final legal paradigm that could be applied to the targeting of al-Harethi is that of (iii.) *general armed conflict*. The US government claims to be conducting a global war on terror, and specifically identifies al-Qaeda as its principal adversary. Under conditions of general warfare, “all combatants can be lawfully targeted.” (Dinstein 2004: 94) As Christopher Greenwood notes in the *Handbook of Humanitarian Law in Armed Conflicts*, “humanitarian law accepts that one of the legitimate objects of warfare is to disable enemy combatants (and in many cases this necessarily involves killing).” (Greenwood 2000: 19-20; see also O’Connell 2005: 1)

If the general framework of war is accepted then, there seems little doubt that the targeting of al-Harethi was legal. As a senior leader of al-Qaeda, he would certainly qualify as a combatant in a war with al-Qaeda. The only real issue raised is with the members of the Aden-Abyan Islamic Army, and in-so-far as they constitute a franchise or operational affiliate of al-Qaeda, they probably qualify as combatants.

Was the targeting of al-Harethi then legal? It appears to be legitimate on two of three applicable legal paradigms. This creates a strong foundation for arguing that it is legal – albeit not purely on the numbers. There is much dispute today between those who think that the struggle against terrorism should be conducted primarily within the framework of law-enforcement, and those who argue that it is best approached as a general war. There is, however, comparatively little dispute about the legality of specific operations conducted under the second paradigm (self-defense short of war), provided that they meet the relevant preconditions (and do not otherwise violate humanitarian law). In-so-far as the operation meets the legal requirements of the paradigm of self-defense short of war, it is probably legal. It is likely for this reason that some human rights groups, such as Human Rights Watch, have declined to condemn the operation. (Ratner 2007: 275)

Indeed, Kenneth Roth, the Director of Human Rights Watch, suggested in 2003 that this might be a justifiable instance of targeting. (Roth 2006: 398-9)

However, the analysis suggests two further points. The first point is that there is an urgent need for more extensive oversight of targeting operations. Since terrorists do not wear uniforms, it is difficult for those outside the targeting government(s) to know when

the targets are legitimate combatants under either of the last two legal paradigms. This concern is illustrated by the al-Harethi case in a number of ways. First, the legitimacy of the operation is at best suggested by the evidence publicly available. Moreover, it seems likely that the available evidence is incomplete – that is, that the state or states cooperating in the targeting have further material that is not available to the public. In addition, information essential to making a just determination includes not only targets’ past actions, but also current activities and, where they can be discerned, future plans, and the quality of evidence the state has on these latter subjects. Such information is typically not publicly available. It may be added that the available material on the al-Harethi targeting is extensive in comparison with other, more recent cases such as the US operations in Somalia in 2007. For these reasons it will often be difficult for those outside the targeting governments to come to a clear determination of the combat status of targets. There is therefore an urgent need for more extensive oversight of targeting operations.

At the same time, targeting states can make a strong case against making all available evidence on future targets publicly available. To disseminate such information in advance could obviously tip off the target and scuttle the operation. Even after the fact, however, the governments may legitimately point out that making sensitive intelligence publicly available may threaten to expose sources and to hamper the continued accumulation of intelligence. In either case, the government may argue that it would be failing in its primary duty to protect its citizens. One possible means of reconciling the need for greater oversight and the need to protect key information would be the creation

of independent and authoritative judicial bodies to review the combat status of potential targets in camera. (Plaw 2007: 23-5)

Second, there is an urgent need to clarify the criteria for the determination of legitimate targets, and more broadly which of the legal paradigms (or what combination thereof) properly applies to such cases. If the decisive argument in defense of the al-Harethi targeting is, as suggested above, an appeal to the self-defense framework, that would suggest some important limits to who could legitimately be targeted. For example, the condition of necessity would require evidence that further attacks were planned. The state would also have to be prepared to show that there was no alternative means to neutralize the threat posed by the terrorist target. Moreover, the state would have to be able to show that it had reason to believe that it could neutralize the terrorist without posing a disproportionate threat to civilians. These criteria look like they may have been met in the al-Harethi case, although it cannot be known with certainty, at least based on the information available. Again, this unavoidable uncertainty points to the urgent need for a credible and independent body, preferably a judicial body, to review such evidence. This is all the clearer in light of two issues that remain unresolved to date: whether a criterion of immediacy or imminence should be applied to such cases, and how exactly the pertinent criteria should be interpreted. Finally, the urgency of judicial oversight is clearer still because some recent targeting operations do not appear to have met even the criteria of necessity and proportionality. For example, an American targeting attack on 13 January 2006 in Damadola, Pakistan, killed 18 unintended victims. However, Ayman Zawahiri, the intended target of the attack, appears not to have even been present.

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