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Panel Questions Targeted Killings by Drones

Tania Karas, New York Law Journal

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Experts on international law Wednesday questioned the legality of the U.S. practice of targeted killings by drones and called on the Obama administration to increase transparency around their use.

The panel discussion at the New York City Bar Association came just hours before an announcement by President Barack Obama that the United States will ramp up airstrikes on terrorist strongholds in Iraq and Syria to combat the terrorist group ISIL.

The session explored the findings of [a June report](#) by the bar group's international law committee that analyzed the legality of targeted killings under international law.

Panelists expressed concern over the murky nature of when and where the United States may be involved in an armed conflict. Different sets of law apply for wartime versus peacetime, meaning it may be unlawful to use drones for targeted killings in the absence of a declared armed conflict.

Complicating matters, the panelists said, is the government's lack of acknowledgment of their use, even when facts are brought to light by human rights organizations and international media.

"There is a serious lack of transparency around what policies apply and in what countries," said panelist Sarah Knuckey, co-director of Columbia Law School's Human Rights Institute. "The U.S. has failed to acknowledge very detailed, credible reports by human rights groups."

The City Bar report, researched and written over the course of 18 months, was meant to bring attention to an issue the group feels has not been scrutinized enough by the public, said event moderator Rory Millson, a litigation partner at Cravath, Swaine and Moore.

The report stated there are "serious constitutional and other implications of conducting a largely secret war, and policy issues on its wisdom and morality." It also pointed out that there is no obvious international judicial venue to determine the legality of drone strikes under international law because the United States is not subject to general jurisdiction of the International Court of Justice and not a party to the International Criminal Court.

The event, which was attended by about 50 people, included panelists John Bellinger, a partner at Arnold & Porter in Washington, D.C., who is a former legal adviser to the National Security Council and former director of the State Department's Office of Legal Counsel; James Ross, legal and policy director for Human Rights Watch; and Scott Shane, The New York Times' national security

reporter.

Bellinger said he was concerned with the Obama administration's "extremely heavy reliance" on drones as a counterterrorism tool. Media reports have counted at least 450 drone strikes under the current administration in at least six countries, causing at least 4,000 fatalities—only four of which have been officially acknowledged.

"I do think the use of drones is legal. But this heavy reliance for 13 years [by the Bush and Obama administrations] with absolutely no acknowledgement is troubling to me," Bellinger said. "It is essentially a secret war that the United States is waging. And I am concerned that even if the United States is confident that the legal framework it is applying is correct, that we are pretty isolated, that we do not have other countries at least openly agreeing with us."

In his televised address Wednesday night, Obama said the terrorist group ISIL, which now calls itself the Islamic State, poses a threat to citizens of Iraq, Syria and the greater Middle East, including American citizens and interests in the region.

"If left unchecked, these terrorists could pose a growing threat beyond that region, including to the United States," he said.

Obama mentioned that the United States has conducted 150 airstrikes in Iraq but made no reference to drones.

The White House has asserted its use of force against ISIL is covered the federal Authorization for Use of Military Force, an act passed by Congress in the days after Sept. 11, 2001 to strike back at those responsible for the terrorist attacks—specifically, al Qaida and its affiliates. But al Qaida leaders have publicly distanced themselves from ISIL, saying their group is no longer affiliated with the terrorist faction it inspired.

Panelists Wednesday questioned whether the act therefore constitutes a legal basis for Obama's ability to order airstrikes. It is getting harder to justify use of force under the act as more time passes since 9/11 and as terrorist groups branch off from each other, Bellinger said.

Panelists warned of a not-so-distant future where other countries, including enemies to the United States, employ their own drones and infer their legality because the United States has not clarified a legal basis for their use.

In their discussion of transparency, panelists also explored whether the United States was obligated to disclose targeted killings by drones. So far, federal courts have missed opportunities to compel the White House to make that information available, Shane said.

Shane was a plaintiff in *The New York Times Co. v. U.S. Department of Justice*, 13-422, where he and the American Civil Liberties Union sued to challenge the denial of separate requests for information on the legal and factual justifications for drone attacks that killed U.S. citizen and al Qaida loyalist Anwar Al-Awlaki, his 16-year-old son and another man in Yemen in 2011. In April, the U.S. Court of Appeals for the Second Circuit ordered the government to release a report related to the incident ([NYLJ, April 22](#)).

At Wednesday's event, Shane noted that the appeals court did not rule the report should have been publicly available under the federal Freedom of Information Act; rather, the government was ordered to produce it after U.S. officials, including Obama, referenced its contents in public statements.

"The effect of all this secrecy, the implication is that we're ashamed of what we're doing," Shane said. "Secrecy destroys accountability."

Knuckey agreed. Increased official acknowledgment is also critical to victims of drone attacks who have no recourse when the United States inadvertently kills the wrong person or innocent bystanders.

"This is about what happens after something comes out of the sky that blows their relatives up and leaves flesh on the street," Knuckey said after the event. "Yes, mistakes happen. But when they happen, there's nowhere for them to go. They don't receive an apology, they don't even receive acknowledgment."

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