

Attack of the Drones

—

An Argument Analysis of the American Official
Justification on Targeted Killings and the Use of
Unmanned Combat Air Vehicles

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Abstract

This thesis uses a Just war theory framework to do an argument analysis of the Obama administrations official legal justification of targeted killings and the use of drones as lawful state practise. The conduct of targeted killings using drones has increased since Barack Obama became president and has become a tool that is argued to effectively diminish the strength of AL-Qaida and other alleged terrorist organisations. But the increased use has called for demands on a public justification from the administration since the conduct of targeted killings using drones against non-state actors is surrounded by legal uncertainties. After presenting the legal issues with targeted killings, the American state practise on targeted killings and the increasing use of drones from the Obama administration I go on to the analysis.

The analysis shows that a selected sample of the international legal scholar community both supports and opposes the American view. Also some uncertainties are found, such as “DPH” and “membership” in an armed organisation as a legal base for targeting. This might call for a furthermore elaborated justification. The thesis also discusses some of the moral and ethical issues regarding a battlefield where the line between man and machine gets evermore thin.

Key words: *Targeted killings, Drones, Just war Theory, Argument Analysis, International law.*

Signs: 82078

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List of Abbreviations

AP	Additional Protocol
CIA	Central Intelligence Agency
DPH	Directly Participating in Hostilities
EJIL	European Journal of International law
GC	Geneva Convention
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
NATO	North Atlantic Treaty Organization
UCAV	Unmanned Combat Air Vehicle
UN	United Nations.
UNHRC	United Nations Human Rights Council

1 Introduction

The title of this thesis is a reference to the second part in the Star wars hexalogy “Attack of the clones”, referring to the futuristic scenario including robots in warfare. This thesis will give a glimpse of a possible future development of conflicts where man will rely more and more on machines. But first we will go back in time.

September 11 2001 changed the world, the events that occurred on that morning in New York and other parts of America brought up the issue of global terrorism on a new level. Almost a decade after these events, American troops are still present in Iraq and Afghanistan in order to promote democracy and to win the hearts and minds of the local population. The self proclaimed “War on Terror” seemed initially to work smoothly for George Bush, but has gradually become a political burden and has received massive criticism. Young American soldiers risk their lives for a war with vague or no prosperity of victory and thousands of them have already returned to America in coffins. But simultaneously, the technological development have given America a way to diminish the top level leadership of its enemy, Al-Qaida and its associates without putting own soldiers at risk of getting killed. Unmanned Combat Air Vehicle or drones are used to kill selected individuals in alleged terrorist groups in order to make these organisations more fragile. This conduct is called targeted killing and is being carried out in regular combat zones and in areas where there is no American troop presence. This “assassination on distance” is effective and cheap making many military officials celebrate the technology.

The only justified way to use international force against other states are through the body of international law, there it is stated how and when it is permissible to use violence. The regulations of warfare are in large extent revolving around conducts between states, but the American war against suspected terrorists who are classified as non-state actors is surrounded with uncertainties. This absence of certainty is problematic since it will be harder to hold persons breaching human rights or laws of war accountable for wrongful actions. Since Barack Obama came to office the frequency of American drones has increased. This development has created reactions from human rights and international law scholars who demand that the legal bases for the use of drones are made public. I May 2010 the legal advisor for the Obama administration, Harold Koh, stated the official view of the administration on some legal issues including targeted killings. This thesis aims at analysing

the statements made by Koh in relation to the restrictions of use of force in international humanitarian law and international human right standards.

1.1 Statement of Purpose and Questions

The thesis intends to investigate the notion of targeted killings and the use of drones. I will concentrate on American targeted killings which includes the use of armed drones (UCAV). This brings along some positive effects from a military strategic point of view. But critical voices have pointed out the legal blurriness that complicates the search for accountability when laws of war might be breached, for example when civilians are unjustly killed. Many scholars, including the Human Rights Council Rapporteur, Philip Alston, have therefore recommended states to publicly specify their bases for targeted killing policies.

With this in mind, it is important to analyze how targeted killings are justified in policymaking. Also the lack of transparency is problematic since it might make these policies a shady business. The thesis also aims to cast some light on the relatively anonyms and new phenomena of unmanned aircrafts in warfare, something that most likely will be more common in the future due to the increased reliability on drones in armed conflicts. There are concerns that this development will make leaders more inclined to warfare because the risks of human casualties are lower. Historically, technological development has changed the capabilities and the conditions of warfare. How could this emerging “virtual battlefield” change the conditions for the way conflicts will be fought tomorrow and what possible impact might it have on the fulfilment of international law standards?

This thesis will revolve around the discussion of these issues and I will work with these specific questions:

- *How are American targeted killings and the use of UCAV officially legally legitimized by the Obama administration?*
- *Which arguments among international law experts can be found that supports or opposes the American official view?*
- *What possible impact on the future conduct of war can be found from the increasing use of drones as a method for targeted killings?*

1.2 Theory

The theoretical framework in this thesis will be based on the “Just War Theory”. This theory analyses *how wars are made legitimate and which arguments that are used to justify the use of lethal force*. The just war theory is not a theory that is attached to one or a few theorists, it is rather a theoretical patchwork and has evolved during the course of history.

The legitimizing of wars have been debated ever since the ancient Greeks Plato and Aristotle philosophized about which principles that should guide the use of force. Later on, Thomas Aquinas formulated guidelines for what would constitute rightful purposes and intentions. The founder of international law, Hugo Grotius wrote in his book *De Jure Belli ac Pacis* (On the law of war and peace) what norms and rules should guide warfare and that civilians and non-combatants should be protected from assaults. The motives for military use have changed during the course of history and is now many times justified under the label of “humanitarian interventions” (Aggestam, 2004: 10, 12).

The principles that determine under which circumstances it is legally acceptable to use armed force and by which means are called *jus ad bellum* and *jus in bello*. *Jus ad bellum* means the “right to wage war” and stipulates that the aggressor must have the right intention and cause. A military intervention should restore peace and order in the global system, it can not be motivated by vengeance. The decision to go to war must be based on a legitimate authority, either the Security Council or by a sovereign state. There must also be a reasonable probability to succeed with the warfare and, prior to that, all possible peaceful alternatives, such as diplomacy and embargos must be exhausted before international violence can be used.

The above mentioned criteria govern what happen before the war. *Jus in bello* (justice in war) regulates the conduct of parties during the course of a war. These regulations are called the “laws of war” and consist primarily of the Geneva Conventions and its Additional Protocols. (Aggetam, 2004: 20-21). The two most important regulations are:

- **Distinction:** The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects (“Customary

International Humanitarian Law”, 2010-08-12: 64).

- **Proportionality:** Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited (“Customary International Humanitarian Law”, 2010-08-12: 107).

Also the need for *military necessity* and *humanity* are guiding principles in the laws of war but are not included in this thesis.

1.2.1 International Law as the Framework for Addressing International Violence

International law is based on the state as the most important subject. International violence can only be rightfully justified with reference to international law. The international system is anarchic since it has no higher authority, it consists of a system of peers. All states recognise the existence of an international set of rules which they all are a part of and no state stands above it. No state has, in modern time, renounced the fact that it is bound by international regulations, even though sometimes the conditions of the obligations are subject for discussions. For instance, after the horrific massacre in Srebrenica in 1995, Serbia did not deny that genocide was a crime but argued that it was not responsible for the violations of international law that had occurred. So a majority of the laws and treaties are followed on a daily basis and when laws are breached it can bring about international attention. The sources for international law are partly made up of the customary law that has evolved from state practise and the customs of states. The law of treaties consists of multi and bilateral agreements (Geneva Conventions) that states are obligated to follow if no reservations are made and the treaty has been signed and ratified (Dixon, 2007: 3-5, 30, 85).

The advantage of this system is of course its universal legitimacy. In a more complex and interrelated world it lies on pure self-interests to have an efficient system of regulation. International law is essential to ensure a stable and orderly international society and it provides a stable regime to regulate global problems in a more interdependent world. If any state acts “unlawfully, it affects the country’s reputation for the bad (Dixon, 2007: 10-12).

This system has its shortcomings as well. The most obvious deficit is the lack of a central authority or institution with a formal police force that can stop international violence once it occurs. Unlike the domestic level, there is no court with absolute authority in international

law and therefore conflicts can last for decades. Also, the law making procedure might be too slow in adapting to a more rapidly changing reality. The vague and flexible fashion of customary law and international treaties makes up for a great deal of confusion and uncertainty and sometimes disputes between states occur just because of the unclear state of the legal system. Another weakness is of course the vital interests of powerful states, their politics and policies will eventually have a big impact on accepted state practise. When a powerful state believes it has vital interests, it might be threatened and the barriers of legal conduct might be transcended (Dixon, 2007:13-14).

All in all, the international law system has the legitimacy as an overarching framework for international relations, it is the normative regulatory body for justification of international violence. The most important legal subject, the state, makes up both for the strength and weakness in the system, mostly because the enforcers and perpetrators of international law are states.

1.2.2 Justification of the American Warfare

USA is the biggest military power in the world exceeding all other nations by far. The American policy is based on total control of all sorts of military warfare from nuclear deterrence to full scale wars and low intense asymmetrical conflicts with terrorists. Since the end of the Cold War, America has fortified its position as the leader of military technology and spends a good deal of its budget on research and development. After 1945, USA has been involved in many military operations in different parts of the world. Many of these operations have been based on a righteous cause and an alleged noble purpose. This is reflected in some of the names for the missions, such as: “*Operation Restore Hope*” (Somalia 1992-92), “*Operation Enduring Freedom*” (Afghanistan, 2001) and “*Operation Iraqi Freedom*” (Iraq, 2003). These names show the American self-image as a country that uses its military in a way that is morally superior to non-democratic states (Hyde-Price, 2004: 115, 117). American use of force since 9/11 has mainly been used under the label of “War on Terror”, that justifies American military involvement in states that harbours or supports suspected terrorists.

Some scholars argue that democracies are using violence differently apart from authoritarian states and that there is a pressure on liberal states to legitimize its warfare based on the principles of just war even if they do not apply the principles in practise. This is based on the structural features and the normative values of democratic states. The government in democratic pluralistic states has to manage the opposition, judicial reviews and a free press. Democracies are also prone to be driven by values such as, mutuality, diplomacy and peaceful

settlements of conflicts. All of these traits can be associated with America which means that USA can be said to have adopted the just war conditions and are because of this constrained its use of warfare (Hyde-Price, 2004:118-120).

1.3 Methodology

Research methods are usually categorised into qualitative and quantitative methods. Quantitative methods are generally characterized by large volumes of data, numbers and large material. Qualitative methodology is focused on in-depth studies of one or few units, a template that will be used in this essay.

Significant for small-scale studies is to describe specific phenomenon through a deep, thorough analysis using material that is limited to a specific area. In my thesis, I will only use materials that touch upon targeted killings and the management of drones. The material will however focus on different angles of the subject. Qualitative studies are also usually described as holistic and to be conducted with an overall perspective, rather than to go into details. A holistic approach is used because social realities can not be understood without its context and can not therefore be studied as an isolated phenomenon (Denscombe, 1998: 204-206). The analysis will concentrate on the policy that lies behind the conduct of targeted killings. My aim is here to understand how target killings can be understood from a legal perspective and much of the analysis will revolve around legal matters. But I am also interested on how it may change the way of future warfare by applying a more ethical and moral approach. This additional approach enables me to reflect on drones from different perspectives which I think will be enriching. The study will thereby get a more holistic, "bird view".

The researcher's role is also important to discuss in relation to the research design. In quantitative methods the researcher should strive to be as objective as possible so that the object of study is independent of the researcher's own premises. When using qualitative methods it is inevitable that the researcher's background, values and identity will have a decisive impact on how the research results will be interpreted (Descombe, 1998: 206-207). The material I will use will of course be based on my subjective bias, this will affect the outcome of the result. This can be argued to give a wrongful picture about the reality. Herein lies the weakness of qualitative studies since the results becomes less representative and it is therefore harder to make generalizations and contribute to cumulative science since the results depends in large on the researcher's own interpretation (Denscombe, 1998: 260-261). It is therefore important to motivate your decisions and to put boundaries to your study.

I will conduct my analysis by using official policy statements as the analysing object. These statements are official statements from the current American administration and shows in a certain extent the Obama administrations view on international law relating to targeted killings and the use of drones. These statements are not true or false in an absolute sense since international law depends on the recognition and likening of other states. Therefore my aim with the analysis cannot be to find out whether the American justification is true or not, my aim is to investigate how the international law community argues about targeted killings and drones and relate those arguments to the American statements. The findings from my analysis will help me to hopefully map out some of the issues that surround the legal debate about targeted killings with drones. It will also point out some areas that are still open for debate and interpretation since the official statements may not fully satisfy the critics of the drones. If some of the statements are considered as vague or unsatisfactory, than it will most likely lead to sustained demands on clarification of policies that might breach international human rights law or international humanitarian law.

1.4 Material

I will use both primary and secondary material in my thesis. The primary material will be official statements from president Obama taken from the administrations legal advisor regarding the American legal views on different matters, such as rendition, the American stance on human rights, detention and targeted killings. The document containing the statements is as to the day of writing the only document that officially puts forward the American stance on targeted killings and drones, this document will be the focus for the analysis. As primary material I will also use a rapport from UNHCR regarding targeted killings that were published in May 2010 and statements made from Kenneth Anderson from a hearing regarding drones made in Mars 2010.

In addition to this, I will also use scientific articles as well as news articles along with books, blogs and homepages. Since this subject of drones is relatively new, the most current development is to be found in articles and homepages related to international law such as European Journal of International law (EJIL).

1.5 Delimitation

I will only analyse American targeted killings and the use of drones even though this is a state practise of other nations, most prominently Israel. Targeted killings have been a method in

foreign policy since the notion of the state and foreign policy was created and is therefore nothing new. But the use of drones is a new element, and therefore the American conduct of targeted killings will mostly revolve around the post 9/11 era. The analysis will focus on the Obama administration and its legal policy but requires some historical background for explanatory purpose. I will, however not limit my self to focus on specific targeted killings or targeted killings in specific countries or regions. In my thesis I want to underline the policies regarding drones in targeted killings whether they are used in conflict zones such as Iraq or Afghanistan or in countries where there are no seemingly armed conflicts such as Yemen.

The practise of targeted killings and drones is heavily disputed, therefore it is widely discussed and the legality is interpreted in many different ways. I will not present all the arguments or scenarios, since that could make up a thesis of its own. I will use opinions of legal scholars and journalists during my analysis of the American justification. The experts in international law and foreign relations especially interested in targeted killings and drones are:

Kennet Anderson: Professor of Law at Washington College of Law.

David Kretzmer: Professor of international law, Hebrew university of Jerusalem.

Jane Mayer: Investigative journalist at the “New Yorker”, also author of the book “The Dark side: the Inside of How the War on Terror Turned Into a War on American Ideals”.

Philip Alston: Professor of law and also the Special Rapporteur of the United Nations Human Rights Council on extrajudicial, summary, or arbitrary executions.

Mary Ellen O’Connell: Professor of Law and Research Professor of International Dispute Resolution at the University of Notre Dame.

Marko Milanovic: PHD candidate in international law at Cambridge University (expected 2010).

2 Targeted Killings and Drones

This chapter will explain targeted killings, how it can be defined and its relationship to international law. I will give a short introduction about the complexities and uncertainties of targeted killings from a legal perspective, and this discussion will be elaborated in chapter 3. I will then describe how USA have incorporated targeted killings in its foreign policy and give a brief historical background of the development of the state practise including the Central Intelligence Agency (CIA). After that the focus is changed to the drones. My aim here is to try to give a balanced picture of the impact that drones has on a modern combat field, the positive military advantages will be explained as well as the concerns coming from a human rights perspective.

2.1 What are Targeted Killings?

The phenomenon of targeted killing is not new, it has had a vital role in foreign politics as long as kingdoms, empires and states have been at war. It has also been a popular theme in movies and novels such as the super agent, James Bond who works for the English secret intelligence service MI6. During the cold war secret agents were frequently used to kill specific threatening leaders or important persons. The rise of militant terrorist groups such as IRA on Northern Ireland, ETA in the Basque province in Spain or Baader-Meinhof in West Germany led to the development of shady policies that was surrounded by vague legality that gave the police force the right to shoot arbitrarily at “terrorists” (Melzer, 2008: 9).

Today the method of targeted killings is more accepted and is used more frequently as a mean for counter-terrorism and in so called “surgical warfare”. Targeted killings have been used by Israel in its pursuit of Palestinian militants, by Russia in the republic of Chechnya and by US in Iraq, Afghanistan, Pakistan, Yemen and Somalia (Melzer, 2008: 9-10). There is no official definition of targeted killings in international law, but according to Nils Melzer¹ targeted killing are commonly associated with these five elements:

- **Use of lethal force:** the method always employs the use of lethal force with some sort of weapon (Melzer, 2008: 4).

¹ Phd in law from Zürich University. Is currently the legal expert for ICRC.

- **Intent, premeditation and deliberation to kill:** Intent to kill the targeted person must exist, it can not happen through an accident or caused by reckless behaviour with lethal weapons. The killing must also come with a premeditation to kill. The option to kill must be based on a decision on forehand to kill and can not be the result of a sudden impulse. The element of deliberation requires the killings to be the main purpose of the operation and not just a mean to achieve other goals (Melzer, 2008: 4).
- **Targeting of individually selected persons:** Targeted killings must be aimed at an individually selected person and can not be included in operations targeting collective or unspecified targets (Melzer, 2008: 4).
- **Lack of physical custody:** The targeted person cannot, during the moment of the killing, be held in custody of those they are targeted by (Melzer, 2008: 4).
- **Subject of international law:** The targets must be to a subject of international law, normally states are the subjects of international law but it also includes non-state actors (Melzer, 2008: 4).

2.2 Targeted Killings in International Law

There exist a debate among international law experts on when and how targeted killings are permissible under international law. It depends on the existence of an armed conflict, how the right to self defence should be interpreted and who might be considered as a lawful target. These are the three main factors which contribute to legal uncertainty since they are understood differently. Due to the extensive and rather complex discussion on the legality of targeted killings, it is hard to present all of the arguments or possible interpretations made. I will briefly present and reflect the debate mainly based on a report about targeted killings made by the UNHCR, this account on international law is not of course shared by everyone.

2.2.1 Different Frameworks for Targeted Killings

First of all, the occurrence of an armed conflict determines which legal framework to apply, there are different scenarios for an armed conflict and these two scenarios are relevant for this thesis:

- The conflict can be international.
- The conflict can be non-international and meeting the threshold in Common article 3 to the Geneva Conventions and/or the Additional Protocol II (Alston, 2010-05-28: 16).

If targeted killings are conducted in **an armed conflict**, the International Humanitarian Law regime (laws of war) will apply. Then all combatants and civilians who “directly participating in hostilities” are lawful targets all others are civilians or unlawful combatants. Under IHL a combatant is defined as: A person taking part in armed forces that are parties to a conflict or a person that is part of another armed group (militias, volunteer corps, and resistance movements) that fulfils the criteria of:

- Being under responsible command.
- Wearing a fixed distinguished sign.
- Carrying arms openly.
- Conducting operations in accordance with the laws of war (Geneva Convention 3 article 4).

However, targeted killings must be based on proportionality so the military advantage is compared with the expected harms of civilians. It is also important to distinguish between combatants and civilians. These rules apply both in international conflicts between states and in non-international conflicts between a state and a non-state actor² or between different non-state actors (Alston, 2010-05-28: 9-10).

The use of deadly force in the **absence of an armed conflict** is regulated by the International Human Rights Law framework (IHRL), where the combatant status does not exist. This law regime is sometimes referred to as the law enforcement model, which is the legal regime for the police and state military where violence can be used only to stop criminal activity and where the purpose is to capture rather than kill (Alston, 2010-05-28:10-11). The IHRL regime relation to targeted killings is primarily revolving on the principle of the right to life which is common in many human rights conventions, for instance in the International Convention of Civil and Political Rights, ICCPR. Targeted killings under human rights law are permitted only in very extreme cases, when there is a concrete and immense danger of death and physical injury, the targeted person must be considered as an **immediate** danger for the security of the attacking state. The killings require an **absolute necessity** and the force must be **indispensable, proportional** and **immediate** (Melzer, 2008: 58-59). The use of lethal force outside an armed conflict must be the last resort to save lives. Unlawful targeted killings that do not fulfil the abovementioned requirements whether under IHL or IHRL are called extrajudicial killings.

2.2.2 Self Defence and Direct Participation in Hostilities

Article 2 (4) of the UN charter forbids states to use force against other sovereign states. There are two exceptions, The UN Security Council can authorize an intervention based on chapter 7 in the UN charter, the second possibility is derived from article 51 (UN-charter), where “The inherent right to self defence” can be applied for states to respond an “armed attack”. Normally, in order to use self defence it is required that the second state gives its consent to let the first state violate its sovereignty. However, the right for a state to use force as self-defence is also legal if another state is responsible for an armed attack against the first state or if the later state is unwilling or unable to prevent armed attacks directed at the first state from its territory by non-state actors. If targeted killings are done under the shield of self defence the targeting state must show that the conduct was legal and if there were any doubt there is a need to investigate its legality (Alston, 2010-05-28: 11-12).

The debate about self defence revolves around uncertainty or different opinions concerning whether self-defence applies to non-state actors, what really constitutes an armed attack and is self-defence alone valid as a justification for targeted killings? Also the controversy about pre-emptive self-defence is highly debated. International Court of Justice (ICJ) holds that there is no support to the right of self defence against non – state actors. Philip Alston also claims that the right to use self defence on a non state actor is very limited and would need the approval from the Security Council (Alston, 2010-05-28:14). There is also a debate of how an armed conflict is defined and if the hostilities require some degree of “intensity”. Besides that, is also unclear what magnitude an armed attack would have to have in order to invoke self defence.

But maybe the biggest absence of clarity surrounding targeted killings is the issue of who qualifies as a lawful target. In international armed conflicts the combatant status is clear. In non international armed conflicts, any lawful target is a person who *directly participates in hostilities*, DPH. The lack of a common definition of DPH is problematic since it gives states the possibility to choose their own interpretation of DPH. There are controversies about the possibility to interpret “membership” of an armed group as a ground for targeting or how long before and after a battle the participation requirement is valid. Many members in armed non-state groups are farmers by day and soldiers by night. A broad interpretation of DPH as a person as a member in a terrorist group allows states to kill suspected persons only based on the “membership”. A more narrow interpretation is to classify lawful targets as those who

² Guerrillas, terrorist organisations or other militias.

participate in hostilities only during combats (“Targeted Killings”, *International Humanitarian law Research Initiative*, 2010-04-24).

In 2009, the International Committee of the Red Cross (ICRC) released a document named the “Interpretative Guidance on DPH”. This document states that persons who are lawful targets must have a “continuous combat function” and the temporal requirement for participation is restricted to preparatory measures such as loading bombs on planes and is after that abolished. ICRC underlines that lawfulness of participation only prevails if the conduct constitutes an integral part of armed hostilities. This means that illegal activities that might be carried out by terrorists that may cause harm does not allow targeted killing unless it meets the criteria for direct participation in hostilities (Alston, 2010-05-28: 19-20).

2.3 Targeted Killings in US Policy

The method of state sanctioned killings has been used by USA as a part in their foreign policy. In 1947 the CIA was established with permission to engage in intelligence activities. During the Cold War CIA was involved in several “covert operations” in order to overthrow foreign governments and to assassinate foreign leaders. The operations during was based on the perspective that USA had well grounded reasons based on international and domestic law to use force, regardless of the existence of an armed conflict (Anderson, 2009: 21-22).

Kenneth Anderson argues that nothing has changed that view, USA still has the right to use violence including targeted killings in self defence in situations that are not defined as armed conflicts. The American view of self defence is grounded in the Caroline doctrine that is the basis for American self defence. The senior war lawyer Hays Parks asserts that the American view on self defence is interpreted so it can apply on new kind of threats including non-state actors such as Al-Qaida. Some other scholars say that USA has appeared to have adopted an “active defence” which allows them to use past aggressions by terrorist groups as a legitimate reason to invoke self defence and pre-emptive strikes, if the pattern of aggression is believed to continue. USA understands the notion of self defence in international law as something flexible and changing over time to meet new circumstances. United States has the right to interpret international law for its own account (Anderson, 2009: 19-20).

In 1975, killings of foreign leaders were banned since it was concluded that CIA had been involved in several assassinations. This ban has been recognised by all succeeding American

presidents. The events on 9/11 changed the American foreign policy, including targeted killings. On 17 September 2001, president George Bush signed a document allowing CIA to use lethal covert operations against selected individuals. CIA officials summarized the presidential findings as: (Melzer, 2008: 37, 40).

“The gloves are off. The president has given the agency the green light to do whatever is necessary. Lethal operations that were unthinkable pre-September 11 are now under way” (Melzer, 2009: 40).

After that, targeted killings have been carried out to kill several leaders in alleged terrorist organisations, if these killings constitute a breach on the assassination ban will be further analysed in chapter 3. The development since 9/11 has changed the focus from interstate conflicts to conflicts between states and non-state armed groups. USA and Israel have started to include conflicts with terrorist organisations or other non-state actors as armed conflicts. (Alston, 2010-05-28: 18).

Even if Barack Obama has dropped the label “War on terror” in his rhetoric he has not refrained from the right to kill alleged terrorists. Terrorists that are not considered as lawful combatants are more or less living in a legal gray zone which makes it hard for the US to stop terrorist that conduct hostilities in Afghanistan and run for cover in Pakistan. William Banks³ puts it this way: (Harris, 2010-01-09: 23-24).

“In Afghanistan, fighters who aren’t members of any recognized military routinely strike U.S. forces and then flee into neighboring Pakistan.[...] “If the non-state entity can simply duck across the border ... you don’t have a realistic concept of the battlefield” (Harris, 2010-01-09: 24).

American targeted killings have gained some international attention, for example, the International Criminal Court (ICC) has opened their eyes on the subject. The chief prosecutor for ICC, Luis Moreno Ocampo stated that American and NATO troops in Afghanistan might be subject for ICC investigations on war crimes, regardless of the fact that USA not has ratified the Rome statute which is the jurisdiction for ICC. Some also put forward the argument that targeted killings in Pakistan are illegal since the Pakistani government has not requested them and might. The Pakistani government might in the

³ Professor at the Syracuse University College of Law.

future hold American action as illegal and call for compensation (Harris, 2010-01-09: 24-25).

2.4 Briefly About Drones

Peter W. Singer has worked for Pentagon, the department of defence and CIA. He has also written the book *“Wired for War – The robotics revolution and conflict in the 21st century”*. This book is a thorough analysis of how robots have become more and more integrated in warfare. It also brings up the possibilities and concerns with future warfare. Singer asserts that today’s technological development is as important as the creation of the atomic bomb. He also asserts that the end of the “human monopoly” of warfare might be what historians will talk about as characteristic for the 21 century in hundred years from now (Singer, 2009: 10).

Drones are today used both for civil and military purposes. They are remotely operated by humans that navigate the drones with help from cameras. Their origin of remotely manoeuvred machines could be traced back to the First World War. During the battles new elements like primitive tanks, airplanes and radio communication was introduced but no one could figure out how to make these inventions work in unison. During the Second World War unmanned airplanes were used in a small scale mostly for training purpose, this war marked the start for the era of human pilots in air battles and bombing campaigns. During the cold war computers were increasingly integrated in military use. Rocket systems, satellites, and space rockets all relied on computer power. Later on, during the Persian Gulf War unmanned systems were first used in warfare, but this war is mostly famous for establishing terms such as “surgical warfare” and “smart bombs”. These terms are used to define targeted bombing of important facilities in order to incapacitate the enemy without creating unnecessary casualties or killing civilians. A laser beam pinpointed the specific target that made it easier to hit. In the mid nineties the introduction of the GPS system made it possible for survey missiles and other vehicles to create a physical space between the warzone and the command centre (Singer, 2009: 46, 49, 51, 53, 56-58).

The advantages of using drones as a substitute or complement to regular planes are many. Drones can be up in the air more than 24 hours and are good for missions that are dull, dirty and dangerous. Human soldiers get hungry, tired, and emotional or might even disobey orders, but this is not a possible scenario with unmanned planes. Drones can also operate in extreme heat, handle high levels of G-force and carry out missions in environments where

biological or chemical weapons have been used. Apart from all of this they are also cheaper to produce than ordinary planes. All in all, drone usage is beneficial from both military and economic perspectives (Singer, 2009: 63-64).

2.5 American Increased Use of Drones

America has two active drone programmes, the first is controlled by the military and is used for targeted killings in Iraq and Afghanistan where there is a recognized combat zone and American troops are present. The other programme is administered by the CIA and targets suspected terrorists around the world where there is no presence of American military and no recognized armed conflict, such as in Yemen or Somalia. The information surrounding the killings by CIA is classified. The CIA has been condemned for using violence far away from combat zones. One example is the killing of Quad Salim sinan al – Harethi in Yemen in 2002. Quad Salim sinan al – Harethi was a prominent Al-Qaida figure who was suspected as one of the men behind the 9/11 attacks. He was killed by a missile from a drone along with five other persons. From an American view it could be argued that it was a case of self defence since the Bush administration had the right to chase involved persons from the 9/11 attacks. USA also had permission from the Yemeni government to use its air space. But the UN Human rights council (UNHRC) found it to be a case of extrajudicial killing. Some analysts also said that USA should have tried to capture the Al-Qaida associate instead of killing him (Harris, 2010-01-09: 25).

Barack Obama promised in his campaign for the presidential elections 2008 to reduce American military presence in Iraq and increase the number of troops in Afghanistan. Obama criticised the Bush government for not doing enough to go after the Al-Qaida leadership. Shortly after his presidential inauguration, Obama ordered the first predator strike in Pakistan which was followed by several strikes over the successive months (Anderson, 2009: 2). The frequency on the use of drones has increased ever since and during Obama's first year he ordered more drone strikes than George W. Bush did during his two terms. The air force fleet of drones has gone up from approximately fifty in 2001 to two hundred in 2009, how many drones that are used by CIA is classified information (Mayer, 2009-10-26: 2-3).

The two most used drone models by the US are called "Predator" and "Reaper MQ1". Many officials who work with intelligence describe the use of predators the best way to fight terrorist insurgency, it has helped CIA to cut down half of its list of "high valuable" targets. It is also said that this method weakens Al-Qaida since the organisation has to be more alert

and act with more caution since some of the drone strikes depend on local informants that reveals the leaders whereabouts. The CIA programme has personnel working both in Afghanistan and Pakistan handling takeoffs and landings of the drones. Once the drone are flying the “remote pilots” in Langley, Virginia (USA) takes over the control and flies it using joysticks and big screens. It resembles a video game but everything is real. According to military experts the targeting process is based on elaborate calculations and civil buildings like mosques and hospitals are taken into consideration and no target is verified without substantial evidence that the person is eligible for targeting. This adds to better accuracy and lesser collateral damage compared with human fighter jets (Mayer, 2009-10-26: 3, 5-6, 8-9).

The CIA program has also been criticised for letting civil personal to act in conflict situations that do not have sufficient knowledge about international law. The increasing use of drones, especially since Obama took office has led to the death of many civilians, including children that were to close to the blast. Every unintended murder of the civilian population risks leading to anti-American sentiments in Pakistan. This might make it harder for the current Zardari⁴ government to allow American presence. Peter W. Singer also fears for the “seductive” feature of the wireless war that might become politically and morally costless. Other commentators point out the absence of heroism and bravery in virtual wars and say that drones are a technological step that further separates the American people from military action and might eradicate political control over the conduct of warfare. Philip Alston talks about an accountability void which USA is currently acting on. He makes comparisons with controversial torture methods such as water boarding that according to Alston was used more and more indiscriminately and soon became standard operating procedures. He fears that drones will become an every day business and therefore be used with less precaution (Mayer, 2009-10-26:2-4, 6,11).

2.6 Drones and Laws of War Principles

Every time a new technology changes the conditions of warfare it is bound to create new challenges for the international legal framework. Technological achievements within the military is said to create a cleavage between the law and the victims it is supposed to protect.

Jack M. Beard⁵ talks about a “virtual distance” between human and battlefield since states today has that capability to kill targeted individuals from a long distance. According to Beard,

⁴ Asif Ali Zardari, current president of Pakistan, July 2010.

this creates concerns since the information on which states make the target selections and who is to become a “combatant” is classified. This is of great significance bearing in mind the borderless global battlefield which has become reality and has increased since George Bush coined the expression “War on Terror”. But Beard is also positive that the new technology will make it easier to control that international law is not being transcended. This can be done using the information from the data traffic logs and the bomb cameras which make it possible to retrace all the steps taken during a mission in order to see if any violations were made. This is something that will increase the transparency and states will have difficulties avoiding breaches against the principles of proportionality (Beard, 2009: 1, 3-4, 11-12).

Another area that speaks for the advantage of the drones being the better alternative from a law perspective has to do with the altitude that the aircrafts is flying on during a mission. When the International Criminal Tribunal for the former Yugoslavia (ICTY) was investigating the lawfulness of the Kosovo bombing campaign in 1999 it concluded that once the principle of proportionality applies, other key questions such as “to what extent is a military commander obliged to expose his own forces to danger in order to limit civilian casualties or damage civilian objects?”. From a military point of view it is desirable to fly as high as possible to avoid hostile anti-aircraft fire, but then it might be harder to distinguish between military and civilian object with the human eye. But with high resolution cameras and sensors it is easier to get a clear view of the target and avoid civilian casualties (Beard, 2009: 12-13).

The increasing reliance on technology also increased the possibility for technical errors and malfunctioning equipment. The “human error” has always been an unavoidable factor in warfare and something that comes with the human nature. But the fusion of man and machine makes it more difficult to differentiate between human and technical errors (Beard, 2009: 18-19). When a drone or a similar machine failures, it might be hard to identify the errors, this is worrying since it might be hard to determine where the responsibility lies if civilians are killed, is it the pilot, the military commander the software developers or the producers of the robots that are responsible?

⁵ Professor in international law.

3 Argument Analysis

In this chapter I will analyze four statements that were made by Harold Koh. These statements reflect the official policy, something that is indicated clearly in the introduction lines:

“What I can say is that it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war” (Koh, Harold. “The Obama administration and international law”: 2010-07-05).

The four statements cover different aspects of the legality of targeted killings and the use of drones. The statements will then be analyzed using international law scholars and commentators, both the critical and the defending side in the debate will be illuminated. Each subchapter starts with a statement followed by the analysis of that particular statement.

3.1 Statement 1

“The United States agrees that it must conform its actions to all applicable law. As I have explained, 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-defense under international law”. (Koh, Harold. “The Obama administration and international law”: 2010-07-05).

First of all, it is clear that America is using the normative framework of international law to justify its actions. Harold Koh admits that USA must “conform” its actions to all applicable law, which would mean international as domestic law. This is in line with the theoretical framework for this thesis that international violence is often justified using a normative framework and USA recognises it self to be bound by customary law and the law of treaties.

The argument that US can kill targeted individuals under the umbrella of self-defence is probably the most important argument because this makes up the basic foundation for the

“War on Terror” and serves to legitimise foreign American military use, when it comes to targeting suspected terrorists. Even though the label war on terror might be dropped today, USA is still using self defence as a legitimate ground to hunt down alleged terrorists in states that harbours them. This is how USA legitimizes its war and falls under the category of jus ad bellum since this motivates self defence.

The statement also proclaims that USA is in an armed conflict with Al-Qaida and the Taliban movement as well as with their associated forces. In armed conflicts combatants and civilians DPH are lawful targets, more on this in the next statement. Recalling from previous chapters, international violence can be used to refer to the customary right of self defence derived from article 51 in the UN-charter. If self defence is used to legitimate violence it must be preceded by an armed attack and the aggressor must have the right cause and intention. Jus ad bellum requires the state to use military force in order to restore peace and it cannot be based on vengeance. The statement does not mention anything concrete about the 9/11 attacks as being armed attacks, it is merely referred to as “the horrific 9/11 attacks”.

As pointed out by Kenneth Anderson the basic foundation for American self-defence is the Carolina doctrine from 1837. The doctrine has been the source for American state practice of pre-emptive self-defence that aims at preventing a new attack from happen even on vague bases. Some argue that USA can adopt the right to self defence so it can meet new threats, such as transnational terrorist groups. This view of a “flexible” self-defence is declared as: (Andersson, 2009: 19).

“A state may use past practices of terrorist groups and past instances of aggression as evidence of a recurring threat. In light of this threat, a state may invoke [the right of self defense]...if there is sufficient reason to believe that a pattern of aggression exists. What may appear to be retaliation is quite often an “active defense” in which a state uses past terrorist acts to justify launching preemptive strikes. Advocates of this theory believe that it offers a much more practical response to a terrorist threat; in effect, a state will no longer need to wait until it is attacked before it may use force” (Andersson, 2009: 19).

Andersson claims that the American justification for targeted killings must lie on the basis of self-defence rather than the narrower law of armed conflict. He writes that the legal self-defence regime is widely applicable since it allows small operations in hostile environments that do not reach the requirement for armed conflicts, even outside combat zones as Afghanistan and Iraq ((1) Andersson, 2010: 31-32). Anderson notes that the American view on targeted killings is far more permissive than that of the international law community who

might perceive the American stance as problematic, at least. Anderson also states that the influence of opinion makers, activists and academics contributes to a view that the American justification is somewhat secluded or not in conform with the view of the rest of the world. (Andersson, 2009: 20-21).

Harold Koh says in the statement that USA is in an armed conflict and has the right to use self defence. It is not specified whether the targeted killings are based on the attribute that the targeted individuals are “imminent” threats so the targeted killings would fall under the IHRL regime or as combatants under the IHL regime. According to Anderson, USA justifies some of its targeted killings as a conduct during an armed conflict under the impression of it being acts of self defence. This is problematic since it combines different legal regimes, the customary obligations of proportionality and necessity and the treaty based definition of the same requirements are not the same. The proportionality and necessity under the IHRL umbrella is not as permissive as the ones under IHL. In IHRL, proportionality means that the state should use forces defensibly and necessity means that the state must look for other options than using deadly force, such as capturing the target. In IHL, necessity means that the state must evaluate if an operation will achieve the military goals of the operation and be consistent with other IHL criteria. The proportionality test under IHL requires the state to judge the military advantage with the possible collateral damage (Alston, 2010-05-28: 14).

Anderson point to a certain incident in 2000 where the two regimes were used in a mixed fashion. In 2000 President Bill Clinton tried to kill Osama Bin Laden since he was believed to be an imminent threat to the USA. It was based on the ground that during an armed conflict it was justified to kill a person that was an imminent threat as a conduct under self defence. At this time, USA was not in a “self proclaimed” armed conflict and targeted killing were therefore based on self defence. But the Clinton administration invokes the armed conflict model without specifying on what legal basis the killings were founded on. Anderson writes that US officials has not considered this mix of legal frameworks as a problem. Since 1990, the American view has been that US is in an armed conflict with AL-Qaida. Whether it is self defence or IHL it does not matter, we are in an armed conflict so why worry about the question on which body of law is the proper one? ((1)Andersson, 2009:17-18).

Philip Alston notes that the interpretation of self defence can be extensive or narrow. A restrictive view allows only self defence after an armed attack, a more permissive version allows self defence when “the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation”. Some commentators proclaim

that USA follows a “robust” form of self defence in Pakistan. This view does not recognize IHL or IHRL to be applied since the basis for the self defence is a “just cause” (Alston, 2010-05-28).

Marko Milanovic writes that the American drone usage in Pakistan violates the sovereignty of Pakistan and the right to life. Milanovic finds it hard to see how the argument of self-defence makes it possible to defy individual rights such as the right to life in ICCPR, even though targeted killings might be legal under the IHRL regime as long as they are absolutely necessary, proportional and immediate. Human rights treaties demand the conducting state to show that the killings took place after that all viable options such as capturing or disarming the perpetrator were made (Milanovic, “Drones and targeted killings: Can Self-Defence Preclude Their Wrongfulness?” 2010-08-02). Anderson writes however, that America did ratify the ICCPR in 1992, but they made some reservations. USA has for example never recognised the principle of right to life to apply outside American soil or in armed conflicts where only the laws of war are present (Andersson, 2009: 13). Milanovic finds this peculiar since he argues that the reliance on self-defence as the proper rationale for targeted killings does not abolish the rights that the targeted person has under IHRL. Killings would always have to be justified under international human rights law, and if the treaties would not apply, then it would little need for self defence. With this logic USA doesn't have to motivate their killings with self defence since the right to life does not apply outside USA (Milanovic, “More on Drones, Self-Defense and the Alston Report on Targeted Killings”, 2010-08-03).

Mary O' Connell also criticise the American reliance on self defence. She claims in line with Milanovic that targeted killings in Pakistan are illegal since USA does not have an official permission from Pakistan to breach Pakistani sovereignty. Even tough self defence can be invoked without the consent from states if they cause armed attacks to other states, this is no valid basis for American use of force in Pakistan since the state of Pakistan did not attack USA, it was Al-Qaida. Also the Pakistani government helps USA to chase wanted terrorists, thereby it is hard to say that the Pakistani government is unwilling to stop attacks on America from terrorists. O' Connell also says that the Security Council has not authorized the drone attacks, this is enough for making the killings illegal (O' Connell, 2009: 18-19). Furthermore O' Connell asserts that terrorist activities are generally referred to as criminal activity and not armed attacks. This means that USA has no right to self-defence since it requires an armed attack and the 9/11 attacks were according to O' Connell a display of criminal activity (O' Connell, 2009: 15).

3.2 Statement 2

“First, some have suggested that the very act of targeting a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law”. (Koh, Harold. “The Obama administration and international law”: 2010-07-05)

The statement is related to the statement and revolves around important questions such as, what is an armed conflict? Who is DPH? is the armed conflict international or non-international and what legal regime is valid?

David Kretzmer writes that if American targeting of terrorists are conducted in an international armed conflict the IHL regime will apply, then combatants or civilians that are DPH will be lawful targets. As mention previously in subchapter 2.2, a combatant is a person of an armed group fulfilling four criteria. But the purpose of terrorism is to kill civilians which automatically disqualify them from a status as combatants since they fail to adhere to the laws of war. Direct participation in hostilities must be assessed for each individual. This separates them from combatants who are eligible targets due to there status (Kretzmer, 2005: 192).

In non-international conflicts the legal basis is not easily defined. Usually in civil wars states do not want to grant insurgents the status of combatants since it may legitimate there cause and would put the state military in equilibrium with the insurgents. Also, in non-international conflicts the law enforcement regime would normally be used, making capturing and disarming perpetrators without lethal force the first priority. Kretzmer thinks that there is no good reason why an internal dispute cannot be considered as an armed conflict even if the non state actor is not bound by territorial restraint. This is made by stretching the definition of a non-international conflict to apply to an armed conflict between a state and a non-state actor beyond the states territory.

In an internal armed conflict situation, can there be combatants? If so, how are their statuses decided? Kretzmer argues that if there were no combatants, everyone would be civilians the need for a special provision for civilian protection would be futile. So belligerents on each side of a conflict are considered as combatants, not in the sense of IHL but they may attack each other. One way to decide who would be a combatant and who not is to turn to the common article 3 of the Geneva conventions that states that the person who

does not take active participation in hostilities shall be protected from violence making everyone that are DPH combatants. When applying this version, it could be argued that AL-Qaida members that take active part in hostilities are lawful targets in a non-international armed conflict (Kretzmer, 2005: 195, 197-199).

So is the American conflict an international or non - international conflict? This is not defined in Koh:s statement, he just mention “armed conflict”. In an international armed conflict it could be argued that terrorists are not combatants, since they don’t follow international law. They are either civilians or unlawful combatants that the US sometimes has labelled them. Harold Koh does not mention anything about direct participation in hostilities, therefore it is hard to say anything about the American view on DPH. Neither does Koh explicitly mention the term “combatant”, Koh prefers the term “belligerent”. It is therefore hard to judge if he by using the term belligerent referring to combatant as meant in IHL.

Philip Alston asserts that the appeal to invoke the IHL regime is favourable since it has more permissive approach than the IHRL regime. The IHL regime also puts immunity for the states armed forces. Alston furthermore points out some elements which a non state actor must fulfil in a non international armed conflict. Some of these elements are that non-state groups must be identifiable on criteria that are objective and verifiable so states can differentiate between combatants and civilians. The non-state group must have a minimal level of organization and apply their conducts to the GC:s. It also requires some engagement from the group in collective, armed anti-governmental action. Finally, it demands the existence of minimum intensity and duration of the armed conflict. (Alston, 2010-05-28: 17-18). Judging from Alstons view, it cold be argued that targeted killings of Al-Qaida and associated forces are questionable. The intensity of the armed conflict with Al-Qaida does not reach a sufficient level, at least not outside Afghanistan or Iraq. This is one of the arguments that is used by people how opposes targeted killings in Yemen other “non armed conflict” zones. Also the level of organisation can be questioned since Al-Qaida does not consist of a homogenous group with an outspoken official goal. Neither do they wear visible signs or limit their conduct of force to international law regulations which disqualifies them from being combatants under the IHL regime.

Another dimension for uncertainty is the issue of territorial restraints on the battlefield. Kenneth Anderson declares that USA might go after the combatants wherever they are in the case of armed conflict. Anderson states that the presumable view of the Obama

administration is that USA is entitled to go anywhere the combatant resides regardless of the territorial integrity of the state, the battlefield goes where the combatant goes. But Anderson also puts forward another legal view where the legal right to target combatants of armed conflicts depends on the “theatre of hostilities” and not wherever the combatant might be. Armed conflicts are constrained by the theatre of hostilities in order to decrease the scope of hostilities and constrain the applicability of the IHL ((3) Anderson, 2010-03-23: 4-5). Since it is not explicitly stated in Kohs statement how the American administration view the territorial restraint of the battlefield, if they do it at all? it is hard to make any conclusions about it. Neither is it stated on what criteria American decides the lawfulness of the targets on. Are lawful targets, from an American view all the “members” of non-state actors or individuals that directly participates in hostilities?

3.3 Statement 3

“Fourth and finally, some have argued that our targeting practices violate domestic law, in particular, the long-standing domestic ban on assassinations. But under domestic law, the use of lawful weapons systems —consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defence or during an armed conflict is not unlawful, and hence does not constitute “assassination” ” (Koh, Harold. “The Obama administration and international law”: 2010-07-05).

This statement deals with the issue of the assassination ban that was briefly mentioned in the last chapter. Here Koh defend the right for the CIA and other government personal to use lawful weapon systems as long as they are in consistence with the laws of war and carried out in self defence.

Kenneth Anderson argues that since the creation of the CIA, USA has used force based on that statutory right. During the Cold War, it existed a wider understanding that USA had a valid reason in international and domestic law to use force outside an armed conflict that could also be carried out by civil agents. In the early seventies the covert use of force by the CIA became public, something that raised public anger. In 1975 the so called Church Committee investigated CIA:s involvement in the assassination of foreign leaders. The findings made by the committee and the following public uproar forced the Ford-administration⁶ to issue an executive order⁷ to ban American government personnel from

⁶ Gerald Ford, American president from 1974-1977.

⁷ Known by Ronald Reagan as: Executive order 12333.

engaging in political assassinations. This ban, the assassination ban, exists still today. There have been some discussions about the legal extent of the order. Some argues that it does not provide a definition of assassination, and that the restriction on murder only applies for “political leaders”, which would not cover terrorist leaders. Anderson argues that since the presidency of Ronald Reagan, there has been a narrow reading of the ban. The legal advisor for the Reagan administration, Abraham Sofaer has stated that: illegal killings do not extend to the lawful exercise of the right to self defence ((1) Anderson, 2009: 21-25). Anderson also argues for a defensive stance on Koh:s statement by saying that:

“In my view, the use of force by civilian CIA agents makes them combatants in the armed conflict underway in AfPak, because they are taking direct part in hostilities under traditional standards. In uses of force outside of AfPak, insofar as they are engaged in lawful exercises of the customary sovereign right of self-defense against a non-state actor, they are not combatants, but they are not thereby unlawful, nor is their use of force unlawful under international law” ((3) Anderson, 2010: 9).

This view is supported by Philip Alston. He writes that civilians can become a lawful part in an armed conflict since they are DPH. They may conduct targeted killings but also be killed them selves. CIA personal can also be charged with murder under foreign domestic law (Alston, 2010-05-28: 22).

This defensive approach on Koh:s view is not shared by Mary Ellen O’ Connell. According to her the CIA members are unlawful combatants. This is because CIA personnel are not members of armed forces. They do not wear uniforms, they are not trained in international law and are therefore unable to abide to the principles of proportionality and distinction (O’ Connell, 2009: 8). Jane Mayer thinks that the fact that some of the drone piloting is outsourced by the CIA to private contractors makes the situation legally interesting since the personal does not belong to the state. She is also critical to the selection process of the targets, this creates uncertainties on what criteria that the target selection is based on. This lack of transparency is problematic since there is no way for the public to investigate about the circumstances surrounding specific killings (“Jane Mayer on Predator Drones and Pakistan”, 2010-08-11).

3.4 Statement 4

Part one

“Second, some have challenged the very use of advanced weapons systems, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict-- such as pilotless aircraft or so-called smart bombs-- so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations and that civilian casualties are minimized in carrying out such operations.” (Koh, Harold. “The Obama administration and international law”: 2010-07-05).

Part two

“This Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

- ✓ “First, the principle of distinction, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and
- ✓ Second, the principle of proportionality, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.” (Koh, Harold. “The Obama administration and international law”: 2010-07-05).

This statement is actually made up from two different parts, but I have chosen to put them together since they are somewhat related. The first part of the statements regarding whether advanced technological weapons systems are lawful or not revolves around the difference between human pilots dropping bombs and unmanned planes dropping bombs where the piloting is done from a long distance. Koh argues that there is nothing unlawful about the conduct of drones, this view is backed up by Anderson who states that from a legal standpoint the use of a missile that is fired from a drone compared with a missile that is fired by humans from remote platforms makes no difference, the legal rules for assessing the lawfulness of the targets are identical. All in all, drones are a step forward for a more discriminate and humanitarian warfare but they are not perfect and need strong

encouragements ((3) Anderson, Kenneth, 2010: 9, 12). Philip Alston agrees with this view saying that using drones and using guns on a helicopter is the same thing. Alston underlines however, the importance of assessing every targeted killing and make sure it is used against a lawful combatant or a person DPH.

The second part of the statements touches upon the importance of distinction and proportionality which according to Koh are said to be fulfilled. Kretzmer argues that it is hard to assess from a subjective base the military advantage of targeting a suspected terrorist. Proportionality must be based on the available information during the attack and not just what it resulted in (Kretzmer, 2005:210). With this in mind, it might be argued that the use of drones increases the amount of information gathered during a mission with the help of high resolution cameras. The technological improvement will make it easier to assess adherence to the proportionality requirements after a mission. Using the same logic it will be easier to distinguish between civilians and combatants.

According to Mary O'Connell drones does not live up to the anticipated boundaries of proportionality (O' Connell, 2009: 24). She claims that they kill far more civilians than intended targets, claiming that in Pakistan 50 civilians are being killed for every killed target.

4 Summary and Concluding Remarks

This thesis investigates targeted killings and drones. Targeted killings can be defined as lawful intended assassinations of selected individuals that are not in custody and subject to international law. Targeted killing has been used throughout history but the use of drones is relatively new. Because of the recent rapid development of drones in “battlefields” it has not been clarified how and when they are legal to use, therefore the demand on states to reveal the legal basis for the use of drones along with targeted killing policies has grown.

In the light of this, I intend to analyze the official stance of the American government on the legality of targeted killings and drone usage. I do not expect to find a right or wrong answer, rather compare the American view with the view of some international law experts. This is done through an argumentative analysis with material that is limited to a specific area and with a holistic approach catching not only the legality of the drones, but also moral and ethical implications on an assumed more drone frequentative future. I am using primary material as basis for my analysis. The answers I get from the analysis will depend on what material I have chosen to include. This will reflect my biased selection of material and might of course undermine the objectivity, which is nearly unavoidable when it comes to qualitative studies. The purpose of qualitative studies is to do a deep coverage within a limited field. The just war theory is used to understand the international legal framework as the only legitimate way to use international violence. It must always be done by following customary law or the laws of war. Some say that democratic states have specific features which make them more constrained in their conduct of warfare since they have to legally justify it. The international system is not perfect, it might be exposed for the agenda of big states, also different interpretations and the openness of international treaties and customary law might lead to large debates about what is legal and what is not. These are two problems present in this thesis.

USA is today the biggest military power, spending a lot on its military budget. It has also justified its wars on alleged noble purposes and is (or at least was) since 9/11 2001 in a “War on Terror”. That makes it legally justifiable to go after terrorists in states that harbour them. One way to do this is by using targeted killings with drones. This is an economical and effective way to undermine the power of terrorist organisations. The advantages are many since drones have capabilities that human soldiers lack. The Noble Peace Prize winner and

the American president Barack Obama has increased to use of drones comparing to his predecessor George Bush, drones are used both by the military where there are conflict and by the CIA and in the absence of armed conflicts. Critics has deemed the use of drones outside conflict zones as unlawful killings that breach international human rights standards or principles of the laws of war. This is one of the reasons why the demands on a public stance from the American government have grown. Also the secrecy behind the killings has made the calls for transparency louder. The lack of justification is problematic. Harold Koh, in some degree, defended the American view on targeted killings and drones in a statement made in May of 2010. This was a perfect opportunity to map the problems with these conducts and also to map the legal uncertainties that were not covered by the statements. Non sufficient statements would most likely lead to further demands on justification from drone critics.

This brings us to the first questions of how American targeted killings and the use of UCAV are officially legally legitimized by the Obama administration. The answer to this question is to be found in the statements made by Koh. It becomes more interesting in the second question, when the statements are being exposed to the arguments from international law experts. The first statement deals with the issues of self defence and armed conflict. Koh asserts that USA is in an armed conflict and has its right to use self defence. The self defence argument could be seen as *jus ad bellum*, where the cause for war is stated. The armed conflict argument works as the *jus in bello* that allows America to use force against combatants or civilians who DPH, including targeted killings as long as the relevant principles are abided. The validity of this statement could be understood from the inherent American view of pre-emptive self defence originating in the Carolina doctrine and used during the Cold War. Some calls it an active defence that allows it to be adaptive to new kinds of threats. Alston claims that self defence can be differently interpreted, but the robust self defence view overrides any international law regulations because of the “just cause”, some commentators says that this view is used by USA. Anderson says that as long as USA are in an armed conflict, they really does not care about under what law regime it justifies its targeted killings. Anderson him self prefers the self defence category. Milanovic criticises the self defence argument for breaching international law since it violates Pakistani sovereignty, since USA never have been given an invite from the Pakistani government. Also the right to life is being breached, that right is argued to apply thoroughly and the IHRL framework allows targeted killings in very rare cases. O’Connell also asserts that targeted killings with the justification of self defence in Pakistan are illegal. Pakistan did not attack USA and is now helping USA to hunt down terrorists, USA cannot argue that Pakistan is unwilling to stop

terrorists from planning new attacks. Neither has the Security Council approved the drone attacks nor is terrorism criminal activity and therefore the 9/11 attacks were not armed attacks.

Harold Koh does not mention the word armed attack in describing the events of 9/11. Article 51 in the UN charter requires an armed attack for using self defence, the vagueness of this might lead to further demands on clarity. Harold Koh does not either specify what law regime the killings are based on. Since this was debated before the statements were made public, it will most likely lead to demands on further clarification.

The second argument touches upon the extension of armed conflicts and the definition of DPH. It also depends on the labelling of the American war against alleged terrorists as international or non-international. In non international armed conflicts there can be combatants if they are persons who are DPH. In international armed conflicts lawful targets are civilians DPI or combatants fulfilling the four criteria of Geneva Convention 3 article 4. David Kretzmer argues that terrorists can not be combatants in international armed conflicts, they do not follow international law. They can however, be combatants in non international armed conflict if they are DPH.

How America perceives this can only be a guessing game since the mode of the conflict is not defined by Koh. Neither is Koh using the word “combatant” which would be the correct term for addressing lawful targets, the term belligerent is used instead. Koh does not state what the American view on DPH is. Does America consider “members”⁸ of non-state groups as lawful targets or the once that for the moment directly participates in conflicts? Koh does not either put a territorial restraint on the battlefield, this might be something that needs clarification. It is uncertain whether USA is still clinging on to the “War on Terror” logic with a borderless global battle field that allows them to hunt terrorists wherever they are. Or do they limit themselves to certain “theatre of hostilities” where some degree of hostilities is required for targeted killings? If the answer is based on the latter view, then targeted killings in non-combat zones outside Afghanistan and Iraq would be hard to justify.

The third statement is largely revolving on the interpretation of the assassination ban and the lawfulness of CIA. Anderson claims that before 1975, USA used CIA in covert operations to kill foreign leaders. This was in 1975 banned, Koh however claims that self defence and armed conflicts abolish the ban. The assassination ban has argued to be vaguely written and

⁸ The statement refers to “ individuals who are part of such armed groups”

to give room for different interpretations, such as who is a “political leader”, a terrorist? It has also since the Reagan years been narrowly read in state practise. Anderson claims with this in mind that when in armed conflicts, CIA staffs are lawful combatants and thereby their use of force is lawful. Under the label of self defence they are not combatants, but their use of force is lawful. Mary O Connell thinks that CIA personnel are unlawful combatants, for instance, they are not trained in international law. Jane Mayer does not argue whether CIA:s conduct is unlawful or not. She points out the lack of transparency in the CIA regarding the information of the target list as very problematic.

The fourth statement takes up the subject if drones are illegal compared to normal planes. This is not the case according to Koh, the legal basis is the same. This is supported by Anderson and Alston and there does not seem to be anyone who opposes this view. The proportionality and distinction requirement is hard to assess. Drones are better at following these regulations due to their advanced technology according to Beard, but according to O’Connell they breach the proportionality requirement.

The third question asks what possible impact on the future conduct of war targeted killings with drones can have. This will of course be a more speculative discussion and deals with the ethical and moral concerns that might rise from the current technical development. Drones have many features that make them more attractive than humans, they can operate for 24 hours and they never get hungry, tired or might disobey orders. They are cheaper than ordinary planes and the “pilots” doesn’t have to be trained as a regular pilot. They just have to learn how to navigate with a joy stick on a big screen.

But some might fear that the threshold for conflict might be lowered since it is politically and economically cheaper to use drones. Head of states with drone capabilities will not have to face the moral dilemma of sending soldiers into dangerous missions. Also the heroism and bravery that comes with warfare might make people more emotionally numb to the realities of war since they do not have to meet the enemy face to face. Also the technological development might replace humans more and more with machines, this fusion of man and machine can make it harder to determine who is responsible for a fatal mistake during a mission, is it the pilot or the software company? But on the other hand, drones might as Jack M. Beard have asserted be a step towards a more clinical warfare where only the intended targets are being killed minimizing the collateral damage, maybe the idea of the “surgical warfare” based on distinct precision will take one step forward towards becoming reality. Kenneth Anderson speaks of drones as a step towards a more humanitarian warfare and

thereby opposing the critics that paints the portrait of the future combat zone where international laws are created in a slow pace and cannot keep up with the technological development.

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Annex: Common article 3 of the Geneva Conventions

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

taking of hostages;

outrages upon personal dignity, in particular humiliating and degrading treatment; and

the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict (www.icrc.org, downloaded 2010-08-16).