

The Legality of America's Program of Targeted Killings by Unmanned Aerial Vehicles

Written by Keith Drummond

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KEITH DRUMMOND, FEB 18 2011

On the 5th of November 2002 a Hellfire missile fired from an Unmanned Aerial Vehicle (UAV) controlled by the Central Intelligence Agency (CIA) killed Qaed Salim Sinan al-Harethi in Yemen. Qaed Salim Sinan al-Harethi, believed to be the planner of the attack on the USS Cole, became the first targeted killing by the USA as a new phase to the then Global War on Terror (GWOT) emerged and has persisted until today. As the program of targeted killings is run primarily by the CIA from Langley, very little official information has been made available concerning how targets are identified, the rules governing a killing, or the subsequent accountability procedures. While there are restrictions on available information regarding the use of UAVs in targeted killings, since 2002 this practice has continued at a steadily increasing rate and has caused much controversy within the realm of international law. The term targeted killing alone would suggest an association with assassination which is considered illegal under International and US domestic laws, hence a suitable definition of what sets a targeted killing apart from an assassination must be agreed upon. Then it is necessary to assess how justifications are used to carry out these targeted killings within existing international and customary law. Once this legal framework has been identified we can compare the law against the available evidence to help assess how the law compares to targeted killings in practice. This report will then offer an overall assessment of this new practice of targeted killings and its place within international law, concluding that better access to the official legal review process by the US would greatly assist in coming to a much more robust appraisal of the use of targeted killings and its greater impact on international law.

Background

Harold Hongju Koh, the current legal adviser to the U.S. Department of State, had the following to say on targeted killings;

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.[1]

The U.S. administrations of President Bush and President Obama have not provided many more details on how they assess just what these targeting practices are or how they operate. While they offer assurances that their procedures meet the necessary requirements of the laws of war in terms of distinction[2] and proportionality[3], they have not offered any evidence of the actual overview process. This legal framework will be considered in more detail later, for now we shall focus on the definition of what a targeted killing is. NGOs such as Amnesty International[4] and even the UN[5] have referred to these killings as “extra-judicial executions”[6] with some even going as far as to call them assassinations[7]. While this is one view, the states who have carried out these actions[8] assert their right to self-defence and, thus making these legitimate acts of war as Koh asserted above. The term targeted killing itself has become a contentious issue, but the definition of assassination is also highly debatable[9]. The following two definitions of what comprises an assassination are offered:

Peacetime Assassination: the murder of a specifically targeted individual for a political purpose. Wartime Assassination: the murder of a specifically targeted individual by treacherous or perfidious means.[10]

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Targeted killings do not fit exactly with either definition, and since Koh asserts that the U.S. is in an armed conflict with Al-Qaeda we can see that the targeting practices do not satisfy the “by treacherous or perfidious means” requirement. Hence a targeted killing can be defined as:

A premeditated killing of an individual by a government or its agents[11] or as, the intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval.[12]

This definition does only refer to states being the perpetrators of targeted killings, but non-state groups like the LTTE in Sri Lanka have justified their killings as being targeted killings[13]. Though these claims are acknowledged, this report only focuses on targeted killing carried out by states, specifically the USA. This program is run by the CIA from Langley, they are believed to make use of military pilots for take-off and landing operations in Pakistan and Afghanistan, while the actual in-flight operation of the UAV, or drone, is undertaken from Langley with the pilots usually being private contractors[14]. The clearest and most heavily reported drone strike was undertaken in Yemen on 3rd November 2002 when Qaed Salim Sinan al-Harethi was killed while in a car with 5 other passengers[15], believed to be other al-Qaeda operatives, were killed. This is not the first instance of a drone being used to kill terrorists but it was, as far as information is available, the first time that lethal force was used outside of Afghanistan[16]. As for the use of drones to carry out these attacks, there seems to be no limits on the use of this specific type of new technology. Drones are an attractive new option for those that have them, as while the first drones that appeared were primarily for the role of reconnaissance, the expansion of their capabilities to carry weapons seems to be a natural evolution. They also significantly reduce the risk that states must expose their troops to conflict zones that may be difficult to access by normal means or where the sending in of regular forces could lead to a significant loss of life. It should also be noted that, like targeted killings, non-state actors have also already begun to branch into the use of drones for similar purposes with Hizbullah deploying them in 2006[17]. While worth noting, this report will be focused on the states, and though no official numbers are available, there are estimates that while Pakistan saw 9 drone strikes over the period of 2004-2007 this number would rise to some 106 by November 2010[18].

Legal Framework

The legal framework surrounding targeted killings hinges on whether it takes place within an armed conflict, outside an armed conflict, or in relation to the inter-state use of force; the answer to this will ultimately decide the legality of such actions[19]. The term targeted killings is new and thus does not lend itself immediately to any specific legal framework, as any killing that takes place during a conflict could be said to be a targeted killing[20]. As noted above, what distinguishes this type of targeted killing from those referred to in customary international humanitarian law (IHL) is the addition of premeditation by the state. Hence we can already dismiss the notion that these acts can be considered part of a states toolbox in terms of peacetime self-defence, rather targeted killings become *at once a description of, and a justification for, the concept of anticipatory self-defence*”[21]. Note that the U.S. administration does consider itself to be engaged in an armed conflict[22] and if we begin by assuming that these targeted killings are taking place within an armed conflict then both IHL and human right law still both apply to these killings, but the legality of the killing is determined with reference to the applicable *lex specialis*[23]. Further, IHL specifically states that a killing can only be considered legal if the target has been identified as a “*combatant*”, “*fighter*”[24] or in the case of civilians they “*directly participate in hostilities*”[25]. Even if those requirements are met, the killing of the individual must be necessary, proportionate force[26] must be used and the risk of collateral damage must be kept to the minimum[27]. It is also important to note that these laws are not restricted to just states engaged in conflict but also extend to non-state actors or groups, which in turn include terrorists.

Outside of armed conflict the law on targeted killings is based on human rights standards; this approach is commonly referred to as the “*law enforcement*”[28] model. This model is usually deemed to exist when the violence occurring does not meet the requirements for the situation to be called an armed conflict. This does not mean that states’ actions are only limited to those carried out by the police, instead it covers all government agencies, including the military who may exercise lethal force when certain conditions have been met[29]. Note that the text of The United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials clearly states in article 9[30] when force can be used[31]. If the law enforcement model is to be abided by then the use of drones is illegal, as

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it is not currently possible to give sufficient warning or arrest a suspect using a drone, *thus drones, like bomber aircraft, cannot lawfully be used in law enforcement*"[32].

The final legal framework with which we can view targeted killings, and probably the most appropriate given the United States statements, is the use of inter-state force. Article 2(4) of the UN Charter[33] applies if a state conducts a targeted killing within another state who they are not involved in armed conflict with, then the appropriate inter-state laws are used to determine if the sovereignty of that country has been violated. However, to determine if the individual subject to the targeted killing was killed lawfully is decided by the appropriate IHL and/or human rights law[34]. The second state's sovereignty will not have been violated under the law as long as the state has consented or if the first state uses its right to self-defence under Article 51 of the UN Charter. Article 51 can only be used if the second state is responsible for an armed attack being carried out or if that state is unwilling or "unable to stop armed attacks against the first State launched from its territory "[35]. Under international law a state may use lethal force to defend itself as long as it meets the requirements of being necessary and proportionate[36].

The legal frameworks described above can all be used to justify the use of lethal force by a state given the appropriate circumstances; however when it comes to targeted killings in practice, the justification for such action has become a source of much controversy, even more so when the official legal basis is largely secretive and unofficially commented on by the states involved.

Practice

Having looked at the legal frameworks that could apply to targeted killings, the focus shall shift to how the law is used in practice; this is when we can take a closer look at the assertion that the U.S. is engaged in an armed conflict and thus acting in self-defence. This would imply that the U.S. is engaged in a war and some maintain that this has been ongoing since 1991[37]; the discourse of both the U.S.[38] and al-Qaeda[39] would support this stance. Having a state and non-state group claiming to be at war with each other is not unique, with Israel attempting to claim this is the case with regards to the Palestinian Liberation Organisation, but in that case the UN Security Council has always rejected that claim[40]. Hence if we accept that the U.S. and al-Qaeda are engaged in war then should we also not apply the laws of IHL to the enemy combatants or fighters? While it is difficult to collect accurate information on the strikes being undertaken in Pakistan we can look at the targeted killing of al-Harethi in Yemen since it is arguably the most well documented targeted killing by a drone available. First, we must ask what rules apply, especially with regards to the Geneva Conventions and their Additional Protocols (API and APII) [41]. We immediately face a problem with this as common article 2 of the convention would seem to exclude al-Qaeda[42]. What further complicates this argument is that APII would not seem to apply either as the "armed group must have control of the High Contract Party's territory under article 1.1"[43]. Though these seem to be reason to justify al-Qaeda's exclusion, the term 'armed conflict' is not clearly defined and there is nothing to specifically exclude terrorist violence from APII[44]. The problem though does not seem to be with the contention that the U.S. is involved in an armed conflict, but rather with how it carried out the drone strike in Yemen. If the action does indeed fall under IHL the actual act of killing al-Harethi may be justified but it is known that he was travelling with 5 other individuals whose affiliation may not have been confirmed; the deaths of these would certainly fall beyond the law.

With regards to the UN Charter we can see justification for the use of force as a result of the attack on the USS Cole and then the 9/11 attack, as article 51 permits the use of force if "an armed attack occurs against a Member". The Security Council can also permit the use of force to "maintain peace and security" as per article 42. If once again we consider the Yemen attack, the idea that this was in self-defence seems doubtful as it took place over a year after the 9/11 attack and there is no evidence to suggest that al-Harethi was an imminent threat. The targeted killing of this individual, based on available evidence, would seem to fit into the category of being an act of reprisal or punitive attack which is clearly prohibited within IHL in the context of armed conflict[45] and would certainly be deemed an illegal use of force by most states[46]. Security Council Resolution 1373 can be seen as a justification of this attack as it allows states to take "*the necessary steps to prevent the commission of terrorist acts*"[47], but the U.S. has not used resolution 1373 as a justification and could be hesitant to do so due to the possibility of exploitation.

Finally, can we consider this act within the realm of anticipatory self-defence? This idea is highly contested by many

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scholars as it has been seen as a misunderstanding of the spirit of Article 2(4)[48]. While for those that are prepared to accept that anticipatory self-defence is permitted in their reading of the UN Charter then they look to the Caroline doctrine as a guide, in that “*the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation*”[49]. If this is the generally accepted understanding of what is meant by anticipatory self-defence then targeted killings by their very nature would seem to fall beyond the requirements, as these individuals are rarely targets of opportunity but instead drones are sent to seek them out in known locations. In the case of al-Harethi he was tracked to an empty desert location where capturing was certainly an available option, while there were no civilians or military nearby that could have been attacked by him.

Conclusion

This paper set out to explore the international law surrounding the USA's program of targeted killings by drones by considering the legal frameworks from which this program can be justified and then looking at the practice in the targeted killings from which we have sufficient information. From the outset the greatest hurdle in collecting evidence for this report has been the lack of access and transparency of the US government on this matter. Regardless, we did manage to investigate the issue of targeted killings enough to come to the conclusion that yes they can be legal under certain specific circumstances, and more specifically the use of force against terrorist organisations “is not inconsistent with the purposes of the United Nations”[50]. Yet the targeted killing in Yemen above would not seem to meet the standards of international law as there was no imminent threat or evidence of impending attack. Thus we see a discrepancy emerging. While this report can find evidence to suggest that targeted killings can be carried within the remit of international law in terms of anticipatory self-defence, the strongest argument seems to agree with the US discourse that this is an ongoing armed conflict. The real concern here is that for the only instance we have sufficient data, the US has not abided by international law, and thus gaining access to the overview process of the increasing numbers of targeted killings would seem to be a necessity.

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[1] Koh, 2010

[2] "Requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack". (ibid)

[3] "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" (ibid)

[4] Amnesty International, *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, 4 July 2003 . Amnesty International Press Release, *Yemen/USA: government must not sanction extra-judicial executions*, 8 Nov. 2002 . Amnesty International, *Yemen, The Rule of Law Sidelined in the Name of Security*, 24 Sept. 2003

[5] Commission on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, Report of the human rights inquiry commission*, (E/CN.4/2001/121), 16 Mar. 2001 . *Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967*, 59th session, 17 Dec. 2002 (E/CN.4/2003/30) . Statement of the UN Secretary General, New York, 10 June 2003: Statement attributable to the Spokesman for the Secretary General on the Middle East, available at <http://www.un.org/apps/sg/sgstats.asp?nid=387> (last accessed 29th Nov. 2010)

[6] Kretzmer, 2005, p.173

[7] Amnesty International have defined an extra-judicial killing as "an unlawful and deliberate killing carried out by order of a government or with its acquiescence. Extra judicial killings are killings which can reasonably be assumed to be the result of a policy at any level of government

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to eliminate specific individuals as an alternative to arresting them and then bringing them to justice. These killings take place outside of any judicial framework. " Amnesty International, *Israel and the Occupied Territories: Israel Must End Its Policy of Assassinations*, 4 July 2003: 176

[8] Russia, USA, Sri Lanka (both the government and LTTE) and Israel have all carried out targeted killings. (Alston, 2010, p.4)

[9] Banks, 2002; Kretzmer, 2005; Machon, 2006

[10] Machon, 2006, p.14

[11] Banks, 2002, p.671

[12] David, 2002, p.2

[13] A/HRC/8/3/Add.3, para. 12

[14] Jane Perlez, Pakistan Rehearses Its Two-Step on Airstrikes, NY Times, 15 April 2009; Mayer, supra note 3; James Risen & Mark Mazzetti, CIA Said to Use Outsiders to Put Bombs on Drones, NY Times, 21 Aug. 2009

[15] Downes, 2004, p.277

[16] "A Predator UAV was first deployed against a convoy of jeeps allegedly containing Taliban leader Mullah Mohammed Omar. Following the advice of a military lawyer, no shots were fired. On a second occasion in Afghanistan, three villagers collecting scrap metal from a deserted guerilla camp were killed by a missile fired from a drone, when operators mistakenly identified one of the three for al-Qaeda leader Osama bin Laden on the basis of his height. See H. Klug, 'The Rule of Law, War, or Terror' (2003) Wisconsin LR 365, pp.377-378." (ibid)

[17] Ephron, 2006.

[18] 2004-07 saw 9 strikes; 2008, 34; 2009, 53; 2010 28th November, 106. Counterterrorism Strategy Initiative, The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010. Available From: <http://counterterrorism.newamerica.net/drones>

[19] Alston, p.9

[20] Article 48, AP I: "[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".

[21] Downes, 2004, p.280

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[22] “With al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defence under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day”. (Koh, 2010)

[23] Human rights law and IHL apply coextensively and simultaneously unless there is a conflict between them. E/CN.4/2005/7, paras. 46-53; A/HRC/4/20, paras. 18-19; A/HRC/11/2/Add.5, paras. 71-73, 83; A/HRC/4/20/Add.1, pp. 342-58; E/CN.4/2006/53/Add.1, pp. 264-65; A/HRC/4/20/Add.1, pp. 358-61. In situations that do not involve the conduct of hostilities – e.g., law enforcement operations during non-international armed conflict – the *lex generalis* of human rights law would apply. (Alston, p.10)

[24] International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict*, March 2006.

[25] Geneva Conventions Common Article 3, AP I, art. 52(1) and (2); AP I, art. 50(1); International Humanitarian Law Research Initiative, *HPCR Manual and Commentary on International Law Applicable to Air and Missile Warfare*, Harvard University Program on Humanitarian Policy and Conflict Research, 15 May 2009, available at <http://www.ihlresearch.org/amw/manual> (HPCR Commentary), section C.12.(a).

[26] Proportionality requires an assessment whether an attack that is expected to cause incidental loss of civilian life or injury to civilians would be excessive in relation to the anticipated concrete and direct military advantage. (Alston, 2010) AP I, arts. 51(5)(b) and 57; Henckaerts & Oswald-Beck, *Customary International Humanitarian Law Rules*, ICRC (2005) (ICRC Rules) Rule 14.

[27] Precaution requires that, before every attack, armed forces must do everything feasible to: i) verify the target is legitimate, (ii) determine what the collateral damage would be and assess necessity and proportionality, and (iii) minimize the collateral loss of lives and/or property. (ibid) AP I, art. 57; ICRC Rules 15-21. “Everything feasible” means precautions that are “practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.” Melzer, *supra* note 9 at 365.

[28] Alston, 2010, p.10

[29] Code of Conduct for Law Enforcement Officials, GA Res. 34/169 of 17 December 1979 (Code of Conduct), art. 1, commentary (a) and (b); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth U.N. Congress on Prevention of Crime and Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, (Basic Principles), preamble, note.

[30] Article 9 states that “Law enforcement officials shall not use firearms against persons except

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in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life”.

[31] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug.-7 Sept. 1990, Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990).

[32] O’Connell, 2010, p.5131

[33] All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations

[34] Alston, 2010, p.11

[35] Ibid, p.12

[36] ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicar. vs. US) [1986] ICJ Rep., para. 194 (Military and Paramilitary Activities); O. Schachter, The Right of States to Use Armed Force, 82 Mich. L. Rev. 1620, 1633-34 (1984). In the context of self-defence, force is proportionate only if it used defensively and if it is confined to the objective (Alston, 2010)

[37] R. Wedgwood, ‘*Al Qaeda, Terrorism and Military Commissions*’ (2002) 96 AJIL 328, p. 330. See also J.J. Paust, ‘*Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*’ (2002) 35 CornellLJ 533, p.557

[38] On September 20, 2001, President Bush stated: ‘On September the 11th, enemies of freedom committed an act of war against our country... Our war on terror begins with al -Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated’. Address to a Joint Session of Congress and the American People, at <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>>

[39] In 1996, Osama bin Laden issued his ‘*Ladenese Epistle: Declaration of War*’. See D. Brown, ‘*Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses*’ (2003) 11 CardozoJICL 1, p.25

[40] M. Bothe, ‘Terrorism and the Legality of Pre-emptive Force’ (2003) 14(2) EJIL 227, p.235

[41] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the

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Protection of Victims of Non-International Armed Conflicts, opened for signature on 12 Dec. 1977 (AP II)

[42] Common article 2 states that the Geneva Conventions apply in “all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties”

[43] Downes, p.283

[44] ICRC have said on this matter “Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions? We do not subscribe to this view” [Online] Available From: <http://www.icrc.org/ihl.nsf/com/375-590006?OpenDocument> [Last Accessed 29th November 2010]

[45] AP I, art. 51 (2); HPCR Commentary section C.18

[46] A. Cassese, ‘*Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*’ (2001) 12(5) EJIL 993, p.996.

[47] SC Res. 1373 (2001) 28 September 2001

[48] Opponents of the expansive interpretation argue that article 2(4) was intended to be ‘watertight’ (see B. Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1 at3) and that an alternative reading would be in contradiction to the overall purpose of the charter, namely to restrict the use of force. (Downes, p.287)

[49] In response to an attack by British forces on Canadian rebels resting in a ferry (The Caroline), US Secretary of State Daniel Webster argued that the situation did not necessitate self-defence by the British. The cited formulation, subsequently accepted by the British, was included in a letter to Henry Fox, British minister in Washington. See The Caroline Case (1837) 30 BFSP 195-6. For a discussion of the case, see T. Kearley, ‘Raising the Caroline’ (1999) 17 Wisconsin ILI 325 (ibid, p.288).

[50] Jordan J. Paust. (1983). Conflicting Norms of Intervention: More Variables for the Equation. 13 Ga. J. Int’l & Comp. L. 305

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