The US Drone Policy Under International Law

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Introduction

Unmanned aerial vehicles (UAVs)[1] or simply drones[2] are increasingly present in the modern battlefield. Although they are heralded by US President Barack Obama as one of the most effective methods of fighting terrorism[3] and as weapon of the future,[4] their deployment nonetheless raises questions in the international community, including legal and moral ones.

The United States, in the framework of the "War on Terror," adopted by the Bush administration in 2001, began conducting drone strikes in the territories of other states such as Pakistan, Yemen, and Somalia.[5] After the terrorist attacks of 11 September 2001 (commonly referred to as 9/11), the Central Intelligence Agency (CIA) and Joint Special Operations Command reportedly began targeted killing programmes aimed at eliminating leaders and high-value members of Al-Qaeda, the Taliban, and their associated forces.[6]

After the 9/11 attacks, which left the US in acute shock, former US President George Bush launched the war on terror, making it clear that the US's war on terror begins with Al-Qaeda but it does not stop there. "It will not stop until every terrorist group of global reach has been found, stopped, and defeated," he said.[7]

For the first time ever, terrorism became the major threat to US national security and thus from year to year Al-Qaeda and its associated forces have remained the primary object of national security efforts. The US National Security Strategy 2010 includes a special section on how to disrupt, dismantle, and defeat Al-Qaeda, and adds that the United States is waging a global campaign against Al-Qaeda and its terrorist affiliates."[8]

The UAVs or drones have become "a weapon of choice" for the United States.[9] Armed drones were first used by the US in the Iraq and Afghanistan wars, and later the Bush administration launched drone operations as a part of its counterterrorism strategy to eliminate suspected terrorists based in fragile states

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such as Yemen, Pakistan, and Somalia, conducting the first drone strike in 2002.[10]

According to investigation by The Bureau of Investigative Journalism (BIJ), "President Bush ordered a single drone strike in Yemen, killing six people in 2002. Under Obama, the CIA and the Pentagon have launched at least 58 drone strikes in Yemen killing more than 281 people, including at least 24 reported civilians."[11] If the Bush administration had started using drones for targeted killing, during the Obama administration "it has been expanded into a major policy,"[12] and its compliance with international law has been debated over 10 years among international lawyers.

Drones cross the borders of foreign countries and kill people, both alleged terrorists and innocent civilians. There is increasing international concern surrounding the issue in the context of international law. Moreover, the lack of transparency around civilian casualties and lack of accountability are causing tension among the populations of those countries on the soils of which drone attacks have been conducted.

In the last 10 years, US drone strikes have become a controversial issue, demanding transparency, accountability, and clarifications from the US authorities. UN high-level experts, namely two UN Special Rapporteurs, and international human rights organizations such as: Human Rights Watch, and Amnesty International have harshly criticized drone strikes.

Ben Emmerson, the UN Special Rapporteur on human rights and counter-terrorism underlined the need for legal clarification: "The problem is the lack of clarity under which it is lawful to deploy lethal force by drone. Despite the proliferation of this technology, there remains a lack of consensus among international lawyers and between states on the core legal principles."[13]

Another UN Special Rapporteur Christof Heyns stated, "If armed drones are to be used, states must adhere to international humanitarian law, and should disclose the legal basis for their operational responsibility and criteria for targeting."[14]

Drones previously had been used only in non-combat roles such as: surveillance, reconnaissance, and guarding entrances and national borders. Whereas a few decades ago the world could not have imagined that robots would be actively involved in the battlefield, since 9/11 we have entered a new era of warfare with armed drones. Discussion of the proper application of the international legal framework has led many scholars and UN experts to question the lawfulness of these drone operations.[15]

On March 2014, the UN Human Rights Council adopted a resolution drafted by Pakistan and co-sponsored by Yemen and Switzerland urging UN member states using drones to ensure that "the use of armed drones comply with their obligations under international law, including the UN Charter, human rights law and international humanitarian law (IHL), in particular the principles of distinction and proportionality."[16] The resolution called for convening an interactive panel discussion of experts on legal questions pertaining to this issue. The panel discussion took place at the 27th session of the Human Rights Council in Geneva in September 2014.

Although the resolution did not name the US, six states including the United States, Britain, and France voted against it, 14 states abstained and 27 states voted in favour. Pakistan's former Ambassador Zamir Akram told the UN Human Rights Council that these drone strikes, which have resulted in civilian deaths, also infringe on its sovereignty. "The purpose of this resolution is not to shame or name anyone, as we are against this approach. It is about supporting a principle."[17]

This research paper aims to analyse the legal questions related to these drone strikes with respect to *jus ad bellum*[18] and *jus in bello*,[19] two main pillars of international law. First, by conducting drone strikes the US has been attacking a sovereign state that they are not engaged in a state of war with. So does this constitute a violation of Pakistan's sovereignty? The second issue is that drone strikes are causing collateral damage on a large scale which is unacceptable under international law.[20] The civilian casualties raise the issue of legality in the context of the law of war. Conventional IHL and customary IHL stipulate a series of principles to be adhered to when using force against individuals, such as: distinction, proportionality, precaution, and prohibition of indiscriminate attacks.

The main research question addressed in this paper is: Are US drone attacks lawful according to international law? In order to answer this main question, answers are sought for two auxiliary research questions:

- How are American drone attacks officially justified by the Obama administration?
- Are the Unites States' official justifications of drone attacks compliant with international law?

The paper contends that the US drone operations fail to fulfil both *jus ad bellum* and *jus in bello* norms of the international law. Although a consensus among scholars and lawyers on the issue has not yet evolved, the majority of international lawyers question the compliance of the US drone attacks with international law.

The US and drone warfare

Emergence of drones and their growing importance for the US

According to Konstantinous Dalamagkidis, the first drones were invented during the First World War and were developed to gather intelligence and conduct surveillance and reconnaissance. "In Britain, experiments with unmanned aircraft took place throughout the 1920s with the RAE 1921 Target. In 1933, the Royal Navy used the Queen Bee target drone for the first time. It was a modified version of the Havilland Tiger Moth biplane and was successfully employed for gunnery practice."[21]

Soon after Second World War interest in reconnaissance missions increased, and by the 1950s many states began to develop remote controlled aircraft. The United States used drones in the Vietnam War and also during the Gulf War for reconnaissance. However, in 2001 the US began using combatant

drones and invented the Predator, the world's first armed drone.[22] Peter Singer describes the Predator as "the ugly little drone," which has quickly become a valuable asset for the US. In a period of just one year from June 2005 to June 2006, "Predators carried out 2,073 missions, flew 33,833 hours, surveyed 18,490 targets, and participated in 242 separate raids."[23]

The United States currently deploys several types of drones, but the most well-known armed drones are "the MQ-1 Reaper and the MQ-9 Predator, both may carry 500-pound bombs."[24]

According to the Unmanned Systems Integrated Roadmap, the US has been spending $6 billion annually on the research, development, procurement, and maintenance of unmanned systems for war.[25] In 2003 alone, $4 billion of the newly-formed Department of Homeland Security's budget went to technology research programmes.[26] The US Department of Defence says that "unmanned systems can help in countering threats by reducing risk to human life and increasing standoff from hazardous areas."[27]

The US authorities define armed drones as a precise and effective weapon, and some experts agree with that. Joshua Foust**,** the Asymmetric Operations Fellow at the American Security Project, admits that drones are extremely precise. "In terms of precision, they do hit the targets we give them very consistently, we just don't always know who that target is."[28] Both the CIA and the Pentagon, when talk about drones, like to mention cases that have been successful to highlight the effectiveness and precision of drone attacks. Former US Defense Secretary Leon Panetta has called drones "the only game in town,"[29] while former US Secretary of State Hillary Clinton has said, "dozens of highly skilled and senior Al-Qaeda commanders, trainers, bomb makers, and operatives have been taken off the battlefield by drone attacks."[30]

There are indeed successful cases when drone strikes killed "high-value" targets. In August 2009, the CIA killed the leader of Tehrik-i-Taliban Pakistan (TTP) Baitullah Mehsud in a drone strike, who was more notorious in Pakistan than Osama bin Laden. "His death also marked a stunning strike for America's hi-tech, low-risk war in Pakistan's tribal belt," wrote *The Guardian* following Mehsud's death.[31] Since drone operators can survey a target for hours or days, and can identify terrorists more accurately than ground troops or conventional pilots, there is some rationale in using armed drones. As of 2013, the drones have killed about 58 known militant leaders in Pakistan and 35 in Yemen.[32]

One of the fundamental advantages of armed drones is that they can be a cost-effective way of achieving national security objectives as drones are cheap, but soldiers are not.[33] For instance, each US soldier deployed in Afghanistan in 2012 cost the government US$2.1 million. Whereas, the American Security Project's reports show that the MQ-9 Reaper drone used for attacks in Pakistan has a single unit cost of US$6.48 million and an operational cost of close to US$3 million.[34]

After 9/11 the world entered "the era of robots at war,"[35] says Peter Singer. In his article "Do drones undermine democracy," Singer set forth the critical evolution of drone attacks:

> Just 10 years ago, the idea of using armed robots in war was the stuff of Hollywood fantasy. Today, the United States military has more than 7,000 unmanned aerial systems, popularly called drones. There are 12,000 more on the ground. Last year, they carried out hundreds of strikes — both covert and overt — in six countries, transforming the way our democracy deliberates and engages in what we used to think of as war.[36]

According to another source, since 2004 the Pentagon's drone flights have tripled from about 170,000 hours to more than 570,000 hours in 2011.[37] Metin Gurcan's analysis of the US's annual budget for drones shows that it has grown from $1.9 billion in 2006 to $4.8 billion in 2010. During this same period, the drones' numbers in the US Military have gone from under 3,100 to more than 6,500.[38]

The next concern about drones is their rapid proliferation. Currently, about 87 countries in the world possess different types of UAVs.[39] As Guy Taylor states, the US, Britain, and Israel are the only states to have fired missiles from UAVs. China uses drones to spy on Japan near disputed islands, while Turkey uses them to eyeball Kurdish activities in northern Iraq.[40]

In light of proliferation concerns, some states may wish to use armed drones in operations against organized crime, for crowd control in demonstrations, and even to attack the territory of another state. What if other states start using armed drones in unacceptable ways? As UN Special Rapporteur Christof Heyns indicated in his report to the General Assembly, "drones can be expected to become more sophisticated and available in compact form, also to become less expensive and therefore more accessible."[41] As it is clear that many states are keen to develop and increase the use of drones, the international community needs to come to greater consensus on how to use them further.

Case study: Pakistan

There are several reasons why the drone strikes carried out in Pakistan by the CIA were chosen as the focus for this research. First, the US conducted the largest number of drone strikes in Pakistan compared to Yemen and Somalia. If the Bush administration carried out about 45 to 55 drone strikes in Pakistan, the Obama administration conducted six times that number in its first term alone.[42] According to data from BIJ, the total number of drone strikes conducted by the US in Pakistani territory is 381, out of which 330 were under the Obama administration.

The second reason for this paper's research focus on Pakistan is that the US has conducted drone strikes in Pakistani territory despite the fact that Pakistan is not in an armed conflict with the US. Pakistan's Prime Minister Mian Muhammad Nawaz Sharif has repeatedly urged an end to the strikes. He has stated that the use of drones is not only a violation of Pakistan's territorial integrity, but also detrimental to the country's resolve and efforts to eliminate terrorism.[43] It is also important to mention that on 9 May 2013, the Peshawar

High Court issued a verdict against drone strikes by CIA-operated spy planes, saying, "the drone attacks are illegal, inhumane, and violate the UN Charter on human rights and constitute a war crime."[44]

Most drone attacks occur in the north-western region of Pakistan, which borders Afghanistan. The main target is the Federally Administered Tribal Areas (FATA), a border region governed by Pakistan's federal government but not effectively controlled because of its mountains and lack of roads, which makes it easier for terrorist groups to cross the border from Afghanistan and use it as a safe haven.

Every attack in Pakistan causing large-scale civilian casualties puts the reputation of the US at stake in the international arena, especially in the Muslim world. It is stated in a BIJ report that of all drone attack victims since 2004 only 1.5 per cent have been high-profile targets, that is, leaders or high value members of Al-Qaeda or the Taliban.[45]

BIJ obtained a secret Pakistani document with data on 330 CIA drone strikes, which showed all drone strikes and the number of people killed, sometimes also identifying the number of civilians among them. As per the report, the US drone strike on 30 October 2006 targeting a religious seminary in Chinagai in the Bajaur tribal region of Pakistan killed 81 people, 80 of them children.[46]

Lack of transparency has further complicated the issue, as it is not possible to obtain exact data on civilian casualties. The numbers coming from different sources vary from 2,000 to 4,000. According to US Senator Lindsay Graham, the US had killed a total of 4,700 people using drone aircraft as of early 2013.[47] "Sometimes you hit innocent people, and I hate that, but we're at war, and we've taken out some very senior members of Al-Qaeda," said Mr Graham. It is not clear, however, whether this figure is based on official sources and whether it includes all countries where the US is conducting drone strikes.

A study conducted by the Counter-terrorism Strategy Initiative states, "the true civilian fatality rate since 2004 according to our analysis is approximately 32 percent."[48] According to the report, 114 reported drone strikes in north-western Pakistan from 2004 to 2010 have killed between 830 and 1,210 individuals, of whom around 550 to 850 were described as militants in reliable press accounts, about two-thirds of the total on average.

Human Rights Watch and the International Human Rights Clinic published their joint report on drone operations titled "Losing Humanity" in 2012, where the two organizations stated that drones create a "responsibility gap," and urged that the military commanders who deploy such weapons should be held responsible for civilian casualties.[49] In this report, human rights organizations remind that accountability serves at least two functions: it deters future harm to civilians, and provides the victims a sense of retribution.

Amnesty International has also published a report on drone strikes in Pakistan. The report refers to drone strikes as "unlawful killings:"

> Amnesty International is seriously concerned that these and other strikes have resulted in unlawful killings that may constitute extrajudicial executions or war crimes. The prevailing secrecy

> surrounding drone strikes, restrictions on access to drone-affected areas, and the refusal of the US administration to explain the international legal basis for individual attacks raise concerns that other strikes in FATA might have also violated human rights.[50]

In the report, Amnesty International has gathered information from various sources on how many people have been killed by drone strikes conducted in Pakistan (see Annex 1). What is striking about civilian casualties is that the CIA carries out secondary attacks to kill rescuers who come to help the injured after the drone attack. Amnesty International expressed its deep concern about follow-up rescuer attacks saying, "deliberately attacking civilians rescuing the wounded or the wounded themselves is a war crime."[51]

One of the concerns of the international community is the drastic increase in the number of strikes under the Obama administration. The graphics drawn by Long War Journal (see Annex 2) help understand the rise and decline of drone strikes in Pakistan and Yemen. As the graphic shows, the peak was in 2010 during the Obama administration when the US conducted 117 drone strikes in Pakistan. But the information about strikes is variable, as they are conducted by the CIA, which complicates the issue with its secrecy, and the US does not show any sign of willingness to declassify all information related to the drone strikes.

Legal analysis

How are the drone attacks officially justified by the Obama administration?

As there is no consensus among international lawyers and the issue is very controversial, this paper aims first to clarify the official stance of the Obama administration on justifying drone strikes under international law.

There is no comprehensive official document on how the US describes the legal framework which it applies to drone attacks. To understand how the US legally justifies its drone operations we will analyze the post-9/11 US National Security Strategy, official statements including speeches of US President and other officials, and the White Paper issued by US Department of Justice, which gives the official view of the Obama administration.

President Obama delivered his first major speech on drones at the National Defence University in May 2013. Obama described the war against terrorism as a different kind of war saying, "On September 11, 2001, we were shaken out of complacency. Thousands were taken from us, as clouds of fire and metal and ash descended upon a sun-filled morning. This was a different kind of war. No armies came to our shores, and our military was not the principal target. Instead, a group of terrorists came to kill as many civilians as they could."[52]

President Obama said that the United States does not order drone strikes when it has the ability to capture terrorists. But according to *The New York Times* analyst Mark Mazzetti, "both the Bush and Obama administrations have determined that Pakistan's tribal areas are areas where capture is not possible. Not only are Pakistanis opposed to American 'boots on the ground,'

but the writ of the Pakistani government does not extend to the Federally Administered Tribal Areas, or FATA. As a result, there have been hundreds of drone strikes in Pakistan and only a very small number of capture operations."[53] President Obama describes the US drone operations as lawful:

> We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with Al-Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war — a war waged proportionally, in last resort, and in self-defense.[54]

In this speech, President Obama also said, "America cannot take strikes wherever we choose; actions are to be bounded by consultations with partners, and respect for state sovereignty."[55]

Harold Hongju Koh, former Legal Adviser of the US Department of State, in his speech at the annual meeting of the American Society of International Law in March 2010 stated, "The Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts."[56] Koh argued that Al-Qaeda has not abandoned its intent to attack the United States, and that there is an armed conflict with Al-Qaeda:

> 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.[57]

As a matter of domestic law, Koh emphasized the US Congress's authorization for the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). Koh argued that the very use of advanced weapons systems such as unmanned aerial vehicles for lethal operations is consistent with the applicable laws of war. He said, "There is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict."

John Brennan, who is serving as CIA Director since March 2013, has publicly defended drone strikes on several occasions. In his speech "The Efficacy and Ethics of US Counterterrorism Strategy" delivered in the Wilson Center, he said that as a matter of domestic law, the US constitution empowers the US President to protect the nation from any imminent threat of attack and the US can use force consistent with its inherent right to national self-defence. "There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat,"[58] said John Brennan in his speech in the Wilson Center.

In February 2013 the National Broadcasting Company (NBC) published the confidential White Paper titled "Lawfulness of a lethal operation directed against a US citizen who is a senior operational leader of Al-Qaeda or an associated force," produced by the US Department of Justice in 2011 for internal use. This is the first official document publicly released ever to explain the Obama administration's position on the legal basis for conducting lethal attacks by unmanned aircrafts to target US citizens who allegedly are linked to Al-Qaeda and its associate forces.

The document says that the US President "has authority to respond to the imminent threat posed by al-Qa'ida and its associated forces, arising from his constitutional responsibility to protect the country, the inherent right of the United States to national self-defense under international law."[59] The US Department of Justice, referring in this paper to Common Article 3 of the Geneva Convention, says that conflict between a nation and a transnational actor, occurring outside the nation's territory, is a non-international armed conflict as it is not a conflict between states. The paper argues that since the US Congress has authorized the use of all necessary and appropriate military force against the enemy, it is in an armed conflict with Al-Qaeda under international law. Any US operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities, according to the White Paper.[60]

On the legality of targeted killing, the White Paper states, "targeting a member of an enemy force who is posing an imminent threat of violent attack to the United States is not unlawful; it is a lawful act of national self-defense." The White Paper concludes that the use of force could be legally authorized if the following three conditions are met:

1. An informed, high-level official of the US government has determined that the targeted individual poses an imminent threat of violent attack against the United States;
2. Capture is not feasible, and the United States continues to monitor whether capture becomes feasible; and
3. The operation would be conducted in a manner consistent with applicable law of war principles.[61]

The US Department of Justice states in the end of the paper that there is no prohibition under the laws of war on the use of technologically advanced weapon systems in armed conflicts — such as pilotless aircraft or so-called smart bombs — as long as they are deployed in conformity with applicable laws of war.

The US justifies its drone attacks in the territory of other states as national self-defence against an imminent threat. The US says that it is in non-international armed conflict with Al-Qaeda and its affiliate forces. However, there remains a very significant question: whether the US use of force in Pakistan violates Pakistan's sovereignty in contravention of the UN Charter.

Jus ad bellum: Can the US use force in the territory of Pakistan?

This section provides analysis of *jus ad bellum*, the body of international law concerning the use of interstate force. It addresses the questions such as: Whether the US drone strikes, regarded as the use of force against Pakistan, are lawful under international law; whether they violate Pakistan's sovereignty; and whether they adhere to at least one of the exceptions to the prohibition of the use of force under international law. The rules of international law on the use of force are to be found in the UN Charter and in customary international law.[62]

Any use of force within the sovereign territory of another state is prohibited by international law. Article 2(4) of the UN Charter prohibits the threat or use of force by one state against another. The UN Charter says, "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."[63] Despite the fact that Pakistan, Yemen, and Somalia are fragile states,[64] each of them is still sovereign and no other state can violate their sovereignty.

The argument that US drone strikes are directed only against Taliban and Al-Qaeda hideouts in the territory of Pakistan is debatable and raises many legal questions under the UN Charter. As Nils Melzer states, "any use of a robotic weapon by one State within the sphere of sovereignty of another comes under the prohibition of interstate force expressed in Article 2(4) of the UN Charter."[65] Sending armed drones into Pakistani territory to conduct airstrikes which cause civilian casualties is "a prima facie violation of State's territorial integrity and, therefore, sovereignty."[66]

There are only three exceptions to the prohibition of the use of force in international law: the first is if a state seeks authorization by the UN Security Council; the second is an inherent right to self-defence if an armed attack occurs; and the third is if consent is given by the territorial state in question.

The first exception comes within the central role of the UN Security Council.[67] In Chapter VII, the Security Council is given authority to act in cases of threats to peace, breaches of peace, and acts of aggression. The Council authorizes the use of force in order to maintain or restore peace.[68] Any state that wishes to resort to the use of force has to seek authorization from the UN Security Council. Drone strikes during NATO's operations in Libya occurred under UN Security Council authorization by resolution 1973 adopted on 17 March 2011.[69] However, neither the Bush administration nor the Obama administration has sought UN Security Council authorization in order to conduct drone operations in Pakistani territory.

As laid out in the previous section, the official justification given by the Obama administration refers to the inherent right to self-defence. Under the UN Charter, without the authorization of the UN Security Council, the second exception to the prohibition of the use of force in international law is self-defence. Article 51 of the UN Charter says, "Nothing in the present Charter shall impair the inherent right of collective or individual self-defence if an armed attack occurs against a member of the United Nations."

The US argument is that by adopting resolutions 1368 and 1373 in 2001, the UN Security Council supported the invocation of self-defence. Former Legal Adviser of US Department of State John Bellinger said, "The UN Security Council recognized the right of the United States to act in self-defence in response to the September 11th attacks, as NATO did by invoking, for the first time in its history, the provisions of collective self-defense in the North Atlantic Treaty."[70] Although the resolution mentions an inherent right to individual or collective self-defence, it does not authorize drone strikes in the territory of any specific state, either Pakistan or Yemen.[71]

Some scholars argue that the Security Council was manipulated by the US. Carsten Stahn states, "the UN Security Council was not bypassed in the aftermath of 9/11 attack, but at the same time the Council was manipulated to meet the US interests for greatest possible operational independence."[72]

However, the notion of self-defence might be interpreted in light of contemporary asymmetric conflicts and non-effective control of territory by fragile states. Nils Melzer argues that after 9/11 some states may have to tolerate such self-defence action within their territories under certain circumstances:

> Since 9/11 attacks, however, there is emerging acceptance within the international community of the view: (a) that self-defence action is permissible also against non-state actors, and (b) that a State's right of territorial inviolability must be understood in light of its corresponding duty to protect the legitimate interests of third States within its sphere of sovereignty. Accordingly, a State unable or unwilling to prevent the use of territory as a base for hostile activities against third States may have to tolerate necessary and proportionate self-defensive action within its sovereign territory.[73]

The United States has confidently put forward this argument that Pakistan is not effectively controlling its own territory and is allowing terrorists to use it as a safe haven. Former Legal Adviser to the US Department of State John Bellinger said, "As a practical matter, [...] a state must prevent terrorists from using its territory as a base for launching attacks. As a legal matter, where a state is unwilling or unable to do so, it may be lawful for the targeted state to use military force in self-defense to address that threat."[74] FATA has been described also as "the most ungoverned, combustible region in the world."[75] As General David Petraeus, the former head of US Central Command, in a meeting with Pakistani officials, defended drone strikes saying, "We are helping you also by hitting your bad guys."[76]

Former United States Secretary of Homeland Security, Michael Chertoff also insisted, "international law must begin to recognize that part of the responsibility of sovereignty is the responsibility to make sure that your own country does not become a platform for attacking other countries… There are areas of the world that are ungoverned or ungovernable but nevertheless technically within the sovereignty of boundaries. Does that mean we simply have to allow terrorists to operate there, in kind of bad lands...?"[77]

Some scholars support the position of the US officials cited above. One such opinion is that state sovereignty should be "earned." This means that "a state has to demonstrate its ability of self-governance."[78] Theresa Reinold argues, "sovereign states have a responsibility to protect — within their own territory — the rights and fundamental security interests of other states." She further argues that a lack of effective control of territory is not the only reason behind the emergence of safe havens around the world; some fragile states such as Pakistan have been showing "not only inability, but rather its unwillingness, to prevent irregular activity on its territory."[79]

Despite the arguments given by some scholars, the fact that fragile states do not effectively control their territories or their alleged unwillingness to protect the security interests of other states, does not justify drone attacks in Pakistani territory within the framework of *jus ad bellum*. The International Court of Justice's (ICJ) decision on Congo and Uganda is of relevance here. The ICJ found unlawful Uganda's use of force in the territory of Congo as the latter is not responsible for the armed groups. The court stated that even Congo's failure to take actions against these armed groups did not justify Uganda's use of force.[80] Here it is also relevant to mention the Nicaragua case where the ICJ opined, "not all measures that involve a use of force are sufficiently grave to qualify as an armed conflict."[81] There is also growing hesitation among scholars and lawyers to accept self-defence as justification for the drone attacks arguing that there is an absence of such an armed attack. "Uses of force by terrorist actors may not necessarily constitute "armed attacks" and justify the use of self-defence under Article 51 of the UN Charter," says Allen Weiner.[82]

In general, the fact that Al-Qaeda is a non-state actor does not bar the US from invoking its right to self-defence though. Article 51 of the UN Charter says only "if an armed attack occurs against a Member of the United Nations" and it does not mention whether an armed attack may be launched by another state or other actors. To support the view that self-defence may be exercised in response to terrorist attacks, some scholars put forward the 1837 Caroline case, an incident when the British Military used force against non-state actors on US territory.[83]

The third exception to the use of force in international law is consent given by the territorial state. This consent should be given by a very high authority of the territorial state, and there are no official documents to prove such consent given by Pakistan for US drone attacks on its soil. Moreover, the United States' official stance – including the Department of Justice White Paper and speeches on the legality of drone attacks given by President Obama and other officials – never mentions consent given by a territorial state.

However, *The Washington Post* and *The New York Times* published several articles trying to give some evidence of how the Pakistani government has given consent for drone strikes in its own territory. *The New York Times* on 25 February 2010 published an article titled "CIA and Pakistan work together" which reported:

> Successful missions sometimes end with American and Pakistani spies toasting one another with Johnnie Walker Blue Label whisky, a

> gift from the CIA. The CIA's drone campaign in Pakistan is well known, which is striking given that this is a covert war. But these on-the-ground activities have been shrouded in secrecy because the Pakistani government has feared the public backlash against the close relationship with the Americans.[84]

Following this article, the Washington Post published secret memos between the CIA and Pakistan's top officials which reveal Pakistan's agreement to the use of drone strikes. According to top CIA documents and Pakistani memos obtained by the *Washington Post*, "top officials in Pakistan's government have for years secretly endorsed the program and routinely received classified briefings on strikes and casualty counts."[85] On 1 December 2010, a Pakistani daily *The Express Tribune* quoted a WikiLeaks' reference to Pakistan's former prime minister Yousaf Raza Gillani saying, "I don't care if they do as long as they get the right people. We will protest in the National Assembly and then ignore it."[86] Although Pakistan publicly denies such consent and publicly condemns drone strikes, and the US has never mentioned whether Pakistan agreed to drone strikes or not, the media articles revealing Pakistan's tacit agreement indicate towards close coordination between Pakistan and the CIA to carry out drone strikes, including detailed maps, and before-and-after photos of US drone targets.

However, these newspaper articles cannot be accepted as official proof that Pakistan has given consent for drone attacks. The first reason to question this is that consent should be given by a very high authority of the territorial state. There is no official evidence that the prime minister of Pakistan has given such consent. To the contrary, the Pakistani government has harshly criticized the drone strikes. Moreover, questions and doubts arise whether this exception could apply "when consent is tacit or there are conflicting statements relating to consent."[87]

The main conclusion of the *jus ad bellum* analysis is that US drone attacks in Pakistan fail to meet international norms on the prohibition of the use of force. Drone attacks are a form of military force and constitute a military attack, causing dozens of casualties including civilians. Pakistan itself is not responsible for the 9/11 attacks or other terrorist attacks, and the United States is acting unlawfully in resorting to military force against Pakistan.

Jus in bello: Applying targeting principles to drones

This section analyses *jus in bello*, which addresses the questions of when and which individuals may lawfully be targeted under international law. *Jus in bello* can be found in Conventional IHL or Customary IHL, both of them address the restrictions and rules on how to wage war and how to use force against a specific individual; and both of them aim to minimize the harmful effects of armed conflict on both sides.

As drones are completely new weapons, they are not specifically mentioned in any part of the law of an armed conflict. However, "the use of any weapon system including armed drones in armed conflict is clearly subject to the rules of international humanitarian law."[88]

Conventional IHL principles can be found in Additional Protocol I (AP I) to the 1949 Geneva Convention. For example, Article 43 (2) of AP I distinguishes combatants which are members of the armed forces.[89] According to Article 48 of AP I, "In order to ensure respect for and protection of civilian population and civilian objects, the Parties shall direct their operations only against combatants and military objects."[90] However, Conventional IHL applies only when an international armed conflict occurs between states. The US drone attacks cannot constitute an armed conflict between states and are subject only to Customary IHL, which has the same rules as Conventional IHL.

As elaborated in this paper, the US has claimed that it is in a non-international armed conflict with Al-Qaeda and that drone strikes comply with the principles of law of war. This section will analyze whether drone strikes in Pakistan comply with the targeting principles of the Customary IHL.

The Customary IHL principles can be found in the International Committee of the Red Cross (ICRC) Customary IHL database. This section aims to analyze the three main principles, which are: distinction between civilians and combatants, proportionality in attack, and precautions in attack.[91]

Rule 1 of Customary IHL is the principle of distinction, which requires that "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."[92] The main purpose of the distinction principle is to protect civilians; accordingly "civilian population must be spared and protected against the effects of hostilities."[93] In the case of the Nuclear Weapons Opinion, ICJ concluded that the IHL principles, including the principle of distinction, are fundamental and cardinally important for "elementary considerations of humanity."[94]

However, there are many examples in Pakistan of US drone strikes killing families, children, and relatives of the target militants as well as other civilians who appeared to be nearby accidently.[95] As stated in this paper, if some sources indicate that the true civilian fatality rate since 2004 is approximately 32 per cent, others state that only about 2 per cent of those killed were militants.

Moreover, the signature strikes[96] and secondary strikes are causing large scale civilian casualties which constitute a war crime.[97] The CIA carries out secondary attacks to kill rescuers who come to help the injured after a drone attack. Amnesty International expressed its deep concern about follow-up rescuer attacks stating, "Deliberately attacking civilians rescuing the wounded or the wounded themselves is a war crime."[98] As stated above, the US drone strike on 30 October 2006 at a religious seminary in Chinagai in the Bajaur tribal region of Pakistan killed 81 people, 80 of them were children.[99]

Another example took place in June 2009, when the US hit a compound in South Waziristan. Local villagers and neighbours rushed to the scene hit by the drone attack to rescue survivors, but the CIA then launched more missiles at them, leaving a total of 13 dead. The next day, when people gathered for the funeral of those killed, the CIA again launched a drone attack and 70 of the mourners were killed.

The next main principle of Customary IHL for lawful targeting is proportionality. The proportionality principle stipulated in the Customary IHL states, "Launching an attack which may be expected to cause incidental loss of civilian lives, 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."[100] In order to kill one high value member of Al-Qaeda, the US has been killing dozens of civilians including women and children. "If the expected harm to civilians is excessive in comparison to the military advantage to be gained from the attack,"[101] it will be a violation of the proportionality principle.

The principle of precautions in attack of customary IHL is stipulated in Rule 15, which says, "In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects."[102]

Even if the targeted person is a terrorist and a high value member of Al-Qaeda whom the United States deems militarily necessary to target, the CIA should comply with the principles of distinction, proportionality, and precaution. The latter requires that all operations must be planned very carefully, and organized and controlled strictly. The CIA, while targeting Al-Qaeda members, should also ensure that drone strikes do not kill other innocent civilians, which is why the precaution principle demands constant attention towards avoiding incidental loss of civilian lives.

The US has failed to meet the precautionary principle through its reported practice of signature strikes and follow-up strikes causing large-scale collateral damage. Moreover, the reported practice of considering all "males of fighting age" who were present in the vicinity of the drone attack to be terrorists violates both the proportionality principle and the precautionary principle.[103] Nils Melzer calls signature strikes and double strikes "alarming approaches."[104] They are indeed not only alarming but constitute war crimes and stand in stark contrast to US government officials' statements about compliance with international law.

To sum up, the US has failed to meet the principles of distinction, precaution, and proportionality of Customary IHL. The US's claims that the drone strikes comply with the principles of law of war do not have any legal standing.

Conclusion

The US drone attacks fail to meet norms of international law; especially considering the fact that two UN Special Rapporteurs and human rights organizations have stated in their reports that drone strikes with large-scale civilian casualties constitute a war crime. The legal standing of US's claims that drone strikes comply with the principles of law of war is unfounded. Drone attacks are a form of military force and constitute a military attack. The US drone attacks in Pakistan fail to meet international norms on the prohibition of

the use of force. The US has also failed to meet the principles of distinction, precaution, and proportionality of Customary IHL.

The issue of drone strikes has become a controversial and alarming issue, raising not only legal questions, but also moral ones. The lack of transparency and accountability are the main obstacles in addressing the issue, which was emphasized in the resolution adopted by the UN Human Rights Council on 28 March 2014. Thus the main challenge faced during this research was the fact that there is no official data on drone strikes. Referring to national security, the United States has never declassified information on matters such as civilian casualties, the CIA's rules of engagement, the airbases used for drone strikes, etc.

The world has entered a new era of warfare, and no one can exclude the possibility that drone strikes might be exercised by states or non-state actors in unacceptable ways. At this stage it is truly crucial that the international community demands transparency around drone operations from the US.

It is essential to examine the issue of how the international community can prevent the use of armed drones in unacceptable ways. Do states need special international treaties or other legislative regulations on armed drones? These vital issues need to be further explored.

Annexes

Annex 1

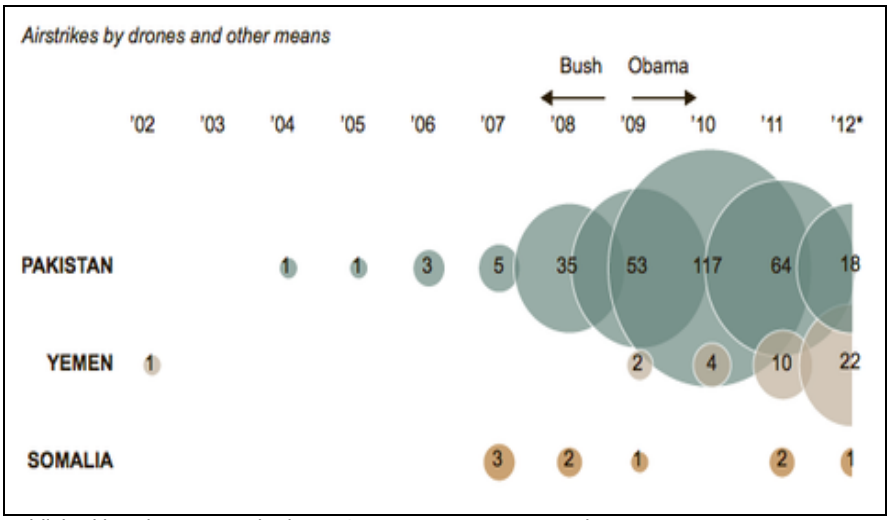
Number of people killed and civilian casualties

	Number of drone strikes	Total killed	Civilians killed	Total injured
Pakistani government	330	2,200	400-600	600
Long War Journal/New American Foundation	348-374	2,065-3,613	153-926	1,117-1,505
US government	classified	4,700 (it is unclear on what sources the Senator is relying)	classified	classified

Source: "Will I be next? US drone strikes in Pakistan," Report by *Amnesty International,* September 2013, available at <https://www.amnesty.org/en/library/ asset/ASA33/013/2013/ en/041c08cb-fb54-47b3-b3fe-a72c9169e487/ asa330132013en.pdf>, (accessed 28 February 2014).

Annex 2

Drone attacks from 2002 to 2012



Published by *The New York Times*; Source: Long War Journal.

Notes and References

1 In this paper I will use terms UAVs and drone interchangeably, as both are simple and familiar. But scholars and experts on the issue also use other terms such as Unmanned Aircraft System (UAS), Unmanned Airborne Vessel (UAV) and Remotely Piloted Aircrafts (RPA).

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