US DRONE ATTACKS ON PAKISTAN – A LEGAL PERSPECTIVE
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Abstract

In the words of Clausewitz: war is a depiction of a policy of achieving political objectives and limited aims; however it comes with long term consequences. The term ‘Global War on Terror’ may be given up by the President Obama’s administration but the massive blows in terms of internal and external threats it brought for Pakistan cannot be ignored. In addition to physical and psychological grievances it paved technological outburst in the western areas of Pakistan. Year 2004 brought Unmanned Aerial Vehicles (UAV’s) in the Pakistani domain with an intention to target militants accurately but also confused the policy followed by the Pakistani government in this regard. Using such lethal technology in a state where its consent itself is vague brings about serious reservations in the international law community. Probing into this aspect is vital for international humanitarian and human rights law along with protecting the sovereignty of states like Pakistan.

Introduction

Tragedy of 9/11 marked a fundamental transformation in the entire world order. Where the US centered its resources in the objective of finding Al-Qaeda targets either to capture or kill1. It also used Unmanned Aircraft System (UAS)2-Drones as a vital part of the strategy. These Aerial attacks ‘that once
seemed impossibly futuristic are now so routine that they rarely attract public attention unless a high-ranking al-Qaeda figure is killed’.3

Drone- ‘an unmanned aircraft or ship guided by a remote control’4 performs variety of functions, i.e. Transportation, Oil Gas Mineral Exploration5, remote sensing, commercial aerial surveillance6, scientific research, and conducting search and rescue operations. However, the US pushed these Aerial attacks by choice7 in Pakistan’s tribal regions usually armed with Hellfire missiles. These predators targeted the militants in western Pakistan8, partly to stem cross-border attacks against U.S. and NATO forces in Afghanistan9. Consequently, this activity raises many questions related to public international law. Certainly, to probe in to the US policy of the drone attacks in Pakistan, and exploring the legal basis of the logic is very critical10.

This study is significant as it objectively analyzes the inability of the United Nations charter, International Human Rights Law, International Law of Armed conflict and the international legal community in coming up with tangible provisions that declare the usage of such lethal technology as illegal. Furthermore, the study argues that the US rationale of these strikes is not logically satisfactory.

It envisages a five-fold focus: firstly, on the issue of breach of sovereignty by usage of such technology. Secondly, view of the US rationale for these strikes. Thirdly, review of the stance and response of Pakistan from all fronts. Fourthly,
implications of these strikes for the locals residing in the targeted areas and finally, presenting some recommendations for Pakistan in the pursuit of bringing the illegalities of these strikes in the limelight. The concluding premise is that the usage of drones should be abandoned because it entails Pakistan’s sovereignty and is in direct clash with the fundamental human rights principles of the citizens of Pakistan.

**Drones – A Legal Minefield**

Drones are remotely operated by CIA Headquarters from Langley, West Virginia, USA or from its bases in Khost, Afghanistan and Pakistan. Theoretically, airborne attacks of such capacity, ‘as a military weapon, can only be used lawfully on the battlefield. As in traditional law enforcement the use of lethal force is limited to the situations of absolute necessity’. Hence, in legal terms assortment to drones must be attuned with the law of *jus ad bellum* (law on resort to force) and *jus in bello* (law governing the conduct of hostilities). The classical rationale of *jus in bello* is to limit the consequences of armed conflicts on non-combatants (including vulnerable groups such as the wounded, women and children), property and the environment. Accordingly, *jus in bello* provides only a fraction of principles governing the process of conflict termination, including capitulations and armistices. Furthermore, traditionally, law of *jus ad bellum* was justified by the purpose of thwarting security threats. This dualist conception was declared to be distinct in nature as it declared...
that all conflicts shall be fought humanely, irrespective of the cause of armed violence\textsuperscript{14}. In short both the theories pave way for the provisions of international humanitarian law and human rights law in this particular case.

Usage of drones naturally concerns the propagators of the basic fundamental rights of humanity. Thus, there is a growing consensus among the jurists that killing an individual without providing him a chance to defend himself in the court of law would construe “target killing” or “extra judicial Killing” which is a violation of International Humanitarian Law.\textsuperscript{15} Extra-judicial killings: are prohibited under the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{16}. Moreover, it commits violations of Article 11 (1) and Article 1 (3) of UN human rights declaration as well\textsuperscript{17}.

In this context, on September 20-21, 2010, the ICJ (International Court of Justice) Global Security and Rule of Law Initiative convened an informal expert consultation on the issue of drone and targeted killings. This meeting emphasized on paving a prompt response to the increased usage of drones in genuine armed conflicts. It also illustrated the frequent disregard of international human rights law and a lack of transparency in targeted killings. However, with the lack of tangible conclusions such exercises are vague.

On the other hand, the UN Charter also lacks a strict affirmative in imposing the human rights obligations on the UN member states. This makes it easier for them to exploit the gap and structural ambiguities in the laws of an armed
conflict. Consequently, for this purposes the criteria of considering a conflict as an ‘armed conflict’ in international law is to be specifically examined. Imminent from customary international law and treaties, a conflict to be declared as an armed conflict should satisfy three main principles: Military necessity (stringently limited to legitimate military objectives), Distinction and Proportionality. The use of force in the form of drones in this case lacks all three.

Consequently, the ‘use of force’ against a state is also subject to certain legal obligations. The international legal system considers the idea of it in certain situations i.e. that in the exercise of ‘self-defence’. This right primarily accepted by the traditional international law also gained sophistication under the UN Charter. As, it is recognized in accordance to the terms of maintaining international peace and stability (Article 2) and also by the Article 51 chapter VII of the Charter which states that: ‘if an armed attack occurs against a member, it can exercise its right of self-defence.’

However, assuming that force is only legal as a response to an armed attack, questions may arise as to the duration of the response. Whether a state having been attacked is authorized only to repulse the attack? Or whether the state is entitled also to use retaliatory force as a deterrent to future attacks coming from the same source? The UN charter and law is silent about these ambiguities. The only relevant provision found in the charter is the Article 51 (affirming the right of self-defence in case of an armed attack). Some hold that this
article along with its complicit is applicable only to the member states. While others are of the view that along with the effect of Article 2, Non-member states become a negligible minority but are bound to act in accordance for maintaining international peace and security.²⁰

Nevertheless, it is to be kept in mind that ‘self-defence’ can be exercised by a state, against a state and to defend a state. This raises technical challenges when the attack is conducted by an entity other than a state i.e. a non-state actor. A way out suggests that the attacked state in order to respond against the non-state actor which is operating in another state, must first justify the ensuing violation of its own sovereignty and second during the process not violate the solidarity of the other state. Various authors have proposed different standards in this case, but three scenarios generally seem possible: (a) the territorial state was complicit or was actively supporting the non-state actor in its armed attack; (b) the territorial state failed to exercise due diligence, i.e. it did not do all that it could reasonably have done to prevent the non-state actor from using its territory to mount an armed attack against another state, or is not doing all it can to prevent further attacks; (c) the territorial state may have exercised due diligence, but it was nonetheless unable to prevent the attack, or to prevent further attacks. The US post-9/11 invasion of Afghanistan is considered to be quite comfortably justified under these standards.²¹
However, considerably it is a matter that requires precise precaution in actually justifying counter actions on the basis of these arguments. Who will decide the amount of diligence required? And are there any alternative measures to seek clarification from the territorial state? The international legal principles are quiet in this regard and further make the situation vague. Thus, the fact remains that whatever the case may be and in the absence of transparent legislations the responding state fails to comply with the aforementioned requirements completely and may continuously violate the norms of certain international set standards. In addition while posing drone attacks in the Pakistani domain what legal justifications does the US propose in a legal vacuum? Americans make believe that by handing over ground bases within its domain and not protesting adequately Pakistan has consented for these strikes.

But is mere consent of the aggrieved state a legal justification for the usage of drones? A valid consent, According to Article 20 of International Law Commission draft on responsibility of state for international wrong, is when a state can give consent for an act which was wrong without consent. It states that ‘valid consent by a state to the Commission of an act by another state precludes the wrongfulness of the act in relation to the former state to the extent that the act remains within the limits of that consent’.22

Thus, if these limits are crossed it becomes the infringement of the sovereignty of the state that consented.
Although a realist perspective proposes that no state enjoys absolute sovereignty in the world today. The question here arises that, can sovereignty of a state be put at stake on the basis of ‘Mutual Interest’? The answer yet simple can get more ambiguous than one can imagine. Theoretically sovereignty is a state’s unavoidable basic right but practically certain states tend to breach it in order to protect their own national interests in situations of intimate cooperation as well. When there is a breach of this right then there is agitation and frustration. However, interestingly the sovereignty issue in this regard has not been highlighted by most of the theorists. This study will further examine this breach in the latter portions, thus firstly it is important to put forward the US rationale of these strikes in Pakistan.

**US Rationale of the Strikes**

Primarily, US rationale of the drone strikes in Pakistan’s tribal areas is attributed to its claim of ‘self defence’. Along with the invention of doctrine of ‘pre-emptive strike’ to seek legitimacy for the use of force in accordance with this right. This approach which significantly evolved following the 9/11 attacks, was affirmed immediately by the resolutions 1368 and 1373 of the Security Council. In addition, the NATO and its alliance countries also affirmed this right of using force against the non-state actors involved in the landmark attack. Following which the coalition forces posed an armed attack in Afghanistan against Al-Qaeda.
Notably there can be no US right of self defence; as in the Nicaragua case 1986, it was held that ‘right of self defence arises of direct attack’. Thus, any use of force not in relation to this is a clear violation of Art 2(4) of UN Charter (which declares the threat of use of force to be against the territorial integrity of a state). So, if any entity from Pakistan didn’t wage a direct attack on the US, how is the use of force in the Pakistani domain justified?

Secondly, following this pursuit it is generally agreed that operations may be launched into the territory of another state with its consent. But it is legally problematic when the cross border operation is conducted without the territorial state’s consent or by secret consent. The US drones in the tribal areas of Pakistan is a problem of such nature. The US places its stance on the duration when former president of Pakistan Gen. Pervez Musharraf allowed the drone strikes from 2004 to 2007. However, the choices of the targets were done unilaterally by the US usually based on faulty intelligence and killed large number of civilians rather than Al-Qaeda leaders. Going unilateral and exercising excessive force (where there are no set standards for quantifying the level of consent) is to be considered as a clear violation of the sovereignty of the state that consented as mentioned in the earlier portion.

Thirdly, according to the US the secret consent of the then president of Pakistan augured well to the coincidence of the policy of eliminating terrorists. But who is to maintain record
of the extra-judicial killings. Furthermore, is mere consent of a state enough for violation of human and humanitarian rights provisions which are ascertained by the UN Charter? Considerably, these are all violations of the dignity and self esteem of the Pakistani state.

Fourthly, the US claims that these strikes in Pakistan are done under the doctrine of the hot pursuit laws. Simply, ‘Hot pursuit’ means continuous pursuit of suspects from one jurisdiction to another. However, that authorization is relevant for U.S. domestic law purposes only. It has no relevance for the law governing international legal matters it is relevant only over sea in international matters.\(^27\)

Thus, in relation to these arguments, the U.S. may use significant armed force in Pakistan only under three conditions: One, if Pakistan is responsible for an armed attack on the U.S. Second, if Pakistan is a failed state [a state with no central government or one where that government is so ineffective that it has little control over much of its territory]. Third, if Pakistan’s government has requested help in waging a civil war. The U.S. does not claim that Pakistan attacked it or that it is a failed state. Pakistan is not engaged in a civil war, nor has it ever requested for their help. The U.S. may have Pakistan’s tacit consent to attack an area, but this is a weak basis for lethal conduct, made even weaker by the lack of Afghanistan’s consent to launch drones from its territory.\(^28\)

But despite of these findings, why are these attacks so routine and still consistently prevalent in the Pakistani
domain? Does Pakistan have an international agreement over these strikes with the US? And has it been inserted in the domestic law? For this the stance of Pakistan from all fronts is to be examined.

**Pakistani Stance and Response**

Firstly, the stance of the Pakistani Government Pakistan's public position is to demand the US to stop the drone attacks due to two reasons: it amounts to a violation of Pakistan's sovereignty; and secondly it is counter-productive.\(^{29}\) Reportedly, in 2008 the strikes were concentrated on those who opposed attacks on Pakistan.\(^{30}\) Thus, in response to these reservations, the Pakistan Foreign Office former spokeswoman Tehmina Janjua and Mustafa Nawaz Khokhar advisor of Human rights to Pakistan’s Prime Minister, both claimed that the CIA drones covertly attacking Pakistanis are intolerable, despite these being President Barack Obama’s “weapon of choice,” and the heavy CIA presence is making citizens angry.\(^{31}\) In addition the attacks are a breach of Pakistan’s sovereignty and the killings are extra judicial.

Secondly, stance of the Military leadership: Some Wiki leaks cables reveal the cause of confusion in Pakistan regarding the stance of the Pakistani military.\(^{32}\) However, what had to be a bilateral affair turned out to be mayhem, when the US initiated the strikes unilaterally. Now there is a demand of equal say in the drone attacks by the military. Primarily, because of the US unilateralism and secondly,
because of the belief that it carries serious risks for Pakistan in its combat against the Pakistani Taliban.

Thirdly, with regard to the Intelligence agencies: It is evident that Pakistan officially condemns drone strikes on its territory however it is also widely believed to share intelligence with the US for at least some of the attacks, especially those that target Pakistani Taliban militants blamed for numerous attacks in the country.\textsuperscript{33} The ties of the ISI and the CIA have been aligned and considered as historical ones.\textsuperscript{34} They might work together on this issue but the CIA is known for its betrayal. Thus, ISI Chief Lt Gen Ahmed Shuja Pasha is reported to have asked the US to stop its drone strikes in Pakistan in a meeting between CIA deputy director Michael Morrell and senior ISI officials held in Islamabad.

Fourthly, stance of the media, civil society and intelligentsia: In Pakistan, none of the issue is more controversial other than American drone attacks. Anti American sentiments are fueled as the drone war continues. American officials may praise the precision of the drone attacks, nevertheless Pakistani news media heavily accounts for the innocent civilian casualties which are widely believed. There is no channel, intellectual gathering and forum which does not discusses the continuance of these strikes in the Pakistani domain.

It is high time that the implications of these strikes on the natives of the targeted areas and the sovereignty of Pakistan
are kept in mind and a practical action strategy is planned urgently.

**Implications of These Strikes:** The drone attacks in Pakistan started in 2004 further from which they have increased in numbers dramatically. The table below illustrates the frequency of the attacks and the estimates of the fatalities as a result of the attacks:

**Drone Attacks Year by Year**

<table>
<thead>
<tr>
<th>Period/Year</th>
<th>No. of Drone Attack</th>
<th>Fatalities</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004-2007</td>
<td>9</td>
<td>109</td>
</tr>
<tr>
<td>2008</td>
<td>34</td>
<td>296</td>
</tr>
<tr>
<td>2009</td>
<td>53</td>
<td>709</td>
</tr>
<tr>
<td>2010</td>
<td>132</td>
<td>938</td>
</tr>
<tr>
<td>2011 (until 31st July)</td>
<td>60</td>
<td>493</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>288</strong></td>
<td><strong>2545</strong></td>
</tr>
</tbody>
</table>

*Source: Conflict Monitoring Center Islamabad report ‘2011.*

It is imperative to note that the continuation of these strikes have adverse implications for the locals residing in the targeted areas. These strikes alienated communities, killed the innocent civilians and driven by the sentiments of vengeance created more terrorists and raised the number of suicide bombings within Pakistan. Reported targeted attacks on funerals and peaceful Jirga’s have been unpopular in the media but they send negative psychological vibes within the area. Brooking Institution reports revealed the fact that
mostly civilians die in drone attacks as compared to terrorists. It is a violation of article 51 (2) of Additional protocol I of Geneva Convention which prohibits the civilian population from being the object of attacks under any circumstances.

On the other hand, this sentiment is also exploited by the terrorists. A Jordanian Suicide bomber trained by TTP blew him up in a CIA base in Khost province of Afghanistan on the ultimate day of 2009. The CIA lost seven of its officer in the attack. It was the worst ever attack since 1983 when the agency lost 8 of its agents in Beirut, Lebanon. TTP claimed responsibility of the attack and said the attack was meant to avenge death of Baitullah Mehsud, the head of TTP. This sentiment is prevalent in the Pakistani domain as well, as evident from the table below:

Hike in Drone attacks create a Hike in Suicide bombings as well. (http://www.longwarjournal.org/pakistan-strikes.php) accessed on: 7th Nov’ 2011

Some Pakistani politicians and western counterinsurgency analysts declare the drone strikes as counterproductive
because they stoke anger against the US among the Pakistani public, potentially adding to the pool of militant recruits.37

Secondly, as a result of these strikes, the people residing in the targeted areas are forced to move from their homes creating a diverse situation of internally displaced persons. The vulnerable economic infrastructure of the country faces serious implications when the displaced demand refuge and shelter from the government.

**Recommended Action Strategy**

Keeping in view the aforementioned scenario, a tangible strategy from all fronts of the country is required, a few steps in this regard are firstly, the Government stance should be made clear. The US rationale is that the Pakistani government has consented to the strikes. However, the Pakistani government regularly denies it. Thus, a legal defence on consent is meaningless if the party who is supposed to have given consent denies it publically. The competence of giving such consent is another debate altogether. But, what is clear is that neither of the US defence has sufficient credibility to make these actions indisputably legal.38

Secondly, another strategy would be to get hold of the drone technology itself. By acquiring it we may be in a position to justify any drone attack from our own front minimizing the chance of reservations in the citizens of Pakistan.

Thirdly, involving the legal community is suggested both at the domestic and international level. Firstly, at the national
level, the local legal community needs to take steps towards formulating and codifying local laws which clearly declare such violation of the sovereignty of the state as illegal. Secondly, they need to approach the UN and make vocal the US violations of many treaties to which it is a signatory. For example, the extra-judicial killings amount to violation of the Human rights treaties and also amount to violation of treaties ratified for the rights of women and children and innocent civilians.

Finally, the government and the military should remain firm in pursuance to the national interests. Steps should be taken to take up full responsibility of the area, after all in any form of cooperation the sovereignty of the country should not be put at stake. In addition the informants should not be trusted entirely in such an area where human intelligence fails due to geographical difficulties.

**Conclusion**

In the pursuit of Counter terrorism the US drones have "recklessly trampled on Pakistan's sovereignty, security and territorial integrity", and caused casualties of Pakistani civilians as well as soldiers. Ironically, the count exceeds the total number of deaths witnessed in the 9/11 attacks. Thus, if the rule of law is to be defended then the tactics used against terrorists must not undermine the democratically mandated law. International law, however weak, provides Pakistan a realm in which to safeguard its sovereignty and protest against the killings of hundreds of its citizens being
unthinkingly targeted. The current wrangling over the legality of drone attacks marks the beginning of the development of the legal regimes that will govern warfare in a new era. In standing up for the sovereignty of smaller nations, Pakistan can ensure that the existence of borders is not a unessential exercise noted by superpowers only when convenient, and disregarded when strategic interests dictate otherwise. It is high time that the US realizes this and stops the drone attacks in Pakistan and also adheres to the principles prescribed in the public international law.

End Notes

2 the official ‘United States Federal Aviation Administration’ (FAA) term for an unmanned aerial vehicle.
5 (http://www.universalwing.com/technology/our-uav) accessed on: 26th Sep’ 2011
11 Senator Diane Feinstein, Chair of the Senate Intelligence Committee, “ As I understand it, “ These [drones] are Flown out of a Pakistani Base’, Dawn ( Karachi), Feb 14th ,2009, New York Times ( New York), Nov 6th
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,2002; News (Rawalpindi), Oct 27th, 2008. (however, following the evacuation of Shamshi air base in Nov’2011 drones are no more operated from Pakistan)

12 Prof Mary Ellen O’Connell, summary of the international law Discussion Group meeting, Chatham House, Thursday, 21st oct’2010, 3.

13 Articles 35-41 of the 1907 Hague Convention (IV) Respecting the Laws and Customs of war on Land.


16 According to article 6 (1) of this covenant every individual has the right to life and no one shall be arbitrarily deprived of his life. It says that the penalty of death can only be rendered by a competent court.

17 Beginning with the Charter of the United Nations the international human rights law is depicted in its Article 1(3) which affirms the “international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.


19 UN Charter, Chapter VII (Article 51)

20 Same as 16.


22 Article 20 of International Law Commission draft on Responsibility of State for International Wrong.


24 Porter. Gearth, “ why Pakistani military Demands a Veto on Drone Strikes”, cross post of IPS

25 ibid


http://wfol.tv/index.php?option=com_content&view=article&id=6773: we-were-right-again-pakistan-military-political-leadership-support-for-drone-attacks&catid=42:nations&Itemid=34 accessed on (1st Nov’ 2011)


Ians, “US- Pakistan ties close to collapse : Chinese daily”, 4th Dec’ 2011