

## The use of drones: legal grey area?

Ahmad Nazir Warraich \*

### **Abstract**

*The U.S. has been conducting drone strikes in Pakistan since 2004 as an integral part of its fight against 'Al-Qaeda, the Taliban and its associates.' This research paper will look at the ongoing use of drones with a view to target and kill alleged members of these groups, based on a reportedly secret 'kill list' prepared and maintained by the U.S. Administration. It will examine the relevant legal framework as well. The purview of this article is limited to assessing the legality, under international law, of the drone attacks in Pakistan's Federally Administered Tribal Areas (FATA). In this regard, the paper shall begin by giving an introduction of the issue, examine the U.S. practice, and then discuss the relevant legal arguments, including the application of the relevant law, and any grey areas that appear. It will reach a conclusion after assessing all the arguments put forth regarding the legality of U.S. actions under international law.*

### **Introduction**

Since the late 20<sup>th</sup> century, warfare and the nature of armed conflicts have constantly evolved due to rapid technological advancements. As a result, the theatre of warfare is becoming increasingly remote from the aggressor while becoming more lethal and aggressive for the victim. This has created new dimensions and challenges the traditional paradigm of war.<sup>1</sup> The U.S.' continued use of drone technology to fight the War on Terror (WoT) in which both the 'enemy' and the 'war theatre' are vaguely defined, has generated novel legal issues.<sup>2</sup> The legitimacy and usefulness of international law has been challenged over the last few centuries. Deemed increasingly weak, the law has come to signify a continuation of perceived violations of norms and rules due to a weak enforcement mechanism. Against this backdrop, the Second World War proved a watershed moment. The world was so shocked by the brutality of the Nazi regime that apart from pursuing *realpolitik*, some of the justifications given by

---

\* Ahmad Nazir Warraich is the recipient of two prestigious scholarships; Britannia Chevening and Hubert Humphrey Fellowship. He did his LL.M in International Law from the University of Nottingham (U.K). He is currently Adjunct Faculty at Punjab University, Civil Services Academy and the Pakistan College of Law, and is an Advocate of the High Court.

### *The use of drones: legal grey area?*

the U.S. President to fight WWII was for the sake of democracy and the now famous Four Freedoms.<sup>3</sup> Due to the atrocities committed and the scale of human loss and suffering that occurred during the War, the world attempted to control the use of force and seek a peaceful resolution of international disputes through the establishment of the United Nations.<sup>4</sup> Amongst other things, the body committed to resolving inter-state disputes through peaceful methods or through the international community's joint action. Resultantly, the post WWII period saw rapid expansion in the corpus of international law. International law, which was to an extent meant to order international relations, and hence rooted in positivism, started aspiring to becoming a law expounding 'justice' and hence idealism.<sup>5</sup> This led to the further development of laws of war, refining of the law on the use of force, and the development of international human rights law. Following the tragic terrorist acts of 11 September 2001 the U.S. rightfully felt the need to address the situation and take necessary steps. However, its reaction to these events and the consequent WoT are perceived to have impacted the development of international law in a number of ways; in some ways arresting its development and in others leading to regression.<sup>6</sup>

The WoT has many facets with one being the use of drone attacks to target leaders of Al Qaeda and allied forces. Although this programme is shrouded in secrecy, it is only in 2010 that the U.S. officially acknowledged using drones in FATA.<sup>7</sup> Despite any particular clarity regarding the exact aggressor, the two main departments believed to be conducting this global operation are the Department of Defense and the Central Intelligence Agency (CIA).<sup>8</sup> Under both domestic and international laws, any action aimed at killing requires transparency but in practice this is lacking. From a legal perspective there is no oversight mechanism available to verify compliance with international law obligations. This raises serious issues of transparency and accountability.<sup>9</sup> 'Double hatting', coupled with the lack of publically available information, makes it difficult to provide the justification in legal terms of such actions.<sup>10</sup> A spy agency is by definition working either beyond or below the legal radar whereas the military functions within the legal paradigm. Therefore this trend raises serious questions. The use of such action by other states would likely be unacceptable to not just international law but also to the United States itself.<sup>11</sup> As the 'leader of the Free World', the United States, which prides itself on a moral element in its foreign policy, needs to ensure that its actions in this conflict are within international and domestic law.

The U.S. War on Terror is providing troubling precedents. The Laws of Warfare allow soldiers to honorably fight for their countries. Humanitarian Law has tried to only control the means and methods of warfare.<sup>12</sup> However, this legal

cover is granted only to armies and not to spy agencies. Spying has been accepted as a necessary *de facto* reality but not deserving the same legal cover.<sup>13</sup> In a post 9/11 world ‘legal grey holes’ and ‘double hatting’ have allowed the U.S. to successfully create deliberate vagueness regarding the blurred lines between the roles of the military and the CIA.<sup>14</sup> There is growing concern amongst nations to regulate the use of drones within the current international law as enunciated in customary and treaty law, and other well-established international norms and practices.<sup>15</sup>

General Pakistani law does not apply in FATA, tribal areas in the north west of Pakistan that border Afghanistan, due to the special status of the area since pre-partition days. This research will look at the possible relevant law, both treaty and customary, which may be applicable to this situation, including the Law on the Use of Force, the International Humanitarian Law, and the International Human Rights Law. It shall also explore the problem of using the Central Intelligence Agency (CIA) instead of the U.S. Military or Air Force in this regard, in contradistinction to the traditional role of spy agencies, and its legality under the International Humanitarian Law. It shall discuss the arguments put forward in favour of the legality of the U.S. action, by the U.S. administration and various international lawyers and academics, as well as the arguments adduced by various international lawyers and academics to prove the illegality of the US actions or, at least create doubts about their legality. Finally, this research paper shall try to prove that the U.S. use of drones in FATA is illegal under international law as it does not fall in any of the situations allowed where such use of force is permissible.

### **Importance of the issue**

Important questions of international law and the development of such state practice have potentially retrogressive effects on the international legal regime governing the use of force, laws of war and international human rights law. Questions also arise regarding the possibly expanding role of spy agencies from ‘intelligence gathering’ to ‘killing’, while at the same time enjoying the same *de facto* protection accorded to all clandestine operations. Legal requirements of accountability, which require transparency come into play.<sup>16</sup>

The United States of America prides itself on having a moral dimension to its foreign policy and distinguishing its international actions from those of European nations.<sup>17</sup> The U.S. has therefore partially condemned the use of targeted killings by other states and as the self proclaimed ‘Leader of the Free World’ has taken upon itself to push the agenda for international law compliance by other states.

As discussed above, international law was developed through state practice and *opinio juris* as a way to provide order to interstate relations premised on reciprocity.<sup>18</sup> However, in the post WWII period and with the establishment of the United Nations, guided by its aim of peaceful resolution of international disputes and socio economic betterment through coordinated and concerted effort amongst states, the nature of international law started changing. The concept of justice and human rights managed to find an increasing space in the international law discourse and corpus of law. The perceived compromise of some of these ideals has been viewed as a regressive step, prompting some commentators and analysts to criticize the way in which the U.S. perhaps acts as an Empire of yesteryears, making laws for the other states to follow while considering itself to be above those same laws. President Obama's Nobel Peace Prize acceptance speech where he stated that the U.S. holds itself to very high standards in the conduct of the operation against terrorists, marks a stark contrast to actual U.S strategy.<sup>19</sup> Although in 2013 the U.S. Administration seemed to be changing its opinion on the effectiveness of the use of drones and consequently reducing their frequency, there was no concomitant change in state policy. The U.S. continues to believe that it has a right to conduct such strikes under international law. What is needed therefore is a change of stance on its legality, and not of policy or tactic.

### **The relevant international legal framework**

Targeted killing may be legal in certain circumstances however, international law imposes an obligation upon states to fulfill the requirement of transparency by being held accountable with regards to their actions.<sup>20</sup> In this way, the international community can judge if the action meets the exceptions in which the violation of this most basic right, i.e. the "Right to Life," is allowed. Various definitions have been given to the term 'targeted killing.' However the "common element in each of the very different contexts noted earlier is that lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator."<sup>21</sup> In the words of Nils Melzer, "a targeted killing is the intentional, premeditated and deliberate use of lethal force, by states or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator."<sup>22</sup>

The legality of a particular targeted killing will depend on whether the context is of an international armed conflict or non-international armed conflict. In the context of armed conflict two legal regimes shall apply, the first is the International Humanitarian Law and the second is International Human Rights

Law. In the context of non-armed conflict situation, International Human Rights Law shall apply. With regard to the violation of sovereignty of another state, in this case Pakistan, the applicable law shall be the International Use of Force.

**(A) International Humanitarian Law (IHL)**

*(1) In the context of armed conflict*

The basic rule of armed conflict is that only combatants can be targeted. Killing of civilians is, as a general rule, prohibited. A civilian can only be killed if he ‘directly participates in hostilities’ or dies as ‘collateral damage’ subject to the relevant conditions of necessity, proportionality and humanity.<sup>23</sup> Most international lawyers agree that laws of war and international human rights law are both applied in the context of an armed conflict.<sup>24</sup> The particular *lex specialis* determines the legality of a particular killing, on a case-by-case basis.<sup>25</sup>

As already discussed, war has always been a sovereign right of states subject to certain conditions; it has always been considered an honour to die for one’s country and permissible to kill for one’s country. Though fighting for one’s country is an honourable task, laws of war have always existed in some form to regulate it and define permissible targets, means and methods. Consequently some acts are allowed and some are prohibited; soldiers are allowed to kill soldiers but not civilians. Likewise spy agencies may gather intelligence information but never get involved in the killing itself. In other words, even in the most violent of human experience, ‘all is not fair.’ The ends do not justify the means. The goal posts cannot be shifted to accommodate individual situations of conflict but rather individual situations of conflict must conform to the relevant *lex speicialis*.<sup>26</sup> All military manuals, including that of the Air Force, have clear rules in accordance with IHL to conduct warfare or armed action. On the other hand, spy agencies don’t have such roles, or at least not publicly available ones, and hence rules are clandestine and secret.<sup>27</sup>

*(2) Outside the context of armed conflict*

**A. International Human Rights Law**

International Human Rights Law governs the use of force in the context outside of armed conflict. Any action taken by the states with regard to fighting terrorists and other policing actions have to meet the standard applicable under International Human Rights Law. In such situations, killing per se is not an option unless it is ‘strictly and directly necessary to save lives.’<sup>28</sup> Legal Standards

and Best Practice for Oversight of Intelligence Agencies, drawn up in 2005 for the Norwegian Parliament, recommends that “No action shall be taken or approved by any official as part of a covert action programme which would violate international human rights.”<sup>29</sup>

An important safeguard for all state actors involving alleged human rights abuses is the need for transparency and accountability. Transparency is required to ensure compliance with necessary domestic and international law. Accountability is the other side of the coin, which also aims at ensuring compliance by state actors and their agents within the relevant law. This is meant to uphold the due process and ensure compliance with legal standards. Most commentators agree that the United States is failing to meet these obligations.<sup>30</sup> Those in favour argue that such opaqueness and vagueness is necessary due to the clandestine nature of the operations. The detractors pick fault with it as they are of the opinion that states are obligated to share this information with the international community and also their own public<sup>31</sup>.

### ***B. International Law on the Use of Force***

The UN Charter strictly prohibits the use of force.<sup>32</sup> The only permissible exception lies under self-defense, covered by Article 51.<sup>33</sup> Otherwise, in the context of a non-international armed conflict, where only one of the parties to the conflict is a state, the use of force is only permitted with the consent of the host state or when the host state is either unwilling or unable to take action against the non-state actor.<sup>34</sup> Even when action is taken in self-defense, it cannot be preventive or punitive; it must be ‘proportional’ and ‘necessary.’ The basic rules are fairly non-controversial but interpretations and application of law vary and are subject to disagreements.<sup>35</sup> Disagreements occur over what constitutes armed conflict and what is permissible under the Article 51 exception of self-defense.<sup>36</sup>

The law governing the use of force amongst states is the International Law on the Use of Force. International law recognises certain instances where use of force is lawful, or in other words it is the *jus ad bellum* question. The use of force in international relations is allowed only in self-defense; otherwise it is prohibited under Article 2(4) of the UN Charter. However, self-defense is also narrowly defined through international treaty and customary law. It is exercised in the case of a ‘clear and impelling danger, in which there is no time for any other way of diffusing the threat, and the only viable option is the use of force.’<sup>37</sup> Even then the use of force is envisaged as a temporary measure till such time that the international community, under the aegis of UN, devises ways to deal with the situation. In addition, any action taken by a state in this regard has to be

reported to the United Nations Security Council, as soon as is practicable. However, the United States has yet to make its report to the United Nations Security Council.<sup>38</sup>

Once the question regarding the legality of the use of force is settled, questions of who may be lawfully targeted under the law arise. The two relevant laws are the International Humanitarian Law and the International Human Rights Law though the concerns may differ with regard to the relevant and applicable *lex specialis*.<sup>39</sup>

### ***(3) Transparency and accountability obligations***

The use of force in every context is subject to the test of transparency and accountability. States and state agencies have had the right to use force in appropriate context, under international or domestic law, whichever is applicable. State agents are allowed to use force and violence in certain circumstances within the law. However, liberal democratic states have endeavoured to ensure that state agents who so act are held accountable under the law and are subjected to transparency processes.<sup>40</sup> The purpose is to ensure that state agents are careful in their use of force and that the public is assured of the state's responsibility. The same principle applies in international law. If the state concerned does not fulfill its obligations in this context, the international community steps in to hold the state accountable and demand that the state holds itself accountable before the community in accordance with international law that represents the collective will of the international community.<sup>41</sup>

The state parties of the various International Humanitarian and International Human Rights Law treaties are obligated to establish domestic mechanisms that ensure compliance with the relevant accountability mechanisms and international accountability is put into force only when domestic mechanisms are found wanting.<sup>42</sup> In this regard, the judge is not the state concerned but the international community.

The history of warfare has realised that war is an instrument of settling disputes but has tried to define it within acceptable limits. The effort is to humanize the otherwise violent human interaction. Article 1 of the 1949 Geneva Conventions provides that all state parties undertake 'to respect and to ensure respect for the present Convention in all circumstances.'<sup>43</sup> States are obligated to investigate all extra judicial killings. If state agents are found guilty, the state is expected to publicly prosecute them and consequently impose punishments.<sup>44</sup>

## **U.S. practice with regard to drone attacks in FATA**

The U.S. has been conducting drone strikes in FATA since 2004. However, the number of drone attacks increased considerably under President Obama's first term in office.<sup>45</sup> The estimates of the number of attacks and killings vary considerably.<sup>46</sup> The official United States stance, as enunciated by Harold Hongju Koh, Legal Adviser of the State Department, and John Brennan, White House Counter Terrorism Adviser, states that the United States has a legitimate right of self-defense under international law.<sup>47</sup> This defense is troubling with regard to 'signature strikes', the concern for civilian casualties, as well as the practice of second strikes that often claim the lives of first responders.<sup>48</sup> This trend is even more troubling when it takes place outside Afghanistan and is further complicated by the fact that, by most accounts, the targets are low-level operatives who do not pose an imminent threat. Due to these factors, the arguments perhaps fail to meet the self-defense requirement of Article 51 of the United Nations Charter.<sup>49</sup>

The U.S. is reported to have established a 'kill list' of wanted men.<sup>50</sup> Reportedly an internal and secret process is conducted as a result of which suspected terrorists are put on this list. The criteria and process used in this regard is not open to scrutiny.<sup>51</sup> In addition, the U.S. conducts what are known as 'signature strikes.' These strikes are conducted on the basis of surveillance of suspected terrorists. As a result of their behaviour pattern, these suspects are put on the 'kill lists.'<sup>52</sup> The NYU-Stanford report, 'Living Under Drones' reports that the collateral damage, a euphemism for civilian deaths, is far higher than what is maintained by some officials. It is presumed that any male of a certain age group who is accompanying a suspect is also considered a suspected terrorist unless proved innocent later.<sup>53</sup> Their death is counted in the militant tally.<sup>54</sup> However, it is not known if there is any process in place to find out if those killed were not militants. It would seem highly unlikely given that the U.S. administration is not in a position to conduct such an inquiry in FATA. In addition, the same report highlights the practice of a second strike that has the potential to kill first responders who are helping the wounded.<sup>55</sup> Furthermore, based on intelligence suggesting the presence of militants, drones targeting mosques, homes and gathering of tribal elders (jirgas) result in numerous civilian deaths<sup>56</sup>.

## **Legal arguments**

The arguments in support of the U.S. government's action are essentially two fold. First, there is the U.S. government's own position, which stresses that it is acting in compliance with all relevant laws, both international as well as

domestic. The second set of arguments is put forth by a range of academics who suggest that the parameters of the current situation, its nature of being a struggle against an amorphous non-state enemy and the asymmetrical nature of warfare, legitimizes U.S. actions. This claim is further bolstered by the level of secrecy required for such warfare that aims to maximize damage to the enemy and reduce risk to informers and U.S. personnel. Harold Koh's address to the American Society of International Law (ASIL) in 2010 was the first time that the Obama Administration publically stated that it was conducting drone strikes in Pakistan's FATA areas.<sup>57</sup> The Legal Advisor went on to state that the "use of unmanned aerial vehicles complies with all applicable law, including the laws of war." He stated that "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 therefore the U.S. "may use force consistent with its inherent right to self defence under international law."<sup>58</sup>

President Obama in his Nobel Peace Prize Acceptance Speech said, "Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conflict. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard-bearer in the conduct of war. That is what makes us different from those whom we fight."<sup>59</sup> On 1 May 2012, while speaking at the Woodrow Wilson Centre, White House Counter Terrorism adviser, John Brennan, publicly stated that the U.S. was conducting a drone strike programme against Al-Qaeda. He touched upon the legality and the standards used for approval and argued that the drones' ability to precisely target the enemy helps it to distinguish between terrorists and innocent civilians.<sup>60</sup> Brennan claimed that drone strikes met the test of proportionality and fulfilled the standard of humanity by not inflicting unnecessary suffering due to the precision of the weapons. He went on to state that the list of people to be targeted is very carefully drawn up thus reducing the risk to U.S. troops.<sup>61</sup> Brennan said, "President Obama has demanded that we hold ourselves to the highest possible standards and processes." If we want other nations to use these technologies responsibly, we must use them responsibly. If we want other nations to adhere to high and rigorous standards for their use, then we must do so as well. We cannot expect of others what we will not do ourselves. President Obama has therefore demanded that we hold ourselves to the highest possible standards, that at every step, we be as thorough and deliberate as possible."<sup>62</sup>

Supporting this argument, Michael Gross opines that targeted killing is a necessary tool against non-state actors who are difficult to identify since they do not wear uniforms. Kenneth Anderson states that if a member of a terrorist

organisation is targeted unexpectedly, he fails to receive advance warning from rogue elements. By using the drone programme, the U.S. benefits from not sending its troops on-ground thus removing the need to capture a militant and preventing potential casualties.<sup>63</sup> On the issue of confidentiality, Gabriella Blum and Philip Hayman argue that in an operation against terrorists, it is permissible to keep information secret to protect the lives of informants.<sup>64</sup>

The next issue of legality is the reported CIA involvements in drone strikes. As it stands now, the issue is not covered by the Laws of War. While traditional information gathering by spy agencies is considered a factual reality, states do not consider it a legal reality.<sup>65</sup> Any protection or acceptance spy agencies enjoy is in that regard though the issue remains to be addressed by officials.<sup>66</sup>

### **Arguments against the legality of drone strikes**

The set of arguments with regard to the problems with the position stated above, are also two fold. The first is with regard to the official position as enunciated by Harold Koh and John Brennan. The second is presented by various academics. With regard to the official position, the concern is that Harold Koh, in his address to the American Society of International Law, did not share any data or sources verifying the information he provided.<sup>67</sup> Professor Alston notices that none of the controversial questions were answered. In this regard the conflict was not stated within a category or geographic scope and the contours of the right to self-defence were not defined.<sup>68</sup> In addition, the speech made no reference to the CIA.<sup>69</sup> According to Professor Alston, the U.S. Government has deliberately maintained vagueness about the role played by the agency by neither denying nor confirming its involvement in the drone programme.<sup>70</sup> However, it has been reported widely that it is in fact CIA, which has primary control of the drone operations in Pakistan.<sup>71</sup> The information available to the public is a result of the 'leaks' from the U.S. Administration. Such 'leaks' by definition put forth the Administration's point of view and only selected aspects of those actions. Even now it is generally believed that the drones programme in Pakistan is conducted by the CIA but is not officially acknowledged.<sup>72</sup> This creates problems regarding the assessment of the programme for without adequate information it is difficult to determine the legality of such actions.<sup>73</sup>

#### ***A. What is the nature and scope of the purported armed conflict?***

The problem with the legal status of U.S. actions in FATA is compounded by the fact that it is not conducted against one specific group but rather targets various factions that are at best loosely related under the 'Al-Qaeda and Taliban'

umbrella group.<sup>74</sup> Furthermore, it is unclear whether all the groups under the banner are waging a war in Afghanistan or if some are involved in other conflicts. The Obama Administration has strived to distance itself from the Bush Administration's general definition of the conflict as being a global War against Terror. Despite the difference in terminology, actual military strategy may almost be the same thus raising serious concerns.<sup>75</sup>

If the conflict is considered a non-international armed conflict, the question of the legality of the means and methods used still arises. The U.S must adhere to four important principles that include 'distinction', 'necessity', 'proportionality' and 'humanity.'<sup>76</sup> Some scholars are of the opinion that some of the people and places being targeted may not fit into the category of permissible targets, such as political and religious leaders or "financial contributors, informants, collaborators and other service providers, targeted individuals in a number of civilian settings, including homes and urban centers."<sup>77</sup> A matter of particular concern is that the vast number of individuals who are targeted are presumed to be lower level individuals.<sup>78</sup>

With regard to the official position that U.S. actions are within the domestic law, commentators including Professor Alston claim that there is no effective oversight either by the Congress or the Judiciary.<sup>79</sup> If this is the case then the need arises for the international community to demand accountability. In this regard the U.S. practice has been encapsulated by President Reagan's doctrine of 'trust but verify', which states that while statements made by foreign governments must be trusted, data must also be provided so that the international community may verify it.<sup>80</sup> Like other nations, the U.S. is also subject to the required standards for such actions in international law through treaty, or customary law requirements. In light of President Obama's Nobel Prize acceptance speech and John Brennan's reiteration of the same principles, the U.S. is also subject to standards that it is strictly speaking not a party to, such as the relevant judgments of the European Court of Human Rights and the opinions of various UN bodies, such as the Human Rights Committee, etc.

### ***B. Targeted killings under international humanitarian law***

The laws of war regulate the methods and means of warfare. A distinction has to be made between the civilians who maintain a 'continuous combatant function (CCF)' and those civilians who only take part in isolated acts.<sup>81</sup> According to the International Committee of the Red Cross (ICRC), "it is allowed to target a civilian while he is involved in a particular act of conflict, but not otherwise, whereas a continuous civilian combatant can be targeted any

### *The use of drones: legal grey area?*

time.” In this regard those being targeted in FATA are legitimate targets if they meet the continuous combatant function test. Otherwise, if not taking part in the act, they revert back to their civilian protected status.<sup>82</sup>

The NYU-Stanford study, ‘Living Under Drones’ raises concerns regarding the legality of the strikes on mosques, funerals, schools and meetings of elders (jirgas), which implies a large civilian presence.<sup>83</sup> This can give rise to legal concerns regarding the military necessity and whether sufficient precautions were taken. Especially troubling are the strikes on first responders and rescuers.<sup>84</sup> Signature strikes that are supposed to be based on behaviour patterns also raise concerns.<sup>85</sup> Human rights groups have raised serious questions regarding the short time between the first and second strike when first responders and rescue workers gather to assist the injured, asking how they can be identified as rightful targets.<sup>86</sup> In this regard, the Obama administration’s ‘guilt by association,’ unless evidence adduced later (which would be too late), categorization of all military age males killed as a result of drone strikes is deeply problematic.<sup>87</sup> The report also claims a strong correlation between political events and drone strikes thus raising doubts over the required legal criteria and questioning whether extraneous considerations, which do not fulfill the factual criteria, are taken into account.<sup>88</sup>

#### ***C. The question of the existence of an armed conflict in Pakistan***

International law has developed criteria for establishing if an armed conflict exists. Every conflict requiring action from security forces does not automatically transform a particular action in to an armed conflict.<sup>89</sup> An armed conflict requires that the violence be of a certain minimum threshold and obtain a certain intensity that lasts for certain time period, in addition to being taken against an entity that is both organised as a group and can be identified.<sup>90</sup> The situation in FATA is unique in that the U.S is fighting against a diffused group that cannot easily be identified from the civilian population. The greater problem however, is posed by the vagueness and broadness of the U.S. definition of the enemy that it is fighting: the ‘Al-Qaeda, Taliban and associated forces.’<sup>91</sup> Does this mean that the U.S. can target any one it unilaterally labels as one of the three? Is this vagueness deliberate? Should this discretion lie solely in the hands of the U.S. government? The problem of not narrowly defining military targets coupled with a law that is very broad, generally fails to provide any meaningful protection or accountability.

**D. Obligations of accountability and transparency**

Phillip Alston, former UN Special Rapporteur, is of the opinion that the U.S. Administration is deliberately indulging in ‘double hatting’, by purposefully confusing the lines between military and intelligence work and domain.<sup>92</sup> This opaqueness helps keep the legal position and debate vague and adds to the lack of clarity on the issue. At the same time, covert operations have been enhanced around the world. What Alston finds particularly troubling is that neither of these two agencies are adequately accountable to domestic oversight by the Executive, Legislature or Judiciary. In this regard he is of the opinion that the international community, in the words of former President Reagan, should ‘trust but verify’, whether the U.S. Administration’s claims of compliance with international law are accurate.<sup>93</sup>

The continued and expanding use of drones for ‘targeted killings’ has troubling aspects with regards to three elements. Firstly, it illustrates a regressive nature of international law in these areas. Secondly, it runs the risk that practices that are not legal shall gain legitimacy through expanding state practice and developing *opinio juris*. Thirdly, this means that spy agencies may get the de facto immunity for such killings; immunity that they so far only enjoy for intelligence gathering.<sup>94</sup>

The use of drones is seen as a beneficial strategy as it allows the U.S. to prevent any military casualties. Operators are not directly put in harms way and the cost incurred is much less than a comparable military or air force action.<sup>95</sup> This makes it even more urgent to evaluate and assess the legality of such attacks before such practices become a regular feature of modern warfare. John Brennan has emphasized that due care is taken in drawing up the ‘kill list.’ However, it seems that being put on such a list automatically legitimizes killing despite the many flaws and weaknesses in the process.<sup>96</sup> It needs bearing in mind that even domestic legal systems occasionally suffer from miscarriages of justice. Mistakes can easily occur with regard to a conflict situation, that too, thousands of kilometers away and shrouded in secrecy and confidentiality.

The Laws of Warfare are an attempt to humanize what is essentially inhumane, in an attempt to prove that ‘all is not fair in war.’ On the other hand, the international law of human rights has painstakingly developed a corpus of law establishing the limits on state actions in an effort to protect individual human rights. State security has a troublesome relationship with human rights

### *The use of drones: legal grey area?*

and laws of warfare, as it is in relation to this that the commitment of a state to these two sets of laws is fully tested.

International law experts have raised a number of issues with regard to the legality of the drone programme being conducted in Pakistan. These include, amongst others, the argument that terrorism is a 'law enforcement issue' and therefore falls short of an armed conflict issue. Then there is the question of *jus ad bellum*: firstly the U.S. is not at war with Pakistan; secondly, Pakistan has at times taken action against non-state actors; thirdly, in the absence of a sufficiently 'imminent' threat to the U.S. there may be other options available.<sup>97</sup> The establishment of a kill list, drawn up on the basis of detailed observation and scrutiny, belies the immediacy and imminence test. Finally the strikes on civilians and places such as homes, mosques, and schools also raise concerns.<sup>98</sup> This implies that the requirement established by UN Charter and under customary international law, is not fulfilled.<sup>99</sup>

It is only a matter of time before drone technology becomes sufficiently widespread and is used by other states that the U.S. may not consider 'responsible' states. This would not only pose an imminent threat to the international community but could also considerably weaken U.S. efforts of not allowing other states to use the same technology.<sup>100</sup> There are concerns that the requirement of 'distinction' is not being maintained in this conflict. It is perhaps in this regard that Lord Bingham, a senior Judge in Britain, suggested that "unmanned drones that fall on a house full of civilians [are weapons] the international community should decide should not be used."<sup>101</sup> Additionally, Unmanned Aerial Vehicles (UAVs) have so far been used in armed conflict situations but commentators believe that it is only a matter of time before they are used in the areas of policing and violent situations that fall short of armed conflict thus complicating the legality question even further.

Admiral Stansfield Turner, former CIA Director, is alleged to have remarked that, "The FBI agent's first reaction when given a job is, 'How do I do this within the law?' The CIA agent's first reaction when given a job is, 'How do I do this regardless of the law of the country in which I am operating?'"<sup>102</sup> The vagueness of the U.S. Administration's policy in this regard can make meaningful discussion difficult and in the absence of concrete facts, the international and scholarly community can only speculate the legality of such actions. Professor Alston, however maintains that this is probably intentional.<sup>103</sup> Accountability is only possible if facts are made available and in their absence nor the U.S. press nor the international community can conclusively judge the legality and necessity of such actions. This can have the potential to undermine the Administration's

commitment to the rule of law, which it reiterates time and again.<sup>104</sup> Furthermore, due to the differing factual nature of each attack, perhaps each incident has to be separately examined to conclude whether it fulfills the legality test, with regard to both *jus ad bellum*, the reason war is fought, and *bello*, the methods used to fight it.<sup>105</sup>

### ***E. Issue of self-defense***

The issue of self-defense is applicable when the host states allows this or when the host state is either unwilling or unable to take action on its own.<sup>106</sup> Some confusion persists regarding the Pakistani government's consent to the drone programme conducted before 2011. Though no clear statements are available in its favour, since 2011 the Pakistani government, the Foreign Office as well as the Parliament have been unequivocal in their assertion that drone strikes in FATA are illegal and a violation of Pakistan's sovereignty.<sup>107</sup> Many commentators in the West feel that Pakistan is not taking action and hence the U.S. government must intervene. 'Living Under Drones', clarifies that Pakistan has at times shown both the willingness and the ability to take action. So the legal arguments and the justification of taking action within Pakistani territory, without Pakistan's consent, becomes doubtful.<sup>108</sup>

A third argument put forth is that of anticipatory self-defense to deal with evolving threats to the security of another state and its people by conducting pre-emptive strikes. All such strikes have to have some threshold of factual reality to pass the acceptable standard of legality. There are problems with this concept as the threshold is not clearly defined nor is it a fully accepted legal right. For such a reasoning to be acceptable, state practice and the relevant treaty or customary law must be examined. Traditionally, such actions have not been supported and the U.S. itself has previously been critical of such actions conducted by other states.<sup>109</sup> Laws cannot be changed to accommodate state necessity. Laws can only be changed through acceptable methods of law development, which in the domain of international law are treaty and custom. For 'anticipatory' self-defense to be operative, the qualifying attack must be "instant, overwhelming, and leaving no choice in response to an armed attack - either as a response to the attacks of choice of means, and no moment of deliberation."<sup>110</sup> This standard seems to be absent with regard to drone attacks in FATA. The U.S. practice of preparing 'kill lists' which are maintained for long periods of time and serve as the premise for carrying out 'signature strikes' show that the threat does not meet these requirements.<sup>111</sup> In an anticipatory self-defense the state is not supposed to have time to decide on alternative methods or means.<sup>112</sup> In addition, the current UN Special Rapporteur on extrajudicial, summary or arbitrary executions,

## *The use of drones: legal grey area?*

Christof Heyns, has raised concerns asking whether “killings carried out in 2012 can be justified as in response to events in 2001?”<sup>113</sup> While every state has a legitimate right to self-defense, it does not possess the ability to change or redefine a law to which it is equally subjected as any other state.

Domestic oversight bodies as well as the media in the U.S. can ensure that the Administration is complying with the relevant standards that the government has itself helped to evolve and uphold.<sup>114</sup> Vagueness and reticence to share information undermines the U.S. assertion of self-defense. The use of force by the U.S. military is determined by the International Law on the Use of Force. Regardless, drone strikes must comply with either the laws relevant to a situation of non-international armed conflict in which case the action has to be in accordance with International Humanitarian Law; or if an armed conflict does not exist and it is a policing action, then it has to be in accordance with International Human Rights Law.<sup>115</sup>

### ***F. Human Rights Law***

In the event that a conflict is not an armed conflict, then International Human Rights Law (IHRL) applies. Under International Human Rights Law deliberate use of force for targeted killing is only allowed when there exists a direct threat to life and no other means exist of removing the perpetrator.<sup>116</sup>

Commentators raise concerns specifically regarding ‘signature strikes’, strikes on first responders, the lack of an imminent threat and the preparation of a kill list.<sup>117</sup> As noted earlier, international accountability assumes particular and even critical importance when domestic mechanisms do not function effectively. The European Court of Human Rights (ECtHR) in a judgment in the case of *Al-Sekeni and Others vs The United Kingdom* held that “the general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities,” and that “related obligations also apply in the context of armed conflict.”<sup>118</sup> Admittedly the U.S. is not a party to the European Convention of Human Rights, hence is not subject to the jurisdiction of the ECtHR. Even if the judgments of the ECtHR, the leading body on human rights protection and norm setting, are not binding on the U.S., it’s status of setting international norms apply fully to those who claim to uphold ‘the highest moral standards.’

## Conclusion

The above discussion leads to the conclusion that the legality of U.S. actions with regard to drone strikes in FATA does not satisfy the legality tests established through treaty and customary international law. With regard to such actions by other states, successive U.S. Administrations have expressed disapproval in the past. Whether commentators and other states agree with this claim or not, the U.S. has always prided itself on the moral stand it takes in international relations and law. The current U.S. Administration has also reiterated its commitment to the rule of law and its adherence to the relevant UN resolutions that stress the importance of human rights law and the fact that they cannot be compromised.<sup>119</sup>

In addition to the legal arguments, scholars also necessitate that the U.S. not just follow the law but also make sure that the ‘law is seemed to be followed.’ These include the prevention of the future use of drones by other states that may possibly quote the U.S. precedent.<sup>120</sup> If not exercised, this would threaten the very basis of law as it stands at the moment with regard to the right to life and the controls established over the use of force and the laws of warfare. Scholars or any government agency that opposes such action runs the risk of institutionalising into law a practice that would disturb the carefully established edifice of laws that need to be protected and not changed or re-interpreted in any way. Professor Alston argues that “from the perspective of both domestic and international law, the practice of secret killings conducted outside conventional combat settings, undertaken on an institutionalized and systematic basis, and with extremely limited if any verifiable external accountability, is a deeply disturbing and regressive one.<sup>121</sup> These developments threaten to do irreparable harm to the international legal framework designed to establish and uphold foundational protections for the right to life and human dignity.”<sup>122</sup>

There are two sources of international law: treaties, and customary international law. Customary international law is developed through a combination of state practice and *opinio juris*. In this regard, the United States, as the sole super power, plays a significant role in the development of new rules. It is because of this that the United States must remain mindful of the fact that its position is not ‘exceptional’ but rather as a member of the international community, it must cooperate to form new laws and be equally subject to the same. In other words, the principle of Rule of Law applies on the international level as well.<sup>123</sup> No state can legally claim exceptions for itself or take any action that directly or indirectly leads to such a conclusion.

## Notes & References

---

- <sup>1</sup> Kenneth Anderson, “Predators over Pakistan”, *WEEKLY STANDARD*, Vol. 15, No. 24, (March 2010), p.26.
- <sup>2</sup> Phillip Alston, “The CIA and Targeted Killings Beyond Borders” *New York University Law Sch. Pub. Public Law & Legal Theory Research Paper Series*, Working Paper No.11-64 (2011), p. 14.
- <sup>3</sup> Thomas Buergenthal, *International Human Rights*, West Publishing, 2<sup>nd</sup> Edition, 1996, p.22,.
- <sup>4</sup> Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, Routledge, 7<sup>th</sup> Ed, 1997, p.27.
- <sup>5</sup> Ahmad Nazir Warraich, Unpublished submission at ICJ Panel Pakistan Hearing of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, Islamabad, 5 March 2007.
- <sup>6</sup> Alston, “The CIA and Targeted Killings Beyond Borders”, p. 4.
- <sup>7</sup> *Ibid.*, 34
- <sup>8</sup> *Ibid.*, 34.
- <sup>9</sup> *Ibid.*, 23.
- <sup>10</sup> “Living Under Drones: Death, Injury, And Trauma to Civilians From US Drone Attacks in Pakistan” *Stanford International Human Rights and Conflict Resolution Clinic (Stanford Sch. of Law) & Global Justice Clinic (NYU Sch. of Law)*, 11, Working Paper, September, 2012, p.123. <http://livingunderdrones.org/>
- <sup>11</sup> Harold Hongju Koh, “The Obama Administration and International Law”, Keynote Speech at the Annual Meeting of the American Society of International Law, March 24 2010 (hereinafter “Koh ASIL speech”)
- <sup>12</sup> ICRC. “What is international humanitarian law?”
- <sup>13</sup> Alston, “The CIA and Targeted Killings Beyond Borders”
- <sup>14</sup> *Ibid.* p. 7-8.
- <sup>15</sup> The News. “UN General Assembly adopts unanimous resolution against drone strikes.” Accessed May 20, 2014. <http://www.thenews.com.pk/article-130949-UN-General-Assembly-adopts-unanimous-resolution-against-drones-strikes>.
- <sup>16</sup> Alston, “The CIA and Targeted Killings Beyond Borders”, p.4
- <sup>17</sup> Henry Kissinger, *Diplomacy*, Simon & Schuster, 1994, p.18.
- <sup>18</sup> Malanczuk, *Akehurst’s Modern Introduction to International Law*, p.23.
- <sup>19</sup> *Ibid.*, 27.
- <sup>20</sup> Michael Gross, Response to “Notes on Asymmetric War”, at <http://www.currentintelligence.net/reviews/2011/2/15/notes-on-asymmetric-war.html>
- <sup>21</sup> ICRC. “What is international humanitarian law?” Accessed May 20, 2014. <http://www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm>.
- <sup>22</sup> *Ibid.*
- <sup>23</sup> *Ibid.*, 14.
- <sup>24</sup> *Ibid.*
- <sup>25</sup> *Ibid.*
- <sup>26</sup> *Ibid.*, 14.

- 27 *Ibid.*, 8 Para 2  
28 *Ibid.*, 16.  
29 *Ibid.*, 5.  
30 *Ibid.*, 56.  
31 *Ibid.*  
32 U.N. Charter art. 2, para.4 . *available at*  
<http://www.un.org/en/documents/charter/chapter1.shtml>.  
33 U.N. Charter art. 51 *available at*  
<http://www.un.org/en/documents/charter/chapter7.shtml>.  
34 Alston, “The CIA and Targeted Killings Beyond Borders”, p.17  
35 *Ibid.*, 17.  
36 *Ibid.*, 17.  
37 “Living Under Drones” p.107-108.  
38 *Ibid.*, 123.  
39 Alston, “The CIA and Targeted Killings Beyond Borders”, p.17  
40 *Ibid.*, 78.  
41 *Ibid.*, 107.  
42 *Ibid.*  
43 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and  
Sick in Armed Forces in the Field. Art. 1, (12August 1949), 75 UNTS  
31, <http://www.unhcr.org/refworld/docIbid/3ae6b3694.html>  
44 Alston, “The CIA and Targeted Killings Beyond Borders”, p.21.  
45 “Living Under Drones”, p.12.  
46 Alston, “The CIA and Targeted Killings Beyond Borders”, p.34-36.  
47 *Ibid.*, 28.  
48 *Ibid.*, 36-37.  
49 *Ibid.*, 36-37.  
50 *Ibid.*, 37.  
51 Anatol Lieven, *Pakistan: a Hard Country*, PublicAffairs, 2011, p.383 .  
52 “Living Under Drones” September 2012.  
53 *Ibid.*, 116.  
54 *Ibid.*  
55 *Ibid.*, 115.  
56 *Ibid.*, 36.  
57 Alston, “The CIA and Targeted Killings Beyond Borders”, p.28  
58 “Living Under Drones” p.104  
59 The White House. “Remarks by the President at the Acceptance of the Nobel Peace  
Prize.” Accessed May 25, 2014.  
<http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.  
60 *Ibid.*  
61 *Ibid.*  
62 *Ibid.*, 104.  
63 Alston, “The CIA and Targeted Killings Beyond Borders”, p.6.

- 64 Mary Ellen O'Connell. "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009." *Shooting to Kill: The Law Governing Lethal Force in Context*, edited by Bronitt at <http://ssrn.com/abstract=1501144>
- 65 Alston, "The CIA and Targeted Killings Beyond Borders", p.63.
- 66 *Ibid.*, 29.
- 67 *Ibid.*, 28.
- 68 *Ibid.*
- 69 *Ibid.*, 29.
- 70 *Ibid.*
- 71 *Ibid.*, 34
- 72 *Ibid.*
- 73 *Ibid.*, 60.
- 74 *Ibid.*
- 75 *Ibid.*, 77.
- 76 *Ibid.*, 112
- 77 *Ibid.*, 77.
- 78 *Ibid.*, 129.
- 79 *Ibid.*
- 80 *Ibid.*, 118.
- 81 "Living Under Drones" p.113.
- 82 *Ibid.*, 113.
- 83 *Ibid.*, 104.
- 84 *Ibid.*
- 85 *Ibid.*
- 86 *Ibid.*, 116.
- 87 *Ibid.*
- 88 *Ibid.*, 117-118.
- 89 *Ibid.*, 110.
- 90 *Ibid.*
- 91 *Ibid.*, 119.
- 92 Alston, "The CIA and Targeted Killings Beyond Borders", p.7-8.
- 93 *Ibid.*, 112.
- 94 *Ibid.*, 4.
- 95 *Ibid.*
- 96 *Ibid.*
- 97 "Living Under Drones" p.109.
- 98 *Ibid.*, 82.
- 99 *Ibid.*, 113-114.
- 100 Supra note 2, at 113.
- 101 Alston, "The CIA and Targeted Killings Beyond Borders", p.30.
- 102 *Ibid.*, 14.
- 103 *Ibid.*, 29.
- 104 *Ibid.*, 26.
- 105 *Ibid.*

- 106 “Living Under Drones” p.105.  
107 *Ibid.*, 139.  
108 *Ibid.*, 108-109.  
109 Alston, “The CIA and Targeted Killings Beyond Borders”, p.26.  
110 “Living Under Drones” p.108.  
111 *Ibid.*  
112 *Ibid.*, 105.  
113 *Ibid.*, 107.  
114 Alston, “The CIA and Targeted Killings Beyond Borders”, p.86.  
115 *Ibid.*, 110.  
116 *Ibid.*, 117.  
117 *Ibid.*  
118 “Koh ASIL speech”, at <http://www.state.gov/s/l/releases/remarks/139119.htm>  
119 Resolution adopted by the General Assembly, [(A/66/462/Add.2)], 30 March 2012.  
120 Alston, “The CIA and Targeted Killings Beyond Borders”, p.32.  
121 *Ibid.*, 7.  
122 *Ibid.*  
123 “Targeting Operations with Drone Technology: Humanitarian Law Implications”,  
Background Note for the American Society of International Law Annual Meeting,  
Human Rights Institute, Columbia Law School, March 25, 2011.