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Mumtaz Zahra Baloch[**]

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Views expressed in the article are those of the author and should not be attributed to the ISSI in any way.

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EDITORIAL TEAM

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CONTENTS

EXECUTIVE SUMMARY

Sovereignty is a fundamental attribute of a nation-state and a basic precept of public international law. While the concept of sovereignty has evolved over the years, the basic premise of the notion of sovereignty stays the same and territorial integrity and inviolability of national borders remain sacred principles in international law and inter-state relations.

Territorial Air Space and the Use of Drones in Peacetime

Unauthorized entry of drones in a foreign country during peacetime interferes with state sovereignty. Contemporary International Air Law recognizes the exclusive and absolute sovereignty of a state over its airspace. The Chicago Convention 1944 restricts over-flight/landing of aircraft of all state aircraft[1] over the territory of another State or land thereon without authorization. "If the drones could be categorized as 'state aircraft', these would not be allowed to enter the airspace of another country for any reason (reconnaissance or otherwise), without express authorization of that state. Furthermore, Article-8 of the Chicago Convention prohibits over-flight by 'pilotless aircraft'." This would imply that drones, which by their very nature are pilotless, cannot be operated, unless expressly authorized, over the territory of another state.

The Use of Drones and State Sovereignty: The Case of Pakistan

Under international law, state aircraft are not permitted to enter the sovereign territory of another except under the following conditions:

i. In case of war/armed conflict
ii. When mandated by the United Nations
iii. Express consent of the state concerned

(i) Condition of War/ Armed Conflict

International law is by definition the law governing inter-state relations and the UN Charter governs relations between member states. Article-2(4) dealing with prohibition of the threat or the use of force and Article-51 on the right of self-defense, therefore, apply to states.

Legal opinion differs on whether a state can lawfully invoke self-defense against individuals in another state, without going to war with that state. The United States has made a claim that it can.

It has, however, relied on the "unwilling or unable" argument as a valid and sufficient legal justification for the use of force against a sovereign state.

Lack of clarity around the target of the US drone operations is a relatively recent development. There was no confusion in September/October 2001 about the target of the US invasion of Afghanistan– Osama Bin Laden/Al-Qaeda for the 9/11 attacks and the Taliban Government for harboring them. Furthermore, legal grounds had been prepared in years leading up to the 9/11 attacks.[2] There was thus a growing international recognition including at Security Council that the acts of Al-Qaeda were closely aligned with and supported by the Taliban.

Such a co-relationship has not been directly established in case of drone strikes inside Pakistani territory. There are no indications that the US strikes are wilfully intended against the Pakistani state or that conditions of armed conflict, as defined in international law, exist between the two countries. Nor has the link been established between the state of Pakistan and Al-Qaeda and its allies. In Congo v Uganda, ICJ determined that Congo's inability to prevent these attacks did not give rise to Uganda's right to intervene militarily in the Congolese territory. This implies that unless Al-Qaeda attacks against the United States are clearly attributable to Pakistan, the US drone strikes against targets inside Pakistan would be illegal.

(ii) Condition of UN Mandated Mission

The US response to 9/11 attacks was not mandated by the UN although the Security Council had accepted its right to self-defense. After deposing the Taliban in November 2001, the United States brought the issue before the Security Council, which passed Resolution 1378 supporting the transition process in the post-Taliban Afghanistan.

A study of the many resolutions on Afghanistan, Taliban and Al-Qaeda/OBL - both before and after the war - suggests that at no point the Security Council decided to extend the military campaign against Al-Qaeda beyond the borders of Afghanistan. Furthermore, unlike in the case of Afghanistan under the Taliban, when a concerted effort was made at the UN to establish the responsibility of the Taliban for acts by Al-Qaeda, there is not apparent trend to link Al-Qaeda and Taliban to the state of Pakistan.

The UNSC has a robust regime to designate terrorists from Al-Qaeda, Taliban and associated groups. Separation of the Al-Qaeda and Taliban sanctions regimes in 2011 was motivated by the desire on the part of the United States and Afghanistan to facilitate political reconciliation in Afghanistan. Furthermore, UNSC resolutions against Al-Qaeda and the Taliban construct a preventive regime based on the law enforcement model and do not authorize targeted killings. UNSC has not taken any action to hold a state (apart from Taliban-led Afghanistan) responsible for actions of terrorists in its territory. Although some of the designated individuals have been killed in drone strikes, many of those targeted are not on the UN list of designated individuals.

(iii) Condition of State Consent

A state can legally conduct targeted strikes inside another with the consent of the state concerned. There are differing views on whether this consent exists or not in case of US strikes inside Pakistani territory. Pakistan has claimed its sovereignty over its airspace and publicly opposed US drones strikes inside its territory. The US officials have suggested that their drone operations in

Pakistan are being conducted with the consent of Pakistan – a claim rejected by Pakistan.

Media reports suggest that some kind of bilateral understanding - "an unspoken deal" - with Pakistan to this effect had been reached with General Pervez Musharraf, the then military ruler of Pakistan. Although claims of Pakistan's consent to the drones program in the past remain controversial, there is little confusion on the current state of play. Since 2011, Pakistan has become more forthright in its demands for an end to the program. The controversy generated by the drone program in Pakistan and its public opposition has raised critical challenges of compliance with international law.

Legal Implications of Violations of State Sovereignty

After the eviction of all US military and intelligence drones from Pakistan in 2011, the United States now relies on Afghanistan to serve as a staging ground for drone strikes in Pakistan. This has legal implications for all three countries.

***Role of Afghanistan*:** The use of Afghan territory by the United States to conduct drone operations against Pakistan raises legal and political questions about the role of Afghanistan. Under international law, unless Afghanistan is itself in an armed conflict with its eastern neighbor, it would not be legal to authorize the use of its territory for drone strikes against Pakistan.

It is not publicly known whether Islamabad has protested to Kabul the use of Afghan territory by the United States in launching drone operations inside Pakistan. Afghanistan's role becomes more problematic when the drone flights were deemed a violation of international law. Legal implications would be different when these operations take place with the consent of the Afghan Government and when the Afghan consent is not taken.

Pakistan-Afghanistan Border: Pakistan has been concerned about maintaining the sanctity of the Pakistan-Afghanistan border. Unlike the case of drone strikes (where Afghan role has received rare criticism from Pakistan), Pakistan has protested incidents of

border violations whenever Afghan soldiers are involved in ground operations inside Pakistani territory. Such public statement are made to send a strong message to Afghanistan that border violations whether by Afghans or by the US troops would not validate Afghan claims about the border. Its silence in case of drone strikes would have an opposite result.

***Continuity of the Drone Program Beyond 2014*:** The end of US combat mission in Afghanistan in 2014 would mean that the "self-defense" argument would not be valid anymore as a legal basis for drone strikes inside Pakistani territory. The Enduring Strategic Partnership Agreement concluded in May 2012 reaffirms that "the presence of the US forces in Afghanistan since 2001 are aimed at defeating Al-Qaeda and its affiliates." It also states that the US shall not "use Afghan territory or facilities as a launching point for attacks against other countries." The continuity of drone attacks after the end of combat operations raises serious questions about their legality.

***Duration and Geographic Scope of the Conflict*:** The United States has taken an expansive view of its right to self-defense under Article-51. By expanding the definition of its target from Al-Qaeda to "Al-Qaeda and associated groups", it has extended the breadth and duration of the conflict. Legal question have arisen on how broad can be the scope of an act of self-defense.

***Pakistan's Response*:** Despite its deep concerns about the violation of its sovereignty by the US drones, Pakistan's reaction has mostly been in the form of public statement and demarches. This does not match with the strong reaction after the Salala border incident in 2011 when Pakistan closed down the supply routes of the US forces in Afghanistan. Its muted response is cited by its detractors as evidence of Pakistan's consent. However, repeated public objections make Pakistan a 'consistent objector', thus giving it a crucial voice in case of emerging international norms.

International Custom and State Sovereignty

International acceptance of the US drone program inside

Pakistani territory, over Pakistan's objections (especially after 2014) could potentially lead to the creation of new norms in international law. These would include: (i) unending duration and geographic scope of a conflict; (ii) limitations on state sovereignty because of the presence of non-state actors; (iii) dilution of the notions of imminence and proportionality; and (iv) use of a state's territory, despite its objection, to launch strikes against another.

There is no indication that there is an emergence of a new legal norm regarding state sovereignty. The conditions for acceptance of a practice as an established custom in international law[3] do not exist. The international community has not accepted the liberal interpretation by the United States of the notion of self-defense, including its understanding of the elastic nature of the duration and geographic scope of the conflict. In addition to Pakistan's repeated protests, both private and public, on violation of its sovereignty by the US drones other countries and a growing number of international bodies and legal experts have expressed concerns about the US drone policy. International legal community does not have consensus on the validity of "unwilling or unable" to invoke self-defense and there is preponderant jurisprudence of ICJ that contradicts this notion. Pakistan has become a persistent objector to the drone strikes. Afghanistan has publicly termed the strikes as unhelpful. And the UN special mechanisms have called attention to the weakness of imminence and proportionality standards in the US drones policy.

Conclusion

The above discussion leads us to conclude that the use of drones by a country in the absence of state consent and self-defence criteria and without the cover of UN resolutions would have serious implications for state sovereignty. Furthermore, unilateral and persistent use of this policy by one state over a considerable time period in the absence of international consensus on legality of this practice does not lead to the emergence of a new legal norm in international law.

IMPLICATIONS OF THE USE OF DRONES ON THE NOTION OF STATE SOVEREIGNTY

Introduction

Lydia de Beer defines drone or Unmanned Aircraft System (UAS)[4] as a "powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload."[5] The US arsenal of armed drones consists of Predator and Reaper.

Rapid increase in the use of drones by the United States in Pakistan, Yemen and Somalia over the last few years has received international attention. Legal scholars both in the United States and in other countries have attempted to assess the impact of their use on the international law. There is a robust body of literature on the use of drones and the notions of self-defense and targeted killings. This paper is a study of the impact of the use of drones on the notion of sovereignty.

As we explore whether unrestricted use of drones is creating a new norm of sovereignty, we will first discuss the notion of state sovereignty in international law, its evolution over the years, and the centrality of inviolability of borders and territorial integrity in international law. We will then evaluate if the use of drones by the United States in areas outside conflict zones is creating a new precedent in international law with a special focus on the case of Pakistan.

The Notion of State Sovereignty in International Law

Sovereignty is a fundamental attribute of a nation-state and a basic precept of public international law. Under the classical system of international law "sovereignty is clearly an absolute. A polity either is or is not sovereign."[6] The nation state thus has the following characteristics: effective control/sovereignty over a definite territory, permanent population, and legal government. In

his *magnum opus* on international law, Wolfgang Friedmann said:

> "international law is based upon (the principles of) national sovereignty, the equality of states, territorial integrity, and non-interference."[7] He considered these principles as the basis of peaceful coexistence of states regardless of their social and economic structure.[8]

These principles became the basis of European political and legal system following the Peace of Westphalia in 1648.[9] Westphalian sovereignty was thus the concept of "nation-state sovereignty based on two principles: territoriality and the exclusion of external actors from domestic authority structures."[10] It was the idea of external sovereignty, which together with the transformation of medieval feudal structures into the modern state, led to the development of modern international law.[11] According to Prof. Giovanni Distefano of the Geneva Academy of International Humanitarian Law and Human Rights, "with the Peace of Westphalia in 1648, there was the definite completion of a process that had begun four centuries before, to say the least. In other words, the State, as territorial entity, emerges as a defined and primary subject of the contemporary international order. This horizontal character of the new international order presupposes the centrality of the territory and the effective deployment of sovereign powers over it."[12]

Territoriality and Sovereignty: The concept of state sovereignty lies at the core of international law, and includes, among other things, the state's "right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law."[13] Friedmann lists territorial sovereignty as a traditional attribute of legal sovereignty in international law[14] and Oppenheim asserts that there are two kinds of sovereignty possessed by each State: *dominum*, or territorial sovereignty, which is supreme authority over all persons, items, and acts within that state's territory and *imperium*, or personal sovereignty, which is supreme authority over all citizens of that State, be they at home or abroad.[15] This concept has been elaborated by Giovanni Distefano as follows*:*

> "Indeed, the State exercises its powers not on a land itself (dominium) but rather within the space subject to its sovereignty (i.e. imperium) and with regard to individuals (physical and moral entities) therein. The said space would constitute the sphere of territorial validity of State's jurisdiction, that is to say, its territorial jurisdiction."[16]

In this paper, we are concerned only with the first category of the notion of state sovereignty.

The principle of territorial jurisdiction and its relationship with state sovereignty was reaffirmed by the Permanent Court of International Justice[17] in the case of S.S. Louts between France and Turkey, "the right of jurisdiction over its own territory is an attribute of (state) sovereignty."[18] The court said: "the exercise of its right of sovereignty and of its territorial jurisdiction, principles (which) have been definitely recognized in international law […]. It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied. The benefit of this principle equally ensures to all independent and sovereign States, and is attended with a corresponding responsibility for what takes place within the national territory […] following principles of international law: that the jurisdiction of a State over the national territory is exclusive."[19]

From the exclusivity of jurisdiction arises the right to be protected from foreign intervention and aggression. This principle was enunciated as an obligation of states in the Covenant of the League of Nations: "The Members of the League undertake to respect and preserve against external aggression the territorial integrity and existing political independence of all Members of the League."[20] The UN Charter solidified the principles of sovereignty, equality and territorial integrity. It also upheld the principle of pacific settlement of disputes and prohibited the threat or use of force against other states.

By virtue of Article-2(1) of the Charter, United Nations is an

organization "based on the principle of the sovereign equality of all its Members." The principle of 'sovereign equality' was not new in 1945. Oppenheim had explained this concept in early 20th century in the following manner: "States are by their nature certainly not equal as regards power, extent, constitution and the like. But as members of the community of nations they are equals whatever differences between them may otherwise exist."[21]

In their commentary on the UN Charter, Bruno Simma et al. explain that by combining the two concepts of 'sovereignty' and 'equality' in the term 'sovereign equality', the drafters underlined the equality of states before the law. 'Sovereign equality' also means that states enjoy the same legal personality, regardless of the terms of geographic size, population, military power or economic strength.[22] Members remain sovereign states because the limits on their sovereignty in terms of UN membership are based on treaty arrangement. When read with Article-2(7), it becomes clear that the states are not, by reason of membership in the UN, deprived of their sovereignty.[23] United Nations thus provided a balance between the legal equality of states (as in case of the League of Nations) and the predominant position of the victors of the World War (by giving them special role in matters of peace and security).[24]

Distefano explains the sovereignty principle in the Charter as follows: "It suffices to think toArticle-2(1) of UN Charter, which spells out the 'sovereign equality' of Member States, as the fundamental principle on which the UN has been built upon. Therefore, one can even argue that the international order, so far, is essentially a territorial order."[25]

State responsibilities under the Charter were elaborated by International Law Commission in December 1949 as the Draft Declaration on Rights and Duties of States.[26] Although the UN General Assembly (UNGA) did not adopt the draft declaration, this document has received attention of legal experts as a good basis to understanding the thinking of the International Law Commission on the concept of sovereignty in the Charter.

Of particular interest to us are Article-2 and Article-14 of the

draft declaration. The concept behind Article-2, which stipulates: "Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law", is explained by Hans Kelsen[27] as follows*:* "The exercise of jurisdiction is exclusive, insofar as a state is allowed to exercise jurisdiction over its citizens only in its own territory. This exclusive right is the reflection of the duty of other states to refrain from the exercise of jurisdiction in the territory of a state, except with the consent of that state. This duty is implied in the duty of a state to respect the territorial integrity of other states, which comprises not only the duty to refrain from the threat or use of force against the territorial integrity of another state (Article-9 of the draft Declaration), but also the duty to refrain from performing acts of jurisdiction (usually called acts of sovereignty) in the territory of another state. If a state in the territory of another state performs, without the latter's consent, an act of jurisdiction not constituting any threat or use of force, for instance, an act of investigation, it violates its duty to respect the territorial integrity of the other state, without violating the principle formulated in Article-9."[28]

Article-14 of the draft declaration placed a limit on state sovereignty: "Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law." Kelsen terms this Article as "entirely superfluous", as it could be interpreted to mean that, "by international law only relations among states, and not relations between a state and individuals, can be regulated. If such an instrument speaks of 'sovereignty' without defining this term in a way compatible with international law, it might be assumed that it recognizes sovereignty as an essential quality of the states, and that it must be interpreted under this presupposition."[29]

The confusion generated by some of these principles and the decision by the UN General Assembly not to adopt the draft Declaration was cleared in 1970 with the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States. The General Assembly

addressed the principles embodied in the UN Charter, including the principle of sovereign equality.[30] It listed the following as elements of sovereign equality: "(a) States are juridically equal; (b) Each state enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable; (e) Each State has the right to freely choose and develop its political, social, economic, and cultural system; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States."[31] The General Assembly thus reflected the existing customary international law,[32] by retaining the concept of sovereignty of Article-2 of the Draft Declaration on Rights and Duties of States, while leaving out the confusion generated by Article-9 of that document.

The principle of territorial integrity further solidified over the years with the adoption of other international declarations and agreements. The Final Act of the 1975 Conference on Security and Co-operation in Europe enumerated inter alia the principles of: (i) sovereign equality, respect for the rights inherent in sovereignty; (ii) refraining from the threat or use of force; (iii) inviolability of frontiers; and (iv) territorial integrity of states.[33]

The concept of sovereignty has evolved since the creation of the United Nations in 1945. International agreements increasingly restrict a state's freedom to take action both internationally and domestically. By joining the United Nations and adhering to the Charter, states agree to collective self-defense and to accept the authority of the Security Council (UNSC) in matters of peace and security. Resolutions of the Security Council are binding on Member States, even if they relate to issues exclusively within their domestic domain. Similarly, human rights treaties and labor conventions have constricted the freedom of states to legislate and a state finds itself isolated when it massacres its own people or infringes on their human rights.

Craig Forcese of University of Ottawa, Canada states: "No state now operates with unfettered sovereignty, unconstrained by other doctrines of international law. While these international obligations

– to the extent they stem from treaties entered into (or not) by states – may vary between states, and some states may honor their obligations more assiduously than others, international law does provide a yardstick for criticizing (or defending) state conduct."[34]

The tension between what Wolfgang Friedmann calls "surviving symbols of national sovereignty and realities of our times", expresses itself in the "conflicting tendencies of contemporary international law."[35] Notwithstanding these tensions, the basic premise of the notion of sovereignty stays the same. States voluntarily give up certain aspects of their sovereignty by joining international and regional organizations hoping to benefit from the international system and to seek reciprocal changes in behavior of other states. By joining environmental regimes, for example, states agree to take domestic measures with the aim of forcing reciprocal measures from other states for the common good. Similar drive for enlightened self-interest makes most states to join trade promotion and arms control treaties.

Friedman explains this trend by identifying two categories of international law. *International Law of Coexistence* is the traditional sphere of diplomatic relations represented by the classical international law. It is based on rules aimed at the peaceful coexistence of all states regardless of their size and wealth. This body of law pertains to "rules governing the limits of national territories and of territorial jurisdiction; the jurisdictional and diplomatic immunities of foreign sovereigns; […] the adjustment of the rights of belligerent states and neutral states in the rules of war and neutrality; and the formal implementation of these principles by custom, treaty or adjudication." The *International Law of Cooperation*, on the other hand, deals with the emerging trend of inter-state cooperation to address new challenges in the form of treaties or international organizations. Friedman sees this as a "move of the international society, from an essentially negative code of rules of abstention to positive rules of cooperation."[36]

The above distinction by Friedman leads us to infer that despite the evolving notion of sovereignty, territorial integrity and inviolability of national borders remain sacred principles in

international law and inter-state relations. Distefano believes that "territory and its normative translation, that is territorial sovereignty, is still the cornerstone of contemporary international legal order, as Article-2(1) of the United Nations Charter solemnly declares."[37]

In the afore-mentioned S.S. Lotus Case,[38] the Permanent Court of International Justice ruled: "the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. […] A State (should) not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty. […] The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty."[39]

The UN itself has reiterated this understanding on several occasions. Even when the General Assembly endorsed 'Responsibility to Protect' - seen by many as a strike against the notion of state sovereignty - it included the following language in the document: "We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations."[40]

Territorial Air Space in International Law and the Use of Drones in Peacetime

In the above discussion we established that despite the evolution of the notion of sovereignty, territorial integrity and inviolability of borders remain soundly anchored in contemporary international law. I will now explore how unauthorized entry of drones in a foreign country during peacetime interferes with state sovereignty. The issue of breach of airspace in case of war is governed by the law of war, which I will address in the next section.

Recognition of the legal rights of a state over its airspace is not new and is even older than the invention of the first aircraft. Historical Survey of International Air Law Before the Second World War points that the Romans considered that the state had legal rights over its airspace.[41] The principle of state sovereignty over airspace that developed as customary law - with individual states claiming this right - was codified for the first time at the Versailles Peace Conference of 1919, which adopted the Paris Convention Relating to the Regulation of Aerial Navigation.

The Paris Convention of 1919 and its successor treaty, the Chicago Convention on Civil Aviation of 1944[42] form the basis of contemporary international law on state sovereignty in airspace. Both these conventions recognize the exclusive and absolute sovereignty of a state over its airspace. According to Article-1 of the Paris Convention, "Each nation has absolute sovereignty over the airspace overlying its territories and waters. A nation, therefore, has the right to deny entry and regulate flights (both foreign and domestic) into and through its airspace." This concept was further developed in the first three articles of the Chicago Convention:

Art-1 (Sovereignty): "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."

Art-2 (Territory): "For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."

Art-3 (c) (Civil and State Aircraft): "No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof."

The legal debate on sovereignty over airspace has mostly been in two areas. The first area of debate was around the definition of the

upper limit of airspace. This question arose with the discovery of space flights and remains unresolved to this day. The second area of debate centred around the question of freedom of passage of commercial aircraft that conflicted with the right of territorial sovereignty of states. This debate was resolved in the Paris and Chicago conventions when limited "freedoms" or privileges for commercial aircraft were agreed.[43]

The rules for state craft are far more stringent. Articles-26 and 32 of the Paris Convention relate to aircraft carrying explosives and over-flight of the military aircraft:

> *Article-26*: "The carriage by aircraft of explosives and of arms and munitions of war is forbidden in international navigation. No foreign aircraft shall be permitted to carry such articles between any two points in the same contracting state."
>
> *Article-32*: "No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorization. In case of such authorization the military aircraft shall enjoy, in principle, in the absence of special stipulation, the privileges which are customarily accorded to foreign ships of war."

The Chicago Convention, on the other hand, does not address the issue of explosives and arms and munitions carried by aircraft over the territory of another state. It restricts over-flight/landing of aircraft of all state aircraft[44] in Article-3(c), which states: "No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof."

The interpretation of Article 3 leads Professor Michael Milde of the McGill University to make the following conclusions about the law governing the state aircraft: "state aircraft are not permitted to fly over or land in foreign sovereign territory otherwise than with express authorization of the state concerned; and the state aircraft

may fly within the territory of its own state,[45] over the high sea and the areas of undetermined sovereignty; they fly within a foreign sovereign territory on the basis of a special authorization and in harmony with the terms of such authorization; such authorization must be given by a special agreement or otherwise." Milde states that the practice of states indicates that, "the preferred form is a bilateral or multilateral agreement between the states concerned, or an 'adhoc' permission properly obtained through the diplomatic channels; a mere operational air traffic control clearance for the flight would not appear sufficient to satisfy the terms of article-3(c)."[46]

In order to explore the applicability of these principles in case of the unmanned aircraft, whether armed or unarmed, it would be instructive to examine whether these could be categorized as state aircraft as outlined in Article-3(b). If the drones could be categorized as 'state aircraft',[47] these would not be allowed to enter the airspace of another country for any reason (reconnaissance or otherwise), without express authorization of the state concerned.

There is a tendency to separate the international legal regime for drones operated by the military and those operated by the CIA. This arises from internal US considerations under which CIA is considered a civilian organization and is governed by different provisions of domestic law and congressional oversight.[48] Such a distinction would create certain complications, which need to be examined separately.

In Section I, I explore the legal principles that apply to overseas operations of spy agencies including their use of drones and establish that international law places similar restrictions on unmanned aircraft or drones as on other state aircraft.

SECTION-I

Spy Planes Drones and International Law

International law on the use of spies is underdeveloped.[49] The Fourth Hague Convention on the Laws and Customs of War[50] addresses the use of spies during war and distinguishes their rights from those of regular soldiers. Craig Forcese states that espionage in times of armed conflict is legitimate because of the, "absence of any general obligation of belligerents to respect the territory or government of the enemy state." He believes, however, that it is difficult to justify the surreptitious intelligence-gathering in another state under the doctrine of self-defense. "It is not clear how spying in aid of self-defense is permissible where the right to self-defense is not yet triggered as a matter of international law by, among other things, a sufficiently imminent armed attack."[51]

Scholars differ on whether the intelligence agencies violate international law when they operate on foreign soil during peacetime. Roger Scott believes that "the status of espionage under international law remains ambiguous, not specifically permitted or prohibited. […] No international convention prohibits that practice, "because all states have an interest in conducting such activity. […] The customary international law has evolved such that spying has become the long-standing practice of nations. Indeed, while the surreptitious penetration of another nation's territory to collect intelligence in peacetime potentially conflicts with the customary principle of territorial integrity, international law does not specifically prohibit espionage."[52]

CIA overseas operations are condoned by the US national law.[53] Roger Scott argues, "The United States is not a party to any treaty or agreement that prohibits surreptitious, non-destructive intelligence collection. Such intelligence collection also does not violate customary international law. The only law that it violates is the domestic law of the state concerned."[54] There is thinking among US policy makers that this loophole in international law gives them leeway to use CIA operatives and assets where regular forces - who are disciplined under the Geneva Conventions and the military code

- cannot be deployed.

Indeed, there are reports that the US Air Force, "loans its armed drones to the CIA for strike missions in Pakistan",[55] and other areas outside the war theatre. According to Mary O'Connell, the CIA started taking the responsibility of drone strikes from the Air Force in November 2002 in Djibouti. "The United States Air Force at the time had control of drone operations, but did not carry out the strike because of the concerns about its legality. The CIA apparently had no such concerns and carried out the strike killing all six persons in the vehicle, including a suspected top operative in Al-Qaeda and a United States citizen."[56] CIA-operated drones now fly extensively in Pakistan, Somalia and Yemen.[57]

A number of legal experts, however, differ with the understanding that spying in peacetime is acceptable under international law. Craig Forcese of the University of Ottowa is of the view that "there is an apparent conflict between extra-territorial spying and the sovereignty interests of the states in which the spying takes place. The exercise of what is known as:

> 'enforcement jurisdiction' by one State and its agents in the territory of another, is clearly a breach of international law – it is impermissible for one state to exercise its power on the territory of another, absent consent or some other permissive rule of international law."[58]

This understanding was affirmed by the Canadian Federal Court, which in a landmark ruling in 2007, declared illegal the overseas covert intelligence activities of the Canadian Security Intelligence Service (CSIS).[59] The Court said, "the warrant[60] would therefore be authorizing activities that are inconsistent with and likely to breach the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations. These prohibitive rules of international law ... have evolved to protect the sovereignty of nation states against interference from other states." Interpreting the Court decision, Forecese states that authorization of covert intelligence activities would be, "in violation of international law if done without the consent of the territorial state."[61]

According to Michael Milde, Article 3 of the Chicago Convention does not give a definition of the 'state aircraft' but only a rebuttable presumption (presumption iuris). Many other types of aircraft may be involved in activities of the state *iure imperii* (in state's 'power' function) […] the examples given in Article 3(b) cannot be taken as all-comprehensive." He is of the view that, "the status of an aircraft is determined by the actual function that aircraft performs in a particular situation […] regardless of the design, technical characteristics, registration, ownership, the status of the aircraft." Milde emphasizes the use of term 'military services'[62] in the Chicago Convention and lists the following elements that would assist in determination of the military nature of the aircraft: design of the aircraft and its technical characteristics; registration marks; ownership; type of operation.[63]

The above explanation implies that any aircraft performing 'military services', whether employed by a country's military, coastguard or intelligence services, would be restricted by the limits prescribed in Article 3(c). This would include drones operated by the military, CIA or by or by a private contractor acting on behalf of the state.[64] In addition to the limitations placed over operation of state aircraft in a foreign territory, drones are limited by Article-8 of the Chicago Convention, which prohibits over-flight by 'pilotless aircraft' by stipulating that:

> "No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization." This would imply that drones, which by their very nature are pilotless, cannot be operated, unless expressly authorized, over the territory of another state.

Writing for CIA *Historical Review Program* in 1993, M. C. Miskovsky addressed the concept of sovereignty and the use of agents in international law. Emphasizing the strength of the sovereignty principle, he says: "The concept of sovereignty is so strong, however, that it may also, in the protective principle of jurisdiction, push beyond state borders with power to try persons outside engaging in acts against the security, territorial integrity, or

political independence of the state. This principle was formulated in statutes of the Italian city-states in the 15th and 16th centuries, and many modern states apply it to both aliens and citizens. Conflicts arise, of course, where the prohibited acts are carried on in another state in which such acts are not illegal. Without agreement, it is difficult to see how the protective theory can be effective in such cases without an infringement of the sovereignty of the second state."[65]

The Use of Drones and State Sovereignty in International Law: The Case of Pakistan

In the previous sections the following conclusions were made: (i) sovereignty is a fundamental principle of international law of coexistence; (ii) territorial integrity and inviolability of borders are key attributes of state sovereignty; (iii) states have full sovereignty over their airspace; (v) foreign aircraft need to take permission of the state concerned in order to transit or land in its territory; and (vi) pilotless planes including drones are not allowed to enter the airspace of a country without express authorization.

I will now examine the case of drones being used by the United States in Pakistan. Although the United States has used drones in a number of places outside war zones,[66] I have selected the case of Pakistan as it involves contentious debate around the issue of state sovereignty and expansive definitions of the target and the battlefield. This study is, however, constrained by certain factors: (i) the *active status of the drone program* and the limited publicly available or declassified material; (ii) the *secrecy surrounding the program* in the United States and the lack of clarity in the US doctrine of the use of drones; (iii) the *divergence* in the official positions of Pakistan and the United States about Pakistan's consent to the drone operations.

These three factors make it difficult to make a definitive evaluation and I thus had to rely mostly on off-the-record and second-hand press accounts of the nature and targets of these attacks. It may be noted, however, that while these constraints make it difficult to make an authoritative judgment on the facts and

politics surrounding the drone program, the underlying legal principles are easier to establish.

Expansion of the US Drone Program

The US drone program has grown exponentially in recent years. Initially used for reconnaissance only, the drone program was expanded in 2004 and US drones now routinely target individuals inside Pakistani territory. According to the New America Foundation that compiles data on drone strikes in Pakistan, that since 2004 an estimated 2,003 to 3,321 people have been killed in 355 US drone strikes there. Of these 1,558 – 2,700 were reportedly militants.[67]

The US lack of transparency on the drone policy has given rise to confusion and inconsistency in definition of the target of these drone strikes. Based on statements of the various high-ranking US officials,[68] Micah Zenko of the Council on Foreign Relations has listed the following categories of individuals being targeted: "high-level Al-Qaeda leaders who are planning to attack; individuals who are a threat to the United States; individuals involved in some sort of operational plot against the United States; and, specific senior operational leaders of Al-Qaeda and associated forces. […] Of the estimated three thousand people killed by drones, however, the vast majority were neither Al-Qaeda nor Taliban leaders. Instead, most were low-level, anonymous suspected militants who were predominantly engaged in insurgent or terrorist operations against their governments, rather than in active international terrorist plots."[69]

The data compiled by the New America Foundation demonstrates that the target of the drone strikes is no longer the top leadership of Al-Qaeda, the initial focus of United States. "During the Bush administration, approximately 25 per cent of strikes targeted Al-Qaeda fighters, while 40 per cent targeted the Taliban. In contrast, under the Obama administration 8 per cent of the drone strikes have targeted Al-Qaeda, and 51 per cent have targeted the Taliban. Under President Bush, about one-third of the militants killed were identified as leaders, but under President Obama, just 13

per cent have been militant leaders."[70] In his report, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, Philip Alston states that the targeted individuals, "are often only loosely linked, if at all with Al-Qaeda and other alleged 'associated' groups. Sometimes they appear to be not even groups, but a few individuals who take 'inspiration' from Al-Qaeda and groups that are essentially drug cartels, criminal gangs or other groups."[71]

An added complication is that the US drone strikes in Pakistan is the expansion from the more targeted *'personality strikes'* aimed at named, high-value terrorists to '*signature strikes*' against training camps and suspicious compounds in areas controlled by militants.[72] This normally includes male adults within a certain age group found in a geographic area of suspected terrorist activity.[73] This expansion in scope and target of the drone program creates certain questions of international law that are discussed in the upcoming paras.

Questions of Law

Under international law, state aircraft are not permitted to enter the sovereign territory of another except under the following conditions:

i. In case of war/armed conflict
ii. When mandated by the United Nations
iii. Express consent of the state concerned

I will now discuss if any of these conditions apply in case of the US drones being used against Pakistan. This appraisal would lead us to examine the legality of the US drone program in Pakistan and to determine whether it is leading to the creation of a new norm of state sovereignty in international law.

Condition of War/ Armed Conflict

Article-2(4) of the UN Charter[74] prohibits the threat or use of force against another state and violation of its sovereignty. The right of states to respond in case of an armed attack is also an established norm of international law. Article-51 of the Charter reaffirmed this

principle: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”

The case of US drones being used in Pakistan is considered in the context of both these principles. Under the war model, the use of drones against the territory of another country would be illegal under international law unless the United States is exercising its right of self-defense under Article-51.[75] As we investigate the US right of self-defense, two complementary questions arise: Are the US strikes targeted against the state of Pakistan or non-state actors? And, whether the US believes Pakistan to be complicit in attacks against its forces in Afghanistan? These questions are interlinked and lead us to overlapping deductions and conclusions about the discussions on legality. Since the focus of this paper is state sovereignty and not targeted killings, I will only briefly delve into this discussion and concentrate mostly on the sovereignty aspects.

The Debate

Conflicting statements made by US officials about the target of the US drone program in Pakistan have confounded the debate on the legality of drone strikes outside zones of active combat. Protagonists of the war model can be roughly divided in two camps – the ‘proxy war camp’ and the ‘global war against Al-Qaeda camp’.

‘Proxy War’ Camp: This group[76] believes that the US and Pakistan are engaged in ‘proxy war’ in Afghanistan” and Pakistan’s ‘inability or complicity’ gives the US a rationale to use drones inside Pakistani territory. This group believes that ISI supports groups that target US interests and assets in Afghanistan and the region and that the United States should not be bound by concerns for Pakistan’s sovereignty in responding to the threat it faces. In October 2011, Congressional Research Service quoted top US officials accusing Pakistan’s intelligence agency of, “using the Haqqanis to conduct a ‘proxy war’ in Afghanistan” and expressing concerns about Islamabad’s, “apparent tolerance of Afghan insurgents operating from Pakistani territory.”[77]

Gabriella Blum and Philips B. Heymann argue that "one obvious precondition for the legality of targeted killing operations outside the theatre of war, in consideration of the other countries' sovereignty, must be that the state in whose territory the terrorist resides either consent to the operation by the foreign power…or else would be unable or unwilling to take action against the terrorists."[78]

There are no indications that the US strikes are will fully intended against the Pakistani state or that conditions of armed conflict, as defined in international law, exist between the two countries.[79] Pakistan has protested the violation of its sovereignty and call for an end to US drone strikes inside its territory. Despite expressing frustration with each other on multiple occasions, both countries consider each other as important partners. They maintain bilateral diplomatic relations, have close collaboration in intelligence gathering and defense, and Pakistan continues to receive US foreign assistance. Professor Antonia Chayes calls Pakistan a 'frenemy' but, "a sovereign nation and a declared ally to whom we provide liberal amounts of financial and military assistance."[80] She agrees that, "Pakistan is not strictly speaking, a war zone."[81]

'Conflict with Al-Qaeda and Associates' Camp: The second group holds the view that the United States is in an "armed conflict with Al-Qaeda, as well as the Taliban and associated forces"[82] and is exercising its inherent right to self-defense under international law. The 2010 speech of then State Department Legal Adviser Harold Koh gives the following insight into the US drone policy: "(i) the target is not just Al-Qaeda, but includes Taliban and associated forces; (ii) the battlefield is not limited to Afghanistan, but anywhere these groups can be found; and (iii) the US operations are being carried out under the doctrine of self-defense."[83]

This statement implies that that the US response in September 2001 was against Al-Qaeda independent of the state of Afghanistan and that the focus of US drones is the 'terrorist network' and not the Pakistani state.

In his remarks at the Harvard Law School in 2011, CIA Director

and former White House Coordinator for Counterterrorism, John O. Brennan explained the US thinking on the scope of the conflict: "The United States does not view our authority to use military force against Al-Qaeda as being restricted solely to 'hot' battlefields like Afghanistan."[84] This argument is elaborated in the Justice Department White Paper on the use of lethal force in a foreign country outside the area of active hostilities: "the United States retains its authority to use force against Al-Qaeda and associated forces outside the area of active hostilities when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans. The United States is currently in a non-international armed conflict with Al-Qaeda and its associated forces."[85] Although the US Supreme Court had abstained from making decision on merit of the argument, the White Paper relies on Hamdan v Rumsfeld (2006)[86] to make the point that, "a conflict between a nation and a transnational non-state actor, occurring outside the nation's territory, is an armed conflict not of an international character because it is not a clash between nations."[87]

The Unwilling or Unable Argument: Both the 'Proxy war' and 'war with Al-Qaeda' camps rely on the "inability or complicity" argument to make their case for US drone strikes inside Pakistan. The same argument was used to justify the US operation against Osama Bin Laden in Abbottabad, Pakistan,[88] when Leon Panetta, the CIA Director at the time famously told members of Congress, "either they (Pakistan) were involved or incompetent."[89]

In the White Paper, the Justice Department stresses that, "Targeting a member of an enemy force who poses an imminent threat of violent attack to the United States is not unlawful. It is a lawful act of national self-defense. Nor would it violate otherwise applicable federal laws […] a lethal operation in a foreign nation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government or after a determination that the host nation was unable to unwilling to suppress the threat posed by the individual targeted."[90]

Legal Debate

International law is by definition the law governing inter-state relations and the UN Charter governs relations between member states. Article-2(4) dealing with prohibition of the threat or the use of force and Article-51 on the right of self-defense, therefore, apply to states.

Legal opinion differs on whether a state can lawfully invoke self-defense against individuals in another state, without going to war with that state. As discussed above, the United States has made a claim that it can. In his aforementioned speech, Harold Koh said 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 [...] there is no prohibition under the laws of war on the use of technologically advanced weapon systems in armed conflict - such as pilotless aircraft or so-called smart bombs - so long as they are employed in conformity with applicable laws of war."[91]

Some scholars believe that UNSC resolutions 1368 (12 September 2001) and 1373 (28 September 2001) recognized the US right of response against a non-state actor - Al-Qaeda - independent of the host country. Jordan Paust of the University of Huston Law Center explains: "an armed attack by a non-state actor on a state, its embassies, its military, or other nationals abroad can trigger the right of self-defense (under Article-51 of the Charter), even if selective responsive force directed against a non-state actor occurs within a foreign country."[92]

Ryan C Henrickson suggests that the US had already invoked self-defense by carrying out 1998 military strikes inside Al-Qaeda training camps in Afghanistan. The (tepid) response from the rest of the world on invocation of the Article 51 reflects general acceptance of the doctrine of self-defense when attacked by a non-state actor. "The vast majority of states' acceptance of the Clinton administration's liberal applications of Article 51 suggests some evolution of the customary law concept of self-defense."[93]

The conditions for determination of Pakistan's 'unwillingness or inability' in the case of Bin Laden operation or drone strikes have not been publicly debated. The United States has, however, relied on the 'unwilling or unable argument as a valid and sufficient legal justification for the use of force against a sovereign state. The 'unwilling or unable' test, "requires a victim state to ascertain whether the territorial state is willing and able to address the threat posed by the non-state group before using force in the territorial state's territory without consent."[94]

Philip Alston is of the view that: "A targeted killing conducted by one state in the territory of a second state does not violate the second state's sovereignty if […] the first, targeting state has a right under international law to use force in self-defense under Article 51 of the UN Charter, because …the second state is unwilling or unable to stop armed attacks against the first state launched from its territory."[95] Jack Goldsmith of the Harvard Law School has made a similar argument: *"*If the president is authorized to use force against a terrorist group by Congress, and if the UN Charter's sovereignty concerns are overcome because the nation in question is unwilling or unable to address the group's threat to the United States, and as long as the United States complies with *jus in bello* restrictions on targeting (distinction, proportionality, etc.), there is no further legal requirement."[96]

Professor Heller of the Melbourne Law School differs with this line of argument and suggests that, "(ICJ) has consistently held that Article 51 of the UN Charter limits self-defensive acts against non-state actors to situations in which the non-state actor's armed attacks are in some way imputable to the state whose territorial sovereignty is being violated. That was the ICJ's position in *Nicaragua,*[97] and the Court reaffirmed that position in both the *Palestinian Wall* advisory opinion and *DRC vs. Congo.*[98] It is certainly possible to argue that the customary rules governing the use of force in self-defense have evolved to adopt the 'unwilling or unable' standard. But that is a highly contentious and extraordinarily difficult question."[99] In her paper on the normative framework for extra-territorial self-defense, Ashley Deeks discusses the lack of content in the normative framework for the 'unwilling or unable' test and

proposes a core set of substantive and procedural factors that should inform the 'unwilling or unable' inquiry.[100]

Lack of clarity around the target of the US drone operations is a relatively recent development. There was no confusion in September/October 2001 about the target of the US invasion of Afghanistan[101] – Osama Bin Laden/Al-Qaeda for the 9/11 attacks and the Taliban Government for harboring them. UNSC Resolution 1368 called for bringing to justice, "the perpetrators, organizers and sponsors of these terrorist attacks", and holding accountable, "those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these (terrorist) acts." In his address before the Congress, President Bush appeared to make a case for targeting Taliban for its links with Al-Qaeda. He issued a warning to the Taliban to hand over Al-Qaeda terrorists and closedown their training camps in Afghanistan "or share in their fate."[102] On 12 September 2001, the US Acting Permanent Representative made similar remarks before the Security Council, "We will make no distinction between the terrorists who committed these acts and those who harbor them."[103]

Legal grounds had been prepared in years leading up to the 9/11 attacks.[104] In 1999, the Security Council noted the US indictment of Osama bin Laden in the 1998 bombings of the embassies in Kenya and Tanzania and its request to the Taliban to surrender him for trial. It called upon the Taliban to turn over bin Laden and declared that the failure of the Taliban to respond to the demands constituted a threat to international peace and security. It also called on the Taliban to close all terrorist training camps, "within the territory under its control", and imposed sanctions against them for the support provided to Al-Qaeda.[105] UNSC adopted another resolution a year later, making similar demands.[106]

There was thus a growing international recognition including at Security Council that the acts of Al-Qaeda were closely aligned with and supported by the Taliban. In their discussion about symmetrical war and the notion of armed conflict, Andreas Paulus and Mindia Vashakmadze express the view that, "according to Common Article-2 (of Geneva Conventions), an international armed conflict

has an inter-state character. Therefore a conflict between a state and a non-state group is only internationalized when the military action of such groups is clearly attributable to the respective (host or other) state."[107]

Jurisprudence of International Court of Justice and the Permanent Court of International Justice reinforces this point. In the case of S.S. Lotus between France and Turkey, the Permanent Court of International Justice relied on the principle of *territorium jus dicentiimpune non paretur*[108] to opine: "Outside the territory, the frontier having once been traversed, the right of States to exercise police duties and jurisdiction ceases to exist; their sovereignty does not operate, and crimes and offences, even in the case of those inflicting injury upon the States themselves, fall normally outside the sanctioning force of their courts.[….] The injured State may try the guilty persons according to its own law if they happen to be in its territory or, if necessary, it may ask for their extradition."[109]

In Congo v Uganda, the Ugandan intervention in the Democratic Republic of Congo (DRC) in response to cross-border incursions by certain armed groups was declared illegal by the International Court of Justice. ICJ determined that Congo's inability to prevent these attacks did not give rise to Uganda's right to intervene militarily in the Congolese territory. Finding Uganda in violation of Article 2(4) of the Charter, ICJ said: "the Court cannot conclude that the absence of action by *Zaire's* Government[110] against the rebel groups in the border area is tantamount to 'tolerating' or 'acquiescing' in their activities. Thus the part of Uganda's first counter claim alleging Congloese responsibility for tolerating the rebel groups prior to May 1997 cannot be upheld."[111]

Following the above line of argument, unless Al-Qaeda attacks against the United States are clearly attributable to Pakistan, the US has, "no legal right to resort to drone attacks in Pakistan, drone attacks are uses of military force. Pakistan is not responsible for an armed attack on the United States and so there is no right to resort to military force under the law of self-defense."[112]

Condition of UN-Mandated Mission

Under Chapter VII of the Charter, the Security Council determines, "the existence of any threat to peace or breach of the peace or act of aggression", and makes recommendations on measures to be taken to maintain or restore international peace and security. It may take measures "not involving the use of armed force", or to use force should such measures prove to be inadequate.[113]

The US response to 9/11 attacks was not mandated by the UN although the Security Council had accepted its right to self-defense and called on all states to, "work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks", and stressed that, "those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable."[114] As explained in the last section,[115] the US military action took place under Congressional 'Authorization for the Use of Military Force' (AUMF) of September 14, 2001 that authorized the President to use all "necessary and appropriate force" against those who "planned, authorized, committed or aided" the September 11th attacks, or "who harbored said persons or groups".

After deposing the Taliban in November 2001, the United States brought the issue before the Security Council, which passed Resolution 1378 supporting the transition process in the post-Taliban Afghanistan and the formation of a "broad-based, multi-ethnic and fully representative" government. In the resolution, the Council reaffirmed strong commitment to the "sovereignty, independence, territorial, integrity and national unity of Afghanistan."[116]

A study of the many resolutions on Afghanistan, Taliban and Al-Qaeda/OBL - both before and after the war - suggests that at no point the Security Council decided to extend the military campaign against Al-Qaeda beyond the borders of Afghanistan. Furthermore, unlike in the case of Afghanistan under the Taliban, when a concerted effort was made at the UN to establish the responsibility of the Taliban for acts by Al-Qaeda, there is not apparent trend to

link Al-Qaeda and Taliban to the state of Pakistan.

The UNSC has a robust regime to designate terrorists from Al-Qaeda, Taliban and associated groups. First established under UNSC Resolution 1267 (1999), it requires states to take the following measures against the designated individuals and entities: freezing of financial assets; travel ban; and arms embargo. States are further required to (i) criminalize terrorist acts; (ii) refrain from supporting "entities or persons involved in terrorist acts"; (iii) deny safe havens; and (iv) prevent the use of their territory for terrorist acts against other States or their citizens.

In June 2011, the Security Council adopted resolutions 1988 (2011) and 1989 (2011) and split the Al-Qaeda and Taliban sanctions regime. Resolution 1989 (2011) now covers Al-Qaeda and its associates while resolution 1988 (2011) deals with the Taliban. Currently, there are 227 designated individuals associated with Al-Qaeda and 64 'Entities and other groups and undertakings associated with the Al-Qaeda'.[117] Division of the sanctions regime has signalled a rupture between the two organizations. It has further weakened the legal basis for continued drone strikes against the Taliban under Article-51 on self-defense.

Separation of the Al-Qaeda and Taliban regimes was motivated by the desire on the part of the United States and Afghanistan to facilitate political reconciliation in Afghanistan and to make progress in the talks with the Taliban. Explaining the initiative Secretary Clinton said: "we are launching a diplomatic surge to move this conflict toward a political outcome that shatters the alliance between the Taliban and Al-Qaeda, ends the insurgency, and helps to produce not only a more stable Afghanistan but a more stable region. …Taliban militants will have to decide that they are better off working within the Afghan political system rather than fighting a losing struggle alongside Al-Qaeda… (the process) aims to support an Afghan-led political process to split the weakened Taliban off from Al-Qaeda and reconcile those who will renounce violence and accept the Afghan constitution with an increasingly stable Afghan Government. That would leave Al-Qaeda alone and on the run."[118]

The aforementioned resolutions of the Security Council construct a preventive regime based on the law enforcement model. There is no provision under the relevant resolutions that the listed individuals would be marked for targeted killings. Nor has any action been taken by UNSC to hold a state (apart from Taliban-led Afghanistan) responsible for actions of terrorists in its territory. Professor Mary O'Connell of the University of Notre Dame states:

> "The Security Council has not authorized attacks and the US has no right on that basis to use drones."[119] Although some of the designated individuals (Abu Yahya al Libbi and Baitullah Mehsud) have been killed in drone strikes, many of those targeted are not on the UN list of designated individuals. The United States has not made public its national list of targeted individuals or the criteria employed in target selection, which makes it difficult to get a complete legal picture of the situation.

Condition of State Consent

UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston is of the opinion that: "a targeted killing conducted by one state in the territory of a second state does not violate the second state's sovereignty if […] the second state consents."[120] Mary O'Connell agrees that Pakistan has a legal right to consent to the action by the United States against terrorist groups in its territory. "If the US has the consent of the territorial state to carry out the attacks, there is no violation of the law of state responsibility."[121]

There are differing views on whether this consent exists or not. Pakistan has claimed its sovereignty over its airspace and expressed disapproval of US drones strikes inside its territory. It has termed drone attacks as, "illegal, counterproductive, in contravention of international law and a violation of Pakistani sovereignty." Pakistan's reluctance to permit US military operations in its territory has been a consistent strain in Pakistan-US relations since 2001. In its report the 9/11 Commission acknowledged Pakistan's "reluctance to permit US military operations on its soil."[122]

The United States has shown some inconsistency in its position on the question of state sovereignty and counter-terrorism operations, including the use of drones inside Pakistani territory. Obama's remarks in 2008 that the US should act and take out bin Laden inside Pakistan[123] was criticized by his Republican opponent, Senator McCain, who opposed conducting such an operation stating that Pakistan was a sovereign state.[124] Nowhere is this dissonance in thinking more obvious than the remarks made by President Bush during a press conference in September 2006. Mr. Bush had told the journalists present there that sending Special Forces to Pakistan to hunt down bin Laden would not work as Pakistan is a sovereign nation. "In order for us to send thousands of troops into a sovereign nation, we've got to be invited by the government of Pakistan."[125] In his memoir *Decision Points*, President Bush writes that he authorized use of drones as he was concerned that the Pakistani government would reject US special operations raids into their country. "No democracy can tolerate violations of its sovereignty."[126] On the drone policy, a high-ranking US official made similar remarks in a conversation with David Sanger of the *New York Times*: "if a country has functioning government, we use them only with the permission of the host country. If they don't want it, we usually don't do it unless it was an issue of force protection."[127]

The US officials have also suggested that their drone operations in Pakistan are being conducted with the consent of Pakistan. The Wall Street Journal reported in September 2012 that the US claims of legality are apparently built on a monthly fax sent by the CIA to its counterpart ISI. CIA considers the lack of response from ISI as a tacit approval of the drone strikes.[128] Harold Koh told the Journal that this rationale veers near the edge of what can be considered permission, though they still think the program is legal.

Pakistan has strongly rejected such assertions. Responding to a report carried by a US-based newspaper about drone attacks, the Foreign Office Spokesperson "categorically rejected the insinuation made in the report and reiterated Pakistan's long-standing position on drone attacks. Drone attacks are illegal, counter-productive, in contravention of international law and a violation of Pakistani

sovereignty. There can be no question of Pakistan's agreement to such attacks."[129]

Media reports suggest that some kind of bilateral arrangement or understanding to this effect had been reached with General Pervez Musharraf, the then military ruler of Pakistan. "Back when Musharraf was running the country, Washington and Islamabad had a secret agreement to allow drone strikes. But that was before production was ramped up and the number of drones mushroomed, and with them the anger of the Pakistani populace."[130] Based on that agreement, drones would reportedly take off from a base given by Pakistan to the United States.[131] The secrecy around the program is partly a result of "an unspoken deal with Pakistan, which wants to hide its episodic participation in the drone program" and to give it plausible deniability in case of civilian deaths in the strikes.[132]

Mark Mazzetti of *New York Times* reported in April 2013 that the deal between Pakistan and the United States concluded in 2004 came about after the United States agreed to eliminate Pakistani Taliban operative Naek Mohammad. In exchange, Pakistan consented to use of its airspace by CIA for drone strikes in the tribal areas, "to hunt down (CIA's) own enemies." Part of the deal was to limit drone operations within the tribal areas and to obscure the party responsible for the drone strikes: "the US would never acknowledge the missile strikes and that Pakistan would either take credit for the individual killings or remain silent."[133]

In an interview with *CNN* on April 13, 2013, General Musharraf agreed that his government had secretly cleared US drone strikes, "only on a few occasions, when a target was absolutely isolated and no chance of collateral damage." He said that these strikes were authorized "only rarely", and only when, "there was no time for (Pakistani) military to act." He disagreed, however, the US contention that there had been a blanket agreement with the US on the controversial drone campaign.[134]

Although claims of Pakistan's consent to the drones program in the past remain controversial, there is little confusion on the current state of play. Since 2011, Pakistan has become more forthright in its

demands for an end to the program. David Sanger reports that in the wake of Raymond Davis incident,[135] ISI's explicit demands included an end to drone strikes. "The Americans pretended they never heard that last demand."[136] Mary O'Connell considers the US assertions of Pakistan's consent as hardly a valid basis for significant lethal force on a state's sovereignty and states that Pakistan's protests suggest that it has, "withdrawn any implicit consent that might have been given."[137]

In the wake of the Salala incident in 2011, the Parliamentary Committee on National Security in Pakistan conducted several hearings over a period of six months. It called witnesses and government officials including from the Foreign Office, Ministry of Defense and ISI. The drone issue was front and center of this process and the Committee made inquiries about the possible understandings given to the United States. According to press accounts, the government denied having concluded any agreement with the United States authorizing the use of drones. The Committee's findings, which were adopted by the Parliament and accepted by the Government, stressed that there should be no verbal commitments on national security issues and any such agreements in place shall be revoked. The Pakistani Parliament also called on the United States to end the drone strikes inside the Pakistani territory.[138] It also, "evicted all US military and intelligence drones, forcing the United States to completely rely on Afghanistan to serve as a staging ground for drone strikes in Pakistan."[139]

Sean Murphy points to the fragility of the legal arguments in favor of US drones operations solely on the consent of the Pakistani government. "That consent, whether given explicitly or implicitly, may be withdrawn at any time, unless it is expressed as a legally binding commitment for a specified period of time. With the changes in leadership within Pakistan in recent years, consent from the government cannot be relied upon as steadfast. Moreover, consent may always be predicated on certain requirements, such as prior notification of a given action to Pakistan, which may be difficult for time sensitive operations or where concerns exist about maintaining confidentiality."[140]

According to Philip Alston, "the proposition that a State may consent to the use of force on its territory by another State is not legally controversial. But while consent may permit the use of force, it does not absolve either of the concerned States from their obligations to abide by human rights law and IHL with respect to the use of lethal force against a specific person. […] A consenting State may only lawfully authorize a killing by the targeting State to the extent that the killing is carried out in accordance with applicable IHL or human rights law."[141]

In short, under international law a state has right of self-defense in response to an armed attack. There has been an acceptance of US right to respond to the September 11, 2001 attacks, which led to its intervention in Afghanistan and removal of the Taliban. The United States has justified its drone program in Pakistan on self-defense grounds as well as on the basis of consent of Pakistan. The self-defense argument is based mostly on the 'inability or complicity' test which is still finding its grounding in international law. Jurisprudence of ICJ suggests that unless Al-Qaeda attacks against the United States are clearly attributable to Pakistan, the United States would not have a, "legal right to resort to drone attacks in Pakistan." In these circumstances, an agreement with Pakistan would provide a more solid legal basis for drone strikes. The controversy generated by the drone program in Pakistan and its public opposition has raised critical challenges of compliance with international law.

In Section II, I will discuss the continued use of drones over the objections of the state concerned and legal implications of violations of State sovereignty.

SECTION-II

Legal Implications of Violations of State Sovereignty

After the eviction of all US military and intelligence drones from Pakistan in 2011, the United States now relies on Afghanistan to serve as a staging ground for drone strikes in Pakistan.[142] This has legal implications for all three countries.

Role of Afghanistan: The use of Afghan territory by the United States to conduct drone operations against Pakistan raises legal and political questions about the role of Afghanistan.

The law of neutrality is rooted in customary international law. The 1907 Hague Convention, "establishes rules to guarantee to belligerent states that neutral states will not permit their territory to be used by another belligerent as a safe harbor or a place from which to launch attacks."[143] […] Neutral states have the right to demand that belligerents respect their territory by not using it for prohibited purposes. "At the same time, neutrals must not permit belligerents to violate their territory."[144] This implies that unless Afghanistan is itself in an armed conflict with its eastern neighbor, it would not be legal to authorize the use of its territory for drone strikes against Pakistan.

According to media reports, except in case of joint operations, the Afghan Government does not have much say in the US operations inside Afghanistan or the occasional cross-border forays of US ground troops into Pakistan. Similarly, it does not appear to have input in decisions about drone operations being conducting from Afghan territory against Pakistan. In an interview with Times of India in November 2012, President Hamid Karzai of Afghanistan expressed unease with the drone program in Pakistan and called for a cooperative and non-confrontational approach to the terrorism problem. "I don't agree with drone attacks. No, I don't agree with them at all. There are lots of civilian people losing lives and suffering as a consequence of that […] drone attacks will never end terrorism. It has to be tried; roots have to be taken out. That cannot be done without a clear, visible strategy addressing the problem

down deep where the roots are. Here, involvement of the Pakistani state with us is vital and important."[145]

It is not publicly known whether Islamabad has protested to Kabul the use of its territory by the United States in launching drone operations inside Pakistan. Afghanistan's role becomes more problematic when the drone flights were deemed a violation of international law, as claimed by some legal experts. Legal implications would be different when these operations take place with the consent of the Afghan Government and when the Afghan consent is not taken. Afghanistan's decision to stay neutral in the drone issue between Pakistan and the United States, would require not just a an act of abstention (not joining the United States in its drone program targeting Pakistan) but also an act of preventing the departure from its jurisdiction of an aircraft/drone that violates the sovereignty of Pakistan.[146]

Pakistan-Afghanistan border: Pakistan has been concerned about maintaining the sanctity of the Pakistan-Afghanistan border.[147] Unlike the case of drone strikes (where Afghan role has received rare criticism from Pakistan), Pakistan has protested incidents of border violations whenever Afghan soldiers are involved in ground operations inside Pakistani territory. According to Pakistan Foreign Office, Foreign Secretary Jalil Abbas Jilani termed cross-border attacks as "unhelpful and unproductive" in a demarche with the Afghan Ambassador late last year and strongly urged the Afghan government to take appropriate measures, "to prevent recurrence of similar incidents in future."[148] Such public statement are made to send a strong message to Afghanistan that border violations whether by Afghans or by the US troops would not validate Afghan claims about the border.

US Withdrawal from Afghanistan and Continuity of the Drone Program Beyond 2014

Another question that arises is the state of play after the US Forces leave Afghanistan in 2014 and how the new security arrangement would affect the drone program. The end of US combat mission in Afghanistan would mean that the "self-defense"

argument would not be valid anymore as a legal basis for drone strikes inside Pakistani territory.

The Enduring Strategic Partnership Agreement concluded in May 2012 gives an insight into the future of the relationship between Afghanistan and the United States. In the Agreement, the two countries reaffirmed that, "the presence of the US forces in Afghanistan since 2001 are aimed at defeating Al-Qaeda and its affiliates." It was also agreed that: "(i) the two countries shall foster close defense and security cooperation, combat Al-Qaeda and its affiliates, and enhance Afghan capacity to, deter threats against its sovereignty, security, and territorial integrity; (ii) Afghanistan will provide US forces access to Afghan facilities to combat Al-Qaeda and its affiliates; (iii) the US shall not use Afghan territory or facilities as a launching point for attacks against other countries."[149]

It is not yet clear if this would entail an end to the drone program and use of Afghan territory for that purpose. According to Washington Post, the government expects to continue adding names to kill or capture lists for years and, "drone operations are likely to be extended at least another decade … given the way Al-Qaeda continues to metastasize."[150] The then US Ambassador to Afghanistan, Ryan Crocker, in an interview indicated that the Enduring Strategic Partnership Agreement, "could leave the door open for continued drone strikes against insurgent targets in Pakistan after 2014. There is nothing in this agreement that precludes the right of self-defense for either party and if there are attacks from the territory of any state aimed at us we have the inherent right of self-defense and will employ it."[151]

It remains to be seen how this understanding squares with the agreement that the United States will not use Afghanistan as a base to launch attacks against other states. In response to a question regarding use of Afghan territory for launching drone strikes against Pakistan, Afghan Foreign Minister Zalmay Rasool told *Al-Jazeera* television that, "Afghan soil will not be used against any country in the region", after NATO combat forces leave by the end of 2014."[152] Michael Zenko is skeptical that Afghanistan would allow the US to conduct drone strikes against Pakistan. In an article

published in April 2012, he expressed the view that: "The sovereign Afghan government holds the decisive veto power, and any US officials who believe that President Hamid Karzai or his successor will give the United States *carte blanche* to use Afghanistan as a platform for CIA drone strikes or Special Forces raids into Pakistan will be sorely disappointed."[153]

Duration and Geographic Scope of the Conflict: The United States has taken an expansive view of its right of self-defense under Article-51. By expanding the definition of its target from Al-Qaeda to "Al-Qaeda and associated groups", it has extended the breadth and duration of the conflict. In his 2011 speech at the Harvard Law School, John Brennan said: "The United States does not view our authority to use military force against Al-Qaeda as being restricted solely to 'hot' battlefields like Afghanistan."[154] As discussed above, the US is considering continuing the drone program in Pakistan beyond the end of combat operations in Afghanistan in 2014.

John Brennan has acknowledged that this understanding differed with rest of the international community. "Others in the international community - including some of our closest allies and partners - take a different view of the geographic scope of the conflict, limiting it only to the 'hot' battlefields. As such, they argue that, outside of these two active theatres, the United States can only act in self-defense against Al-Qaeda when they are planning, engaging in, or threatening an armed attack against US interests if it amounts to an 'imminent' threat."[155]

On April 16, 2013, International Red Cross chief Peter Maurer warned against a creeping expansion of the definition of what constitutes a battlefield. He termed the drones as legitimate weapons in the context of an armed conflict but added that, "if a drone is used in a country where there is no armed conflict… there is a problem. […] To link (the definition of) battlefields to combatants on the move is an interpretation that we don't share."[156]

Pakistan's Response: According to Michael Milde, "protection of the airspace is an integral part of the protection of the national territory […] the basic means in the protection of airspace is the

interception. What would be the consequences if a state aircraft enters the foreign sovereign airspace without proper authorization? Such aircraft may be: intercepted for purposes of identification; directed to leave the violated airspace by a determined route; directed to land for the purpose of further investigation/ prosecution; ….The State of the violating aircraft would face international responsibility for the infraction; the nature and severity of such responsibility would much depend on the overall relations of the states concerned and could range from the duty to apologize, promise to penalize the individuals responsible, promise not to repeat such infraction … and to more severe sanctions, including forfeiture of the violating aircraft and imprisonment of the crew or other sanctions."[157]

Despite its deep concerns about the violation of its sovereignty by the US drones, Pakistan's reaction has mostly been in the form of public statement and demarches. This does not match with the strong reaction after the Salala border incident in 2011 when Pakistan closed down the supply routes of the US forces in Afghanistan.[158] It would be interesting to see if and how continuity of the US drone program without an express agreement with Pakistan would lead to an evolution of Pakistani reaction.

International Custom as International Law

Article 38 of the Statute of the International Court of Justice refers to, "international custom, as evidence of a general practice accepted as law."[159] Brownlie reiterates Brierly in remarking that, "what is sought for is a general recognition among States of a certain practice as obligatory."[160] The elements of custom include: duration; uniformity and consistency of the practice; generality of practice; and *opinio juris*. According to Brownlie, ICJ practice suggests that:

(a) *Duration*: No particular duration is required if the consistency and generality of a practice are proved.

(b) *Uniformity, consistency of the practice*: Complete uniformity is not required. "This is very much a matter of appreciation

and a tribunal will have considerable freedom of determination in many cases."[161] "The Party which relies on custom […] must prove that this custom in such a manner that it has become binding on the other party."[162]

(c) *Generality of practice*: "While universality is not required it is important to determine the generality of practice. The real problem is to determine the value of abstention from protest by a substantial number of states in face of a practice followed by some others. Silence may denote either tacit agreement or simple lack of interest in the issue."

(d) *Opinio juris et necessitates*: is considered an essential element of establishing legal custom. According to Article-38(1) (b) of the ICJ Statute, "the custom to be applied must be accepted as law." Brownlie explains that the state practice that's becomes custom needs to be recognized by states "as obligatory", and requires a, "conception that the practice is required by, or consistent with, prevailing international law."[163]

International Custom and State Sovereignty

International acceptance of the US drone program inside Pakistani territory, over Pakistan's objections (especially after 2014) could potentially lead to the creation of new norms in international law. These would include: (i) unending duration and geographic scope of a conflict; (ii) limitations on state sovereignty because of the presence of non-state actors; (iii) dilution of the notions of imminence and proportionality; and (iv) use of a state's territory, despite its objection, to launch strikes against another.

There is no indication that there is an emergence of a new legal norm regarding state sovereignty. The conditions discussed above for acceptance of a practice as an established custom in international law do not exist. The international community has not accepted the liberal interpretation by the United States of the notion of self-defense including its understanding of the elastic nature of duration and geographic scope of the conflict.

International legal community does not have consensus on the validity of 'unwilling or unable' to invoke self-defense and there is preponderant jurisprudence of ICJ that contradicts this notion. Pakistan has become a persistent objector[164] to the drone strikes. Afghanistan has publicly termed the strikes as unhelpful. And the UN special mechanisms have called attention to the weakness of imminence and proportionality standards in the US drones policy.

In addition to Pakistan's repeated protests, both privately and publicly, on violation of its sovereignty by the US drones other countries have expressed concerns about the US drone policy. During a visit to Pakistan in October 2012, Russian Foreign Minister Sergei Lavrov backed Pakistan's position on the drone issue and said: "I would like to confirm the Russia's principled position on the unacceptable violation of the sovereignty and territorial integrity of states."[165] Chinese position on the drone strikes was voiced by Zhao Qizheng, Chairman Foreign Affairs Committee of the Chinese People's Political Consultative Conference (CPPCC). During a visit to Pakistan in October 2012, Zhao told the Pakistani media that China supported Pakistani policy pertaining to US drone strikes and that that it was essential for global peace that all the countries respect each others' territorial integrity and sovereignty.[166]

A growing number of international bodies and legal experts both in the United States and around the world have also raised concerns about the legality of the drone strikes. UN Human Rights machinery, in particular, has been very vocal. High Commissioner for Human Rights Navanetham Pillay has said that, "drone attacks do raise serious questions about compliance with international law, in particular the principle of distinction and proportionality." She has stressed that, "ensuring accountability for any failure to comply with international law is also difficult when drone attacks are conducted outside the military chain of command."[167] The United Nations Special Rapporteur on Human Rights and Counterterrorism, Ben Emmerson, issued a statement in March 2013 stressing that with the drone strikes, the United States has violated Pakistan's sovereignty and disrupted life in the tribal areas. The drone campaign, "involves the use of force on the territory of another state

without its consent and is therefore a violation of Pakistan's sovereignty."[168] The fact that that Emerson's investigative report was commissioned by the UN Human Rights Council at the initiative of Pakistan and with the support of China and Russia[169] reflects the lack of international consensus on the US policy of peacetime use of drones for targeted killings over the objections of a sovereign state.

Conclusion

The above discussion leads us to conclude that the use of drones by a country in the absence of State consent and self-defence criteria and without the cover of UN resolutions would have serious implications for state sovereignty. Furthermore, unilateral and persistent use of this policy by one State over a considerable time period in the absence of international consensus on legality of this practice does not lead to the emergence of a new legal norm in international law.

Notes and References

1. Article-3(b) of the Convention limits “state aircraft” as aircraft used in military, customs and police services.

2. “The United States had warned the Taliban that they would be held accountable for further attacks by Bin Laden against (US) interests. The warning had been given in 1998, again in late 1999, once more in the fall of 2000, and again in the summer of 2000. Delivering it repeatedly did not make it more effective”.

3. Duration, uniformity or consistency of practice, generality of practice.

4. Drones are interchangeably used with UAS, UAV (unmanned aerial vehicle) and RPA (remotely piloted aircraft).

5. Lydia de Beer, *Unmanned Aircraft Systems (Drones) and Law*,(Nijmegen: Wolf Legal Publishers): 2.

6. David A. Lake, "The new Sovereignty in International Relations," *International Studies Review* 5 (2003).

7. Grotius postulated these principles in developing the basic tenets of “acceptable rules of conduct” in international relations Wolfgang Friedmann, Changing Structure of International Law (New York: Columbia University Press, 1964): 331.

8. *Ibid.* at 60.

9. Derek Croxton disagrees and states “A great deal of creativity is required to attribute sovereignty to the peace of Westphalia in the way scholars have traditionally done. It is more reason to treat the negotiations at the congress (as opposed to the treaties that followed) as an important and identifiable stage in the evolution of the state system towards sovereignty”. Derek Croxton, “The Peace of Westphalia of 1648 and the Origins of Sovereignty,” *The International History Review* , 21, 3 (1999).

10. Linn-Benton Community College Website Write-up on Peace of Westphalia 1648 Accessed: December 19, 2012 http://cf.linnbenton.edu/artcom/social_science/clarkd/upload/Peace%20of%20Westphalia.pdf

11. Bruno Simma, ed., The Charter of the United Nations (Oxford: Oxford University Press, 2002).

12. Giovanni Distefano, “Theories on Territorial Sovereignty: A Reappraisal,” *Journal of Sharia and Law*, 41 (2010).

13. Craig Forcese, “Spies Without Border: International Law and Intelligence collection,” *Journal of National Security Law & Policy*, 5 (2011).

14. *Supra note* 4, p- 36.

15. Oppenheim's International Law § 123 (h. Lauterpacht ed. 8th ed., 1955).

16. *Supra note* 9.

17. The Permanent Court of International Justice (PCIJ) was established in 1922 under the Covenant of the League of Nations. It was dissolved in 1946 and replaced by the International Court of Justice.

18. France v. Turkey, The Case of S. S. Lotus, Judgment 9, File E. c. (CIJ 1927).

19. Ibid.

20. Article-10 of the Covenant of the League of Nations.

21. Oppenheim, Lassa *International Law: A treatise* (London, New York [etc.] Longmans, Green, and co.).

22. *Supra note* 8.

23. "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

24. *Supra note* 4, p-32.

25. *Supra note* 9.

26. The Declaration was annexed to General Assembly resolution 375 (IV) of 6 December 1949; it was never adopted.

27. Hans Kelsen, "The Draft on Rights and Duties of States," *The American Journal of International Law*, 4, 2 (1950): 259-276.

28. Article-9 of the draft Declaration: "Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order".

29. *Supra Note* 24.

30. Article-2(1) of the Charter on sovereign equality of states.

31. UNGA Resolution 2625 (XXV), adopted on 24 October 1970.

32. *Supra Note* 9.

33. Held in Helsinki, Finland to improve relations between the Communist bloc and the West; 35 countries, including the US, signed on to the Final Act.

34. *Supra note* 9.

35. *Supra note* 4, p-32.

36. *Supra note* 4, p-60-62.

37. *Supra note* 9.

38. *Supra note* 15.

39. Ibid.

40. Outcome of the 2005 World Summit (UN General Assembly Resolution A60/1).

41. Sand, Freietas, and Pratt, *A Historical Survey of International Air Law before the Second World War*, McGill Law Journal 7 (1960): 24, 28.

42. Convention on International Civil Aviation adopted at Chicago, on December 7, 1944.

43. An agreement was reached between parties at the Versailles Peace Conference, where the 'freedom of passage' was acknowledged with limitations. Article-2 of Paris Convention 1919: "*Each nation should apply its airspace rules equally to its own and foreign aircraft operating within that airspace, and make rules such that its sovereignty and security are respected while affording as much freedom of passage as possible to its own and other signatories' aircraft*". In 1944 at Chicago, a companion agreement (International Air Services Transit Agreement 1944) annexed to the Civil Aviation Convention outlined two "freedoms of the air". These included: the privilege of civil aircraft to fly across territory without landing; and the privilege to land for non-traffic purposes.

44. Article-3(b) of the Convention limits "state aircraft" as aircraft used in military, customs and police services.

45. Within the land mass and territorial waters of that state.

46. Micahael Milde, *"Rendition flights" and international air law* (2008) (Received from the author by email).

47. *Supra note* 41.

48. According to Micah Zenko: "Despite nearly ten years of nonbattlefield targeted killings, no congressional committee has conducted a hearing on any aspect of them." Micah Zenko, *Reforming US Drone Strike Policies*, Council on Foreign Relations Center for Conflict Preventive Action Council's Special Report No. 65,January 2013.

49. *Supra Note 10.*

50. The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (October 1907).

51. *Supra Note* 10.

52. Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F.L. REV. 217, 223 (1999).

53. CIA operates under US Code Title 50.

54. *Supra Note* 49.

55. Micah Zenko, *Crumbling Wall Between the Pentagon and CIA*, Council on Foreign Relations, http://www.cfr.org/united-states/crumbling-wall-between-pentagon-cia/p24812

56. Mary Ellen O'Connell, *Remarks: the Resort to Drones Under International Law* Denver Journal of International Law and Policy 585 2010-2011.

57. The 9/11 Commission recommended: "The CIA should retain responsibility for the direction and execution of clandestine operations…lead responsibility for the direction and execution of paramilitary operations, whether clandestine or covert, should shift to the Defense Department.57[…] The CIA experts should be integrated into the military's training, exercises, and planning." *Report of the National Commission on Terrorist Attacks Upon the United States (July 2004).*

58. *Supra note* 10.

59. Canadian law places limits on CSIS in "the type of activity that may be investigated, the ways that information can be collected, and who may view the information". Source: Website of CSIS; Accessed: April 22, 2013 http://www.csis-scrs.gc.ca/bts/lgsltn-eng.asp

60. Sought by CSIS for covert electronic surveillance and, potentially, physical searches of premises in a foreign state.

61. *Supra Note* 10.

62. The traveauxprepatoires do not provide an insight into the debate on the scope of the Convention in article 3(c). The text of this provision was agreed bilaterally between the US and the UK. Michael Milde "*Status of military aircraft in international air law*" (2001) *shared with the author by email.*

63. Michael Milde*: International Air Law and ICAO - Essential Air and Space Law Series Vol:10,* Boom Eleven International Second Ed. (2012).

64. In interviews with the author Michael Milde (April 2013) and Micah Zenko (January 2013) agree that CIA-operated drones are state aircraft.

65. "Impunity of agents in international law" by M. C. Miskovsky (CIA historical Review program, 22 September1993) Accessed: December 6, 2012 https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol5no2/html/v05i2a10p_0001.htm

66. Somalia, Yemen, Mali, Djibouti.

67. "The Year of the Drone: Key Observations," New America Foundation, accessed April 22, 2013. http://counterterrorism.newamerica.net/drones/observations

68. Barack Obama, Eric Holder, Harold Koh and John O. Brennan Source: Micah Zenko, *Reforming US Drone Strike Policies,* Council on Foreign Relations Center for Conflict Preventive Action Council's Special Report No. 65, January 2013.

69. *Supra Note 44.*

70. *Supra Note* 64.

71. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Addendum: *Study on targeted killings (*A/HRC/14/24/Add.6 dated 28 May 2010)http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf

72. "Secret, "Kill List' Proves a Test of Obama's Principles and Will," *The New York Times*, May 29, 2012, accessed December 17, 2012 http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&_r=1&

73. David Sanger of New York Times during a talk at the Fletcher School of Law and Diplomacy on December 3, 2012.

74. Article-2(4): All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

75. Article-51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security…".

76. These including former Secretary Defense Leon Panetta.

77. Alan K Kronstadt, *Pakistan-US Relations: A Summary.* Congressional Research Service, October 2011.

78. Gabriella Blum and Philips B. Heymann, *Laws, Outlaws, and Terrorists* (Cambridge: The MIT Press, 2010).

79. "Any difference arising between two States and leading to the intervention of armed forces" qualifies as armed conflict, regardless of its intensity, duration or scale. (J. Pictet, Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, ICRC, Geneva, 1952, p. 32.)

80. Presentation by Antonia Chayes at the New Wars Conference held on October 27, 2012.

81. Ibid.

82. Harold Koh, for example, has said that the United States is in an "armed conflict with Al-Qaeda, as well as the Taliban and associated forces, and is exercising its inherent right to self-defense under international law. (Speech before American Society of International Law ASIL, Washington, DC March 25, 2010) http://www.state.gov/s/l/releases/remarks/139119.htm

83. The 2010 speech of then State Department Legal Adviser Harold Koh gives the following insight into the US drone policy: (i) the target is not just Al-Qaeda, but includes "Taliban and associated forces"; (ii) the battlefield is not limited to Afghanistan but anywhere these groups can be found; (iii) the US operations are being carried out under the doctrine of "self-defense;" (iv) the Administration is still relying on the 2001 Congressional Authorization for Use of Military Force (AUMF)83; (v) the operations are conducted with law of war principles including the principles of distinction and proportionality. *Speech before American Society of International Law ASIL, Washington, DC March 25, 2010*, http://www.state.gov/s/l/releases/remarks/139119.htm

84. Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, "Strengthening our Security by Adhering to our Values and Laws" Harvard Law School (Friday, September 16, 2011).

85. Department of Justice White Paper on "Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qaeda or an Associated Force". The undated White Paper was leaked to the NBC News.

86. Alternatively, the appeals court agreed with the Government that the (Geneva) Conventions do not apply because Hamdan was captured during the war with al Qaeda, which is not a Convention signatory, and that conflict is distinct from the war with signatory Afghanistan. The Court need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories. Common Article 3, which appears in all four Conventions, provides that, in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties [*i.e.*, signatories], each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons … placed *hors de combat* by … detention," including a prohibition on "the passing of sentences … without previous judgment … by a regularly constituted court affording all the judicial guarantees … recognized as indispensable by civilized peoples." *Rumsfeld v Hamdan* - 548 US 557 (2006).

87. *Supra Note* 83.

88. In second presidential debate on October 7, 2008 then Senator Obama had vowed to take action inside Pakistani territory if the US government had actionable intelligence about high-value targets including Osama Bin Laden and if the Pakistani government was unable or unwilling to take action strike against them. "If we have actionable; intelligence against Bin Laden or other key Al-Qaeda officials…and Pakistan is

unwilling or unable to strike against them, we should". As president, in May 2011 Obama ordered an operation to against strike against Bin Laden in Abbottabad, Pakistan without the knowledge or consent of the Pakistani Government.

89. "Sources: Panetta to Congress -- Pakistan Either Incompetent or Involved," *CNN.com*, March 3, 2011,accessed December 17, 2012 http://politicalticker.blogs.cnn.com/2011/05/03/sources-panetta-to-congress-pakistan-either-incompetent-or-involved/

90. It noted three conditions for the use of lethal force against the US citizens in a foreign country (i) that the targeted individual poses an imminent threat of violent attack against the United States (ii) capture is infeasible (iii) the operation would be conducted in a manner consistent with applicable law of war principles."

Department of Justice White Paper on "Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qaeda or an Associated Force".

91. *Supra Note* 80.

92. Jordan J. Paust, Self-Defense Targeting Non-State Actors and Permissibility of US Use of Drones in Pakistan, *Journal of Transnational Law & Policy*, Vol. 19, No. 2 (December 2009).

93. Ryan C. Hendrickson, "Article 51 And The Clinton Presidency: Military Strikes And The UN Charter," *Boston University International Law Journal* (Fall 2001).

94. Ashley S Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, *Virginia Journal of International Law, [Vol 52:483]*.

95. UN High Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN.Doc.A/HRC/12/24/Add.6 (May 28, 2010).

96. Jack Goldsmith *Thoughts on the Latest Round of Johnson v. Koh* Lawfare - Hard National Security Choices (Friday, September 16, 2011) Accessed April 20, 2013 http://www.lawfareblog.com/2011/09/thoughts-on-the-latest-round-of-johnson-v-koh/

97. The Military And Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States) 1986 ICJ (June 1986).

98. Armed Activities on the Territory of the Congo (Congo v. Uganda) 2005 ICJ (December 2005).

99. Kevin Heller, *The "Unwilling or Unable" Standard for Self-Defense*, OpinioJuris blog; Accessed: April 20, 2013 http://opiniojuris.org/2011/09/17/the-unwilling-or-unable-standard-for-self-defense-against-non-state-actors/

100. She recommends internationally agreed standards for "unwilling or unable standard" that would constrain the "victim state" action by reducing the number of situations in which a victim state resorts to force. These standards or principles would include:"(i) prioritiz(ation) of consent or cooperation with territorial state over unilateral uses of force; (ii) ask the territorial state to address the threat and provide adequate time for the latter to respond (iii) reasonably assess the territorial state's control and capacity in the relevant region (iv) reasonably assess the territorial state's proposed means to suppress the threat; and (v) evaluate the prior interactions with the territorial state". *Supra Note* 91.

101. Operation Enduring Freedom began on 7 October 2001.

102. Remarks made during an address before the joint session of the Congress on 20 September 2001.

103. Statement by James B. Cunningham at the UN Security Council on 12 September 2001.

104. "The United States had warned the Taliban that they would be held accountable for further attacks by Bin Laden against (US) interests. The warning had been given in 1998, again in late 1999, once more in the fall of 2000, and again in the summer of 2000. Delivering it repeatedly did not make it more effective". *Supra Note* 52.

105. UNSC Resolution 1267 adopted on 15 October 1999.

106. UNSC Resolution 1333 (2000) adopted on 19 December 2000.

107. Andreas Paulus and Mindia Vashakmadze Asymmetrical war and the notion of armed conflict – a tentative conceptualizationhttp://www.icrc.org/eng/assets/files/other/irrc-873-paulus-vashakmadze.pdf

108. The judgment (or the authority) of one who is exceeding his territorial jurisdiction is disobeyed with impunity.

109. Court also said: "The criminal law of a State may extend to crimes and offences committed abroad by its nationals, since such nationals are subject to the law of their own country; but it cannot extend to offences committed by a foreigner in foreign territory, without infringing the sovereign rights of the foreign State concerned, since in that State the State enacting the law has no jurisdiction". France v. Turkey, The Case of S. S.Lotus, Judgment 9, File E. c. (CIJ 1927).

110. DRC was called Zaire before 1997.

111. *Supra Note* 95.

112. 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, Simon Bronitt, ed.,

Forthcoming; Notre Dame Legal Studies Paper No. 09-43. Available at SSRN: http://ssrn.com/abstract=1501144.

113. Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Articles 39-51).

114. Resolution 1368 adopted on 12 September 2001.

115. *Supra Note* 81.

116. Adopted by UN Security Council on 14 November 2001.

117. "The List Established and Maintained By 1267 Committee with Respect to Individuals, Groups, Undertakings and Other Entities Associated with Al-Qaeda," Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 92011) Concerning Al-Qaeda and Associated Individuals and Entities, United Nations, Last updated March 25, 2013. Accessed April 22, 2013 http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml

118. Remarks of Secretary of State Hillary Rodham Clinton at the Asia Society in New York, February 18, 2011.

119 *Supra Note* 109.

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125. Press Conference by President George W. Bush in September 2006 in New York.

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137. *Supra Note* 89.

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141. *Supra Note* 69.

142. *Supra Note* 66.

143. *Ashley S. Deeks* "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense Virginia Journal Of International Law (2008) Volume 52 - Number 3.

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government is bound to use the means at its disposal…to prevent the departure from its jurisdiction of an aircraft in a condition to make a hostile attack against a belligerent Power".

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153. Micah Zenko, "The End of Drone Strikes in Afghanistan and Pakistan?", *"Politics, Power, and Preventive Action"*, April 6, 2012, Accessed December 17, 2012,http://blogs.cfr.org/zenko/2012/04/06/the-end-of-drone-strikes-in-afghanistan-and-pakistan/?cid=oth_partner_site-atlantic

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155. Supra Note 82.

156. Red Cross chief criticizes US drone use in Pakistan Published: April 16, 2013 Accessed: April 20, 2013, http://dawn.com/2013/04/16/red-cross-chief-criticises-us-drone-use-in-pakistan/

157. *Supra Note* 60.

158. *Supra Note* 135.

159. The material sources include: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national juridical decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly. Ian Brownlie *Principles of Public International* Law, 5th Ed. (1999) Oxford.

160. Ibid.

161. Ibid.

162. ICJ in Asylum case: "the Party which relies on custom… must prove that this custom in such a manner that it has become binding on the other party. Facts (that) disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise (of diplomatic asylum) and in the official views expressed on different occasions; there has been so much inconsistency in the rapid succession of conventions (on asylum), ratified by some states and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law. Asylum Case (Colombia v Peru) 1950 ICJ (November 20, 1950)

163. ICJ has assumed the "existence of an opinion juris on the bases of evidence of practice, or a consensus in the literature, or the previous determinations of the Court or other international tribunals. However, in a significant minority of cases the Court has adopted a more rigorous approach and has called for more positive evidence of the recognition of the validity of the rules in question in the practice of states". *Supra Note* 156.

164. According to International law, a persistent objector to the status a particular practice in the process of evolving into a custom, is not bound by that customary rule. "Evidence of objection must be clear and there is probably a presumption of acceptance [of the status of the practice as custom] which is to be rebutted. Whatever the theoretical underpinnings of the principle, it is well recognized by international tribunals, and in the practice of states." *Supra Note* 156.

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