

"US Drone Attacks in Pakistan: An International Law Perspective"

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Abstract

Following the terrorist attacks in 2001, on the US territory, the US and its allies launched a Global War on Terror (GWOT) in Afghanistan. Federally Administered Tribal Areas (FATA) of Pakistan became a battle ground being in the neighborhood of Afghanistan. These areas have been frequently attacked by unmanned aerial vehicles (UAVs), called Drones, by the NATO forces. Although these drone attacks are to target the terrorists stationed in FATA but a large number of civilians are the victim of these attacks, a cause of resentment in Pakistan. Being the partner in Global War on terror (GWOT) Pakistan government has to face strong criticism from media and people of Pakistan, questioning the legality of these drone attacks. This article focuses on the justification and legal position of Drone attacks within the boundaries of a sovereign state. It examines the legality of drone attacks under international law and the US domestic law. It concludes that Drone attacks are not supported by international law. They are also not justified under US domestic laws since Pakistan government never refused to take action against terrorists. Moreover there is no transparency in conduct of these drone attacks. In current scenario the US has lost all justification, if there would have ever been any, to continue these attacks because Pakistan army is conducting an aggressive military action against terrorist in FATA.

Keyword: FATA, Drone attacks, Terrorist, Militancy, International Law, Taliban

1. Introduction

The region which has become most volatile and bone of contention between Pakistan and the US in their joint struggle against terrorism is the Federally Administered Tribal Areas of Pakistan (FATA).¹ This region due to sharing borders with Afghanistan² which has been used as a breeding ground for Jihadists during so called US sponsored covert armed struggle against former Soviet Union, continued to be the hub of terrorist activities in 1990s.³

¹The semi-autonomous tribal lands consist of seven parts called "agencies": Bajaur, Mohmand, Khyber, Orakzai, Kurram, and North and South Waziristan. There are also six smaller zones known as frontier regions in the transitional area between the tribal lands and the North-West Frontier Province to the east.

²This border called Durand line, was marked during the colonial period and was never accepted by Afghanistan since the creation of Pakistan. Pakhtun tribes are divided on both sides of the border. They are warriors having a long history of struggle to resist any external power to establish control over them. In fact they gave tough time to the British who were wise enough to make peace with them on the term of non-interference in their internal matters.

³Still this region enjoys a special administrative status within the federation of Pakistan.

This is one of the most deprived regions of the country as its per capitaincome is around \$663 in 2010 and more than 66 percent people live below poverty line. Around 2.4 per cent of Pakistan's population live here but its share in economy of the country is only 1.5 per cent (Malik, 2013). In absence of development and regular economic activity, life is very hard in this

After 9/11 attacks on the US and NATO's military campaign against Al-Qaeda in Afghanistan, FATA region became the hub of insurgents and a challenge to the Pakistani authorities.

The US initially started pressurizing Pakistan's government to control the militant activities in the tribal areas. Later in 2004, it extended its fight against Taliban and Al-Qaeda to FATA by targeting through UAVs. It was used for target killing of the high value targets (HVT) but the precious civilian lives of innocent Pakistanis were the collateral damage. Frequent use of UAVs raised questions about the legality of these attacks in Pakistan and world over especially due to collateral damages these attacks caused. First question was the legal justification of these attacks under the international law. Second question was also about the legality of these attacks within the boundaries of a sovereign state, situated outside the war zone, especially when Pakistan government denied presence of any agreement between Pakistan and NATO forces on the subject. This paper investigates both questions under international law and the US domestic law.

2. Rise of Militancy in the Fata and Its Spread into the NWFP

Although the emergence of Taliban⁴ to the pedestal of power in Afghanistan changed the situation in FATA also, which was consisted of tribes divided into various groups? However, the militancy by these religious extremist groups was not new in FATA. It was dated back to the Afghan resistance to Soviet occupation when the US and its allies themselves supported the Islamic concept of Jihad to wage a war against the USSR, their old Cold War rival (Rashid, 2001).⁵ Mostly financed by the Arab money in collaboration with local religious political parties⁶ the madrasas (seminaries) were used as breeding grounds for Jihadist therefore 1980s witnessed the mushroom growth of these religious schools (Kux, 2001, 287-89).⁷

Kathy Gannon explains "extreme tribal views are not new," and predates the international counterterrorism operation in the region by decades (Zissis and Bajoria, 2007).⁸ However the Soviet's efforts to establish communist government through military intervention in Afghanistan further strengthened the warrior culture. After the Soviet Union's retreat in 1989, the US and its allies washed their hands⁹ and abandoned their allies, *Mujahedeen*. In absence of any central authority in Afghanistan, a civil war erupted within the different religious factions and groups of Mujahedeen. This power struggle was concluded with the emergence of Taliban, as a stabilizing force in 1994. They remain in power until September 11, 2001 (Abbas, 2009). However FATA region remained volatile because of continued tussle among the tribes.

The 2001 American invasion of Afghanistan pushed various resistant groups into FATA to escape NATO's military operations. NATO command realized this and directed their attention to safe havens in FATA by 2003.

region. However militancy is an attractive source of money for the terrorist since USSR's military intervention in Afghanistan.

⁴The word Taliban literary means the pupils. The term is used for the people, who became orphans in Afghan struggle for liberation from the Soviet Army after 1979 military intervention in Afghanistan. They were trained in religious seminaries (Madrasas) of a particular creed of Islam. They took the control of Afghan government in post Geneva Accords' period and were successful in establishing and maintaining peace in a major area of Afghanistan. They were intolerant to any opposition and did not hesitate to kill their opponent tribal chiefs.

⁵Ahmed Rashid says that FATA "has become a melting pot for jihadists from all over the world." The Afghan and Pakistan Taliban, al-Qaeda, Chechens, and the Islamic Movement of Uzbekistan are among the militants who train and take refuge in the tribal region. Furthermore, since the beginning of the Afghanistan war, members of the Taliban have advanced into leadership roles in some parts of the tribal lands, particularly the agencies of North and South Waziristan and Bajaur. The Pakistani government appears to take a harder stand on al-Qaeda to please the United States and a more permissive posture with the Taliban, who in turn work with other militant groups.

⁶Jamaat-i-Islami was a partner of Inter-Services Intelligence Service (ISI) for Afghan Jihad.

⁷Taliban were launched by the ISI but later they became autonomous in their decisions. ISI wanted to have a pro-Pakistan government in Afghanistan and before that was not ready to sign any agreement with Soviets and Najeeb-ullah government.

⁸The US promoted the Islamic concept of Jihad to dislodge Soviet occupation of Afghanistan and warriors were named as Mujahedeen. This term is used for religious warriors or those who wage jihad (war against the enemies of Islam); in an Afghan context the term is used to describe those who fought against the Soviet Union in Afghanistan in the 1980s, with the so-called covert support of the US and its allies. FATA became the base camp for Mujahedeen coming from all over the world to evacuate the Soviet forces from Afghanistan.

⁹After the Geneva Accord all powers left Afghanistan without establishing any government there which gave way to a power struggle among the local war lords.

Since Pakistan and Afghanistan share a border of 1,500-mile, all consisted of mountainous terrain, it was not possible for Pakistani government to control the cross boarder movement. This problem benefited Taliban to increase their militant activities in FATA region. During the period of 2002-08, Taliban were the de-facto rulers of this area (Abbas,2009).

In FATA, Pakistan government instituted many agreements with the militants to make peace but all of them failed to establish writ of the government in these areas, in the absence of a strong legal and administrative structure (Tajik, 2011). As a result territorial control of militants established in this area. The militants have been moved to the settled southern districts of Khyber Pakhtunkhwa including Dera Ismail Khan, Bannu, Kohat, and Swat. They were also involved in terrorist activities in the central districts of KPK including Peshawar, Mardan, Nowshera, Swabi, and Charsadda (Ijaz, 2008). Pakistan government conducted cleanup operation in Waziristan and introduced reforms in the area also but militants resumed their activities as the military returned to the barracks.

Balochistan with its 7.5 million inhabitants has become the next target of terrorist activities after FATA (Hoffman, 2009). Already marked with the civil war like situation, Balochistan is the most sensitive province of Pakistan after KPK. However terrorist threat has already been extended to Punjab and Sindh also. Now to curb militancy is a national cause (This is in the National Interests of Pakistan, not only for the West, 2009). The terrorist activities are threatening the education institutions all over the country.¹⁰

3. Pakistan`s Policy

Apparently, Pakistan`s FATA policy is to do what the Americans tell to do. So far, the direct cost of war has been reimbursed by the Americans, which amount to Rs. 80 billion yearly. However the indirect cost `of this `war on terror` is immense, in the form of both material and social. The material losses include destruction of schools, infrastructures, suspension of economic activities and loss of precious lives. While the social cost is much higher in the form of insecurity in the region, displacement of war affected people from their homes, disperse families, psychological problems etc. Pakistan accepted to join GWOT on the call of the US after 9/11 and providing all logistic and strategic support to NATO forces in Afghanistan but the allied forces are not satisfied with Pakistan`s role. Although Pakistan Army has been trying to control the militancy inside Pakistan but a trust deficit on both sides exists, despite close cooperation with each other in the form of sharing information and strategic cooperation. It is obvious that Pakistan cannot afford to sustain this war for long on its own (Khan, 2008), However Pakistan government and people are of the view that there should be a difference in Pakistan and Afghanistan. They agree on action against terrorists but that action should be by the Pakistani authorities and NATO forces have no right to attack within Pakistani boundaries, not even by drones.

4. Drone Attacks in Pakistan

Bush Administrations sought Drone attacks as a part of its grand strategy to defeat Al-Qaeda and Taliban in FATA and especially in Northwest Pakistan since 2004.¹¹ These controversial attacks were guided by the Central Intelligence Agency's (CIA) Special Activities Division, to target militants who were thought to have a safe haven in FATA in Northwest of Pakistan. These strikes also continued under the Barack Obama Administration. This series of attacks are generally referred as a "drone war." People of Pakistan feel very insecure because of civilian casualties as a result of these attacks. Government of Pakistan also condemns these attacks but there are evidences that Pakistani authorities have secretly shared information with Americans on high value targets. Pakistani forces also allowed the drones to operate from Shamsi airbase.¹²

Bush`s successor Barak Obama continued the policy of drone attacks in FATA. He was warned by a US-based think-tank declaring FATA of Pakistan as the "most dangerous place" in the world (Abbas, 2009).

¹⁰ Terrorist attack on Army Public School took 134 lives of children under 16. Following terrorist threat all education institutions remained closed since 22/12/2014 to 12/01/2015.

¹¹Drones are unmanned aerial vehicles (UAVs) operated remotely from Creech Air Force Base. These UAVs are MQ-1 Predator and more recently MQ-9 Reaper firing AGM-114 Hellfire missiles.

¹²Shamsi Airfield was under the control of Arab Emirates before transferred to US. Pakistan`s two Governments (General Musharraf & PPPP` third term) sheltered these Drones to kill their innocent people in search of terrorists. During Musharraf`s period this base`s core was totally run by CIA and semi-periphery look after by Frontier Constabulary and periphery was watched by local police to camouflage the presence of outsiders. To pacify and appease local population, due to loud noise of drones` takeoff, US distributed generators to surrounding villages.

This report further declared that “nuclear Pakistan as a base for international terrorism is a prospect that the world cannot afford” (Nawaz, 2008).¹³ However the report suggests that there emerged a new consensus among the scholars that there is no military solution to the conflict. An early Confidence Building Measure (CBM) should come from Pakistan government to end its selective protection of Afghan Taliban militants including the Quetta Shura, the Haqqani and Hekmatyar network.¹⁴ Further steps should be taken to expel foreign militants from the FATA. But at the same time this report recommended the new administration to include FATA in the war region, while the actual war is fought in Afghanistan. On the recommendations of such reports Obama administration allowed more drone attacks in FATA, than its predecessor George Bush did in his two terms of eight years, principally targeting leadership of Taliban and Al-Qaeda (Vendrell, 2009). However these attacks resulted in a large civilian death toll. Detailed table of deaths from US drone strikes and injured in Pakistan since 2004 is as under:

Drone Attacks and its Results:

Year	Drone attacks	Killed	Injured
2013	13	105	32
2012	51	349	98
2011	73	574	154
2010	109	993	421
2009	50	633	331
2008	36	368	154
2007	4	46	30
2006	3	103	4
2005	2	7	2
2004	1	5	0
Total	342	3183	1226

Source: Drone Attacks: Pakistan Body Count.

Available on http://pakistanbodycount.org/drone_attack.

A CNN report says that the United States operates two separate drone programs in the region. First one is running as a support and surveillance missions in Afghanistan by the US military. While, the other one is run by the CIA, in the tribal areas of Pakistan in collaboration with the Pakistani Army and NATO. All these missions are having a so called covert face and Obama administration did not admit its targeting of militants with drones (CNN, 2011).¹⁵ But the Senator Dianne Feinstein (D-CA), who chairs the Senate Intelligence Committee, publicly acknowledged in early 2009, that Pakistan and the US are cooperating on drone. He further declared the US Airstrikes in Pakistan called ‘very effective’ (Woods, 2011), US military sources believe that terrorist attacks in Afghanistan are done by the foreigners, stationed in FATA (Washington Post, 2 October 2008)

5. Justification of Drone Attacks and Legal Position

Although targeting terror suspects with UAVs in official combat areas is considered legal, the use of the technology outside a declared zone of combat i.e., Iraq and Afghanistan has brought international criticism. Whereas, UAV-targeting program in Pakistan is believed to be operated by the CIA and the distinction between military applications and covert CIA use of drones has become a point of contention, as are issues pertaining to collateral damage and legal justification (Bruno, 2012).

As stated by Hina Shamsi,¹⁶ “There is tremendous damage being done to the international rule of law, which requires accountability, when these killings are being done based on secret justifications”(Greg , 2010). Collateral damages and civilian losses of life in these drone attacks are other causes of resentment among the local population.

¹³The Centre for Strategic and International Studies (CSIS) asked the US government to redefine the territory of war in the region and include FATA in war zone.

¹⁴These are the terrorist groups operating in FATA region and have involved in terrorist activities within Pakistan also.

¹⁵CIA Chief Leon Panetta in may 2009 called unmanned airstrikes “The Only Game in Town in Targeting Al-Qaeda Leadership in the Tribal Areas” see “US Airstrikes in Pakistan called ‘Very Effective.’

¹⁶Hina Shamsi is a senior advisor of project on extrajudicial executions, New York.

However the US sources do not accept any civilian casualties in drone strikes which is against striking ground realities. As Obama's top counterterrorism advisor, Brennan, claimed in a television program that "the US had not killed a single civilian since August 23, 2010" (Brennan's Statement, 2011). Independent sources reveals that drone strikes caused thousands casualties since 2004 among them around one-third were civilians. The strikes may also have the unintended consequence of creating enemies where none existed or providing militants with a justification for striking Western targets. These strikes are creating enemies of the US among those innocent people who had no concern about war on terror. It is also providing the militants the justifications for strikes on the western targets.¹⁷ Daniel Byman,¹⁸ states that these target killing programs have proved counterproductive in other states in the past, therefore, drone attacks should be avoided.¹⁹ It is a very painful fact extracted out of published statistical data that "to kill one terrorist" the US drones had to kill 57 innocent Pakistanis (Present Statistical Data, Wolfram.com, www.wolfram.com/Mathematica, 2012).²⁰

5.1 American's Standpoint

President George W Bush proclaimed, "A national emergency exists by reason of the terrorists attacks at the World Trade Center, New York, and the Pentagon, and the continuing and immediate threat of future attacks on the United States" (Proclamation No. 7463, 2002). The US officials and White House administration declared that the top leadership of the Al-Qaeda was in Pakistan including Osama Bin Laden, in safe hides, therefore, Pakistan would be the top concern. (U.S. to shift from Afghanistan to Pakistan?, 2009).

With the inauguration of Obama in office the drone attacks over Afghanistan and Pakistan were doubled (Woods,2011).²¹ The US administration claimed that it has broadened these attacks against those terrorist groups who were destabilizing Pakistani civilian government. They considered these attacks very successful in decimating the senior al-Qaeda leadership. US Military reports defended that al Qaeda is gradually becoming scared. They further claimed that drones attacks have puzzled the Taliban and stimulated internal discord and fight making weaker (Khan, 2010).

The US Administration has been defending drone attacks as a legal means of self defence in its war against al-Qaeda and the Taliban post-9/11. The State Department's Senior Legal Adviser, Harold Hongju Koh, defended these tactics without referring to CIA's conducting of these attacks. He insisted that the use of targeting practices including the deadly operations conducted with the use of aerial vehicles was in conformity to the US laws of war (McNeal, 2010). However, some US politicians like US Congressman Dennis Kucinich declared it was the violation of international law by carrying out such attacks against a country that never attacked the United States. Philip Alston the most important opponent of these attacks condemned the legal reasoning given by the administration. Alston wrote in a May 2010 report, "it does not address some of the most central legal issues including: the scope of the armed conflict in which the U.S. asserts it is engaged, the criteria for individuals who may be targeted and killed, the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings, and the existence of accountability mechanisms" (Alston, 2010). During the first term, Obama Administration launched more than six times drone strikes as President Bush did throughout his eight years in office and kept CIA-run drone program away from the scrutiny of Congress and the Courts.²²

Much of the existing debate on drones has focused on their legality under international and domestic law and their ethical use as a weapon of war (Brennan, 2012).

¹⁷Faisal Shahzad, who confessed to the failed Times Square bombing in May 2010, and those militants of al-Qaeda involved in a suicide-bomb attempt on a Detroit-bound airliner in the Arabian Peninsula, in December 2009, justified their actions as an attempt to avenge US drone strikes in Pakistan.

¹⁸Daniel Byman is a counterterrorism expert at the Brookings Institution.

¹⁹He gives the example of Israel's efforts to decimate Hamas proved futile and it produced negative results.

²⁰ It is the tag line of Hollywood film 'War' by Warner brother that nobody has grief on Pakistani's death, even the Pakistanis.

²¹Since Obama has asserted that Pakistan has become safe hide for al-Qaeda, the CIA increased the number of the drones attacked to Afghanistan and Pakistan.

²²According to data collected by the New America Foundation, the Obama administration launched 284, drone strikes between 2009 and September 2012. By comparison, the Bush administration launched 46 strikes between 2004 and 2008. For data, see <http://counterterrorism.newamerica.net/drones>, accessed 16/6/2012.

Arguments for the effectiveness of drones can be subdivided into four separate claims: (1) that drones are effective at killing terrorists with minimum civilian casualties; (2) that drones have successfully been killing ‘high value targets’ (HVTs); (3) use of drones puts pressure on terrorist organizations that degrades their organizational capacity and ability to strike (4) a cost–benefit analysis of their use relative to other options (Boyle, 2013). Henry A. Crumpton, former Deputy Chief of the CIA’s counterterrorism center, concluded that drones are a morally superior, even humane, form of warfare (Shane, 2012).

5.2 Drones under International Law

Use of drones inside a warzone is considered legal but legal fraternity, Parliamentarians and human rights organizations around the world have raised questions about it and demanded transparency. Distinction between military use and use of drones for covert operations has become blurred since it is believed that CIA and not the US military operates drones inside Pakistan. The issues of collateral damage and legal justification are also important.

The Pakistani governments remained mostly silent on this issue but legal experts have questioned the justifications given by the US for the use of drones. Unlike government officials the legal experts do not have a passive response to drone strikes. Obama has been accused by them for breaking International Law. Use of drones outside battlefield is against human rights and the rule of law which is most important in the fight against terrorism (Dworkin, 2013).

As its proponents, the US governments have been denying any controversial point in drone strikes and assert that it is fulfilling all the criteria of international law. The US administrations also insist that drones are also justified under the US domestic laws. To resolve the controversy it is imperative to study the clauses of i) international law that deal with drones and ii) the US domestic’s laws relevant to the operating drones. This article would study the issues under both laws respectively.

Under the international law drones can be examined through the principle of Jus ad Bellum (right to go for war) and Jus in Bello (right conduct of war). US-cross-border drones attack on the territory of Pakistan can only be justified only if:

1. Pakistan government has given its consent to America for these types of attacks.
2. If the US has taken permission from UN for these types of attacks inside a non-combatant zone like that of Pakistan.
3. If Pakistan government has launched an attack on American forces inside Afghanistan (Aslam, 2011).

For a detailed analysis of the legal aspect of drones discussion needs to examine all these aspects separately under the principles of just war.

5.2.1 Jus Ad Bellum (Right to go to war)

This principle deals with those principles, which have to be taken into consideration, in order to determine, whether a nation can resort to war or not (Connell, 2010). In four cases it can resort to war under international law:

i) Last Resort

This rule states that military should only be used as a last option when all other options like negotiations, mediation, concession etc., fail. In the case of drone strategy America has not burdened itself of any negotiations or concessions, and directly applied it. Regarding UN charter this principle is very important. UN ensures world peace and stability and prohibits the use of hard power and military force. Article 2(4) of the UN charter “Prohibits the threat or the use of force by states against one another”, except when the host state has allowed the other state to use force in its territory, only if the force is used in self-defense and if the concerned state is not taking appropriate actions against irritants on its territory (Jin, 2012). Article 2(4) further asks states to respect the territorial integrity and political independence of other states. If a state violates this principle, his actions will be labeled as aggression (Mazhr & Goraya, 2011).

As far as state’s consent is concerned, America has claimed that it is practicing drone policy in Pakistan with the full support of Pakistani government. But yet it is unable to prove its claims, since it is unable to prove any documented proof of it (Mazhr & Goraya, 2011). On the other hand Pakistani government has always condemned these attacks as a violation of its sovereignty (Orr, 2011).

As former president of Pakistan Asif Ali Zardari has said, “Drone attacks in our country results in high rate of casualties as well as the loss of property. These are counterproductive and should brought to an end immediately” (Boyle, 2013). Present government of Prime Minister Nawaz Sharif has filed a case in UN Security Council against drones on its territory and the council has passed a resolution declaring drones as illegal (Pakistan urges end to drone strikes in UN General Assembly, 2013).

ii) Just Cause

This rule states that war initiation should always have a just cause. For example force can only be used in the face of an imminent threat or in self-defense. Through the principle of imminent threat, a state can get the right of first strike by proving that its enemy is going to attack it at a specific time and place. However in asymmetric wars, like GWOT, this principle cannot be applied because one cannot anticipate when and where, a terrorist group is going to launch an attack. To overcome this problem Americans has coined a new term “broader concept of imminence”. Through this concept Americans claim every terrorist attack as imminent even when there is no specific evidence of where such an attack would take place or of the precise nature of the attack (Kevin, 2013). This modification in existing law exhibits the hegemonic attitude of the US as a sole super power.

As for as principle of “self-defense” is concerned, Article 51 of UN charter clarify that “states can response in self-defense only if an armed attack occurs”. However there is also a debate about the term “armed attack” as different scholars interpret this term in different ways. This uncertainty was resolved by International court of Justice (ICJ) in 1986. According to ICJ a state can launch counter-offence against the other state that has done an armed attack on it. Such attack must be of very large scale and does not include cross border firing. Further court states that the actions which a country takes in the name of self-defense must be aimed at achieving just defense and not at the destruction of the enemy. In simple words actions should be proportionate to the aim of sustaining defense and peace (O’Connell, 2010).²³ Moreover there has been debate about whether Article 51 applies to the use of force against non-state actors or not (UN Charter art. 51.) Since terrorists’ attacks can never be regarded as full scale armed attacks so they cannot trigger the self-defense principle of UN charter (Sterio, 2012).

iii) Competent Authority

A just war can only be initiated by a political authority and not by a dictator, authoritarian regime or military establishment. Because the decisions of a political authority reflects popular opinion as well as ensures the principle of distinction and justice. Currently America is working on two types of drone systems: one is operated by army in the declared battle zone of Afghanistan and Iraq which are publically acknowledged.

The second system is covertly used by central investigating agency (CIA) in non-battle zone of Pakistan and Yemen (Sterio, 2012). The covert operations are illegal in their own capacity. Since the Article 43(2) of UN charter states, “Members of armed forces of a party to a conflict are combatants, they have right to participate directly in the war” (Connell, 2010), the legality of CIA operatives who are directly involved in initiating drone attacks in Pakistan is questioned. Moreover although the drone strategy is endorsed by President Bush as well as President Obama but CIA did not seek their approval in any single strike (Irfanuddin,2014). These drone attacks in Pakistan, Yemen and Somalia are conducted by CIA with little Congressional oversight. The existence of any such program has been denied by the Obama Administration in the Courts (Melber, 2012). As far as general opinion is concerned US citizens are also supporting “drone strategy” against terrorists because they are vaguely aware of this technology and the legal aspects involved in its use (Brunstetter, 2012).

iv) Comparative Justice

Comparative justice means injuries and damages must be balanced between two warring parties. In simple words it means the devastation of one party should not exceed the others. But many theorists reject this principle on the ground that belligerents and revolutionary can use it in a negative way. This Jus Ad Bellum principle is not applicable to Asymmetric wars, such as that between the customary collation forces and lopsided extremist forces.

v)Probability of Success

This principle states that force must be used only when the probability of success is obvious, and that the use of force must be avoided if disproportionate force is required to attain the victory.

²³O’Connell arguing that terrorist attacks “are generally treated as criminal acts because they have the hallmarks of crime, not armed attacks that give rise to the rights of self-defense.” 14..

America is using drones as an effective strategy to curtail terrorism. But as Aziz Ahmad Chaudhry, the spokesman of Pakistan's Foreign Ministry, was of the opinion that drones are not effective as instead of curbing down terrorism it is intensifying peoples' emotions against America and creating a thrust for revenge (Will I be next? 2013).

5.2.2 Jus in Bello

Jus in Bello governs the right conduct of an armed conflict. Jus in Bello is comprised of the three principles.

i) Principle of Distinction

This principle forbids indiscriminate attack and states that during a fight, distinction has to be made between warriors and civilians, between fighters and non-combatants. After this differentiation, attack should be focused only on combatants while civilians should be given adequate protection. According to the definition combatants can only be the members of a state's army. But in the changing scenarios of international system civilians can also be regarded as combatants only if they directly contribute to the war. In this regard one thing should be kept in mind that those who indirectly contribute to war in the shape of fanatical assistance of moral and political support should not be considered participants of a conflict. Further, if in some cases it becomes difficult to discriminate a person as combatant or non-combatant, he must be given full safeguard (Ahmed, 2014).

According to Article 51(3) of Additional protocol I of 1977-1979 Geneva convention: "Civilians shall enjoy the protection given by this piece of law unless they take part in hostilities" (Connell, 2010). International committee of Red Cross says "Al-Qaeda members can be targeted through drones only if one can prove that particular target is directly engaged in hostilities" (Sterio, 2012). To follow the principle of distinction in FATA is not easy as militants have fused closely in civilian population. American "signature strikes" which are based on behavioral pattern is also a clear violation of law because through these types of strikes, all the persons who may have similar outlooks and behaviors to militants are attacked. This situation got further worse by the traditions of openly holding ammunitions (Jin, 2012). Further the "double-tap strikes" whose victims are early respondents and rescue workers, is also a breach of International Humanitarian Law (Ahmed, 2014). According to Christ Henery (UN special Reporter on extrajudicial and arbitrary execution) "Civilian rescuers are indeed being intentionally targeted, there is no doubt about the law, these strikes are war crimes" (Jin, 2012).

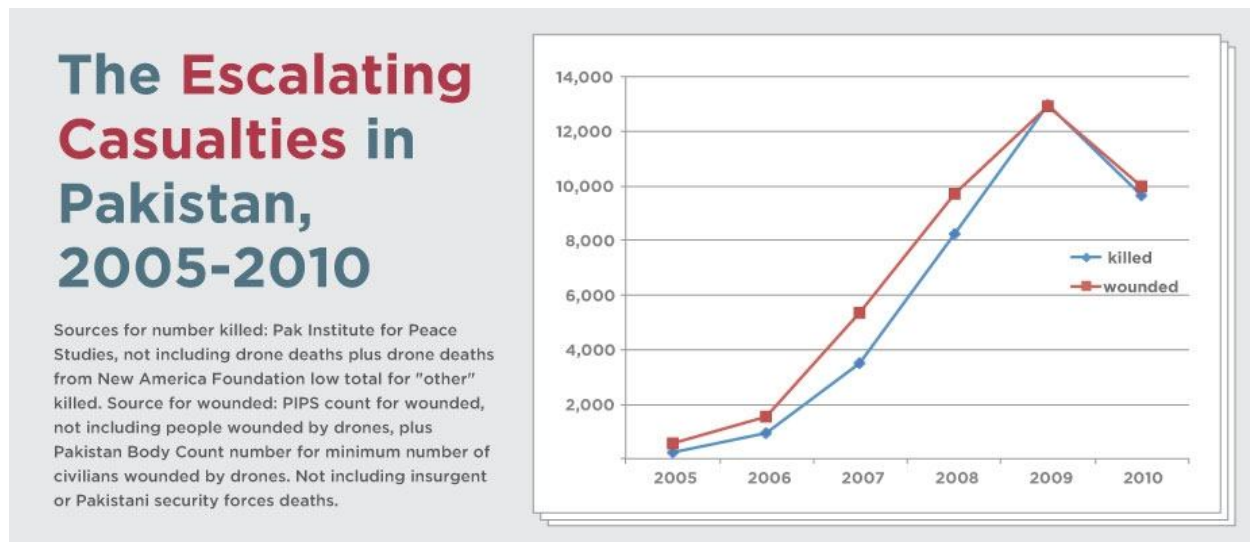
ii) Principle of Necessity and Proportionality

International human right law allows the intended use of fatal force only when it obeys the principle of necessity and proportionality (Living under Drones, 2012). Principle of necessity and proportionality means that attacks should be conducted when there is a clear prospect of success. Further the loss of civilian life, property and money should not exceed to military advantage. As far as American drone campaign in Pakistan is concerned, it claimed that it has killed many high value targets (HVT) but Stand Ford law school claims that these were only 2 percent of the total casualties and the remaining 98 percent are either civilians or low value targets (LVT) (Boyle, 2013).

In the start of its drone operations in Pakistan, the US has claimed that civilian death rate was in single digit. But the Bureau of investigative journalism says that there were minimum 2,562 to 3,325 people died during 2004-2012 in drone attacks, of which 474 to 881 were civilians and 176 were children (Living under Drones, 2012). David Killcullen (Congressman) has acknowledged in 2009, "I realized that they do damage to Al-Qaeda leadership since 2006. We have killed 14 senior Al-Qaeda leader and in the same period we have killed 700 Pakistanis" (Connell, 2010).

The list of civilian death toll is presented differently by different organizations. According to New American foundation there were 1,886 to 3,119 total casualties since 2004 to 2012. And the organization claim that out of these 85 percent were militants (Boyle, 2013). Whereas Saleem Mazhar and Naheed Goraya have assert in their paper that 90 percent of the dead were civilians.

Stand Ford-NYU reports 477-881 civilians that have become the victim of drones since 2004 (Braun, 2012). Long war journal claim these to be only 6 percent whereas Columbia law school's human right clinic (CHRC) maintained these between 11 to 34 percent. Pakistan government claims approximately 400 civilians who have become a prey to American drones (Singh, 2013).



Civilian causality rate: Source: <http://costsofwar.org/article/pakistani-civilians>

Thus one can say that it is very difficult to check whether US is conducting its war lawfully because of the lack of exact data. Americans have been advocating its drone strikes under the principle of necessity by stating that these strikes are fulfilling its military objectives. But it is unable to justify its drone policy under the principle of distinction by accepting the fact that they are killing civilians and it is the main reason for the unpopularity of drones. At the same time US argues that civilian casualties can also be caused by the use of traditional weapons in a conventional warfare, but the problem with drones is that opponents do not get any opportunity to surrender.

iii) Principle of Humanity

According to this code of conduct, decisions regarding resort to the use of force must be made in favor of sparing lives, property, infrastructure and the minimal destruction and chaos. Geneva Convention of 1864 “forbids attacking sick and wounded.” Rule 47 of 2005 International Red Cross Council (ICRC) prescribes “attacking persons who are recognized as hors de combat²⁴ is not allowed” (Connell, 2010). However, drone attacks are clearly violating the above-mentioned principle.

c) Target Killing

Target killing is defined as premeditated and deliberate use of lethal force by states, their agents and other organized groups against specific individuals. International humanitarian law prohibits it and allows only when the threat is eminent. International covenant on civil and political rights (ICCPR) also prohibits arbitrary killing as well as punitive killing of terrorists (Sterio, 2012). Article 6(2) of international covenant on civil and political rights dictates “in countries which have not abolished the death penalties, sentence to death may be imposed only by the serious crimes in accordance to the law in force at the time of the commission of the crime. This penalty can only be carried out pursuant to a final judgment rendered by a competent court” (Mazhar, and Goraya, 2011). Therefore drone strikes even on the terrorist are extrajudicial killings which are not justified under any law, either domestic or international.

5.3 US Domestic Law

US drone strikes must also comply with US domestic law. Under Article II of the US Constitution, the President wields significant authority over questions involving national security and the use of force. National Emergencies Act provides such authorization, empowering president to deal with any situation. However the principal legislative basis offered to justify drone strikes against Al-Qaeda is the ‘Authorization to Use Military Force’ (AUMF), a joint resolution passed by both houses of Congress, exactly one week after 9/11. Congress has been engaged in oversight of the drone program. It reaffirmed the Presidential power to detain forces “associated” with Al Qaeda and Taliban and all those “engaged in hostilities against the United States or its coalition partners” (National Defense Authorization Act (NDAA), 2012).

²⁴Any person who is defenseless because of unconsciousness, wound, sickness or shipwreck.

The AUMF is to justify the US President's authority to use the CIA for pre-emptive lethal action against terrorists in response to an imminent threat, in self-defense, without obtaining Congressional approval.

Although the CIA is governed by a different section of the US Code (Title 50), the CIA "may not authorize any action that would violate the Constitution or any statute of the United States". Director of National Intelligence James Clapper explained in a January 2012 Senate Intelligence Committee hearing that the entirety of Harold Koh's March 2010 speech at the American Society of International Law's annual conference, which laid out the legal requirements to which the US is bound and the administration's legal justification for targeted killings, applied equally to intelligence agencies.

6. Conclusion

Drones are frequently used by America in Pakistan since 2004. This policy has aroused many questions about its legality. But answering these questions is difficult because of the unavailability of reliable data. International court of Justice can play its role for the gathering of exact information through conducting a survey in Pakistan, Yemen, Afghanistan and all other states which are victimized through drones. United States use of drones against Al-Qaeda and Taliban in Afghanistan is legal. But the US has no legal right to use drone attacks in Pakistan because Pakistan is not responsible for armed attack on it. So it cannot resort to military force (drones) under the right of self-defense. Further, Pakistan has not requested US to help it in fighting with terrorists on its territory. Thus, these strikes are violation of international law, as it restricts states to use force against one another, violation of Pakistan's sovereignty, as Pakistan is independent state whose security forces are responsible for maintaining peace and stability of the country. American drones are also violating the principles of the right conduct of war. As these attacks are conducted by CIA officials which are not the lawful combatants to exercise these type of activities. Further these strikes are often used indiscriminately which results in large scale civilian casualties. A major disadvantage of this policy is that instead of controlling extremists and radical elements of the society it has multiplied them.

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