

Drone Strikes, Logic of Self-defense and Violation of State Sovereignty

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ABSTRACT

The use of drones or Unmanned Aerial Vehicle (UAV) technology in modern warfare presents a challenge to the traditional concepts of war and peace and International Law. The US. justifications for the legality of drone strikes in Pakistan have posed serious challenges to the foundations set by the United Nations Charter for maintaining the international rule of law. This research provides an in-depth and objective analysis of the problem of legality of US drone attacks against Pakistan. This paper argues that the US rationale of self-defense and armed-conflict for justifying the legality of drone strikes in Pakistan does not fulfil the criteria set by the provisions of Article 2 (3), Article 2 (4) and Article 51 of the United Nations Charter and thus, cannot be termed as legal. This research argues that some provisions of UN Charter about the use of force are vague or not well defined and therefore, states can interpret these provisions according to their own logic and needs. The study is based on table research and most of data was collected through

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secondary sources such as different books, journal papers, research reports, blogs, and newspapers.

Introduction

Since the US invasion of Afghanistan in 2001, Pakistan's Federally Administered Tribal Areas (FATA) have turned into one of the most troubled regions in the US war against terrorism. Because of its geographic proximity to Afghanistan, many of Al-Qaeda and Taliban terrorists fled to the FATA and developed their hideouts in the region. As a result, the region attracted increased US attention and came under intense US scrutiny in its counter terrorism strategies. During initial years of its military engagement in Afghanistan, the Washington did not interfere in FATA region. Initially, the Washington asked Pakistan to take measures to eradicate Al-Qaeda and Taliban terrorist sanctuaries in FATA region. FATA is a mountainous region and has a very difficult terrain for conventional military operations. In 2002, Pakistan launched its first military operation "Al-Mizan" for eradicating terrorist hideouts in FATA. However, the conventional military tactics and the lack of modern sophisticated technology gave Pakistani military very little success in the operation "Al-Mizan".

Because of Pakistan's limited success in operation "Al-Mizan", the US launched its first drone attack in 2004 on Pakistani soil using "Unmanned Aerial Vehicle" (UAV) with claims that Taliban and Al-Qaeda terrorists have safe havens in Pakistan's FATA region and they are involved in cross-border attacks against US military in Afghanistan. Initially, the UAV or drone attacks were considered very helpful in eliminating high valued terrorists, however, with the rise in frequency of these attacks and the increasing numbers of civilian casualties, a strong opposition to these attacks started to develop in Pakistan.¹

1 Amna Mahmood, Sadaf Farooq, & Asia Karim, "US Drone Attacks in Pakistan: An International Law Perspective", *International Journal of Business and Social Science* 6, no. 6 (2015): 165-76.

“The Bureau of Investigative Journalism (TBIJ)” holds best available data or figures on casualties caused by the US drone attacks in Pakistan. According to available TBIJ data, from January 2004 till March 2017, the US launched 425 drone strikes in Pakistan killing 2,501 to 4,003 people, out of whom 424 to 966 were civilians and the number of children killed in the attacks was 172 to 207.²

The Pakistani government at different times has declared the US drone attacks as illegal violation to its sovereignty. In 2013, the Prime Minister of Pakistan, Nawaz Sharif, demanded an end to drone attacks declaring the attacks as illegal and violation to Pakistan’s sovereignty. In his speech at the “US Institute of Peace, Washington”, Prime Minister Nawaz Sharif said, “The use of drones is not only a continual violation of our territorial integrity but also detrimental to our resolve and efforts at eliminating terrorism from our country. This issue has become a major irritant in our bilateral relations; I would therefore stress the need for an end to drone attacks”.³ The Prime Minister Nawaz Sharif on May 23, 2016 again declared the US drone attacks as illegal and violation of Pakistan’s territorial integrity when the Taliban leader Mullah Akhtar Mansoor was targeted and killed by the US drone attack inside Pakistani Balochistan.⁴ Despite the strong opposition by Pakistani government, continuous drone attacks by the US on Pakistani territory and the significant increase in civilian casualties has raised

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- 2 The Bureau of Investigative Journalism.
<https://www.thebureauinvestigates.com>. March 22, 2017.
https://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&show_injuries=1&show_strikes=1&location=pakistan&from=2004-1-1&to=now (accessed March 22, 2017).
 - 3 See Prime Minister Nawaz Sharif’s address to *United States Institute for Peace*. October 22, 2013.
http://www.embassyofpakistanusa.org/PM_Visit_1021_23_2013_US_image_s.php (accessed February 16, 2017).
 - 4 Prime Minister Nawaz Sharif’s statement reported in media. See, *Dawn News*. May 23, 2016. <https://www.dawn.com/news/1260041> (accessed February 16, 2017).

further questions about the validity of International Law and the legality of these attacks.

The US administration, on the other hand, strongly rejects all the claims that the drone strikes in Pakistan violate international law.⁵ The US official holds the position that the drone strikes are legal on the basis of principle of “self-defense”. According to a former US State Department legal advisor, the United States is in state of war with Al-Qaeda, Taliban and other terrorist networks, therefore, the US can adopt measures based on use of force in “self-defense” as given in the international law. In response to Prime Minister Nawaz Sharif’s demand and Amnesty International’s criticism on United States for its drone campaign in Pakistan declaring it as illegal under international law, Jay Carney the White House spokesman said, “U.S. counterterrorism operations are precise, they are lawful, and they are effective, and the United States does not take lethal strikes when we or our partners have the ability to capture individual terrorists”.⁶

This paper argues that the rationale used by the US for justifying the legality of drone strikes in Pakistan does not fulfil the criteria set by the UN charter and thus, cannot be termed as legal. This research also argues that the killings of Pakistani civilians in the US drone attacks are also in violation of “International Humanitarian Law, International Human Rights Law and International Law of Armed Conflict.”⁷

This paper first presents debate about the provisions Article 2(3), Article 2(4) and Article 51 of U.N Charter related to the principal of “self-defense” and the state sovereignty

5 Seth G. Jones & Christine C. Fai, *Counterinsurgency in Pakistan* (Santa Monica CA: Rand Cooperation, 2010).

6 Ayaz Gul, *Voice of America News*, October 22, 2013. <http://www.voanews.com/a/us-accused-of-unlawful-killings-pakistan-drone-strikes/1774276.html> (accessed January 6, 2017).

7 Beenish Sultan, “U.S Drone Attacks on Pakistan: A Legal Perspective”, *ISSRA Papers*, 3, no. 2 (2012): 50-67.

and explains in which cases and under what circumstances the U.N allows a state to use force under the logic of “self-defense”. It also explains under what circumstance the use of force by one state against another state under the U.N Charter can be considered as an act to infringe the sovereignty and territorial integrity of the state against whom the force is being used. This study also presents the US point of view on the subject of the legality of the drone attacks and then it proceeds to the next stage and presents the Pakistani point of view and explains why the state of Pakistan believes that the drone attacks on its territory are illegal.

This research provides an in-depth and objective analysis of the legality of US drone attacks inside Pakistan’s territory. The study shows how the provisions of United Nations Charter are being used and interpreted by United States according to its own needs for justifying its actions that otherwise would be regarded as illegal. This research indicates that there are some weaknesses in the charter of the United Nations because some of its provisions about the use of force are vague or not well defined and the states can interpret these provisions according to their own logic and needs. Finally, this study concludes that the Article 2 (4) of the charter of the United Nations prohibits the unilateral use of force and considers any attempt of this kind as illegal; therefore, US drone attacks on Pakistani territory constitute a breach to the International Law.

State Sovereignty, Self-defense and Armed Conflict under United Nations Charter

Since the start of US war against terrorism, Washington has been using different means and taking different measures to target international terrorist networks to eradicate international terrorism. The use of UAVs, notoriously known as drones to target and kill most wanted or high valued terrorists, is one of the most successful and relied upon tactics of the United States. However, the use of drones by the US outside the declared warzones or battle areas such as Pakistan and the killings of non-terrorist targets or

civilians, have raised debates related to the legality of these attacks under international law.

The United Nations Charter Article 2 (3) urges the member states to resolve their disputes peacefully, “all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”,⁸ and “urges all member states to respect the sovereignty, territorial integrity and independence of other states”.⁹ Article 2 (4) of the United Nations Charter provides: “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”.¹⁰ Article 2 (4) restricts any attempt by a state to infringe the sovereignty or to unilaterally use force against another state. Therefore, if any state unilaterally attempts to use force against another state it would be considered illegal under the UN Charter.

However, in some cases, if the UNSC identifies, “any threat to peace, breach of the peace, or an act of aggression”,¹¹ it may allow a state to use the force against one or more than one states (as in the case of Afghanistan the UN allowed the US to launch an attack on Afghanistan because the UN believed that Taliban government was protecting the Al-Qaeda terrorists who were involved in the 9/11 attack on the US), if the council believes that the use of force is necessary to restore international peace. The UN Security Council can give permission under Article 42 of the UN Charter to a state or can take a collective action in such instances when it considers that the actions of a state can endanger the international peace, and there are no other options left other than to use force “it may take such action

8 See, U.N. Charter Article 2(3).

9 U.N. Charter Article 2(3).

10 U.N. Charter Article 2(4).

11 U.N. Charter Article 39.

by air, sea, or land forces as may be necessary to maintain or restore international peace and security".¹²

Also, Article 51 of the United Nations Charter grants a state the right to use force in "self-defense" if an "armed attack occurs against a state, 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, until the Security Council has taken the measures necessary to maintain international peace and security"¹³. After 9/11, the UNSC in its resolutions 1368 and 1373 acknowledged the "right to self-defense" in case of any act of international terrorism and called upon all member states to "work together to prevent and suppress terrorist acts". Thus, this resolution brought the war in "Afghanistan under the formal umbrella of United Nations Security Council".¹⁴ However, according to Professor Rosa Brooks of Georgetown University, Law Center, "it is difficult to evaluate US drone strikes in Pakistan under these rules. Clearly, the Security Council has not expressly authorized the use of force by the United States in Pakistan. Therefore, she maintains that, UNSC Resolution 1373 does not extend the US mandate to use force outside Afghanistan under the right of self-defense".¹⁵

Justification for the Legality of Drone Attacks

The US administration denies the claims that the drone strikes in Pakistan are breaching the charter of United Nations, or illegal, or violating international law. The US justification for the legality of drone attacks rests on two points, the first one is based on the principal and logic of "self-defense" that the US can act in "self-defense" against the looming threats to its national security as provided by the

12 U.N. Charter Article 42.

13 U.N. Charter Article 51.

14 Rosa Brooks, "Drones and the International Rule of Law", *Ethics & International Affairs*, 28, no. 1 (2013): 83-103.

15 Brooks, "Drones and the International Rule of Law".

Article 51 of the charter of United Nations.¹⁶ The second justification is based on the notion that the US is at war with Al-Qaeda, Taliban and other terrorist groups and, therefore, the use of force against its enemy Al-Qaeda and Taliban wherever it might find them is legal.¹⁷ According to Anthony Dworkin, armed conflict framework is another legal justification given by the US officials on the issue of legality of drone attacks: “the US is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces, authorized for the purpose of US domestic law by a Congressional resolution (the Authorization for Use of Military Force, or AUMF) passed on 14 September 2001”.¹⁸

The US administration holds the position that the Article 2 (4) of the U.N Charter only prohibits the unilateral use of force, however, if the state where the attack(s) has been made gives its consent for the attack, it no longer violates the sovereignty of that state.¹⁹ According to the US authorities, the former Pakistani President Pervez Musharraf had done secret agreement with the United States for allowing Washington to launch drone strikes on Pakistani soil.²⁰ Furthermore, “cables released by Wiki Leaks indicate that senior Pakistani officials consented to US drone strikes, even while publicly speaking out against them.²¹” Top US officials on many occasions have continually stated that

16 Anthony Dworkin, “Drones and the Target Killing: Defining a European Position. European Council on Foreign Relations” (July, 2013): 5.

17 Jehanzeb Khalil & Saima Perveen, “The United States Covert War in Pakistan: Drone Strikes an Infringement on National Sovereignty”, *Journal of Applied Environmental and Biological Sciences*, (2014): 209-15.

18 Dworkin, “Drones and the Target Killing”, 5.

19 Ben Emmerson, *Promotion and protection of human rights and fundamental freedoms while countering terrorism* (New York: United Nations General Assembly, 2013).

20 Sib Kaifee, *Fox News*. April 13, 2013.
<http://www.foxnews.com/world/2013/04/13/usdrone-pact-revealed-by-former-pakistani-president> (accessed February 14, 2017).

21 Rory O. Millson & David A. Herman, *Killing by Drones: Legality under International Law* (London: The Foundation for Law, Justice and Society, 2015), 2.

“they only use force inside the borders of a sovereign state when that state either consents to the use of force or is unwilling and unable to take appropriate action to address the threat itself”.²²

On the issue that the US is violating Pakistan’s sovereignty, former Director of National Intelligence, Admiral Denis C. Blair, while talking to discussion forum organized by Council on Foreign Relations on January 22, 2013, stated:

Pakistan could shut us down anytime. They have what they think is the best of all worlds; they get attacks against militants who are a threat to them as well as to us in Afghanistan and they get to blame us for it.²³

The US also holds the position that it can use force against the non-state actors if anticipating an attack from them. According to Anthony Dworkin, “the self-defense justification is based on logic of individual threat... that a strike is necessary to avoid an imminent threat to life that cannot be prevented in any other way”.²⁴ The US also dismisses the claims that the UN Charter and the Security Council Resolutions 1368 and 1373 permit the Washington to use force against those states which are officially declared as warzones such as Afghanistan and not against a state that is outside the declared combat zones (such as Pakistan, Yemen and Somalia), because it is against Article 2 (4) of the U.N Charter. Speaking at the annual meeting of the “American Society of International Law”, the US State Department Harold Koh explained: “As a matter of international law, the United States is involved 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

22 Brooks, “Drones and the International Rule of Law”, 90.

23 Denis C. Blair, *Council on Foreign Relations*. January 22, 2013. <http://www.cfr.org/counterterrorism/us-drone-strike-policies/p29849> (accessed February 15, 2017).

24 Dworkin, “Drones and the Target Killing”, 5.

force consistent with its inherent right to self-defense under international law”²⁵.

Furthermore, the US also claims that its right to use of force against non-state actors on the basis of the notion of “self-defense” was affirmed by and the UNSC Resolutions 1368 and resolution 1373 and also by NATO along with other countries. Therefore, on the basis of UNSC Resolutions and their affirmation by the international community of states, the US drone strikes are not in any kind of breach or violation of Article 2(4) or Article 51 of the UN charter.

Armed Conflict and Non-State Actors

The US justification for the drone operations in Pakistan swings to and fro the notion of “self-defense” and armed conflict. Brooks stated that: “Understanding US legal arguments is made more difficult by the fact that administration spokespersons often appear to oscillate between putting forward a law of armed conflict framework and a self-defense framework when justifying drone strikes. At times, US officials appear to have suggested that the self-defense framework supplements the armed conflict framework”²⁶.

The Washington has used the armed conflict notion many times to justify the legality of its drone attacks in Pakistan. Some US researchers have also argued in favour of the armed conflict framework. Steven Groves, a senior research fellow at the Heritage Foundation, maintains that:

Because the United States is engaged in an ongoing armed conflict with al-Qaeda and its associated forces, it may lawfully target them with lethal force because the members of those organizations are belligerents. They may be targeted just as the US targeted North

25 Harold Hongju. Koh, *U.S. Department of State*, March 25, 2010. <http://www.state.gov/s/l/releases/remarks/139119.htm> (accessed February 14, 2017).

26 Brooks, “Drones and the International Rule of Law”, 90.

Korean forces during the Korean War and Iraqi forces during the Gulf Wars.²⁷

Defending the US drone operations in Pakistan and in other parts of the world, the counter terrorism advisor of President Obama, John Brennan, said during his speech at Harvard Law School on September 16, 2011:

We are at war with Al-Qaeda. In an indisputable act of aggression, Al-Qaeda attacked our nation and killed nearly 3,000 innocent people. And as we were reminded just last weekend, Al-Qaida seeks to attack us again. Our ongoing armed conflict with Al-Qaeda stems from our right recognized under international law to self-defense. The purpose of these actions is to mitigate threats to US persons' lives and it is the option of last recourse. So the president, and I think all of us here, don't like the fact that people have to die. And so he wants to make sure that we go through a rigorous checklist, the infeasibility of capture, the certainty of the intelligence base, the imminence of the threat, all of these things.²⁸

The most important words about the legality on drone operations came from the Obama himself during his speech delivered at National Defense University, Washington on May 23, 2013:

America's actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with Al-Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war, a war waged proportionally, in last resort, and in self-defense.²⁹

Top US officials have consistently rejected Pakistan's claim that US is violating the International law and the Charter of United Nations and the US officials also reject the

27 Steven Groves, *Drone Strikes: The Legality of U.S. Targeting Terrorists Abroad* (Washington, DC: The Heritage Foundation, 2013).

28 John O. Brennan. "Strengthening our Security by Adhering to our Values and Laws". September 16, 2011. <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (accessed February 15, 2017).

29 Barack Obama. *whitehoue.gov: Remarks of President Barack Obama*. May 23, 2013. <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-barack-obama> (accessed February 15, 2017).

criticism that targeted terrorist and civilian killings by US drone attacks in Pakistan also constitute violations to International Humanitarian Law and International Human Rights Law. Talking about the 'target list' and 'signature strike' policy, the officials said, 'we select the targets very carefully and only after a careful screening by the experts, both legal and intelligence, the officials take decision. Obama emphasized the same point in his speech and said, "We act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat".³⁰

John Brennan again reiterated the same point about US operations outside Iraq and Afghanistan, and said, "the counterterrorism efforts of the United States outside Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant even if only temporary disruption of the plans and capabilities of al-Qaeda and its associated forces".³¹

Answering to criticism about the "target list" and "signature strikes", the US officials stated, "These strikes target groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren't known".³² John A Rizzo, a former CIA official states that the CIA uses a cautious screening in decision making process to determine that which individuals would be targeted to kill through drone strikes.³³ He further,

30 Obama. *whitehouse.gov: Remarks of President Barack Obama*.

31 Brennan. "Strengthening our Security by Adhering to our Values and Laws".

32 James Cavallaro, Stephan Sonnenberg, & Sarah Knuckey, *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (New York: Stanford: International Human Rights and Conflict Resolution Clinic Stanford Law School; Global Justice Clinic, NYU School of Law, 2012), 12.

33 Tara Mckelvey, *The Newsweek*, February 13, 2011. <http://www.newsweek.com/inside-killing-machine-68771> (accessed February 15, 2017).

explained how the different individuals are involved in the agency's target selection and "signature strike" decision making process. The process, he said, involves careful consideration by eight to ten lawyers who provide their legal feedback on justifying the targeting of specific high profile terrorist individuals, if the lawyers opinion is against the targeted killing the request to target kill the individual denied in most cases.³⁴

Pakistan's Stand-Point

Pakistan has publicly been opposing the drone attacks in FATA and declaring them illegal because it sees them as an act of infringement of country's political sovereignty and territorial integrity.³⁵ In 2008, during his visit to Pakistan, the then commander of US military's central command (USCENTCOM) General David Petraeus, was told that the US drone attacks are not acceptable to the government of Pakistan because they are violating Pakistan's sovereignty and are making people of Pakistan angry against the government.

The former spokesperson of Foreign Office of Pakistan, Tehmina Janjua, stated that the CIA drones are attacking Pakistani nationals and that is not an acceptable and tolerable act, moreover, the killings of Pakistani civilians in these attacks are illegal and extra-judicial and they are making our citizens angry.³⁶ In 2011, the ex-Pakistani Army Chief, General Ashfaq Pervez Kayani, issued an order to shoot down drones or any other thing violating Pakistan's sovereignty and territorial integrity. In 2012, Pakistan's former president Asif Ali Zardari, during his meeting with the US special envoy to Afghanistan and Pakistan Marc Grossman, demanded an end to drone strikes terming them

34 Mckelvey, *The Newsweek*.

35 Farhat Taj, "Drone Attacks: Pakistan's Policy and the Tribesmen's Perspective", *Terror Monitor* 8, no. 10 (March 2010): 3.

36 Tehmina Janjua, *The Express Tribune*, April 19, 2011. <https://tribune.com.pk/story/152316/tribal-area-drone-attacks-ineffective-fo> (accessed February 16, 2017).

illegal and counter-productive in Pakistan's fight against militants.

In April 2012, Pakistani Foreign Minister Hina Rabbani Khar, declared drone strikes as illegal, she said, "on drones, the language is clear: a clear cessation of drone strikes. I maintain the position that we had told them categorically before. But they did not listen. I hope their listening will improve".³⁷ On 9th May 2013, Peshawar High Court in a judgment, declared, the US drone attacks are illegal, inhuman and are violating the "Universal Declaration of the Human Rights" and asked the Federal government to take necessary steps to put a stop to these attacks.³⁸ Pakistan has also raised the issue on different times in the United Nations and called for the immediate end to US drone attacks in Pakistan.

Pakistani public opinion including political parties, journalists, political analysts, news and print media, and different civil society organizations openly criticize the drone attacks and call these attacks as illegal and violation to Pakistan's sovereignty and territorial integrity. A research on US drone attacks in Pakistan's FATA region indicated strong evidences that these attacks have been damaging impact on local life; "they deterred humanitarian assistance to victims (because of the alleged practice of double-tap targeting in which two missiles are launched successively at the same target), they tore families apart, caused financial sufferings to victims extended families, exerted a psychological toll on

37 Hina Rabbani Khar's statement reported on REUTERS.

<http://www.reuters.com>. April 26, 2012.

<http://www.reuters.com/article/2012/04/26/us-pakistan-minister-dronesidUSBRE83P0AM20120426> (accessed March 11, 2017).

38 Andrew Buncombe. *The Independent*. Pakistani court declares US drone strikes in the country's tribal belt illegal. May 9, 2013.

<http://www.independent.co.uk/news/world/asia/pakistani-court-declares-us-drone-strikes-in-the-countrys-tribal-belt-illegal-8609843.html> (accessed February 16, 2017).

communities, and inhibited social gatherings and community meetings”.³⁹

A research conducted by International Crisis Group found that the “double-tap” policy is causing more damage as it not only prevents rescue activities but also increases the death toll.⁴⁰ The targeting of the people involved in relief activities is a clear violation of International Human Rights law. Thus, these attacks are not only violating international law by causing damage to the sovereignty and territorial integrity of Pakistan but they are also causing large scale human sufferings in the target regions which is clearly a violation to “International Human Rights Law and International Humanitarian Law”.

Thus, according to the Government of Pakistan, the US drone attacks and the subsequent killings of Pakistani people especially the civilians in FATA region, not only a violation to Article 2 (4) of the Charter but it also constitutes a violation to Article 3 (the right to life) of the “United Nations Universal Declaration of Human Rights, the International Humanitarian law and the International Law of Armed Conflict”.⁴¹ Pakistan’s stand was also affirmed by the “United Nations Terrorism and Human Rights Envoy” Ben Emerson, calling “the US drone strikes in Pakistan a violation of International Law because the US drone campaign in Pakistan is being conducted without the consent of the elected representatives of the people or the legitimate government of the state”.⁴²

39 Dworkin, “Drones and the Target Killing”, 2.

40 Jehanzeb Khalil & Saima Perveen, “The United States Covert War in Pakistan: Drone Strikes an Infringement on National Sovereignty”, *Journal of Applied Environmental and Biological Sciences*, (2014): 209-15.

41 Sultan, “U.S Drone Attacks on Pakistan”, 50-67.

42 Dana Hughes, *ABC NEWS: US Drone Strikes in Pakistan Are Illegal, Says UN Terrorism Official*, March 15, 2013.
<http://abcnews.go.com/blogs/politics/2013/03/us-drone-strikes-in-pakistan-are-illegal-says-un-terrorism-official/> (accessed February 18, 2017).

Challenging the US Argument

Pakistan considers the US drone attacks in its FATA region as the violation of its territorial integrity and political sovereignty because neither Pakistan has committed an attack on the US directly or indirectly nor it has given any consent (secret or open consent of any kind) to the Washington for launching such strikes in Pakistan. Hence, the US cannot use the logic of “self-defense” under Article 51 of U.N Charter for launching drone attacks in Pakistan because Pakistan was not involved in September 11 attacks in New York.

There is a significant amount of debate among many international scholars whether Article 51 about the use of force in self-defense is applicable in Pakistan’s case. According to Carter and Weiner, “the international community has generally been critical of the use of force in self-defense against non-state terrorists”.⁴³ Oscar Schachter also expressed considerable doubts whether Article 51 sanctions the use of force in self-defense against non-state actors or terrorists, when “no state has been guilty of an armed attack or has directed or controlled the terrorists in question”.⁴⁴ Also, Mary Ellen O’Connell, in “Unlawful killing with Combat Drones” argues that “terrorist attacks are generally treated as criminal acts because they have the hallmarks of crime, not armed attack that give rise to the rights of self-defense”.⁴⁵ O’Connell further argues:

It is important to realize that self-defense is a term of art in international law. The reference in Article 51 to self-defense is to the right of the victim state to use significant offensive military force on the territory of a state legally responsible for the attack. Even where militant groups remain active along a border for a considerable period of time, their armed cross-border incursions are not

43 Bry E. Carter, & Allen S. Weiner, *International Law* (New York: Aspen Publishers, 2011).

44 Oscar Schachter, *International Law in Theory and Practice Developments in International Law* (New York: Springer, 1991), 165.

45 Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004* (Norte Dam: Norte Dam Law School, 2011), 14, 54.

considered attacks under Article 51 giving rise to the right of self-defense unless the state where the group is present is responsible for their actions.⁴⁶

“For the use of force in self-defense to be lawful, the host state must also be shown to be unwilling or unable to take the appropriate steps, itself, against the non-state group”.⁴⁷ Pakistan on the other hand, from “Operation Al-Mizan 2002, to most recent, Operation Radd-ul-Fassad in 2017”, has been continuously carrying out military operations against different terrorist organizations in FATA and other parts of the country. Even if Pakistan decides not to take any meaningful action against the militant groups this does not give rise to any right by the US to launch drone attacks into Pakistani territory.

Also, the Article 51 of the United Nations charter requires “US to disclose, in general terms, the measures taken in self-defense when it uses force on the territory of another state. The US made such disclosures for Afghanistan, Iraq, and Syria, but notably not for Pakistan”.⁴⁸

The US logic of being involved in global “armed conflict” against terrorist organizations for justifying the drone attacks in Pakistan has also been contested. International Committee of the Red Cross (ICRC), on defining an armed conflict, holds that “the conflict must pit ‘armed forces’ against dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations”.⁴⁹ Furthermore, if, “there is an armed conflict, the legality of any drone strike must then be evaluated in accordance with IHL,

46 O’Connell, *Unlawful Killing with Combat Drones*, 14-15.

47 Cavallaro, *et al.*, 32, 45, 107.

48 Millson & David A. Herman, *Killing by Drones*, 4.

49 See ICRC’s protocols, *International Committee of the Red Cross*. March 2008.
<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?opendocument>
(accessed March 22, 2017).

including particularly the fundamental principles of distinction, proportionality, humanity, and military necessity”.⁵⁰ Thus; in armed conflict, the IHL requires a state to distinguish between combatants, non-combatants and legitimate and illegitimate targets for an attack.

Even when a person is deemed to be a legitimate target of an attack, the attack must also satisfy IHL’s other core requirements. At a minimum, any attack must serve a legitimate military objective, and the expected harm or risk to civilians must not outweigh the expected military objective.⁵¹

The United States often tends to overlook this important set of legal principles governing international armed conflict while justifying the legality of drone attacks. The US “double-tap strike policy” is a severe violation to International Human Rights Law. According to Christof Heyns, U.N Special Rapporteur on extra-judicial or arbitrary executions, “If civilian ‘rescuers’ are indeed being intentionally targeted, there is no doubt about the law: those strikes are a war crime”.⁵²

For many experts and analysts, the US is violating the “International Humanitarian Law (IHL)” because, “a targeted killing outside of an armed conflict violates the right to life guaranteed by IHL”.⁵³ This claim is being made on the argument that, “certain human rights principles apply even during an armed conflict”.⁵⁴ The point of view that some rules of international law for countering or responding to international terrorism are not up-to-date and need to be reconsidered is simply not true. Therefore, the US argument of being involved in a “global armed conflict” with Al-Qaeda and other terrorist networks as a legal justification for its

50 Cavallaro, *et al.*, 32, 112.

51 Cavallaro, *et al.*, 32, 113.

52 Jack Serle, *The Bureau of Investigative Journalism*, June 21, 2012. <http://www.thebureauinvestigates.com/2012/06/21/unexpert-labels-cia-tactic-exposed-by-bureau-a-war-crime/> (accessed March 22, 2017).

53 Millson & David A, Herman, *Killing by Drones*, 3.

54 Mary Ellen O’Connell, 45, 12.

strikes against Pakistan is not valid and the drone attacks are clear violation of International Law.⁵⁵

Conclusion

The US justifications for the drone strikes in Pakistan have posed serious challenges to the foundations set by the United Nations Charter for maintaining the international rule of law.

The use of force by a state can only be termed legal under these conditions according to International Law, only if, (a) the state where the attack has been carried out has given its consent to other state for launching such attack or, (b) if, the state using force holds a valid claim to exercise the right of “self-defense” and, if, (c) the territorial state in question is being involved in an armed conflict with the other state and finally, (d) if, the use of force is in compliance with the rules of International Humanitarian Law. The US drone attacks inside Pakistan’s territory, clearly, do not fulfil these conditions. Thus, the claims by United States that it has been carrying out the drone attacks under the logic of anticipatory “self-defense” are invalid.

Washington’s reliance on the logic of being involved in a “global armed conflict against terrorist organization” and anticipatory “self-defense” are in direct clash with the principles of the UN Charter, because, Pakistan has not been declared as a terrorist state by the UN, neither it has constituted a threat to the US security and nor it has given its consent to the US to carry out drone attacks on its territory. Therefore, according to the rules laid by the Charter of the United Nations, these drone attacks cannot be termed as legal.

The unilateral use of force against Pakistan shows weaknesses in the UN Charter that allowed the US to use some provision such as the Article 51 to justify its acts. Also, the inability of the UN to stop the US drone attacks in

55 Sultan, “US Drone Attacks on Pakistan”, 58.

Pakistan have posed serious challenges to the validity of Article 2 (4) and to the validity of whole International Law itself. Moreover, accepting the US drone attacks in Pakistan as legal would set a wrong precedent for other states who might take this practice as a part of "Customary International Law" and might attempt to use the same logic of "self-defense" against their enemy or weaker states under the notion of "global fight against terrorism" and that would put international peace and security in some serious jeopardy.