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The Legality and Conduct of Drone Attacks

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THE LEGALITY AND CONDUCT OF DRONE ATTACKS

WASEEM AHMAD QURESHI*

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INTRODUCTION

Recently, various states have resorted to the use of drone airstrikes as a means of targeting terrorist and militant groups. Most notably, the United States (U.S.) has resorted to using drone airstrikes to target insurgent groups such as Al-Qaeda, the Taliban, and other armed groups that are disturbing the security and peace of the international community.¹ With regard to the increased usage of drone airstrikes, this paper investigates its legality and conduct as per international law.

This article will start off by providing a historical overview of the use of drone strikes—discussing the early and contemporary use of drone strikes. The article will then analyze the conditions under which drone strikes are considered justified and lawful—that is, the *jus ad bellum* of drone attacks. In this regard, relevant articles and provisions of the United Nations (UN) Charter will be outlined, followed by an analysis of the reasons for conducting drone strikes in

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¹ MICAH ZENKO, REFORMING THE U.S. DRONE STRIKES POLICIES 10 (Council on Foreign Relations, Council Special Report No. 65, 2013).

light of international law. This section will focus specifically on the issue of consent by the host nation. The article will then discuss the *jus in bello* of drone attacks, largely placing emphasis on the lawful targeting of drone strikes. The key elements of this section will include the construction of a distinction between civilian and military targets, human shields, non-state actors, and internal armed conflicts. This section will also highlight the discussion with regard to “target killing versus assassination,” “personality-based targets versus conduct-based targets,” and “weaponry.”

I. HISTORICAL OVERVIEW OF THE USE OF DRONE STRIKES

Drones are aircraft that do not have human pilots on board and are consequently often referred to as “Unmanned Combat Aerial Vehicles” (UCAV) or “Unmanned Aerial Vehicles” (UAV). While they were initially used only for surveillance, by 2001, the U.S. started to arm these drones with missiles to combat terrorists in Afghanistan. Ever since then, more than eighty countries, including the U.S., Russia, Pakistan, India, Iran, China, and Israel, have expanded the use of UCAV and UAV for combatant and surveillance reasons.²

The U.S. has used UCAV in Afghanistan, Pakistan, Yemen, and Iraq. The U.S. claims that the first drone used for target killing in Afghanistan during military combat was targeted against Muhammad Atef of Al-Qaeda in November 2001.³ In 2002, a suspected lieutenant of Al-Qaeda was killed—along with five other people—by drone strikes carried out in Yemen by Central Intelligence Agency (CIA).⁴ A UN spokesperson explained this was a “clear case of extrajudicial killing.”⁵ Moreover, the U.S. started drone strikes in Pakistan in 2004, and since then, the number of aerial drone strikes has escalated significantly.⁶

Some credible sources, such as the head of UCAV control at Nellis Air Force Base in the U.S. and personnel from the CIA have confirmed that all decisions to conduct drone strikes are taken at CIA headquarters. These decisions are made at the U.S. Central Command (CENTCOM) and Nellis Air Force Base after collective information is gathered from personnel on the ground in New Mexico, Afghanistan, Pakistan and other places.⁷

Besides stark criticism over private contractor and CIA involvement in the decision-making and organizational framework of drone strikes against sovereign nations, the main contention of the international community is that the copious

² DRONE WARS: TRANSFORMING CONFLICT, LAW, AND POLICY 4 (Peter L. Bergen & Daniel Rothenberg eds., 2015).

³ Peter Bergen, *A Dangerous New World of Drones*, CNN (Oct. 8, 2012, 5:13 AM), <http://www.cnn.com/2012/10/01/opinion/bergen-world-of-drones/>.

⁴ CIA ‘Killed al-Qaeda Suspects’ in Yemen, BBC NEWS (Nov. 5, 2002, 7:16 AM), <http://news.bbc.co.uk/2/hi/2402479.stm>.

⁵ YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 2011 309 (Michael N. Schmitt ed., 2012).

⁶ See DRONE WARS, *supra* note 2, at 13.

⁷ CRITICAL TERRORISM STUDIES SINCE 11 SEPTEMBER 2001: WHAT HAS BEEN LEARNED? 53 (David Miller et al. eds., 2014).

use of drone combat is illegal in the absence of actual or imminent battle or necessity. Since lethal force is limited to absolute necessity, armed drones can only be used legally on the battlefield as a military weapon for combat. It is for this reason that the use of drones must be based on the principles of *jus ad bellum*—that is, the laws of conduct and limitation of the use of force in accordance with international and humanitarian law.⁸

II. JUS AD BELLUM

A. United Nations Charter Provisions on the Use of Force

Article 2(4) of the UN Charter governs the laws of the use of force by states. This article outlaws both the use of force and the threat of the use of force in international relations by stating, “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.”⁹

This Article covers all uses of force—including, but not limited to, war¹⁰—and now constitutes a part of customary international law, which must be upheld by the international community. The only immunity from this embargo on the use of force is Article 51 of the UN Charter, which preserves states’ innate right of self-defense through customary international law. Article 51 states:

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. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹¹

This Article permits states to engage in armed acts in self-defense, although this right is also limited so as to prevent misuse of the provision.

Violations of Article 2(4), in the shape of grave armed offenses, have to be accounted for by the leader of the aggressor state.¹² Articles 39 and 42 of the UN Charter authorize the UN Security Council to use force against aggressors to

⁸ UGO PAGALLO, *THE LAWS OF ROBOTS: CRIMES, CONTRACTS, AND TORTS* 57 (2013).

⁹ U.N. Charter art. 2, ¶ 4.

¹⁰ *Id.*

¹¹ U.N. Charter art. 51.

¹² Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello?: Reaffirming the Separation of the Two Bodies of Law*, 90 INT’L REV. OF THE RED CROSS 872, 973–74 (2008).

address violations of Article 2(4). Article 39 states, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”¹³

Article 42 says:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.¹⁴

It is established, from rulings of the International Court of Justice (ICJ), that if a state uses force against any other state, then the latter can use force against the aggressor—relying on the inherent right of self-defense. Such aggression, however, must involve a substantial use of force and not just be a trivial frontier incident. In the context of using weapons of mass destruction in response to an aggression, the ICJ held that the consequent use of force in self-defense must follow the established doctrines of “necessity” and “proportionality.”¹⁵

B. The Use of Drone Strikes and International Law

The U.S. justified its aggression in Afghanistan by using the same principle: self-defense. The U.S. characterizing the events of 9/11 as an armed attack, while disregarding the fact that, to this date, the perpetrators of 9/11 stay unidentified (albeit, known to be non-state actors), and also disregarding the rules of proportionality and necessity. The strategy with Afghanistan, however, changed when Hamid Karzai came to power in 2002, replacing the Taliban regime, and called on the international armed forces already in the country to fight the insurgent groups.¹⁶ Hence, the legal use of force by the U.S. is limited to the confines of Afghanistan. Since then, the U.S. has used UCAV in the tribal areas of Pakistan to combat different armed groups and targets, with and without the consent of the state.¹⁷ The U.S., however, has also conducted airborne drone strikes off the battlefield, where there are no aggressions or skirmishes and where the consent of the state has not been given.

While it has been suggested that armed groups routinely cross the border from Afghanistan to Pakistan, this does not mean that the U.S. has the right to use

¹³ U.N. Charter art. 39.

¹⁴ U.N. Charter art. 42.

¹⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 41 (July 8).

¹⁶ GLOBAL ANTI-TERRORISM LAW AND POLICY 465 (Victor V. Ramraj et al. eds., 2d ed. 2012).

¹⁷ See BRADLEY JAY STRAWSER ET AL., OPPOSING PERSPECTIVES ON THE DRONE DEBATE 168–72 (2014).

force or carry out drone strikes in the regions of Pakistan without the authority of the state. Likewise, just because a terrorist group plans or carries out terrorist activity in one state, this does not create the right to use force under a claim of self-defense in any country where an armed group is acting. Such acts are sporadic and conducted by non-state actors—states are rarely responsible for them. Moreover, in the case of *Congo v. Uganda*, the ICJ concluded that the inability of Congo to mitigate and control the armed activities of the militants in Uganda did not establish a right for Uganda to use force in self-defense.¹⁸ Therefore, Uganda could not legally violate the sovereignty of Congo and attack the militants.¹⁹

Furthermore, within the territory of a particular state, human rights laws prohibit the unnecessary use of force to curb insurgent armed groups, unless there is a substantial use of force by the rebels against the government. The UN provides standards and basic principles for the use of force by the state on its citizens and rebels.²⁰ Notwithstanding these clear regulations, the U.S. has argued that, since the 9/11 attack constitutes a significant use of force, it can consequently take any measures to combat Al-Qaeda, no matter where it is found. The Bush regime labeled this justification of using force as the “Global War on Terror,”²¹ whereas the Obama regime prefers to call it an “armed conflict with Al-Qaeda and other associated forces” to justify its use of force by invoking its right to use force as self-defense.²² The Obama regime is acting to stop expected future attacks by non-state actors residing in different states by using the theory of “pre-emptive self-defense,”²³ which is not in accordance with the established values under customary international law.

The International Law Association defines armed conflict by setting basic criteria for the use of force, under which an armed conflict must include the presence of an organized group, *inter alia*, intensely fighting with other groups.²⁴ It is pertinent to note that isolated attacks by the armed groups acting as terrorists do not constitute an armed conflict and, hence, do not contravene the aforementioned criteria.

Furthermore, the U.S. has tried to justify its drone attacks by the principle of “hot pursuit,” but this principle is only recognized in the law of the seas, and not on land.²⁵

¹⁸ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, 170 (Dec. 2005).

¹⁹ *Id.*

²⁰ U.N. Charter art. 51.

²¹ Peter L. Bergen & Jennifer Rowland, *World of Drones: The Global Proliferation of Drone Technology*, in *DRONE WARS*, *supra* note 2, at 300, 300.

²² Leanne Pigot, *The “Bush Doctrine” and the Use of Force in International Law*, in *THE IMPACT OF 9/11 AND THE NEW LEGAL LANDSCAPE: THE DAY THAT CHANGED EVERYTHING?* 241, 246 (Matthew J. Morgan ed., 2009).

²³ WILLIAM F. GROVER & JOSEPH G. PESCHEK, *THE UNSUSTAINABLE PRESIDENCY: CLINTON, BUSH, OBAMA, & BEYOND* 88 (2014).

²⁴ KOSOVO: A PRECEDENT?: THE DECLARATION OF INDEPENDENCE, THE ADVISORY OPINION, AND IMPLICATIONS FOR STATEHOOD, SELF-DETERMINATION AND MINORITY RIGHTS 242 (James Summers ed., 2011).

²⁵ Convention on the High Seas art. 23, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.

C. *The Consent of the Host Nation*

The matter of consent is extremely important in assessing the legality of the use of drone strikes for two reasons. First, a country cannot resort to the use of force without the existence of an actual armed conflict, even in its own territory. Second, even if there is an actual armed conflict, the practices of drone attacks must follow the principles of proportionality and necessity. Counterterrorism expert David Kilcullen believes that drones are not able to pursue military goals because the legal requirement for proportionality has to be followed.²⁶ Drone strikes assassinate far more people in collateral damage than the actual target; although the actual target is usually only one person, the number of casualties is around ten people per attack.²⁷

There are a number of concerns with regard to airborne drones acting without the consent of the targeted states. Arguably, operating UCAV in a state's territory not only violates U.S. policy, but also violates the sovereignty of the host state. The U.S. contends, however, that the records demonstrate consent being given by the host states. For example, the Obama administration has claimed that the U.S. conducted airstrikes with the "full consent and cooperation" of the host states.²⁸ In this context, David Sanger has written in his book, *Confront and Conceal*, that the prime minister of Pakistan, Yusuf Raza Gillani, told the U.S. ambassador, Anne Patterson, in 2008 that "I do not care if you conduct the drone attacks, as long as you get the right people."²⁹ The U.S. claims that for a very long period of time Pakistan has permitted U.S. officials to launch UCAV in Pakistani airbases, aided U.S. military and intelligence in locating targets in the Federal Administrative Tribal Areas (FATA), and authorized the CIA and U.S. military to conduct drone strikes in the designated kill boxes. It is further claimed that Pakistan and the U.S. had a joint UCAV program in 2006, in which Pakistani administrators were operating drones, deciding routes, identifying targets, and using firepower. In this regard, in 2012 the *New York Times* identified the names of the people who were hired by Pakistani military intelligence and had helped the U.S. in UCAV attacks.³⁰ These officials contradicted the official Pakistani stance of opposing the drone strikes.³¹ Furthermore, opinions regarding the Pakistani consent in U.S. drone attacks are in other reports, claiming that the U.S. did not acquire the official consent of Pakistan; the U.S. has theoretically acquired the "tacit consent" of Pakistan, since Pakistan has not strongly opposed the drone attacks and effectively permitted the drone attacks.³² Such claims of

²⁶ See David Akerson, *Applying Jus in Bello Proportionality to Drone Warfare*, 16 OR. REV. INT'L L. 173, 179 (2014) (discussing the low "hit rate" for drone attacks by the United States).

²⁷ NETA CRAWFORD, *ACCOUNTABILITY FOR KILLING: MORAL RESPONSIBILITY FOR COLLATERAL DAMAGE IN AMERICA'S POST-9/11 WARS* 209 (2013).

²⁸ Byron Tau, *Brennan: Drones 'Necessary'*, POLITICO (Apr. 30, 2012), <http://www.politico.com/story/2012/04/brennan-drones-necessary-not-vengeance-075751>.

²⁹ DAVID E. SANGER, *CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND SURPRISING USE OF AMERICAN POWER* (2012).

³⁰ Declan Walsh, *Drone War Spurs Militants to Deadly Reprisals*, N.Y. TIMES (Dec. 29, 2012), <http://www.nytimes.com/2012/12/30/world/asia/drone-war-in-pakistan-spurs-militants-to-deadly-reprisals.html>.

³¹ *Id.*

³² CONFLICT AND PEACE IN EURASIA 170 (Debidatta Mahapatra ed., 2013).

consent are debatable given that the official Pakistani stance has opposed such claims. One commentator stated that:

About once a month the Central Intelligence Agency sends a fax to a general at Pakistan's Intelligence service outlining broad areas where the U.S. intends to conduct strikes with drone aircraft, accordingly to U.S. officials. The Pakistanis, who in public oppose the program, don't respond.

On this basis, plus the fact that Pakistan continues to clear airspace in the targeted areas, the U.S. government concludes it has tacit consent to conduct strikes within the borders of a sovereign nation . . .³³

Harold Koh, the legal consultant to the U.S. State Department, noted that the aforementioned Pakistani practice of tacit consent established substantial permission, and he added that drone strikes in the absence of valid permission establish an act of war against a sovereign state.³⁴ This issue of Pakistani consent in regard to drone attacks has been discussed attentively. The Bureau of Investigative Journalism investigated and found that Pakistan had not given consent for drone strikes in its territory and denied the establishment of tacit consent.³⁵ Finally, in 2012, the Pakistani parliament unanimously agreed: clearly and officially commanding the instant termination of U.S. drone attacks in the territories of Pakistan.³⁶ Pakistan continues to press these same demands,³⁷ but the U.S. has disregarded such demands. A U.N. official established that drones attacks by the U.S. breach Pakistani sovereignty.³⁸

II. JUS IN BELLO

The U.S. is involved in two types of armed conflicts while conducting drone strikes. The first is the transnational non-international conflict, in which the U.S. maintains that the scope of such conflict has no territorial confinement. The second type of conflict is the customary non-international conflict, in which the U.S. acts to help an ally within the geographical boundaries of the ally state. The first kind of conflict has been contested in international law for its legality, but it has been authorized by the Obama administration and supported by the U.S. Supreme Court in the case of *Hamdan v. Rumsfeld*.³⁹ John Brennan added that

³³ Adam Entous et al., *U.S. Unease over Drone Strikes*, WALL STREET J. (Sept. 26, 2012, 6:59 AM), <https://www.wsj.com/articles/SB10000872396390444100404577641520858011452>.

³⁴ *Id.*

³⁵ Chris Woods, *Pakistan 'Categorically Rejects' Claim That It Tacitly Allows U.S. Drone Strikes*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Sept. 28, 2012), <https://www.thebureauinvestigates.com/stories/2012-09-28/pakistan-categorically-rejects-claim-that-it-tacitly-allows-us-drone-strikes>.

³⁶ *At U.N., Pakistan Presses On It's [sic] Demand for End to Illegal Drone Strikes*, THE NEWS (July 2, 2016), <https://www.thenews.com.pk/latest/132367-Pakistan-presses-demand-end-illegal-drone-strikes>.

³⁷ *Id.*

³⁸ *U.N. Official Says U.S. Drones Breach Pakistan Sovereignty*, N.Y. TIMES (Mar. 15, 2013), <http://www.nytimes.com/2013/03/16/world/asia/un-official-denounces-us-drone-use-in-pakistan.html>.

³⁹ 548 U.S. 557 (2006).

the U.S. does not feel restricted to only use of force in “hot” battlefield areas like Afghanistan, but he acknowledged that some of the allies of the U.S. do not share the same opinion and prefer to restrict themselves to hot battlefields.⁴⁰

Interestingly, while the U.S. conducts airstrikes in non-international conflicts to terminate targets on the kill list, the authority to act does not come from its statutes, such as the Authorization for Use of Military Force (AUMF), but, rather, the U.S. justifies such terminations by claiming that the subject presents a peril to a U.S. ally and it is in foreign policy interests of the U.S. Through this maneuver, the U.S. can convert simple non-state actors’ actions—from acts of vandalism to non-transnational conflicts—to international conflict by exacerbating trivial matters. For example, when insurgents were posing a threat to the Yemeni government, U.S. drone airstrikes were carried out to stabilize the Yemen regime against insurgency.⁴¹ This effectively transformed the conflict from one between Yemen and the insurgents to one between Yemen and the U.S. versus the insurgents, or the U.S. versus Al-Qaeda.

Therefore, these two kinds of conflicts with Al-Qaeda give the U.S. administration ample authority to create kill lists and conduct target killings. In this manner, the U.S. justifies its drone attacks in two ways: first, by arguing that the concept of transnational non-international conflict with Al-Qaeda is not confined to geographical locations and limits of the boundaries; and, second, by theorizing that a non-international, insurgency conflict within the borders of an ally state requires U.S. intervention to stabilize the situation. Paradoxically, however, the U.S. has been using firepower against the government of Syria while also arming insurgent groups. Consequently, this strategy is destabilizing the region and establishing a risk to the peace and security of the global community—simply for the purpose of removing the Assad regime.⁴² On the other hand, in accordance with the norms of international laws, arming insurgents against a state is an act of war and is a clearly abominable act against humanity. In the case of *Nicaragua v. USA*, the ICJ arrived at the conclusion that the U.S. violated international law by providing material support to Nicaraguan rebels.⁴³

A. Lawful Killing

In accordance with the justifications given above, targets on kill lists can be categorized into the following three groups:

- a.) Targets falling into the AUMF considerations.
- b.) Targets falling into the terms and conditions of the secret action findings.
- c.) Targets falling into the list of insurgent groups posing threat to a U.S. ally state, where the U.S. is a participant.

⁴⁰ GEOFFREY CORN ET AL., *THE WAR ON TERROR AND THE LAWS OF WAR* 91 (2d ed. 2015).

⁴¹ Chris Downes, *Targeted Killing in the Age Of Terror: The Legality of the Yemen Strike*, 9 J. CONFLICT & SEC. L. 277, 280–81 (2004).

⁴² See ARNOLD SCHUCHTER, *ISIS CONTAINMENT AND DEFEAT* at ch. 1 (2015).

⁴³ Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. Rep 14 (June 27).

B. Lawful Targeting

For a combatant to be legally targeted, he needs to be defined in accordance with customary humanitarian law, which is concerned with the treatment of a combatant in armed conflict. Humanitarian law defines a combatant as a participant in conflicts, who, when captured, is then called a prisoner of war.⁴⁴ Combatants are further defined as state actors—to be distinguished from non-state actors—who represent state conduct, including members of forces and volunteers—to be distinguished from civilians, who do not take part in conflict.⁴⁵ To undertake targeting, humanitarian law encompasses four major rules: “humanity,” “military necessity,” “distinction,” and “proportionality.”⁴⁶ The law of war prescribes strict limits on the conduct of states in an armed conflict, primarily, to limit the negative effects of the war and reduce the suffering of those affected by the war. As Grotius remarked, “it is not for a man to put his fellow man to a wasteful use.”⁴⁷ Therefore, distinction is an important factor to be considered both in terms of who is targeted and the means of targeting.⁴⁸

Additionally, distinction is required to follow the principle of military necessity, as international humanitarian law does not even allow the killing of armed personnel forces if it is not absolutely necessary. Accordingly, if there is no necessity to use military force, international humanitarian law does not permit retribution, even against combatants who have participated or continue to participate in hostilities. Distinction must be applied when targeting combatants, and notions of humanity must also be considered while facing an adversary by providing them with the opportunity to surrender to avoid preventable massacres. The ICJ reiterated these contentions by stating: “methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited.”⁴⁹

C. Distinction Between Civil and Military Targets

The legality of targeting individuals depends on the status of the target. Therefore, distinguishing civilians from military targets is required for lawful targeting. The protection granted to civilians and those not participating in armed conflicts has long been established. Those not participating in hostilities are given the privilege of protection from being targeted in any conflict; this includes a variety of people even when they belong to the opposing camp. Likewise, targeting civilians in international or non-international hostilities is now a war crime. Therefore, the first distinction for determining a lawful target is that the target must actively participate in hostilities. This includes carrying out attacks, laying mines, and so on, but does not include those who take a supportive role—

⁴⁴ Int’l Committee of the Red Cross, *Customary IHL Rule 3: Definition of Combatants* (2017), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3 [hereinafter *IHL Rule 3*].

⁴⁵ *See id.*

⁴⁶ U.S. ARMY, *LAW OF ARMED CONFLICT DESKBOOK* (David Lee ed., 5th ed. 2015), http://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2015.pdf.

⁴⁷ LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* 121 (2008).

⁴⁸ *Id.*

⁴⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226 (July 8).

for example, supplying food or clothes.⁵⁰ Accordingly, the principle of distinction grants immunity to civilians from being targeted, but, at the same time, it criminalizes adopting a civilian disguise for deception.⁵¹ Using civilian disguises comes within the definition of “perfidy,”⁵² a war crime under customary international law.⁵³ To be sure, the past conduct of a person or a previous association with an armed group does not make him a lawful target. A person who was previously a combatant but is no longer associated with the military or militant organization will be considered a civilian.⁵⁴ Civilians, however, may be harmed “incidentally or unintentionally” when military objectives are targeted, subject to proportionality. Here, “incidentally or unintentionally” implies that the use of force—and any collateral damage—should not be disproportionate, and, instead, it should be avoided if there are alternate means or methods available.⁵⁵

D. Human Shields

A human shield can be defined as a civilian deliberately installed by militants in close proximity to themselves to avoid targeting or to protect militant goals. Such shields violate humanitarian law.⁵⁶ Civilians, however, are generally protected under humanitarian law in general, which includes the specific instances when civilians are in close proximity to combatants—whether accidentally or as a result of combatants deliberately hiding among them.⁵⁷ Indeed, the legality of targeting civilians is only debatable in situations where the civilians voluntarily chose to be human shields or work in war industries. In times of conflict, there will always be collateral damage. Therefore, proportional collateral damage to civilians is permitted and lawful to the extent that it is the last resort to reconcile armed conflict and it is not disproportionate to the corresponding military advantage gained.⁵⁸ As Grotius pointed out, “Though there may be circumstances, in which absolute justice will not condemn the

⁵⁰ Int'l Committee of the Red Cross, *Direct Participation in Hostilities: Questions & Answers* (Feb. 6, 2009), <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>.

⁵¹ I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 3–5* (2005).

⁵² “Perfidy” is defined as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence” and can include a combatant disguising as a civilian or any other person *hors de combat* to trick the opponent. *Id.* at 223–24 (quoting Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1), June 8, 1977, 1125 U.N.T.S. 3).

⁵³ *Id.* at 214–15. Explaining that this practice corrodes the basic principles of international humanitarian law by violating the principle of distinction and removing the trust that is established primarily for the protection of civilians from violence. Its illegality does not arise from the targeting the opponent or from a combatant not being in a uniform all the times. Instead, its illegality is based on the pretense of using civilian protection to gain trust and target the opponent.

⁵⁴ Int'l Committee of the Red Cross, *Customary IHL Rule 1: The Principle of Distinction between Civilians and Combatants* (2017), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 [hereinafter *IHL Rule 1*].

⁵⁵ JANINA DILL, *LEGITIMATE TARGETS?*, 75 (2014).

⁵⁶ Int'l Committee of the Red Cross, *Customary IHL Rule 97: Human Shields* (2017) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule97.

⁵⁷ Int'l Committee of the Red Cross, *Civilians Protected Under International Humanitarian Law* (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/protected-persons/civilians/overview-civilians-protected.htm>.

⁵⁸ IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING* 115–19 (2009).

sacrifice of lives in war, yet humanity will require that the greatest precaution should be used against involving the innocent in danger, except in cases of extreme urgency and utility.”⁵⁹

E. *Non-State Actors and Internal Armed Conflicts*

The rule of distinction is also applicable to non-state actors and internal armed conflicts, although countries treat non-state combatants as terrorists subject to domestic laws. To begin, it must be understood that members of structured militant groups are functional insurgent combatants working against the state, and targeting them within their state and their ally states—with consent—is lawful.⁶⁰ In those instances where individuals belong to a structured and controlled armed group with terrorist agendas, targeting them is permissible.⁶¹ Likewise, regardless of the law the state intends to apply to an internal armed conflict, certain personnel who participate in hostilities against the state can be characterized as combatants under the principle of distinction.⁶² Conversely, to protect noncombatants during internal armed conflict, humanitarian law, through Article 3 of the Geneva Convention, offers certain safeties to noncombatants during non-international armed conflict.⁶³

With regard to attacks on the U.S. military in Afghanistan, targeting the Taliban leaders and their guards would be considered necessary and within the limits of distinction. At the same time, an issue arises with regard to the use of distinctive signs or uniforms, as required by customary humanitarian law, in the context of U.S. military operations against the Taliban. The purpose of this requirement is not to distinguish militants from each other but to differentiate them from the general population. Moreover, any individual from a non-state actor militant organization who admits to supporting anti-international law agendas is no longer a civilian—at least until he ceases active participation in the militant objectives of such groups.

Moreover, any use of force during armed conflict must conform with the limits provided by customary international law. Therefore, the choice of targets of a defensive action requires a necessity criterion. In this regard, the ICJ has also maintained that the use of force must follow the principle of necessity, in congruence with humanitarian laws.⁶⁴ This implies that the mere identification or characterization of individuals as combatants does not constitute the lawful use of target killing. Since, by definition, to conduct a killing, it must be an actual military necessity—taking into consideration the principles of necessity and proportionality within the confines of actual armed conflict and self-defense

⁵⁹ HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (1625), *reprinted in* *THE RIGHTS OF WAR AND PEACE, INCLUDING THE LAW OF NATURE AND OF NATIONS; TRANSLATED FROM THE ORIGINAL LATIN OF GROTIUS* Book III, chp. XI (Bartleby.com 2013) (1901), <http://www.bartleby.com/172/311.html> (last visited Apr. 14, 2017).

⁶⁰ *IHL Rule 3*, *supra* note 44.

⁶¹ *IHL Rule 1*, *supra* note 53.

⁶² ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 254 (2005).

⁶³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 356, 75 U.N.T.S. 287

⁶⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 246-47 (July 8).

under humanitarian laws. Therefore, identifying individuals as probable combatants and conducting drone attacks without actual armed conflict within the sovereign borders of another state, without consent of that state, constitutes an act of war.⁶⁵

F. *Target Killing Versus Assassination*

The notion of “target killing” has been defined as the use of lethal force with the deliberate intention of killing non-imprisoned personnel subjected to international law.⁶⁶ A target killing is similar to an assassination or an extrajudicial killing, both of which are prohibited by international law.⁶⁷ The use of state agents to assassinate targeted individuals violates the legal requirements of due process. To some degree, assassination is also target killing, though with the added characteristics of being committed during peacetime, politically motivated, and illegal. During peacetime, the applicable international law is human rights law, which mandates the requirements of due process before the use of any lethal force except as a law enforcement measure.⁶⁸ It is for such reasons that target killing cannot be justified during peacetime.⁶⁹

The concept of assassination—defined as the treacherous killing of a selected individual of the opposing camp⁷⁰—is also present in armed conflict. This is distinct from “perfidy”: in the context of armed conflict, target killing must still follow the principles of distinction as enunciated above.⁷¹ The principles of *jus in bello*—necessity, proportionality, and precaution—must still be satisfied when targeting individuals. Furthermore, target killing operations are still subject to certain prohibitions under the principles regarding the conduct of wars or hostilities—such as the prohibitions against the denial of quarters, perfidy, and the use of certain weapons.⁷²

G. *Personality-Based Targets Versus Conduct-Based Targets*

A distinction should also be drawn between personality-based targets and conduct-based targets.⁷³ The personality-based targets are those holding positions of authority in an organization.⁷⁴ Conduct-based targets—which are primarily

⁶⁵ THE HANDBOOK OF INT'L HUMANITARIAN L. 57 (Dieter Fleck et al., 3d ed. 2013).

⁶⁶ U.N. General Assembly, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

⁶⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 62.

⁶⁸ Gabriella Blum & Philip Heyman, *Law and Policy of Target Killing*, 1 HARV. NAT'L SECURITY J. 145, 160–64 (2010), <https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/BlumHeymannLawPolicy.pdf> (discussing the limitations under international law on using deadly force against individuals to ensure state security, which includes due process requirements among other things).

⁶⁹ ANNA GOPPEL, *KILLING TERRORISTS* 14 (2013).

⁷⁰ *Id.*

⁷¹ INT'L COMMITTEE OF THE RED CROSS, COMMENTARY ON ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 ¶ 1505 (Yves Sandoz et al. eds., 1987).

⁷² See GOPPEL, *supra* note 69, at 14–15.

⁷³ Cora Currier, *Everything We Know So Far About Drone Strikes*, PROPUBLICA (Feb. 5, 2013, 11:50 AM), <https://www.propublica.org/article/everything-we-know-so-far-about-drone-strikes> (referring to conduct-based targets as “signature targets”).

⁷⁴ *Id.*

associated with non-state actors—on the other hand, are those who have been involved in specific operations or violent, terrorist acts.⁷⁵

Accordingly, the U.S. has defended the targeted killing of some individuals on the ground that they are personality-based targets. The U.S. has also argued that these targets are associates of terrorist organizations operating within the territories of another country, such that the targeted killing is justifiable law enforcement—disregarding humanitarian law.

The U.S. has therefore used its legal frameworks to target individuals who are either associates of terrorist organizations or have been involved in terror plots. In either case, the legality of target killing depends on international human rights law, which protects the right to life of individuals against the unlawful targeting of civilians outside actual armed conflicts.⁷⁶ Even within the confines of law enforcement standards, target killing must maintain the preventive, compulsive characteristics and serve as a last resort in an armed conflict. In addition, the due process requirement of the law must be afforded to every individual regardless of his position in the organization or involvement in any incident.⁷⁷

It is further contended that target killings justified on “personality” or “conduct” bases to preemptively prevent future crimes are still subject to the rule of necessity and must be grounded in the immediacy of conflict.⁷⁸ However, it can be argued that such target killings have no legal basis as the crime has not yet been committed, and the probability to measure the same is questionable. This means that such practices of target killing come within the ambit of extrajudicial killing prohibited under the *jus cogens* principles. It is generally understood that criminals, whether national or international, must be dealt with through law enforcement methods. The reality is that humanitarian law does not deal with targeted killings in the absence of armed conflict. Instead, such targeted killings must be dealt with through law enforcement methods as defined by human rights law. Human rights law puts an absolute prohibition on target killings while also imposing necessary restraints to forestall any arbitrary deprivation of life.⁷⁹

H. *Weaponry*

Reverting to the topic of armed conflict, there are also issues related to the use of certain weaponry. Modern warfare has seen the use of weaponry that is incapable of distinguishing combatant from noncombatant targets, and, as a result, they can cause mass suffering. Customary international law forbids use of

⁷⁵ *Id.*

⁷⁶ Downes, *supra* note 41, at 279–80.

⁷⁷ For example, even early American military documents contemplated the concept of “outlawry,” whereby criminals were not given the protection of the law and due process. The American government expressed a policy against using “outlawry” as a way to circumvent due process during times of war. U.S. WAR DEP’T, GENERAL ORDERS NO. 100 § IX, art. 148 (1863), http://avalon.law.yale.edu/19th_century/lieber.asp (“The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage.”)

⁷⁸ Downes, *supra* note 41, at 289–91.

⁷⁹ PETER HENNER, HUMAN RIGHTS AND ALIEN TORT STATUTE 128 (2009).

such weaponry.⁸⁰ In any conflict, the value of the target is calculated against the force necessary to weaken the opponent or end the conflict. Moreover, such calculation gives due consideration to alternate methods and means in every military operation. As a result, the analysis of alternate methods when directing an attack necessarily requires a prompt decision regarding other actions and weaponry available. Therefore, in an armed conflict, due consideration must be given to the means of targeting, while precaution must be taken to reduce collateral damage and casualties.⁸¹

One concerning example with respect to distinction and modern weaponry is the U.S. claim to use of drones in Pakistan, Afghanistan, and Yemen for targeted killings. It is hugely controversial whether drones are inherently discriminatory weapons or if their use is in accordance with the principles of *jus ad bellum* or *jus in bello*. Arguably, a number of factors make drones indiscriminate weapons. For instance, drone operators rely on data, which may not be accurate. Additionally, the computers used to control drones are partly autonomous—the drone operators rely strongly on analyses from computers for accuracy. Furthermore, the operators are removed from the reality and circumstances of the field—the operating decisions are made in light of some technical data relayed on screens to them, similar to video games.⁸²

Moreover, CIA operatives—who are neither members of the military forces nor trained in legal understandings of distinction, proportionality, or necessity in armed conflicts—are operating these drones. Drones are not law enforcement weapons but military weapons, and therefore, their use must be governed by *jus ad bellum* and *jus in bello*. The use of drones in any case must be solely by military personnel, as CIA operatives would be recognized as combatants—and unlawful combatants, at that—and cannot take part in armed conflicts—which in most cases do not even exist—under humanitarian law.⁸³

The targeted killing by the use of drones must therefore be analyzed within the established norms and regulations of proportionality, necessity, and distinction. If the targets are noncombatants then they are not lawful targets according to the principles of distinction. It is contended that drone strikes by the U.S. in Pakistan are illegal, as drone attacks without official consent breach the sovereignty of Pakistan, and, furthermore, these attacks do not follow the rules of humanitarian law because they are disproportionate and unnecessary killings outside the theater of actual armed conflict. For instance, most individuals collaterally killed by drone attacks were identified as noncombatant civilians—neither participating in any terrorist activities nor having any connections with such groups.⁸⁴ Similarly, the majority of U.S. drone attacks were conducted in noncombatant zones, where civilian casualties were almost certain. Even, for the sake of argument, if there had been any terrorists killed in drone strikes, the

⁸⁰ See Int'l Committee of the Red Cross, *Customary IHL Rule 71: Weapons That Are by Nature Indiscriminate* (2017), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule71.

⁸¹ MIKE AARONSON ET AL., PRECISION STRIKE WARFARE AND INTERNATIONAL INTERVENTION 122–27 (2014).

⁸² *Id.*

⁸³ KAREN GUTTIERI, UNDERSTANDING COMPLEX MILITARY OPERATIONS 189 (2014).

⁸⁴ STEVEN BARELA, LEGITIMACY AND DRONES 172 (2016).

number of civilians killed and the use of firepower would violate humanitarian laws for being highly disproportionate. As emphasized earlier, collateral damage must be kept within certain bounds, with particular reference to the criteria of unintended collateral damage and precautions to prevent the loss of innocent lives.⁸⁵ Therefore, the use of drones seems to have ignored the principles of distinction, necessity, and proportionality, and has also overlooked the requirements for an actual conflict and the consent of host state. Thus it falls short of meeting the standards of international and humanitarian laws.⁸⁶

CONCLUSION

In order to understand the legality of the use of drone strikes, it is relevant to note that Article 2(4) of the UN Charter prohibits the use of force and that Article 51 is the only exemption against such a use of force under the *jus cogens* principles of self-defense under customary international law. Drone strikes, and thereby target killing, constitutes an act of war and the use of force can only be justified as self-defense in an actual armed conflict. Attacking non-state actors in hot pursuit in the host states is against customary international law according to the ICJ. Drones, however, can be used against insurgent groups or terrorist organizations by a foreign state with the consent of host state, but, even then, only to stabilize the region. Hence, drone attacks against the will of a host state or drone attacks against a state to help rebel groups destabilize a region are entirely illegitimate.

Furthermore, even if the drone strikes are legal, do not constitute an act of war against any state, and are conducted with the consent of host states, they must follow certain humanitarian law principles. Such principles present vigorous restraints over such use of force. First, drone strikes must be undertaken out of absolute military necessity—that is, where recourse to drone attacks or the use of force must be the last available resort to reconcile an armed conflict. Second, to commence a kill list in drone attacks, targets must be combatants—distinguished from the noncombatant civilian population in accordance with the principle of distinction under humanitarian law—to avoid lawlessness and complete injustice. Third, drone attacks must be aligned with the principle of proportionality, by which civilians are protected against collateral damage.

So, arguably, because Pakistan has taken an official stance that demands the immediate cessation of drone attacks inside its territory, drone attacks by the U.S. in Pakistan are an unlawful use of force since there is no actual armed conflict and there is no consent of the host state. Furthermore, these drone attacks are an act of war against Pakistan's sovereignty. Perhaps, arguably, even if Pakistan gives its consent—covertly or unofficially—to the US to conduct drone attacks, the rules of proportionality, necessity, and distinction still make these drone

⁸⁵ AARONSON ET AL., *supra* note 81.

⁸⁶ Waseem Khan, *US Drone Policy and Anti-American Sentiments in Pakistan (2001-2012)*, 1 INT'L J. OF RES. 936, 985-91 (2014).

attacks unlawful. Indeed, if there is any collateral damage to the civilian population—in the absence of actual armed conflict and with available alternatives to reconcile the armed conflict—it would infringe humanitarian laws.

Nevertheless, the U.S. maintains that it has obtained Pakistan's tacit consent to conduct drone attacks against terrorists because Pakistani officials covertly allow such drone attacks. The U.S. further asserts that such drone attacks follow a "personality-based test," where members of terrorist organizations are targeted and not assassinated. So, to avoid despicable future terrorist activities in the region and in foreign lands by non-state actors, the U.S. argues that drone attacks within the territories of host states in the form of preemptive measures are needed, and that civilian collateral damage is a cost in accordance with customary international law.