A Critical Study of the Legal Position of the US Drone Strikes in the FATA

Ghulam Shams-ur-Rehman, PhD
Assistant Professor
Department of Islamic Studies
Bahauddin Zakariya University, Multan, Pakistan
Email: shams@bzu.edu.pk

Abstract:
The legal position of the use of unmanned aerial vehicles or drones by the US for reconnaissance and targeting the non-state actors in the Federally Administered Areas of Pakistan (FATA) is complex and complicated. The issue raises serious questions about its legality and its ethical and moral status. The US justifies its position on the use of drone by the argument of self-defense and by the authorization of US Congress to use all necessary and appropriate force under the September 2001 Authorization for Use of Military Force Act (AUMFA). Whereas, many experts of international law and organizations of human rights argue that the use of drone is a clear violation of international law; it is also against the principle of humanity and the humanitarian law. Moreover, the use of force is not permissible in non-war zones against suspected terrorists. Therefore, it is against the law of proportionality; and the killings by the use of drones are considered as extra-judicial killings. This paper aims to analyze the legal position of drone strikes on the FATA which has a distinctive semi-autonomous entity under the federal administration of Pakistan.

Keywords: Drone Attacks, U.S. Military Policy After 9/11, FATA, Human Rights Violation, International Law.

I. Introduction:
The use of drone raises some serious questions the jurisdiction and future of international law and the role of United Nations. As an organisation, to what extent, its various entities are bound by customary human rights jus cogens? Can the law of war override the limitations of human rights law? How much the UN can protect the violation of human rights and provide remedies? What are legal arguments of the US for the use of unmanned aerial vehicles or drones and how does it justify them? The present study aims to evaluate these issues by examining the standpoints of legal experts in the field of international law of war.

II. A Critical Study of the Legal Status of the US Drone Strikes
The US officials argue that the use of drone strikes is legal and justified not only by the US law but also by the UN Charter. The US congress passed a resolution on the Authorization on the Use of Military Force after the attacks of 9/11. The resolution authorizes the president to take all necessary actions, including the drone strikes in Afghanistan, to protect the security of US.
The President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons (Congressional Record, 2001, vol. 147).

The US claims justification from Article 51 of the UN Charter: “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 measures necessary to maintain international peace and security”. The US asserts that an armed attack was carried out against US on September 11, 2011. Therefore, US is in an armed conflict with al-Qaida and its associated forces such as Taliban. The US further justifies the use of drones in Pakistan and argues that the drone strikes in FATA is as an extension of US counterterrorism policy against al-Qaida in Afghanistan which is legitimate by the resolution of US Authorization of Use of Military Force, and UN Security Resolution 1973.

Both the Bush and Obama administration conducted drone strikes in Afghanistan and Pakistan. However, the number of Drone strikes was comparatively low in Pakistan under the Bush Administration. Amita Etzioni supports US drone strikes and maintains that the ‘critics pay little attention to the fact that the use of drones is subject to close oversight (Etzioni, 07.2010, 11).’ He asserts the drone attacks are conducted carefully by collecting data from reliable intelligence sources and then it is reviewed properly by command chain. On the basis of that, approval is granted to conduct drone strikes. Special arrangements are made to protect the civilians and innocent persons. ‘However, Baitullah Mehsud, head of the Taliban in Pakistan, was considered an asset of such high value that the presence of his wife and father-in-law were not enough to abort a strike that killed all three (Etzioni, 07.2010, 12).’ Etzioni examines the issue of collateral damage in drone strikes. He argues that the militant are responsible for death of civilians as they used them as a human shield. They use ambulance to transport suicide bombers and they store ammunition and anti-aircraft guns in schools and mosques. Therefore, ‘one must note that the main fault lies with militants, who refuse to separate themselves from the true civilian population (Etzioni, 07.2010, 14).’

Etzioni further states that the critics consider assassination by drones as extra-judicial killings. They argue that militants should be treated as criminals. Etzioni rejects the argument and asserts that the militants who have acquired the weapons of mass destruction cannot ‘effectively deterred by the criminal justice system.’ He asserts that ‘drones cause less collateral damage than other instrument of war (Etzioni, 07.2010, 14).’ Civilian are the protected class and they should be protected at any cost. Moreover, the Article 51 allows carrying out armed attacks only against the states involved in terrorism. As far as the militant groups are concerned, their status should be assessed whether they are combatant or non-combatant. However, the civilian should be protected. Etzioni

1. Under the Bush Administration there were 42 drones conducted from 2004-2008, whereas the Obama Administration conducted 180 drone strikes in Pakistan about 90 strikes per year during 2009-2010. (Bergen P. Year of the Drone. New America Foundation [Internet]. 2010. [cited 2011 May 11] Available from: http://counterterrorism.newamerica.net/drones.)
refers that ‘Additional Protocol! Of the Geneva Conventions states, ‘civilians shall enjoy…protection …unless and for a such time as they take direct part in hostilities.’ Under this rule, whether targeting killing is legal depends on how narrowly one interprets ‘take direct part’ especially as many targeting killings occur when an individual is not carrying arms nor fighting (Etzioni, 07.2010, 13).’

The US officials assert that drone strikes are carried out with great precision observing the spirit of International Humanitarian Law by maintaining discrimination and proportionality. Leon Panetta, Former CIA Director, has claimed that U.S. airstrikes aimed at al Qaeda leaders in Pakistan have been "very effective," with few civilian deaths as a result. He stated: ‘I can assure you that in terms of that particular area; it is precise and is very limited in terms of collateral damage (CNN, 2009, May 18).’ Similarly, Vincent Bataiel argues that ‘experience in Pakistan has shown, the ability to apply swift force at a stand-off distance is advantageous (for the US) because the US can now effectively be involved in global security affairs while maintaining a minimal military footprint, and minimum financial commitment (Bataoel, 2011, 73).’

On the other hand, there is strong criticism on the US drone policy by public interest groups and legal experts such as the International Committee for Robotic Arms Control asserts that it is ‘unacceptable for machines to control, determine, or decide upon the application of force or violence in conflict or war (ICFRAC, 2010).’ Similarly, The Fellowship of Reconciliation opines that the use of drone is not acceptable because it creates a ‘play-station mentality’. Like a video game, the operators kill the people indiscriminately which is against the spirit of International Humanitarian Law (Dobbing M, Hailwood A, Cole C. 2010).

The legal experts and agencies also criticize the US drone strikes beyond the boundaries of Afghanistan. Amnesty International issued a statement that ‘the US has carried out an extrajudicial execution, in violation of international law (Amnesty International, 2005)’. Many experts such as Mary Ellen O’Connell and Professor Anderson evaluate the legal position of the drones under the principles of necessity and proportionality. O’Connell argues that drones are battlefield weapons and they are used as launch vehicles for delivering bombs and missiles. Therefore, the use of the drone is not different than the use of other military vehicles such as rocket launcher and bomber aircraft. Consequently, “drones are weapons for military operations not police operations (O’Connell, 2010, 1).” O’Connell further argues that as the battlefield weapons, drones are to be used only in the war-zone of conflict not in the peacetime. Therefore, any legal regime is bound to use the drones under three primary components: “the jus ad bellum governing initial resort to military force; the jus in bello governing the conduct of armed force, and aspects of human rights law that apply all times regardless of whether situations are ones of armed conflict or not.” She further argues that the jus ad bellum — the legal regime governing military force—is the United Nations Charter. The Charter constitutes the legal standard against which to judge U.S. drone use. The Charter normally prohibits resort to military force. However, according to the Charter, any such military expedition is lawful when it complies with one of the Charter exceptions or the state where the force is used in an armed conflict has invited the U.N. to join it in armed conflict hostilities. Furthermore, the use of military force is conditioned to comply with the principles of necessity and proportionality. Therefore, any resort to military force is subject to the principle of proportionality which demands that the cost in civilian lives
lost and civilian property destroyed may not be disproportionate to the value of the military objectives. As far as the rationale of the use of drone is concerned, O’Connell argues that it depends on the assessment of its effectiveness and importance of any resort to military force. However, she does not favour the use of military force in any case. It seems that O’Connell brings the ethical argument in the legal debate particularly when she asserts: “If a resort to military force is unlikely to be effective and proportionate, it is also unlikely to be wise. Indeed, history teaches that resort to military force in violation of international law rarely if ever results in a positive outcome for the law violator (O’Connell, 2010, 2).”

The drones are basically military weapons which could be used only in the battlefield. Their use for law enforcement operations is clearly against the human rights even if they are used effectively and proportionately. The Article 2 (4) of the United Nation Charter prohibits the use of major military force. However, there are two express exceptions to this general rule of prohibition. The states may use force in self-defence or states may use force with the Security Council’s authorization. As far as the self-defence is concerned, it is highly restricted right in the Charter as Article 51, mentions that the state may exercise the right of self-defence “if an armed attack occurs.” The American academics used this argument to justify the US policy of drone attacks. They argue that US has an extended legal right to resort to military force against Al-Qaida and Taliban in Afghanistan and across Pak-Afghan border. O’Connell criticises their argument and asserts: “Regardless of this academic interest, however, the world agreed without dissent in 2005 at United Nations World Summit in New York to reconfirm the Charter rule as written. In addition to this renewed support by high-ranking national representatives, the International Court of Justice had ruled in many cases over the years that the Charter means what it says and that the rules of the Charter are the current governing law respecting the use of force (O’Connell, 2010, 3).”

The second exception for the use of force under Article 2 (4) is the authorization of the Security Council. The Security Council referred to Article 51 and to a U.S. right of self-defence following the 9/11 attacks in Resolution 1368 (2001), but the Council did not authorise the use of force in the resolution. The resolution was useful in making a finding that the 9/11 attacks could give rise to a right of self-defence, but the actual exercise of force was under Article 51, not the Council’s authority in Articles 39-42 (O’Connell, 2010, 3; O’Connell, 2007, 63; O’Connell, 2002, 889-904).

Jordon J. Paust has analysed the work of Tom Dennenbaum who has attempted to analyse the similar questions raised above (Dennenbaum, 2010, 301). Dennenbaum argues that the United Nation is legally bound to conform to human rights standards. He writes: “[I]t surely is a consequence of the UN’s legal personality at international law that it is bound by customary international law” and “is constitutionally mandated to promote the advancement of human rights (Dennenbaum, 2010 223-227).” Paust views that the

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2. U.N. Charter Article. 51: Noting in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures take by members in the exercise of this right of self-defence 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. Cf. [Internet, 14 September 2014] at http://www.un.org/en/documents/charter/chapter7.shtml
establishment of the UN was to accomplish these objectives and to reaffirm human rights as mentioned in the preamble to the UN charter. He further argues that there are significant reasons why the UN and its entities are bound by human rights. The Article 55 (c) of the U.N. charter confers constitutive mandate for human rights; according to which, “the United Nation shall promote….universal respect for, and observance of, human rights and fundamental freedoms for all.” Paust asserts that “such an express obligation of the United Nations must also condition the authority of its entities, such as the Security Council, the General Assembly, and the Secretariat, and even individual U.N. personnel. Members of United Nation are similarly bound under Article 56 of the Charter “to take joint and separate action…for the achievement of the purposes set forth in Article 55 (Paust, 2010, 2).” Therefore, it is the duty of every member state of the UN “to promote through joint and separate action universal respect for and observance of human rights and fundamental freedom in accordance with the Charter (Paust, 2010, 2).” Furthermore, the International Court of Justice has affirmed that “a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter (Paust, 2010, 3).” Thus, the denial and violation of human rights by any state is considered a violation of the Charter. Paust writes: “I agree with Dannenbaum that there must be “a strong presumption that any vaguely phrased authorization from the UN can reasonably be interpreted to stretch only as far as it is “consistent with human rights law (Paust, 2010, 3).”” Megret and Hoffmann also argued that the U.N. and its members are bound to observe international human rights standards (Frederic Megret and Florian Hoffmann, 2003, 314, 323). Similarly, the Security Council under Article 24 (2) is bound to act in accordance with the purpose and principles of the United Nations. Paust argues that the purposes, principles and requirements to observe human rights are recognised in the preamble and Articles 1 (3) and 55 (c) of the UN Charter. It is necessary according to the Charter to promote “universal respect for, and observance of, human rights (Paust, 2010, 4).” Moreover, under Article 25 of the Charter the members of the United Nation must “carry out the decision of the Security Council in accordance with the present Charter.” It means the Security Council has to make decisions in accordance with the Charter or the decision of the Security Council must only carry out to serve the purpose and principle of the Charter (Paust, 1994, 4). Consequently, the Security Council is bound to observe human rights under Article 1 (3), 24 (2) and 55 (c) while the member states of the U.N. have to follow the same under Article 56, which incorporates Article 55 (c) by reference (Paust, 1996, 15-17).

Paust further maintains that for every right there must be a remedy while immunity produces unrest. Therefore, immunity in the case of human right violation is disastrous and against the human dignity. The immunity in accordance with the U.N. Charter is counterintuitive and on legal point of view, it is clear violation of Article 55 (c). On the other hand, “the right to a remedy is part of the human rights that must be universally respected and observed within the meaning of Article 55 (c) and 56 of the United Nations Charter. As such, the United Nations is constitutionally bound to provide an effective remedy (Paust, 2010, 9).”

The United Nation has criticised the Obama administration’s reliance on the drones to hit and kill the suspected terrorists such as FATA and Iraq in June 2009. The United Nations of Human Rights Council (UNHRC) presented a report which asserted that the US failed to maintain human rights in its war on terror, military operations and the drone attacks. It is also noted that the information of civilian causalities in the drone
attacks is not accessible to the public due to the high level of secrecy regarding the drone campaign (Silverstein, 2009). Philip Alston, the UNHRC investigator, called on the US on 27 October 2009 to reveal that it was not randomly killing people against the International law across the Pak-Afghan border. He criticised the refusal to respond to the UN concerns and said: “Otherwise you have the really problematic bottom line, which is that the Central Intelligence Agency is running a program that is killing significant numbers of people and there is absolutely no accountability in terms of the relevant international law (Reuters, 2009).” Alston's team submitted another report on 3 June 2010 to the United Nations Commission on Human Rights. He criticised the United States for being “the most prolific user of targeted killings” among the member states of the U.N (Cloud, 2010, 1). The Obama administration not only continued the drone policy of the Bush administration but also increased its intensity. The UN report expresses serious concerns on the use of drone. It further states that other nations will take the precedent of American use of drone to kill the suspected terrorists across borders which would be disastrous for global peace and harmony.

The experts opine that according to the international law, a state does not have a right to attack on non-state combatants without the consent of the state in which it’s operating. Secondly the attack should be launched under the principle of proportionality which requires that the collateral damage and civilian deaths should not be excessive as contrast to the military gains anticipated. Robert Sloane comments on the UN report and criticises policy of the Obama administration. He says:

I agree that it’s troubling that we don’t know the criteria by which the Obama administration vets targets who are allegedly terrorists. In Guantanamo Bay, a high percentage of those detained for years as alleged terrorists has been found by federal courts to have been held on insufficient evidence, and not infrequently it’s fairly clear they’re innocent. Why should we have confidence that the CIA or the Pentagon are getting it any more accurate when they’re now deliberately killing people rather than just detaining them?

Slone further argues that the US shared the intelligence with NATO after 9/11. On that basis, it asserted that Al-Qaeda had been responsible for the attacks. It is more pertinent for the US to elaborate the legal rationales of drone to its allies. The US should balance transparency and practicality in using the force of unmanned aerial vehicle. In this way, the US can increase its credibility (Barlow, 2010).

III. The US Drone Strikes in Afghanistan and the FATA

The US started its use of force in Afghanistan in 2001 under an Article 51 self-defence argument (O’Connell, 2002, 889). Moreover the position for the use of force is legally recognised under international and US domestic law. The Bush administration was permitted to drone strikes against al-Qaeda and Taliban leaders by the September 2001 Authorization to Use Military Force Act, which empowered the president to “all necessary and appropriate force against nations, organisations and persons who planned, and committed and aided the September 11 attacks. However, the right to use the force in Afghanistan under Article 51 is ended with the collapse of the Taliban regime and establishment of new leadership through the loya jirga in 2002. Today the US has right to use military force on the basis of the request of elected government of Afghanistan to assist it in the conflict. Therefore, the US, NATO and ISAF are present in Afghanistan to
help the government in armed hostilities. However, beyond Afghanistan, the US does not have such kind of invitation or request particularly in the FATA. There is not any official invitation or request from Pakistani elected governments. Moreover, the elected leadership condemned the drone attacks and asserted that these were counter-productive. (thenews)

John B. Bellinger III, a partner at Arnold & Porter LLP and an adjunct senior fellow in international and national security law at the Council on Foreign Relations, raises serious concerns on the legal position of the US authority to use the militarily force beyond the Afghanistan. He notes:

[T]he U.S. legal position may not satisfy the rest of the world. No other government has said publicly that it agrees with the U.S. policy or legal rationale for drones. European allies, who vigorously criticized the Bush administration for asserting the unilateral right to use force against terrorists in countries outside Afghanistan, have neither supported nor criticized reported U.S. drone strikes in Pakistan, Yemen and Somalia. Instead, they have largely looked the other way, as they did with the killing of Osama bin Laden. Human rights advocates, on the other hand, while quiet for several years, have grown increasingly uncomfortable with drone attacks. Last year, the U.N. rapporteur for summary executions and extrajudicial killings said that drone strikes may violate international humanitarian and human rights law and could constitute war crimes (Bellinger III, 2011).

Bellinger also asserts the Obama administration has to redefine their legal justification of the use of military force which can satisfy its allies and human right advocates. The Obama administration has to develop a broader international consensus on the methods and limitation of the use of force. He also cited the acknowledgement of White House counterterrorism advisor John Brennan who said: “the effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies.” Bellinger advised the Obama administration “to avoid losing the tacit support of its allies for drone strikes and its other counterterrorism policies, it should try to ensure that they understand and agree with the U.S. policy and legal justification. Otherwise, the administration risks having its largely successful drone program become as maligned as Guantanamo (Bellinger III, 2011).”

Actually the right to use military force under Article 51 for self-defense is permissible against active militant groups in a state. O’Connell argues that ‘even the militant groups remain active along a border for a considerable period of time, their armed, cross border incursions are not armed attacks under Article 51 that can give rise to the right of self-defense unless the state or the group is present is responsible for their actions. And if their military acts are significant enough to give rise to an Article 51 self-defense case (O’Connell, 2010, 6).’ The international law does not allow the states to use the military force against the state which is not responsible for any armed attack on the defender under Article 51. One point on which, many experts of international law are agreed is that any armed operation is not permissible against individuals or small groups far from armed conflict hostilities occurring or that once occurred on the territory of the responsible state under Article 51. O’Connell argues that ‘the law of state responsibility combined with territorial jurisdiction creates the restriction. Even on the territory of a state responsible for an armed attack, the principle of necessity and proportionality may
also limit the territorial extent of military operations in self-defense. States may only use that force necessary to accomplish the military purpose without disproportionate losses to the civilian population’ (O’Connell, 2010, 6). The United State may argue that it has legitimacy to hit and kill the members of Al-Qaeda and the Taliban who are planning to attack the United States. Therefore, the US has justification for use of drone in non-war zones as an act of pre-emptive self-defense. O’Connell argues that ‘this argument is completely antithetical of the law of self-defense. The law of self-defense does not permit states to attack before they possess evidence of an armed attack occurring- evidence of plots does not suffice. Moreover, this law does not permit attacks on individuals and small groups lacking state sponsorship even if they are carrying out actual attacks’ (O’Connell, 2010, 7). O’Connell further argues that ‘even where the U.S. may have permission from Pakistan and is engaging in hostilities along with the authorities of that state, counter-terrorism experts have raised real concerns about the wisdom of drone strikes. Whether attacking with drones is wise, lead us to question the necessity and proportionality of resorting to this sort of military force. Counter-terrorism experts have told us that our drone attacks are actually fuelling interest in the insurgency in Afghanistan and in Pakistan and in taking lethal action against the government of Pakistan’ (O’Connell, 2010, 7). It is observed that every incident creates more insurgent in the region since its beginning from the killing of a Pashtun tribesman Nek Muhammad in the first drone attack on June 18, 2004 in the village of Wana in South Waziristan. Nek Muhammad was invited on dinner in a house of his friend, Sher Zaman Ashrafkhel, a local tribal leader. In the midst of dinner, a Hellfire missile launched by Predator drone exploded. At least five persons, Nek Muhammad, Sher Zaman, one guard, and two sons of Sher Zaman (aged 16 and 10) were killed in the attack (Avery Plaw, Matthew S. Fricker, Brian Glyn Williams, 2011, 52). In this case, obviously, the required person was Nek Muhammad, but four innocent civilians were killed without any reason. In a tribal base society, this kind of attacks has provided much support and force to the insurgents. The data shows that CIA attempted to improve its targeting procedures; as a result a clear reduction in the numbers of civilian casualties was observed during 2010 and 2011 (newamerica.net). Even then, we have seen that the drone remained counter-productive.

IV. Conclusion

The present study concludes that it is highly controversial to carry out drone strikes against non-combatants who are not direct threat to the US security. No serious effort was made by international authorities to develop consensus on the legal framework to assess the legality of drone strikes of the US. Similarly, the legal opinions of the experts are at variance. Some legal experts opine that the US is observing its national and international laws regarding drone attacks in FATA, Pakistan. Moreover, the drone strikes are useful as the US gradually improved the drone’s quality of attacking the target and the collateral damage is less in drone strikes then other instruments of war. (Etzioni, 07.2010, 14) On the other hand, some scholars reject the legitimacy of US drone strikes. O’Connell seems very critic to use of drones and she argues that all kind of drone strikes are illegal because ‘drones, like bomber aircraft, cannot legal fully be used in law enforcement’ (O’Connell (i), 2010, 5131). Furthermore, the legal experts assert that peacetime rule should be implemented in cases of doubt. Secondly, the use of lethal force can be permitted only in the conditions of absolute necessity. The critics argue that the IHR/Law enforcement rules require particular considerations of necessity and proportionality. On the basis of that, they refuse to accept the US legitimacy to carry out
drone attacks in the FATA under the international law and law of proportionality and necessity. They believe that the US failed to observe the human rights under the humanitarian law. The present study shows the controversy of legal experts over the use of drone in FATA. It is the time for US to revisit its policy of drone strikes in the light of objections posed by legal experts. The data shows that the many most wanted persons were killed in drone attacks along with many civilian casualties in the attacks. The killing of innocent civilians particularly in the tribal society can give the impetus to insurgency.

References


