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Legality of the Modern Modes of Warfare The Case of Drones

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The use of drones has revolutionized modern warfare and also impacted upon the legal framework of conflict. With the rise in civilians' deaths from drone strikes, an intense debate has been raging over its legality under international law, with some critics considering it a violation of the territorial sovereignty of the state against whom it is deployed. The deeply polarized debate itself demonstrates the complexities and ambiguities surrounding its legal status. The author contends that it is important to understand the context of its use to determine its legality. In the subsequent sections the author analyzes the case for and against drone use by the United States in Pakistan.

Keywords: Drones, Pakistan, international law, non-state actors, United Nations, International Court of Justice

Introduction

The increased use of drones to target terrorist groups in Yemen, Somalia, and Pakistan has revolutionized modern warfare and altered the legal framework of conflict, in general. Although drones have successfully eliminated scores of prominent terrorist leaders, the remote nature of this relatively new warfare technology and deaths of civilians has triggered an intense debate over its legality under international law. It has been repeatedly asked whether it constitutes a violation of the territorial sovereignty of the state against whom this option is exercised. The Central Intelligence Agency (CIA) and the Joint Special Operations Command in United States continue to use drones, and now more and more countries are including it in their arsenal as well. The on-going debate between the protagonists and antagonists of drone warfare demonstrates the complexities of the legal dimension of the drone use, which has been underpinned by the transformation that has occurred in the nature of conflict itself in recent decades. If states are using non-state actors (NSAs) as their proxies that do not identify themselves openly, then the injured states are deploying drones to target these NSAs from afar, without having to enter the territory physically where the NSAs are based. In this context, this chapter looks into the claims and counter-claims of whether drone use constitutes violation of territorial sovereignty of the states where this option is exercised or if the injured states have any *locus standi* over the drone use under international law, notwithstanding civilian casualties and the question of sovereignty. This chapter looks at drone use by the CIA against Pakistan based NSAs as the case study to analyze the abovementioned questions.

Drone Use in Pakistan

Since 2004, U.S. drones strikes have killed over 1,800 militants including Ilyas Kashmiri, BaitullahMehsud, HakimullahMehsud, Nek Muhammad, Romanullah, BadarMansoor, Hafiz Gul, and Abu Yahya Al-Libi among others in Pakistan. According to the New America

Foundation, between 2004 and 2015 (17 September) in 402 drone strikes, between 2,257 and 3,643 people have been killed including 260 to 309 civilians, 1,801 to 3,004 militants and 196 to 330 unknown persons.¹ The current strain in US-Pakistan bilateral relations dates back to November 2011 when a NATO air strike killed 24 Pakistani soldiers in the Mohmand agency, which led to the closure of US drone base at the Shamsi air base in Quetta. The ruling Pakistan People's Party (PPP) government demanded a U.S. apology and closed NATO supply routes from Pakistan.² In March 2012, the All-Party Parliamentary Committee declared, "The US must review its footprints in Pakistan" and called for an end to drone attacks and "no hot pursuit or boots" on Pakistani territory and declared it a violation of its sovereignty.³ The apology from Secretary of State Hillary Clinton came in July 2012.⁴ But according to WikiLeaks cables, accessed by an English Daily in Pakistan, revealed that the U.S. strikes had more than a tacit approval of Pakistan and the Pakistan Army wanted more drone support.⁵ Reportedly, Pakistan has not completely opposed drone strikes, and instead demanded greater say in deciding the targets that suited its security interests. The Inter-Services Intelligence (ISI) and the CIA had an understanding that drones would be used under the CIA's covert action authority and, while the US would never acknowledge the missile strikes, Pakistan would either take credit for the individual killings or remain tight-lipped. In the case of the death of Nek Muhammad, the Pakistani military even claimed responsibility.⁶ Former President Pervez Musharraf and Asif Ali Zardari and former Prime Minister Yousuf Raza Gilani acknowledged the usefulness of drone strikes for Pakistan's own benefit, particularly until 2011.⁷ Former General Ashfaq Pervez Kayani was also convinced of the precision of the drones with minimum civilian casualties and maximum casualties of militants in North Waziristan.⁸

Antagonists

In May 2012, the Pakistan Foreign Office had emphasized that drones constituted "a violation of its sovereignty and territorial integrity and also in contravention of international law."⁹ UN Secretary General Ban Ki-Moon urged states to be more "transparent" about circumstances in which drones are used and take necessary precautions under the international law to minimize civilian casualties. UN High Commissioner for Human Rights Navi Pillay was deeply critical in saying, "Drone attacks do raise questions about compliance with international law...and indiscriminate killings and injuries of civilians in any circumstances are human rights violations."¹⁰ The former US ambassador to Pakistan Cameron P. Munter also expressed his disapproval of the drone strikes driven US policy saying that "he did not realize that his main job was killing people."¹¹ Dennis C. Blair, former National Intelligence director, too questioned the intense focus on drone strikes before he was dismissed in May 2010. A *New York Times* report revealed that in Pakistan's case President Obama not only approved of "personality" strikes at high value terrorists but also the "signature" strikes which target training camps, hideout, and suspected compounds and the criteria to determine the latter is too lax.¹² A *Washington Post* report talked of the "disposition matrix," a database under development that is "designed to go beyond existing kill lists and mapping plans for the 'disposition' of suspects beyond the reach of America drones."¹³ Congressman Dennis Kucinich has also been very critical of the drone policy, pushing for greater congressional oversight and transparency in decision-making over its use.¹⁴

Some scholars have argued that the use of drones "falls far short of meeting the international law rules governing resort to armed force and the conduct of armed force"...[Drones can be] "only lawful in the course of an armed conflict"...[Besides] "Pakistan has neither requested US assistance in the form of drone attacks nor expressly consented to

them”...[And] “there is no Security Council authorization for drone attacks nor the US have a basis in the law of self defence for attacking inside Pakistan”.¹⁵ It is also argued that the death of civilians and destruction of civilian structure questions the logic of “proportionality.” The CIA operators of drones are non-combatants and hence unlawful, and there is no Security Council authorization for the drones either.¹⁶

Protagonists

The protagonists have repeatedly referred to the involvement of Pakistani state organs in harboring terrorist groups as the *raison d'être* for the preemptive use of drones in self-defense.¹⁷ Press reports also allege that the ISI has been encouraging the Haqqani network to attack US targets like on the US Embassy on 13 September 2011 in Kabul.¹⁸ Senior US commanders including former Joint Chief of Staff Admiral Mike Mullen and General John Allen, former Commander of NATO led International Security Assistance Force (ISAF), were critical of Pakistan’s failure to curb the Haqqani network’s operations.¹⁹ According to a diplomatic cable sent with Hilary Clinton’s authorization, “some officials of Pakistan’s Inter-Services Intelligence Directorate (ISI) continue to maintain ties with a wide array of extremist organizations”...[The cables also said that] these organizations exploit charities, non-governmental organizations and madrassas and provide them with “recruits, funding and infrastructure to plan new attacks”.²⁰ Senator Dianne Feinstein, chairperson of the Senate Select Committee on Intelligence, said in an interview that the Taliban “have a safe harbor in Pakistan and the Pakistanis are doing nothing to abate that safe haven.”²¹ The 2001 Authorization for Use of Military Force (AUMF) apparently provides the legal cover which says, “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 harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations.”²²

A Dawn editorial remarked, “Pakistan need not deny that the drone strikes have done this country good too, taking out senior figures in the Pakistani Taliban. Despite their civilian casualties, they are more precise than conventional Pakistani strikes can ever be. And this country has not played its card right either, supporting the program in private conversations with American officials—at least historically—while railing against it in public.”²³ Gary Solis, Professor of Law, Georgetown University says,

...drones and their missiles are lawful weapons, little different from artillery, naval gunfire, or close air support by manned aircraft. Because of the nature of the war on terrorism, in which the enemy does not identify himself in traditional ways, identifying lawful drone target is difficult. It nevertheless is done with skill and professionalism by Americana and allied war-fighters. Yet mistakes are made. Civilians are killed. To say that is the nature of war, and always has been, is not cynicism so much as a recognition of sad reality.²⁴

Legality of Drones and State Responsibility under International Law

The debate over the legality of drones is enmeshed in complexities given the difficulty of proving the linkage of state organs with non-state actors (NSAs) operating from its territory. The inherent difficulty on part of the injured states to produce “substantive” and “actionable” evidence to this effect remains a major inducement for states to employ NSAs to achieve foreign policy objectives.²⁵ International law clearly distinguishes between state and NSAs but this distinction has been eroded in recent decades in relation to *jus ad bellum* (use of force). States

use NSAs as proxies and yet expect their territorial sovereignty to be insulated from any use of force in self-defense by the injured state.

Fixing State Responsibility

But scholars hold states harboring such NSAs in breach of their international obligation to prevent a wrongful act.²⁶ Article 8 (Conduct directed or controlled by a State) of the International Law Commission Articles on State Responsibility (ILCSR) establishes that responsibility. It enshrines, “The conduct of a person or a group of persons shall be considered an act of a State under international law if the person or the group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”²⁷ In addition, some cases adjudicated by the International Court of Justice (ICJ) are also instructive on the issue of state responsibility and use of force by the injured states.

The Genocide Case

This case pertained to the alleged involvement of Serbia (Former State of Yugoslavia, FRY) in the genocide of Bosniaks (Bosnian Muslims) and non-Serb minorities in Srebrenica in early 1990s. On the appeal of the former Republic of Bosnia and Herzegovina, the ICJ declined to attribute genocide to FRY for lack of evidence. Explaining “attribution” however, the Court said that the FRY furthered “considerable military and financial support available to the RepublikaSrpska” [Republic of Serbia] and “had it withdrawn that support, [it] would have greatly constrained the options that were available to the RepublikaSrpska authorities.”²⁸ But in spite of this support rendered by FRY, VRS (the military of the Republic of Serbia) could not be considered a de jure organ of the FRY as required under international law.²⁹ But the Court also established FRY’s clear obligation to rein in the NSAs over whom it exercised considerable influence, by interpreting broadly state’s obligation to prevent a wrongful act. The ruling, therefore, imposes liability upon states for failing their responsibility in preventing a wrongful act that was not otherwise attributable to them, under the obligation of “duty to prevent.”³⁰

DRC v Uganda Case

In the Democratic Republic of Congo (DRC) v Uganda case, the DRC had charged the Ugandan troops for invading its territory, committing human rights violations, massacring a large number of Congolese, looting property and causing widespread destruction. The Court ruled that since the attacks carried out by anti-Ugandan rebels operating from DRC territory could not be attributed to the DRC, Uganda had no right to use force in self-defense on DRC territory. But scholars argue that Article 51 of the UN Charter, wherein the inherent right of self-defense rests, is an exception to the prohibition on the use of force against the territorial integrity of the state.³¹

State Responsibility

State responsibility towards an international wrongful act committed by NSAs or its agents can be imputed in three ways: original responsibility; responsibility by endorsement; and vicarious responsibility. Original responsibility is borne by a state for acts that are directly imputable to it, such as acts of its government or those of its officials or private individuals and agents, performed at the government’s command or with its authorization. This is specified under Article 8 of ILCASR. It does not apply to agents or NSAs not controlled by the state.³² But the state should exercise its due diligence to prevent these agents or NSAs from committing a wrongful act. In the Iranian hostage crisis of 1979-80 Iran had failed to prevent the crisis while the NSAs based on its territory acted under its knowledge.³³ Responsibility by endorsement is relates to acts that are endorsed by a state publically. Vicarious responsibility holds a state responsible for the acts of NSAs or agents not under its control, but failing to prevent or prosecute the accused.³⁴

Pakistan providing sanctuary to a large number of NSAs operating from its territory in the neighboring Afghanistan and India falls under this category.

Breach of International Obligation

Scholars say that like the Security Council collectively or individually states can act under the rubric of customary laws in self-defense, as an attacked state has as much right to act in self-defense under Article 51 as much the Security Council has under Chapter VII.³⁵ The use of force against NSAs can be lawfully undertaken by reconciling it with the requirement of “necessity” and “proportionality.”³⁶ For any action to be taken in self-defense, it is necessary to establish that the state or NSA is responsible for that attack and a breach of international obligation has occurred on part of the state on whose territory the NSA in question is based. Under Article 51, nothing prohibits the use of individual or collective self-defense in the wake of an armed attack against the member of the UN until the UNSC has undertaken any necessary measure to address the situation. The drone attacks in Pakistan occur under the same rationale. Previously, in August 1998, President Bill Clinton had justified the cruise missiles attacks against terrorist training camps in Afghanistan and Sudan in response to the bombings of US embassies in Nairobi and Dar es Salaam.³⁷

The United Nations General Assembly (UNGA) Resolution 2625 specifies, “Every State has the duty to refrain from organizing, instigating, assisting or participating in...terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve threat or use of force.”³⁸ Article 2(4) of the UN charter and the 1994 UN General Assembly Declaration on Measures to Eliminate International Terrorism also endorse such prohibitions.³⁹ In the case of an organization providing funding, training, logistical support, and direction to an individual would be held responsible for the attack. In addition, NSAs also put states under the spotlight on whose territory they are based, for not doing enough to prevent the attack.⁴⁰ This would be considered a breach of its international obligation not to engage in a wrongful act or support terrorist acts.⁴¹

Necessity, Proportionality, and UNGA 2625

The element of necessity requires that force should be the last option after all political and diplomatic options have been exhausted to resolve the issue. Proportionality means that the use of force be tailored in such a fashion that it does not go beyond what is necessary to halt or prevent the armed attack under question.⁴² In the event, the state on whose territory the NSAs are based, is actively doing all that can be done in countering the NSA’s activities and prevent launch of terrorist attacks, the justification of self-defense on part of the victim or injured state is nullified. However, in case the state is unable or unwilling to prevent such attacks and reign in the NSAs’ activities, the victim state can then be forced to either respect the territorial integrity of the other state at its own peril or launch an attack in a targeted fashion against the NSAs as specified under the customary law.⁴³ The drone strikes in Pakistan are based on the right of self-defense enshrined in Article 51 and it specifically targets terrorist hideouts inside Pakistan by conforming to the requirements of “necessity” and “proportionality” as mandated by customary international law. Some international law experts also justify drones as perfectly legal under the 2001 AUMF against al-Qaeda.⁴⁴

The Context: Jihadi Infrastructure in Pakistan

Pakistan’s alleged inability and reluctance to wind up its Jihadi infrastructure, apparently until Afghanistan and Kashmir remain disputed, can be deemed a violation of the UNGA resolution

2625 (XXV). Several authoritative works have discussed these NSA thriving in Pakistan having linkages with the state organs.⁴⁵ The testimonies of Abu Jundal and David Coleman Headley (involved in the Mumbai 2008 attacks by LeT) have exposed these linkages.⁴⁶ Media and US official documents also demonstrate the alleged linkages that perpetrate attacks on the US and its allies in Afghanistan.⁴⁷ In July 2011, reportedly the US had deferred \$800 million aid to Pakistani for expelling US military trainers and for suspected ISI links in the killing of journalist SaleemShehzaad who was investigating the infiltration of extremist elements in the military and the ISI.⁴⁸ Haqqani network, Quetta Shura, Tehrik-e-Taliban Pakistan (TTP) and Tehrik-e-Nifaz-Shariyat-e-Muhammadi (TNSM) have been thriving for years, only being targeted since last year by the Pakistani military, following the death of 132 school children in an attack in December 2014. In spite of repeated assurances by the Pakistani authorities these groups still operate with impunity in contravention of Pakistan's obligations under the UNGA resolution 2625 (XXV).

Conclusion

UAVs have revolutionized modern warfare and altered the legal framework of conflict in general. More and more states are now deploying drones to minimize personnel casualties that have triggered increased contestations between the antagonists and protagonists over the notion of territorial sovereignty and right of self-defense, respectively. Then there is the issue of civilian casualties, which pose ethical questions over the legality and efficacy of the use of drones. The UN High Commissioner for Human Rights and the Secretary General have raised concerns over civilian deaths and called for utmost precaution. In the meantime, it is necessary to develop a transparent mechanism for compensating the victim's families (condolence payment), while the antagonists and protagonists debate over the legality of the drones. There is also a need for greater clarity over whether CIA operators of drones are lawful combatants, and if a Security Council authorization is required for drone use. Acting upon this concern, the US Air Force now recruits UAV "pilots," sensory operators and mission-coordinators for the drone missions for the Pentagon that would make them commissioned and lawful combatants. As the role of NSAs increases as proxies of states, the injured states would continue to deploy drones under Article 51 of the UN Charter in self-defense unless the Security Council authorizes otherwise. The UNGA resolution 2625 clearly establishes state responsibility to refrain from supporting acts of terrorism, failing which the injured states will continue to target the NSAs, and not the state, conforming to the requirements of "necessity" and "proportionality."

Various ICJ rulings also shed light on the scope of state responsibility; the rights of injured states under international law; the issue of territorial sovereignty of the state on whose territory the act of self-defense is exercised; and its obligation for preventing the wrongful acts of the NSAs. The ICJ has ruled that unless any wrongful act of the NSAs can be attributed to the state, targeting the state per se would be deemed unlawful. However, scholars and legal experts argue that there is an exception available to the state's right of territorial sovereignty under customary international law. In Pakistan's case, its alleged inability or reluctance to rein in the NSAs on its territory has justified the use of drones by the CIA, targeting only the NSAs, more so with the tacit approval of the Pakistani leaders. Pakistan cannot be absolved of its duty to prevent these NSAs from injuring other states and wind up the vast Jihadi infrastructure thriving there since the 1980s. Failing to do so, and yet calling the drone attacks a violation of its territorial sovereignty would be untenable.

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