

U.S. DRONE STRIKES IN THE FATA REGION OF PAKISTAN: LEGALITY AND HUMAN IMPACT

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ABSTRACT: This article attempts to analyse the legality of U.S. drone strikes in the FATA region of Pakistan, its compliance with applicable IHL and IHRL standards, and its consequences for the civilian population. It will firstly evaluate the different justifications given by the U.S. in order to legitimise its resource to the use of force in the tribal areas of Pakistan, namely, the existence of a non-international armed conflict against a stateless enemy, Pakistan's consent to their operations, and the use of force in self-defence in compliance with article 51 of the UN Charter. Secondly, and due to the relative novelty of drones or UAVs, the legality of this innovative weapon will be assessed, as well as the compliance of U.S. targeted killings with IHRL obligations. Such practices will be similarly evaluated from the perspective of IHL, with special focus on the principles of distinction, proportionality and necessity. In its final section, the present article addresses the consequences of U.S. drone policy, its efficacy in the fight against terrorism, and the impact it has had on Pakistani civilian population.

KEY WORDS: drones, targeted killings, Pakistan, human impact, NIAC, self-defence, efficacy, IHL, IHRL.

RESUMEN: El presente artículo pretende analizar la legalidad de los ataques con drones por parte de los EE.UU. en las regiones tribales de Paquistán, su observancia de los estándares aplicables de DIH y DDHH así como sus consecuencias para la población civil. En un primer lugar, se evalúan las diversas justificaciones dadas por EE.UU. con la finalidad de legitimar su recurso al uso de la fuerza, en concreto la existencia de un conflicto armado no internacional contra un enemigo sin Estado, el consentimiento de Paquistán a sus operaciones y el uso de la fuerza en legítima defensa en conformidad con el artículo 51 de la Carta de las NN.UU. Seguidamente, debido a la relativa novedad de los drones o VANTs (Vehículos Aéreos No Tripulados), la legalidad de esta arma innovadora será analizada, así como la conformidad de los ataques selectivos llevados a cabo por EE.U.

con las obligaciones derivadas de DD.HH. Dichas prácticas serán similarmente analizadas desde la perspectiva de DIH, con un especial énfasis en los principios de distinción, proporcionalidad y necesidad. En su sección final, el presente artículo abordará las consecuencias de la política de drones estadounidense, su eficacia en la lucha contra el terrorismo y el impacto que ha tenido sobre la población civil.

PALABRAS CLAVE: drones, ataques selectivos, Paquistán, CANI, legítima defensa, eficacia, DIH, DD.HH.

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1. INTRODUCTION

"Terrorism succeeds when it persuades us to abandon the legal preconditions to democracy".¹

On June 2004, the Tribal Agencies located in the Northwest region of Pakistan witnessed the first drone strike carried out by the U.S. Central Intelligence Agency, unleashing a decade of intense violence and a myriad of academic and political debate stained by controversy.²

Shortly before September 2001, the U.S. had publicly stated that the deployment by the State of Israel of a policy of targeted killings in the fight against Palestinian terrorist networks was contrary to applicable law and was, consequently, condemned by the U.S. However, the heinous terrorist attacks which took place on the heart of U.S. soil seemed to

¹ WILSON, R.A. (ed), *Human Rights in the 'War on Terror'*, Cambridge, 2005, p. 16.

² ROSS, A.K., "Ten Years On: Eyewitnesses Describe the Aftermath of the First Pakistan Drone Strike", The Bureau of Investigative Journalism, 17 June 2014, <<http://bit.ly/1nBHP1F>> accessed 23 July 2014.

inflict a profound change in the perceptions and legal analyses of the North American Government, as it soon welcomed such practices as part of its international security policy.³

Although in the aftermath of the terrorist attacks the U.S. first focused its efforts on the war in Afghanistan, baptised as Operation Enduring Freedom, it soon expanded its attention to the Federally Administered Tribal Areas (hereinafter FATA) of Pakistan. This semi autonomous and relatively independent region⁴ was believed to serve as a safe haven for al-Qaeda members and Taliban militants who tried to escape from the armed conflict taking place in the neighbouring Afghanistan, with the aim of continuing planning and carrying out attacks against U.S. and coalition forces both in Afghan and Pakistani territory.⁵ The broadening of U.S. fight against terrorism beyond the territorial boundaries of Afghanistan intended to hinder the existent collaboration between Taliban militants located on both sides of the border as well as to debilitate the threat they posed, jointly with al-Qaeda and its affiliated forces, to the Government of Pakistan and to U.S. troops in Afghan soil.⁶

Therefore, under the pretext of pursuing its "war on terror", the U.S. started employing Unmanned Aerial Vehicles (hereinafter UAVs) or drones in the perpetration of targeted killings of high and low profile terrorist members of al-Qaeda, the Taliban and associated forces.⁷ Targeted killings have been defined by Special Rapporteur Philip Alston as the "intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a

³ MAYER, J., "The Predator War: What are the Risks of the C.I.A.'s Covert Drone Program?", *The New Yorker*, 26 October 2009, <<http://nyr.kr/1z2Q89c>> accessed 27 June 2014.

⁴ NATIONAL ASSEMBLY OF PAKISTAN, "The Constitution of the Islamic Republic of Pakistan", Islamabad, 2012, available at <<http://bit.ly/1dW5err>> accessed 20 June 2015, arts 246-47; SHAW, I.G.R. and AKHTER, M., "The Unbearable Humanness of Drone Warfare in FATA, Pakistan", *Antipode*, 44, 2012, 1490-1509, pp. 1496-99.

⁵ NORTON, S.M., "The United Nations Charter's Collective Security Framework in the Twenty-First Century: A Case Study of the United States' Use of Force in Pakistan", *Loyola Law Review*, 57, 2011, 157-206, p. 158.

⁶ ASLAM, M.W., "A Critical Evaluation of American Drone Strikes in Pakistan: Legality, Legitimacy and Prudence", *Critical Studies on Terrorism*, 4, 2011, 313-329, p. 317.

⁷ O'CONNELL, M.E., "The International Law of Drones", *American Society of International Law*, 14, November 2010, <<http://bit.ly/1oyIgJ4>> accessed 3 August 2014.

specific individual who is not in the physical custody of the perpetrator".⁸ Since the year 2001, the U.S. has employed combat drones in the perpetration of targeted killings in a range of scenarios, namely in Afghanistan, Iraq, Somalia, Yemen and Pakistan.⁹

Despite the fact that the use of pilotless and remotely controlled drones in the Northwest of Pakistan began in 2004, during Bush Administration, this legacy was continued, and in fact enhanced, by his successor.¹⁰ The number of strikes authorised during the first period of Obama Administration represented a dramatic increase in comparison with the previous five years, reaching a peak of 128 strikes in 2010,¹¹ and having special incidence in the territories of North and South Waziristan.¹² Nevertheless, this frenetic activity has progressively decreased, being reduced to a total of 27 in 2013, and is likely to continue declining in the forthcoming years.¹³ John Kerry, current Secretary of State, declared last year that the U.S. had an established timeline to put to an end drone strikes in Pakistani territory, as the programme had presumably met its objective of weakening al-Qaeda and Taliban ranks.¹⁴ Nonetheless, on August 6 2014, more than a decade after the beginning of U.S. employment of UAVs, the tribal areas were once again hit by a U.S. drone, being this the latest of a lengthy list of targeted strikes.¹⁵

This policy, far from going unnoticed or being quietly accepted by the international community and the public opinion, has generated intense controversy, particularly in relation to the number of civilian deaths which have been caused by drone

⁸ ALSTON, P., "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston" UN Human Rights Council, UN Doc A/HRC/14/24/Add.6, 2010, (Alston), para. 1.

⁹ O'CONNELL(n 7).

¹⁰ CROOK, J.R., "Contemporary Practice of the United States Relating to International Law", American Journal of International Law, 104, 2010, 100, p. 134.

¹¹ EMMERSON, B., "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson", UN Human Rights Council, UN Doc A/HRC/25/59, 2014, (Emmerson) para. 26.

¹² PESHAWAR HIGH COURT, "Peshawar Judicial Department Writ Petition No. 1551-P/2012 [judgement]", 11 April 2013, available at <<http://bit.ly/1oebXQQ>> accessed 6 August 2014 [22.i]; AMNESTY INTERNATIONAL, "Will I be Next? US Drone Strikes in Pakistan", London, 2013, p. 12, available at <<http://bit.ly/1tbW7br>> accessed 30 June 2014.

¹³ EMMERSON (n 11) para. 26.

¹⁴ *ibid.*

¹⁵ DRONES TEAM, "Obama 2014 Pakistan Drone Strikes", The Bureau of Investigative Journalism, <<http://bit.ly/1qWzIEt>> accessed 6 August 2014.

strikes, and to the numerous legal and ethical questions raised by the use of combat drones. UAVs allow the perpetration of strikes from a long distance, implying a virtually non-existent threat to the life of operators ordering and supervising the attacks.¹⁶ Although it has been argued that, as a highly precision weapon, it decreases the likelihood of causing incidental civilian losses,¹⁷ their employment in operations involving the use of force is ethically questionable, as it makes States more prone to the use of force,¹⁸ and may wrongfully place the burden of armed confrontation on the civilian population.

The continuation of these practices over time and the amount of scholarly articles and opinions which have already been written on the topic should not diminish the importance of continuing focusing on this area of international law. U.S. use of force in the FATA region has had, and continues to have, an undeniable and highly negative impact on the lives of civilians who reside in the area. In spite of the lack of agreement as to the percentage of civilian losses,¹⁹ and even though available information seems to indicate a gradual reduction over the years,²⁰ serious concerns have been raised as to the legality of U.S. policy and to its observance of human rights and humanitarian law standards. Each civilian loss should be justified and, when applicable law has not been observed, those responsible should be held accountable. No accurate and appropriate evaluation can be done without proper transparency from the part of the U.S., which, so far, has proved to be insufficient.²¹

This article will try to analyse the legality of U.S. drone strikes in the FATA region of Pakistan and its consequences for the civilian population. For this purpose, it will firstly be evaluated, from a legal point of view, the different justifications given by the U.S.

¹⁶ BACHMANN, S.D., "Targeted Killings: Contemporary Challenges, Risks and Opportunities", *Journal of Conflict and Security Law*, 18, 2013, 259-288, p. 277.

¹⁷ ALSTON (n 8) paras. 81-82.

¹⁸ HEYNS, C., "Extrajudicial, Summary and Arbitrary Executions. Note by the Secretary-General", UNGA, UN Doc A/68/382, 2013 (Heyns) para. 15.

¹⁹ UNGA, "Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism. Note by the Secretary-General", UN Doc A/68/389, 2013, para. 33.

²⁰ EMMERSON (n 11) para. 26.

²¹ AMNESTY INTERNATIONAL (n 12) 11.

for its resource to force in the tribal areas of Pakistan, namely, the existence of a non-international armed conflict (hereinafter NIAC) against a stateless enemy, Pakistan's consent to their operations and the use of force in self-defence in compliance with article 51 of the UN Charter. Secondly, and due to the novelty and special characteristics of the drones, the possible inherent illegality of this innovative weapon will be assessed, as well as the compliance of U.S. targeted killings with International Human Rights Law (hereinafter IHRL) obligations, in particular the right to life. Similarly, such practices will be evaluated from the perspective of International Humanitarian Law (hereinafter IHL), with special focus on the principles of distinction, proportionality and necessity. Thirdly, the consequences of U.S. drone policy and its efficacy in the fight against terrorism will be analysed, with special mention to the impact it has had on the civilian population.

2. U.S. JUSTIFICATIONS FOR THE USE OF FORCE IN THE FATA REGION OF PAKISTAN: NIAC, PAKISTAN'S CONSENT AND SELF-DEFENCE

Shortly after the terrorist attacks on the States of New York, Virginia and Pennsylvania took place in September 2001, the U.S. justified its military operations in Afghan territory as part of its so-called "war on terror", which they characterised as an armed conflict of uncertain duration directed against a stateless enemy in many different fronts.²² It was also contended that U.S. actions fell, at the same time, under its inherent right to self-defence pursuant to article 51 of the UN Charter,²³ and that, despite the fact that U.S. Government's first response was directed against the Taliban regime located in Afghanistan, future investigations could prove that its right to self-defence called for

²² THE WHITE HOUSE, "The National Security Strategy of the United States of America", The White House, 2002, p. 5, available at <<http://1.usa.gov/JjOICV>>, accessed 20 June 2014.

²³ HELLER, K.J., "One Hell of a Killing Machine": Signature Strikes and International Law", *Journal of International Criminal Justice*, 11, 2013, 89-119, p. 91.

further operations against other organisations and States.²⁴ Thus, the U.S. Government startlingly offered a legal justification on two alternative grounds.²⁵ This broad interpretation of their right to use force against those armed groups which they considered responsible for such abhorrent crimes left open the possibility of expanding U.S. military operations to other areas, including the FATA region of Pakistan.²⁶ This section will analyse the various justifications offered by the U.S. Government in their legitimisation of the use of force in this last scenario.

On the one hand, U.S. representatives have repeatedly claimed to be involved in a NIAC against al-Qaeda, the Taliban and associated forces.²⁷ When affirming the existence of such armed confrontation, the U.S. does not elaborate, neither justifies, the reasons why these groups can be considered to be parties to a non-international armed conflict.²⁸ It is well established that, in order for a NIAC, which has been defined by Special Rapporteur Christof Heyns as "protracted armed violence between governmental authorities and organised armed groups or between such groups within a State",²⁹ to exist, two cumulative criteria must be met: hostilities must reach a minimum degree of intensity and both parties must show a minimal level of organisation.³⁰

The first of these requirements, that is, the threshold of intensity, allows to differentiate armed conflicts from situations of mere internal disturbances and tensions,

²⁴ UNSC, "Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council", UN Doc S/2001/946, 2001, available at <<http://bit.ly/1NdyDtC>>, accessed 20 June 2015.

²⁵ RAMSDEN, M, "Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki", *Journal of Conflict and Security Law*, 16, Oxford, 2011, pp. 385- 406, p. 389.

²⁶ WILSON CENTER, "The Efficacy and Ethics of the President's Counterterrorism Strategy. Transcript of Remarks by John O. Brennan", Wilson Center, 30 April 2012, available at <<http://bit.ly/1jQqex>> accessed 30 June 2014.

²⁷ ALSTON (n 8) para. 22.

²⁸ *ibid* para. 53.

²⁹ HEYNS (n 18) para. 55.

³⁰ RAMSDEN (n 25) 390; HELLER (n 23) 109; UNHRC, "Summary of the Human Rights Council interactive panel discussion of experts on the use of remotely piloted aircraft or armed drones in compliance with international law", A/HRC/28/38, 15 December 2014, para. 14, available at <<http://bit.ly/1z5Wd5i>>, accessed 21 June 2015

such as riots or turmoil.³¹ Thus, only armed confrontations sustained for an extended period of time with a minimum level of severity could be considered to reach the threshold of an armed conflict.³²

The U.S. has not established neither recognised a territorial limit to its "war on terrorism",³³ claiming that its current use of force is directed against armed groups that are not located in a concrete and defined area. It alleges to be involved in an armed conflict which is unlimited both in time and space, as it implicates transnational terrorist networks which operate in several fronts.³⁴ These particular interpretations and analyses of international law are notably troubling, as the frequency and severity of armed attacks between the opposing parties to a conflict should be evaluated in relation to a given area, requiring therefore to establish the territorial scope of the alleged armed confrontation.³⁵ Otherwise, as pointed out by the International Committee of the Red Cross (hereinafter ICRC), the battlefield would be extended without limits, blurring the legal constraints to the use of force, hindering civilian protection and endangering the compliance with human rights and humanitarian law standards.³⁶ Despite the fact that the U.S. has sustained that geographical limitations derive from the analysis of past forms of warfare which cannot be transposed to current asymmetric armed confrontations,³⁷ the absence of a territorial limit would entail an over-expansion of applicable international law. Hence, it is here considered that the assessment of the level of intensity of armed confrontations between the U.S. and al-Qaeda, the Taliban and affiliated forces should be restricted to the Federally Administered Tribal Areas of Pakistan. Further, the Taliban and al-Qaeda may not even be

³¹ HEYNS (n 18) para. 57.

³² MCCORMACK, W., "Targeted Killing at a Distance: Robotics and Self-Defense", *Pacific McGeorge Global Business and Development Law Journal*, 25, 2012, 361-381, p. 367.

³³ UN Doc A/68/389 (n 19), para. 62.

³⁴ THE WHITE HOUSE, 'The National Security Strategy' (September 2002) (n 22) 5.

³⁵ UN Doc A/68/389 (n 19), para. 63; DEEKS, A.S., "Pakistan's Sovereignty and the Killing of Osama Bin Laden", *American Society of International Law*, 15, May 2011, available at <<http://bit.ly/UwK1uC>> accessed 25 July 2014; UNHRC (n 30) para. 14.

³⁶ UN Doc A/68/389 (n 19) para. 64.

³⁷ *ibid* para. 65.

held responsible for the same set or armed attacks, despite their mutual collaboration.³⁸ Even if considered jointly, and taking into account the fact that terrorist attacks of September 11 occurred more than a decade ago and that, since that date, armed attacks from the part of al-Qaeda, the Taliban and affiliated forces located in the FATA region against the U.S. and its coalition forces have been infrequent, sporadic and lacking sufficient coordination,³⁹ it can hardly be sustained that the intensity requirement has been met.

The second threshold requirement for the escalation of an armed confrontation to a NIAC implies that all parties must show a minimum level of organisation. Organisation within an armed group entails the existence of a command structure and of appropriate communication channels, as well as the ability of the group to plan, prepare and execute operations of a military kind.⁴⁰ The U.S. has sustained that the Taliban and affiliated forces encompass all armed groups which participate in the fight against the U.S. and its coalition forces alongside with al-Qaeda,⁴¹ acknowledging them as a single party to the NIAC.⁴² Nevertheless, Special Rapporteur Christof Heyns has established that, under international law applicable to NIACs, the existent trend towards the expansion of the use of force in order to include co-belligerents would only be acceptable if such affiliated forces, which in this case would be the Taliban and associated armed groups, are guided and controlled by the same command structure and participate of the same hierarchical structure.⁴³ Hence, if different forces do not share the same chain of command and, consequently, cannot be considered jointly as a party to the conflict, armed confrontations existent between the State and each armed group would amount to separate non-international armed conflicts,

³⁸ NORTON (n 5) 184.

³⁹ PESHAWAR HIGH COURT (n 12) [15]; HELLER (n 23) 110.

⁴⁰ HEYNS (n 18) para. 56.

⁴¹ HUMAN RIGHTS WATCH AND OTHERS, "Joint Letter to President Obama on US Drone Strikes and Targeted Killings", Human Rights Watch, 11 April 2013, available at <<http://bit.ly/1o1e0XD>> accessed 27 June 2014, p. 6-7.

⁴² UN Doc A/68/389 (n 19) para. 67.

⁴³ HEYNS (n 18) paras. 59-62.

provided that they comply with the required thresholds of intensity and organisation.⁴⁴ In this particular case, al-Qaeda, the Taliban and affiliated forces, although sharing similar ideologies and objectives, do not share the same command structure.⁴⁵ Even al-Qaeda, which has been depicted in several occasions as a structured and organised terrorist network, may lack the unified, integrated and defined hierarchical structure required.⁴⁶

Consequently, al-Qaeda, the Taliban and affiliated forces located in the tribal belt of Pakistan may not legitimately be considered as party to the NIAC in which the U.S. has repeatedly alleged to be involved, as neither the threshold of intensity, nor the requirement of organisation, have been clearly met.

Leaving aside U.S.' claim of being involved in a non-international armed conflict, their use of force through the employment of combat UAVs in the Tribal Agencies of Northwest Pakistan has also been justified as deriving from Pakistan's consent,⁴⁷ which, according to the U.S. has joined its war against terror.⁴⁸ While the United Nations has established as one of its main aims the maintenance of international peace and security, prohibiting in its second article the threat or use of force in international relations,⁴⁹ it is nevertheless recognised that the highest governmental authorities of a State may consent to the use of force in its territory by a third State.⁵⁰ It must be highlighted that such authorisation would not exempt the consenting State from its international human rights and humanitarian responsibilities,⁵¹ bearing therefore the obligation of ensuring the protection of the right to life of individuals under its jurisdiction.⁵² Nonetheless, as long as

⁴⁴ *ibid* para. 63.

⁴⁵ ALSTON (n 8) para. 55

⁴⁶ BURKE, J. *Al-Qaeda: The True Story of Radical Islam*, London, 2007, pp. 1-21; HELLER (n 23) pp. 110-11.

⁴⁷ HAIDER, Z., "Pakistan's Parliament Warns U.S. Over bin Laden Raid" Reuters, Islamabad, 14 May 2011, available at <<http://reut.rs/1rUULyR>> accessed 30 June 2014.

⁴⁸ THE WHITE HOUSE, "The National Security Strategy" (September 2002) (n 22) 10.

⁴⁹ UN, "Charter of the United Nations" (24 October 1945) 1 UNTS XVI (UN Charter), art 2.4.

⁵⁰ HEYNS (n 18) paras. 81-4; ASLAM (n 6) 318.

⁵¹ HEYNS (n 18) para. 84.

⁵² ALSTON (n 8) paras. 37-38.

the State authorises such acts, any claim in relation to the violation of its territorial and political sovereignty may not be raised.⁵³

Throughout the period that elapsed between U.S. first drone strike in 2004 and the year 2008, Pakistani Inter-Services Intelligence agency (hereinafter I.S.I.), along with military services, allegedly offered support to U.S. operations and gave consent to their use of force in the FATA region.⁵⁴ Similarly, it has been repeatedly sustained that Governmental officials, although publicly opposing such targeted attacks, privately and tacitly authorised these actions.⁵⁵ However, in the year 2009, former Prime Minister Yousuf Raza Gilani openly denied the existence of any agreement with the U.S. Government and claimed that no authorisation had been given for the use of combat drones, asking for the information gathered by U.S. intelligence services to be transmitted to the competent Pakistani agencies.⁵⁶ Numerous concerns were raised by the Government of Pakistan in relation to the alleged violation of its sovereignty by U.S. operations, which they claimed to be interfering with Pakistan's efforts to tackle the terrorist threat posed by al-Qaeda and the Taliban.⁵⁷ Years later, following U.S. capture and killing of Osama bin Laden in Pakistani territory during the code-named "Operation Neptune Spear", members of Pakistan's Houses of Parliament asked, with the aim of protecting Pakistan's national interests, for the termination of U.S. drone attacks against Taliban and al-Qaeda militants.⁵⁸ This unparalleled declaration characterised U.S. actions as an unauthorised unilateral operation which amounted to a blatant violation of Pakistani sovereignty. It similarly provided that past agreements accorded between Pakistani Governmental or military forces and the U.S.

⁵³ UN Doc A/68/389 (n 19), para. 51.

⁵⁴ *ibid* para. 53.

⁵⁵ THE GUARDIAN, "US Embassy Cables: Pakistan Backs US Drone Attacks on Tribal Areas", The Guardian, 30 November 2010, available at <<http://bit.ly/1nKFB00>> accessed 30 June 2014.

⁵⁶ SHAH, S.A., "War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan", Washington University Global Studies Law Review, 9, 2010, 77-131, p. 114; HOOPER, S., "Pakistan: U.S. Must Halt Drone Attacks", CNN, Switzerland, 29 January 2009, available at <<http://cnn.it/1kizSxR>> accessed 30 June 2014.

⁵⁷ *ibid* 82.

⁵⁸ HAIDER (n 47).

would no longer have effect.⁵⁹ Any remaining doubt in relation to Pakistan's lack of consent to U.S. use of combat drones in the Tribal Belt was certainly dispelled by the High Court of Peshawar's recent judgement. In April 2013, the High Court unequivocally ruled that U.S. drone strikes in Pakistani territory are unlawful and illegal, representing a clear violation both of Pakistan's territorial sovereignty and of basic human rights.⁶⁰ This landmark judgement further established that such operations illicitly interfered with Pakistan's internal affairs and compelled the Government of Pakistan to ensure that U.S. drone strikes would no longer violate or threaten Pakistani sovereignty.⁶¹ Finally, regarding U.S. allegations of having acted under consent given by former President Musharraf, Peshawar's High Court judgement signalled that there was no authorisation or evidentiary document available which supported such claim.⁶²

From all of the above, it follows that Pakistani Government strongly opposes the use of force by the U.S. in its territory. Consequently, American operations in the FATA region may not be justified as extraterritorial use of force legitimised by Pakistan's consent.

In addition to the aforementioned justifications, the U.S. has likewise legitimised its use of combat drones in Pakistan's Tribal Agencies as an exercise of its inherent right to self-defence under article 51 of the UN Charter.⁶³ Article 51 comprises an exception to the general prohibition on the use of force which, as previously mentioned, is stated in article 2.4.⁶⁴ The provisions of the fourth section of article 2 have been described as the cornerstone of the Charter,⁶⁵ as it illustrates the common objectives and goals of State members to the United Nations,⁶⁶ compelling them to refrain from the threat or use of force in their international relations and dispute settlements.⁶⁷ Under article 51, a State may

⁵⁹ UN Doc A/68/389 (n 19), para. 53.

⁶⁰ PESHAWAR HIGH COURT (n 12) [16], [22.i]-[22.ii]; UNHRC (n 30) para. 28.

⁶¹ *ibid* [21], [22.v].

⁶² *ibid* [6].

⁶³ WILSON CENTER (n 26).

⁶⁴ DINSTEIN, Y., *War, Aggression and Self-Defence*, Cambridge, 2011, p. 189.

⁶⁵ GRAY, C., *International Law and the Use of Force*, Oxford, 2008, p. 30.

⁶⁶ FRANCK, T.M., *Recourse to Force: State Action Against Threats and Armed Attacks*, Cambridge, 2002, p. 11.

⁶⁷ UN CHARTER (n 49) art 2.4.

invoke its inherent right to individual or collective self-defence "if an armed attack occurs".⁶⁸ Therefore, article 51 exempts a State from complying with the prohibition introduced in article 2.4, provided that it has been victim of an armed aggression.⁶⁹

The U.S. has frequently justified its use of force in its fight against al-Qaeda, the Taliban and affiliated forces by relying on UN Security Council Resolutions 1368 and 1373, adopted in the wake of 2001 terrorist attacks. Both resolutions recognised U.S.' inherent right to self-defence and condemned acts of terrorism as being a threat to the peace and security of mankind, and therefore contrary to the purposes and principles of the United Nations.⁷⁰ Further, the North Atlantic Treaty Organisation (NATO) publicly recognised the right of its members to collective self-defence as a response to the armed attacks suffered by the U.S., and in accordance with article 5 of the Washington Treaty.⁷¹ Nevertheless, while these resolutions and statements supported and allowed U.S. use of force in self-defence, no particular mention was made to the Afghan Taliban Regime, and it can hardly be interpreted as granting the North American country legitimisation in its use of force in Pakistani soil more than a decade after.⁷² Moreover, subsequent UN Security Council Resolutions, such as Resolution 1456, focused on encouraging cooperation among States in the progressive and continuous fight against terrorism through peaceful means, with no explicit mention to U.S.' right to self-defence.⁷³ Hence, it can be sustained that there is no UN Security Council endorsement or NATO approval of U.S. operations in the Pakistani Tribal Agencies.⁷⁴ Nonetheless, and despite the fact that Pakistan has not given its consent to U.S. use of force in the FATA region, U.S. may still resource to the use of force in self-defence against terrorist networks located in the territory of Pakistan if the later proves to be unable or unwilling to tackle the threat posed by armed groups present in its territory.

⁶⁸ *ibid* art 51.

⁶⁹ DINSTEIN, *War, Aggression and Self-Defence* (n 64) 189-90.

⁷⁰ UNSC, "UNSC Resolution 1368", UN Doc S/Res/1368, 12 September 2001; UNSC, "UNSC Resolution 1373", UN Doc S/RES/1373, 28 September 2001.

⁷¹ NATO, "Statement by the North Atlantic Council", NATO Press Release 124, Brussels, 12 September 2001, available at <<http://bit.ly/1kho7I8>> accessed 27 June 2014.

⁷² ASLAM (n 6) 319.

⁷³ UNSC, "UNSC Resolution 1456", UN Doc S/Res/1456, 20 January 2003; SHAH (n 56) 95.

⁷⁴ NORTON (n 5) 182.

The obligation to take all appropriate measures to prevent and avoid the launch of terrorist acts from its sovereign territory against third States or their citizens is an integral part of the responsibilities derived from the principle of State sovereignty.⁷⁵ Hence, if a State is not capable of abiding by its international responsibility to deter such violent attacks, claims of political and territorial sovereignty may be displaced.⁷⁶

The State of Pakistan has carried out significant efforts to neutralise the terrorist threat posed by Taliban and al-Qaeda militants present in the Tribal Agencies, but, nevertheless, has lacked the appropriate capacity to halt the spread of these terrorist networks,⁷⁷ partly due to FATA's inaccessibility for Pakistani Armed Forces and to the relative independence of the region.⁷⁸ Pakistan's willingness to cooperate in the fight against al-Qaeda, the Taliban and affiliated forces was, however, called into question following the capture of Osama bin Laden in 2011, as the area in which he was located was situated in the vicinity of Pakistani military installations,⁷⁹ heightening suspicions of the existence of historical links between the I.S.I. and Pakistani Taliban members.⁸⁰ Nonetheless, the recent ground military offensive launched by the Pakistani Military Forces in June 2014 against al-Qaeda and Taliban militants hidden in the Northwestern Tribal Agencies,⁸¹ can be interpreted as dispelling any future allegations of Pakistan's lack of disposition and capacity.

As previously stated, in order for a State to legitimately use force in self-defence in accordance with the provisions of the UN Charter, it must have been victim of an armed attack.⁸² This requirement, as established by the International Court of Justice (hereinafter

⁷⁵ ALSTON (n 8) para. 35; ASLAM (n 6) 314.

⁷⁶ BAKER, M.B., "Terrorism and the Inherent Right of Self-Defense (a Call to Amend Article 51 of the United Nations Charter)", *Houston Journal of International Law*, 10, 1987, 25-49, p. 40.

⁷⁷ NORTON (n 5) 184; HOOPER (n 56).

⁷⁸ PESHAWAR HIGH COURT (n 12) [4]; ASLAM (n 6) 317.

⁷⁹ DEEKS (n 35); HAIDER (n 47).

⁸⁰ NORTON (n 5) 159, 161-4; FILKINS, D., "The Journalist and the Spies: The Murder of a Reporter who Exposed Pakistan's Secrets", *The New Yorker*, 19 September 2011, available at <<http://nyr.kr/1ozUHoa>> accessed 27 June 2014.

⁸¹ CRAIG, T., "Pakistani Army Begins Ground Offensive Against Taliban", *The Washington Post*, Islamabad, 30 June 2014, available at <<http://wapo.st/1x4GH8h>> accessed 23 July 2014.

⁸² UN CHARTER (n 49) art 51.

ICJ) in the *Nicaragua Case*,⁸³ implies that a minimum threshold of gravity must be reached, as less grave or minor forms of use of force do not trigger the right embedded in article 51.⁸⁴ In this respect, a preliminary legal matter needs to be addressed: can a stateless actor perpetrate an armed attack and can, consequently, the victim State lawfully resource to force in self-defence against a non-State actor? State practice and scholarly opinion prior to the unfolding of the events of September 2001 established that, in order for the victim State to legally exercise its right under article 51 of the Charter against an armed group present in the territory of a third State, the armed group's actions should be attributable to the territorial State.⁸⁵ ICJ jurisprudence, both preceding and following the terrorist attacks on U.S. soil, similarly interpreted that, absent cooperation or facilitation by the host State in the perpetration of armed attacks by organised armed groups, the victim State's resource to force would be tantamount to a violation of its sovereignty and territorial integrity.⁸⁶ Nevertheless, the text of article 51 does not restrict State's right to unilateral or collective self-defence to such instances, allowing to readapt its interpretation in order to give an appropriate response to the threat posed by international terrorism nowadays.⁸⁷ In fact, as pointed out by international law professor Christian Tams, the approach taken by the ICJ is in itself a re-reading of article 51, as it incorporated a standard which was "developed by the Court, not God-given".⁸⁸

⁸³ ICJ, "Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America) (Merits)", [1986] ICJ Rep 14 [191], [210] available at <<http://bit.ly/UZKdmh>> accessed 7 August 2014.

⁸⁴ DINSTEIN, *War, Aggression and Self-Defence* (n 64) 208; HEYNS (n 18) para. 85.

⁸⁵ BROWNLIE, I., *International Law and the Use of Force by States*, Oxford, 1963, pp. 278-80; BACHMANN (n 16) 281.

⁸⁶ ICJ, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)", [2004] 9 July 2004, available at <<http://bit.ly/1jVGfqC>> accessed 3 July 2014 [139]; Shah (n 56) 93-94.

⁸⁷ HEAD, J.W., "The United States and International Law After September 11", *Kansas Journal of Law and Public Policy*, 11, 2001-2002, 1-16, p. 3; NOLTE, G., "Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order", *Theoretical Inquiries in Law*, 5, 2004, 111-129, p. 119; WACHTEL, H.A., "Targeting Osama bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy", *Duke Law Journal*, 55, 2005, 677-710, p. 706.

⁸⁸ TAMS, C.J., "The Use of Force Against Terrorists", *EJIL*, 20, 2009, 359-397, p. 386.

Doubts as to whether an armed attack can be considered to be committed by a non-State actor which does not act on behalf of or with the acquiescence of the territorial State could be considered to have been dismissed after the international community's response to the 9/11 terrorist attacks.⁸⁹ As Security Council Resolutions 1368 and 1373 clearly reflected, it was not questioned that the U.S. had the right to use force in self-defence against those non-State armed groups responsible for the commission of such abhorrent crimes.⁹⁰ Even within the ICJ, dissenting opinions have begun to contradict the jurisprudence of the Court and to recognise that victim States are entitled to lawfully claim their inherent right to self-defence in response to an armed attack carried out by a non-State actor, even if it is not harboured, instigated or assisted by the territorial State.⁹¹ Hence, in the light of contemporary international law, even though al-Qaeda, the Taliban and affiliated forces present in the FATA region of Pakistan do not act with the consent or assistance of the Pakistani Government, the U.S. could be entitled to use force in self-defence against these non-State actors.

Nevertheless, there is a temporal limit to the exercise of this inherent right. The requisite of immediacy implies that there must not exist an undue delay between the armed attack and the response of the victim State in the exercise of its right to self-defence.⁹² Moreover, the legitimate resource to force by a victim State against the State or non-State actor responsible for the aggression may only last as long as it is necessary to repel the armed attack.⁹³ The continuation of the use of force under the pretext of self-defence after

⁸⁹ DINSTEN, *War, Aggression and Self-Defence* (n 64) 227.

⁹⁰ ICJ, "Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)", Separate Opinion Judge Simma, 19 December 2005, [11] available at <<http://bit.ly/1qL2r9I>> accessed 3 July 2014.

⁹¹ ICJ, "Wall Advisory Opinion" (n 86), Separate Opinion of Judge Higgins, 9 July 2004, [33], available at <<http://bit.ly/1IWtyXN>> accessed 3 July 2014; ICJ, "Wall Advisory Opinion" (n 86) Declaration of Judge Buergenthal, 9 July 2004 [6], available at <<http://bit.ly/1tsU4Qq>> accessed 3 July 2014; ICJ, "DRC v Uganda" (n 90) Separate Opinion Judge Kooijmans, 19 December 2005 [25]-[31] available at <<http://bit.ly/Xf1fyo>> accessed 3 July 2014; ICJ "DRC v Uganda" (n 90) Separate Opinion Judge Simma, 19 December 2005 [4]-[13], available at <<http://bit.ly/1qL2r9I>> accessed 3 July 2014.

⁹² COMBACAU, J., "The Exception of Self-Defence in U.N. Practice" in A Cassese (ed), *The Current Legal Regulation of the Use of Force*, The Netherlands, 1986, p. 28; SCHACTER, O., "The Lawful Resort to Unilateral Use of Force", *Yale Journal of International Law*, 10, 1985, 291-295, p. 292; BAKER (n 76) 34.

⁹³ BAKER (n 76) 47; HEAD (87) 4.

the threat has ceased to exist, with the sole objective of retaliating against past attacks or neutralising and destroying enemy forces so that no future threat may emanate, would be unlawful.⁹⁴ Retaliatory operations are categorically prohibited, as they are contrary to the main purpose of the United Nations, which is to guarantee and maintain international peace, exceptionally allowing the use of force only under certain restricted circumstances.⁹⁵ The main aim or objective of a State's self-defence operations must not be to seek retribution for previous confrontations, but to repel an ongoing attack or, as it will be discussed below, to avoid the commission of an imminent armed offensive.⁹⁶

The U.S. has stated that al-Qaeda, the Taliban and associated forces pose an ongoing threat to their national security and interests, avoiding in this manner accusations of acting under a desire of vengeance for the 9/11 terrorist attacks.⁹⁷ Nonetheless, the invocation of self-defence and the consequent suspension of the obligation to respect the sovereignty of, in this case, Pakistan, must be circumscribed to the shortest period possible and to the situation of necessity created by the threat: the use of force must be limited in time.⁹⁸ Since the outrageous events of 2001, no armed attack has been launched by militants present in the FATA region against U.S. soil and, likewise, armed confrontations in which they have engaged against U.S. and coalition forces present in Afghanistan and Pakistan have been, as previously stated, irregular and sporadic.⁹⁹ Hence, while recourse to force in self-defence was granted and legitimate in the aftermath of al-Qaeda's attacks on the U.S., its perpetuation and expansion over the years would be tantamount to a travesty of the notion of self-defence.

The U.S., in its military operations on the Tribal Belt of Pakistan, appears to have incorporated the active defence theory, which was first developed by the Israeli

⁹⁴ HEYNS (n 18) para. 90; SHAH (n 56) 91-92, 122-23.

⁹⁵ CASSESSE (n 92) 25, 28; GRAY (n 65) 151, 198.

⁹⁶ HEYNS (n 18) para. 86.

⁹⁷ BACHMANN (n 16) 268.

⁹⁸ SHAH (n 56) 128; THE AVALON PROJECT, "British-American Diplomacy: The Caroline Case", Yale Law School, Lillian Goldman Law Library, available at <<http://bit.ly/X2WQi5>> accessed 30 June 2014.

⁹⁹ UN Doc A/68/389 (n 19) para. 68; NORTON (n 5) 185, 187.

Government.¹⁰⁰ According to this doctrine, repeated separated minor attacks can be considered altogether as constituting an armed attack directed against the political or territorial independence of the victim State.¹⁰¹ Hence, the gravity of the threat posed by a particular State or non-State actor can be deduced from an identified pattern of small-scale attacks.¹⁰² The active defence doctrine may offer a solution to the legal loophole or gap created by article 51, which requires a minimum threshold of harm to be met in order for a State to exercise its right to self-defence, giving leeway to perpetrators to carry out small-scale armed attacks and leaving the victim State defenceless.¹⁰³ Nevertheless, this theory has proved to be controversial.¹⁰⁴ It is here considered that, as suggested by Special Rapporteur Philip Alston, the legality of the use of force in self-defence should be analysed in relation to each armed attack, as otherwise the narrow exception to the use of force which was included in article 51 would be stretched over acceptable boundaries.¹⁰⁵

Even though the right to self-defence derived from the terrorist attacks of September 2001 may not be lawfully extended to the current situation in the Tribal Agencies of Pakistan without contravening the temporal limitation of article 51, and although the active defence claim may similarly be contrary to the conceptual framework of self-defence, the U.S. could still anticipatorily resource to force in self-defence against an imminent attack.

According to the theory of anticipatory self-defence, when the occurrence of an armed attack is imminent, States are not obliged to wait until it has actually been carried out in order to lawfully resource to the use of force.¹⁰⁶ Especially when considering the developments of modern warfare and weaponry, such as nuclear weapons and other weapons of mass destruction, the consequences that one single attack could unchain would

¹⁰⁰ WACHTEL (n 87) 693.

¹⁰¹ *ibid*; GRAY (n 65) 155.

¹⁰² BAKER (n 76) 42.

¹⁰³ NORTON (n 5) 177-78.

¹⁰⁴ TAMS (n 88) 370.

¹⁰⁵ ALSTON (n 8) para. 41.

¹⁰⁶ SCHACTER (n 92) 291-93.

threaten the very existence of the victim State and would nullify its ability to respond.¹⁰⁷ Hence, as pointed out by international law professor Thomas Franck, to ignore these advancements by narrowly interpreting article 51 and limiting the claim of self-defence to instances where an armed attack has already occurred, would be tantamount to a "reductio ab absurdum" and would transform the UN Charter into an untenable and ineffective agreement.¹⁰⁸ Further, the terminology of article 51 of the UN Charter, which qualifies the right to self-defence as 'inherent',¹⁰⁹ can be interpreted as preserving and recognising the right as pre-existent under customary international law.¹¹⁰ International law prevalent prior to the creation of the United Nations System in 1945 already recognised the right of States to use force in self-defence against an imminent threat.¹¹¹ Requisites and conditions for the use of force in self-defence against an imminent attack were developed in the *Caroline* dispute between the U.S. and the United Kingdom, which unfold in the year 1837.¹¹²

The *Caroline* threshold, set out by U.S. Secretary of State Daniel Webster in the XIX century, requires that the attack must be "instant, overwhelming, leaving no choice of means and no moment for deliberation"¹¹³. Moreover, the act of self-defence must not be unreasonable or excessive, but proportionate to the defensive needs of the State.¹¹⁴ Similarly, the use of force in self-defence must be necessary, that is, no other means short of the use of force would allow the State to neutralise the threat posed by the imminent attack.¹¹⁵ If the Webster formula is observed, concerns that a broad expansion of the right to self-defence could facilitate the resource to force by States and therefore open the pace for abuse, blurring the dividing line between the right to self-defence and armed

¹⁰⁷ BAKER (n 76) 45-46; MCCORMACK (n 32) 373.

¹⁰⁸ FRANCK (n 66) 98.

¹⁰⁹ UN CHARTER (n 49) art 51.

¹¹⁰ UNGA, "A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change", UN Doc A/59/565, 2 December 2004, para. 188; HEYNS (n 18) para. 87.

¹¹¹ BAKER (n 76) 31-32.

¹¹² *ibid*; FRANCK (n 66) 97-8; GRAY (n 65) 148-9.

¹¹³ THE AVALON PROJECT (n 98); WACHTEL (n 87) 692; Nolte (n 87) 115.

¹¹⁴ BAKER (n 76) 32; SHAH (n 56) 92-3.

¹¹⁵ *ibid*; MCCORMACK (n 32) 372.

reprisals,¹¹⁶ could be dispelled. Nevertheless, the context in which the U.S. employs combat drones in the FATA region can hardly be regarded as fulfilling the requisites established in the *Caroline* doctrine. U.S. officials have stated that their Government does not authorise the perpetration of targeted killings in the event that alternative means, namely the capture of the suspects, are available.¹¹⁷ However, due to the topographical characteristics of the Pakistani Tribal Belt and the inaccessibility of the region, the capture of militants has so far proved to be impractical and counterproductive, as it would imply endangering the lives of an excessive number of military personnel and civilians alike.¹¹⁸ While such policy would appear to comply with the requirement of necessity established by the *Caroline* doctrine, it can barely be demonstrated that, in each targeted strike carried out in the Northwest of Pakistan, the U.S. has found itself in a situation which implies a threat which is imminent and overwhelming, endangering its territorial sovereignty or the lives of U.S. citizens or U.S. soldiers serving in Afghanistan.¹¹⁹ Available information seems to indicate that attacks carried out by the United States in Pakistani territory are in fact pre-emptive in nature.¹²⁰

Pre-emptive attacks take place in response to future undetermined attacks, when a threat is not imminent and it is still unclear when and where will the armed attack take place.¹²¹ It has been argued that, under circumstances of asymmetric warfare, such as that of the FATA region, where the size, weaponry, technology and military training of both parties are considerably disparate,¹²² intelligence gathered cannot effectively enable States to anticipate with exactitude the location and time when an armed attack is likely to take place.¹²³ Under U.S. interpretation, previous requirements for the fulfilment of the requisite of imminence should be revisited and flexibly adapted to new circumstances, incorporating the concept of "window of opportunity"¹²⁴. Consideration of the "window of opportunity"

¹¹⁶ TAMS (n 88) 391.

¹¹⁷ WILSON CENTER (n 26).

¹¹⁸ RAMSDEN (n 25) 402; WILSON CENTER (n 26).

¹¹⁹ ASLAM (n 6) 319.

¹²⁰ SHAH (n 56) 122-23.

¹²¹ ALSTON (n 8) para. 45.

¹²² FLECK, D. (ed), *The Handbook of International Humanitarian Law*, Oxford, 2008, p. 605.

¹²³ UN Doc A/68/389 (n 19) para. 58.

¹²⁴ *ibid*; WILSON CENTER (n 26).

implies the possibility of targeting an individual who, although not representing an imminent threat, is identified as a terrorist militant, as soon as information on her/his location becomes available.¹²⁵ Hence, and according to this criteria, the pre-emptive targeting of these individuals would imply the neutralisation of a hostile intent from the part of the enemy forces before it materialises into a specific action, avoiding in this manner the perpetration of future terrorist attacks.¹²⁶ The pre-emptive nature of U.S. operations in its fight against terrorism can be clearly induced from several U.S. official documents, such as National Security Strategies of the years 2002 and 2006,¹²⁷ as well as from the letter sent by the Permanent Representative of the U.S. in the United Nations to the President of the Security Council in October 2001.¹²⁸ These documents recognise the right of the U.S. to deter future attacks, "even if uncertainty remains as to the time and place of the enemy's attack"¹²⁹.

While anticipatory self-defence, that is, the right of States to resource to force when the threat of an armed attack is imminent, is still contested but growingly gaining acceptance,¹³⁰ the use of pre-emptive force in self-defence is largely rejected.¹³¹ Anticipatory self-defence must be interpreted strictly, establishing a limited exception to the prohibition of the use of force.¹³² Therefore, the U.S. would not be entitled to legitimately resource to force in self-defence against a mere latent threat.¹³³ It can consequently be interpreted that U.S. long-lasting operations in the Tribal Belt of Pakistan may only be considered as lawfully falling under the article 51 of the UN Charter if an inadmissibly overbroad understanding of the notion of self-defence was adopted.

¹²⁵ RAMSDEN (n 25) 404-05.

¹²⁶ HELLER (n 23) 115.

¹²⁷ THE WHITE HOUSE, "The National Security Strategy", September 2002 (n 22) 6, 15; THE WHITE HOUSE, "The National Security Strategy of the United States of America", 2006, p. 23.

¹²⁸ UNSC, "Letter dated 7 October 2001 from the Permanent Representative of the United States of America" (n 24).

¹²⁹ THE WHITE HOUSE, "The National Security Strategy", March 2006 (n 127) 18.

¹³⁰ GRAY (n 65) 117-8; TAMS (n 88) 390.

¹³¹ GRAY (n 65) 212.

¹³² HEYNS (n 18) para. 87.

¹³³ TAMS (n 88) 389.

Finally, it should be noted that, under article 51 of the Charter, States are obliged to report to the UN Security Council all measures taken in the exercise of their right to individual or collective self-defence.¹³⁴ So far, the U.S. has failed to communicate operations carried out in the Tribal Agencies of Pakistan as falling under its inherent right to self-defence.¹³⁵ Although failure to report does not immediately imply the illegality of the State's conduct, the absence of such communication can be interpreted as indicating that the State itself is not entirely confident of the legality and legitimacy of its actions.¹³⁶

3. COMPLIANCE WITH APPLICABLE LAW: IHRL AND IHL

The use of UAVs by the United States in its fight against terrorist networks present in the FATA region of Pakistan has raised several questions as to the compliance of drones with international law, partly due to the novelty of their employment in combat situations. It is still uncertain and disputed how does existent law apply to this kind of innovative weapon.¹³⁷ This controversy has been evidenced by European Parliament's recent resolution on the use of armed drones, in which the European Council was prompted to develop a clear and agreed EU stand on the employment of UAVs.¹³⁸

Under international law applicable to armed conflicts, States have the obligation to respect and observe certain restrictions in their choice and use of weaponry, with the aim of effectively protecting civilian population.¹³⁹ States are, accordingly, prohibited from using so-called "blind weapons", that is, weapons which are unable to distinguish between civilians and lawful targets or between civilian objects and military objectives.¹⁴⁰ Not only

¹³⁴ UN CHARTER (n 49) art 51.

¹³⁵ SHAH (n 56) 115.

¹³⁶ GRAY (n 65) 239-40.

¹³⁷ HEYNS (n 18) para. 13.

¹³⁸ EUROPEAN PARLIAMENT, "Joint Motion for a Resolution", RC/1021121EN.doc, 25 February 2014, para. 3, available at <<http://bit.ly/1u2MIG8>> accessed 3 July 2014; EMMERSON (n 11) para. 31.

¹³⁹ HEAD (n 87) 5.

¹⁴⁰ DINSTEIN, Y., *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 62.

the employment of indiscriminate weapons incapable of complying with the principle of distinction is rendered unlawful, the use of weapons which can cause unnecessary injury or suffering are likewise forbidden.¹⁴¹ Combat drones, by their very nature, are not intrinsically unable to distinguish between lawful targets and individuals with protected civilian status. Neither they inflict unnecessary suffering to their victims. Conversely, UAVs facilitate reconnaissance operations and the gathering of information, and can therefore increase the precision of States' use of force.¹⁴² In this regard, the ICRC has emphasised that weapons which offer the possibility of incrementing the accuracy in the use of force and, consequently, of decreasing the risk posed to civilians, should be prioritised and encouraged.¹⁴³ Hence, UAVs could be seen as a welcoming development, provided that applicable law is observed and respected. Moreover, the recent use of drones in UN peacekeeping operations can be understood as dispelling any doubt as to the legality of the weapon.¹⁴⁴ However, it must be noted that the United Nations has not employed UAVs in combat situations, but merely as a surveillance mechanism, with the objective of deterring violence in the area and of improving knowledge on the situation.¹⁴⁵

As a consequence, it can be deduced that the lawfulness of the employment of drones in combat situations would be dependent on the particular circumstances of each strike, and not on the innate features of the weapon.¹⁴⁶ Despite the fact that UAVs or drones are not inherently illegal, States should still abide by international norms on the regulation and control of arms.¹⁴⁷ Further, and taking into account that the employment of combat drones facilitates the use of deadly force by States in the targeting of individuals, special

¹⁴¹ *ibid* 65-67; ICC, "Rome Statute of the International Criminal Court", adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 3, art 8.(2)(b)(xx), available at <<http://bit.ly/1GZS4VP>> accessed 24 June 2014; Fleck (n 122) 614.

¹⁴² O'CONNELL (n 7).

¹⁴³ UN Doc A/68/389 (n 19) para. 28.

¹⁴⁴ APUULI, K.P., "The Use of Unmanned Aerial Vehicles (Drones) in United Nations Peacekeeping: The Case of the Democratic Republic of Congo", *American Society of International Law*, 18, June 2014, available at <<http://bit.ly/1nW4fus>> accessed 25 July 2014; BBC, "La ONU recomienda el uso de drones para misiones de paz", 24 febrero 2015, available at <<http://bbc.in/1K4eFBw>>, accessed 21 June 2015.

¹⁴⁵ UNSC, "Resolution 2098", Un Doc S/Res/2098, 28 March 2013, p 7, para. 12(c).

¹⁴⁶ ALSTON (n 8) para. 79.

¹⁴⁷ EUROPEAN PARLIAMENT, "Joint Resolution" (n 138) para. 2(c).

and cautious consideration has to be given to the compliance by States with their obligations under international law.¹⁴⁸

Independently of the legality of the use of drones in combat situations and of the dubious legitimacy of U.S. justifications for their use of force in the FATA region of Pakistan, States deploying lethal force in extraterritorial scenarios, in this particular case, the U.S., must ensure that their operations comply with certain obligations derived both from IHRL and IHL.¹⁴⁹

Under IHRL framework, the use of force is only permitted as a method of last resort, when no other alternative is available and the resource to force is strictly necessary and unavoidable in order to protect individuals from an imminent threat to their lives.¹⁵⁰ Accordingly, under the law enforcement paradigm, the perpetration of targeted killings, which, by definition, imply the premeditated killing of an individual as the main objective of the operation,¹⁵¹ would be equivalent to an arbitrary deprivation of life in violation of IHRL.¹⁵² Only under the restrictive circumstances abovementioned, that is, when lethal force is "strictly and directly necessary to save life" and no other means short of the use of lethal force can be employed, would targeted killings comply with international human rights norms.¹⁵³ Deviations from this robust protection of the right to life are only permitted during times of public emergency, and therefore also during the unfolding of an armed conflict.¹⁵⁴ Under these circumstances, human rights applicable during peacetime can be temporarily derogated, although exclusively to the extent to which it is strictly necessary in accordance with the circumstances.¹⁵⁵ Nevertheless, the right to life, as a foundational right from which the enjoyment of every fundamental right and liberty is predicated, cannot be

¹⁴⁸ ALSTON (n 8) para. 80.

¹⁴⁹ UN Doc A/68/389 (n 19) para. 22.

¹⁵⁰ COUNCIL OF EUROPE, "European Convention for the Protection of Human Rights and Fundamental Freedoms", 1950, ETS 5 (ECHR) art 2; BACHMANN (n 16) 278.

¹⁵¹ ALSTON (n 8) para. 1.

¹⁵² HEYNS (n 18) paras. 32-5; UN Doc A/68/389 (n 19) paras. 24, 60; Amnesty International (n 12) 44.

¹⁵³ ALSTON (n 8) paras. 33, 74; UNHRC (n 39) paras. 6, 12.

¹⁵⁴ UNGA, "International Covenant on Civil and Political Rights", adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 (ICCPR) art 4.1.

¹⁵⁵ *ibid.*

lawfully suspended, not even in times of war.¹⁵⁶ Its protection still applies during armed confrontations, albeit with certain modifications derived from the replacement of IHRL by the *lex specialis* of IHL.¹⁵⁷ Thus, the requisites of non-arbitrariness and last resort would be reinterpreted according to IHL norms.¹⁵⁸

The adequate protection of the right to life can only be guaranteed if the provisions of both IHRL and IHL frameworks are respected and observed.¹⁵⁹ The applicability of IHRL framework "side by side" with IHL norms,¹⁶⁰ is not only essential for the protection of fundamental rights such as the right to life or the right to live free from torture, but also to guarantee and enable reconciliation between the opposing parties after the cessation of hostilities.¹⁶¹ In this particular case, it would pave the way to future friendly relations between the U.S. and the civilian population of the Tribal Agencies and of Pakistan at large. Complying with IHRL obligations is not only mandatory but also a wise choice, as it discourages the opposing party from committing infractions in reciprocity and enhances international approval and sympathy.¹⁶²

Although IHL establishes more permissive and flexible norms in relation to the use of deadly force by States,¹⁶³ it nevertheless continues to offer a high level of protection to the right to life, as reflected in common article 3 to the Geneva Conventions, applicable to armed conflicts of a non-international nature, as well as in articles 4 and 13 of the Second Additional Protocol (hereinafter APII GC).¹⁶⁴ It must be noted, however, that the

¹⁵⁶ ICCPR (n 154) art 4.2; DINSTEIN, *The Conduct of Hostilities* (n 140) 21-3.

¹⁵⁷ DINSTEIN, *The Conduct of Hostilities* (n 140) 23-25; UNHRC (n 30).

¹⁵⁸ HEYNS (n 18) paras. 40-41; UN Doc A/68/389 (n 19) para. 61.

¹⁵⁹ HEYNS (n 18) para. 24.

¹⁶⁰ DINSTEIN, *The Conduct of Hostilities* (n 140) 25; UNHRC (n 30) para. 12.

¹⁶¹ FLECK (n 122) 609, 630.

¹⁶² *ibid*; HEAD (n 87) 2.

¹⁶³ O'CONNELL (n 7).

¹⁶⁴ ICRC, "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field", adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 31 (First Geneva Convention) art 3; ICRC, "Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts", adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 609 (Protocol II), arts 4, 13.

U.S. is not party to the APII GC,¹⁶⁵ and that, moreover, the rigid threshold established in article one of the protocol would render its provisions inapplicable to the armed confrontation between the U.S. and non-State actors present in the Tribal Belt.¹⁶⁶ Nevertheless, all the substantial articles of APII GC, such as the protection of civilians and of combatants placed hors de combat, reflect norms of international customary law, and are, accordingly, applicable to this scenario.¹⁶⁷

The protection of the right to life under IHL framework is further guaranteed by the prohibition on the use of force set out in article 2.4 of the UN Charter, which only ceases to apply under limited exceptions, in particular, when the use of force is authorised by the UN Security Council acting under Chapter VII powers or the conditions required for the use of force in self-defence under article 51 have been met.¹⁶⁸ IHL further requires that, in order for U.S. targeted killings to be lawful, three principles have to be complied with, namely, the principle of necessity, the principle of proportionality and the principle of distinction.¹⁶⁹

In accordance with the principle of proportionality, States resorting to the use of force have the obligation of balancing the anticipated military advantage expected to be gained from the military operation and the foreseeable harm and suffering that it may inflict upon the civilian population and/or civilian objects.¹⁷⁰ It would therefore be unlawful to carry out an armed attack if the expected civilian loss and/or damage inflicted on civilian objects are higher than the concrete direct military advantage envisaged.¹⁷¹ States are additionally required to take all appropriate and feasible measures with the aim of avoiding

¹⁶⁵ ICRC, "Annual Report 2013. Volume II", ICRC, May 2014, pp. 610-11, available at <<http://bit.ly/WPDRr7>> accessed 31 July 2014.

¹⁶⁶ PROTOCOL II (n 164) art 1.

¹⁶⁷ FLECK (n 122) 622.

¹⁶⁸ HEYNS (n 18) para. 23; NORTON (n 5) 169, 172.

¹⁶⁹ BACHMANN (n 16) 275.

¹⁷⁰ DINSTEIN, *The Conduct of Hostilities* (n 140) 128-30.

¹⁷¹ Heyns (n 18) para. 75; BERGEN, P. and TIEDEMANN, K., "Revenge of the Drones: An Analysis of Drone Strikes in Pakistan", New America Foundation, 19 October 2009, available at <<http://bit.ly/XkGAcc>> accessed 27 June 2014.

incidental civilian deaths to the maximum extent possible.¹⁷² Accordingly, if doubt arises as to the status of an individual or object, military commanders are obliged to seek and analyse additional information.¹⁷³

On the other hand, the principle of military necessity has been defined under IHL as "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war".¹⁷⁴ Therefore, following this principle of modern warfare which imposes a limit on the use of force by States,¹⁷⁵ a particular military action will only be consistent with the principle of necessity if it contributes in a vital manner to the achievement of the overall operation. Moreover, the exercise of force by States, in order to comply with the principle of necessity, must be consistent with all other rules of IHL regulating the conduct of hostilities,¹⁷⁶ and the damage caused shall not exceed the degree of force deemed to be unavoidable in the circumstances.¹⁷⁷

Investigations carried out in relation to U.S. drone programme in the Tribal Agencies of Pakistan have revealed the commission of several attacks which may have violated principles of proportionality and military necessity. Strikes such as the targeting in 2006 of a religious seminary which resulted in the death of 82 people, 69 of whom were children,¹⁷⁸ raise serious doubts as to the consistency of U.S. operations in the Northwest of Pakistan with these principles of IHL.

For its part, the principle of distinction establishes the obligation to differentiate between civilians and lawful targets as well as between civil and military objects in the

¹⁷² PESHAWAR HIGH COURT (n 12) [11]; GASSER, H.P., "Protection of the Civilian Population" in FLECK (n 122) 248-50.

¹⁷³ HELLER (n 23) 103-04.

¹⁷⁴ LIEBER CODE, "Instructions for the Government of Armies of the United States in the Field", 1863, art 14, available at <<http://bit.ly/XnBFav>> accessed 1 August 2014.

¹⁷⁵ *ibid* art 16; CARNAHAN, B.M., "Lincoln, Lieber and the Laws of War: the Origins and Limits of the Principle of Military Necessity", *American Journal of International Law*, 92, 1998, 213-231, p. 231.

¹⁷⁶ LIEBER CODE (n 174) art 14.

¹⁷⁷ ALSTON (n 8) paras. 43, 75-76.

¹⁷⁸ EMMERSON (n 11) para. 47.

commission of armed attacks.¹⁷⁹ According to this principle, civilian population must be treated humanely at all times and shall be protected to the maximum extent possible from the hazards derived from military operations.¹⁸⁰ Thus, civilians must never be the object of an armed attack and acts or threat of acts which have as their main aim the propagation of terror among civilian population are always prohibited.¹⁸¹ In order to ensure that the harm inflicted on the civilian population is minimised, all feasible measures must be taken, and, whenever practicable, early warning should be given to the civilian population before any military operation or strike is carried out.¹⁸² Moreover, all available information must be analysed in furtherance of the principle of distinction,¹⁸³ and, in any instance where intelligence gathered cannot clearly determine the status of an individual, presumption of civilian status must apply.¹⁸⁴

While the principle of military distinction prohibits the perpetration of attacks directed against civilians, this protective status does not extend to those individuals who are members of a State's armed forces or of an organised armed group. This category of individuals, who therefore hold a continuous combat function (hereinafter CCF) may be targeted at any time.¹⁸⁵ Under the definition of CCF would fall any individual whose constant functions involve the planning, preparation or execution of armed attacks.¹⁸⁶ Individuals who do not assume a CCF but who, nevertheless, actively support combat operations on a sporadic basis, may likewise be lawfully targeted, but only for as long as their direct support lasts.¹⁸⁷ Thus, civilians who engage in activities and acts which imply a direct participation in hostilities (hereinafter DPH) temporarily lose their protective

¹⁷⁹ APUULI (n 144).

¹⁸⁰ FIRST GENEVA CONVENTION (n 164) art 3; PROTOCOL II (n 164) art 13.1.

¹⁸¹ PROTOCOL II (n 164) arts 4, 13; ICRC, "Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts", adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 3 (Protocol I), art 51.2.

¹⁸² LIEBER CODE (n 174) art 19; Alston (n 8) para. 78; GASSER, "Protection of the Civilian Population" in FLECK (n 122) 250; AMNESTY INTERNATIONAL (n 12) 46.

¹⁸³ PESHAWAR HIGH COURT (n 12) [11]; HEYNS (n 18) para. 71.

¹⁸⁴ DINSTEIN, *The Conduct of Hostilities* (n 140) 151; GASSER, "Protection of the Civilian Population" in Fleck (n 122) 239.

¹⁸⁵ HELLER (n 23) 92-93.

¹⁸⁶ UN Doc A/68/389 (n 19) para. 69.

¹⁸⁷ GASSER, "Protection of the Civilian Population" in FLECK (n 122) 261.

status.¹⁸⁸ Accurate distinction between civilians who assume a continuous combat function and those who participate in hostilities merely on an irregular or occasional basis is essential, as it determines when an individual may be lawfully targeted.¹⁸⁹

In order for the acts carried out by an individual to be considered as DPH, the ICRC has determined that actions committed must reach a minimum threshold of harm, negatively affecting either the military operations of the opposing party or its military capacity.¹⁹⁰ Moreover, there must be identified a direct causal relation between the acts of the individual and the damage expected to be inflicted to the other party.¹⁹¹ Finally, for an individual to be legitimately stripped of her/his civilian status, (s)he must show a belligerent nexus to the armed conflict, that is, the acts of the individual must be carried out in support of a party to the conflict.¹⁹² Therefore, certain actions which may ultimately be detrimental to the enemy forces but which nevertheless do not reach this threshold, such as working on a munitions factory or the dissemination of propaganda, would not be considered to amount to DPH.¹⁹³ In this regard, it is highly regrettable that the U.S. has not clearly established what its definition of DPH is, and, consequently, which conduct would strip an individual of its protected civilian status.¹⁹⁴ The withdrawal of such information endangers the principle of transparency and hinders all efforts to assess accurately the legality of UAVs strikes.¹⁹⁵ It further raises troubling concerns as to the alleged U.S. targeting of individuals on the mere basis of their membership to al-Qaeda, the Taliban or affiliated forces, without sufficient proof of their direct participation in the hostilities or their assumption of a CCF.¹⁹⁶ It has similarly been suggested that U.S. strikes target civilians who provide fighters with food and shelter or who finance these groups'

¹⁸⁸ PROTOCOL II (n 164) art 13.3.

¹⁸⁹ HELLER (n 23) 105.

¹⁹⁰ MELZER, N., "Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law", ICRC, May 2009, p. 16, available at <<http://bit.ly/1uP75FD>> accessed 27 June 2014.

¹⁹¹ *ibid*; GASSER, "Protection of the Civilian Population" in FLECK (n 122) 261-62.

¹⁹² *ibid*; DINSTEIN, *The Conduct of Hostilities* (n 140) 149.

¹⁹³ DINSTEIN, *The Conduct of Hostilities* (n 140) 150; Heller (n 23) 102.

¹⁹⁴ UN Doc A/68/389 (n 19) para. 71.

¹⁹⁵ ALSTON (n 8) para. 68; Ramsden (n 25) 406.

¹⁹⁶ AMNESTY INTERNATIONAL (n 12) 27.

operations,¹⁹⁷ showing certain parallelism with the Afghan conflict, in which U.S. forces allegedly targeted drug lords who financially supported Taliban operations.¹⁹⁸ Such interpretations of the concept of DPH would clearly imply the broadening of the threshold set out by the ICRC in order to include activities which do not have a direct support role in the hostilities, and would therefore diminish the protection offered to the civilian population.¹⁹⁹ Particularly disturbing are cases reported by the media in which strikes were allegedly fired against mourners during funeral processions where civilians were present.²⁰⁰ This was the case of the strike carried out by the U.S. on the 14th of June 2009 during funeral prayers taking place in Northwest Pakistan, resulting in the killing of approximately 86 people.²⁰¹

The prohibition on the use of violence against civilians not participating in hostilities is further extended to individuals who have a CCF but who nevertheless have been placed hors de combat.²⁰² Hence, follow-up strikes, which target individuals wounded by a previous strike as well as those who first offer medical aid or assistance to the victims, would be a blatant violation of the right to life, unless it has been ascertained that those targeted are in fact holding a CCF or directly participating in the hostilities.²⁰³ According to investigations carried out by Amnesty International and Special Rapporteur Ben Emmerson, on July 2012 U.S. drones targeted a group of workers in a village of North Waziristan and, shortly after, fired a second strike which caused the death of those who first attempted to provide their aid and assistance. As a result, eighteen people were killed and a minimum of twenty-two others were injured. Inquiries carried out following the attacks strongly suggest that all of the deceased were civilians.²⁰⁴ Later that year, on October 2012,

¹⁹⁷ HELLER (n 23) 102-03.

¹⁹⁸ ALSTON (n 8) paras. 21, 68.

¹⁹⁹ *ibid* para. 60.

²⁰⁰ PESHAWAR HIGH COURT (n 12) [14]; ROSS, A.K., WOODS, C. and LEO, S., "The Reaper Presidency: Obama's 300th Drone Strike in Pakistan", The Bureau of Investigative Journalism, 3 December 2012, available at <<http://bit.ly/1gZEuCY>> accessed 23 July 2014.

²⁰¹ MAYER (n 3).

²⁰² FIRST GENEVA CONVENTION (n 164) art 3; PROTOCOL II (n 164) art 7.

²⁰³ HEYNS (n 18) para. 73.

²⁰⁴ EMMERSON (n 11) para. 53; AMNESTY INTERNATIONAL (n 12) 7, 24-27.

two U.S. strikes were fired in an agricultural area also located in the area of North Waziristan. The strikes instantly killed an elderly woman, later identified as Mamana Bibi, who was working in the fields, and injured several children who were standing nearby. Shortly after, and despite the fact that two relatives of the deceased woman had rushed to the fields in her search, the first strikes were followed by a second attack, causing severe injuries to one of them. None of the individuals targeted had any link to al-Qaeda or the Taliban.²⁰⁵

These types of unlawful practices, which imply the deliberate targeting of rescuers, have allegedly been carried out on various occasions by the U.S. in the FATA region,²⁰⁶ forcing civilians to restrain from assisting victims of drone strikes in fear of being victims of a subsequent attack.²⁰⁷ Taking into account the small lapse of time which elapses between follow-up strikes, it is highly contestable that U.S. drone operators can accurately evaluate and analyse the status of each and every individual who first responds to the attacks.²⁰⁸

U.S. officials have alleged that UAVs entail a significant advancement in the protection of civilians from the adversities of armed confrontation, as they facilitate the accurate distinction between civilian population and legitimate targets.²⁰⁹ Further, current director of the C.I.A. John Brennan, publicly ensured that no strike is authorised until information gathered can clearly indicate that no civilian losses will result from the attack, unless such losses are unavoidable and do not exceed the anticipated military advantage.²¹⁰ Nevertheless, the welcoming increase in the precision of the targeting and in the thoroughness of the intelligence gathered cannot be invoked as an irrefutable proof of the lawfulness of the strikes. In fact, Special Rapporteur Christof Heyns has claimed that these

²⁰⁵ EMMERSON (n 11) para. 54; AMNESTY INTERNATIONAL (n 12) 7, 18-24.

²⁰⁶ PESHAWAR HIGH COURT (n 12) [14].

²⁰⁷ WOODS, C., "Bureau Investigation Finds Fresh Evidence of CIA Drone Strikes on Rescuers", TBIJ, 1 August 2013, available at <<http://bit.ly/1rWQpK6>> accessed 23 July 2014; UNHRC (n 30) para. 7.

²⁰⁸ *ibid.*

²⁰⁹ WILSON CENTER (n 26).

²¹⁰ *ibid.*

technological advancements entail an increase on State's responsibility to take all adequate precautions in order to avoid civilian losses.²¹¹

Another grey area which has generated great controversy as to the compliance of U.S. drone strikes in the Tribal Agencies of Pakistan with applicable IHL is the perpetration of signature strikes.²¹² Signature strikes are predominantly directed against low-level profile individuals whose identity is unknown by the drone operators on the basis of their conduct and life patterns.²¹³ Thus, these type of strikes target 'groups of men who bear certain signatures, or defining characteristics, associated with terrorist activity, but whose identities aren't known'.²¹⁴ The legality of such attacks would therefore largely depend on what are the signatures on the basis of which strikes are authorised, as well as on their compliance with the principle of distinction.²¹⁵ Only if the signature can lawfully determine that an individual is not protected with civilian status and if the information gathered is sufficient to clearly establish that the individual has incurred in such specific conduct, would a signature strike be legal.²¹⁶ The U.S. has refused to publicly determine the different criteria on which they rely in the targeting of al-Qaeda and Taliban members in the Northwest of Pakistan, making it extremely difficult to develop an adequate process of review or to evaluate the lawfulness of these practices.²¹⁷ The circumstances under which the U.S. considers that an individual may be targeted are unknown, and therefore U.S. compliance with international applicable law would be dependent on mere trust rather than on an accurate legal analysis.²¹⁸

Concerns have been raised as to the incapability of U.S. drone operators to properly distinguish between civilians who DPH and those who assume a continuous

²¹¹ HEYNS (n 18) para. 71.

²¹² BACHMANN (n 16) 276.

²¹³ *ibid*; ENTOUS, A., GORMAN, S. and BARNES, J.E., "U.S. Relaxes Drone Rules", *The Wall Street Journal*, 26 April 2012, available at <<http://on.wsj.com/1kse3fn>> accessed 17 February 2014.

²¹⁴ KLAIDMAN, D., *Kill or Capture: the War on Terror and the Soul of the Obama Presidency*, New York, 2012, p. 41 in HELLER (n 23) 90.

²¹⁵ HEYNS (n 18) para. 72.

²¹⁶ HELLER (n 23) 94.

²¹⁷ *ibid* 119.

²¹⁸ NOLTE (n 87) 120.

combat function.²¹⁹ It has also been suggested that the U.S. has over-expanded the definition of lawful targets in order to include all men of military age present in the tribal areas, a practice which would be in clear violation of humanitarian law.²²⁰ Moreover, operators in charge of authorising and carrying out drone strikes have on various occasions showed a palpable lack of knowledge of the cultural traditions and customs of tribes living in the FATA region which may have led to misjudgements and misrepresentations of the status of tribesmen.²²¹ This lack of awareness of local practices may have led to the incident of March 2011, where a minimum of two strikes were fired against a *jirga* or tribal council gathered in the tribal area of North Waziristan, causing the death of 43 people. Cross-referenced information later revealed that the great majority of the individuals killed in the attack were civilians participating in a council meeting which, in accordance with tribal customs, had the purpose of settling a local dispute and which had been previously authorised by the military authorities.²²²

4. EFFECTIVENESS AND HUMAN IMPACT

Representatives of the U.S. Government have on several occasions ensured that the strategy implemented in their war against terrorism has reduced the ranks of the terrorist network responsible for the 9/11 attacks to "a shadow of its former self"²²³. According to their assessment of U.S. operations, al-Qaeda members have been forced to focus their efforts and resources in guaranteeing self-preservation, therefore considerably hindering their ability to plan and launch armed attacks as well as their capability of training new

²¹⁹ HELLER (n 23) 105.

²²⁰ ROSS, WOODS and LEO (n 200).

²²¹ ALSTON (n 8) para. 83.

²²² UN Doc A/68/389 (n 19) para. 50; AMNESTY INTERNATIONAL (n 12) 14; ROSS, WOODS and LEO (n 200); FORENSIC ARCHITECTURE, "Drone Strikes. Investigating Covert Operations Through Spatial Media", Forensic Architecture, available at <<http://bit.ly/UKkQVq>> accessed 3 August 2014.

²²³ THE WHITE HOUSE, "Remarks by the President in the State of the Union Address", The White House, Office of the Press Secretary, 12 February 2013, available at <<http://1.usa.gov/1jYhfKY>> accessed 27 June 2014.

recruits.²²⁴ In a nutshell, the U.S. considers that the use of combat drones and the implementation of a policy of targeted killings is not only wise but also ethical and legal, as it allegedly facilitates compliance with applicable international law.²²⁵

Far less optimistic and indulgent are the numerous allegations on the inefficacy of U.S. drone operations in the Tribal Agencies of Pakistan. According to these criticisms, U.S. strikes have had a temporary effectiveness, as deaths have been easily absorbed by the terrorist networks.²²⁶ Moreover, the employment of combat UAVs by the U.S. has allegedly fuelled militancy in the region. U.S. drone programme has been used by Taliban and al-Qaeda members as a powerful recruiting tool by systematically claiming that every victim of a drone strike had a protected civilian status.²²⁷ Furthermore, U.S. operations in the Tribal Belt of Pakistan have had a radicalising effect, unleashing retaliatory responses by Taliban and al-Qaeda militants and multiplying violence even within their ranks, as the leaking of information to the U.S. has raised doubts as to the loyalty of its members.²²⁸ Ultimately, this behaviour has affected the civilian population living in the region, as they are now not only susceptible of being victims of drone strikes but also of violent retaliation by the militants present in the area.²²⁹

In addition, U.S. use of combat drones in the FATA region has helped radical groups to illustrate how the Pakistani Government has been incapable of protecting its own citizens from a foreign aggressor, fuelling claims for independence from the Tribal Agencies' Pashtun population.²³⁰ Hostility towards U.S. operations has wildly spread throughout Pakistani population at large, nourishing a sentiment of anti-Americanism and heightening the view that U.S. operations consistently violate Pakistan's territorial and political sovereignty.²³¹ In the year 2009, Al Jazeera conducted a survey among Pakistani

²²⁴ WILSON CENTER (n 26).

²²⁵ *ibid.*

²²⁶ SHAW and AKHTER (n 4); MAYER (n 3).

²²⁷ MAYER (n 3).

²²⁸ SHAH (n 56) 85, 115, 125; MAYER (n 3).

²²⁹ ASLAM (n 6) 324; AMNESTY INTERNATIONAL (n 12) 33.

²³⁰ SHAH (n 56) 87; ASLAM (n 6) 324-25.

²³¹ HOOPER (n 56); BERGEN and TIEDERMANN (n 171).

population with the aim of evaluating the degree of acceptance of U.S. operations in the region. Results showed that a wide majority of respondents condemned U.S. drone strikes.²³² More significantly, the majority of those who participated in the poll considered that the U.S. posed a greater threat to Pakistan's national security than Taliban militants. Recently, on July 2014, a Pakistani newspaper conducted a similar survey which showed analogous results, with two thirds of the respondents adopting an unfavourable stand towards U.S. employment of combat drones.²³³

An expansion of the drone programme from the tribal areas towards other regions of Pakistan would undoubtedly and effusively be rejected by Pakistan as a blatant violation of its sovereignty. Consequently, and aware of the geographic circumscription of U.S. drone operations, Taliban and al-Qaeda militants have fled the FATA region towards other areas of Pakistan, unleashing a destabilising effect on an already fragile State.²³⁴ Hence, instead of reducing the threat posed by terrorist networks present in the FATA region of Pakistan, U.S. operations, which started in the year 2004 and which have so far persisted throughout both Bush and Obama Administrations, may be aggravating the terrorist menace.²³⁵ Heretofore, U.S. drone strikes strategy has proved to be an ineffective response to al-Qaeda and Taliban militancy in the remote Tribal Agencies, focused on short-term efficacy rather than on the addressing of the root causes of the conflict.

As previously mentioned, from U.S. standpoint, clear advantages emanate from the employment of combat drones in the operations carried out in the FATA region. Not only it minimises the risk assumed by personnel ordering and supervising the attacks,²³⁶ but it likewise represents a significant financial and strategic advantage, allowing the neutralisation of the threat posed by legitimate targets within an almost non-existent lapse of time and without the need of incurring in the costs derived from the use of military

²³² SHAW and AKHTER (n 4) 1491; AL JAZEERA, "Pakistan: State of the Nation", Al Jazeera, 13 August 2009, available at <<http://bit.ly/1u9Jmvx>> accessed 27 June 2014.

²³³ VAYANI, R., "At 7%, Pakistan's Approval Rate of Obama Lowest Among 44 Countries", The Express Tribune, 15 July 2014, available at <<http://bit.ly/1n70v92>> accessed 23 July 2014.

²³⁴ ASLAM (n 6) 325; BERGEN and TIEDEMANN (n 171).

²³⁵ SHAH (n 56) 124-25.

²³⁶ NORTON (n 5) 165; BACHMANN(n 16) 277.

personnel on the ground.²³⁷ Furthermore, the gathering of reliable intelligence facilitated by the UAVs can increase the precision and accuracy of the strikes, and therefore the use of combat drones has the potential of considerably reducing the toll of civilian deaths as well as the damage inflicted on civilian objects and infrastructure.²³⁸

Nonetheless, the employment of drones in combat situations for the perpetration of strikes has raised numerous moral and ethical concerns, as it removes human contact between the perpetrator and the victim, isolating the former from the consequences of its actions and representing the apogee of warfare and weaponry evolution, which has gradually and unequivocally moved towards the distancing between the perpetrator and the victim.²³⁹ The physical and situational remoteness of drone operators from the FATA region where the missiles are ultimately fired and the conduct of operations entirely through computer screens has led to light-hearted comparisons between the employment of drones and playing videogames.²⁴⁰ This "Playstation" effect, as referred to by Special Rapporteur Philip Alston, has the risk of detaching operators from the outcome of their actions.²⁴¹ The moral discomfort raised by this innovative weapon is further evidenced by the increasing development of PTSD (post-traumatic stress disorder) by drone pilots.²⁴²

The policy of drone strikes implemented by the U.S. insulates both drone operators and the American public from the human impact that these operations have on the Pakistani tribal population.²⁴³ The moral distance created between the perpetrators and the victims of drone strikes as well as the dehumanisation of the later ones patently crystallise in the unfortunate names attributed both to the missiles and to the UAVs used (such as "predator" or "reaper" drones or "hellfire" missiles), which reflect a complete disregard to the dignity

²³⁷ HEYNS (n 18) para. 12; UN Doc A/68/389 (n 19) para. 25; BACHMANN (n 16) 262, 265.

²³⁸ ALSTON (n 8) paras. 81-82; UN Doc A/68/389 (n 19) paras. 28, 77; BACHMANN (n 16) 277-78.

²³⁹ MCCORMACK (n 32) 377; SIFTON, J., "A Brief History of Drones", *The Nation*, 27 February 2012, available at <<http://bit.ly/Km0f4W>> accessed 17 February 2014.

²⁴⁰ SHAW and AKHTER (n 4) 1493.

²⁴¹ ALSTON (n 8) para. 84.

²⁴² SHAW and AKHTER (n 4) 1493.

²⁴³ MAYER (n 3).

of human life and fuel moral opposition and resentment.²⁴⁴ Moreover, as UAVs allow the targeting of individuals without endangering the military and civilian personnel of the State employing them, society's opposition to the use of force might be debilitated.²⁴⁵ Similarly, as military forces are dissociated from the horrors derived from the use of deadly force, their legal interpretations of applicable IHRL and IHL might be over-expanded and softened.²⁴⁶

Despite the fact that combat drones represent a promising advancement which could lead to a dramatic reduction of the percentage of civilian losses, they ultimately rely on the human intelligence guiding the proceeding.²⁴⁷ Furthermore, the information gathered by drones in their surveillance operations in the Tribal Belt has proved to be insufficient in order to ensure that civilian losses remain minimised. The number of civilian deaths derived from the more than three hundred U.S. drone strikes carried out in Pakistan since 2004 varies vastly depending on the consulted source.²⁴⁸ The inaccessibility of the FATA tribal area, worsen by alleged governmental and military attempts to restrict access to journalists, has obstructed efforts to keep an accurate and rigorous quantification of the number of civilians killed by U.S. air strikes.²⁴⁹

In spite of the lack of adequate investigations, the Government of Pakistan informed in March 2013 that a minimum of 400 civilians had been killed during U.S. operations involving the use of UAVs,²⁵⁰ while the High Court of Peshawar's recent judgement acknowledged the death of more than one thousand civilians in the agencies of North and South Waziristan.²⁵¹ For its part, the Bureau of Investigative Journalism, a non-profit research organisation, has launched a project which aims at identifying and

²⁴⁴ SIFTON(n 239).

²⁴⁵ ALSTON (n 8) para. 80; HEYNS (n 18) paras. 17-18.

²⁴⁶ *ibid*; BACHMANN (n 16) 284.

²⁴⁷ ALSTON (n 8) para. 81.

²⁴⁸ UN Doc A/68/389 (n 19), para. 33.

²⁴⁹ ASLAM (n 6) 318; AMNESTY INTERNATIONAL (n 12) 8, 10.

²⁵⁰ UN Doc A/68/389 (n 19) para. 32.

²⁵¹ PESHAWAR HIGH COURT (n 12) [3].

registering personal details of the more than two thousand people killed in the strikes.²⁵² Of a total of 701 individuals so far identified, the Bureau has reported that almost half of them had civilian status.²⁵³ The comparatively low number of civilian deaths recognised by U.S. Administration since the beginning of its operations in Pakistan may be a consequence of its wrongful and extensive definition of the concepts of CCF and DPH.²⁵⁴

Special Rapporteur Ben Emmerson has carried out a series of legal analyses of different drone strikes performed by the U.S. on Pakistani soil in relation to which plausible allegations of civilian deaths have been raised. These investigations have evidenced that, at a minimum, and despite the underreporting and the lack of adequate information on U.S. drone strike operations, eight different cases involving the unlawful killing and injury of civilian population have occurred since the year 2004.²⁵⁵

The use of combat drones by the U.S. has not only caused numerous civilian deaths, it has further had a considerably negative psychological impact on the population. The constant overflight of drones generates great distress to civilians living in the Tribal Agencies, and forces them to live in an uninterrupted state of fear and mental anxiety. This fear has lead communities to significantly modify their daily habits, limiting and endangering the exercise of some of their fundamental rights like their freedom of assembly or children's access to education.²⁵⁶ The continuous presence of drones in the FATA airspace and the distinctive and unceasing sound they emit is the reason why drones are referred as 'wasps' by the civilian population living under their permanent threat.²⁵⁷

Regardless of the disparities on the data recorded by different media and investigative organisations, it is commonly agreed that a considerable and gradual decrease

²⁵² THE BUREAU OF INVESTIGATIVE JOURNALISM, "Naming the Dead", available at <<http://bit.ly/1jLyoFr>> accessed 3 August 2014.

²⁵³ SERLE, J., "Naming the Dead Records the Names of More than 700 Killed by Drones in Pakistan", The Bureau of Investigative Journalism, 31 July 2014, available at <<http://bit.ly/1ko8eQ4>> accessed 3 August 2014.

²⁵⁴ HRW And OTHERS (n 41) 3.

²⁵⁵ EMMERSON (n 11) paras. 33-34, 47-54.

²⁵⁶ AMNESTY INTERNATIONAL (n 12) 29, 31-33; UNHRC (n 30) paras. 7, 27.

²⁵⁷ MAYER (n 3).

in the number of civilian deaths has taken place during the last years of U.S. operations in the Tribal Belt.²⁵⁸ While these improvements are gladly welcomed, the decrease in the number of civilian losses and the improvement of the accuracy in the drone strikes does not dispel the obligation to investigate past crimes and to hold those responsible accountable for the wrongdoing.

One of the main obstacles in the assessment of UAVs' impact on the civilian population living in the Tribal Agencies of Pakistan is the absence of appropriate transparency in U.S. operations.²⁵⁹ The U.S. has so far failed to provide public information on the number of people killed as a consequence of their drone programme, as well as to disclose their legal evaluation of what conducts and life patterns justify the legitimate target of an individual.²⁶⁰ Lack of adequate transparency may be regarded as a threat to international peace and security in itself, as it obstructs investigations on the compliance of U.S. operations with human rights and humanitarian norms and obligations.²⁶¹ Accordingly, the concealment of relevant information concerning drone strikes operations may hinder the restraining effect that public opinion exerts on Governmental policies.²⁶² The international obligation of transparency requires that U.S. authorities should publicly disclose the legal criteria on which their targeting operations are based, its impact on the civilian population and an official record of the individuals who have been killed as a result of the drone programme.²⁶³

As expressed by Amnesty International, "secrecy is a barrier to accountability"²⁶⁴ and U.S. blatant disregard of its international legal obligations of transparency has created an inadmissible accountability vacuum, negating victims of their drone strikes and their

²⁵⁸ EMMERSON (n 11) para. 26.

²⁵⁹ UN Doc A/68/389 (n 19) para. 41.

²⁶⁰ ALSTON (n 8) para. 91; SHAW and AKHTER (n 4) 1504; AMNESTY INTERNATIONAL (n 12) 11, 49.

²⁶¹ HEYNS (n 18) para. 97; CENTRO DE NOTICIAS ONU, "Prepara ONU Estudio sobre Uso de Drones en Conflictos Armados", 24 abril 2015, available at <<http://bit.ly/1dX6BGq>>, accessed 21 June 2015.

²⁶² *ibid* para. 18.

²⁶³ *ibid* paras. 98-99, 108; ALSTON (n 8) para. 93; HRW And OTHERS (n 41) 1-4; UNHRC(n 30) paras. 8, 26.

²⁶⁴ AMNESTY INTERNATIONAL (n 12) 50.

relatives their legitimate right to seek redress and to understand the circumstances under which they were targeted.²⁶⁵ The U.S. is under the obligation to conduct prompt, thorough impartial and independent investigations whenever allegations of civilian deaths which did not comply with principles of necessity, distinction and proportionality are raised.²⁶⁶ If, after an initial fact-finding investigation, such allegations are confirmed, a process of criminal investigation should be conducted in order to hold those responsible accountable for their wrongful actions. A public and detailed explanation of the outcome and findings of such investigations should be provided.²⁶⁷

The need to protect national security interests is commonly invoked by U.S. authorities as the main justification why information related to targeted killings in the Tribal Agencies of Pakistan has not been publicly displayed.²⁶⁸ While States have legitimate security concerns which may require the maintenance of certain classified information, the refusal to disclose basic data in relation to the drone operations in the tribal areas of Pakistan only contributes to the perpetuation of a legal vacuum which threatens the observance of IHRL and IHL frameworks.²⁶⁹ In order to avoid the concealment of information related to drone strikes, Special Rapporteur Christof Heyns has suggested that drone operators should not be linked to an institution, such as the C.I.A. which, by reason of its activities, cannot openly release information on its operations and programmes.²⁷⁰ In this regard, the U.S. Administration has communicated that it intends to transfer control over drone operations from the C.I.A. to the Department of Defence by the end of 2014, in order to increase the level of transparency offered in relation to the use of force in their fight against terrorism.²⁷¹

²⁶⁵ ALSTON (n 8) paras. 3, 87; UN Doc A/68/389 (n 19) para. 41; EMMERSON (n 11) para. 100.

²⁶⁶ EUROPEAN PARLIAMENT, "Joint Resolution" (n 138) para. C; EMMERSON (n 11) para. 32; HEYNS (n 18) para. 101; AMNESTY INTERNATIONAL (n 12) 9, 35-37; UNHRC (n 30) paras. 8, 12, 21.

²⁶⁷ UN Doc A/68/389 (n 19) paras. 43, 78; EMMERSON (n 11) paras. 32, 36, 73; UNHRC (n 30) para. 21.

²⁶⁸ AMNESTY INTERNATIONAL (n 12) 49.

²⁶⁹ ALSTON (n 8) para. 92; UN Doc A/68/389 (n 19) para. 47.

²⁷⁰ HEYNS (n 18) para. 112.

²⁷¹ UN Doc A/68/389 (n 19) para. 48.

5. CONCLUSION

The 17th of June of 2014 marked the perpetuation of U.S. drone strikes operations in the Tribal Agencies of Pakistan for over a decade.²⁷² During the course of ten years, U.S. officials have been cautious in relentlessly repeating, as a sort of personal mantra, the legitimacy of their actions as part of U.S. "war on terrorism" as well as of their inherent right to self-defence.²⁷³

Nevertheless, a careful evaluation of the U.S. drone programme unfolded in the FATA region inevitably raises serious concerns as to the legality of U.S. justifications for their continuous interference in Pakistani sovereign territory. Firstly, the alleged existence of an ongoing armed conflict against a stateless and shadowy terrorist network with no geographical or temporal limitations represents a troubling re-interpretation of the traditional law applicable to NIAC. Furthermore, the recent launch on June 2014 of the "Operation Zarb-e-Azb" by the Pakistani military forces in an attempt to confront the presence of terrorist militants in the Tribal Belt,²⁷⁴ together with reiterated demands requesting the termination of drone operations, may indicate a persistent disregard of Pakistan's willingness and capability for combating the presence of terrorist networks in its territory. Finally, and although recent developments in international law have progressively embraced the flexible adaptation of article 51 of the UN Charter in order to recognise the lawfulness of anticipatory acts of self-defence, U.S. resource to force in the Pakistani scenario appears to have surpassed the legal boundaries of the framework of self-defence. The policy of targeted killings developed by the U.S. has overlooked the requirements of immediacy and necessity established by the *Caroline* doctrine, in order to pre-emptively neutralise the latent threat that al-Qaeda and Taliban militants pose.

UAVs represent a considerable development in modern weaponry, an evolution which may, at least theoretically, represent a beneficial advancement in the protection of

²⁷² ROSS (n 2).

²⁷³ GEARTY, C., "The Superpatriotic Fervour of the Moment", *Oxford Journal of Legal Studies*, 00, 2008, p. 1.

²⁷⁴ CRAIG (n 81).

the civilian population. Nevertheless, available evidence discredits the high precision with which the U.S. sustains that its strikes have been carried out.²⁷⁵ Notwithstanding the lack of reliable information in relation to U.S. operations and despite the vast difficulties in the maintenance of a rigorous account of civilian deaths, investigations have revealed details of several strikes in which humanitarian law principles of necessity, proportionality and distinction were clearly disregarded, as well as evidence on actions, such as follow-up strikes, which blatantly violate IHL obligations.

The facilitation of combat drones of the use of force, derived from the insulation of drone operators from physical peril, has so far resulted in the death of thousands of individuals in the FATA region of Pakistan, while no casualties have been suffered by U.S. troops.²⁷⁶ The physical remoteness between drone operators and the territory where the strikes are carried out has the potential danger of detaching the U.S. from the human impact of their actions, and of debilitating public scrutiny.²⁷⁷ Civilians whose lives have been by violently terminated by drone strikes are usually translated into mere statistical data,²⁷⁸ but in the other side of the computer screens several civilians who had no direct involvement in the hostilities have been denied the most fundamental human right: the right to life, which applies even in times of armed conflict. The accountability void in which these unlawful strikes have fallen, primarily as a consequence of U.S. concealment of information as well as of their understanding of legal definitions such as DPH, can no longer be tolerated. The U.S. is under the international obligation to conduct comprehensive investigations, addressing the harm inflicted during the past decade and allowing victims of unlawful actions and their relatives to seek justice, truth and redress for the wrongdoing.

Not only U.S. drone operations have had, and still have, a negative impact on the lives of Pakistani population living in the Tribal Belt. Their efficacy can also be questioned, as it has unleashed a radicalising and destabilising effect, which can ultimately erode U.S.

²⁷⁵ PESHAWAR HIGH COURT (n 12) [5].

²⁷⁶ SERLE (n 253).

²⁷⁷ ALSTON (n 8) para. 84.

²⁷⁸ SHAW And AKHTER (n 4) 1505.

efforts to tackle the terrorist menace, seeking a short-term solution instead of tackling its root causes.

Practices and policies tolerated by the international community today, whether tacitly or explicitly, will serve as a dangerous precedent for future conflicts. Therefore, it is the moral obligation of the international community to compel the U.S. to abide by its IHRL and IHL obligations, making publicly available information on its drone policy, conducting investigations when allegations of civilian deaths have been raised, and ensuring the non-repetition of past violations.

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