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Legal Defense of US Drone Strikes in Pakistan Through the Prism of US Laws

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Abstract: *The US drone policy of targeted killings after 9/11 as part of its counter-terrorism efforts in Pakistan's tribal areas has raised major serious concerns, particularly legal issues. This paper attempts to assess how US Laws defend drone strikes. US Congressional Order 1973, AUMF and its national self-defence right have mainly been focused on. The study is qualitative in nature and based on secondary sources. The results indicated the US approach to be based solely on its domestic laws and realist thinking. This indifferent legal analysis by the US is not acceptable for other legal regimes and requires certain modifications. Therefore the study recommends that rather than relying on a single state law the other legal circles and stakeholders may be given due share in deciding and finally adopting a well-established international legal framework for drones. Only a consensus-based legal system can make drone use more effective in future wars.*

Key Words: : Drones, Targeted Killings, Legality, National Self-defence, Legal Framework, Modifications, Congressional Order, AUMF

Introduction

The US used to deploy elite assassins in foreign states to get their targets and provided them with every facility to reach and eliminate their targets. It was risky for both the assassins and those who deployed them. But now the US has changed this policy and replaced it with unmanned drones for carrying out state-sponsored assassinations or targeted killings under the authorised basis of its global war on terrorism (MacAskill, 2017). The technological development in the form of drones has challenged International Laws (Khan, 2023). Its use has also changed the traditional nature of warfare. These changes not only provide enough space for new analysis in applied moral reasoning but also raise serious legal concerns. During the Cold War, moral debates focused on deterrence theory and the chances of nuclear warfare between the two superpowers the United States and the Soviet Union. With the end of the Cold War discussions focused on moral analysis of conflicts and terrorism that increased after the attacks of Al Qaeda on the world superpower state of the United States on 11th September, 2001. After over a decade of US wars in Afghanistan and Iraq, moral debate and discussions have entered a new phase, as technology has changed the nature of warfare. These changes are not only technological, as they raise issues on politics, ethics, and law, and give opportunities to the powerful states to avoid the legal and ethical restraints in their realism-based actions. There are different views about the use of drones in contemporary wars. To some, drones might actually provide more discrimination in

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killing (Strawser, 2010) while some may totally reject it.

Pakistan became the target of US Drone strikes in 2004, but it can be associated with the US invasion of Afghanistan when most of the militants moved into Pakistan tribal areas. Among the seven tribal agencies of FATA Bajour, the North and South Waziristan are considered to be the main sanctuaries for Al Qaeda and its supporting groups. These areas were also used by the militants as a platform for targeting NATO supplies and cross-border attacks, like the 9/11 attacks which compelled the US to follow a harsh policy against the perpetrators and also Pakistan, as its government and the chief Intelligence agency were blamed for supporting the militants. Targeted killing through Drones was part of the US counter-terrorism strategy (Aslam, 2011).

The US conducted Drone strikes in Pakistan since 2004 during the Bush administration and increased them during Obama's rule. Different aspects of the US usage of drones were discussed but there has been no legal discussion since 2009. In 2010 with the highest number of strikes and increasing civilian causalities legal issues came to the surface and became a hot debate of the day. Different US officials presented their statements about the rightfulness of drones but still the US government's efforts at the US Drones strike clarity, the policy statements from each of these American officials have offered claims about the legality, but none of the statements have offered the legal analysis obligatory for one to conclude if the targeted killing operations in Pakistan are according to International laws. Thus, space is left for the world community to legally analyse drone-related issues. American policymakers constantly claimed that the US is at war with Al Qaeda, the Taliban and the associated forces and has used drones against it in foreign states. However, the way they had used them has provided space for more issues like the nature of targets, signature strikes, double tap strikes, civilian causalities etc that require to be addressed on a priority basis. The US defends its drone policy in Pakistan by providing different justifications. The most common justification provided is self-defence, it justifies its actions both through domestic Laws and International Laws. However, the main focus of this paper is on US domestic Laws.

US legal justifications for Drone Strikes in Pakistan

Though the US covert drone operations in Pakistan were not openly discussed when its number increased it faced severe criticism, especially during the Obama Administration. Different circles demanded more open discussions and transparency. Obama administration officials for the first time talked about the legal aspects and provided different justifications for its drone use for targeted killings. These justifications were both based on domestic and International laws.

US Domestic Laws Regarding US Drone Strikes in Pakistan

The Powers Act of 1973 Public Law 93-148

This act was related to the combined decision of the US Congress and the head of the state about its armed forces entry into an armed conflict or simply the President must ask the Congress formerly deploying its military in any kind of conflict. All such reports must be shared by the President with both houses. This resolution was passed by Congress to limit the powers of the President regarding the engagement of US forces in armed conflicts abroad. The law keeps a check on the President's decisions while deploying troops to an armed conflict without permission of Congress. It also directs the President to notify Congress immediately about its military action (H. J. Res. 542 Concerning the war powers of Congress and the President, 1973). In the case of US drone strikes in Pakistan, the US administration did not consult Congress while the President used its powers in an expanded capacity and used AUMF as a basis for its attacks in Pakistan.

AUMF

John Brenan Assistant to the President for Homeland Security and Counterterrorism in his remarks at the Wilson Center said that targeted strikes are legal. As far as domestic law is concerned the constitution of the US provides the

President the power to safeguard the state from a forthcoming threat of attack (Miller, 2012). After the deadliest attacks of the terrorists on the US mainland, the Bush Administration reacted promptly and passed an important legislation, Authorization for Use of Military Force (AUMF) just a week after the said incident, on 18th September, 2001. The order gave power to the President: to use all the requisite and right force against all nations, organizations, persons involved in the planning and supporting the terrorists responsible for the September 11, attacks or those organizations or persons who have provided shelter to these terrorists, in order to prevent any future attack on the United States. Although its allocation of power to the President was comprehensive, the AUMF in fact revealed a compromise between Congress and the Bush Administration-which had pursued an even broader and more unrestricted grant of power. The President got the right to be the judge, juror and executioner, a defacto certificate to kill free from any interference. The only thing that is really important is the Law of 9/11 (Benjamin, 2013.127-128). The AUMF presented in 2001 by the US Congress permitted the use of military force against the perpetrators of 9/11 and those who supported them in those attacks. Al Qaeda was identified as the perpetrator by the George W. Bush administration and the Taliban government in Afghanistan supported them. Under the AUMF, in October 2001 President Bush sent the U.S. Armed Forces to Afghanistan for military operations to stop Afghanistan from being used as a platform for terrorist activities and to target the military capability of the Taliban rule (Garamone, 2001).

The Bush Government emphasised the "War on Terrorism" while Congress gave the authority to use military force only against the groups and their supporters directly accountable for the September 11 attacks. Congress openly refused to declare a “war on terrorism”.Instead, the use of force Congress allowed was to be focused on those who were responsible for the 9/11 attacks namely al Qaeda and the Taliban and the main purpose was to stop the September 11 culprits and their associates from future terrorist activities against the US. For nearly a decade, the AUMF remained the main basis of the U.S. government’s national lawful authority to use military force against al Qaeda and its direct supporters, both in Afghanistan and other states. The AUMF was introduced only to defeat Al Qaeda and militants in Afghanistan; with the end of the Taliban regime in Afghanistan most of the forces directly involved in the 9/11 attacks have been weakened, particularly the Al Qaeda has been destroyed and it is no more a threat to the US as it was before and after 9/11 Afghanistan. The rapid decrease of the US forces in Afghanistan shows that the AUMF is very close to achieving its objectives which will bring an end to the war with Al Qaeda and the Taliban (US Government Publishing Office, 2013). The Bush administration interpreted the AUMF broadly as a legal basis for international operations against terrorists. It also presented it as a rationale for employing military tribunals at Guantanamo Bay in Hamdi v. Rumsfeld (Hamdi v. Rumsfeld, 2004).

Although, President Obama declared in December 2014 to end the US operation in Afghanistan, still the U.S. Armed Forces remained in Afghanistan and targeted Al Qaeda and the Taliban (Mazzetti, 2014). These military operations against Al Qaeda and its associates are not limited to Afghanistan. The operations are further extended to Pakistan as the Al Qaeda members have entered Pakistan. In response, the United States has carried out Drone Strikes to hunt down Al Qaeda and the Taliban targets in Pakistan. The United States has also targeted other states that are suspected to be the supporters of Al Qaeda and its associate groups in different states; Yemen, Somalia, Libya, and most recently, Syria. The President has mostly used the AUMF 2001 as a context for these attacks. But has argued that this Law is not clearly defined to be used for every counter-terrorist campaign of the US around the world. The officials of the Obama rule have stated that AUMF can only be used against terrorists and Al Qaeda in Afghanistan, and, outside in case only when there is an imminent threat of attack against it.US has provided various explanations for the drone strikes. One of these justifications is its duty of being a superpower to target the terrorists not only wanted by its government but also by foreign governments. The best example in this

context is provided by Rashid Rauf who was assumed to be the organizer of the 2006 plot to destroy the airline flying from the U.K. to the U.S. (Aslam, 2011).

During his Presidency Obama has continuously used traditional International Humanitarian Laws to protect himself against criticism while at the same time, the administration has suggested that these Laws are not enough to address the threats that the US and its allies are facing in the 21st century (Wittes, 2012).

Though the US administration has used AUMF as the main source for supporting its drone strikes programme still it is not much satisfied with its relevance to its drone policies. The Obama administration's uncertainty about the AUMF has been reflected by different statements from important administration officials on whether a new, revised AUMF is desirable or essential. In his May 2013 speech, President Obama said: The AUMF is about 12 years old and the Afghan war is near its end. Main al Qaeda is weak now but groups like this must be dealt with, but in the years to come, not every collection of criminals that mark themselves al Qaeda will pose a credible threat to the United States. Unless we revise and reform our thinking, definitions or actions, we may enter into more wars but we don't need to fight or continue to increase the President's powers more suited for traditional armed conflicts between nation-states. The American people and its Parliament should participate in introducing new laws relevant to drone warfare and an end to the old order of the A.U.M.F.New Laws are needed of the time as the old laws cannot be used and expanded for further application to any future conflict. Terrorism is not possible to be rooted out with a few efforts, therefore the state needs to continue its struggle against the terrorists but the present war cannot be further extended and requires a better ending. that's not only advised by history but also is a demand of our democracy (The White House, 2013).

The AUMF was later improved by the National Defense Authorization Act of 2012, asking the US president to adopt all possible methods to go after terrorists both at home and abroad (Crowley, 2012). According to John Brennan, these targeted strikes are legal under domestic law in the form of a Congress-approved order, the AUMF that authorises the President to defend the nation from any forthcoming threat of attack.

US National Self-Defence

Every state has its own constitution which provides the basis for administering the state. Similarly, the US has also its own constitution which is followed by the state leaders for guidance. The US President is considered to be the most powerful world leader as he possesses extensive powers which are vested in him by the US Constitution. Since its very inception, the US President being the executive Chief and Commander in Chief can use the armed forces to protect its people and state in any kind of situation (United States v. Verdugo-Urquidez, 1990).

In the Prize Cases, the Supreme Court acknowledged the President's essential power to use force in self-defence to protect the nation against invasion or sudden attack, declaring that if a war is started by another state the President is responsible not only for defending its state but has the duty to use force in order to resist the force of the other state. Even though he didn't initiate the war but is bound to accept the challenge of the aggressor state and take retaliatory action rather than waiting for any other legislative power. Being the Commander in Chief the President has the constitutional authority to take responsible action in self-defence which is also authorized by the state's constitution against any threat. Under the principle of self-defence that is inherent in the President's Commander-in-Chief Authority, the President has long been understood to have constitutional authority to act reasonably in self-defence against any threat (Daskal, 2013). In Pakistan, the US has also based its drone strikes program on its national self-defence justification where the President is the Commander in Chief of his army and has the power to use any method to secure its state.

Obamas Administration International Law Justification

The Obama administration has not only defended its drone strike policy through domestic laws but has also used international laws to provide an additional legal basis for its drone strike programme. The most important of these Laws is the Self-defense under the UN charter and the International Humanitarian Law.

US Drone Strikes as a Self-defence under UN Charter as Interpreted by US

The killing of suspected militants through drones who are considered a threat to the state's security is highly challenging. States have adopted pre-emptive targeted killing as the most suitable policy decision under the laws regulating armed conflicts, as a genuine response to the terrorist threats and problems associated with irregular conflicts. The US administration has defended its targeted killing practices by claiming its self-defence right, as it is in an armed conflict with Al Qaeda and its associates. The legitimacy of a particular targeted killing depends on the situation in which it is conducted. Article 51 of the UN Charter also supports the state's self-defence rights claims as a reaction to the attacks by a foreign state (U.N. Charter, art. 51).

In May 2012, **John Brenan** (US President Obama's Chief Counterterrorism Advisor) presented the first Official position of the US administration on Drone Attacks in Pakistan and neighbouring Afghanistan. He defended and justified these strikes under International Law; as such strikes are permissible when the US is engaged in a fight against Al-Qaeda, the Taliban, and associated forces, as a result of the 9/11 attacks, and it is its inherent right to defend itself by using force against the militants. International law has no such rules that prohibit the use of Drones or fatal force against adversaries in non-conflict zones, in case when the state engaged is weak, gives consent or is not capable of tackling the terrorist threat itself. Though Brenan did not directly mention Pakistan but indirectly blamed it for consent or its weakness and incapability to take action against the terrorists. However, Pakistan has never accepted these charges as it has taken various military operations in its own state to counter-terrorism and has continuously condemned these strikes.

In the case of US drone strikes in Pakistan the two main articles i.e., Article 2 (4) and Article 51 have been extensively used where the former forbids the use of force in other state's territories while the latter allows the use of force under specific conditions.

The US administration claims that the US has the inherent right to self-defence as provided by the UN charter and this right allows it to target Al Qaeda (Koh 2010). The interpretation of self-defence offered by the administration argues that persons who are part of a group like al-Qaeda and the Taliban can be considered belligerents, and can be targeted-, even if they are not in the state where the original self-defence justification was raised. This means that if a person has planned and organized an attack in one state and then fled to another state can be targeted there on the basis of a claim of self-defence. In the administration's view, this killing would not be an assassination because, in the words of Koh, 'under national law, the use of lawful weapons systems – consistent with the appropriate laws of war – for precision targeting of specific high-level belligerent leaders when acting in self-defence or during an armed conflict is not unlawful, and hence does not constitute "assassination"(Koh,2010). In a speech at the annual meeting of the American Society of International Law on March 25, 2010, **Harold Koh,** (former Legal Advisor to the Department of State), defended the administration's use of unmanned aircraft for targeted killings, "that the US may use force consisted with its inherent right to self-defence under international law".He further claimed that the Obama Administration has cautiously studied the rules administering the targeted operations to certify that these operations were carried out regularly in compliance with the law of armed conflicts (Benjamen,2013.128).

General Counsel for the Department of Defence, Jeh Johnson in February 2012, also stated that the US was already in an armed conflict and it was its inherent right to target the

specific military objectives according to the principles of war (Johnson J. C., 2012).

Some scholars have supported this argument that if a country faces a potential attack it can use the rationale of self-defence for targeting the international actors through drones no matter where they are located (Paust, 2009).

The US defended its invasion of Afghanistan on the basis of the provision of the UN Charter on self-defence. It describes the 9/11 attacks as an armed attack overlooking the fact that till today, the offenders of the 9/11 attacks are still unknown while also ignoring the principles of necessity and proportionality. With the replacement of the Taliban government in 2002 the new leader Hamid Karzai requested the already present international military forces in the state to fight the rebellious groups (Qureshi, 2017). Therefore, the US's authorised use of force was limited to Afghanistan. The US applied force against Afghanistan in 2001 on the basis of self-defence justified under Article 51. Then again the Afghanistan government requested for US support and thus, the U.S. intervention in Afghanistan was justified (Haque, 2020).

But Pakistan's case is different as it is not involved in any armed conflict with the US became the target of its drone attacks with or without its consent for hunting the terrorists. It has also used drone missiles in non-conflict areas without the consent of Pakistan (Strawser, 2014: 177). It is claimed that the terrorist groups regularly enter Pakistan from Afghanistan through its border (Nielsen, 2008) but this does not allow the US to carry out drone strikes on Pakistan's territory without its consent or in case when terrorists are operating from the other state territory. Pakistan is also doubted for welcoming the US help however the offer has not been openly declared or officially made. Moreover, the U.S. claims that the drone strikes are conducted in the name of pre-emptive self-defence. Such self-defence is supported neither by the UN Charter nor by International Law.

The US drone policy for targeting terrorists abroad and defence is a good option and legal but the problem with the policy is that the Obama Administration has presented it as merely an effective policy for killing rather than providing a general legal view. Both the President and its officials take credit for expanding the program but have never tried to publically defend it on legal grounds (Anderson, 2010).

Findings and Discussions

The legality of US drone strikes in Pakistan's tribal areas was assessed through **US** Laws. The common findings arrived at are that the US has not been in a position to clearly defend its legal justifications and its drone strikes in Pakistan for targeting the militants cannot be considered as legal. As drones use in foreign states is an issue of international nature rather than national, therefore it requires an international legal framework for qualifying the legality concerns.

US has defended its case regarding the legality of US drone strikes through AUMF which is a US Congressional order passed by the Bush Administration promptly almost a week after the 9/11 incident that allowed the president to use all the requisite and the right force against all those responsible for the 9/11 event. The study revealed that the AUMF's main purpose was to deal with Al Qaeda and Taliban in Afghanistan however US has expanded its scope to include Pakistan. It has been noticed that differences existed between the Bush administration and the Congress over the use of AUMF where the US mainly focused on war against terrorism while the Congress insisted on limiting its scope to Afghanistan.US This attitude clearly violates the Powers Act of 1973 that was a determination to balance the power between the President and Congress before deploying the armed forces to any conflict. However, the US drone policy towards Pakistan without consulting Congress has challenged its authority. The National Defence Authorization Act of 2012, improved the AUMF by allowing the president to use all the possible means to fight against the militants both at home and abroad (Crowley, 2012).

Though the US has carried out its drone strikes in Pakistan by using AUMF as a legal basis still uncertainty exists about its application to different types of conflicts like the one against AlQaeda, the Taliban and its associates in

Pakistan tribal areas. This uncertainty can be clearly noticed from the statements of the US officials about whether a new or revised AUMF is required or important. President Obama himself in his May 2013 speech said that AUMF is quite old and its main purpose which is to deal with Al Qaeda and its associated groups in Afghanistan is near an end but groups like that will continue to threaten the US interests in the future but every threat cannot be considered as an imminent one. The US administration can no longer rely on the AUMF to deal with future threats instead the US public and Congress need to play a positive role in abolishing the AUMF order. Further, he accepts that every war must come to an end as advised not only by history but also demanded by democracy (The White House, 2013).

Moreover, the US claims that the Security Council Resolution 1368 has permitted the US to act in self-defence to the 11 September attacks has used fatal force against Al-Qaeda in Afghanistan and justified it boldly in the name of self-defence as the Taliban were ruling the state and had openly supported Al Qaeda. Thus, the US made its justification of self-defence against both the Al-Qaeda and Taliban. In that situation, the Afghan administration was involved so self-defence was defendable but the case of Pakistan is entirely different. After the September attacks, terrorist activities heavily increased in Pakistan and it itself became the target of terrorism the military forces of Pakistan were on different occasions attacked by the militants. Pakistan cannot be accused of being involved in terrorist activities. So the claim of self-defence which the US referred to in the case of Afghanistan fails in the situation of Pakistan. For instance, if the Resolution 1368 of the Security Council has permitted the US to self-defence, still in Pakistan it is not clearly mentioned about whom such defensive actions can be used.

The justification of the US for its drone strikes is largely dependent upon self-defense against Al-Qaeda and the Taliban along with other associated groups fighting with the military forces in Afghanistan and Pakistan. The studies argue that the US has provided national self-defence both in terms of its constitution and under the UN charter as a legitimate basis for its drones related policies in Pakistan but this claim cannot be accepted regarding the legality of drone strikes in a foreign state that is not itself involved in a direct conflict with US. Article 2(4) bans the use of force but with exclusion (UN, n.d.) in the form of article 51 which allows the use of force by a state in its self-defence only with certain conditions like if it has been attacked by the other state, or that state or UN Security Council has allowed it to take any action. If Article 2(4) of the UN Charter is taken into account then the US cannot carry out drone strikes on the basis of self-defence unless the Security Council has taken different steps or initiatives for controlling the terrorist activities in the area. However, the Security Council has not considered any such initiative. On the other hand, if a member of the Security Council has taken any action in self-defence, it must inform the Security Council but the US has not submitted any such report to the Security Council. It means that the drone strikes in Pakistan were certainly not the last likely choice against terrorism as no other action earlier to it has been taken by the US or the Security Council. The US also considers drone attacks as a preemptive self-defence right where it has the authority to attack other states even in the absence of any armed conflict Pakistan itself is not involved in any terrorist activity against the US. And if any Pakistani is proven to be involved in the terrorist attacks on the US then Pakistan's government and its security forces are responsible for taking action against the perpetrators.

As Strawser (2014) claimed that Pakistan has not given any approval for carrying out drone strikes in Pakistan. The US explanation of the UN charter in the name of self-defence according to its own convenience cannot be considered legally justified.

Conclusions

This research intended to investigate the legal basis provided by the US for its drone use in the tribal areas of Pakistan. The results indicated that the US unilaterally adopted an aggressive policy in the form of drone strikes in Pakistan to target the militants specifically based on its national interests.

The way the US has used drones in Pakistan and its claims for self-defence rights are not justified under the UN Charter. The US has tried to defend its drone policy towards Pakistan by broadly defining the old US domestic laws (AUMF) while the new innovative weapons in modern warfare require new laws in the field as the old laws may be outdated or used by the states for serving their sole interests rather than handling the legal issues on a more mutual basis. The most important authorities that must be consulted in case of any conflictual situation, the US administration has mostly side-lined these authorities e.g. the US Congress and the UN Security Council. This US attitude is also creating hindrances in legally qualifying the US drone strikes.

Article 2 (4) and 51 of the UN charter has been used as a justification for its national self-defence right. Further, the interpretation of these articles by the US in their own way is not enough to justify its actions as legal. However, it creates a space for more legal concerns. Though the US has attempted to make its policy on drones more legalised under its domestic laws drones when used in warfare become an issue of international concern. Therefore a single state's perspective cannot make it wholly legalised.

Though the US legal justifications for its drone policy in Pakistan lacks the proper element of satisfaction it can be admired for accepting the challenges to its old domestic laws. It is ready to modify its laws and allow the public and other legal authorities to play their roles in any forthcoming legislation for future wars of a dynamic nature.

Drone warfare is not limited to only the concerned states. It is a more sensitive issue that can affect the international system as other states have also acquired this technology and may use it in the near future. Therefore the International Community has to play its role in bringing all the states to a single forum where they can decide on a new legal regime for addressing drone warfare in a more legal way.

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