

## The “Surgical” Legitimacy of Drone Strikes? Issues of Sovereignty and Human Rights in the Use of Unmanned Aerial Systems in Pakistan

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## **The “Surgical” Legitimacy of Drone Strikes? Issues of Sovereignty and Human Rights in the Use of Unmanned Aerial Systems in Pakistan**

### **Abstract**

The Revolution in Military Affairs had an important role in providing the United States Armed Forces the technical instruments necessary to conduct high-risky operations in the context of Irregular Warfare. The development of these instruments, such as Unmanned Aerial Vehicles (UAV), allowed the emergence of a discourse of surgical and lean wars by the George W. Bush and Barack Obama administrations, whose legitimacy of the interventions were related to the accuracy and technical superiority of the UAVs. Focusing in the case of the U.S. drone strikes in Pakistan, this article seeks to debate the legal limits of the employment of these instruments. Despite the supposed accuracy and visual capacity of the UAVs, we argue that there are several information on the deaths of civilians, and legal limitations in the International Humanitarian Law, that constrain the employment of this instrument, and illegitimate the argument of surgical war.

## Introduction

The use of Unmanned Aerial Vehicles (UAV), or simply drones, has become the way by which the United States has been dealing with insurgent movements on the border between Afghanistan and Pakistan since 2004. According to the data disposed by the platform "Out of Sight, out of Mind," over ten years of operations, there were more than 370 strikes performed, more than 3000 casualties, 22 percent of which were civilians, and less than 2 percent were high priority targets identified by the Central Intelligence Agency (CIA).<sup>1</sup>

Despite the difficulty in obtaining this information and distinguishing between civilian and militant deaths, several organizations affirm that these strikes reached their peak during the Obama administration with more than 330 executions.<sup>2</sup> This article argues that an unprecedented number of attacks resulted from the implementation of autonomous systems that facilitate the use of force. Once it is possible to actualize violence remotely and with highly accurate weapon deployment systems, in delicate situations, without much risk to American military personnel, many political and moral constraints related to the use of force tend to be excused.<sup>3</sup>

The so-called "targeted killing" operations, examined by the special rapporteur of the United Nations, are the subject of great legal controversy, covering issues of legitimacy, arguments of integrity of the combatants, and the surgical precision of the instruments in sensitive military tasks.<sup>4</sup> The report provides the following description of targeted killings, a topic of focus in this article:

*"A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator."*<sup>5</sup>

Many questions have been raised over how the employment of drones by the United States in the sovereign territory of Pakistan—mainly under the pretense of Just War—may be illegitimate and inconsistent with the alleged principles of accuracy and precision.

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<sup>1</sup> "Out of sight, out of mind 'Attacks'," May 16, 2014, available at: <http://drones.pitchinteractive.com/>.

<sup>2</sup> "Drone Wars Pakistan: Analysis," *New America Foundation*, April 12, 2014, available at: <http://natsec.newamerica.net/drones/pakistan/analysis>.

<sup>3</sup> Singer, Peter, *Wired for War: The Robotics Revolution and Conflict in the 21<sup>st</sup> Century* (New York: Penguin Press, 2009), 319.

<sup>4</sup> Philip Alston, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," *United Nations Human Rights Council*, 2010, available at: <http://www.refworld.org/docid/4c07635c2.html>.

<sup>5</sup> Alston, "Report of the Special Rapporteur," 03

Based on the experience of these counterinsurgency operations in the Pakistani territory over the last ten years, the purpose of this article is to discuss the legal implications involved in the employment of drones in targeted killing missions. It's intended to demonstrate that the argument of surgical precision, associated to the use of drones, is much more a discourse rationalized by the revolution in military affairs, rather than a substantiation of the moral and legal engagement with the rules of combat. This argument, lensed through the principles of Just War and the report of the United Nations on targeted killing, claims the employment of drones in Pakistan is incompatible with the idea of Just War, particularly in what concerns the guarantee of civilian human rights and the sovereignty of the country.

### The Revolution in Military Affairs: The Evolving Discourse on Irregular Warfare

From 1980-90, American think tanks such, as the Rand Corporation, sought to describe and conceptualize new kinds of threats to United States security in order to provide defense policy recommendations that were more accurate on the topic of terrorism. Defining terrorism as an asymmetric threat, Rand developed a militarized view on the subject, characterizing it as non-state actors whose unconventional methods had the capacity to promote surprisingly successful attacks against citizens or State capacities.<sup>6</sup> This new concept of threat became influential in the reorganization of American weapons systems, as well as the command and control systems in U.S. military operations.

This advent of new global threats, combined with the emergence of new informational and computing technologies, contributed to the efficiency of the United States Armed Forces, especially on the tactical and decision-making levels. Crucially, the application of informational technologies for new armaments resulted in the subsequent development of a lean and surgical modern war philosophy and also inspired the process of technological, administrative, and political change that characterizes the Revolution in Military Affairs (RMA).

According to Shimko, the RMA could be understood as a set of interests and perceptions that evolves through a distinct political-economic context and begins to constrain the security agenda to the production of new technologies for war, as well as how it is conducted and commanded.<sup>7</sup> The development of the RMA can be attributed to a number of factors, such as: (1) the murky outcome of the Vietnam War, responsible for the development of a collective aversion to grand-scale conflict—known as the Vietnam Syndrome—that often

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<sup>6</sup> Bruce Bennett, "Responding to Asymmetric Threats," in S. Johnson, M. Libicki and G. Trevorton, *New Challenges, New Tools for Defense Decisionmaking*. (Santa Monica: Rand Corporation, 2003), 39.

<sup>7</sup> Keith Shimko, *The Iraq Wars and America's Military Revolution* (New York: Cambridge University Press, 2010), 02.

compromises the lives of American soldiers and governs the social perception about the U.S. military campaigns; (2) the profusion of information and communication technologies with possible applications in new military technology systems; (3) the perception of a substantial diversification in national Security threats, which provoked the reorientation of defense policy and operational concepts.<sup>8</sup>

Among the technological systems designed under the RMA are systems of satellite communication and live feeds, Stand-off Weapons (mainly UAVs), and sensor systems for targeting in Unmanned Ground Vehicles (UGVs). These innovations enabled not only the development of C4IRS (Command, Control, Communication, Computing, Information, Reconnaissance and Surveillance) that optimized “Shock and Awe” campaigns, but also granted the Armed Forces access and control to the whole flow of information on war, conforming to the dynamic of network-centric warfare stated by Cerebrowsky.<sup>9</sup> This happened, according to Bellamy, for the enhancement of surgical strategies in tactics, the acquisition and destruction of data in a cybernetic environment, and the control of the public information spread about war in general.<sup>10</sup>

During this period, the argument that these new tactics and technologies could be capable of dealing with new asymmetric threats without employing conventional military equipment became much more influential. The *Joint Publication* doctrine of the U.S. military, anticipating a change in international security, discerned the difference between traditional warfare and irregular warfare and the necessity for America to operate well under both contexts.<sup>11</sup> While traditional warfare is understood as a violent encounter between nation states through conventional weapons systems, irregular warfare involves the struggle between state and non-state actors, in which surgical means are used for the identification and elimination of enemies in hostile and populated environments.

Along the same line of reasoning, the work of Harlan Ullman and James Wade about the “Shock and Awe” strategy suggests that the most efficient way of fighting asymmetric threats in irregular warfare is to conduct fast and

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<sup>8</sup> Ian Buchanan, “Treatise on Militarism,” *Simplex* 14 (2006): 155; Zbigniew Brzezinski, *American Security in an Interdependent World: A Collection of Papers Presented at the Atlantic Council’s 1987 Annual Conference* (Lanham, Maryland: University Press of America, 1989), 03-04.

<sup>9</sup> Arthur Cerebrowsky, “Military Responses to the Informational Age,” *The RUSI Journal* 145:5 (2000): 27.

<sup>10</sup> Christopher Bellamy, “What is information warfare?” in Ron Matthews and John Treddenick (eds.) *Managing the Revolution in Military Affairs* (New York: Palgrave, 2001), 61.

<sup>11</sup> U.S. Department of Defense, *Joint Publication 1: Doctrine for the Armed Forces of the United States* (Washington, D.C.: OSD, 2013), I6-8.

destructive operations in order to incapacitate the enemy.<sup>12</sup> This would only be possible if the force design was capable of effectively using information technology in order to achieve knowledge, accuracy, agility, and control. It should be noted that the Department of Defense's (DoD) *Quadrennial Defense Reviews* (QDR) highlight this use of emerging technologies, like UAVs, to deal with growing threats in the international environment. These documents are a series of publications that reflect changes in international security, demanding timely alterations in security and defense strategies, including the use of new technical systems and the development of advanced weapons. Thus, the 1997 QDR recommended the use of information technology to provide surveillance capacity in order to predict and disrupt transnational terrorist threats or for use in irregular warfare.<sup>13</sup> Naming the UAV as an example of a “surgical precision” weapon, the 2006 QDR predicted that in the near future 45 percent of long-range attacks would be executed by such machines and announced the duplication of covert capacity within such systems through the acquisition of Predators and Global Hawks.<sup>14</sup> The 2010 QDR considered the use of UAVs as the basis of success in counterinsurgency and counterterrorist operations, through missions of intelligence, surveillance, and reconnaissance, especially in the regions of Afghanistan and Pakistan.<sup>15</sup>

The implementation of surgical weapons, mainly UAVs, to combat asymmetric threats became a primary policy during George W. Bush's administration. In the 2004 annual State of the Union speech, the President affirmed that the main characteristic of the Global War on Terror was a “manhunt” against al-Qaida terrorists that would outrank concerns of national borders and sovereignty. This way, the United States would never again have to face terrorist acts similar to September 11th, and the administration was willing to “face the regimes that hide and help terrorists and that could provide them nuclear weapons, chemical or biological.”<sup>16</sup>

Alongside the Iraq and Afghanistan campaigns, invoking a prerogative of “Failed States,” the employment of armed drones became constant in countries such as Yemen, Somalia and Pakistan, due to their inability of controlling and keeping track of potential terrorist activities. In what concerns Pakistan, Bush argued drones were necessary by reason of the fragility of the

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<sup>12</sup> Ullman, Harlan and James Wade, *Shock and Awe: Achieving Rapid Dominance* (Washington, D.C.: The National Defense University, 1996), 88.

<sup>13</sup> U.S. Department of Defense, *Quadrennial Defense Review 1997* (Washington, D.C.: OSD, 1997), 03-04.

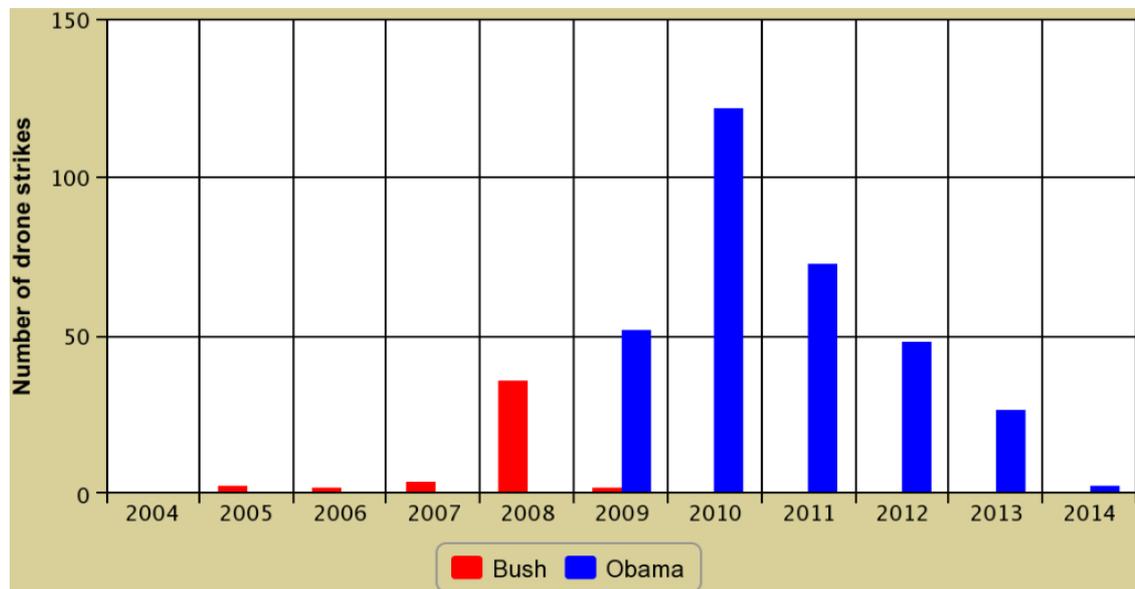
<sup>14</sup> U.S. Department of Defense, *Quadrennial Defense Review 2006* (Washington, D.C.: OSD, 2006), 46.

<sup>15</sup> U.S. Department of Defense, *Quadrennial Defense Review 2010* (Washington, D.C.: OSD, 2010), viii.

<sup>16</sup> George W. Bush, “The 2004 State of the Union Address,” *2004 State of the Union*, Capitol Building, Washington, D.C., 2004, available at: <http://whitehouse.georgewbush.org/news/2004/012004SOTU.asp>.

border with Afghanistan (North and South Waziristan) and because the local authorities are unable to control the traffic of Taliban or al-Qaida’s militants.<sup>17</sup>

**Figure 1: Drone Strikes in Pakistan: Comparison between the Bush and Obama Administrations<sup>18</sup>**



Despite the increase of drone strikes in Pakistan (Figure 1), the Obama administration seems to be more skeptical to define the country as a failed state. In an announcement regarding use of UAVs as a weapons platform, President Obama rejected the argument of a “war on terror,” opting to define its practice as a cooperative strategy for counterinsurgency.<sup>19</sup>

President Obama focused on building an argument that could justify the operations not as interventions in the context of a global war, but as cooperative practices that seek for the elimination of mutual problems. This suggests that the incursion of Taliban and al-Qaida militants into Pakistan are also a legitimate national security problem for the United States. At the heart of this discourse is the possibility of deploying drones in counterterrorist missions without compromising the life of civilians as “collateral damage.”<sup>20</sup>

The existence of attacks that resulted in the deaths of civilians were constantly brought up by President Obama, while also justifying that these attacks were efficient, legal, and morally justifiable. In this case, the focus on legality is rooted on the affirmation that these actions are part of a Just War in which

<sup>17</sup> Brian Williams, “The CIA’s Covert Predator Drone War in Pakistan, 2004-2010: The History of an Assassination Campaign,” *Studies in Conflict & Terrorism* 33:10 (2010): 871-872.

<sup>18</sup> “Drone Wars Pakistan: Analysis.”

<sup>19</sup> Barack Obama, “Obama’s Speech on Drone Policy,” *The New York Times*, 2013, available at: [http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?\\_r=3&](http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?_r=3&).

<sup>20</sup> Ibid.

the United States is acting in self-defense against an organization—not a state—after the September 11th attacks.<sup>21</sup> The moral component of the drone strikes resides on their supposed efficiency and the commitment of the Armed Forces to follow the “rules of engagement” and avoid “collateral damage.”<sup>22</sup> Furthermore, the Obama administration stated that it sought the legitimate use of drones in these operations by affirming that the actions were conducted both morally, legally, and in accordance with the principles of Just War. Once described as surgical, these attacks are not characterized as a formal invasion or intervention in a sovereign territory.

From the given historical background, the development and extensive launch of advanced surgical weapons in irregular warfare seemingly justifies U.S. policy that meets modern security demands through drone strikes without compromising American soldiers’ lives. Indeed, the tactic of using drones promises the ability of eliminating enemies in complex environments, while minimizing the political implications of resorting to war. Nevertheless, the interoperability and the reduction of the personnel due to the RMA’s technological advancements made irregular combat more common, but not necessarily more legitimate. To this end, the next section will shed light on the matters of legality and legitimacy in the employment of drones in military operations.

### The Legal Controversies in Targeted Killing Practices

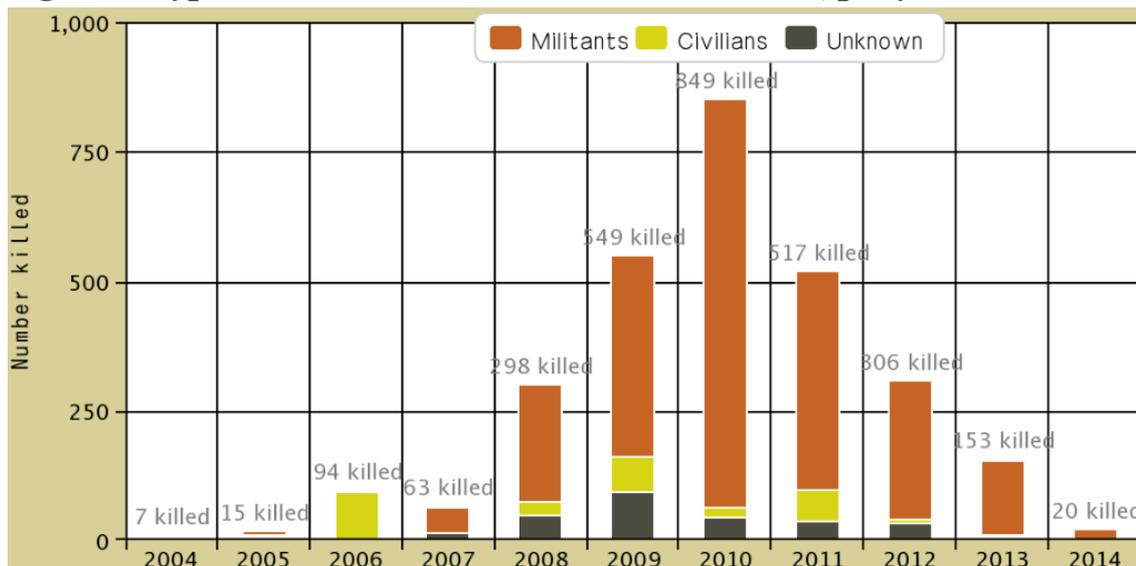
Targeted killing operations in Pakistan are conducted by both the U.S. Air Force and the CIA. As it can be observed on Figure 2, the number of deaths in targeted killing operations with drones presents a steady growth until 2010, followed by gradual decreases until the beginning of 2014. According to the Bureau of Investigative Journalism, every year drone strikes result in the killing of civilians, but the estimate of civilian casualties vary by source. The New America Foundation, for example, affirms that the number of civilian deaths by UAV’s attacks for the last ten years vary from 258 to 307, while the Bureau of Investigative Journalism estimates that these casualties range from 416 to 957, with 168 to 202 of these victims being children.<sup>23</sup> Regardless of these estimates, the data on civilian victims tends to recognize the difficulty to distinguish between civilian and militant targets. Interestingly, the United States does not offer clear information on how they recognize civilians and “combatants” in drone strikes.

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> "Drone Wars Pakistan: Analysis"; "Get the Data: Drone Wars," *The Bureau of Investigative Journalism*, July, 2014, available at: <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/>

**Figure 2: Types of deaths in Drone Strikes in Pakistan, per year<sup>24</sup>**

The United Nations report referenced earlier states that targeted killings are common and legal practices in the context of formal wars.<sup>25</sup> However, they have also been occurring without a formal declaration of war or sanctioned intervention. Thereby, they cannot be automatically justified as legitimate self-defense act.<sup>26</sup> This poses a problem for the Obama administration to provide a substantiated explanation of its actions in legal terms since it claims not to be in a declared war against Pakistan, but rather curtailing a terrorist organization. According to the UN report, the United States only declares an armed conflict once it has provided a legal basis to commit extrajudicial killings, thus justifying the deaths of civilians under direct involvement in hostile activities.<sup>27</sup>

Therefore, what is intended to be demonstrated in this section is that, even if there isn't a specific legislation on the use of UAV in conflicts, there are many legal principles concerning the issues of the sovereignty of a state and human rights—both in the absence or in the context of formal conflicts—that the employment of drones fails to accomplish. With focus on the case of Pakistan, this article will first illuminate the problematic aspects of Just War arguments and sovereignty, and then discuss the disrespect to human rights based on the customary International law.

### *Just War and Sovereignty*

According to Walzer, war is always measured twice: adjectively and adverbially. Initially, as an adjective, it is measured by the reasons that guided

<sup>24</sup> "Drone Wars Pakistan: Analysis."

<sup>25</sup> Alston, "Report of the Special Rapporteur."

<sup>26</sup> Ibid, 3.

<sup>27</sup> Ibid, 16.

its occurrence and whether it's just or unjust.<sup>28</sup> Afterwards, it is evaluated adverbially, when it's possible to confirm if it's fought in a just or unjust way. On these grounds, the principles of Just War are divided into justice to war (*Jus ad Bellum*), to which arguments of aggression and self-defense result in war, and justice in war (*Jus in bello*), to which one considers the behaviors and actions being conducted in the aggression itself, especially in terms of proportionality and distinction. In general, these rules are institutionalized by The Hague and Geneva Conventions. As Walzer also points out, it is possible for a Just War to be fought through unjust means and an Unjust War to be in accordance with the rules of engagement. However, the practice of targeted killings using drones is in discordance to the principles of international laws in both cases.

It should be emphasized that International Humanitarian Law (IHL) emerged in a moment when the use of force in international relations was legitimate – when States had the right to individually resort to war. Nonetheless, as Bouvier points out, the state is forbidden to spontaneously declare and make war—in a way the *jus ad bellum* is converted into *jus contra bellum*—except when supported by the Charter of the United Nations.<sup>29</sup>

The Report of the United Nations on Targeted Killing, then, indicates several problems related to the practice, mainly in what concerns the employment of drones by the United States. The biggest issues are caused by an incompatibility of targeted killing with the United Nations Charter (*Jus ad bellum*), and consequently, with the practices and norms of IHL, both for non-international and international armed conflicts (*Jus in Bello*).

O'Connell explained that Article 2 (4) of the Charter of the United Nations, in which all members are urged to avoid the use of force against each other, has only two exceptions, both disposed of in the Chapter IV.<sup>30</sup> In case of threats to peace and acts of aggression, the Security Council has the authority to allow the use of force to restore international order. Still, according to Article 51, States are allowed to act in self-defense “in the evidence of an armed attack” until the Security Council is able to intervene. O'Connell also posed that Article 2 (4) of the Charter of the United Nations covered the use of force against Failed States.<sup>31</sup> It is important to note that the International Court of Justice has never authorized another State to intervene by the use of force against non-State groups in violation of another sovereign's space. For

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<sup>28</sup> Walzer, Michel, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 21.

<sup>29</sup> Bouvier, Antoine, *Direito Internacional Humanitário e Direito dos Conflitos Armados* (Instituto para Treinamento em Operações de Paz, 2011), 15.

<sup>30</sup> Mary Ellen O'Connell, "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009," *Social Science Research Network*, November 6, 2009, 13.

<sup>31</sup> Mary Ellen O'Connell, "Seductive Drones: Learning from a Decade of Lethal Operations," *Journal of Law, Information & Science and Faculty of Law* (2011): 14-15.

instance, when Uganda claimed the right to use force against non-State actors in Congo in 2005, the International Court of Justice didn't allow it.

In the majority of cases, the International Court of Justice is concerned that armed attacks give legitimacy to self-defense retaliations that are not small and/or sporadic border incidents.<sup>32</sup> In the same line, the IHL considered that, for the occurrence of international armed conflicts, it was necessary that "any difference arising between two states and leading to the intervention of armed forces" had to be independent of its intensity or frequency.<sup>33</sup> By this definition, an armed conflict between states and non-state actors is not to be automatically considered within the legal parameters of self-defense.

However, if a border incident is not treated as an international armed conflict, it's possible, through the IHL, to legitimate the use of state force against non-state actors. In this situation, the armed groups should be characterized according to the criteria disposed in the Additional Protocol II of the Geneva Convention: they should be objectively perceived as an armed group (with a minimal level of organization and command structure), and be involved in collective actions against the state; there should be a threshold of what is considered violence, being that so that acts cannot be isolated incidents, but historical movements of armed conflicts; and there should be a territorial restriction of its acts, either in the territory of the state, or in its frontiers.<sup>34</sup>

As noted by the targeted killing report of the United Nations, all these factors considered together make it very difficult to justify conflict by al-Qaida or Taliban on the Pakistani border as an international armed conflict without further explaining how these entities constitute a part of the IHL. Still, according to this report, the only factor that could characterize an armed conflict between States (even Pakistan) and al-Qaida is the fact that its actions are transnational.<sup>35</sup> Therefore, even if there is consent from the "host" state for a foreign intervention against these armed groups—something that, as O'Connell and Williams confirm has never happened in the case of Pakistan and its Tribal Zones – the IHL restrains the use of force against groups that do not match the criteria, that defines them as a part of the IHL. In this regard, O'Connell refutes the argument of self-defense used by the United States to legitimate actions against terrorists.<sup>36</sup>

Therefore, the practice of targeted killing through the use of drones by the United States in Pakistan doesn't find legal basis, and should be characterized as an indiscriminate and disproportionate use of force that violates the sovereignty of Pakistan. In this case, considering a state sovereignty as its independence from and legal impermeability in relation to foreign powers, as

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<sup>32</sup> O'Connell, "Unlawful Killing with Combat Drones," 14.

<sup>33</sup> Alston, "Report of the Special Rapporteur," 16.

<sup>34</sup> Ibid, 17.

<sup>35</sup> Alston, "Report of the Special Rapporteur," 18

<sup>36</sup> O'Connell, "Unlawful Killing with Combat Drones," 14

well as its exclusive jurisdiction and supremacy over its territory and inhabitants—a right guaranteed by Article 2 of the U.N. Charter—the fact that the drone is an uninhabited vehicle and an alleged accurate weapon, doesn't make it less pervasive of the Pakistani sovereignty.<sup>37</sup> Still, the use of Just War (*Jus ad bellum*) to define this practice as legitimate defense is contradictory since Pakistan wasn't responsible, by any means, for the attacks of September 11th in the United States. Therefore, nothing justifies the violation of Pakistani sovereignty, not even arguments of self-defense, or those concerning the technical capability to eliminate specific enemies.

## Technical Limitations and the Disregard for Human Rights

Through the analysis of the report of the United Nations on targeted killing, the optics of IHL, and of the principles of Just War, the evidence suggests that the United States has ignored several dispositions of the international normative system, and kept active this illegal and illegitimate practice for approximately ten years. Furthermore, it can be said that the way it is performed also disregards principles of proportionality and distinction, foreseen by the IHL in the Geneva Conventions—which demand combat be fought by “just” means. The use of drones isn't *Just* since it doesn't allow a clear distinction between militants and civilians.<sup>38</sup> The categorization of dead militants is also often based on the unproven speculation of direct involvement of victims in hostile activities.<sup>39</sup>

Despite the continuous sophistication of UAVs, the process of target identification in drones is performed through the construction of “patterns of life” based on the interpretation of heat signatures produced by the vehicle's onboard infrared camera. According to Chamanyou, the examination of patterns of life is made by the fusion between the analysis of social connections of the targets, and geo-spatial analysis—what he defines as a joint cartography of the social connections in a specific time-space.<sup>40</sup> Whenever a potential target is located, an investigation examines the different kinds of information gathered. In the fusion center, this data is associated to the target registered by the UAV's heat signature, creating nodular points that originate a diagram called “matrix of disposal.” Although there are only a few pieces of quantitative information on the targets, it's sufficient to classify a determinate pattern of life as suspect or not. A CIA official, quoted by Chamanyou, states

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<sup>37</sup> Myoshi Masahiro, “Sovereignty and International Law,” *The State of Sovereignty*, Durham University, 2009, available at: [https://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro\\_miyoshi\\_paper.pdf](https://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro_miyoshi_paper.pdf).

<sup>38</sup> Lamber Royackers and Rinie Van Est, “The cubicle warrior: the marionette of digitalized warfare,” *Ethics Inf Technol* 12 (2010): 293.

<sup>39</sup> Human Rights Clinic, *Counting Drone Strike Deaths* (New York: Columbia Law School, 2012), available at: <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/COLUMBIACountingDronesFinalNotEmbargo.pdf>.

<sup>40</sup> Chamanyou, Gregoire, *Théorie du Drone* (Paris: La Fabrique éditions, 2013), 72-73.

that “once we decide that an individual is an enemy, the people who he is related to will also be [enemies].”<sup>41</sup>

This practice of constructing an enemy before identifying him, and incriminating all those related to him, is extremely controversial and insufficient to properly classify those on the ground as enemies.<sup>42</sup> Maybe the most elucidative case of this insufficiency of technical instruments is the drone strike in Datta Khel in March of 2011, when a group of nineteen to thirty civilians was killed after the identification of “suspicious” heat signatures in the area.<sup>43</sup>

The IHL foresees that the distinction between civilian and combatants is necessary in order to avoid purposeful or accidental strikes against civilian populations.<sup>44</sup> The Additional Protocol I of 1977 for the Geneva Conventions of 1949, adds Article 43 (2), which states that members of the Armed Forces will always be considered direct participants in hostilities.<sup>45</sup> Article 51 (3), however, affirms that civilians must always be protected, unless they took direct participation in hostilities.

Even if the IHL allows attacks on civilians directly involved in hostile activities, the situation doesn’t apply to the practice in Pakistan, as there is controversy concerning the term “direct involvement.” According to the International Committee of Red Cross (ICRC), for an action to be considered a direct participation in hostilities, it’s necessary to accomplish the following cumulative characteristics: 1) there must be a principle of aggression that directly results in the act and impact on the life of civilians or on military operations; 2) the aggression needs to be a result of an organized and planned action; 3) and the act must be associated with the support of military force.<sup>46</sup> The ICRC reveals the complexity inherent to understanding the status of those killed in State violence during armed conflicts. As the ICRC poses in case of doubt about the participation of civilians in hostilities—by the inexistence of any evidence that proves it—the civilian protection article must be applied *a priori*.<sup>47</sup>

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<sup>41</sup> Ibid, 76.

<sup>42</sup> Ibid, 74; Alston, "Report of the Special Rapporteur," 08.

<sup>43</sup> Chamanyou, *Théorie du Drone*, 74-75.

<sup>44</sup> Melzer, Nils, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (International Comitee of the Red Cross, 2009), 04.

<sup>45</sup> “Protocolo Adicional às Convenções de Genebra de 12 de Agosto de 1949 relativo à Proteção das Vítimas dos Conflitos Armados Internacionais,” Gabinete de Documentação e Direito Comparado, 1979, available at: <http://www.gddc.pt/direitos-humanos/textos-internacionais-dh/tidhuniversais/dih-prot-I-conv-genebra-12-08-1949.html>.

<sup>46</sup> Melzer, *Interpretative Guidance*, 16.

<sup>47</sup> Ibid, 75-76.

As the report of the United Nations states, the United States, in a very contradictory practice, has refused to present the basis by which they qualify “killed militants” as direct participants in hostilities. They also present the drone operators as capable of performing this distinction on their own.<sup>48</sup> Consider, however, that by some accounts less than 2 percent of the targets in Pakistan in the last ten years were high profile insurgents, while the rest of the “collateral victims” were alleged combatants (as perceived by heat signatures.)<sup>49</sup> Defining insurgents as combatants, without granting them the option of surrendering and of facing a trial, has become a justifiable military practice during both Bush and Obama administrations—a strong point of concern for targeted killing operations. Therefore, in the absence of arguments that proves the existence of an international armed conflict, and lacking information regarding the technical capacity of the UAV’s to distinguish between combatants and civilians, the evidence affirms the illegitimate character of drone deployment.

As O’Connell explained, besides the principle of distinction, there are other principles that need to be considered by the deployment of drones in targeted killing operations, such as the “necessity” and “proportionality” principles.<sup>50</sup> In the first case, it’s fundamental to demonstrate that the use of military force is the only way to reach the military objective; in the case of proportionality, the strikes must have an element of discrimination so as to avoid incidental casualties of civilians.<sup>51</sup> In both cases, considering the amount of deaths caused in Pakistan in the last ten years, and the discussion presented here about legal contradictions, it can be reasonably concluded that the employment of drones in Pakistan exemplifies an unnecessary and disproportionate use of force. In short, the practice of targeted killing using drones fails to respect humanitarian principles that would guarantee legitimacy to the operations.

## Conclusion

The U.S. practice of using drones to perform preemptive strikes as a counterinsurgency strategy has been extremely effective to eliminate high profile targets in Afghanistan and Pakistan. Despite the evident affront to the sovereignty of Pakistan, the argument used by the United States to legitimate these extrajudicial killings is that these are surgically precise strikes with minimal to zero civilian casualties, and no formal intervention by American troops. This argument of timely and accurate operations is historically built on the documents and strategies produced by the DoD and other military institutions in America, and now resides in the practices of recent presidential

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<sup>48</sup> Alston, "Report of the Special Rapporteur," 21.

<sup>49</sup> Out of sight, out of Mind 'Attacks'," September 24, 2014, available at: <http://drones.pitchinteractive.com/>.

<sup>50</sup> O'Connell, "Unlawful Killing with Combat Drones," 24.

<sup>51</sup> Chamanyou, *Théorie du Drone*, 72.

administrations to create a sense of lean, bloodless and, consequently, Just War.<sup>52</sup>

However, the great number of civilian collateral deaths in ten years of operations raises doubts about the legitimacy of the surgical nature of drones and consequently incites investigations on their legality. In the case of Pakistan, this article demonstrates that the use of drones in many ways disregards the principles of Just War. In fact, it's possible to suggest that not only is this practice disruptive to the moral and ethical system of just war, but may be illegal.

Therefore, despite the capabilities of drones to operate in high risk environments and to minimize the casualties of military personnel, there are many doubts concerning the technical capacity of this instrument, such as to conduct operations for long hours, to be a "persistent presence" in surveillance missions, and the legal implications of its use as a platform for other weaponry.<sup>53</sup> Taking these issues into consideration, this article emphasizes the need for a greater enforcement of legal conduct of U.S. military operations. Greater access to information on how drone operations are able to distinguish civilians and combatants, as well as detailed information on actual strikes, would help establish the legitimacy of such targeted killings.<sup>54</sup>

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<sup>52</sup> Der Derian, James, *Critical Practices in International Theory: Selected Essays* (New York: Routledge, 2009), 244-247.

<sup>53</sup> Rogers, Ann and Hill, John, *Unmanned: Drone Warfare and Global Security* (London: Pluto Press, 2014), 50-51; Alisson J. Williams, "Enabling persistent presence? Performing the embodied geopolitics of the Unmanned Aerial Vehicle assemblage," *Political Geography* 30 (2011).

<sup>54</sup> Williams, "The CIA's Covert Predator Drone War in Pakistan," 877.