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국제학석사학위논문

**A Study on the Conformity of the  
U.S. Drone Attacks to the International Law of War:  
A Case of Combat Drones in Pakistan, 2004 to 2013**

미국 드론 공격의 국제법에 대한 상응 연구:  
파키스탄 내 전투 드론의 경우, 2004-2013년

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**A Study on the Conformity of the  
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# Abstract

## **A Study on the Conformity of the U.S. Drone Attacks to the International Law of War: A Case of Combat Drones in Pakistan, 2004 to 2013**

By 2013, more than a decade after the CIA drone campaign began, the most significant changes have involved increased transparency regarding the program. Over time, now the controversies over the morality and legality of the drone attacks have flooded in the studies of international affairs. In this regard, this paper seeks to answer reasons behind critical disparities surrounding the legality of drone strikes under the existing laws of war, based on the English School theory of international relations which defines 'international society' as a group of states which not merely form a combined system, in the sense that the conduct of each is a necessary factor in the evaluations and regulations of the others, but also have established by dialogue and consent common laws and institutions for the exercise of their relations. In that sense, this paper assumes that the lack of specific codified norms regarding the "drones" and the fact that drone strikes have so far been used outside the conventional warfare is what caused these scholarly disparities. In proving the hypotheses, it concludes that drone technology itself cannot be judged as illegal; rather the "irregular" warfare where the drones has been mainly used has made the drones seem to violate the established international law of war. The future of drone warfare waits ahead of us, and it is urged that international society promptly fill out the missing norms regarding the abnormalities of future warfare.

### **Keywords**

International Law of War, Drones (UAVs), War against Terrorism, Pakistan, *Jus ad Bellum*, *Jus in Bello*, Irregular Warfare

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## **I. Introduction**

In the year of 2000, the United States became capable of employing drones for a new groundbreaking purpose: as an unmanned combat vehicle with capacity to launch missiles for targeted killing. The invention of drones for military purposes actually traces back to the Second World War, but their purpose mainly being reconnaissance and were employed in actuality during the 1950s. Drones, or more specifically in this case the Unmanned Aerial Vehicles(UAVs), were notable since then for being able to secure the safety of pilots who used to pawn their lives in maneuvering dangerous aircrafts in battlegrounds. However, the salience of drones started to receive worldwide attention with the emerging American policy of "war against terrorism" after the 911 incident. The United States' once covert usage of drones outside the traditional battlefield now has been significantly revealed, therefore enabling deeper research to be conducted regarding this particular matter. Moreover, the geometrical increase in employment of combat drones in the 21th century raises important questions for the future dynamics of warfare.

## **1.1 Definition of Drones**

Drone by definition refers to a number of different types of machinery which are remotely piloted, in other words, maneuvered without an onboard pilot.<sup>1</sup> These may include vehicles such as automobiles, vessels and aircrafts. Among them, Unmanned Aerial Vehicles(UAVs) are subordinate concept of the drone, where the definition is limited to mean remotely controlled aerial aircrafts. In this regard, the term drone is often used simultaneously with UAVs but usually entails a more comprehensive meaning compared to the latter. In this particular paper, the main subject matter of research is the combat UAVs employed by the United States in attacking Pakistan terrorists since 2004, especially MQ-1 Predator and MQ-9 Reaper, those capable of flying for significant amount of time with armed missiles and firing them to the targeted subjects. However since the paper is not seeking for a study on comprehensive technical investigation on drones or UAVs, both terms will not be technically distinguished from now on specifically in this paper.

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<sup>1</sup> John Kaag and Sarah Kreps. (2014). *Drone Warfare*. Polity Press. p21

## 1.2 Development of Combat Drones and their Distinctive Features

Before drones became available to launce missiles to their targets, they were primarily employed as reconnaissance purposes. Then in November 2001, only few weeks after diving into the Afghanistan campaign, the United States exercised the first ever recorded use of a drone in actual battle.<sup>2</sup> This was when a U.S. Predator killed Mohammed Atef who was an al-Qaeda military commander in Afghanistan. Since then, the total coalition of drone strikes have steadily increased.<sup>3</sup>

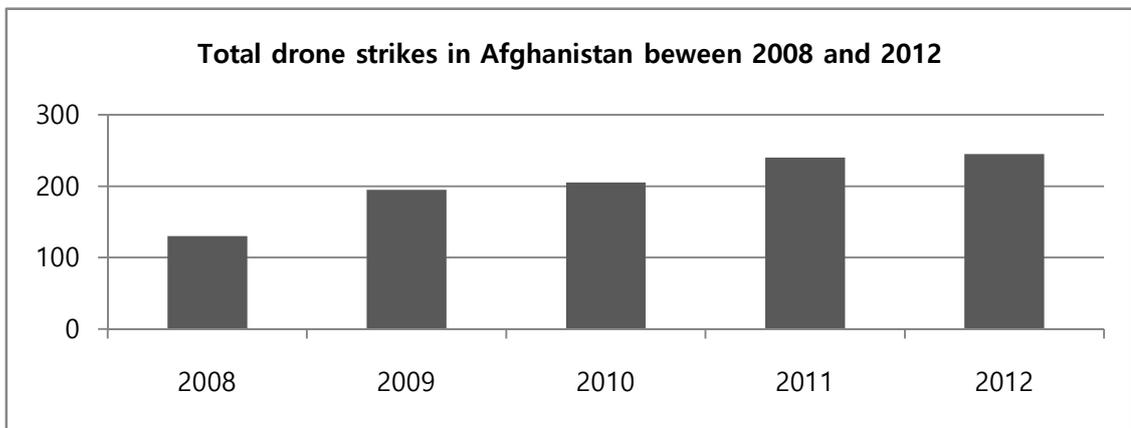


Figure 1

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<sup>2</sup> John Kaag and Sarah Kreps. (2014).

<sup>3</sup> See Figure 1, Bureau of Investigative Journalism in *Drone Warfare*. Polity Press. p27

Drones, except for those employed militarily, are easily accessible by almost everyone nowadays and operate in numerous aspects of people's daily lives, though its limits of usage in legal aspects is yet controversial. Among a number of drones, combat drones employed for military purposes now represent the weaponry of new- phase globalization: high-tech in performance, sleek in appearance, and global in reach.<sup>4</sup> Regarding the some features and merits of the current drones such as Predators and Reapers, they can fly at 50,000 feet above ground which makes them out of sight of their intended targets and are also able to hover overhead for twenty-four hours without blinking.<sup>5</sup> Operating without exhaustion of pilots in manned aircrafts, the missions can be fulfilled more effectively, not to say even more efficiently. More importantly, drones possess both tactical and financial advantages in that they are highly cost-efficient: the unmanned Reaper costs approximately US\$20 million, while the manned F-22 Raptor which represent the fifth-generation stealth fighter has a per unit cost about US\$185 million.<sup>6</sup> Last but definitely not least, perhaps the most distinctive and advantageous feature is that drones are able to assassinate the targets

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<sup>4</sup> A. Ahmed. (2013). *The Thistle and The Drone*. Brookings Institution Press. p2

<sup>5</sup> A. Ahmed. (2013).

<sup>6</sup> John Kaag and Sarah Kreps. (2014).

without pawning the lives of one's own pilots. Thus, this feature is able to secure the absolute safety of one's domestic drone operators and pilots.



**Picture 1**<sup>7</sup>

Yet, there are a couple of disadvantages in employing the drones in the traditional battlefield. First is that combat drones are currently not equipped for an air-to-air combat. The Chief of Air Combat Command General Hostage mentioned that Predators and Reapers are useless in a contested environment.<sup>8</sup> Moreover, drones are highly vulnerable to signal disruption and jamming, which ultimately makes the technology effective as long as it has secure datalinks.

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<sup>7</sup> Photo of MQ-1 Predator attached with hellfire missiles

<sup>8</sup> John Kaag and Sarah Kreps. (2014).

However, the advantages of combat drones clearly outweigh the demerits when it comes to the U.S. policy of employing them as tactical weapons against terrorism. In this regard, increase in the usage of combat drones has come to represent the US counterterrorism efforts currently sought within the Obama administration. In other words, the drone became a symbol of America's war on terror.<sup>9</sup> This serves as one of the core policies indicating the transition from Bush administration's "Global War on Terrorism" to the present's more precise "war with a specific network, al-Qaeda, and its terrorist affiliates who support efforts to attack the United States, its allies, and partners".<sup>10</sup> In pursuit of this policy, drones are receiving much attention as a key apparatus in possibly eradicating terrorist threats the United States may encounter. Thus in the United States, drones have been increasingly viewed as an absolutely vital weapon in fighting terrorism and keeping America safe.<sup>11</sup>

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<sup>9</sup> A. Ahmed. (2013).

<sup>10</sup> P. Bergen and J. Rowland. (2015). "Decade of the Drone". In: P. Bergen & D. Rothenberg. <*Drone Wars*>. Cambridge University Press. p12

<sup>11</sup> A. Ahmed. (2013).

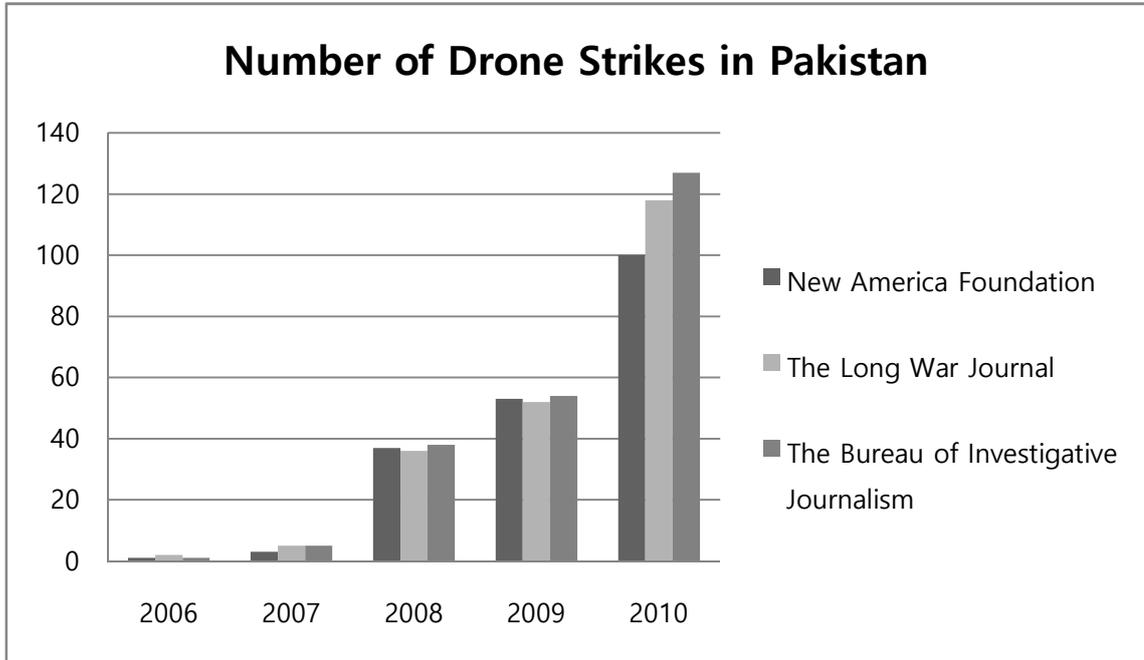
### 1.3 Research Purpose and Significance

Drones, with their enhanced capability to kill targeted groups without risking lives of domestic pilots, will be one of the leading factors in introducing a new security and war paradigm in the future. In fact, Obama administration officials since 2010 have steadily constructed a database for administering life and death: the so-called "disposition matrix" which contains a list of suspects targeted for elimination around the globe.<sup>12</sup> This list indicates the shift of US national security strategy toward more normalized targeted killing, compared to the Clinton administration's antithetical approach on targeted assassinations. Even in 2001, the US ambassador to Israel conveyed that the United States government is very clearly on record as against targeted killings. Now, the US policy on targeted killings has been much more normalized as supported by a number of empirical data, which can be seen in figure 2.<sup>13</sup>

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<sup>12</sup> Ian G.R. Shaw. (2013). Predator Empire: The geopolitics of US drone warfare. *geopolitics*. 18(3). p536-559

<sup>13</sup> See Figure 2, "Drone Strikes: cause or effect". (2015). *The Economist*. Retrieved from: <http://www.economist.com/blogs/graphicdetail/2015/09/daily-chart-drone-attacks-and-terrorism-pakistan>



**Figure 2**

Thus the United States' recent exponential increase in using drones, in this regard, are questioned for its compatibility to the current international rules of law. Despite the gap between the development of societal norms and technological advancement, targeted killing has become one of the key features of the US security policy and there is less doubt it will be for a number of other countries in the near future. This particular research holds significance in that it analyzes both of controversial arguments surrounding the legality of combat drones through the most objective method possible. Taking these controversies into consideration,

the paper seeks to answer the reasons behind the huge gap among the assessments. Then, different from the existing studies which argue that the advanced drone technology itself raises legal and ethical issues, this paper see that development of technology has been witnessed throughout the human history; rather, what gives drones the center of spotlight is the particular situation the drones have been employed in so far which entails non-state actor, territorial sovereignty, and international laws.

#### **1.4 Research Question**

As much as the interesting studies that combat drones provide, it has attracted many prior researches to be done on the conformity of targeted killings by the US combat drones to the international law of war. Some have argued that the United States use of drones in Pakistan appears to have violated the international law.<sup>14</sup> They assert that the U.S. use of combat drones in Pakistan between the given period seems to fall far short of meeting the international law rules governing resort to armed force (*jus ad*

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<sup>14</sup> J. Paust. (2009). "Self-defense Targetings of Non-state Actors and Permissibility of U.S. Use of Drones in Pakistan". The University of Houston Law Center. *Public Law and Legal Theory Series*. 2009-A-36.

*bellum*) and the conduct of armed force (*jus in bello*),<sup>15</sup> criticizing the drone policy as an "extrajudicial killing".<sup>16</sup> Others, on the other hand, evaluate the drone attacks quite differently: the latter would argue that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law including the laws of war.<sup>17</sup>

In recognition of these disparities in scholarly assessment on legality of combat drones, this paper raises a question of the grounds for the existence of significant gap between the debate of combat drones' compatibility to the international law of war, pondering upon the reason for the overheated attention to this new type of weaponry. The core question which the paper seeks to answer is the reason for the parallel controversy in assessing the legality of drones which seems quite explicit at the moment. In pursuit of answering the research question, attacks on Pakistan from 2004 to 2013 will be mainly designated as a research case among numerous

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<sup>15</sup> M. O'Connell. (2010). "Unlawful Killing with Combat Drones: A case study of Pakistan, 2004-2009". *Notre Dame Law School Legal Studies Research Paper*. No.09-43

<sup>16</sup> T. McKelvey. (2015). "Defending the Drones: Harold Koh and the evolution of US policy". In: P. Bergen & D. Rothenberg. <*Drone Wars*>. Cambridge University Press. p198

<sup>17</sup> Harold Koh. Keynote speech at the annual meeting of the American Society of International Law. "The Obama Administration and International Law". Mar 25, 2010

other drone attacks exerted by the United States. The reason for this selection of the case is because Pakistan is one of the assaulted places that the United States is not officially in war with, thereby posing a far more crucial case in explaining how war paradigm has been changing especially regarding the interventionism and sovereignty issue with non-state actors. Moreover, it is also one of the places where the most drone attacks were conducted: by December 2013, up to 322 strikes in Pakistan were authorized under President Obama, which is six times more than the number carried out during President Bush's total eight years in office.<sup>18</sup>

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<sup>18</sup> P. Bergen and J. Rowland. (2015).

## **II. Research Design**

### **2.1 Hypothesis**

Regarding the main research question raised above, this paper poses two main hypotheses: the first is that the current studies on conformity of drones attacks to international law of war could not have possibly been properly evaluated for the lack of existing established norms specifically on targeted killings via employment of UAVs. Secondly, the paper also hypothesizes that even if there exists such specific agreements about drones, this gap is not to be narrowed because of the controversy regarding targeted killings on non-state actors in a location where an attacker is not officially in war with and for the fact that most of drone programs are being operated under Central Intelligence Agency (CIA) of the United States, not the government itself. To elaborate, one of the main arguments from the prior research that shows illegality of drone attacks in Pakistan is that Pakistan is not a state officially in war with the United States, therefore targeted killings on non-state terrorist groups in the land of Pakistan cannot be justified under the US domestic law on self-defense. This is because still

within the international law, targeted killings by drones outside of conventional wars and armed conflicts remain severely controversial.<sup>19</sup> Moreover, regarding the CIA as an unlawful combatant raises another critical question of the legality of the whole drone operations. Thus this paper attempts to prove that employment of combat drones itself when it comes to the "conventional" warfare does not violate the international law and agreements of war, but only now it is being criticized under the basis of normative factors in international law for its main principal of operators and targets which are both regarded as unlawful combatants.

## **2.2 Research Methodology and Outline**

In searching for the answer of the hypothesis, this paper takes the form of qualitative text analytical research mainly taking the English School's ideas of the international relations theory by analyzing pattern of the U.S. drone attacks in Pakistan since its first assault in 2004. Then regarding the issue of compliance to international law of war, International

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<sup>19</sup> W. Banks. (2015). "Regulating Drones: Are targeted killings by drones outside traditional battlefields legal?". In: P. Bergen & D. Rothenberg. <*Drone Wars*>. Cambridge University Press. p142

Humanitarian Law(IHL) and related Articles of the UN Charter will be studied, for those are directly relevant to the matter of targeted killing in warfare. In this regard, the research is to be done respectively based on two main concepts: *jus ad bellum* and *jus in bello*. Both being the wartime regulating laws from the IHL, the former will be studied in parallel to how the U.S. drone attacks could have been justified and carried on in the first place. The latter, *jus in bello*, will serve as a criterion for the what unlawful harms the drones brought about in the targeted areas such as civilian casualties and collateral damages. Then, the United States' domestic laws and policies regarding "war against terrorism" will be researched for the US justification on the employment of combat drones against Al-Qaeda groups in Pakistan.

Based on the prior studies, further research on possibly more objective application to the international law with the impact of drones and the existence of international agreements related to Unmanned Aerial Vehicles as tactical weapons will be done in endeavor to answer the first hypothesis. Moreover, specific analysis on the legality of combat drones in terms of various aspects without consideration of non-state actors as targets is also to be done. This particular analysis is likely to provide the answer

whether the sole factor of drone attacks on non-state actors has resulted in the gap among many other former legal researches on this matter.

### **III. Literature Review**

#### **3.1 Drones and the International Law of War**

**The necessity and pretext of examining international laws:**

**International Relations Theory of English School**

Shifting from the Bush administration to the Obama administration, the once expansive approach toward the 'global war against terror' has slightly changed in its rhetoric: the United States is not engaged in a global war on terror anymore but rather, more specifically, in a war against al-Qaeda, the Taliban, and associated forces.<sup>20</sup> Yet, by conducting drone attacks in various overseas regions such as Pakistan and Yemen, the Obama administration has followed the former administration view of the global battlefields. Therefore, it is believed that international laws of war is able to be applied to the use of drone strikes as it can be observed that the United States is engaged in an armed conflict.

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<sup>20</sup> M. Sterio. (2012). The United States' use of drones in the war on terror: The (il)legality of targeted killings under international law. *Case Western Reserve Journal of International Law*. 45.

This paper takes into consideration that since the middle of the twentieth century, international society witnessed a tendency where individuals actors, once considered as agents in terms of International Relations theory, are now held personally accountable for their actions. Targeting and killing the top terrorist groups via drone attacks is the most obvious and recent example. Unfortunately, a number of the international relations theories are far more better in explaining stability rather than the shifting paradigm. Therefore, with the developments of the actual and potential use of force challenges international societies norms, principles, and its collective consensus on laws, this paper seeks to carry out the research based on the English School which defines 'international society' as: A group of states (or to be more general, a group of independent political communities) which do not merely form a system, regarding the sense that the behavior of each and everyone is necessary factor in the evaluation of the others, but also have formed by dialogue and common regulations, rules, and institutions for the conduct of their relations.<sup>21</sup>

Moreover, the English School tremendously focus on normative factors such as values and international law, quite differently from its

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<sup>21</sup> J. Troy. (2014).

legacy of the Realist. It also centers on behavioral norms, which are rules of conduct as they are understood by the players. One can in the end identify an international society once regimes are institutionalized and consent on rule-making procedures can be observed.<sup>22</sup>

The mere policy efficacy of drone strikes does not make them legal. For them to conform to the established international agreements, they must be supported by law, not just simply sensed by the absence of clear legal violations, but through positive legal authority.<sup>23</sup> In this sense, international law, which is known to shape the international society by setting the guidelines for the actors to conform to, is necessary for analysis in assessing the recent novel forms of warfare via drone attacks. And when it comes to the scope of international law, the definition of terms such as "global war on terror" and "war against al-Qaeda, the Taliban, and associated forces" is critical, since this determines the applicable legal framework with the drone strikes. This paper takes into account that both terminologies suggest the global nature of the armed conflict between the

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<sup>22</sup> J. Troy. (2014).

<sup>23</sup> W. Banks. (2015).

United States and terrorist groups. Thus, this supports the need for a thorough examination on international laws regarding the legality of the U.S. drone attacks.

Mary O'Connell describes the role of international law, especially in the aspect of use of force in the international community:

"International law, like all law, provides an alternative to force and violence in human affairs. States may use force in self-defense or with the authorization of the United Nations Security Council. States are restricted from using military force outside these situations. They may resort to law enforcement measures in some cases. International humanitarian law further restricts the use of military force; all uses of force are also subject to human rights principles".<sup>24</sup>

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<sup>24</sup> M. O'Connell. (2010).

The particular international laws respecting when states may resort to military force, especially regarding the operation of targeted killings, are written down in the United Nations Charter, in rules of customary international law, and in general principles collectively known as the "*jus ad bellum*". The Charter of United Nations Article 2 and 51 protect national borders and sovereign prerogatives regarding the use of force, while preserving the states' rights of self-defense.

Perhaps the most important rule on resort to force within international law is the Article 2(4) of the UN Charter that prohibits use of force.<sup>25</sup> It is interpreted as a means of prohibition on resort of armed force above a certain minimal level such as firing a single shot across an agreed international boundary.<sup>26</sup> However, under exceptional situations, Article 2(4) may be defied: Chapter VII from Article 51 provides that states may respond in self-defense if and when an armed attack occurs until the Security Council acts. The right of states to employ force in self-defense has long been understood to be a core element of customary international

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<sup>25</sup> Article 2(4): All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. From <The United Nations Charter>

<sup>26</sup> M. O'Connell. (2010).

law. Adding on to a basis of the Charter, states using force must show that force is necessary to achieve a defensive purpose and also demonstrate that the method of employing force will not result in disproportionate loss of life and destruction compared to the value of the objective.<sup>27</sup>

Based on the lawful standards in use of force, in this section, the foundation of studies on the legality of using combat drones will be examined more concretely under these existing agreements in the international community. The following sections will be divided into two respective norms of conducting the war: *jus ad bellum* and *jus in bello*. In seeking for the correlation with the drone strikes with these principles, international scholarly judgments, firstly the restrictionists view who narrowly delimit the conditions under which states can employ force legally, will be studied. Counter-restrictionists' arguments, which tend to have a more liberal reading of these international principles, is also to be gone over in the next section of the United States' domestic law within these international norms after the following sections.

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<sup>27</sup> M. O'Connell. (2010).

### 3.2 *Jus ad Bellum*

A number of scholars attribute the technology itself to the emergence of debate about whether the drones conform to the international law. They argue that drones equipped with precision munitions raise questions about the principles of warfare.<sup>28</sup> In this sense, *Jus ad Bellum* refers to the law which regulates how certain actors may engage in a war. These requirements are quite normative, and in the context of drone attacks, they focus largely on whether the host state has consented to the incursion, as well as issues of military proportionality and necessity.<sup>29</sup>

As mentioned above, the UN Charter Article 2 and 51 provides the legal framework for the use of force, the larger picture when assessing the drone operations. The United States mainly relies on Article 51, the self-defense clause, to justify its drone strikes. However, one cannot miss to read this alongside with the parallel provision in Article 2, which hinders all member states to "refrain ... from the threat or use of force against the territorial integrity or political independence of any state".<sup>30</sup> The keen judgment between these two aligned with other international humanitarian

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<sup>28</sup> John Kaag and Sarah Kreps. (2014).

<sup>29</sup> W. Banks. (2015).

<sup>30</sup> W. Banks. (2015).

treaties and principles is necessary in studying the legality of the U.S. drone strikes.

In this context, not only the Article 51 but also International Humanitarian Law (IHL) highly limits the exercise of self-defense against non-state actors. Whether the Article 51 understandings of necessity, proportionality, and distinction are substantively different than their IHL contents is quite opaque, but the evaluations under IHL could certainly prohibit the drone strikes in terms of international law, as they do any other use of force, in an armed conflict.<sup>31</sup>

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<sup>31</sup> W. Banks. (2015).

### ***3.3 Jus in Bello***

*Jus in Bello*, closely linked with *jus ad bellum*, exists in order to regulate the military exercise of parties which are engaged in an armed conflict; it is established under the pursuit of minimizing sufferings and unnecessary casualties during battles, significantly by assisting and protecting all virtual and potential victims of the armed conflict to the greatest extent possible.<sup>32</sup> Its guidelines seek for a balance between humanitarian concerns and the military requirements of the states. It is mainly comprised of two major principles in conducting warfare: principle of distinction and proportionality. The origins of both principles derive from the just war tradition, which offered both ethical and philosophical guidelines, or indicators for the goals and means of war.<sup>33</sup> States have begun to codify the war treaties, notions, and protocols beginning from the nineteenth century, which now has resulted in modern international humanitarian law that seeks to protect non-combatants from the impacts of war.

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<sup>32</sup> International Committee of the Red Cross. (2015). "What are jus ad bellum and jus in bello?". Retrieved from: <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>

<sup>33</sup> J. Gardam. (1993). "Proportionality and force in international law". *American Journal of International Law*. 87(3): p391-413

Therefore, provided that the aspect of *jus in bellum* be accepted and the Pakistanis government keeps on to be engaged in internal armed conflicts on its territory and requests the U.S. assistance, the United States must still comply with the strict rules on *how* the drone is operated. As mentioned right above, *jus in bello* concerns with the principle of distinction and proportionality that sets norms on how an armed conflict be conducted; studies on both principles in regards to the drone attacks will be presented in this section.

#### *Distinction*

The principle of distinction forbids immediate attacks against the innocent civilians. The Article 48 of the Protocol Additional to the Geneva Convention (AP I, 1997) is written that,

"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only

against military objectives".<sup>34</sup>

To engage in a war by means of lawful conduct with this particular principle, the attacker must first make a distinction between those who are considered as directly involved in hostilities and those who take no active or direct part in the conflicts.

Regarding the definition of combatant which needs to be distinguished, Article 4 of the Third Geneva Convention offers the following conditions: individuals (1) that of being commanded and ruled under a person responsible for his subordinates, (2) that of having a fixed and certain distinctive emblem recognizable from a significant distance, (3) that of carrying arms openly; and (4) that of conducting their operations in accordance with the laws and customs of war.<sup>35</sup> In this context of provisions, Article 50 from the Additional Protocol would define a civilian as "any person who does not belong to one of the categories of persons referred to in Article 4 A of the Third Convention".

In many other conventional wars such as the World War II, the

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<sup>34</sup> John Kaag and Sarah Kreps. (2014).

<sup>35</sup> International Committee of the Red Cross, "Convention (III) Relative to the Treatment of Prisoners of War". *International Humanitarian Law - Treaties and Documents*. Retrieved from: [www.icrc.org/](http://www.icrc.org/)

application of this was relatively straightforward; the soldiers wore uniforms and combatants fought for states which were party to international law. However, with the emergence of non-state terrorist groups as new type of battlefield enemies, the distinction line between lawful combatants and those who are not became much more difficult for verification, and most decisions have become highly subjective and arbitrary.

### *Proportionality*

Closely linked with the principle of distinction above, the principle of proportionality suggests that the anticipated military gain must exceed the anticipated damage to civilians and their property. Article 51(5)(b) of AP I proscribes "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".<sup>36</sup> Based on this principle, the incidental or unintentional killing or damaging of civilians and civilian objects is permitted; however, this only applies to the extent that harm to civilians must not exceed the anticipated military advantage - that is,

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<sup>36</sup> Additional Protocol I, 1997. In John Kaag and Sarah Kreps. (2014).

disproportionate harm should be avoided under the international agreements.

Article 8(2)(b)(iv) of the 1998 Rome Statute clarifies the 1997 AP I principle and requires an assessment of the following: (a) the anticipated civilian damage or injury, (b) the anticipated military advantage, and (c) whether (a) was "clearly excessive" in relation to (b).<sup>37</sup> The issue here is that while calculus based on this provisions may sound straightforward, the determination can be quite subjective. A soldier determines military advantage "based on his or her experience and evaluation of the target in the context of the entire campaign, and the information reasonably available at the relevant time"<sup>38</sup>

As the theoretical framework to engage international law in evaluating the drone strikes has been dealt with, the following analyses of this paper are to cover the general patterns of the U.S. drone programs enforcing targeted killings. Then, the aspects on the disparities among scholarly assessment on the legality of the drone attacks will be seen, which would ultimately lead to the deeper studies of the main research question of

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<sup>37</sup> John Kaag and Sarah Kreps. (2014).

<sup>38</sup> C. Jenks. (2010). "Law from above: Unmanned aerial systems, use of force, and the law of armed conflict". *North Dakota Law Review*. 85: p649-671

the paper: why and how these disparities among scholars are witnessed, and how the prospect of combat drones would come upon the international community in the future.

## **IV. Analytical Framework**

### **4.1 The 'Global War on Terror' and Targeted Killings**

Targeted killing is perhaps the most coercive tactic employed in the war of terrorism by the United States: unlike detention or interrogation, it is not to capture the individual, monitor his or her actions, or extract information.<sup>39</sup> Rather, it is an action carried out in mostly if not solely unilateral method which is specifically designed to eliminate the targeted terrorists. This posed a serious controversy when it comes to the legality of murdering individuals of other sovereign states within the framework of international norms, especially regarding those outside the traditional battlefield which makes it difficult to identify them as official enemies of a certain state. Therefore, more than any other counterterrorism policies of the United States, targeted killings raise complexity with classifying these operations either as part of a war or as a law enforcement operation,<sup>40</sup> posing far more difficulties in legal justifications of one's actions.

Surprisingly, there was a time when targeted killings were

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<sup>39</sup> G. Blum and P. Heymann. (2010). "Law and policy of targeted killing". In: G. Blum and P. Heymann. <*Laws, Outlaws, and Terrorists: Lessons from the war on terrorism*>. MIT Press. p.147

<sup>40</sup> G. Blum and P. Heymann. (2010).

antithetical to the American policy of war.<sup>41</sup> The legality of deciding the scope of potential targets and assassinating them was fiercely debated among the U.S. officials during the very early 2000s. Accepting the possibility of grayish judgments regarding the established legal aspects of targeted killings overseas, decisions to employ drones as means of assassinating certain individuals were highly debated under the sovereignty issues and human rights problems.

However, the post-2001 "Global War on Terror" began its life as a war which maintains geographical amorphous state, now contains battlegrounds and "black sites" that marked a new stages and cases of American exceptionalism.<sup>42</sup> As the time passed, the borders of "global war against terror" did not scale down, but rather they expanded. Now, both apparent and in shadow, Pakistan, Somalia and Yemen has become targets in a so-called low-level battles which is officially branded under the Obama administration as an overseas contingency operation. For instance in 2010, the CIA has drastically increased its bombing campaigns in Pakistan; the strikes were part of an effort by military and intelligence operatives in an

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<sup>41</sup> Ian G.R. Shaw. (2013).

<sup>42</sup> Ian G.R. Shaw. (2013).

effort to cripple the Taliban in a stronghold being used to plan attacks against the U.S. troops those in Afghanistan.<sup>43</sup> Now in this sense, Obama administration's even more concrete and advanced missions to root out terrorist groups and individuals via one-way attacks outside the conventional battlefields have brought about the question of legal judgments over targeted killings within the international society.

Recognizing this gradual expansion in the violence of the state in areas which are far removed from the officially declared arenas of traditional warfare, Derek Gregory describes an "everywhere war" that is defined by highly asymmetrical and paramilitary battles in the current borders of international society.<sup>44</sup> In the framework of these newly emerging battle systems, the drones now have become key medium in global warfare mainly for the United States, along with a number of other countries such as the United Kingdom and China.

The usage of drones as a missile launcher for overseas targeted assassinations has been fairly recent but it is indeed a significant and shocking development compared to the traditional warfare. This is the

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<sup>43</sup> M. Mazzetti and E. Schmitt. (2010). "C.I.A. steps up drone attacks on Taliban in Pakistan". *The New York Times*. Retrieved from: [http://www.nytimes.com/2010/09/28/world/asia/28drones.html?\\_r=0](http://www.nytimes.com/2010/09/28/world/asia/28drones.html?_r=0)

<sup>44</sup> Ian G.R. Shaw. (2013).

reason why studies regarding the legality of combat drones are present, although it is not quite extensive and may lack concrete agreements up to this point. The scholarly disparities concerning these research will be discussed in the coming sections, followed by a study on the existence of international regulations on targeted killings by drones.

## **4.2 Scholarly Disparities between the Legality of Combat**

### **Drones**

#### **4.2.1 Contrary views on the interpretation of *jus ad bellum***

##### **Restrictionist View**

The restrictionist view, who as mentioned earlier narrows the conditions of states to use force, opposes the use of drones for targeting suspected terrorists outside the "hot" battlefields mainly on three grounds.<sup>45</sup>

The following arguments are based on the overall *jus ad bellum* principles, in which the very foundations of drone program's legality is concerned.

First of all, the recourse to force must respond to state-on-state

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<sup>45</sup> John Kaag and Sarah Kreps. (2014). *Drone Warfare*. Polity Press. p84

attack according to the international law, whereas the non-state actors perpetrate the terrorist attacks in the matter of concern in this paper. O'Connell argued that "the International Court of Justice (ICJ) has said that the armed assault must be attributable to a state in which the notion self-defense is applicable on that state's lawful territory to be legal".<sup>46</sup> In this context, the main targets, who reside in locations like Pakistan, Yemen, and Somalia - mainly the Pakistan for the sake of this particular paper - are part of terrorist groups, not states. This signifies that use of force against those actors would be considered as illegal under the current international law.

Second, even under the condition where terrorist groups *were* in fact sponsored and supported by the states, the United States must be in a continuous armed conflict with those states in order for the use of drones as targeted killings to be legal.<sup>47</sup> United States is currently not engaged in a "hot" war under the armed conflict with Pakistan. This sole fact would rule out the legality of drone attacks conducted against the people in this particular country.

Third, according to the restrictionist standpoint, the notion of

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<sup>46</sup> M. O'Connell. (2010-11). "Remarks: The resort to drones under international law". *Denver Journal of International Law*. 585(39): 585-600

<sup>47</sup> John Kaag and Sarah Kreps. (2014).

"anticipatory self-defense" does not apply in the case of drone strikes. This terminology can be seen under the administration's leaked White Paper regarding the decisions for targeting, which emphasize the "imminent" threat of violent attack against the United States that may justify the U.S. policy of chasing after those terrorists within the region of non-battlefield. Anticipatory means that an impending attack must be "instant, overwhelming, and leaving no choice of means, and no moment of deliberation".<sup>48</sup> The United States government constantly suggests that terrorist groups which they seeks to target is a continuing, imminent threat to the American people, it has not defined "imminent" and this is why many international scholars of law question the certain targets' legality of falling under the definition of imminent threat toward the territory of the United States. This question is derived from the fact that many of the targets that have been attacked and killed outside the combat zones are lower-level foot soldiers who are neither presently aggressing nor temporally about to aggress<sup>49</sup>; only the two percent among them were the "high-level targets"<sup>50</sup>

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<sup>48</sup> John Kaag and Sarah Kreps. (2014).

<sup>49</sup> R. Christopher. (2012). "Imminence in justified targeted killing", in C. Finkelstein, et al. *Targeted Killing*. Oxford University Press. p253-284

<sup>50</sup> International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law. (2012). "Living under drones: Death, injury, and trauma to civilians from US drone practices in

Moreover, in order to meet the self-defense standard, it is responsible for the government to demonstrate how these individuals are culpable to be killed; up to this date, however, the administration has offered only the assertions that drone attacks are consistent with the UN Charter's provisions for self-defense.<sup>51</sup>

Mainly within the restrictionist view, the most reasonable conclusion which can be drawn under the *jus ad bellum* is that there is no legal rights to pursue drone operations in Pakistan.<sup>52</sup> The main question under the principle of *jus ad bellum* was whether the United States is authorized to employ armed attacked against the targets. The prior research in this particular section can argue that consequently, drone operations intended for targeted killings is largely regarded as illegal in Pakistan, as Pakistan is not held responsible for an armed attack from the United States and there is no lawful right to conduct an armed attack via combat droens under the law of self-defense.

But for now, the following section turns to the opposite camps of legal assessment, the counter-restrictionist, to which the Unites States seeks

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Pakistan". Stanford/NYU

<sup>51</sup> John Kaag and Sarah Kreps. (2014).

<sup>52</sup> M. O'Connell. (2010).

to justify the drone operations under their own law within these international norms, as both controversial schools of interpreting the drone attacks need to be studied for the objectiveness of this research paper.

### **Counter-restrictionist View: Drone Program under The U.S. Constitution**

The counter-restrictionist position maintains that drone attacks are in fact consistent with nonintervention principles and as such, the United States is justified in engaging in armed conflict with those actors suspected of terrorist affiliates who can possibly threaten the national security of and within the U.S. territory.<sup>53</sup> As further testament to the compliance pull of these norms on the use of force, the United States which has been the major carrier of overseas drone operations has shown endeavors in great lengths to defend its drone attacks as compatible with the existing international laws. In 2009, Leon Panetta, the Director of the U.S. Central Intelligence Agency (CIA), directly responded to the growing concerns and upbraiding of America's employment of combat drones: geographical increase of drone attacks in the border area between Afghanistan and Pakistan has resulted in

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<sup>53</sup> John Kaag and Sarah Kreps. (2014).

the casualties of hundreds of innocent and unintended victims, including children.<sup>54</sup> Panetta endeavored to make a counter-argument against the criticism, asserting that drones are "precise" and cause only "limited collateral damage". Further noted, he said that "it's (the drones) the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership".<sup>55</sup>

Under the Constitution, President of the United States may order targeted killing to defend the territory in wartime. The President's authority as commander in chief to "repel sudden attacks" has traditionally been interpreted as having a real-time dimension, a sort of imminence requirement that may be analogous to the provisions of self-defense within the international law.<sup>56</sup> The Obama administration has claimed that combat drones may be used in states that currently attain terrorist enemies and are unable or unwilling to seize control of the territory where such enemies are currently harboring.<sup>57</sup> Under this rationale, states such as England and France may be excluded from the localization and definition of the battlefields mentioned above, but would be able to justify the employment

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<sup>54</sup> M. O'Connell. (2010).

<sup>55</sup> M. O'Connell. (2010).

<sup>56</sup> W. Banks. (2015).

<sup>57</sup> M. Sterio. (2012).

of drones in places such as Pakistan and Yemen, where remote terrorists are difficult to control effectively by the respective governments.

Adding on to the interpretations of *jus ad bellum* under the counter-restrictionists view with more liberal understanding of the established international laws, drone strikes are in fact consistent with non-intervention principles of UN Charter Article 2(4). Harold Koh assures that the United States is involved in an ongoing armed conflict with al-Qaeda and the Taliban that started with the 911 attacks, thus justifying the U.S. using force against individuals suspected of terrorist affiliation regardless of their location.<sup>58</sup> He stated that "U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war".<sup>59</sup>

Furthermore, Koh additionally argues that such targeted killings are legally sanctioned as acts of anticipatory self-defense intended to prevent future attacks by militants. As a matter of fact, legal scholars such as Robert Chesney point to a "continuous threat model" where "a terrorist attack triggered Article 51 and ... the resulting right to use force remains in

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<sup>58</sup> Harold Koh Speech (Mar-25-2010) "The Obama Administration and International Law". In: John Kaag and Sarah Kreps. (2014). *Drone Warfare*. Polity Press. p83

<sup>59</sup> Harold Koh Speech (Mar-25-2010).

effect over time insofar as the perpetrating organization intends to strike again".<sup>60</sup> Koh counters the argument of unlawful extrajudicial killings by asserting that the United States is constantly engaged in an armed conflict, therefore it is not required to provide targets with legal process before the state may use lethal force.

More recently, the Obama administration's revealed White Paper on targeting decisions reaffirmed the legality under international law of targeting any senior leader of al-Qaeda or associated forces "who poses an *imminent* threat of violent attack against the United States". Throughout the paper, the administration brings up the principle of anticipatory self-defense majorly against a so-called imminent threat as justification for targeting the suspected terrorists outside the traditional "hot" battlefields such as Afghanistan and Pakistan.<sup>61</sup> Although certain scholars such as the restrictionist above brought up the terminology issue with the definition and scope of the "imminent" factor, counter-restrictionist view on the threat tends to be aligned with this urgency of threat from the terrorist actors.

However, the U.S. government does not rest its case here but rather

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<sup>60</sup> R. Chesney. (2014). "Postwar". *Harvard National Security Journal*. forthcoming

<sup>61</sup> John Kaag and Sarah Kreps. (2014).

also relies deeply on the executive authority granted under the Authorization for Use of Military Force (AUMF). By the extent of the government's justification under the AUMF authorities, "The President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States".<sup>62</sup> Under this basis of the AUMF, it offers not temporal or spatial limits on the executive's ability to target suspected terrorists who "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States".

More specifically, for the case of lawfulness of an operator in drone campaign, presidential directives and eventual legislation established the country's first publicly acknowledged peacetime intelligence functions during the time when Cold War began to shape the security concerns. The National Security Act of 1947 authorized the newly created CIA to "perform such other functions and duties related to intelligence affecting the national security as the President or National Security Council may direct".<sup>63</sup> The performances over time have come to include the targeted

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<sup>62</sup> The Public Law 107-40, Authorization for Use of Military Force. Retrieved from: <https://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>

<sup>63</sup> W. Banks. (2015).

killings via drone attacks against those believed to threaten the U.S. policy and national security.

#### **4.2.2 Drone and the principle of distinction and proportionality**

The clear disparities when it comes to the legality of drones within the principles of *jus ad bellum* has been dealt with. However, it is necessary to also look at more concrete legal basis on *how* the drones may be employed if and when the programs can be officially authorized. Beforehand, it should first be notified that the United States in fact has not ratified the AP I of the Geneva Convention, but the principles of proportionality and distinction embedded in it are generally considered as a customary law.<sup>64</sup>

Under international law, as covered in the previous sections, civilians may not be intentionally targeted. Yet when it comes to the issue with *distinction*, the meanings of combatant status and military objectives

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<sup>64</sup> J. Henckaerts and L. Doswald-Beck. (2009). *Customary International Humanitarian Law*. ICRC and Cambridge University Press. Vol I. p51

are largely subject to arbitrary interpretation. This ambiguity can be a good source for the states to ratify provisions whose compliance is more difficult to verify.<sup>65</sup> Moreover this provides flexibility which enables the actors to more easily argue that they are in fact in compliance with the international law.

Technology, namely the drone's ability of signature strikes, may differentiate between combatants and innocents during war; however in asymmetrical settings, such distinctions are fraught with ambiguity and cannot be satisfactorily answered by sophisticated technology itself but rather by serious legal and ethical discussions.

Still, when applying this principle to the U.S. drone attacks in Pakistan, it should be reminded that persons with a right to take direct part in hostilities are considered as lawful combatants, while those without a right to do so are unlawful ones.<sup>66</sup> Here, having a right to participate in hostilities means that the person may not be charged with a crime for using force. In this regard, the fact that CIA has carried out the majority of drone

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<sup>65</sup> I. Claude Jr.. "Collective legitimization as a political function of the United Nations". *International Organizations* 20:p367-379a

<sup>66</sup> M. O'Connell. (2010).

strikes<sup>67</sup> poses a serious legal question in drawing a line between legal and illegal combatant: CIA operatives, just like the militants challenging authority in Pakistan, do not have right to participate in hostilities and are therefore unlawful combatants.<sup>68</sup>

In the case of drone attacks in Pakistan, there is a question of identification issue concerning targets the United States intends to kill with missile via drones. This is highly different from the situation such as the invasion of Iraq where the U.S. forces met large, organized units of the Iraqi Army outside Baghdad, where using drones to launch missiles might in fact have protected civilians from bombs dropped from airplanes which fly at high altitudes.<sup>69</sup> On the other hand, a question whether drone's targeting is precise enough and whether the intended targets are lawful enemies may clash with the rule of distinction in Pakistan, mainly in the region of Waziristan. The suspected militants tend to wear normal, civilian clothes, unlike those in the conventional warfare. According to the ICRC Interpretative Guidance on Direct Participation in Hostilities,<sup>70</sup> the U.S. is

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<sup>67</sup> M. Mazzetti and E. Schmitt. (2010).

<sup>68</sup> M. O'Connell. (2010).

<sup>69</sup> M. O'Connell. (2010).

<sup>70</sup> "In case of doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not amount to direct participation in

obligated to take all feasible precautions in the choice of means and methods of attack with a view to avoiding. The problem is that very limited information is available as to whether it takes any means of precautions when operating the drone strikes.

Moreover, in decision for targets to be assassinated, there is an argument of the dehumanization via signature strikes which is a tactic to kill suspicious persons due "patterns of behavior".<sup>71</sup> Setting aside the top-level terrorists, most names on targeting lists have been determined via subjective judgments on their behavioral patterns, which highly lacks in detail and transparency. This also poses a question of the distinction problems of which extent of behaviors should be regarded as an act of hostilities or not.

In addition to the principle of distinction, the compatibility of the U.S. drone operations to the standards of *proportionality* has been lengthily debated by members of the policy and legal communities. Unfortunately, in scholarly discussions of proportionality, often "disproportionate violence is

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hostilities. The presumption of civilian protection applies, *a fortiori*, in case of doubt as to whether a person has become a member of an organized armed group belonging to a party to the conflict"

<sup>71</sup> J. Troy. (2014).

simply violence they do not like, or it is violence committed by people they do not like".<sup>72</sup> Perhaps a more statistical approach on the matter of evaluating proportionality is to compare pre-operational estimates of civilian deaths with the total killed by the drone attacks. Another problem is that those estimates differ dramatically from institution to institutions.

Between 2004 and 2013, the drone program in Pakistan killed 58 militant leaders whose deaths have been confirmed by at least two credible news sources.<sup>73</sup> This may signify a critical hit to the militant chain of command, but the cruel fact is this number only accounts for 2 percent of all drone-related casualties in the region. According to O'Connell, fifty civilians killed for one suspected combatant killed is a textbook example of a violation of the proportionality principle, which may suggest the trouble in efficacy of drone programs. Meanwhile, it should also be noted that a number of sources are yet disclosed and faulty, which still poses a challenge in assessing the proportionate impacts of drone strikes.

Also, regarding the aftershock of the drone program, it is many times impossible to exactly evaluate what kind or how many terror attacks

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<sup>72</sup> John Kaag and Sarah Kreps. (2014).

<sup>73</sup> P. Bergen and J. Rowland. (2015).

would have been prevented with one or another drone strike.<sup>74</sup> Not only is the program itself highly covert, but also the subjective and respective judgments make the assessment on the drone campaign much more complex. Often the drone strikes are known to have stimulated the targeted groups, more than having them rooted out, who are fully capable of threaten a backfire against the United States territory. However, the decline of U.S. drone strikes since 2011 may, on the other hand, suggest the possible decline in the number of targets in the tribal regions, after eradicating key militant leaders of the group.

#### **4.2.3 Additional principles: principle of necessity and humanity**

The principle of *necessity*, tightly connected to proportionality principles, refers to the obligation that force is used only if necessary to accomplish a reasonable military objectives. Some argue that drone attacks in Pakistan are in fact fueling interest in fighting against the United States rather than oppressing it, making it difficult for the drone program to be justified under the principle of necessity.<sup>75</sup> Even though fewer civilians

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<sup>74</sup> J. Troy. (2014).

<sup>75</sup> M. O'Connell. (2010).

have been killed by drone strikes compared to the original massive bombing from air-fighters, the drone program remains deeply unpopular among the Pakistanis public.<sup>76</sup> Still, no concrete evidence has been provided yet which could demonstrate the effectiveness of drone strikes against the al-Qaeda, Taliban terrorist groups in Pakistan.

Last but not least, the principle of *humanity* supports decisions in favor of sparing life and avoiding destruction in close cases under either the principles of necessity or proportionality. In conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.<sup>77</sup> It is practically impossible to determine the precise degree of force to be used within the parameters of IHL principles, but it is commonly understood that no casualties and damages should exceed those in need to achieve the military goals.

All these principles are interconnected to each other in the sense of

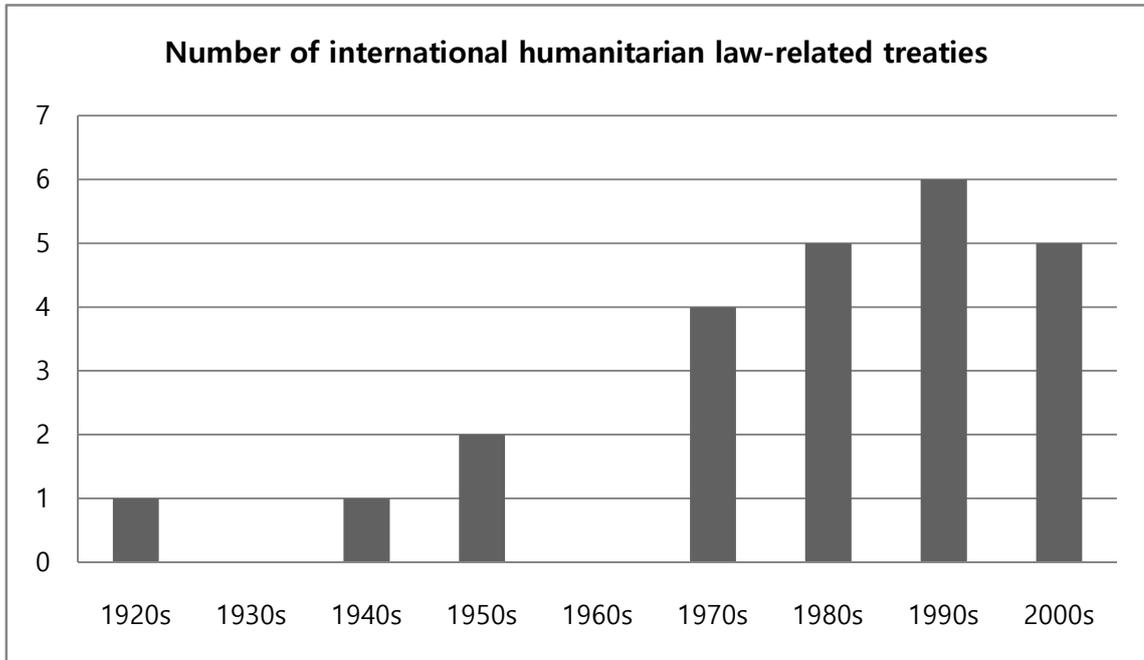
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<sup>76</sup> Mahsood, Salman, and Declan Walsh. (2012). "Pakistan give U.S. a list of demands, including an end to C.I.A. drone strikes". *New York Times*.

<sup>77</sup> ICRC Guidance on DPH. p79

limiting wartime damages as much as possible under the basis of IHL. Based on the provisions, the prior research regarding the legality of drone attacks within various aspects of international norms and principles have been covered. What can be noticed as the most remarkable is the fact that legal assessment within the codified established international law dramatically varies from scholars to scholars, and from judgments to judgments. Taking this phenomenon into account, the following sections of this paper seek to analyze the reasons behind this scholarly gap and point out the hypothesized factors that may have hindered such original analyses.

### 4.3 International Agreements on the Usage of Combat Drones



**Figure 3**

As Figure 3 demonstrates, the number of international humanitarian law-related treaties has increased over past decades, formalizing state obligations to conduct war in methods that limit the effects of armed conflicts for humanitarian reasons.<sup>78</sup> According to a number of international relations theories, particularly from the English School, states

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<sup>78</sup> See Figure 3, International Committee of the Red Cross's customary IHL database. Retrieved from: John Kaag and Sarah Kreps. (2014). *Drone Warfare*. Polity Press. p80

are more likely to be socialized and shamed into compliance with international law or at least frame their actions along with the established norms when international rules become institutionalized. In this sense, the established legal foundations regarding the drone attacks can be proved critical in assessing the pattern of the U.S. drone policies and their legality.

However, the law of armed conflict scholars and ethicists have just begun to consider the implications of the new drone technology. So far, it is a reality that they have very little to provide any legal advice to the military or public officials specifically about the combat drones.<sup>79</sup> In addition, in an age of asymmetric warfare, modern technology has granted non-state actors the power to very much threaten the existing nation-states. Considering this in mind, a number of scholars understand this new danger and believe that this warrants a new interpretation of international law.<sup>80</sup>

In this particular section, the paper attempts to prove the lack of established norms on the employment of combat drones, which admittedly is an unfamiliar type of technology. As such, the paper takes this

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<sup>79</sup> M. O'Connell. (2010).

<sup>80</sup> John Kaag and Sarah Kreps. (2014).

uniqueness of drones into account when considering the law and principles that can be applied to this new technology.

The central principle of the law on resort to force is Article 2(4) of the UN Charter, which is a general rule on the prohibition of the use of force in international relations. There are two possible exceptions to this principle, the first is an authorization by the Security Council in accordance to Chapter VII and the second is the right for self-defense under Article 51 once an armed attack occurs. The International Court of Justice (ICJ) has made clear that self-defense is a term of art in international law. The ICJ has held on several occasions that the armed attack must be attributable to a state where any counterattack in self-defense occurs, and secondly, the initial armed attack must involve significant force. The attack must involve more force than a mere frontier incident.<sup>81</sup> The United States have been justifying the drone campaign under the exceptional clause of Article 51, which allows for the self-defense against an armed attack. However, certain terminologies are yet quite susceptible for arbitrary defining and nowhere is the provisions on targeting practices on individuals, in addition to the

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<sup>81</sup> "International law and the use of drones". (2010). Chatham House Meeting Summary. Speaker: M. O'Connell

definition of those individuals who can in fact be targeted.

One of the key agreements with regard to the use of drones within the international society is that it is generally agreed that operations may be launched into the territory of another state with that state's consent, albeit with limits. Examples of such circumstances include those in which the territorial state (1) agrees to other state's self-defense action, (2) asks the other state to assist with its non-international armed conflict, as is the case in Afghanistan, (3) requests the other state's assistance in complying with its obligation to police its own territory, or (4) seeks assistance with its own law enforcement operation against terrorists.<sup>82</sup> However, it is legally more problematic when the cross border operation is conducted without the territorial state's consent, like for the case of drone policies in Pakistan. Unfortunately, there is no codified means of balancing the two competing legal rights, which are namely the territorial sovereignty and self-defense; rather, current international law seeks for a compromise which best accommodates the two.

Further speaking, the location of drone operators - which certainly

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<sup>82</sup> "International law and the use of drones". (2010). Chatham House Meeting Summary. Speaker: M. Schmitt

is a distinguishable feature of the drones - poses additional questions regarding the lawfulness of drone policies. The operators are generally revealed and known to be situated far away from the actual grounds of killings. This secured safety of the drone pilots, who have sometimes even been regarded as a video game player,<sup>83</sup> raises ethical problems that "as wars become safer and easier, soldiers are removed from the horrors of war and see the enemy not as humans but as blips on a screen".<sup>84</sup> Neither *jus ad bellum* nor *jus in bello* contain any particular requirements regarding the location of drone operators, so it is fair to assume that when these rules were codified, drone weaponry which enables remotely controlled operations has not been contemplated. Harold Koh also specifies that "there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict - such as pilotless aircraft or so-called smart bombs - so long as they are employed in conformity with applicable laws of war".<sup>85</sup>

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<sup>83</sup> M. Sterio. (2012). The United States' use of drones in the war on terror: The (il)legality of targeted killings under international law. *Case Western Reserve Journal of International Law*. 45.

<sup>84</sup> P. Singer. (2009). *Wired for war: The robotics revolution and conflict in the twenty-first century*. *The Penguin Press*. p396

<sup>85</sup> Harold Koh. Keynote speech at the annual meeting of the American Society of International Law. "The Obama Administration and International Law". Mar 25, 2010

As such, lack of established international agreements on the usage of combat drones poses difficulties in arriving at conclusions for the legality of drone attacks in Pakistan. On the other hand, the study also confirmed that up to this point, drones may be employed under the consent of certain states which brings this research more closer to the conclusion for future of combat drones. But still, a more specific study on the matter of non-state factors to look into the definite availability of combat drones is necessary.

#### **4.4 The CIA, 'Non-state' Terrorists, and Territorial Sovereignty**

##### **4.4.1 The non-state actor factor**

Perhaps one of the most important question to answer when it comes to the drone operation has to do with the targets themselves: who can be targets and under what situations? This particular question is critical in the matter about the nature of the conflict with non-state terrorist groups. The recurring difficulty in this context of drone operations is that al-Qaeda is not considered as a state, and under the traditional international law, only officially agreed "states" could initiate an armed attack against other states, thus ultimately giving a room for the right to defense against the harasser.

"A killing is only legal to prevent a concrete and imminent threat to life, and, additionally, if there is no other non-lethal means of preventing that threat to life"<sup>86</sup> Under the laws of war, al-Qaeda groups may not be targeted if they are considered as non-state civilians and are protected from any military strikes; however this also suggests that they are exposed to targeting if they in fact qualify as lawful combatants. Based on this logic, civilians - or in this case, the non-state terrorist groups - can only be

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<sup>86</sup> M. Sterio. (2012).

targeted via warheads if they participate directly in the hostilities, when they are classified as performing the function of combatants. However, the problem is that certain grounds that define direct participation in hostilities are not elaborated. What has been mostly settled up to this point was discussed in a study by the International Committee of the Red Cross (ICRC). And according to the ICRC study, direct participation contemplates a specific act, and civilians lose protection against direct attacks as long as they are participating in such specific hostile acts.<sup>87</sup>

However, important fact to be considered is that in the immediate aftermath of 9/11, the Security Council, in Resolutions 1368 and 1373, affirmed the right of the United States (and other affected States) to collective and individual self-defense against a *non-state actor*, in this case the transnational terrorists who had conducted the attacks. NATO and other international organizations also acknowledged that the attacks implicated the right of self-defense, as did many nations on a bilateral basis. It is true that the ICJ appears to have rejected the notion that the right to self-defense arises against an armed attack by a non-state actor. Yet, those decisions were highly controversial and widely criticized. Indeed, strong dissenting

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<sup>87</sup> M. Sterio. (2012).

opinions correctly pointed out that not only was the Court ignoring post 9/11 state practice, but that there was nothing in the text of the Article 51 which would indicate that an armed attack cannot be launched by a non-state actor.<sup>88</sup>

#### 4.4.2 The CIA factor

Moreover, because the drone program appears to be mainly operated by the CIA and also because very little information is publicly known about the details of drone attacks, it is difficult to apply the *jus in bello* foundations in order to assess the legality of particular strikes.

Numerous disclosed reports on the drone program show that the CIA carried out the targeted killings. In Pakistan, the CIA has carried out 239 strikes since Obama was sworn in, and the agency continues to have wide latitude to launch attacks.<sup>89</sup> This poses legal issues because the CIA operatives have no legal right to participate in the killing of an armed conflict.<sup>90</sup>

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<sup>88</sup> "International law and the use of drones". (2010). Chatham House Meeting Summary. Speaker: M. Schmitt

<sup>89</sup> G. Miller. (2011). "Under Obama, an emerging global apparatus for drone killing". *The Washington Post*.

<sup>90</sup> M. O'Connell. (2010).

One of many legal questions surrounding the drone strikes in Pakistan also emerges from the secrecy with the CIA drone program. It is stated that a number of aircrafts including the UAVs have been allocated to the CIA, but the agency has a separate category that does not show up in any public accounting, a fleet of stealth drones that were developed and acquired under a highly compartmentalized CIA program created after the 911 attacks.<sup>91</sup> There is still a much dispute regarding the CIA's formal attachment to the U.S. military and whether its functions have been in align with the military. Therefore if the U.S. government is correct in its assessment that the drone program conducted by CIA in fact satisfies the requirements of *jus in bello* principles, then it should provide more transparent information to the public about the program.

#### **4.4.3 Territorial sovereignty factor**

As mentioned earlier, this paper takes into account that the current 'war against terrorism' contains global nature, accordingly making the pretext of applying international law reasonable in the research. However, if, perhaps one should reject the conclusion that the United States is

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<sup>91</sup> G. Miller. (2011).

engaged in armed conflict, then the legality of the entire drone program becomes questionable.<sup>92</sup> It should also be considered that some may logically conclude that the United States is currently not in a conventional war, but rather merely chasing terrorist in means of seeking vengeance. Under this logic, the international law of war would no longer apply, and the United States could use force against such terrorist groups only under a law enforcement paradigm.

In practice, following an attack by a suspect who is at large in another state, states must and generally conform to a normalized process, through diplomatic channels, but if the state is unable or unwilling to take action necessary to remove the threat against the victim state, that state may use military force, including drone attacks, in self-defense.<sup>93</sup> However, this normalized process was proved to be difficult in practicality in the previous section, due to the lack of codified agreements on the priorities between self-defense and sovereign integrity. In this context, what should be taken into account is the fact that massive opposition to the U.S. drone deployment can be witnessed in major opinion polls. A widely referenced

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<sup>92</sup> M. Sterio. (2012).

<sup>93</sup> M. Sterio. (2012).

survey by Al Jazeera/Gauup in 2009 put support for drone strikes at only 6 percent.<sup>94</sup> The government officials were also largely against the drone program as mentioned in earlier parts. The fact that drone strikes have actually increased until 2011 raises serious lawful question on the basis of the U.S. to carry those attacks even after the opposition from Pakistan.

#### **4.5 The United Nations Resolution of 2013**

In response to the concerns surrounding the drone attacks in Pakistan, the United Nations unanimously passed a resolution against the United States drone campaign in foreign territories in 2013. The major background was that Pakistan, a vocal opponent of the attacks conducted via U.S. drones in the country's borderline regions, raised the issue at the United Nations General Assembly. The Pakistanis officials continuously have furiously criticized the U.S. aerial attacks, saying that NATO's mandate in Afghanistan does not extend across the border in Pakistan.<sup>95</sup>

This resolution urged the United States to ensure that any measures

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<sup>94</sup> S. Imtiaz. (2015). "What do Pakistanis really think about drones?". In: P. Bergen & D. Rothenberg. <*Drone Wars*>. Cambridge University Press. p89

<sup>95</sup> M. Mazzetti and E. Schmitt. (2010).

[http://www.nytimes.com/2010/09/28/world/asia/28drones.html?\\_r=0](http://www.nytimes.com/2010/09/28/world/asia/28drones.html?_r=0)

taken or means employed to counter-terrorism - which contains the UAVs - conform to the international law, including the Charter of the United Nations, human rights law and international humanitarian law. The text also calls for taking into account relevant UN resolutions and decisions on human rights and giving due consideration to recommendations of special procedures and mechanisms of the Human Rights Council, and relevant comments and views of UN human rights treaty bodies."<sup>96</sup> The United States was also urged to undertake immediate and impartial fact-finding inquiries whenever there are reasonable signs that may indicate possible breaches to the international humanitarian law.

In this sense, Pakistan has officially renewed the demands for putting an end to the U.S. drone usage on its territory. Pakistan's UN Ambassador Masood Khan asserted that civilians suffered inhumane deaths and the strikes had radicalized the public opinion in Pakistan, therefore said that "we call for the immediate cessation of the drone attacks inside the territorial borders of Pakistan".<sup>97</sup>

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<sup>96</sup> The Express Tribune. (Dec-19-2013). "UN passes resolution on drone strikes after pressure from Pakistan". Retrieved from: <http://tribune.com.pk/story/647672/un-passes-resolution-against-drone-strikes-unanimously/>

<sup>97</sup> The Express Tribune. (Dec-19-2013).

As the research implies, the major concern with the drone strikes does not accuse the drone technology itself; but rather the parameters of the war in which the drones are being used. If seen from the restrictive interpretations of *jus ad bellum*, some argue that the only place where drone attacks are plausibly legal is in Afghanistan, in which the United States initiated a war of self-defense after the 9/11 incident.<sup>98</sup> This, however, cannot directly conclude that drone strikes in Afghanistan were in fact completely legal nor those in Pakistan were illegal, because of the non-state actor and the CIA factors which has caused the disparities among the legal assessment of the U.S. drone strikes. Rather, this can be positively restated that the *territorial sovereignty* issue played a key role in raising the legality question of the drone program in Pakistan.

In fact, what is noticeable is the technology of the drone itself that can effectively differentiate between combatants and civilians, which is an integral ability for a distinction under the IHL. The problem for the case of Pakistan is that the situation was highly asymmetric, where such distinctions pose serious ambiguity. On top of this ambiguity, what can be judged so far is that Pakistan not being a lawful state in battle with the U.S.

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<sup>98</sup> John Kaag and Sarah Kreps. (2014).

provided clear parameters of drone usage in the conventional warfare.

There are actually many ways in which military personnel have used drones to gather better intelligence and this capability is no doubt useful in upholding the principles of distinction and proportionality.<sup>99</sup> Although the advanced technology itself must not be given with legal and ethical legitimacy, it is in the end the individuals who control the technology, who should be held accountable for their actions. Thus, the legal questions exist irrespective of the drone techniques, but whether targeted killing is legitimate in location like Pakistan where the U.S. have not declared as a state in war with.

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<sup>99</sup> John Kaag and Sarah Kreps. (2014).

## **V. Conclusion: Future of Combat Drones**

### **Legal Analysis surrounding Combat Drones**

By 2013, more than a decade after the CIA drone campaign began, the most significant changes have involved increased transparency regarding the program.<sup>100</sup> Over time, now the controversies over the morality and legality of the drone attacks have flooded in the studies of international affairs. In this regard, this paper sought to answer reasons behind critical disparities surrounding the legality of drone strikes under the existing laws of war. The original hypothesis that the lack of specific codified norms regarding the "drones" and the fact that drone strikes were so far used outside the conventional warfare is what caused these scholarly disparities has been proved reasonable. Based on these findings, the English School's idea is to be illuminated once again: Order in international politics is more likely to be sustained by fortification of the institutions of an international society, that is, the practice of balance of power, diplomacy, and international law.

First, this paper concludes that lack of institutions has fostered the

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<sup>100</sup> P. Bergen and J. Rowland. (2015).

complexity in assessing the legality of drone attacks. Second, although some argue the technology itself brought about the question whether drones are compatible with international law or not, this paper attempted to prove that it was not the advanced drone technology that caused illegality of their operations; rather, the extent to which they were operated under the name of targeted killing has shown conflicts with the existing international laws of war, in that the concerning normative factors (lawfulness of both targets and attackers, territorial sovereignty issue) may have stretched the established laws. Irregular warfare including the drone program in Pakistan is what has intensified confusion.

### **Future of Combat Drones**

Since 1945, as international legal principles such as territorial sovereignty and the principles of distinction and proportionality became prevalent norms, the same states that bombed the entire cities during the Second World War became very attentive to the question of civilian casualties.<sup>101</sup> Moreover, during the Persian Gulf War in the 1991, the United States allies operated under an "injunction to avoid high levels of

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<sup>101</sup> John Kaag and Sarah Kreps. (2014).

civilian casualties" and thus they stayed highly attentive to identify and avoid hospitals, historical sites, and religious facilities.<sup>102</sup> In this regard, noting the difficulties in deterring the employment of combat drones under the established international law, the possibility of a new arms race around combat drones and the need for more legal clarification of their use are both legal and technological challenges that needs to be pondered for the future warfare.

At this point, when looking to the future with other states' - even the terrorist affiliates' - potential of acquiring armed drones, the United States is likely to benefit more from preserving international sovereignty norms as stated in the United Nations Resolution of 2013 than from eroding them under the notion of anticipatory self-defense. However, international agreements and norms regarding the usage of drones for targeted killings have only begun to be established, therefore situating the U.S. in a more flexible interpretation of the current international law.

The controversy of combat drones is attributed to the quality of drones equipped with precision munitions that raise questions about the *jus*

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<sup>102</sup> N. Wheeler. (2002). "Dying for 'enduring freedom': Accepting responsibility for civilian casualties in the war on terrorism". *International Relations*. 16: 205-225

*in bello* principles of distinction and proportionality.<sup>103</sup> However, this paper sees that drones are no different from any other high-tech weapons; the only issue surrounding the legality of drones were the non-state actor factors and lack of established norms. In other words, this paper once again concludes that employment of drones under conventional warfare does not violate the international law of war, adding on to the fact that drones will be one of the key armaments of battleships in the near future. Anyhow, with the increase in irregular warfare which entails the non-state actors, the paper urges that international norms be settled promptly.

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<sup>103</sup> John Kaag and Sarah Kreps. (2014).

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## 국문 초록 Abstract in Korean

### 미국 드론 공격의 국제법에 대한 상응 연구: 파키스탄 내 전투 드론의 경우, 2004-2013년

미국 국정원이 기밀의 드론 프로그램을 착수한지 10년이 지난 2013년 현재에 이를 둘러싼 가장 큰 변화라 할 수 있는 것은 드론 정책의 투명성이 증가했다는 것이다. 이에 따라 시간이 지나면서 전투 드론에 관한 도덕성과 합법성에 대한 논쟁이 대두되고 있다. 이러한 점에 있어서 이 논문은 전투 드론의 국제법 상응에 있어서 극명하게 차이를 보이는 학문적 연구의 이유를 영국 학파 국제관계 이론에 근거하여 연구하고자 한다. 영국 학파 이론은 '국제 사회'를 공통된 체계를 이루는 국가들의 모임을 넘어서 그들의 관계를 행하는 데 있어서 대화와 합의된 법과 제도를 설립한 것이라 여긴다. 이것에 기초하여 이 논문은 드론에 관한 성문화된 규범의 부족과 지금까지의 전투 드론이 비정규전에서 주로 쓰였다는 점이 학문적 연구의 차이를 야기했다고 가정한다. 이 가설들을 증명하는데 있어서 이 논문은 드론의 기술 자체가 단순히 불법이라고 여길 수 없으며 오히려 현재까지 전투 드론이 비정규전에서만 쓰였다는 점이 이를 국제법에 위반된 것이라 보이게 한 것으로 결론을 낸다. 전투 드론이 전쟁에 상용화되는 일은 머지않아 발생할 것이며 국제 사회는 발전하는 기술과 전투의 불규칙성에 대비하여 부족한 국제 규범을 만들어 나가야 한다.

**핵심어:** 국제 전시 법규, 드론(무인항공기), 대테러 전쟁, 파키스탄, 전쟁권, 전시 국제법, 비정규전

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