

Use of Unmanned Aerial Vehicles (UAVs) in Targeted Killings as a Counter  
Terrorism Strategy: A Human Rights Perspective

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*Killing has become an easy-go than capture, as 'killers' are "above the law" these days.*

*Intelligence is put on rest, as drones are above our heads these days.*

*Value of civilian life has deceased considerably as Collateral death has become above our  
humanitarian principles these days.\**

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\* My reaction to Ms. Nabeela's (8 yrs.) statement- "**Will I be next?**" She is the granddaughter of Mrs. MaminaBibi- the victim of US drone strike. She was blasted into pieces when she was collecting vegetables from her family land in Pakistan. It seems that the attack was aimed directly at her. However, US government never acknowledged her death. Reported by Amnesty International Publications, 2013, Executive Summary, Index ASA 33/014/2013.

## Abstract

*Modern technological weapons like the “Unmanned Aerial Vehicles” (UAVs) are increasingly being used in battle fields to translate each war into a Military success. In this paper, an endeavour has been made to analyze the legal ramifications of use of drone technology in “War on Terror” in the context of Human Rights violations by United States and NATO Forces in different countries with special reference to North-West Pakistan. To understand the complexities involved, reference has been made to other counter-terrorism measures. The researcher has tried to highlight how targeted killing by UMS strike is violative of International Bill of Human Rights like ICCPR, ICESCR and Regional Human Rights treaty arrangements like ECHR. Efforts are been made to analyze how IHRL has application to targeted killing, in addition to the IHL, by elaborating the concept of extra-territorial application of IHRL. However, due to paucity of time and limitations of words, the research is confined to the counter terrorism strategy of the United States of America alone.*

## 1. Introduction

“Terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America. These acts shatter steel, but they cannot dent the steel of American resolve...*We will make no distinction between the terrorists who committed these acts and those who harbor them...*”(emphasis added)

-President George W. Bush

September 11, 2001: Three Airliners, earlier hijacked by Al-Qaeda militants, crashed into the World Trade Centre and the Pentagon<sup>2</sup>. Almost 3,000 people died including 227 civilians! It shook the conscience of the world community. Everyone saw in their own eyes that “evil is real<sup>3</sup>”. And consequently a determination developed that “it must be opposed<sup>4</sup>”. Every States started robustly acceding for global peace, security and counter terrorism, however, the prominent role was played by the United States; and illustrious was its fight against terrorism which led to the famous US declaration of “Global War on Terror”. Apart from Military interventions, the US began hunting terrorist using Unmanned Military Systems (UMSs), including Unmanned Aerial Vehicles (UAVs), which marked a paradigm shift on the fight against Terrorism.

The UAVs, which were deployed in service for surveillance in Vietnam and Gulf Wars, are now been used by US as weapons of targeted killings in Afghanistan, Pakistan, Iraq and other countries. Gradually, this technology was adopted by United Kingdom, France, Russia, Germany and other countries; and the targets of such killings have shifted from most wanted Talibans and Al Queda members to *suspected terrorists*, raising human rights concerns. However, the lack of

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<sup>2</sup>Four passenger airliners were hijacked by 19 al-Qaeda terrorists earlier. Two of those planes, American Airlines Flight 11 and United Airlines Flight 175, were crashed into the North and South towers, respectively, of the World Trade Center complex in New York. A third plane, American Airlines Flight 77, was crashed into the Pentagon (the headquarters of the United States Department of Defense). The fourth plane, United Airlines Flight 93, was targeted at Washington, D.C., but crashed into a field near Shanksville, Pennsylvania, after its passengers tried to overcome the hijackers.

<sup>3</sup> “Evil is Real” is a phrase used by President Bush. The Presidential Address on the eve of the Patriot Day, 2002

<sup>4</sup> Ibid.

unanimity among scholars as to the applicable law i.e. International Humanitarian Law or International Human Rights Law, have aggravated the situation.

This paper assays to provide a context in which the UAVs are being used as a weapon in War on Terror. The next part (i.e. Part 2) highlights different kinds of strategies to counter terrorism and its legal aspects. Part 3 devolves around the nature of UMS as a weapon of modern warfare and the concept of Targeted Killings. Part 4 investigates to answer what the applicable law is in the cases of targeted killings? Part 5 reviews and settles the debate as to whether targeted killings by drones are violative of Bill of Human Rights or any Regional Human Rights treaty arrangements; and lastly Part 6 sets forth the concluding remarks of the researcher with her personal notes.

## 2. Counter Terrorism Mechanism and the United States

### 2.1. Strategies

Counter Terrorism Mechanism can be broadly divided into two parts viz. Pre-emptive Neutralization and Military Intervention.

#### 2.1.1. Pre-emptive Neutralization

Pre-emptive Neutralization includes numerous strategies from intelligence information gathering to responding to such acts of terrorism. It is viewed by United States, United Kingdom, and Israel as a legitimate counter terrorism strategy. In contrast, Western European countries have taken strong objection to such strategies. The European Court of Human Rights in 1978 ruled in the *Ireland v. United Kingdom*<sup>5</sup> that such strategies amount to a practice of inhuman and degrading treatment and are clear violation of Article 3 of the European Convention on Human Rights (ECHR).

##### 2.1.1.1. Detection of Potential Acts

Before effectively countering terrorism, an attacking State needs to detect or identify the terrorists. For detecting, the State can rely on intelligence which includes *interception of communications*: telephonic, emails, signals and other wise. However, Rights activists' opposition to "mass surveillance" has to be kept on board, as it is a blatant violation of Right to privacy. Secondly, *tracing of persons* through airport security, immigration profiling and border patrol. And thirdly, *financial tracking* as an option can be considered also.

##### 2.1.1.2. Capturing, Disabling and Killing

The first step that has to be tried after detection is to capture such terrorists alive so that subsequent information can be obtained from them. In case the information is in relation to any prospective terrorist attack, the primary focus has to be disabling or neutralizing it. Similarly, where civilians are getting influenced by terrorists, all care has to be taken to deactivate such bases. Lastly, if there remains no scope for preventive actions, they must be stroked down.

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<sup>5</sup>Ireland v. the United Kingdom, Case No. 5310/71, para 167 and 168.

### 2.1.1.3. Detention, Interrogation and trial

Formal detention, systemic questioning of suspected terrorists to ascertain their indulgence, and trial of the person charged with -is an adherence to the procedure established by criminal law. In the *Ireland case*<sup>6</sup>, the European Court of Human Rights criticized the five techniques, which were adopted by the Northern Ireland and British governments during *Operation Demetrius*. The techniques were wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink. Therefore all these interrogation, detention and other things has to be done with due compliance of Human Rights. In cases of prolong or continued detention, it has to be ensured that there is a continued threat. Unlike a criminal law trial, Military commission does not require a judicial authorization or review. Hence, reasonableness has to be given prime importance to. Judge Bates in *Maqaleh v. Gates*<sup>7</sup> observed that some prisoners, who were held by the U.S. military base in Afghanistan outside the zone of combat have a right to challenge their imprisonment.

Additional measures can be applied under certain restricted circumstances subject to strict control. Certain schools of thought argue that putting strict control is equating terrorism with crime, and goes on to say- terrorist interrogation can go much beyond criminal interrogation<sup>8</sup>. Some scholars argue that sleep deprivation, room temperature modulation, sitting in an uncomfortable chair, placing of a burlap bag over the head, and playing loud music are measures that is within the permissible limits<sup>9</sup>. And an alleged terrorist can be tried in National Courts, International treaty courts or Military commissions.

Torture is clearly proscribed being illegal and immoral. To ensure that the additional measures are not arbitrarily and capriciously used, authorization has to be given by the head of intelligence agency and an independent physician has to give a no-objection in writing. However surprisingly, until President Obama's Executive Order<sup>10</sup>, the Army Field Manual had not

<sup>6</sup> Ibid.

<sup>7</sup> 604 F. Supp. 2d 205 (D.D.C. 2009).

<sup>8</sup> Amos N. Guiora, American Counterterrorism: The Triangle of Detention, Interrogation and Trial, University of Utah - S.J. Quinney College of Law, Magna Carta Institute's Symposium, Towards a Global Legal Counter-Terrorism Model: Transatlantic Perspectives, 2010.

<sup>9</sup> Ibid.

<sup>10</sup> Executive Order of January 22, 2009. Available at <http://ccrjustice.org/files/2009interrogation%20eo%20final%20rel.pdf>

imposed any restrictions on CIA or private contractors. To sum it all, torture chambers are the graves of civil rights; hence, prohibition of excesses is obligatory for all States.

### 2.1.2. Military Intervention

In countries like Pakistan, where terrorists have their base, Military intervention is the only alternate there. The U.S. justified its invasion in Afghanistan and Russia justified its invasion in Chechnya on the ground of counter-terrorism beyond repair. However, the archives suggests military intervention has not always been successful.<sup>11</sup>

### 2.2. United States Interventions in Pakistan

The US intervention in Pakistan is also viewed very closely by international community. In Pakistan, as per the *Bureau of Investigative Journalism* report, there were 330 strikes between 2004 and 2012. More than 2, 400 people were reported to be killed and the number of people got injured is more than 1000.<sup>12</sup>

The CIA drone attack began in Pakistan in 2004 and it increased under President Barack Obama in 2009 i.e. 122 in 2010. The casualty rate for civilians and unknowns - not identified as either militants or civilians, was around 40% under President George W. Bush. It has come down to about 7% under President Obama. As per the New America Foundation Report<sup>13</sup>, only 58 known militant leaders have been killed in drone strikes in Pakistan, which is just 2% of the total deaths.

In 2012, 2% of the drones' attack victims were civilians and 9% were ambiguous as to whether they were civilians or militants. In 2013, civilian casualties were 26 as compared to 122 in 2010.<sup>14</sup> In Pakistan, there were total 370 Strikes, in which 2080 - 3428 persons were killed. Out of which 258-307 were civilians, 1623-2787 were militants and 199-334 were unknown.<sup>15</sup> The latest was the attack at Qutab Khel, Miran Shah in North Waziristan on December 25, 2013 where target was a House and it killed between 3 and 4 militants.<sup>16</sup>

<sup>11</sup> Robert A. Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism*, Random House, 2005, pp. 237–250.

<sup>12</sup> The Report of Bureau of Investigative Journalism, which was subsequently adopted by the Amnesty International, Index: AMR 51/047/2012, 15 June 2012.

<sup>13</sup> Available at <http://natsec.newamerica.net/drones/pakistan/analysis> (accessed on dtd. 14.04.2014)

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Four killed in fresh North Waziristan drone attack, *the Tribune*, December 26, 2013. Available at <http://tribune.com.pk/story/650705/drone-attacks-targets-in-north-waziristan/> (accessed on dtd. 14.04.2014)

All these targeted killings are clear violations of Human Rights<sup>17</sup> which *inter alia* include right to life, right to liberty, privacy and personal security and many other rights. Mr. Nawaz Sharif, the Prime Minister of Pakistan, has repeatedly demanded an end to the strikes, stating:

"...the use of drones is not only a continual violation of our territorial integrity but also detrimental to our resolve and efforts at eliminating terrorism from our country."<sup>18</sup>

A Pakistani Peshawar High Court has also declared that US drone strikes in the country's tribal belt are illegal and has directed the government to move a resolution against the attacks in the United Nations.<sup>19</sup> Civilians in Waziristan believe that the US actively seeks to kill them simply for being Muslims, viewing the drone campaign as a part of a religious crusade against Islam.<sup>20</sup>

In 2013, civilian casualties are at their lowest ever in Pakistan. There have been no known drone strikes in Pakistan since 25 December, and January was the first full month in two years without any attacks at all, according to the Bureau of Investigative Journalism, which closely monitors media reports about drones.<sup>21</sup> It is a positive development! However, efforts should be made to lessen use of such technology and rather resort to measures which are in compliance with Human Rights.

### 2.3. Existing Legal regime

There are various legislations passed by different countries to counter-terrorism. However, here we will limit ourselves to the study of laws in United States, United Kingdom and India.

#### 2.3.1. United States

As a response to international terrorism, the U.S. government began to use economic sanctions in 1995. In the same line, *Executive Order 12947* was issued by President Bill Clinton on January

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<sup>17</sup> Infra Chapter 5 at p. 21.

<sup>18</sup> Jethro Mullen, *Rights groups challenge U.S. on drone strikes in Pakistan, Yemen*, CNN, October 22, 2013. Available at <http://edition.cnn.com/2013/10/22/world/asia/us-drone-strikes-reports/> (accessed on dtd. 14.04.2014)

<sup>19</sup> *Pakistani court declares US drone strikes in the country's tribal belt illegal*, The Independent, 9<sup>th</sup> May, 2013.

<sup>20</sup> *Living under drones, Death, Injury and Trauma to civilians From US drone practices in Pakistan*, Global Justice Clinic, NYU School of Law, September, 2012,

<sup>21</sup> Jon Boone, *US limits Pakistan drone strikes amid political battle over military moves*, the guardian, 5 February, 2014. Available at <http://www.theguardian.com/world/2014/feb/05/us-limits-pakistan-drone-strikes> (accessed on 14 April, 2014)

23, 1995 prohibiting financial transactions with any Specially Designated Terrorist<sup>22, 23</sup>. It was later expanded to include freezing the assets of Osama bin Laden and others. The Omnibus Counterterrorism Act was introduced in 1995. The bill was intended to establish federal criminal jurisdiction over acts of international terrorism. Civil liberty advocacy groups opposed the bill on the grounds that it would violate fundamental civil liberties. Another source of opposition was the Government's ability to use evidence from secret sources in deportation proceedings for suspected terrorists. The *Antiterrorism and Effective Death Penalty Act of 1996* substantively narrowed the grounds on which successful habeas claims can be made, allowing claims only to succeed when the convictions were contrary to "clearly established federal law" or an "unreasonable determination of the facts in light of the evidence. President George W. Bush signed *Executive Order 13224* on Sept. 23, 2001. This order empowers gives the authority to seize assets of those involved in terrorists activities.

On 26<sup>th</sup> October 2001, President Bush signed the *Patriot Act*<sup>24</sup>, which aims to deter and punish terrorist acts, to enhance law enforcement investigatory tools, and other purposes. However, it remained controversial as it authorizes indefinite detentions and permits search without the owner's or the occupant's consent or knowledge. The expanded use of *National Security Letters*, which allows the Federal Bureau of Investigation to search telephone, e-mail, and financial records without a court order; and the expanded access of law enforcement agencies to business records, has received major criticism from the champions of Human Rights.

The Homeland Security Act (HSA) was introduced in the aftermath of the September 11 attack, which aims to ostensibly "organize a government that is fractured, divided and under-prepared to handle the all-important task of defending our great nation from terrorist attack." It consolidated more than 20 existing federal agencies into a single Homeland Security Department. The purported aim of such consolidation was to detect and eliminate emerging terrorist threats by removing information firewalls between government agencies, and centralizing the

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<sup>22</sup>Specially designated Terrorist are persons, whom US Secretary designates under rules of Office of Foreign Assets Control. Twelve organizations and 18 people were identified in the Order as threatening disruption of the Middle East peace process. The U.S. Secretary of the Treasury and the U.S. Attorney General were given the power to add other organizations and people to the list.

<sup>23</sup>Sean S Costigan, David Gold, *Terronomics*, Ashgate Publishing Ltd. ISBN 978-0-7546-4995-3

<sup>24</sup> It stands for Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.

unprecedented flood of surveillance.<sup>25</sup> However, civil liberties groups have objected it on three fronts viz. Reduced privacy, Increased government secrecy and power, and Strengthened government protection of special interests.<sup>26</sup> The Support Anti-terrorism by Fostering Effective Technologies Act, 2002 (SAFETY) is a constituent of HSA. Allen Weinstein, president of the Center for Democracy in Washington, DC, has called it a "law of unintended consequences."<sup>27</sup>

### 2.3.2. United Kingdom

There are a numerous Acts legislated by British Parliament in the wake of 11<sup>th</sup> September, 2001 attack and 7<sup>th</sup> July, 2005 bombings. A new and distinct set of police power and procedures were established. For the first time, *the Terrorism Act, 2000* gave a broad definition of terrorism and provided an extensive list of proscribed organization. It empowers a constable to arrest a person, without warrant, whom he reasonably suspects to be a terrorist. Further he can be detained upto 48 hours and it can also be extended.<sup>28</sup> Unlike other search and seizure power, section 44 does not require the police to have reasonable suspicion before searching an individual. Consequently, a huge number of search were made, not resulting in arrest under Terrorism Act, leading the European Court of Human Rights to rule it as illegal.<sup>29</sup> One year later in 2001, *the Anti Terrorism, Crime and Security Act* was passed allowed the police to forcefully obtain fingerprints and other identifying features from an individual to ascertain their identity.<sup>30</sup>

In 2005, *the Prevention of Terrorism Act* was passed which allowed the Home Ministry to impose "control order" –a form of house arrest, on people who are suspected of involvement in terrorism. This provision is a great derogation of the human rights law. The Hon'ble High Court, in April 2006, held that section 3 of the Act to be incompatible with Article 6 of the ECHR i.e. the right to a fair trial. Mr Justice Sullivan described the pattern of control orders as an 'affront to justice'.

<sup>25</sup> The Homeland Security Act, Legislation Predicated on the Official Story of the 9/11/01 Attack, available at <http://911research.wtc7.net/post911/legislation/hsa.html> (accessed on 06.04.2014)

<sup>26</sup> Nancy Talanian, *The Homeland security Act: The Decline of Privacy; the Rise of Government Secrecy*, Bill of Rights Defence Committee, Available at <http://www.bordc.org/resources/hsasummary.pdf> (accessed on 06.04.2014).

<sup>27</sup> Supra note 25.

<sup>28</sup> Section 41 of the Terrorism Act, 2000.

<sup>29</sup> Stop-and-search powers ruled illegal by European court. Available at [http://news.bbc.co.uk/2/hi/uk\\_news/8453878.stm](http://news.bbc.co.uk/2/hi/uk_news/8453878.stm) (reported dated 12.01.2010)

<sup>30</sup> Section 89 the Anti Terrorism, Crime and Security Act, 2001.

In the aftermath of 7<sup>th</sup> July bombings, the *Terrorism Act, 2006* was passed, which defined the offence of “glorifying terrorism”. It extended the limit of pre-detention to 28 days. It created a series of new offences viz. Encouragement of terrorism<sup>31</sup>, Disseminating terrorist publications<sup>32</sup>, Preparation of terrorist acts<sup>33</sup>, Training for terrorism<sup>34</sup>, Attendance at a place used for terrorist training<sup>35</sup>, Making and possession of radioactive devices or materials<sup>36</sup>, Misuse of devices or material and misuse and damage of facilities<sup>37</sup>, Terrorist threats relating to devices, materials or facilities<sup>38</sup>, Trespassing etc. on nuclear sites<sup>39</sup>. In the same year, the *Terrorism (United Nations Measures) Order 2006* came in which gave effect to Resolution 1373 of the UN Security Council. It also allowed freezing of assets of suspected terrorists.

The most vibrant Act i.e. *the Counter-Terrorism Act* came in 2008, which extended the jurisdiction of the courts over terrorism offences overseas. It also extended the police powers for detention up to 42 days. However, this measure was dropped as it failed to get approval of the House of Lords. Greater use of DNA and finger prints was recognized by this Act and it requires convicted terrorists to notify the police of their whereabouts. In 2009, the *Terrorism (United Nations Measures) Order, 2009* replaced the *Terrorism (United Nations Measures) Order 2006*. Lastly, the *Terrorism Prevention & Investigation Measures* bill received a royal assent on 14 December 2011.

### 2.3.3. India

In India, in the back drop of terrorist violence in Punjab, *the Terrorist and Disruptive Activities (Prevention) Act*, popularly known as TADA, was enacted which came into effect on 23 May 1985. It was the first anti-terrorism law legislated by the Indian Parliament to define and counter terrorist activities.<sup>40</sup> In the Act, to deal with terrorist and other disruptive elements in strict hands, all the features of inquisitorial system were inculcated even when India follows an adversarial

<sup>31</sup> Section 1 of the Terrorism Act, 2006.

<sup>32</sup> Ibid. Section 2.

<sup>33</sup> Ibid. Section 5.

<sup>34</sup> Ibid. Section 6.

<sup>35</sup> Ibid. Section 8.

<sup>36</sup> Ibid. Section 9.

<sup>37</sup> Ibid. Section 10.

<sup>38</sup> Ibid. Section 11.

<sup>39</sup> Ibid. Section 12.

<sup>40</sup> The Terrorist and Disruptive Activities (Prevention) Act, Available at <http://www.satp.org/satporgtp/countries/india/document/actandordinances/TADA.HTM#7A>

criminal justice system. As per the law, the police were not obliged to produce a detainee before a judicial magistrate within 24 hours and the accused can be detained up to 1 year without formal charges and trial against him. Confessions made to police officers, which is otherwise not admissible, were made admissible. The burden of proof is shifted on the accused to prove his innocence.<sup>41</sup> Trials can be held at any place secretly and the identities of the witnesses will be kept secret.<sup>42</sup> Importantly, the Act denies the right to appeal or revision to any other court except to the Hon'ble Supreme Court.<sup>43</sup> These are all violations of international standard of fair trial. Due to its unpopularity and gross denial of standard Human rights, it was allowed to lapse in 1995.

The TADA Act was succeeded by the *Prevention of Terrorism Ordinance (POTO), 2001* and the *Prevention of Terrorism Act (POTA), 2002* which was enacted in the aftermath of December 2001 Parliament attack. In this Act, human rights concerns were a little addressed by granting the right to appeal before the division bench of the High Court. Importantly, it had no provision of preventive detention. However, the definition of 'terrorist act' under the Act was too broad, even to include political activism. The law permitted prolonged detentions without charge, similar to the preceding Act and also the presumption of innocence was on the accused.<sup>44</sup> Sweeping power of arrest, sketchy review procedure and summary trial and even trial *in absentia* made critics to describe it as harsher than the US Patriot Act. Therefore, enactment of new law was though successful, the underlying structural theme persisted to be the same. The Act which was termed as necessary weapon in the fight against terrorism was repealed as it was used for cracking down political opponents and human rights abuses were reported.

Subsequently, an amended *Unlawful Activities (Prevention) Act*, popularly known as UAPA, came in force. The aim of this legislation is effective prevention of unlawful activities in India. Its main objective is to make powers available for dealing with activities directed against the integrity and sovereignty of India. Fortunately, it has responded to the human rights concerns by relaxing the bail conditions and extending the time for pre-trial investigations.<sup>45</sup> It eliminated

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<sup>41</sup> Anil Kalhan, *Colonial Continuities: Human Rights, Terrorism, and Security Laws*, Columbia Journal of Asian Law, Vol. 20, 2006, p. 93.

<sup>42</sup> Ibid.

<sup>43</sup> Section 19(2) of TADA, 1987

<sup>44</sup> Rethink the new UAPA, The Hindu, the Indian newspaper dtd: 20.12.2012.

<sup>45</sup> Supra note 41, p.161.

POTA's rules authorizing confessions before the police<sup>46</sup>, provisions for special courts and provisions enabling courts to try the defendants *in absentia*<sup>47</sup>. However, it retained the provisions for *in camera* proceedings and for the protection of identity of prosecution witnesses but not defence witnesses.<sup>48</sup> Most importantly, it retained the provisions of burden shifting in aspect of the offence but repealed rest provisions, which undermine the presumption of innocence.<sup>49</sup> However, there are many provisions yet to be made rational and humane. A noted lawyer Dr. Rajeev Dhavan is noted to have said,

“The Bill casts a shadow on all of us. It is founded on the principle that everyone is suspicious or a suspect, with no fine distinction between the two. We are creating a suspicious state to empower suspicious officials and citizenry to act suspiciously against any supposed suspect. This Bill goes further than TADA or POTA in its creation of a suspicious state. India must fight terrorism, but the last thing India wants to be is a terrorist anti-terrorist state.” – Rajeev Dhavan

Recently there is a demand to repeal the amended UAPA as it has become a tool to falsely implicate innocent persons, community leaders, activists and lawyers.<sup>50</sup>

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<sup>46</sup> Supra note 41, p. 163.

<sup>47</sup> Supra note 41, p. 166.

<sup>48</sup> Ibid.

<sup>49</sup> Supra note 41, p. 168.

<sup>50</sup> Demand for repeal of Unlawful Activities (Prevention) Act gains momentum, Available at <http://timesofindia.indiatimes.com/city/varanasi/demand-for-repeal-of-unlawful-activities-prevention-act-gains-momentum/articleshow/30805763.cms> (reported dated 21.02.2014)

### 3. Unmanned Military System and Targeted Killings

#### 3.1. UMS: As weapon of modern warfare

The quest to be inexpugnable, to remain impregnable and be impervious has always encouraged Military technology; and advancement of it has always enhanced military strategy and vigilance. From the innovation of radar to the recent lethal autonomous robots (LARs), each development has significant implications on modern warfare. There are various reasons to opt for UMS over other traditional weapons.

*Extending battle field:* The UMS can reach places, which army in ground will have problem in reaching.

*Economic with life:* Secondly, it is effective in counter-attack zone as there is no loss of life, if the drone is shot down.

*Economic with cost:* Thirdly, it is cost effective. And lastly it minimizes unintended casualties and destruction of properties due to proper target identifications. These are a few lucrative advantages which push for UMS, making it trendy. The increasingly inevitability can be traced from the fact that the Congress issued a mandate in 2001 that stated that by 2010 one-third of all U.S. deep-strike aircraft should be unmanned and by 2015 one-third of all ground vehicles should be likewise unmanned<sup>51</sup>.

There are different varieties of Unmanned Military System viz. Unmanned Underwater vehicles (UUVs)/ Underwater drones, Unmanned Aerial Vehicles (UAVs), Unmanned Ground Vehicles (UGVs). Among these major classifications, there are numerous technologies like Vertical Take-Off and Landing (VTOL) Unmanned Vehicle, Lighter than Air System, Blimp, Aerostat etc. Similarly operation wise it is either remotely operated or autonomous. However, let's not divulge into *nitty-gritty* of every such technologies. As we are here concerned with use of UAVs, let us take a look on UAVs in brief.

As per the Department of Defense (DoD), UAV is a powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be

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<sup>51</sup>Thomas K. Adams, *Future Warfare and the Decline of Human Decision making*, Parameters, U.S. Army War College Quarterly, Winter 2001-02, at 57-58.

piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload. Ballistic or semi ballistic vehicles, cruise missiles, and artillery projectiles are not considered unmanned aerial vehicles.<sup>52</sup> It is also called drone in popular parlance. It was earlier known as ‘remotely piloted vehicle’. The Congressional Budget Office Study uses the term ‘unmanned aircraft system’ to emphasize the fact that the ground control system, control link, data link and other components are included in it.<sup>53</sup> UAVs are mainly used for military or special operations, apart from civil applications such as non-military policing, surveillance of oil/gas/minerals pipe lines, disaster relief etc.

### 3.2. Targeted Killing

None of the International Human Rights Treaty or International Humanitarian Treaty defines “targeted killing”. However, it can be expressed as the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.<sup>54</sup> Thus ‘targeted killing’ briefly denotes premeditation or identification of target for killing, which can occur both at war time and peace time; thus IHL and IHRL can be applied.<sup>55</sup> The methods of targeted killings may vary and can include drone attack, sniper fire, car bombs and others.<sup>56</sup> However, the primacy is on the use of lethal weapon, which distinguishes it from other killings.<sup>57</sup>

In the 1990s, when confronted and accused, Israel categorically refused to admit to targeted killings by stating:

“the [Israeli Defense Force] wholeheartedly rejects this accusation. There is no policy and there never will be a policy or a reality of willful killing of suspects . . . the principle of the sanctity of life is a fundamental principle....”<sup>58</sup>

<sup>52</sup> Department of Defense, DoD Dictionary of Military and Associated Terms, Joint Publication 1-02.

<sup>53</sup> Bernard Kempinski, Policy Options for Unmanned Aircraft Systems (UAS), Congress of the United States, Congressional Budget Office, June 2011, p. 27

<sup>54</sup> Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HR/14/24/Add. 6.

<sup>55</sup> AOrakhelashvili, *The interaction between human rights and humanitarian law: Fragmentation conflict parallelism or convergence?* (2008) 19 EJIL, 161.

<sup>56</sup> B. Tselem, Statistics. Available at <http://www.btselem.org/English/Statistics/Casualties.asp>. (Accessed on 30.03.14).

<sup>57</sup> Supra note 51.

<sup>58</sup> Na’ama Yashuvi, *Activity of the Undercover Units in the Occupied Territories*, B’Tselem (1992). Cf. Ibid.

However, in November 2000, the Israeli Government confirmed the existence of a policy pursuant to which it justified targeted killings in self-defence and under IHL because the Palestinian Authority was failing to prevent, investigate and prosecute terrorism and, especially, suicide attacks directed at Israel.<sup>59</sup> This was reinforced by the issuance, in 2002, of a legal opinion by the Israeli Defense Force Judge Advocate General on the conditions under which Israel considered targeted killings to be legal.<sup>60</sup>

The concept gained momentum after the use of drones for targeted killings by US in the armed conflicts in Afghanistan and Iraq, where the operations are conducted by the armed forces. It is also reported that the US has adopted a secret policy of targeted killings after the attacks of 11 September 2001.<sup>61</sup> The first credibly reported CIA drone killing occurred on 3 November 2002, when a Predator drone fired a missile at a car in Yemen, killing Qaed Senyan al-Harithi, an al-Qaeda leader allegedly responsible for the US Cole bombing.<sup>62</sup> Similarly, Russia's counter-terrorism operation "Chechnya", which was launched in 1999 was to kill groups of insurgents.<sup>63</sup>

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<sup>59</sup>Orna Ben-Naftali & Keren Michaeli, We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell Int'l L.J. 233, 234 (2003) c.f. Supra note 54.

<sup>60</sup>Gideon Alon & Amos Harel, IDF Lawyers Set 'Conditions' for Assassination Policy, Haaretz, 2 Feb. 2002.

<sup>61</sup>Council of Europe, Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States, report submitted by Mr. Dick Marty, Doc. 11302 Rev. (7 June 2007), paras. 58-64.

<sup>62</sup>Jane's, Yemen Drone Strike: Just the Start? 8 Nov. 2002, available at [http://www.janes.com/aerospace/military/news/jdw/jdw021108\\_1\\_n.shtml](http://www.janes.com/aerospace/military/news/jdw/jdw021108_1_n.shtml).

<sup>63</sup>Anna Le Huerou, *Russia's War in Chechnya*, 2008, 222 c.f. supra note 54

## 4. Applicable Legal Regime

### 4.1. IHL or IHRL?

Though concerns are raised as to the legality of the drone attacks, no concrete agreement is yet reached as to the applicable laws under which targeted killings by drone is assessed. The US argues since terrorists continue to menace the security of US citizen it is a state of war.<sup>64</sup> It is based on its asserted right to self-defence as the US is in “an armed conflict” (*emphasis added*) with Al Qaeda, as well as the Taliban and associated forces.<sup>65</sup> In addition, a group of scholars argue that when UN Security Council describes September 11 attack to be a “threat to peace”<sup>66</sup>, it is an acknowledgment of war on terror’s intensity-thus making it an armed conflict.<sup>67</sup> Therefore IHL will be applicable to the exclusion of IHRL<sup>68</sup> and IHL justifies US drone attack under doctrines of ‘military necessity’ and ‘self-defence’.<sup>69</sup>

However, the opponents argue that *War on Terror is No War at all*. Calling it ‘armed conflict’ gives US a license to kill, which it otherwise wouldn’t have. They question on whose scale the intensity has to be measured? Moreover, its duration is also very short (except in Afghanistan). In the case of *Nicaragua v. U.S.*<sup>70</sup>, the ICJ opined only grave attack can be termed as armed conflict. Therefore, to term it as an ‘armed conflict’ will be an error and CIA members are not lawful combatants, therefore their involvement is clearly a crime.<sup>71</sup> And unless Pakistan expressly request for US assistance, members of US armed forces will continue to be unlawful, however, it is interesting to note that there is no such request till date. Scholars also argue even if

<sup>64</sup>R Chesney ‘Who may be killed? Anwar Al-Awlaki as a case study in the international legal regulation of lethal force’ (2011) Yearbook of International Humanitarian Law 26.

<sup>65</sup>Harold Koh, Legal Adviser, Department of State, *The Obama Administration and International Law*, Keynote Address at the Annual Meeting of the American Soc’y of Int’l Law (25 Mar. 2010).

<sup>66</sup>LN Sadat ‘Terrorism and the Rule of Law’ (2004) 3 Washington University Global Studies Law Review 135.

<sup>67</sup>C Henks ‘Law from above unmanned aerial systems use of force and the law of armed conflict’ (2009)85 North Dakota Law Review 656. C.f. Thompson Chengeta, *Are United States of America’s Drone Targeted Killings within the confines of the Law?* 2011

<sup>68</sup>RH Vogel ‘Drone warfare and the law of armed conflict’ (2010)39 Denver Journal of International Law and Policy 107.

<sup>69</sup> Ibid. p. 115

<sup>70</sup> 1986 ICJ Reports, 14.

<sup>71</sup>Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, University of Notre Dame, Legal Studies Research Paper No. 09-43.

an express request is made, these drone attack will continue to be unlawful under international humanitarian laws.<sup>72</sup>

Killing Taliban and Al-Qaeda forces fighting US troops may be a necessary evil elsewhere but, Kenneth Roth asks, what is the justification in places like Yemen, Somalia, or Mali? And where does northwestern Pakistan fit?<sup>73</sup>The US is using drones to kill leaders of Taliban and Al Qaeda in Pakistan. However, rarely it has hit the intended target. The target and non-target ratio being 20:800, the fingers are often raised regarding the compliance of Principle of proportionality.<sup>74</sup>

#### **4.2. Extra territorial Application of Human Rights Law**

The traditional notion is that IHL applies to state of war situation and IHRL in peace time. However, the International Court of Justice in *Nuclear Weapons case*<sup>75</sup> held IHL as *lex specialis* and IHRL as *lex generalis*. Therefore IHRL applies both in war and peace time.

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<sup>72</sup> Ibid.

<sup>73</sup> Kenneth Roth, *What rules should govern US drone attacks*, The Human Rights Watch, available at <http://www.hrw.org/news/2013/03/11/what-rules-should-govern-us-drone-attacks> (accessed on dt. 14.01.2014)

<sup>74</sup> Ibid.

<sup>75</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, 8<sup>th</sup> July, 1996, 226.

## 5. Human Rights Perspective

Development, deployment and use of UAVs have always raised a number of legal, operational, ethical issues. Though the exhaustive list will not be offered here, however, a number of cardinal ones will be outlined for cognizance.

### 5.1. Violation of Right to Life

Drone attacks are inconsistent with Right to life.<sup>76</sup> Part III- Article 6 of the ICCPR proscribes arbitrary deprivation of the inherent right to life. It expressly states that this right shall be protected by law and is extended to all human beings. Though there are provisions for derogations of other human rights, however, the covenant strictly prohibits<sup>77</sup> violation of this most cherished right. This right can never be suspended or derogated from even in the time of public emergency which threatens the life of the nation.<sup>78</sup>

Similarly, Article 2 of the ECHR provides for the right to life. There are three main obligations under this article viz. a duty to refrain from unlawful killing, a duty to investigate suspicious deaths, and in certain circumstances, a positive duty to prevent foreseeable loss of life. Though self defence is made an exception, however, a limitation is also placed as to it must “not be more than absolute necessity”. Likewise, death resulted from “lawful” act of war is also an exception. However, the drone attack of US in Pakistan somehow does not seem to suit to the criteria of ‘lawful’ and ‘absolute necessity’ and appears to be a blatant violation.

### 5.2. Suspected Terrorism and Rule of Law

In the initial years, drones were used to target high ranking members of the Al-Qaeda and Taliban, whose activities in terrorist attacks were known to the international community.<sup>79</sup> However, in recent years targeting has been extended to individuals who are neither known nor even listed amongst the wanted persons.

The accessible evidence indicates that the vast majority of strikes conducted by CIA are “Signature strikes”- a drone attack that targets a group of men who bear certain signatures, or

<sup>76</sup> A. Dworkin, *Military necessity and due process The place of human rights in the war on terror*, D Wippman & M Evangelista (eds) *New wars, new laws? Applying the laws of war in the 21st century conflicts* (2005)53.

<sup>77</sup> Article 4 of the International Covenant on Civil and Political Rights

<sup>78</sup> Ibid.

<sup>79</sup> ‘Turning off autopilot towards a sustainable drone policy’ (2010) *Harvard National Security Journal Analysis* available at <http://www.harvardnsj.com/2010/03/nsj-analysis-turning-off-autopilot-towards-a-sustainable-dronepolicy/>

characteristics associated with terrorists activities but their identity are unknown.<sup>80</sup> It does not require specific knowledge about an individual's participation in hostilities or an imminent threat. Amnesty International documented many cases in which residents came to the scene of an initial drone strike only to be struck in follow-up strikes, possibly on the presumption that they too were members of the group being targeted. Yet local communities have little control over the presence of armed groups in their villages and districts.<sup>81</sup>

In 2010, Reuters reported that of the 500 "militants" killed by drones between 2008 and 2010, only 8% were the kind "top-tier militant targets" or "mid-to-high-level organizers" whose identities could have been known prior to being killed.<sup>82</sup> Similarly, in 2011, a U.S. official revealed that the U.S. had killed "twice as many 'wanted terrorists' in signature strikes than in personality strikes."<sup>83</sup>

It started with the killing of Zahwar Kili<sup>84</sup> and it has become such frequent now. The increasing number of individuals being targeted purely on the basis of suspicion and the inadequate opposition from the Human Rights groups is a matter of concern as it is a blatant violation of Rule of Law. Survivors have little chance of securing justice and getting compensation and other assistances. Lifting of dead bodies to unknown areas by armed groups, misinformation and politically driven propaganda have added misery to the victim and his family.

### 5.3. Trailing and Monitoring

Trailing and monitoring for the purposes of detection often derails certain rights, which we hold to be most precious otherwise. Continuous and baseless monitoring sends out the *Right to Liberty*. Article 9(1) of ICCPR says,

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<sup>80</sup> D. Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, Harcourt, 2012, 41 c.f. Kelvin Jon Heller, *One Hell of a Killing Machine: Signature Stricks and the International Law*, Melbourne Law Studies Research Paper No. 634, Melbourne Law School

<sup>81</sup> Will I be next? Amnesty International Publications, 2013, Executive Summary, Index ASA 33/014/2013.

<sup>82</sup> Stanford Law School International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *Living under Drones: Death Injury and Trauma to civilians from US Drone Practices in Pakistan*, September, 2012 at 31 c.f. *One Hell of a Killing Machine*, supra note 80.

<sup>83</sup> Columbia Law School Human Rights Clinic, *The Civilian Impacts on Drones*, September 2012 c.f. *One Hell of a Killing Machine*, supra note 80.

<sup>84</sup> On February 04, 2002, CIA killed Zahwar Kili and two others in the abandoned mujahedeen complex in the city of Khost, Paktia Province, Afghanistan.

“Everyone has the right to liberty and security of person... No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

Similarly, Article 5 of European Convention on Human Rights proscribes any deprivation of liberty, unless lawful. Article 17 of ICCPR holding *Right to Respect and Privacy* as sacrosanct prohibits arbitrary interference in one's family, privacy, home or correspondence and everyone has the right to the protection of laws against such interference and attacks. Similarly, Article 8 of ECHR guarantees every one of their right to respect for their private and family life.

## 6. Conclusion

With the upsurge of global terrorism, the relevance of counter-terrorism mechanisms can't be rescinded; and concurrently, adhesion with human rights is a *condition-precedent*. While there is much room for debate as to which law is apt, there can be no negation of the fact that nay consensus would encourage human rights abuses further.

Relying on the arguments advanced above, it is certain that the law of Human rights, having extra territorial applicability, has application over Global War on terror. Therefore, US claiming it as an armed conflict, for application of IHL alone, wouldn't sustain. May commitment of US be so firm; firmer is human rights, and it can't be a license to disregard such rights! The United States which champions human rights laws and its enforcement world-wide has to first live by such laws itself. Deliberate targeted killings, signature strikes and non-acceptance of liability can do no good except aggravating the environment of hostility further. The researcher is of a considerate opinion that US creates more terrorists than it actually kills! Killing of a terrorist might exterminate one; but killing of civilian certainly creates one. US approach to convert the entire world to a battle field and the intrusions of human rights are clearly unacceptable. Killing in the pretext of self-defense has to be stopped immediately and the concept of 'imminence' cannot be given a go by.

