

**DRONES AND THE CHICAGO CONVENTION:  
AN EXAMINATION OF THE CONCEPTS OF AERIAL SOVEREIGNTY, THE WAR  
ON TERROR AND THE NOTION OF SELF-DEFENCE IN RELATION TO THE  
CHICAGO CONVENTION**

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**Submitted in accordance with the requirements for the degree  
Magister Legum in International Law with Specialization in Air, Space and  
Telecommunication Law  
in the Faculty of Law  
at the University of Pretoria**

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**October 2013**

## Synopsis

From 2004 to the present the United States Government has employed drones for cross-border law enforcement purposes in the sovereign territory of Pakistan. Various opinions exist as to whether the US is justified in its intrusion into the territory of another sovereign state.

Matters regarding to both the integrity of territorial sovereignty and the use of force by a foreign country within the sovereign domain of another state are confirmed by both customary and treaty law. The United States and Pakistan are both parties to the two treaties that enshrine the principle of sovereignty - the UN Charter and the Chicago Convention of 1944.

Drones are being used increasingly by governments and private individuals for a host of reasons, ranging from military aggression to aerial recreation. They fulfil various military and useful other tasks, with the result that they are becoming increasingly indispensable. But, as with all technological innovations, the beneficial aspects of these inventions are counterbalanced by the aggressive and destructive use that can be made of them.

Some see the employment of drones for military purposes, such as the elimination of terrorist leaders linked to Al Qaeda in Pakistan, as preferable to whole scale destructive warfare. By the same token though, the argument can be made that the reasoning offered to justify intrusions into the sovereign territory of another state is insubstantial to the point of being dispensable and that the abuse of drones as weapons on these insubstantial grounds thereby becomes a real threat to civilised society and to international peace and security.

The purpose - and burden - of this study are to debate the legality and the justifications for the use of drones for law enforcement (seemingly military) purposes by the United States in the sovereign territory of Pakistan. A clear view of the permissibility and legality of this campaign in Pakistan is of considerable consequence to other countries that could find their sovereignty compromised.

Two essential 'tools' used to establish legal clarity in this matter are the Chicago Convention of 1944 and the UN Charter of 1945. The relevant provisions of these international agreements will therefore be studied in detail. Both these

conventions were signed by Pakistan and the United States, and both contain provisions protecting the territorial integrity and sovereignty of states. Reference will additionally be made to the Vienna Convention on the Law of Treaties in order to interpret the provisions of the Chicago Convention which is viewed by some as appropriate to regulate drone warfare. The writer intends to use this Convention to show that the applicability of the Chicago Convention may be open to dispute and that, instead, cross-border drone operations and the protection of aerial sovereignty depend on the purport of article 2(4) of the UN Charter and the customary principle of aerial sovereignty.

Therefore, the need to thoroughly examine and understand the concepts of the so-called 'war on terror' and the principle of preemptive self-defence is considered critical for the purpose in hand, as the United States uses these elements as justification for their infringement of Pakistani sovereign territory and their cross-border use of force in drone operations. These matters will, therefore, receive appropriate attention by reference to the relevant provisions in the UN Charter as well as the principles set out in international case law dealing with the subject matter.

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# 1 Introduction

The protection of State Sovereignty and of territorial integrity, which on occasion presents a barrier to the protection of human rights, here can constitute an important component of their protection of people against deadly force, especially with the advent of armed drones.<sup>1</sup>

In his October 2013 General Assembly Report on Drone Warfare, the United Nations (UN) Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, correctly identified the important roles the concepts of sovereignty and territorial integrity have to play in the protection of the victims of cross border drone operations similar to those conducted by the United States (US) in Pakistan.<sup>2</sup> This thesis argues that, by utilising existing laws enshrining this principle, the current drone operations in Pakistan may be proved illegal.

## 1.1 State Sovereignty and US cross-border drone operations in Pakistan

The modern system of global governance, with the UN as overarching forum, is founded on the long-established *grund norm* of modern international law, namely, the principle of state sovereignty.<sup>3</sup> Commonly referred to as aerial sovereignty, this principle was couched to include the airspace above the territory of a state.<sup>4</sup> This principle is explored in the present context with reference to its pivotal significance in determining the legality or otherwise of US drones operations in Pakistan from the perspective of air law and the cross-border use of force.

The US frequently relies on drone technology for its cross-border law enforcement exercises in various countries, including Pakistan, Yemen, Somalia and Afghanistan. It is important to note, however, that this dissertation focuses exclusively on US drone operations in Pakistan.

In response to these cross-border operations, Pakistan state officials have repeatedly stated that the US is encroaching upon their national aerial sovereignty.<sup>5</sup> To strengthen the Pakistani Argument, the Peshawar High Court (a national Pakistani Court) ruled on 9 May 2013 that the US was guilty of war crimes for its use

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<sup>1</sup>UN Doc. A/68/382.

<sup>2</sup>*Ibid.*

<sup>3</sup>Schaffner(2012) 35 *Fordham Int'l L.J.*1121 at 1124.

<sup>4</sup>Chicago Convention Art 1.

<sup>5</sup>Orr (2012) 44 *Cornell Int'l L.J.* 729 at 736.

of drones in North West Pakistan.<sup>6</sup> The court ordered the Pakistani government to take steps to prevent such drone strikes by the US.<sup>7</sup> The Court further found that drone strikes mounted by the Central Intelligence Agency (CIA) in the federally administered tribal areas (FATA) constituted a violation of both Pakistani sovereignty and a breach of international law.<sup>8</sup> This ruling emphasises the key importance of the sovereignty principle when adjudicating the matter. This dissertation will proceed to prove, with reference to existing international law, that the Peshawar High Court's ruling is correct and that the US is indeed in breach of Pakistani sovereignty, and further, that the US defences to justify these infringements of sovereignty (i.e. the pursuit of the putative 'war on terror', and the 'preemptive self-defence' argument) are essentially baseless for the purposes at issue.

## 1.2 The current situation

Traditional methods of warfare and traditionally-defined battlefields have given way to targeted killings in both law enforcement and military operations.<sup>9</sup> Non-international armed conflicts are a reality and there has been a shift from the traditional battlefield towards civilian population centres.<sup>10</sup> The traditional concept of war is also being challenged by the US, which states that it is fighting a war on terror, which can be interpreted as implying that it can hunt down terrorists associated with Al Qaeda anywhere in the world.<sup>11</sup>

Weaponry, too, has changed from traditional arms to unmanned robotic killing machines.<sup>12</sup> With regard to these changes it is the purpose of this dissertation to analyse whether existing aviation law, specifically the principle of aerial sovereignty as contained in the Chicago Convention, and the prohibition imposed by the UN Charter on the cross-border use of force to protect the sovereign territorial integrity of states, can be considered a sufficient legal deterrent to curb or regulate the unpermitted cross-border law-enforcement and anti-terrorist exercises currently being undertaken by the US in Pakistan.

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<sup>6</sup>Peshawar High Court Writ Petition 1551-P/2012.

<sup>7</sup>*Ibid.*

<sup>8</sup>*Ibid.*

<sup>9</sup>Finkelstein, Ohlin and Altman (2012) v.

<sup>10</sup>Melzer (2012) 69.

<sup>11</sup>Gray (2008) 1.

<sup>12</sup> *Ibid.*



Some argue that these unmanned aerial vehicles are a cleaner and more precise method of warfare, and so raising the question whether this study is necessary at all.<sup>13</sup> Such doubts can obviously be laid to rest by looking at the impressive array of infringements of international law that occur when these weapons are used incorrectly. Without prejudice to the freely-acknowledged benefits of Unmanned Aerial Vehicles (UAVs), this study nevertheless focuses on the potentially illegal use of UAVs in peacetime cross-border law-enforcement operations without the prior consent of the targeted state.

The pivotal reasoning of the dissertation is that drone activity is governed by the existing legal principle of aerial sovereignty as well as the UN Charter. Some consider the Chicago Convention to be an adequate legal framework within which to regulate drone warfare conducted by the US in Pakistan, but this dissertation will show that such a deterrent effect can be achieved by merely asserting the principle of aerial sovereignty with specific reference to state-operated craft as specified in article 3(c), rather than the Convention as a whole, specifically since article 8 of the Convention applies exclusively to civil aircraft, whereas drones are certainly not classifiable under that category.<sup>14</sup>

The use of UAVs is not going to end;<sup>15</sup> the technology is here to stay, and regulation and legal certainty are therefore needed. During 2009 the US purchased more unmanned than manned aircraft. US defence and budget reports clearly indicate that America plans to triple its inventory of high-altitude armed and unarmed drones by 2020.<sup>16</sup> Various countries are following in its footsteps.<sup>17</sup>

### **1.3 Appropriate legal framework**

The Special Rapporteur emphasizes that the various components of international law developed over the ages create a finely balanced system to address immediate security concerns, in addition to the need to protect the right to life in the short and long terms.

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<sup>13</sup>Love (2011)19.

<sup>14</sup>*cf* Dempsey (2005) 30 *N.C.J. Int'l L. & Com. Reg.* 1 at 5; Phelps (1985) 107 *Military Law Review* 225.

<sup>15</sup>UN Doc. A/68/382.

<sup>16</sup>Shaw and Akhter (2012) 44; *Antipode* 1490 at 1492.

<sup>17</sup> O'Connell (2010) *Nôtre Dame Law School Legal Studies Research Paper* No 09-43 1 at 2.

International security and the protection for the right to life depend on the principle that the use of force is a matter of last resort.<sup>18</sup>

Christof Heyns pointed out to the General Assembly in his 2013 Drone Report that existing international law provides sufficient means to limit actions that may violate aerial sovereignty and impose an effective prohibition on cross-border military exercises involving drones as instruments of military aggression.<sup>19</sup> The 2005 World Summit Outcome of the United Nations, furthermore, reaffirmed in outcome 79 that the relevant provisions of the UN Charter are sufficient to address the full range of present-day threats to international peace and security.<sup>20</sup> The legality or otherwise of drones' entry into foreign airspace can be determined simply by examining international law. There is no difference between the use of a drone and the use of an F 14 fighter jet in this respect.<sup>21</sup>

It is vital that the use of drones be regulated by existing international law, the only safeguard for humanity. A review of the current legal framework governing aerial sovereignty and territorial integrity against intrusions and cross-border use of force by means of UAVs is the starting point in determining whether US action in Pakistan is legal.

This dissertation, therefore, will explore the existing concept of aerial sovereignty pertaining to state and military aircraft as mentioned in the Chicago Convention. The Vienna Convention on the Law of Treaties will be employed to show that under the laws of treaty interpretation such UAVs are not subject to the provisions of Chicago.

The writer will further show that, regardless of whether Chicago is applicable, the principle of aerial sovereignty as asserted in practice clearly demonstrates an acknowledgment that state craft may not cross sovereign borders without prior permission, thus proclaiming the US exercise illegal by virtue of preponderance of practical opinion.

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<sup>18</sup>*Supra* n 1.

<sup>19</sup>*Ibid.*

<sup>20</sup> UN Doc. A/Res/60/1

<sup>21</sup> *Compare* Schmitt (2012) 30 *BU ILJ* 595.

In order to further the object of proving the illegality of US drone operations in Pakistan, an additional treaty will be considered, namely, the UN Charter concluded in 1945 to protect the sovereign integrity of states. Article 2(4) of the Charter will be invoked to show a breach of sovereignty and sovereign integrity due to the illegal use of force.

#### **1.4 Critical research questions**

The research questions are:

- Why are drones perceived negatively?
- Is the US breaching Pakistani aerial sovereignty?
- Is the Chicago Convention, though initially drafted to regulate civil aviation, the appropriate legal framework to regulate the aerial sovereignty principle that comes into play in cross-border drone operations?
- Can the concepts of the “war on terror” and “self-defence” constitute sufficient legal grounds on which to justify entry into Pakistani territory for the purpose of exercising military force? Or can such exercises be declared beyond the pale in legal terms in virtue of article 2(4) of the UN Charter?

#### **1.5 Research Aims**

The thesis of this dissertation is to show that the Chicago Convention is not the correct law to apply where cross-border law-enforcement operations are concerned. It will, however, show that existing law such as the UN Charter and the customary principle of aerial sovereignty is the appropriate legal framework to answer the research questions raised.

A practical aim of the research project is to provide an academic underpinning to contribute to legal certainty for the benefit of law-enforcement agencies around the world as to the appropriate application of laws pertaining to peacetime cross-border law-enforcement exercises involving drones.

## **1.6 Chapter breakdown**

The above-mentioned research questions and research aims will be addressed in the following chapters:

### **1.6.1 Chapter 2: Why are drones perceived negatively?**

The various uses of drones will be identified, and the benefits of this technology will be mentioned. The negative implications of the use of drones contrary to the principles of international law will be discussed. This chapter is a vital starting point at which to introduce the hypothesis from which this dissertation proceeds, namely, that drones operations in Pakistan take a heavy toll on that country and are in fact illegal.

### **1.6.2 Chapter 3: Sovereignty**

The writer will analyse the historic development of the principle of sovereignty in general, and 'aerial sovereignty' in particular, with specific reference to the Paris Convention (1919) and the Chicago Convention (1944). Exactly how drones may be said to breach the concept of aerial sovereignty with specific reference to the infraction of aerial sovereignty by US drones in Pakistan will be investigated. This chapter will furthermore indicate how the concept of territorial integrity is protected against the use of force by foreign nations, with the result that the sovereignty of the targeted state is protected by the UN Charter. The UN Charter and the principle of aerial sovereignty are sufficient in themselves to prove that the cross-border drone operations currently conducted by the US in Pakistan are illegal.

### **1.6.3 Chapter 4: State sovereignty in relation to the Chicago Convention**

The writer will investigate whether drones as employed by the US in its cross-border operations in Pakistan should and could be regulated by the Chicago Convention of 1944. The reason why this Convention should be a major reference point is that the concept of aerial sovereignty is enshrined in this treaty and both Pakistan and the US are parties to it. The writer will assert by virtue of an analysis of the definition and characteristics of a drone that article 8 of the Chicago Convention is in fact in conflict with the opinion of some eminent scholars, not the authorising instrument that enables the Convention to regulate the operation of drones at this time. Article 3(c) and the protection of the sovereignty principle in relation to the concept of state aircraft will be analysed. The writer will list the arguments for the application of the

Chicago Convention and will discredit these *contra legem* arguments with due reference to the Vienna Convention on the Law of Treaties (1969) to that end. The chapter will indicate that the UN Charter will serve as an adequate catch-all or default position if application of the Convention is invalidated.

#### **1.6.4 Chapter 5: The war on terror**

The 'war on terror' is a popular justification by the US to legitimise its illegal crossing of Pakistan's sovereign aerial borders as well as the use of force against Pakistan's sovereign territorial integrity during its drone operations. Analysis of this defence is thus central in deciding whether the US is breaching Pakistan's aerial sovereignty and infringing on their territorial integrity as protected by the UN Charter, international aviation law and customary international law. Whether the 'war on terror' justifies the popular opinion that humanitarian law alone should regulate drone operations will be investigated. Humanitarian law is the law which applies in times of war and can permit the crossing of borders to target enemy combatants. The aim of this chapter will be to convince the reader that the 'war on terror' is not a war in the traditional sense, and that it does not meet the requirements to establish a non-international armed conflict, and that peacetime law should therefore still apply.

#### **1.6.5 Chapter 6: The concept of pre-emptive self-defence**

Article 2(4) of the UN Charter serves to protect territorial sovereign integrity against the use of force by one nation against another during peacetime. The concept of aerial sovereignty is thus, furthermore, protected by treaty and custom during peacetime. The US uses an 'inherent right to self-defence' or a right to anticipatory self-defence to justify its crossing of Pakistani aerial borders with the aid of drones in order to execute targeted killing operations. This chapter will examine the exact scope of self-defence as understood in the context of article 51 of the UN Charter to determine whether current drone operations by the US in Pakistan meet these requirements. The conclusion of this chapter will be that the requirements to act in self-defence (as set out in the *Caroline* case) have not been met.

#### **1.6.6 Chapter 7: Conclusion**

In this final chapter the writer will show that the solution to the problem of legal certainty as to which framework should regulate the crossing of aerial borders by

drones is very straight-forward: it is simply the application of article 2(4) of the UN Charter as well as the principle of aerial sovereignty.

### **1.7 Limitations on the scope of this thesis**

The author of this dissertation is well aware of *lacunae* in its dealings with the subject under review. In the light of practical constraints the author chooses to address the most prominent nuances relating to the topic and to focus only on the US drone operations undertaken in Pakistan at the time of the presentation of this research project.

### **1.8 Conclusion**

The purpose of this dissertation is to prove that even though technology has changed, existing laws remain adequate as a legal framework within which to regulate issues of the cross-border use of force and the infringement of aerial sovereignty, specifically the drone phenomenon; and, further, to show conclusively in light of the legal analysis presented that the US is in breach of Pakistani sovereignty and its territorial integrity.

## 2. Why are drones perceived negatively?

### 2.1 Synopsis

Drones come from the sky, but leave the heavy footprint of war on the communities that they target. The claims that drones are more precise in targeting cannot be accepted uncritically, not least because terms such as ‘terrorist’ or ‘militant’ are sometimes used to describe people who are in truth protected civilians.<sup>22</sup>

This chapter examines the heavy footprint left by US drones specifically in Pakistan and other territories affected by the US drone policy in general. The writer also acknowledges the advantages of utilising drones in general. The writer starts her hypothesis in this chapter as it is indeed this “heavy footprint” that is crucial in proving such US drone operations illegal and in breach of Pakistan’s aerial sovereignty and territorial integrity.

### 2.2 Introduction

Drones may be used for both civil and military purposes. This dissertation focuses exclusively on the peace-time use of drones for law-enforcement purposes and cross-border operations. It is manifestly clear that drone technology does have its advantages, including the fact that states which possess such technology have reduced financial and human capital risk when using drones instead of manned aircraft.<sup>23</sup> Part of its appeal is that drones are relatively cheap in comparison to combat aircraft, they have a longer flying time, and there is no risk of loss of life for the operating state.<sup>24</sup> Drones, furthermore, provide their operators with a strategic advantage of minimising the time between the identification of a possible distant target and the deployment of lethal force against it.<sup>25</sup> Drones are, therefore, not bad *per se*, but rather in the way in which these machines are currently used in targeted killing operations which may have a wide-spread negative impact if not regulated by law.<sup>26</sup> These negative implications are outlined below.

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<sup>22</sup>*Supra* n 1.

<sup>23</sup>O’Connell, *supra* n 17 at 4; See Love, *supra* n 13 at 10, 19 and 45 for ways in which drones may be utilized in a positive manner.

<sup>24</sup>*Ibid.*

<sup>25</sup>*Supra* n 1.

<sup>26</sup>*Compare supra* n 1; *supra* n 20.

### 2.3 Infringements of human rights

The human rights that may potentially be infringed by drone attacks can be divided into three groups: direct violations owing to targeted killings; violations of socio-economic rights owing to damage caused by drone strikes, and, finally, direct violations caused by using drones for cross-border surveillance.

The first group includes: the right to life;<sup>27</sup> the right to a fair trial;<sup>28</sup> the right to freedom of association;<sup>29</sup> and the protection of the family as a unit.<sup>30</sup>

The second group includes the violation of the right to the enjoyment of the highest attainable health standards<sup>31</sup>(destruction of hospitals and concomitant infrastructure); the right to education<sup>32</sup>(e.g. destruction of educational infrastructure and citizens' fear of assembly given the risk of drone attack); and the right to freedom from hunger<sup>33</sup> (NGOs may be unable to reach those in need in unsafe areas that are subjected to unexpected attacks, and/or destruction of roads may delay delivery of food aid).

Finally, surveillance drones infringe the fundamental right to privacy.<sup>34</sup>

Both the former and current Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions, Phillip Alston and Christof Heyns, have expressed profound concern and the conviction that drone attacks contravene international law and violate the right to life.<sup>35</sup> The more the international community allows deviations from existing international law, the more difficult it will be to restore the integrity of the international rule of law.<sup>36</sup> It should be clear that drones pose a major threat to international law in that they violate the most fundamental human rights, including

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<sup>27</sup>ICCPR Art 6, UDHR Art 3.

<sup>28</sup>ICCPR Art 26.

<sup>29</sup>ICCPR Art 22.

<sup>30</sup>ICCPR Art 23.

<sup>31</sup>ICCPR Art 12.

<sup>32</sup>ICCPR Art 13.

<sup>33</sup>CESCR Art 12.

<sup>34</sup>ICCPR Art 15.

<sup>35</sup>A/HRC/14/24/add.6; Heyns, address to the International Law Journal symposium on 'StateEthics', Harvard Law School, February 2012.

<sup>36</sup>*ibid.*



the right to life.<sup>37</sup> This highlights the need for transparency and accountability that will enable the reliable monitoring of violations such as those listed above.

The Peshawar High Court recently took the first step forward by ruling that:

...in light of the Pakistani Government's constitutional obligations to protect the right to life of its citizens, the court orders the Pakistan Government to take immediate steps to stop future attacks.<sup>38</sup>

The Court further called for a referral to the UN and that the US is bound to pay compensation to the victims' families and that the Pakistani government should take steps to ensure that this happens.<sup>39</sup> It is well-known that national courts do not have binding jurisdiction on other states, but this indeed is a step in the right direction; the Pakistani government may be forced to meet their international law and constitutional obligations to protect their citizens. This is the first ruling of its kind to acknowledge that drones do indeed cause serious human rights violations.

## 2.4 The issue of collateral damage

According to a 2012 Amnesty International Report, the death toll resulting from drone strikes in Somalia, Yemen, and Pakistan varies to between 2854 and 4175.<sup>40</sup> The civilian death toll reported in the media varies dramatically. Drones are anything but precise in their strike effect.<sup>41</sup> Heyns specifically expressed concern about the civilian death toll caused by US drone strikes in Pakistan and cautioned against US allegations that only terrorists were killed.<sup>42</sup> A shocking example was a strike that killed no combatants but cost the lives of a woman aged 67 and five other civilians.<sup>43</sup> Inaccurate strikes such as these are unacceptably frequent. The court endorsed this position in the Pakistani case where the majority of the victims were small children

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<sup>37</sup>AMR 51/047/2012.

<sup>38</sup>*Supra* n 6.

<sup>39</sup>*Ibid.*

<sup>40</sup>*Ibid.*

<sup>41</sup>O'Connell, *supra* n 17, at 6-7, *Contra* Love, *supra* n 15, at 19.

<sup>42</sup>[http://www.repriev.org.uk/press/2013\\_10\\_17\\_UN\\_drones\\_security\\_Heyns/](http://www.repriev.org.uk/press/2013_10_17_UN_drones_security_Heyns/) (accessed on 24 October 2013).

<sup>43</sup> <http://www.thenews.com.pk/Todays-News-7-139621-Tribesmen-protest-drone-strike-in-north-waziristan> (accessed on 10 January 2012).

and women, and civilian deaths dwarfed those of alleged combatants (i.e. as the judge put it, they were ‘a hundred times greater’).<sup>44</sup>

## **2.5 What is the known socio-economic impact of drone attacks on the targeted state?**

In view of the high and projected major escalation in expenditure on unmanned aircraft in the US, it seems that the destructive threat of this kind of warfare is spreading apace, thus indicating an urgent need to discuss some of the devastating, and long-lasting, effects of this remote-controlled warfare on the targeted state.<sup>45</sup> The cost of war should be counted not only in loss of life but also in terms of the economic impact of drone attacks on the targeted state.<sup>46</sup>

It stands to reason that drone attacks undermine the economic growth of already-vulnerable targeted states. It is therefore incumbent on the international community to seek a solution to this problem so that vulnerable countries can develop their economies. Research has shown that economically-unstable countries are much more likely to become a target for terrorist activities than are countries with firmly-established economies.<sup>47</sup> For example, repeatedly targeting poor countries such as Somalia, Yemen and Pakistan, fosters a climate for terrorism in that terrorist groups find a ready source for recruitment among frustrated citizens who are easily persuaded to join the terrorist cause.<sup>48</sup> This is not the avowed purpose of anti-terrorist campaigns.<sup>49</sup> Mary Ellen O’Connell, an eminent scholar, writes the following in this regard:

Moreover, killing leaders has typically had only a short-term impact on repressing terrorist violence, while every civilian killed represents an alienated family, a new desire for revenge, and more recruits for a militant movement that has grown exponentially even as drone strikes have increased.<sup>50</sup>

It has the effect of pulling out one weed and ten more coming in its place. It seems incontrovertible, therefore, that drone attacks are counterproductive.

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<sup>44</sup>*Supra* n 6.

<sup>45</sup>Gregory (2011) *The Independent Institute* 1.

<sup>46</sup>*Ibid.*

<sup>47</sup>Gregory, *supra* n 45, at 16.

<sup>48</sup>*Ibid.*

<sup>49</sup>*Ibid.*

<sup>50</sup>O’Connell, *supra* n 17, at 6-7.

A study conducted by Sidel and Levy into the adverse consequences of US drone strikes on public health in targeted states since 2001 revealed that, in Afghanistan and Pakistan, much of the health-care infrastructure had been damaged or destroyed and that life-expectancy had been reduced from the age of 66 to 48.<sup>51</sup> Living conditions generally have declined to unacceptably low levels, thus creating favourable conditions for terrorism as indicated. Damage to economic infrastructure includes environmental damage, for example the depletion of timber by displaced persons in need of firewood.<sup>52</sup>

A further economic consequence is that trade and investment flows are inhibited by negative foreign sentiment, which, in turn, is exacerbated by economically harmful losses of physical and human capital and the psychological impact of being under constant threat of drone attack, which seriously disrupts work and family life and effectively further depresses the economy.<sup>53</sup> Thus, there is the direct physical impact, as well as the indirect impact of the influence on localised and national, as well as international, sentiment (e.g. reluctance to invest).<sup>54</sup> The destruction of transport infrastructure naturally inhibits general economic activity and the delivery of goods and services for basic human consumption.<sup>55</sup> Tourism is also naturally brought to a virtually complete standstill and effectively eliminated as a source of revenue.<sup>56</sup> The inevitable result of these severely inhibiting factors is that the GDP declines, the repayment of loans become prohibitive, and the resultant general climate of impoverishment, generates conditions that lend an aura of acceptability to the prospect of joining terrorist organisations, thus completing the eternal cycle of violence breeding violence.<sup>57</sup>

## **2.6 The cost of war and economic impact on the state using drone warfare to fight terrorism – a brief account of the quandary for the US**

The tactical advantage of using drones as a weapon of choice to execute targeted killings is clear. Drones are relatively cheap to manufacture compared to manned

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<sup>51</sup>Levy and Sidel (2011) 378 *Lancet* 944 at 944- 949.

<sup>52</sup>*Ibid.*

<sup>53</sup> Schneider, Bruck and Mayernicks (2010) 1050 *Discussion Papers: German Institute for Economic Research* 4.

<sup>54</sup>Schneider, Bruck and Mayernicks, *supra* n 54, at 38, 50.

<sup>55</sup>Schneider, Bruck and Mayernicks, *supra* n 54, at 42.

<sup>56</sup>Schneider, Bruck and Mayernicks, *supra* n 54, at 77.

<sup>57</sup>*Ibid.*

aircraft, and they do not risk the lives of pilots.<sup>58</sup> Drone warfare appears to be in a class of its own in that existing legislation makes inadequate provision for its regulation, particularly since it is protected by a wilful lack of transparency and obfuscatory legal defences that are difficult to penetrate or circumvent. They do excite a spirit of resentment and revenge against the aggressor (the US), however, with the result that hostilities are kept alive and even exacerbated at immense cost to the US.<sup>59</sup>

Sidel and Levy estimate that the wars in Afghanistan and Iraq, including drone warfare, have cost the US around US \$789 billion and \$438 billion respectively, which means that substantial human and financial resources that should have been available to the US and its allies for peaceful purposes were diverted for military purposes.<sup>60</sup> For example, soldiers deployed to fight the war on terror should have been available to deal with natural disasters such as hurricane Katrina where manpower shortages were experienced.<sup>61</sup> Inadequate health-care funding in the US is blamed on excessive military spending, this despite the promise of the Obama administration to reduce the defence budget, instead of which it rose to unprecedented levels in 2011.<sup>62</sup> It is clear, therefore, that the sustained warfare at issue here is harmful to the targeted as well as the targeting state and is really unaffordable to both at any stage, let alone in the long run.

By resorting to unconventional tactics that ride roughshod over legalities the US continues to expose itself to similar retaliatory tactics as well as possible future legal claims for compensation for the damage caused by US-launched drone attacks.<sup>63</sup>

## 2.7 Conclusion

Besides making inroads on the force of international law, the scourge of drone warfare undermines the economies of both the targeting and targeted state and reduces basic infrastructure and services in the targeted state. This is felt mostly by

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<sup>58</sup>O'Connell, *supra* n 17, at 5.

<sup>59</sup>K Anderson (2009) *University of Washington College of Law Working Papers* 6.

<sup>60</sup>Levy and Sidel, *supra* n 52.

<sup>61</sup>*Ibid.*

<sup>62</sup>Gregory, *supra* n 45, at 7-8.

<sup>63</sup>O'Connell, *supra* n 17, at 18.

innocent civilians, living in the Pakistani regions, whose basic human rights are grossly violated. It is further evident from various case studies that “aggression against terrorism is answered with further aggression”.<sup>64</sup>

In conclusion a quotation is taken from the work of O’Connell as she offers the best summation of the situation:

International law, by contrast, supports the position of counter terrorism experts that law enforcement methods are the proper means to employ in suppressing terrorism. Confronting the violent lawlessness that is terrorism with strict adherence to the rule of law makes common sense and moral sense.<sup>65</sup>

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<sup>64</sup>Schneider, Bruck and Mayernicks, *supra* n 60, at 9.

<sup>65</sup>O’Connell, *supra* n 17, at 26.

## 3. Sovereignty

### 3.1 Synopsis

The US has been deploying drones to enter Pakistani airspace since 2004 for surveillance and targeting purposes.<sup>66</sup> Pakistan has repeatedly stated that it will never give the US permission to enter its territorial airspace with drones.<sup>67</sup> A Pakistani court ruled that the use of drones in Pakistan is a clear violation of its territorial sovereignty.<sup>68</sup> It regrettably failed to indicate which body of law it had used to reach this conclusion.

As it is the hypothesis of this dissertation that US drone operations in Pakistan do indeed violate Pakistani aerial sovereignty, it is only natural that any such discussion should begin with an excavation of the basic concept of sovereignty.

### 3.2 Introduction

This chapter focuses on the principle of sovereignty in general and the concept of aerial sovereignty in particular. The writer will aim to give a basic legal underpinning of these legal terms.

### 3.3 The principle of sovereignty in general

Dugard is of the opinion that international lawyers avoid defining the term 'sovereignty' owing to the fact that it has an 'elastic' meaning which adapts to the context and discipline in which it is used.<sup>69</sup> Max Huber has given an accurate definition of the meaning, however, in the *Island of Palmas* case:

Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is a right to exercise therein to the exclusion of any other state, the function of that state.<sup>70</sup>

The concept of sovereignty is one of the founding principles of international law.<sup>71</sup> The sovereignty principle is deemed to be such a fundamental principle of

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<sup>66</sup>Orr, *supra* n 5, at 729.

<sup>67</sup>*Ibid.*

<sup>68</sup>Peshwar, *supra* n 6.

<sup>69</sup>Dugard (2012) 126.

<sup>70</sup>*Island of Palmas Case* 2 RIAA 829 at 838.

<sup>71</sup>Dugard, *supra* n 69..

international law that it receives protection in the UN Charter. Art 2(1) of the Charter states that ‘the organisation is based on the principle of the sovereign equality of all its Members’. The UN Charter confirms that the concepts of territorial integrity and sovereignty are closely intertwined and one of the organisation’s core principles is to protect sovereignty (territorial integrity or political independence of any state)<sup>72</sup> against the threat or use of force by one state against another.<sup>73</sup>

The relevance of art 2(4) and the sovereignty principle in general as enshrined in the UN Charter with regard to the ‘use of force’ has been confirmed by the UN General Assembly in Resolution A/res/60/1, the 2005 World Summit Outcome. In Chapter 1, stating the values and principles of the organisation—in principle 5:

We are determined to establish a just and lasting peace over the world in accordance with the purposes and principles of the Charter. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations...<sup>74</sup>

Both Alston and Heyns have indicated that cross-border targeted killing operations, with particular reference to drone operations in Pakistan, raise sovereignty concerns, and that article 2(4) of the UN Charter prohibits such action.<sup>75</sup> It is thus clear that the general principle of sovereignty as protected by the UN Charter is central to this discussion. The alleged infringement of this principle under article 2(4) and the prime US justifications for such infraction will be discussed in detail in chapter 5 and chapter 6.

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<sup>72</sup>*Compare* Libarona (2012) 16 *REAF* 107.

<sup>73</sup>UN Charter Art 2(4).

<sup>74</sup>*Supra* n 20.

<sup>75</sup>*Supra* n 35.

### 3.4 The concept of aerial sovereignty

#### 3.4.1 Overview and definition

Dugard rightly notes that the term 'sovereignty' should be defined in relation to the field and context in which it is used.<sup>76</sup> The concept of aerial sovereignty will be examined in the present context.

The principle of aerial sovereignty is the most basic principle of international air law.<sup>77</sup> The principle acknowledges the sovereignty of all nations individually, thereby acknowledging that by virtue of that sovereignty every nation exercises absolute power over its airspace.<sup>78</sup>

To fully understand this principle, an analysis of what exactly is meant by the term 'airspace' is crucial.<sup>79</sup> First, it is important to note that airspace extends both horizontally and vertically.<sup>80</sup> International law has failed to provide a binding definition of the term 'airspace'.<sup>81</sup> The vertical dimension has, however, been traditionally set at between 80 to 120 km above the ground surface.<sup>82</sup> This dimension is acceptable purely because aircraft are able to 'derive support in the atmosphere from the reactions of the air'<sup>83</sup> and can thus still fly.<sup>84</sup> The Karman line which establishes the boundary between Earth's atmosphere and outer space at 100km above sea level also enjoys wide acceptance.<sup>85</sup> The horizontal dimension refers to the state's sovereign borders.

The principle of aerial sovereignty was adopted into treaty law for the first time in the Paris Convention of 1919. This treaty 'solemnly affirmed the principle of the sovereignty of the subjacent states over the airspace and forbade military aircraft to enter foreign airspace without the authorisation of the territorial sovereign'.<sup>86</sup> At the time of the signing of the Paris Convention, both contracting and non-contracting

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<sup>76</sup>Dugard, *supra* n 69.

<sup>77</sup>Hughes (1952) 19 *Air L & Com* 144.

<sup>78</sup>Giemulla and Weber (2011) 6.

<sup>79</sup>Honig (1956) 34.

<sup>80</sup>Boothby (2012) 328.

<sup>81</sup>*Ibid.*

<sup>82</sup>Giemulla and Weber, *supra* n 78 at 49.

<sup>83</sup>[http://www.icao.int/safety/AirNavigation/NationalityMarks/annexes\\_booklet\\_en.pdf](http://www.icao.int/safety/AirNavigation/NationalityMarks/annexes_booklet_en.pdf) (accessed on 22 October 2013).

<sup>84</sup>Giemulla and Weber, *supra* n 82.

<sup>85</sup>*Ibid.*

<sup>86</sup>Lissitzyn (1953) 47 *AM. J. Int'l L* 559 at 563.



states deemed the principle of aerial sovereignty to be a basic rule of international law.<sup>87</sup> Article 1 of the Chicago Convention is nearly an exact iteration of Article 1 of the Paris Convention.<sup>88</sup> This principle has, furthermore, been adopted into national laws and contemporary aviation agreements.<sup>89</sup>

Cooper has restated the principle:

If any area on the surface of the earth, whether land or water, is recognised as part of the territory of a State, then the airspace over such area is also part of the territory of the same State. Conversely, if an area on the earth's surface is not part of the territory of any State, such as the water areas included in the high seas, then the airspace over such surface areas is not subject to the sovereign control of any State, and is free for the use of all States.<sup>90</sup>

If any area on the surface of the earth, whether land or water, is recognised as part of the territory of a state, then the airspace over such area is also part of the territory of the same state. Conversely, if an area on the earth's surface is not part of the territory of any state, such as the water areas included in the high seas, then the airspace over such surface areas is not subject to the sovereign control of any state, and is free for the use of all states. Defining the sovereign airspace of a country is important as it aims to exclude other states from using sovereign airspace without explicit authorisation.<sup>91</sup> This seems to include penetration of sovereign borders by state craft without consent (e.g. the incursions allegedly perpetrated by the US into Pakistan's sovereign territory).

Goedhuis stated in 1955 that:<sup>92</sup>

While agreement on the principle that the state should have sovereignty over its territorial air space was easily achieved, the views of both statesmen and writers in respect of the nature and contents of this sovereignty have been deeply divided and changing.

This comment has even greater relevance in the contemporary world as these principles are continuously being challenged by new technologies, including drones. It is vital, therefore, that international law scholars debate and prove that these principles are not to be taken lightly as they are timeless.

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<sup>87</sup>*Ibid.*

<sup>88</sup>Hughes, *supra* n 77.

<sup>89</sup>Giemulla and Weber, *supra* n 78 at 8.

<sup>90</sup>Hughes, *supra* n 77, at 145.

<sup>91</sup>Giemulla and Weber, *supra* n 82.

<sup>92</sup>Goedhuis (1955) 22 *Air L. & Com* 209.

### 3.4.2 The aerial sovereignty principle and military aircraft

The classification of aircraft as civil or military is essential as a precaution in the event of a breach of sovereignty perpetrated by the violation of the Chicago Convention since it applies only to civil aircraft as articulated in the said Convention.<sup>93</sup>

As precursor of the Chicago Convention, the Paris Convention of 1919 contained a specific disposition pertaining to military aircraft.<sup>94</sup> This determination was included in article 32 which reads: ‘... no military aircraft of a contracting State shall fly over the territory of another contracting State or land thereon without special authorization.’<sup>95</sup>

The question about the regulatory relevance of the Chicago Convention with regard to drone warfare waged by the US in Pakistan is germane simply because there is no international treaty that regulates the operation of military aircraft (*cf* Parks - ‘the legal vacuum that existed before World War II remains today’).<sup>96</sup> Furthermore, if art 3(c) of the Chicago Convention is upheld regardless of its inconsistency with art 3(a) – (to be scrutinised in the next chapter) - a convention would thereby exist to which both the US and Pakistan would be signatories, in which case the signatories would be bound to uphold the condition that US drones would have to desist from crossing Pakistani borders without express authorisation. Indeed some scholars hold that a general international understanding exists that the principle of aerial sovereignty applies universally to all types of aircraft, thus implying that the need exists in any case to gain authorisation from the state whose territory is being subjected to aerial encroachment by the state seeking such entry, failing which such *de facto* entry would constitute a violation of the aerial sovereignty of the state thus entered.<sup>97</sup>

### 3.5 Conclusion

The significance of a clear understanding of the concept of sovereignty in the context of this dissertation is, simply put, that the unpermitted use of drones by the US to

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<sup>93</sup>See Chicago Convention Art 3(a).

<sup>94</sup>Bourbonniere and Haeck (2001) 66 *J. Air L. & Com* 885 at 893.

<sup>95</sup>*Ibid.*

<sup>96</sup>Boothby, *supra* n 80, at 326.

<sup>97</sup>*Ibid.*

enter Pakistani airspace and, furthermore, the use of such drones to penetrate acts of military aggression within Pakistani borders, constitutes a violation of Pakistan's aerial sovereignty.

## 4. State sovereignty in relation to the Chicago Convention

### 4.1 Synopsis

The purpose of this chapter is to critically examine any scholarly contentions alleging that article 8 of the Chicago Convention is the correct framework within which to regulate drone warfare, specifically the current unauthorised use of drones by the US in Pakistan. It will also argue that the sovereignty principle as contained in article 1 is not applicable in the current case. It will acknowledge that, although such *contra legem* arguments do exist, the interpretive guidance of the Vienna Convention on the Law of Treaties confirms these articles' lack of applicability. It will, however, acknowledge that article 3(c) may find limited but insignificant application given that it merely reiterates an international principle already perceived to be customary law.

### 4.2 Introduction

The Chicago Convention is often referred to as the *Magna Carta* of international air law.<sup>98</sup> Both the US and Pakistan are contracting states to the Convention. The Pakistani government has continuously protested that intrusion into its airspace by US drones is a violation of its aerial sovereignty, and that it will never grant such permission.<sup>99</sup> The UN confirmed, in a press release dated March 2013, that the drone warfare conducted by the US is a clear breach of Pakistani sovereignty and a contravention of international law.<sup>100</sup>

Articles 1, 3(c) and 8 of the Convention regulate aerial sovereignty between contracting parties. Article 8, dealing specifically with unmanned aircraft, is regarded by some as the *lex specialis* regulating drones in international law.<sup>101</sup> Article 3(a) states clearly that the Convention is only relevant to civil aircraft; consequently the civil status of the craft used in the incursions under discussion will have to be determined as a preliminary issue to deciding whether articles 1, 3 and 8 provide a valid framework within which to regulate aerial sovereignty issues relating to the peace-time use of drones by the US in Pakistan.

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<sup>98</sup>Bourbonniere and Haeck, *supra* n 94.

<sup>99</sup>Orr, *supra* n 5.

<sup>100</sup>[http://www.reprive.org.uk/press/2013\\_03\\_15\\_cia\\_drones\\_in\\_pakistan\\_illegal\\_says\\_un/](http://www.reprive.org.uk/press/2013_03_15_cia_drones_in_pakistan_illegal_says_un/) (accessed on 20 March 2013).

<sup>101</sup>*Compare Fedele (1967) 9 U.S.A.F. Jag L. Rev 8 at 155.*

Once the validity of the legal framework is settled, the next question is to decide whether the relevant parties to the Convention have met the obligation to respect each other's aerial sovereignty, with particular reference to the operations of drones. The most immediate question at this point is whether, in terms of article 8, prior consent was sought for an incursion into the airspace of the country targeted for such a visitation, and whether on receiving such a request the targeted country was given the opportunity to specify the conditions under which permission for the intended entry would be granted. Article 8 is also a self-executing treaty provision in terms of US Law.<sup>102</sup> The US Court of Appeals for the District of Columbia has decided that certain provisions of the Chicago Convention impose direct obligations upon member states and that they require no implementing legislation.<sup>103</sup> These provisions include article 8.<sup>104</sup> The US is, without doubt, bound to comply with this provision.

This chapter will debate whether, owing to the classification of drones operated by the US in Pakistan, they fall outside the scope of article 8.

### **4.3 Classification of drones**

Article 3(a) of the Convention states that the Convention applies to civil aircraft and not state aircraft. The questions of whether drones fall within the classification of 'aircraft' in terms of this treaty, and, furthermore, whether drones operated by the US in Pakistan are categorised as civil or state aircraft need to be explored.

The US Department of Defense defines an unmanned aerial vehicle (drone) as a:

...powered aerial vehicle that does not carry a human operator ...can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload.<sup>105</sup>

Although the term 'aircraft' is not defined in the Convention itself, it is described in the annexures to the Convention.<sup>106</sup> In Annexures 6, 7 and 10, the definition of

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<sup>102</sup>Paust (1988) 82 *AM.J.INT'L L* 760 at 776.

<sup>103</sup>*Ibid.*

<sup>104</sup>*Ibid.*

<sup>105</sup>O'Connell, *supra* n 17.

<sup>106</sup>Bourbonniere and Haeck, *supra* n 94.

‘aircraft’ reads: ‘Aircraft: Any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth’s surface.’<sup>107</sup> This broad definition does not state that such a ‘machine’ must be manned. Consequently, drones may be included in the definition of an ‘aircraft’.

Section 3 (b) defines ‘state aircraft’ to include aircraft used in military, police, or customs services. There is debate over the exact definition of state aircraft as there does not appear to be an internationally accepted interpretation.<sup>108</sup> There seems, however, to be consensus that the key to the classification of an aircraft as ‘civil’ or ‘state’ is contained in the word ‘use’.<sup>109</sup> The term ‘services’ may also be understood to include the use of the aircraft to fulfil military, police, or customs ‘purposes’.<sup>110</sup> Such an interpretation is consistent with the definition of public aircraft in the Draft Hague Rules of Air Warfare of 1923, as well as the definition of military aircraft in article 1(k) of the Harvard research Draft on Rights and Duties of Neutral States in Naval and Aerial War.<sup>111</sup>

As drones are operated by the USA in Pakistan for law enforcement purposes, in the service of the CIA and/or police and/or the military, such drones may fall within the definition of ‘state aircraft’.

#### **4.4 Sovereignty under the Chicago Convention: Is the sovereignty principle exclusive to civil aircraft?**

##### **4.4.1 Article 1 of the Chicago Convention**

‘The contracting States recognize that every State has *complete and exclusive sovereignty* over the airspace above its territory’.<sup>112</sup>

##### **4.4.1.1 *Argument for the exclusive application to civil aircraft***

It could be argued that the aerial sovereignty principle as defined in article 1 applies exclusively to civil aircraft. This argument can be made owing to the inclusion of article 3(a) which reads, ‘[t]his convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft’. Furthermore, a first reading of the Preamble

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<sup>107</sup>Chicago Convention.

<sup>108</sup>Sochor (1988) 7 *Comparative Strategy* 311 at 317.

<sup>109</sup>Sochor, *supra* n 109; Diederiks-Verschoor (2012) 21; Honig, *supra* n 79 at 39.

<sup>110</sup>Diederiks-Verschoor (2012) 20.

<sup>111</sup>Fedele, *supra* 102 at 11.

<sup>112</sup>Chicago Convention Art 1; writers own italics.

seems to support the idea that the sole purpose of the Convention is the regulation of civil aviation, and the conclusion, therefore, may be drawn that the sovereignty principle, within the spirit of this Convention, relates to civil aircraft only. Many writers are of the opinion that based on sub-articles 3 (a) and (b), the Convention was never intended to regulate anything but civil aircraft.<sup>113</sup>

#### 4.4.1.2 *Arguments for the inclusion of state aircraft*

In contrast it could be argued that article 1 gives ‘complete’ and ‘exclusive’ sovereignty to states above the airspace of their territory as the article does not limit this with the words ‘in terms of civil aviation’. Evidently, ‘complete’ and ‘exclusive’ bestow enormous power on the territorial state to exercise its aerial sovereignty in terms of all aircraft. If the sovereignty principle is indeed applicable to all aircraft - state and military - then the sovereignty principle gives greater protection to the territorial state and better ensures overall aerial safety and regulation. Support of this view regarding the provision is the inclusion of articles 3(c) and 8. Article 1 was chronologically placed before article 3 which excludes civil aircraft. Gjemulla and Webber are of the opinion that this chronological order can be construed as an indication that article 1 is not subject to the limitation contained in article 3(a):

‘This statement has to be understood in the context that article 1 of the Chicago Convention emphasizes the general international principle of sovereignty of the air as a principle that claims universal application and therefore also – but not exclusively – is a basic precondition for the Convention and its interpretation. Placing it in front of the description of the area of application of the Convention thus not only is an editorial question, but also serves to show that this principle shall apply to all possible cases. That is not only for civil aircraft and thereby for the application area of the Convention, but also for State aircraft.’<sup>114</sup>

The inclusion of articles 3(c) and 8 can be seen to confirm that the sovereignty principle applies to all aircraft, including pilotless and state aircraft.<sup>115</sup>

Such arguments are considered too weak to justify a *contra legem* interpretation against the clear object and purpose of this treaty. This argument will be discussed in relation to the international rules of treaty interpretation as per the Vienna Convention on the Law of Treaties.

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<sup>113</sup>Compare Beresford (1960) 27 *Air L. & Com.* 107 at 112.

<sup>114</sup>Compare Gjemulla and Webber (2011) 52.

<sup>115</sup>Compare Fedele, *supra* n 102.

#### 4.4.2 Article 3(c)

*No state aircraft* of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.<sup>116</sup>

##### 4.4.2.1 *Argument for the exclusive application to civil aircraft*

It is submitted that a general rule of aviation law was included in this treaty by article 3(c) which aims to prohibit the unauthorised overflight of the territory of any nation by foreign state aircraft.<sup>117</sup> This does not change the fact, however, that the treaty as a whole applies exclusively to civil aviation. This view can be supported by the fact that the Chicago Convention did not confer any rights on military aircraft as had the Paris Convention.<sup>118</sup> It did not do so as the Convention, simply put, does not regulate state aircraft.<sup>119</sup> The work of Lissitzyn can be construed to support this sentiment:

Is the omission in the Chicago Convention of the rules on the privileges of foreign military and other state aircraft contained in Articles 32 and 33 of the Paris Convention intended to imply some change of law? Or is it merely due to a feeling that provisions dealing with jurisdiction over military aircraft are out of place in a civil aviation convention? The published records of the Chicago Convention give no clue to the answer, but the second explanation seems to be the likely one.<sup>120</sup>

The inclusion of this general rule of international law has limited significance as the rule of total aerial sovereignty is deemed to be customary international law.<sup>121</sup> This is thus merely a restatement of a rule that would be applicable whether the treaty as such is applicable or not.

##### 4.4.2.2 *Arguments for the inclusion of state aircraft*

Bourbonniere and Haeck are of the opinion that the ostensible transparency of article 3 of the Chicago Convention is deceptive, and that a conclusion that the application of the Convention is limited to civil aircraft is incorrect.<sup>122</sup> These scholars are of the opinion that an in-depth analysis of article 3 will reveal its prime importance to both

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<sup>116</sup>Chicago Convention Art 3(c); writer's own italics.

<sup>117</sup>Phelps (1985) 107 *Mil.L.Rev.* 255 at 272.

<sup>118</sup>Phelps, *supra* n 118, at 273.

<sup>119</sup>*Ibid.*

<sup>120</sup>Lissitzyn, *supra* n 86.

<sup>121</sup>Phelps, *supra* n 118, at 269.

<sup>122</sup>Bourbonniere and Haeck, *supra* n 94, at 894.



civil and military international aviation.<sup>123</sup> They consider that article 3(c) of this Convention not only regulates the flight of state craft of contracting states into foreign territory, but also places a duty of ‘due regard’ (when read in relation to article 3(d)) on the operators of state aircraft for the safety of the navigation of civil aircraft.<sup>124</sup> In terms of such an interpretation, the US has failed to comply with the ‘due regard’ requirement, with particular reference to the safe operation of Pakistani civil craft as well as the sovereignty principle.

The purport of sub-article 3(c) is clearly that ‘no state aircraft of a contracting State *shall fly over the territory of another state ... without its permission*’. This subsection includes state aircraft and subjects them to the sovereignty principle.<sup>125</sup> It can be argued that article 3(c) was an additional measure to ensure that the sovereignty principle, as enshrined in article 1, applies to *all* aircraft. This is merely a reiteration of existing international law

#### 4.4.3 Article 8

*No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization.*<sup>126</sup>

##### 4.4.3.1 Arguments for the exclusive application to civil aircraft

Article 8 regulates the use of all unmanned aircraft within the scope of the Convention.<sup>127</sup> The plain meaning of this article is that the state which is to be entered by a pilotless aircraft has full sovereignty over its own territory, and special authorisation has to be sought from and granted by that state for overflight of its territory. Such authorisation is the ‘sole prerogative’ of the state to be overflown and therefore under potential threat of violation.

Should this provision find application to the intrusion of Pakistan by US Drones, it would entail that Pakistan could provide special terms for such authorisation and that the US may not enter without adhering to those terms and having received such authorization.

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<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid*, Compare Boothby *supra* n 96, at 336.

<sup>125</sup> Fedele, *supra* n 102.

<sup>126</sup> Chicago Convention Art 8; writer’s own italics.

<sup>127</sup> Fedele, *supra* n 102.

If the validity of this purport of article 8 is corroborated, the entry of US drones into Pakistani airspace would enable that country to lay down conditions for such entry and the US would be bound to comply with such conditions as a prerequisite for the authorisation sought to enter Pakistani airspace.

The argument could be adduced that this provision is not applicable to the situation in Pakistan, indeed, that article 3(a) expressly provides that article 8 applies exclusively to civil aircraft because that is the purport of the Convention as a whole.<sup>128</sup>

#### *4.4.3.2 Arguments for the inclusion of state aircraft*

When one compares the wording of article 8 with that of article 1, where sovereignty is defined as '[t]he contracting states recognize that every State has complete and exclusive sovereignty over the airspace above its territory', it seems that article 8 is a strong iteration of the sovereignty principle as encapsulated by article 1. Article 8, however, goes a step further by ensuring that the sovereignty principle is undeniably applicable to pilotless aircraft. It is doubtful whether the argument can be made that article 8 applies to *all* pilotless aircraft, although such an interpretation would be inconsistent with the clear wording of article 3(a).

Some writers contend that article 8 of the Convention may also apply to state UAVs.<sup>129</sup> Firstly, a literal interpretation of the words '[n]o aircraft capable of being flown without a pilot' can indicate that this phrase includes *any* aircraft capable of being flown without a pilot, whether they are state or non-state aircraft. The key word here is 'no'. 'No' which, by common understanding, implies that *all* aircraft – military, civil and state – are included in this prohibition.

The argument may also be presented that consideration should be given to the drafting history of the treaty, with particular reference to the context in which article 8 was drafted, in consideration of the use made of unmanned balloons during World War II to carry bombs over international borders to bomb neighbouring states and to spy on foreign territory.<sup>130</sup> This practise closely resembled the use made of drones by the US in Pakistan. It would therefore be correct to infer that the purpose

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<sup>128</sup>Bazyler (1987) 8 *Whittier L. Rev* 685 at 701; Dalamagkidis, Valavanis, Piegl (2008) 52 *J Intell Robot Syst* 313.

<sup>129</sup>*Compare* Kaiser (2006) 55 *ZLW* 334 at 349.

<sup>130</sup>Marshall (2009) 88 *Issues Aviation L. & Pol'y* 87 at 93.

of this provision is to protect the territorial sovereignty of every state against unlawful entry by pilotless vehicles of any sort.<sup>131</sup>

#### 4.4.4 Drones, the Chicago Convention and the Vienna Convention

The Vienna Convention on the Law of Treaties (VCLT) (1969) serves as a uniform system of international rules regulating treaty interpretation. This treaty serves as an interpretive tool to establish the true meaning of treaty provisions.

As noted in this chapter, the interpretation of articles 1, 3(c) and 8 of the Chicago Convention with respect to warfare remains undecided at the present juncture. The problem of conflicting views in this regard fall within the scope of article 1 of the VCLT as this treaty was intended to regulate treaties between states, including the Chicago Convention. Part III, section 3 of the VCLT sets the primary and secondary rules of treaty interpretation. Article 31 contains the general rules of interpretation. Secondary rules may be employed only if the general rules fail to give relief. Article 31(1) will help to clarify any confusion relating to articles 1, 3(c) and 8 of the Chicago Convention:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.<sup>132</sup>

The object and purpose of the Chicago Convention are enshrined in its Preamble. The scope of application of the treaty also provides answers as to the context of the terms. The scope of application of the principle contained in the Preamble is clearly stated in article 3(a) of this Convention as being only to civil aircraft.

According to the guidance provided in article 31(1) of the VCLT, the term 'aircraft' in article 8 of the Chicago Convention clearly means nothing but civil unmanned craft, and that, furthermore, article 1 and the treaty are exclusively concerned with the regulation of civil aircraft.

This interpretation of article 31(1) is in line with the works of the major authors on the VCLT. At the time of the negotiation of this treaty, Sir Humphrey, the Special

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<sup>131</sup>Compare Peterson (2006) 71 *J. Air L. & Com.* 521 at 555.

<sup>132</sup>VCLT Art 31(1).

Rapporteur, emphasised that a ‘textual’ approach should be adopted to the interpretation of treaties, and this advice was duly followed by adopting the approach in the VCLT.

Sir Humphrey appears to have regarded “interpretation” as the process by which, in cases of doubt only, the correct meaning of the treaty is to be established. For that process and having that objective, the text to which the parties had set their hands constituted the only point of departure; not an investigation into the objectives which prompted them to subscribed to that text, or more teleological concepts having in mind the presumed objectives of the treaty.<sup>133</sup>

Jacobs confirms that the adoption of the VCLT favoured a textual interpretation, and that the subjective and teleological schools were no longer applicable to treaty interpretation.<sup>134</sup> Support for the textual approach is highlighted by the fact that the *travaux preparatoires* are categorised only as secondary means of interpretation.<sup>135</sup>

Lauterpacht has the last word on the matter in his original report to the Institute of International Law:

Writing there of the view that if the words had a clear meaning that was the end of the matter, he argued that the “clear meaning” should be the conclusion, not the starting point, of the process of interpretation...<sup>136</sup>

It is thus indisputable that the textual interpretation means that words should be read in their context. In the context of a treaty applying only to civil aircraft, therefore, the provisions should also be read and interpreted as such.<sup>137</sup>

Arguments made by some that article 8 should be read in context of the circumstances at the time of its conclusion are precluded as article 32 of the VCLT states that recourse may be had to the supplementary rules of interpretation only under two conditions:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

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<sup>133</sup>Rosenne (1966) 5 *Colum. J. Transnat'l L.* 205 at 218.

<sup>134</sup>Jacobs (1969) 18 *ILQ* 318 at 326.

<sup>135</sup>*Ibid.*

<sup>136</sup>Jacobs, *supra* n 135, at 341.

<sup>137</sup>*Id.*, at 334.

(b) Leads to a result which is manifestly absurd or unreasonable.

It is clear that since neither of these two conditions is apposite as regards the interpretation of the Chicago Convention, it follows that the Convention is exclusively applicable to civil aircraft and civil drones, as laid down by the VCLT, and not state drones as operated by the US in Pakistan.

#### 4.5 Conclusion

The Chicago Convention is not, as a whole, applicable to the regulation of US drones operated in Pakistan. The reason for this is that drones are classified as 'state aircraft' and are therefore excluded from the scope of the treaty.<sup>138</sup> Article 8, the provision regulating unmanned craft, is thus construed to be exclusively applicable to civil aircraft.

Article 3(c) is applicable to the extent that it contains the customary norm of international air law which dictates that the state aircraft of one state may not enter the foreign territory of another state without prior authorisation.<sup>139</sup> Consequently the US is in breach of this requirement as it does not have permission to enter that country's sovereign airspace. As it can be argued that article 3(c) is a mere iteration of a general rule and that article 3(a) excludes the application of the Convention to civil craft, it would be best, in the writer's view, not to rely on the Chicago Convention but rather on the customary principle of aerial sovereignty which applies to all aircraft. As was seen in chapter 3, article 2(4) of the UN Charter may also be employed to regulate this phenomenon.

As it has been established above that its actions are an infraction of Pakistani aerial sovereignty, there are three exceptions on which the US can rely to justify its crossing of Pakistan's borders. Two exceptions allow for the crossing of sovereign aerial borders during peace-time and the other exception relates to the applicability of the law of war.

A state's peace-time incursion into foreign territorial airspace through the agency of its aircraft can be justified if the perpetrator of the intrusion has authorisation from the foreign state's government to do so, or if perpetrator is acting

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<sup>138</sup>Chicago Convention Art 3(c).

<sup>139</sup>*Compare Boothby supra* n 83, at 336; *Lissitzyn supra* n 123.

in self-defence. It has been made clear that Pakistan has not consented to this infraction and has no intention ever to do so. On the other hand, the US has defended its incursive actions on the grounds of pre-emptive self-defence with a view to eliminating Al Qaeda operatives hiding in Pakistan. This 'justification' will be explored further in Chapter 6.

Another defensive argument adduced to justify this infiltration of Pakistani airspace is that the US is conducting a putative 'war on terror'. The merits of this protestation will be discussed below in Chapter 5.

## 5. The war on terror

### 5.1 Synopsis

This chapter argues that the ‘war on terror’ is no legal justification for the infringement by the US of the aerial sovereignty of Pakistan on the use of force to infringe the territorial integrity of that country, and, therefore, its sovereignty, an act that is expressly forbidden in terms of the provisions of article 2(4) of the UN Charter. The reason given by the US to justify the ‘war on terror’ is discussed in detail in this Chapter. In brief, that justification subsists in the view that the US is in good legal standing in venturing to enter Pakistani territory by aerial incursion to strike at targets in that country under the mantle of waging a war on terror. The contention put forward in this chapter, upon analysis of the primary sources of international law, is that no such war exists, and that peace-time law, namely, the UN Charter, is wholly applicable in this situation.

### 5.2 Introduction

Until recently the general perception has been that the described categories of international and non-international armed conflict covered all conceivable forms of contemporary armed conflict. Since the events of 11 September 2001, this categorisation has been challenged by the claim of the United States that it was engaged in a ‘war on terrorism’ and by the ensuing debate on the possibility of a new kind of ‘transnational armed conflict’.<sup>140</sup>

This ‘war on terror’ is an apt place to start the debate regarding the so-called ‘war on terror’ proclaimed by President Bush in 2001.<sup>141</sup> Shortly after this declaration, he added that ‘the war... will not end until every terrorist group of global reach has been found, stopped, and defeated’.<sup>142</sup>

On 3 November 2002 the US launched a drone strike against a suspected Al Qaeda operative in Yemen.<sup>143</sup> Yemen claimed that there was no armed conflict in its

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<sup>140</sup>Melzer, *supra* n 10, at 262.

<sup>141</sup>O Connell (2005)12 *ILSA Journal of International & Comparative Law* 1 at 2.

<sup>142</sup>*Ibid.*

<sup>143</sup>*Ibid.*

territory at the time of the strike, nor was the United States at war with Yemen.<sup>144</sup> Condoleeza Rice, the National Security adviser, explained that the United States was engaged in a new kind of war and that this would be fought on different battlefields.<sup>145</sup> This means that the US deems it within the scope of the 'war on terror' to target Al Qaeda operatives wherever they are, as the 'war on terror' is a borderless war.

The concept of a 'borderless war' is central to this dissertation as it is argued that the US intrusion into Pakistani airspace is an infringement of Pakistan's national aerial sovereignty. If the US wins credence for its advocacy of a 'borderless war', it will have won legitimacy for any intention it may have of entering foreign airspace without violating the customary and treaty law principle of aerial sovereignty.<sup>146</sup> Put differently, if a 'war on terror' indeed exists as a legitimate war enterprise in the eyes of the world, then it would be justifiable to regard the members of Al Qaeda as combatants who may be targeted if they have a continuous combat function or if they participate directly in hostilities.<sup>147</sup> This justification could legitimise drone strikes by the US without Pakistan's permission, which would mean, effectively, that the principle of Pakistani territory's sovereignty would be set aside, thus laying that territory open to attack.

The vaunted concept of a 'war on terror' has led to much academic debate.<sup>148</sup> Most international law scholars agree that the concept carries no weight in law and does not constitute a legitimate defence proving justification for acts of military aggression across borders.<sup>149</sup> In fact, the notion of a 'war on terror' does not meet the principal criteria that define a traditional war.<sup>150</sup> Despite the lack of legal cogency of the idea, however, a school of thought exists in the US and further afield to the

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<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> Cf Paust (2010) 19 *J Transnat'l L & Pol'y* 23.

<sup>147</sup> Cf Bandridge (2012) 30 *Boston University International Law Journal* 409.

<sup>148</sup> Cf Williams (2009) 1 *Pakistan Journal of Criminology* 7 at 17 – 18; Bandridge (2012) 30 *Boston University International Law Journal* 409; Shaw and Akther (2012) 44 *Antipode* 1490; *contra* Dempsey (2005) 30 *N.C.J. Int'l L. & Com. Reg.* 1 at 3; Gogerty and Hagger (2008) 19 *Journal of Information Law and Science* 73; Newton (2011) 39 *Denver Journal International Law and Policy* 513; Gray (2010) 10 *Chinese J. Int'l L* 35.

<sup>149</sup> Gray (2010) 10 *Chinese J. Int'l L* 35; O'Connell (2010) *Notre Dame Law School Legal Studies Research Paper* No. 09-43, 2.

<sup>150</sup> *Supra* n 149.



effect that acts of terrorism have justifiably led to the development of a new kind of warfare that has carved an undeniable niche for itself in the modern world.<sup>151</sup>

It is clear from this summary of scholarly opinions that this issue is still warmly contested. The movement by some US scholars to support the existence of such a law on terror does, indeed, show that the law is under pressure. However, this dissertation holds in concert with international legal opinion that the concept of a 'war on terror' is indefensible in international humanitarian law.<sup>152</sup> The crossing of territorial borders for purposes of military aggression, especially without the prior knowledge or consent of the authorities controlling the territory in question, remains illegal, whether the incursion is perpetrated by air or otherwise.

### 5.3 Definition and scope of war under international law

The first step in determining whether a 'war on terror' exists as alleged by the US is to establish the traditional definition of war. In *Prosecutor v Tadic*,<sup>153</sup> the court explored the elements which constitute the existence of an armed conflict:

...an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.<sup>154</sup>

Christof Heyns, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, contextualised this issue in relation to drone warfare in his October 2013 UN General Assembly Drone Report. He stated that:

In the context of drones, these requirements mean that international humanitarian law will not apply where the threshold levels of violence or organization are not present, leaving international human rights law principles to govern the situation alone.<sup>155</sup>

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<sup>151</sup>Williams (2009) 1 *Pakistan Journal of Criminology* 7 at 17 – 18; Bandridge (2012) 30 *Boston University International Law Journal* 409; Shaw and Akther (2012) 44 *Antipode* 1490.

<sup>152</sup>Compare Gray (2010) 10 *Chinese J. Int'l L* 35.

<sup>153</sup>*Prosecutor v Tadic* Judgment Case NoIT-94-1-AICTY Appeals Chamber 15 July 1999.

<sup>154</sup>*Tadic*, *supra* n 85, at par 70; *Compare supra* n 1, The *Tadic* judgement remains relevant, even 14 years after the ruling. Some may argue that the law is changing and that case law is becoming outdated. This is, however, not true of the *Tadic* case. Heyns still deems the elements highlighted in this ruling to be the contemporary legal criterion to establish the existence of an armed conflict, and he relied on this ruling as the determining case law on the issue in his 2013 drone report.

<sup>155</sup>*Supra* n 1..

The court in *Tadic* stated that the intensity requirements of an armed conflict are satisfied if there has been ‘protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups’.<sup>156</sup> The ruling in the *Tadic* Trial Chamber gives more clarity on this matter:

The test applied [for] the existence of an armed conflict for the purposes of the rules contained in Common Article 3 [a non-international armed conflict] focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, at a minimum, of distinguishing an armed conflict from banditry, unorganized and short lived insurrections, or terrorist activities, which are not subject to international humanitarian law.<sup>157</sup>

The intensity of war-requirement, as stated by *Tadic*, is crucial as this is one of the elements needed to establish whether the threshold of violence has been met. The *Tadic* case refers to an ‘intensity’ standard that is the standard for both non-international and international armed conflicts.<sup>158</sup> Christopher Greenwood, a celebrated international humanitarian-law scholar, takes the position that,

Many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts. It may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law will apply.<sup>159</sup>

The additional protocols to the Geneva Conventions, similarly, incorporate concepts of intensity and organised fighting as preconditions for the designation ‘armed conflict’. Additional Protocol II applies only to conflicts amounting to ‘more than situations of internal disturbances and tensions such as riots and isolated sporadic acts of violence’.<sup>160</sup>

To provide more clarity on the meaning of the term ‘armed conflict’ in international law, the International Law Association Committee on the Use of Force published a document called the ‘Initial Report on the Meaning of Armed Conflict in International Law’. This report was motivated by the US position that it was involved

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<sup>156</sup>*Ibid.*

<sup>157</sup>*Tadic, supra* n 85.

<sup>158</sup>*Ibid.*

<sup>159</sup>O’Connell, *supra* n74, at 9.

<sup>160</sup>O’Connell, *supra* n 74, at 3.

in a 'global war on terror'.<sup>161</sup> The Committee found that the term 'armed conflict' was more appropriate to current circumstances than the term 'war'.<sup>162</sup> The Committee commented as follows:

- a) The existence of armed conflict triggers international humanitarian law obligations, affects treaty rights and duties;
- b) The existence of an armed conflict is not something that can be declared or denied by governments as a matter of policy; and
- c) The committee found at least two characteristics with respect to all forms of armed conflict, namely the existence of organized armed groups and that they are engaged in fighting of some intensity.<sup>163</sup>

For the war on terror to meet the standards of international law it needs to be more than a mere political statement. The words of President Bush are not sufficient to constitute a war on terror. We need to establish whether Al Qaeda and its affiliates constitute an organised armed group and whether they are engaged in fighting which meets the intensity standard as established in the *Tadic* case. Importantly, in *Tadic* it was stated that terrorist activities did not fall within the ambit of international humanitarian law.

### **5.3.1 Do Al Qaeda and its terrorist attacks meet the criteria laid down in *Tadic* to justify the declaration of the existence of a non-international armed conflict?**

The question whether Al Qaeda meets the organisational criteria of an armed group is debatable, but there can be no doubt that it meets the criteria that define a terrorist network. It is clear from principles laid down in *Tadic* that terrorist activities are excluded from the ambit of international humanitarian law and that it is therefore common cause that they should be regulated by peace-time law.<sup>164</sup> In light of the above, therefore, the objective pursued in this chapter will be to determine whether the other two criteria needed to define an armed conflict are met. First, the criterion of 'organisation' must be met. A minimum degree of 'organisation' is required for accountability, but the exact nature and scope of an organisation that will serve as a

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<sup>161</sup>International Law Association, Initial Report on the Meaning of Armed Conflict in International Law, 2008..

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Compare Solis* who argues that the application of the laws of war in operations to counter terrorism has always been particularly problematic and that these activities should be criminalised: Solis (2010) 157.

benchmark in this regard have not yet been settled in law.<sup>165</sup> Boskoski explores the factors indicative of the 'organisational criterion' as identified by the ICTY and adopted by the International Criminal Court in the *Lubanga* case.<sup>166</sup> These factors were categorised to include: the existence of a command structure; military capacity of the armed group; logistical capacity of the armed group; the existence of an internal disciplinary system and the ability to implement IHL; and the armed group's ability to speak with one voice on its own behalf.<sup>167</sup> The category of the existence of a command structure includes, among other indicators, headquarters and general staff of high command. Military operational capacity includes control of a certain territory, and logistical capacity includes the ability to recruit and train personnel.<sup>168</sup> It has been argued that since the mounting of the US Operation Enduring Freedom, including the drone attacks, most of the command structures of Al Qaeda and its operatives have been eliminated. The killing of Osama Bin Laden and the killing of most of the leaders in the Taliban by drone strikes have taken a heavy toll on the minimal leadership left in a very vulnerable terrorist group. Most of its affiliates have been killed by the US, and Al Qaeda is a mere shadow of the group it once was. The category of command, therefore, has been compromised. This was confirmed by President Obama himself during his 'Drone Speech' of 23 May 2013:

Today, Osama bin Laden is dead, and so are most of his top lieutenants. The UAMF is now nearly 12 years old. The Afghan war is coming to an end. Core Al Qaeda is a shell of its former self...today, the core of Al Qaeda in Afghanistan and Pakistan is on the path to defeat. Their remaining operatives spend more time thinking about their own safety than plotting against us.<sup>169</sup>

Further training would be very difficult without leaders and facilities. The unwavering surveillance maintained with the aid of drones, to which must be added the undermining impact of drone strikes, have forced the few Al Qaeda affiliates who are left to go into hiding or distance themselves from the group completely.

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<sup>165</sup>Sassoli (2009) 46.

<sup>166</sup><http://armedgroups-internationalallaw.org/2012/08/09/the-organistical-requirement-for-thethreshold> (accessed on 4 June 2013); *supra* n 1, Heyns stated that the 'sufficient organisation' test should be evaluated on a case-by-case basis. He is of the opinion that the existing case law is still adequate in determining whether the organisational criteria have been met.

<sup>167</sup>*Ibid.*

<sup>168</sup>*Ibid.*

<sup>169</sup><http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas> (accessed on 10 June 2013).

Al Qaeda is also not in control of territory. It has no control over any territory in Pakistan specifically, and operatives try to hide in densely populated areas. If one could overlook the fact that a terrorist group cannot be a non-state actor and proceed to the organisation test, then Al Qaeda would find that test a virtually unassailable barrier to overcome. Given that it has been brought to its knees in the twelve years since 9/11, it would be difficult to prove at this stage that this organisation meets these criteria. It is important to note that the drone operations in Pakistan are continuing at present. The argument that Al Qaeda has met the threshold of organisational requirements will not currently hold under international law. This has even been indicated by the US President himself. In the 2013 Drone report Heyns confirmed the slim possibility that Al Qaeda would pass the test of organisational criteria:

It is to be questioned whether the various terrorist groups that call themselves Al-Qaida or associate themselves with Al-Qaida today possess the kind of integrated command structure that would justify considering them a single party involved in a global non-international armed conflict.<sup>170</sup>

The second requirement is the threshold of violence. For this criterion to be upheld terrorist attacks would have to be sufficiently violent and protracted, that is to say they would have to be steadily maintained beyond a benchmark level, and not sporadic, failing which they will be criminal events governed by criminal law. The writer, however, acknowledges that this issue is more complicated as there is legal opinion to support the contention that the term “protracted violence” refers more to the intensity of the armed attack than its duration.<sup>171</sup> Although the acts of Al Qaeda are appalling and the death toll of 9/11 was very high, the duration element is not met. Many years have passed since the initial attacks; hence it can be argued that attacks are too sporadic and thinly spread. Concrete evidence is presented by President Obama:

...today, the core of Al Qaeda in Afghanistan and Pakistan is on the path to defeat. Their remaining operatives spend more time thinking about their own safety than plotting against us.

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<sup>170</sup>*Supra* n 1.

<sup>171</sup>*Ibid.*

They did not direct the attacks in Benghazi or Boston. They have not carried out a successful attack on our homeland since 9/11.<sup>172</sup>

According to the evidence adduced in the above discussion the criteria that need to be satisfied for a terrorist incursion to be appropriately designated an international armed conflict have not been met. The President's speech was delivered on 23 May 2013. Nevertheless, another drone attack, akin to the drone attacks which are deemed to be infringing the aerial sovereignty of Pakistan, took place on 29 May 2013.<sup>173</sup> This lethal attack, carried out with the aid of a US drone operating over Pakistani territory only five days after President Obama's speech, proves that this problem persists as before.

#### **5.4 Labelling terrorists as combatants**

In the language of international law there is no basis for speaking of a war on Al Qaeda or any other terrorist group, for such a group cannot be a belligerent; it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving the assailants in question a status that to some implies a degree of legitimacy.<sup>174</sup>

The second component in the 'war on terror' construct is the concept of terrorism. The US argues that, under the putative auspices of the 'war on terror', the agents perpetrating acts of terrorist aggression against the US are combatants and thus legitimate targets. The quotation above accurately categorises these Al Qaeda affiliates.

Terrorism is a grave international crime, however, hence terrorists are deemed to be criminals in terms of national and international law.<sup>175</sup> By law criminals cannot be targeted for elimination by military means and are subject to law enforcement and human rights law. That is to say, criminal acts fall under the jurisdiction of criminal prosecutorial authority (i.e. peacetime law enforcement). Nations cannot simply cross borders to kill terrorists.

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<sup>172</sup>*Supra* n 168.

<sup>173</sup><http://www.nationalreview.com/campaign-spot/350632/meet-new-drone-policy-jum-geraghty> (accessed on 10 June 2013).

<sup>174</sup>O'Connell, *supra* n 74, at 4.

<sup>175</sup>Gray (2010) 10 *Chinese J. Int'l* 35.

## 5.5 Conclusion

Christine Gray posits that ‘war on terror’ is not a legal but a technical term, and that it is misleading.<sup>176</sup> This remains a hotly-debated issue. The writer’s contention is that the primary sources and traditional positions in law should be consulted for legal clarity and that, until custom, court rulings, and conventions give formal credence to a ‘new type of war’, the existing rules need to be respected.

The US is crossing Pakistani aerial borders twice a week to conduct its drone strike missions. This action would be legal if the concept of a ‘war on terror’ were to gain traction in law. The members of Al Qaeda then would be legitimate military targets. This dissertation proceeds from the premise that technically the ‘war on terror’ is not a legal term, and that normal peace-time law, including the principle of aerial sovereignty and the UN Charter, applies in the absence of a legally definable armed conflict.

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<sup>176</sup>*Ibid.*

## **6. The concept of preemptive self-defence**

### **6.1 Synopsis**

Article 2(4) of the UN Charter is intended to protect the territorial integrity and sovereignty of member states by prohibiting the use of force across borders during peace-time. US drones are currently crossing Pakistani borders for targeted killing operations. In this context, the only acceptable exception to the prohibition contained in article 2(4) relates to self-defence dealt with in article 51. The US pleads that it is acting in preemptive self-defence against Al Qaeda forces allegedly still operative in Pakistan, thus offering to justify cross-border operations involving the use of force with the aid of drones. This chapter will deal with the requirements for such operations on legal grounds as laid down in article 51 of the UN Charter and case law, and the argument advanced will be that, given the verified reality of the situation in Pakistan, the grounds offered by the US do not amount to a legally-defensible justification for targeted killing operations launched into Pakistani territory with the aid of a remotely operated lethal device, namely, a drone.

### **6.2 Introduction**

The US relies on an 'inherent right to self-defence' or a right to anticipatory self-defence to justify its drone missions into Pakistani airspace in order to execute targeted killing operations.<sup>177</sup> If the notion of a 'war on terror' is rejected by the international community, this defence at best will be relegated to a fall-back position for the US. Self-defence is, indeed, the exception to the prohibition imposed on the use of force by virtue of article 2(4) of the UN Charter. This defence will also be applicable in the human rights paradigm.

The question whether self-defence is a tenable justification for incursions into Pakistani territory, thus breaching Pakistani aerial sovereignty, will be considered with reference to the following criteria: prohibition on the use of force; self-defence by virtue of article 51 of the UN Charter; and the application of a case study based on the current drone activities in Pakistan.

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<sup>177</sup><http://www.state.gov/s/l/releases/remarks/139119.htm> (accessed on 26 March 2013).



## 6.3 The use of force in terms of International Law

### 6.3.1 Article 2(4) of the UN Charter – prohibition of the use of force

A general prohibition on the use of force exists in international law.<sup>178</sup> Article 2(4) of the UN Charter is preeminent in deciding questions about the legality of cross-border use of force. It reads as follows:

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 purpose of the United Nations.<sup>179</sup>

The normative objectives of the UN (article 1 of the UN Charter) can be interpreted as offering persuasive guidance in the interpretation of these matters. The US may argue that its use of force is consistent with the normative objectives of the United Nations, namely, to maintain international peace and security. In response, Pakistan could offer the counter argument that US drone strikes are, in fact, achieving the opposite effect by destabilising the very qualities they claim to be protecting in Pakistan.<sup>180</sup> It is, however, important to take cognisance of the fact that these arguments may be perceived to be merely political and that a satisfactory legal argument should be based on an analysis of the nature and scope of article 2(4) to determine how absolute these obligations are when read together with article 51 of the UN charter.

### 6.3.2 Article 51 of the UN Charter – self-defence

Self-defence or legitimate self-defence is a legal exception to the use of force.<sup>181</sup> This exception is articulated in article 51 of the UN Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be *immediately reported to the Security Council* and shall not in any way affect the authority and responsibility of the

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<sup>178</sup>UN Charter Art 2(4).

<sup>179</sup>Writer's own italics; Pakistan has repeatedly alleged the violation of its territorial integrity by the US in this matter.

<sup>180</sup>UN Charter Art 1.

<sup>181</sup>UN Charter Art 51.

Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>182</sup>

The above article allows an exception to the terms laid down in article 2(4).<sup>183</sup> In the *Corfu Channel* case,<sup>184</sup> the ICJ underscored the broad prohibition on the use of force, even deciding that some actions taken for purposes of self-defence may be considered unlawful if their purposes are misaligned with the UN Charter.<sup>185</sup> In the *Corfu Channel* case, the ICJ upheld the inviolability of the principle of territorial sovereignty, even when the justification of self-defence was attempted.<sup>186</sup>

In his reply in this case the United Kingdom Agent further classified 'Operation Retail' as a method of self-protection or self-help.<sup>187</sup> The Court could not accept this defence either.<sup>188</sup> '*Respect for territorial sovereignty is an essential foundation of international relations*' between independent states.<sup>189</sup> And that, furthermore, to ensure respect for international law, of which it is the administering organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.<sup>190</sup>

It is the burden of this thesis that self-defence needs to be defined quite strictly as laid down in article 51 of the UN Charter to the exclusion of self-protection and reprisals. The writer, however, acknowledges arguments to the contrary, that post-9/11 the context and application of this provision have changed, arguments similar to those of Bethlehem who is of the view that the 'right to self-defence is not a static concept but rather one that must be reasonable and appropriate to the threats and circumstances of the day'.<sup>191</sup> The ICJ sets great store by the sovereignty principle and would probably insist on that principle to contradict the US's justification of its violation of Pakistan's territorial integrity.

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<sup>182</sup>Writer's own italics.

<sup>183</sup>O'Connell, *supra* n 74, at 274; Hestermeyer *et al* (2012) 1563. De Wet states that, according to the restrictive line of argument which regards the Security Council as the cornerstone of collective security, the right to self-defence can only be asseverate in exceptional circumstances.

<sup>184</sup>*The Corfu Channel Case, UK v. Alb.* 1949 I.C.J. 4, 29 – 35 (Dec 15).

<sup>185</sup>*Compare* O'Connell, *supra* n 74, at 274.

<sup>186</sup>*The Corfu Channel Case, supra* n 184.

<sup>187</sup>*Ibid.*

<sup>188</sup>*Ibid.*

<sup>189</sup>*Ibid.*

<sup>190</sup>*Ibid.*

<sup>191</sup>Bethlehem (2012) 106 *Am. J. Int'l L* 770 at 776.

Erika De Wet, a distinguished international scholar on the use of force, points out that controversy is rife regarding the demarcation of the type of situations that constitute an armed attack in accordance with article 51 of the UN Charter, and that according to the dominant opinion only the gravest forms of military force in violation of article 2(4) of the UN Charter qualify for such classification.<sup>192</sup> De Wet further notes that the right to anticipatory self-defence may be exercised ‘in the face of an imminent threat of large-scale use of force, where no other means would deflect it and the action is proportionate’.<sup>193</sup> It is unknown whether the US is acting in Pakistan against a threat of large-scale use of force, as the CIA keeps the intelligence of whom they target and why strictly classified.

‘Self-defence’ in the traditional sense (*cf* article 51 of the UN Charter) may justify the use of force entailing an incursion into foreign territory in response to an armed attack. On 11 September 2001 an attack launched by foreign nationals was perpetrated against the US. The question here is whether the incident referred to can be considered an armed attack in the sense of a non-international armed conflict (see above), given that it certainly qualifies as a terrorist attack. Regardless of whether the attack launched by Al Qaeda against the US falls within the ambit of armed conflict (article 51), however, the self-defence argument is hard to be sustained at this juncture, twelve years after the fact. Grounds for the charge are effectively vitiated by the time lapse involved. The threat is no longer imminent as legally required. Even the statements made by President Obama seem to imply that the US admits that this argument is invalid as no armed attacks since 2001 have been perpetrated on US territory by the organisation claiming responsibility.<sup>194</sup> Heyns contributes to the nuances by stating that ‘states are not entitled to continue to act in self-defence until the absolute destruction of the enemy is achieved, such that the enemy poses no long-term threats’.<sup>195</sup> This cements the argument that the US cannot continue to target Al Qaeda operatives wherever they are until every last

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<sup>192</sup>Heystermeyer *et al* (2012) 1565.

<sup>193</sup>*Ibid.*

<sup>194</sup>*Supra* n 99. ‘...today, the core of al Quada in Afghanistan and Pakistan is on the path to defeat. Their remaining operatives spend more time thinking about their own safety than plotting against us. They did not direct the attacks in Benghasi or Boston. They have not carried out a successful attack on our homeland since 9/11.’

<sup>195</sup>*Supra* n 1.

member has been hunted down. The ‘imminence’ requirement is no longer met, and once the threat has ceased the attack should stop.

### 6.3.3 Preemptive self-defence

Authors generally agree that in principle targeted killings undertaken on foreign soil (beyond the perpetrating political entity’s national boundaries) fall under article 2(4) of the UN Charter.<sup>196</sup> This article requires a situation of interstate self-defence to authorise such action.<sup>197</sup> In the case of targeted killings, the US adduces preemptive self-defence against Al Qaeda and its affiliates. In the *Caroline* case<sup>198</sup> the Court held that self-defence is admissible and justified by necessity, provided that the necessity is instant, overwhelming, leaving no choice of means and no moment for deliberation.<sup>199</sup> Although hailing from the 19<sup>th</sup> century, this case is still deemed to include the decisive requirements to justify necessity. This is illustrated by the inclusion of these principles as the starting point of any such academic discussion, as in the Heyns 2013 Drone report dealing with the 2005 World Summit outcome, as well as in contemporary scholarly writings.<sup>200</sup>

Further, article 51 of the UN Charter justifies self-defensive action not only against ‘an actual use of force, or hostile act’, or against an imminent use of force, but also against so-called ‘continuing threats’. Melzer would claim that a military action undertaken in anticipatory self-defence would accommodate the possibility of arbitrary or speculative use of force.<sup>201</sup> Article 25 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts allows ‘necessity to act’ in situations such as self-defence, provided that it is the only way for the state to safeguard an essential interest against a grave and imminent peril.

The proportionality requirement on which the legitimacy of the self-defence argument depends, demands that a state acting defensively may employ no more force than is reasonably required to overcome the threat.<sup>202</sup> In the situation under

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<sup>196</sup>*Supra* n 1; Orr, *supra* n 27; Finkelstein, Ohlin and Altman, *supra* n 9; Melzer, *supra* n 10, at 51; Boothby, *supra* n 80 at 44.

<sup>197</sup>Melzer, *supra* n 10, at 51.

<sup>198</sup>*Caroline Incident*, 29 B.F.S.P. 1137 – 1138.

<sup>199</sup>Writer’s own italics.

<sup>200</sup>*Supra* n 1; Bethlehem, *supra* n 2 at 771; *supra* n 20.

<sup>201</sup>Melzer, *supra* n 10, at 51.

<sup>202</sup>Gray, *supra* n 11, at 148.

review, which is a cross-border operation, the limitation entails that only necessary actions may be taken.<sup>203</sup>

The writer appreciates the principles as laid down in the *Caroline* case and agrees that a prohibition of preemptive self-defensive action would contradict the purposes of the Charter since it would effectively allow an aggressor to strike the first blow, which could be fatal.<sup>204</sup>

The test in *Caroline*, however, states clearly that the threat must be imminent and that there must be no alternative but to use force.<sup>205</sup> The World Summit Outcome reaffirmed the criterion set in the *Caroline* case.<sup>206</sup> It is evident from President Obama's speech and the purport of news reports that Al Qaeda does not pose an immediate threat to the US and has not used force against the US since 9/11.<sup>207</sup> It is therefore unlikely that the requirement of 'imminence' would be considered met in the situation under review. It may also be argued that the use of force against Pakistani territory is unjustifiable since the threat does not emanate from that quarter.

The second condition stated in *Caroline* is that there must be no alternative cause of action.<sup>208</sup> The purport of the US 2013 Drone Policy speech seems to imply a realisation by the US that a claim to that effect would be unlikely to gain decisive credence:

Beyond the Afghan theatre, we only target Al Qaeda and its associated forces. And even then, the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate and to prosecute. America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.<sup>209</sup>

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<sup>203</sup>Alston (2011) 1 *Harvard Security Journal* 1 at 18.

<sup>204</sup>O'Connell, *supra* n 74, at 285.

<sup>205</sup>*Caroline Incident*, *supra* n 198.

<sup>206</sup>*Supra* n 20.

<sup>207</sup>*Supra* n 99. '...today, the core of al Quada in Afghanistan and Pakistan is on the path to defeat. Their remaining operatives spend more time thinking about their own safety than plotting against us. They did not direct the attacks in Benghasi or Boston. They have not carried out a successful attack on our homeland since 9/11'.

<sup>208</sup>*Caroline Incident*, *supra* n 198.

<sup>209</sup>*Supra* n 1.

The question whether the use of force is indeed a last resort in the conduct of drone operations undertaken by the US is difficult to answer since there is little information available from which to discover how the US determines whom to target, when to target, and how to exclude other possible methods as required by the *Caroline* case. At first, avowal of these self-imposed constraints may have brought some hope to scholars who anticipated that the condition for cross-border military intervention as a last resort would be more rigorously observed and upheld by the US. Similar drone strikes have occurred in Pakistan since this statement, however, and justification by the US Defence Department is still not forthcoming.<sup>210</sup>

In the *Case of the Armed Activities on the Territory of Congo (DRC v Rwanda)* the ICJ made the following statement:

Article 51 may justify the use of force in self defence only within the strict confines there laid down, it does not allow the use of force by a state to protect perceived security interest beyond these parameters.<sup>211</sup>

The *Nuclear Weapons* case<sup>212</sup> confirmed that the admissibility of self-defence is contingent on observing the rules of necessity and proportionality in accordance with customary international law, and that this dual condition applies equally to article 51, whatever the means of force. In the *Oil Platforms* case the court confirmed that when acting in self-defence, the requirements of necessity and proportionality are immutable.<sup>213</sup> This means that the US will have to prove in accordance with article 51 that the use of drones for the purported purpose of self-defence is unavoidable, and that there can be no other recourse. Heyns observed in his 2013 Drone Report that:

... there is an emerging view that the level of violence necessary to justify a resort to self-defence ought to be set higher when it is in response to an attack by non-state actors than to an attack by another state. This specific intensity requirement for the definition of an armed

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<sup>210</sup>*Supra* n 174.

<sup>211</sup>*Demo.Rep.Congo v. Uganda*, 2005 I.C.J. (Dec. 19); Gray, *supra* n 11, at 164; Hestermeyer, *supra* n 188; compare *Case Concerning Oil Platforms*, ICJ Reports 2003.

<sup>211</sup> Advisory Opinion 1996 I.C.J. 226 (July 8).

<sup>212</sup>*Ibid.*

<sup>213</sup>Hestermeyer, *supra* n 188; compare *Case Concerning Oil Platforms*, ICJ Reports 2003.

attack must be met *vis-a-vis* each host State on whose territory action in self-defence is taken.<sup>214</sup>

The legal implication of the above statement is that the ‘violence’ or, rather, ‘lack of violence’ on Pakistani territory does not constitute sufficient grounds for the US to justify a claim that it is acting in self-defence against a non-state actor.

It is further important to note that convenience and necessity are by no means synonymous. It may be convenient for the US to use drones, but action thus motivated would not meet the criterion of necessity. The proportionality requirement would not be a formidable barrier to overcome as civilians often fall prey to collateral damage caused by drone strikes. Such an analysis should be done on a case-by-case basis.

De Wet notes that 9/11 revived the academic debate regarding the legal justifiability of launching a retaliatory armed attack against non-state entities whose actions cannot be attributed to a state.<sup>215</sup> This issue was addressed in the *Palestinian Wall* case, in which the court admitted the argument of self-defence provided that defensive acts could be shown to be in reaction to an armed attack mounted by a state against another state.<sup>216</sup> The current US operations in Pakistan are aimed at Al Qaeda (a non-state actor) and not at the state of Pakistan. The purport is clear, namely, that the actions of the US in this instance do not meet the criteria for self-defence according to the Court’s ruling, as Al Qaeda is not a state.

## 6.4 Conclusion

Drone strikes by the US in Pakistan remain an infringement of Pakistan’s territorial sovereignty. This is so in view of the case law which supports a narrow interpretation of self-defence permitted under article 51. Some scholars support the US position.<sup>217</sup> However, the thesis of this dissertation is that it is evident from the primary sources on international law that this defence is baseless. In the World Summit Outcome it was reaffirmed that the relevant provisions of the Charter are

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<sup>214</sup>*Supra* n 1.

<sup>215</sup>Hestermeyer, *supra* n 188, at 1566.

<sup>216</sup>*Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, ICJ Reports 2004; compare Hestermeyer, *supra* n 188, at 1565.

<sup>217</sup>Orr, *supra* n 27; *contra* Hestermeyer *supra* n 188, at 1567. The author agrees with De Wet who notes that ‘[w]ith each expansion of the notion of self-defence, the collective security system is weakened in favour of the unilateral use of force exercised under the exclusive control of the states affected’.

sufficient to address the full range of threats to international peace and security.<sup>218</sup>  
This includes the protection of territorial integrity against the use of force by a foreign state.

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<sup>218</sup> *Supra* n 20.



## 7. Conclusion

The purpose of this thesis has been to show that the US is in violation of international law on aerial sovereignty and, consequently, of human rights law, as a result of its drone intrusions into the territory of Pakistan.

The thesis has acknowledged that drones may be used for peaceful purposes and that they are not inherently 'evil', but that, when used in contravention of international law, they do have the potential to be destructive. It has emphasised that the legal and moral problems with drones do not relate to drones *per se*, but to the current use made of them by the US.

The principle of aerial sovereignty has also been explored. It has been found that the application of article 2(4) of the UN Charter and the customary principle of aerial sovereignty as contained in article 3(c) of the Chicago Convention provide that the US is in breach of Pakistani sovereignty. It has been argued, in addition that, contrary to much scholarly opinion, the Chicago Convention applies exclusively to civil aircraft and does not in itself regulate the drones deployed by the US in Pakistan.

It has illustrated, further, the vacuity of purported arguments based on such expressions as 'the war on terror' and 'preemptive self-defence', attested by the words of the US President himself.

It can thus be concluded that the current drone operations of the US in Pakistan constitute a breach of Pakistani aerial sovereignty.

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