

**VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW**  
**ACROSS THE DURAND LINE:**  
**THE FIRST DECADE OF 21<sup>ST</sup> CENTURY**

A thesis submitted as fulfillment of a partial requirement for the award of the degree of LLM in Human Rights



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## **FINAL APPROVAL**

It is certified that we have read the dissertation submitted by Mrs. Fozia Naseem, entitled "*VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW ACROSS THE DURAND LINE: THE FIRST DECADE OF 21<sup>ST</sup> CENTURY*" as a partial fulfillment for the award of degree of LLM (Human Rights Law). We have evaluated the dissertation and found it up to the requirement in its scope and quality for the award of degree.

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# *Dedicated*

TO

My Late Mother,  
A real source of strength for me !

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## **ABSTRACT**

This study is primarily focused on the analysis of the situation which emerged in the region immediately after the 9/11 incident in US. Soon after the incident the whole international community showed its determination to eliminate all the sources of terrorism throughout the world. In this regard the resolutions unanimously passed by the Security Council indicate the intention of the members that how serious they were. However, the US decided to opt for its own methodology and the line of action it considered suitable for it. Available means in international law to meet with such a situation were totally ignored. The diplomatic channels in this regard were also bypassed. The US government not even waited for the outcome of the inquiries constituted by the congress to probe into the matter before deciding the line of action. Resultantly the military action was started by the US led and the NATO forces. The legitimate Taliban regime in Kabul was overthrown and as a result a gorilla war began, which never could end because of the suitability of the land for such type of war. During the belligerency between the US and the allied forces on one hand and the resisting groups on the other hand, the general public suffered very badly. All the safeguards for non-combatants available in the international humanitarian law and the law of war proved totally ineffective. The reason is that the US wounded sense of pride as a global power overshadowed all the humanitarian international law evolved during the last century. The first decade of the 21<sup>st</sup> century had to witness such a cruel violation of the human rights in this region.

Violation of human rights in Afghanistan as well as the tribal areas of Pakistan is a multidimensional issue in which many factors are involved. The allied forces and Afghan regular army is fighting against the resisting groups generally called Taliban. However, the cruelties are being committed equally on the other side as well. They use the general public and specific villages/localities as shield against the air and field attacks of the Allied Forces. There are instances where the armed resisting groups seek support from the villagers on gun point. Indiscriminate air attacks of the NATO forces on the Afghanistan Taliban captured areas cause very serious casualties. Same practice is repeated frequently on the eastern side of the border in Pakistan. Such blind bombardment is strictly prohibited in international law of war.

Many people during these belligerencies are captured by the hostile groups. But these captured persons are never given the status of war prisoners according to the Geneva Convention of 1949. The techniques of investigation are totally inhuman. In this regard the Guantánamo prison is very notorious and has been highlighted by different authors and human rights groups.

As a whole the situation of human rights in the region under study is very serious and has put the champions of human rights into a test. The global powers' determination to keep their status 'at any cost' is a big challenge in this regard. In the absence of any strong and effective administrative and legal/constitutional set up the implementation of the charters and conventions of human rights at international level will remain a dream of the oppressed people of the world. The global power, to maintain its hegemony will not hesitate to play another drama like Hiroshima and Nagasaki once again.

## **ACKNOWLEDGEMENTS**

I owe a great debt of gratitude to my supervisor Dr. Muhammad Munir, Chairman of the Department. He was so generous and encouraging that after every meeting with him I felt in myself a new energy, confidence and enthusiasm for completion of this study.

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I have to pay special thanks to my all friends in IIU as well as in University of Sargodha. Finally, I would express my sincere thanks to my family members who suffered greatly because of my absence from home while doing LLM in IIU Islamabad. My father, SHEIKH-M-NASEEM, Brother SHEIKH-M-ASIM, & sister ASIMA provided me every kind of support in this regard. I pray for my late mother who could not wait for the completion of this work and passed away during my course work of LLM. May her soul rest with peace.(AMEEM)



# **Chapter-1**

## **INTRODUCTION**

9/11 shook the whole world badly. Total international community including UN and other international organizations responded very positively with determination to punish the terrorists. On the other hand the United States reacted so violently that many innocent lives had been lost in this so called war against terrorism. Blind use of force in Afghanistan and the tribal and a few settled areas Pakistan remain unchallenged. All the movements of human rights and efforts for the revival of humanitarian laws of the war apparently proved futile. This situation demands the academicians and the researchers of the subject to explore the possibilities of stopping the humanity from moving towards another Hiroshima and Nagasaki.

### **Thesis Statement:**

The International Humanitarian Law had been proved totally ineffective during the belligerent activities in the name of “War Against Terrorism” on both sides of the Durand Line, the boundary between Afghanistan and Pakistan from 2001 to 2010. This war was launched hurriedly without exploring the diplomatic channels and the forums of international organizations, particularly the United Nations. The proposed study is to know that:

- why the US retaliated so spontaneously without exploring the diplomatic channels?
- why the UN, OIC, and other international organizations were not allowed to be mobilized before the start of this operation?

- why the humanitarian aspect was not considered before it?
- why the human rights organizations kept silent during this brutal military operations affecting innocent citizens?
- what was the response of the international community on this severe violation of the law of war across the Pak-Afghan boundary?
- how the law of war extending protection to the non combatants can be made effective and meaningful in future?

### **Hypothesis:**

International Humanitarian Law or Law of War needs to be supported by effective sanctions against the violations. Though the governments can hardly be convinced to keep their belligerent activities within the legal framework, the human rights organizations can mobilize the masses to compel their respective governments through public pressure.

International Humanitarian Law regarding the protection of civilian population and other non-combatants during the war proved totally ineffective despite of its wide recognition through the world. It is the need of the time to make it strong, effective and implemental. For this purpose these laws must be backed by meaningful sanctions against the parties violating them. At the same time the state governments should be forced to respect the humanitarian law during war. Public awareness is needed to be generated among the masses.

### **Significance of the Research:**

21<sup>st</sup> century is considered as the century of upholding the Human Rights throughout the world. It gained so much importance and so many organizations have emerged as the champions of the human rights that even state sovereignty claims and the boundary barriers have lost their significance. NGOs boldly

intervene wherever such rights are violated, whether it is at governmental or private level, and no country considers such intervention as a violation of its territorial sanctity. However, it is surprising that the conscience of the whole world is silent at the sufferings of the humanity in Afghanistan and the tribal and a few settled areas of Pakistan. Even in the heart of Federal Capital of Pakistan the State machinery brutally perished more than 3000 innocent students host aged by a few militants in Jamia Hafsa and no reaction appeared from the world opinion leaders of the 21<sup>st</sup> century. The need of the time is to make the international organizations, and international law, particularly humanitarian law practicable and enforceable. This study is hoped to be a valuable addition in the existing literature on the subject.

### **Objectives of the Research:**

The target of this study was mainly to highlight the violations of the International Humanitarian Law during the war against terrorism, started by US as retaliation against the 9/11 incident without using the diplomatic channels. Resultantly some possible safeguards against such violations in future can be suggested. International Humanitarian Law and the provisions of human rights has been a very hot topic of the United Nations as well as the other non-governmental organizations. However, this question is still to be answered that how the governments, particularly of the global powers, can be compelled to take care and uphold the rules regulations of warfare so that a full protection to the civilian population during military or civil-military joint operations could be extended. The main objective of the proposed study is to find out the answer of this question.

### **Literature Review:**

So far as international humanitarian law is concerned, too much has been written about the rules regulations regarding laws of war to minimize the human

sufferings in war. At the same time too many international conventions and treaties have been signed to this effect. However, much work is still left to be done to make these laws enforceable and effective. The available literature related to the proposed study is of two types. One is related to international law of war related to human rights in war time. Other category comprised of the case studies of different regions of the world subject to insurgencies and terrorist activities, including Afghanistan. Most of this literature just explains the existing rules and regulations but without any solid and objective analysis of their applicability.

Roy Gutman, David Rieff, and Anthony Dworkin have jointly edited '*Crimes of War: What the Public Should Know*' (2007). The authors tried to identify the laws which might prevent the cruelties in various parts of the world, such as Chechnya, Rwanda, Liberia, or ex-Yugoslavia. These are the areas where the horrifying brutalities, cruelties and extreme of terrorism prevail. According to its legal editor Kenneth Anderson, this book was conceived "to combine technical accuracy and readability." It further explain such legal aspects which are related to civilian immunity and protection, genocide, safety zones, Camps of the prisoners of war etc. The book is written in encyclopedia format and alphabetical order. It is not a manual of law, but provides the factual knowledge of the atrocities from the actual sites and indicates the legal remedies not adopted yet. It is really the food for thought for those who are concerned to uphold the human rights.

Steven L. Burg, Paul S. Shoup, in their book, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (1990) also highlighted the violations and brutalities of the State apparatus in Bosnia-Herzegovina. However, it unnecessarily tried to justify the foreign intervention to stop the internal ethnic conflict.

Rizwan Hussain (2005) in *“Pakistan and Emergence of Islamic Militancy in Afghanistan”* explains the process through which the involvement of Pakistan Army in the activities of Islamists of Afghanistan became the part of Pakistani elite’s strategic agenda of the post-war period. It also analyzes the nature of the Pakistani society and the role of Pakistan Army in policy making process. The interrelationship between geopolitical changes of Southwest and the South Asian zones with the security related policies of the Pakistani elites are particularly covered in this study. Contemporary politics of South Asia as well as West Asia are also discussed by the authors. However, little attention is given to the conditions of the human sufferings in this area.

Gary D. Solis (2010) in *“The Law of Armed Conflict: International Humanitarian Law in War”*, provides very basic information and concepts of the laws of war in this period of international terrorism. The essential questions such as: which law is applicable to any particular the armed conflict, the status of the combatants and non-combatants in the hostile activities, the lawful targets and the targeting decisions, differentiation between the lawful and unlawful weapons, civilians protection during hostilities, are tried to be answered in this text. It definitely generates an awareness among the readers regarding many law questions related to the human rights and sufferings of civilian population during the armed conflicts. This work is mainly ‘US weighted’. It includes a large number of cases from worldwide jurisdictions. However, the author does not highlight the problem of implementation. Naorem Sanajaoba’s *A Manual of International Humanitarian Laws* (2004) also provided almost the same type of information, but without any specific case studies.

Benjamin Wittes has edited *Legislating the War on Terror: An Agenda for Reform*

(2009). The contributors mainly focused on the internal situation of USA and suggested short term and long term strategy against terrorism and targeted killings.

Helen Duffy in *The "war on terror" and the framework of international law* (2005) gave valuable suggestions to adjust the war against terrorism within the framework of international law.

Michael Byers, Canada Research Chair in Global Politics and International Law at the University of British Columbia, presented his book *War Law: Understanding International Law and Armed Conflict* in 2005. Byers, with the help of the series of the case studies of international armed conflicts, tries to explore the history of application of international law on the hostilities and conflicts. He starts from the Caroline incident of 1837 and comes to the Abu Ghraib prison of Iraq. He also examines the legal contradiction/controversies regarding the US interventions in Kosovo, Iraq, Afghanistan, Iraq, etc. He also analyzes the effectiveness of the tribunals of war crimes and the role of International law. War Criminal Court. This book is over-dominated by a historical and comparative approach, touching the current issue of Afghanistan very lightly.

Yusuf Aksar (2004) in *"Implementing International Humanitarian Law: From the Ad hoc Tribunals to a Permanent International Criminal Court"* gives a detailed view of the development of humanitarian international law and the formulation of International Criminal Tribunals for Rwanda (ICTW) and International Criminal Court for the ex-Yugoslavia (ICTY) in 1994 and 1993 respectively. It was followed by the establishment of International Criminal Court (ICC) on permanent basis in 1998. The author gave a detailed account of such a significant structural development in the form of ICTY and ICTW for the implementation of the

International Humanitarian Law. The practice of ad hoc tribunals in this regard has also been examined in this text to highlight their impacts on the development of international law in general and humanitarian law in particular. In this study the fresh instruments signed to ensure the sanctity of international humanitarian law such as the 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind, or the Statute of ICC are also covered in detail. However, the author surprisingly did not touch the violations of human rights and humanitarian law of war in Afghanistan, which still is bearing a big question mark.

Gerhard Werle and Florian Jessberger (2009) in "*Principles of International Criminal Law*" discuss very general principles of international law related to war crimes. Further, certain individual crimes such as aggression, genocide, crimes against the humanity, war crimes are also discussed. Fundamental issues related to the development/evolution of international law, its sources, implementation problems are also included. The Rome Statute of the International Criminal Court is discussed with its historical context. Customary international law is analyzed with sociopolitical reference. Development of International law through the judicial decisions specially the case law of the ICTY and the ICTR as well as the decisions of national courts are extensively covered in detail. No doubt this book, in combination with that of Yusuf Aksar, as discussed above, presents a systematic view of the development of international criminal law during the first decade of the current century. However, its practical aspect with reference to Afghanistan and the Tribal Areas of Pakistan is ignored.

John Grant, Craig Barker, in their book titled as *International Criminal Law* published in 2006, try to discuss the cases of individual persons involved in the unlawful activities such as Slobodan Milosevic and Saddam Hussein. They further discuss the establishment of International Criminal Court. The authors

highlight the growing use and significance of international criminal law as an independent discipline. This unique collection provides an access to the researchers and academicians to the core and basic international instruments in a single handy volume. It is user friendly which contains about eighty major documents on International Criminal Law signed in the period from 1919 to 2005. The documents are organized around generally recognized categories of international crimes like terrorism, crimes committed during hostile/war activities, crimes against the humanity etc. It further includes constitutional instruments of the most significant domestic, international, or hybrid type of tribunals. It also discuss the International Criminal Court's Statute, its rules regulations and procedures, the elements of crimes, principles of international criminal judicial system, international and regional instruments in this regard. Practical difficulties of providing the criminal justice to the nations are discussed in detail. Possibilities of ensuring the mutual assistance in the form of extradition of asylum are thoroughly elaborated.

Christoph Johannes and Maria Safferling have written the book *Towards an International Criminal Procedure* (2001). The authors in this book tried to develop some type of criminal judicial procedural order that may join the approaches adopted by the Europe and America. It made a comparative study of German, British American criminal procedures and tried to find out their philosophical and historical evolution. This criminal procedure covered from the start of the investigation to the punishment of the convicted. The application of these rules in the situation prevailing in Afghanistan, however, is not mentioned.

Jordan J. Paust, in in his book *Beyond the law: the Bush Administration's Unlawful Responses in the 'War on Terror'* (2007) provided a detailed account about the violations of international law, which were authorized and abetted,



either by the secret or open memorandums, notifications, and orders of the Bush administration. Particularly, it highlighted the reasons of several illegal executive claims, unlawful authorizations, illegal and tacitly approved interrogations, unlawful detentions and transfers etc. It proved with proper authenticated documents, relevant to different cases that how the US President was bound by the international law of war. Further it clarified that during war, all the decisions of detaining the persons, determining their status, and mishandling them is subject to be reviewed by the judiciary. It also is indicated that the chief of the armed forces is bound to the restraints imposed by the US Congress. However, it is mainly confined to highlight the internal procedural violations in the American system of government. To link such violations with any specific case such as Afghanistan is left by the author for further research.

Wybo P. Heere in *Terrorism and the Military: International Legal Implications* (2003) analyzes the war against terrorism presently being fought in different parts of the globe. According to the author, such hybrid type of operations are covered by several areas of law. These operations as part of that antiterrorism war raise so many legal questions related to the international humanitarian law of war. A two-days conference on "Terrorism and the Military: International Legal Implications" held in November 2002 in Hague. The academicians and practitioners of international law, representatives of the defense or foreign ministries of various countries participated in it to find out the answers to the questions being posed by international community related to the implementation of the existing body of rules and regulations of law of war. The discussions focused on three major themes: 1) Laws related to the use of force across the state borders; 2) Laws governing the conduct of war; 3) The Criminal law. This book contains all the proceedings of this valuable conference, including the discussions, recommendations, and the conclusion. The book can be used as a

very rich source of reference for further research focusing on any specific area like Afghanistan or Iraq.

Helen Duffy in *"War on Terror" and the Framework of International Law* (2005) discusses the legal issues raised in the post 9/11 era. Such acts of terrorism on September 11, 2001 were followed by a so called 'war against terror'. This text indicates the essential parameters of the international legal framework within which the 9/11 attacks and the legal status of the measures taken to counter this terrorism can be determined. The author discusses the relevant law in relation to international terrorist activities and the responsibility of the international community in this regard. It further evaluates the effectiveness of the existing criminal law framework, the legal constraints on the use of force, the law of war and the international humanitarian law applicable in an armed conflict, and the international law protecting the human rights. It points out the availability of a valid legal structure having potential to tackle with the events like that of 9/11. The author examines the compatibility of the war on terror with the available international legal framework. Further, the implications of this war for the states responsible of this situation and the neutral states in this scenario are also discussed. However, nothing is there in this book about Afghanistan, Iraq or Pakistan which are equally involved in this war.

Most of the available literature on this subject, as discussed above, gives the basic information and ready references about the legal frame work for international hostilities, including the so called war against terrorism. However, too much work is left to be done to find out the answers of the questions about the legality of the activities in which the main players of war on terrorism are involved in Afghanistan or the tribal areas of Pakistan across the boundary line.

## **Structure of the Thesis:**

Chapter-1 consists of introduction of the topic, hypothesis, significance, objectives of the study under review. It also contain a brief review of the literature on this subject.

Chapter 2: UN and other Diplomatic Channels and 9/11 Incident: This chapter is discusses the roles which UN and other international organizations could have played to rationalize the US reaction and keep it within the limits of International Humanitarian Law and minimize the human sufferings but they were not given opportunity in this regard. It is to sort out that why the US avoided bringing the matter first at international forums before adopting any line of action. The US motives or apprehensions behind its efforts to avoid the UN plate form and the diplomatic channels available before going to start the so-called war against terrorism have also been discussed.

### **Chapter 3**

Military operations of the NATO forces in Afghanistan: This chapter analyzes the military operations of US and its allies in Afghanistan and the retaliation of the international public opinion. Violations of the humanitarian law have also been highlighted where necessary.

### **Chapter 4**

War on Terror on the East of the Durand Line (this chapter explain the legal, social, and humanitarian aspects of the operations in the tribal areas of Pakistan. Certain operations were also conducted by the US army men inside Pakistan at their own or in collaboration with Pakistan's government, or by the government of

Pakistan under compulsion. Such operations have been assessed from the humanitarian criteria.

## Chapter 5

Conclusion: (In the light of the previous discussions the solid and practicable suggestions will be prepared to make the international humanitarian law effective and meaningful. In this regard the role of UN will also be discussed in the light of the previous discussion.

## **Chapter-2**

### **UN AND OTHER DIPLOMATIC CHANNELS AND 9/11 INCIDENT**

This chapter discusses the roles which the UN and other international organizations could have played to rationalize the US reaction and keep it within the limits of humanitarian international law and minimize the human sufferings. But unfortunately they were not given opportunity in this regard. It is to sort out the reasons that why the US avoided to bring the matter, first at international forums and then adopting any reasonable diplomatic line of action. It is tried to highlight the US motives or apprehensions behind its efforts to avoid the use of UN platform or the other diplomatic channels available before going to start the so-called *war against terrorism*, a vague and subjective term easily applicable anywhere. Apparently 9/11 was an internal matter of US, and should have been resolved internally, as the matter of bombing federal building in Oklahoma City was dealt rationally instead of bombing Middle East, as was suggested as was suggested at that time by various circles.

According to the International Humanitarian Law the states are obliged to adopt amicable measures to settle down all their mutual disputes prior to the use of forcible measures. The Permanent Court of Arbitration was established in the "1899 Convention for the Settlement of International Disputes." This Convention was signed by the State Parties in Hague during the 'First Hague Peace Conference'. This Convention was then revised in the 'Second Peace Conference 1907'.

The first Chapter of the Hague Convention 1907 (Article 1-36) explained the usage of the available amicable means in this regard.

The same was asserted in the Kellogg-Briand Pact 1928, also known as Paris Peace Treaty signed by the US and other European States. It says:

“Article I. The High Contracting Parties solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.”<sup>1</sup>

“Art. II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or origin they may be, which may arise among them, shall never be sought except by pacific means.”<sup>2</sup>

Same spirit was endorsed in the international convention on the similar subjects held in the following years:

The League of Nations re-confirmed the same spirit in its Covenant by saying:

“Should any member of the League resort to war in disregard to its covenant’s Articles 12, 13, or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of covenant-breaking State and the nationals of any other State, whether Member of

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<sup>1</sup> Quoted by William W. Bishop, Jr, International Law: Cases and Materials, 3<sup>rd</sup> Edn, Little Brown Series, Toronto: 1971, p.912. for original text see at: [http://avalon.law.yale.edu/subject\\_menus/kbmenu.asp](http://avalon.law.yale.edu/subject_menus/kbmenu.asp).

<sup>2</sup> Ibid.

League or not”.<sup>3</sup>

In the UN Charter the use of force for the settlement of international disputes before exhaustion of peaceful means is also strictly prohibited.

“The organization and its members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles.

3. All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with purposes of the United Nations”.

UN Charter, in its Chap. VI, Article. 33 to 38 also accentuate the member states for peaceful settlement of their disputes with other states. Chapter VII stress on use of force through the UN Security Council.

September 11, 2001 was the day when the terrorists, by attacking the World Trade Center in New York, shook the whole world. This incident actually put all international organizations, champions of human rights, all mentioned international treaties, declarations and the UN Charter into a very tough test. Mainly it was the time of trial of the faith and belief of the whole international community in International Humanitarian Law.

The most of the international humanity, including UN stood up with the United

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<sup>3</sup> William W. Bishop, Jr, *op cit*, p.914

States. The expression of sympathy of the international community in the United States' hour of agony was instantaneous, intense, overwhelming, and unanimous. On September 12, 2001, the very next day of the incident, the United Nations General Assembly and the Security Council adopted several resolutions which forcefully condemned all sorts of acts of terror. Further, in these resolutions the member States were asked to, "co-operate, bring to justice the perpetrators, organizers, and sponsors of the outrages of September 11, and in combating terrorism worldwide"<sup>4</sup>. They further emphasized that "those responsible for aiding, supporting or harboring the propagators, organizers and sponsors of these acts will be held accountable"<sup>5</sup>.

"Additionally the United Nations Security Council Resolution 1368, adopted unanimously on September 12, 2001, after expressing its determination to combat threats to international peace and security caused by acts of terrorism and recognizing the right of individual and collective self-defense, the Council condemned the September 11 attacks in the United States"<sup>6</sup>.

"The Security Council condemned the attacks very firmly in New York City, Washington D.C. and Pennsylvania. It declared this incident as a challenge to the global order, peace and security. It expressed solidarity with the US government along with sympathy and condolences with the victims of and their families"<sup>7</sup>.

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<sup>4</sup> V.S. Mani, "The Fifth Afghan War and International Law", *Economic and Political Weekly*, Vol. 37, No. 4 (Jan 26, 2002) pp. 294-298.

<sup>5</sup> *Ibid.*

<sup>6</sup> Washington Post dated September 13, 2001.

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



The said resolution asked all the nations. The international community was called upon to increase efforts to suppress and prevent terrorist activities through co-operation and implementation of anti-terrorist conventions and Security Council resolutions, particularly Resolution 1269 (1999)<sup>8</sup>.

Resolution 1368 was concluded with the Council's expression of its will for taking serious steps to counter the attacks and "combat all forms of terrorism in accordance with the United Nations Charter"<sup>9</sup>.

The debates at the United Nations generally supported "action through the UN" against the 9/11 terrorists and those who harbored them. Countries like China and France and many others aired views to this effect<sup>10</sup>.

Meanwhile the NATO also declared 9/11 attacks amounted to an armed attack against a member country of the Organization within the ambit of Art. 5 of the Treaty of Washington 1949, its basic constitution, and therefore, all other member states were entitled and obliged to respond as the Alliance might deem fit. The European nations through, many of their common regional institutional mechanisms responded, initially accepted the possibility of military action. However, this willingness was subject to the condition that all such military actions should be recommended by the United Nations Security council, along with clearly defined objectives, proper assurances of the protections of the civilians. Further, that all military operations shall be in accordance to the

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<sup>8</sup> Ibid

<sup>9</sup> UN Security Council Resolution 1368 (2001) September 12, 2001.

<sup>10</sup> V.S. Mani, "The Fifth Afghan War and International Law", *op. cit.*

provisions of international law. However, they were brought in line with NATO.”<sup>11</sup> This was of course expected because most of the prominent European states were members of the Alliance, and at any rate the United Kingdom had already committed itself totally to any action that the US might consider appropriate to meet the situation<sup>12</sup>.

The US did not bother to wait for any initiative from the UN or any other international forum outside NATO. One is not sure whether there were any prior consultations with other countries outside the NATO, or if there were, how wide and how much, before the US set the agenda of the war, and initiated each step in pursuit of the agenda, leaving others merely to march behind the leader.

The presidential address of Mr. Bush immediately after the incident of 9/11 indicates that he had no firm belief in the available amicable means for settlement of this issue. He declared war on the 9/11 terrorists and those who harbored them. In the joint session of the Congress, he said that investigations implicated Osama bin Laden and Al-Qaida organization, which had also been responsible for the attacks on American embassies in Kenya and Tanzania. He declared, “The American Response to terrorism is being fought at home and abroad through multiple operations, including diplomatic, military, financial, investigative, homeland security and humanitarian actions”<sup>13</sup>. He then proclaimed: Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists”. Impliedly he did not leave any option for the other countries

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid*

<sup>13</sup> See the text of the President George W. Bush’s address to the joint session of the Congress and the nation on September 20, 2001 available at <http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/>

except to follow the US in this so called war to be fought outside the orbit of the UN. In the end of the speech the President put across to Taliban five demands: (1) deliver all Al-Qaida leaders to the authorities of the United States (2) release all foreign nationals held hostage (3) extend protection to all the diplomats, journalists, and the workers of the aid agencies (4) immediately close, on permanent basis, all the camps of the terrorists immediately (5) provide the United States with a complete access to the training camps of the terrorists, and ensure that their operations are stopped. These demands were unilaterally determined by the US and not even open for any further negotiations.

“The Security Council, on September 28, 2001 passed a resolution demanding all the states to: (a) absolutely stop the financial support of terrorist activities, (b) declare unlawful and criminal all type of collection, by all means, of finances by their citizens or on their territories to be used for commission of terrorist activities, (c) immediately freeze accounts/funds and other financial or economic sources of individuals or groups who either commit or intend to commit terrorist activities or involve in or support the commission of such activities, and (d) strictly stop any person in their territories from making any resources or services for the benefits of terrorists or those who abet them”<sup>14</sup>. It further had a provision “for the formulation of a Council Committee to monitor the implementation of the Resolution. All the member states were bound to submit the reports in this regard within three months.”<sup>15</sup> The Security Council also expressed “its determination to ensure the full implementation of the Resolution, in accordance to its responsibilities under the Charter” and decided to remain seized of this issue”.<sup>16</sup>

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<sup>14</sup> Resolution 1373 (2001), September 28, 2001.

<sup>15</sup> Ibid.

<sup>16</sup> V.S. Mani, op. cit.

It is worthy to mention here that the resolution was adopted by the Council acting under the UN Charter's chapter. VII. It authorizes the Security Council for implementation of any proper action against any breach of, or threat to international peace, or any aggression. The Charter provides vide Article 25 read with Article 48 that decision of the council of this nature, taken in accordance with the Charter, shall be binding on all member states of the UN.

From the entire discussion one can safely conclude that the UN Security Council's efforts were not entirely meaningless such as resolutions on Kashmir issue. The Council was determined to take effective measures for the implementation of the resolution and declarations passed in this context. A huge legal infrastructure was available to translate the resolutions into practical actions.

US reaction on 9/11 and its war against terrorism is studied from four different angles: 1- the available legal framework to counter the terrorism; 2- the legal status of the arbitrary use of force by the United States backed by its allies; 3- The role of the UN Security Council in respect of the US action; 4- the machinery to bring the terrorists and their supporters before justice.

In this section the available legal infrastructure will be pointed out which could have been mobilized to counter the international terrorism instead of adopting the massacre in the Afghanistan and the neighboring areas.

In international law there are solid principles and regulations which render all sort of terrorism as illegal, and all States swear by them, in spite of the reality that most of them have telltales in their skeletons in their cupboards.

In the Corfu Channel (Merits) case 1949, the ICJ spoke of "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."<sup>17</sup> The United Nations General Assembly adopted by consensus at least four important resolutions, namely, "The 1970 Friendly Relation Declaration,"<sup>18</sup> "The 1974 Declaration on Definition of Aggression,"<sup>19</sup> the "1987 Declaration on the Enhancement of the Effectiveness of Principle of Non-use of Force,"<sup>20</sup> and "Declaration on Measures to Eliminate International Terrorism,"<sup>21</sup> All of them prescribe all acts of international terrorism. The Friendly Relations Declaration stated the principle as under:

"Every State has duty to refrain from organizing, instigating, assisting or participating in ... terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."<sup>22</sup>

This para of the referred resolution was confirmed as part of general international law by the International Court of Justice in the Nicaragua Case.<sup>23</sup>

Through many such declarations and other resolutions, the international community of states recognizes a clear legal ban on international terrorism, and an obligation on the part of the states to endorse it into their respective domestic

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<sup>17</sup> *ICJ Reports 1949*, p 4. 22, Quoted by Bishop, *op.cit.* p. 399.

<sup>18</sup> Resolution 2625 (XXV), 1970.

<sup>19</sup> Resolution 3314 (XXIX), 1974.

<sup>20</sup> Resolution 42/22, 1987.

<sup>21</sup> Resolution 4960, 1994.

<sup>22</sup> Resolution 2625 (XXV), *op.cit.*

<sup>23</sup> *ICJ Reports 1986*, p 14 at p 101.

laws.

The treaty framework for combating terrorism is quite broad based. In this regard there are at least one dozen global treaties, seven regional treaties, and three related global treaties. Both Afghanistan and US are parties to the aviation terrorism treaties of 1963, 1970 and 1971. The later is a party to the first 10 of the 12 global treaties on terrorism referred above, but not to the 1998 Convention on Terrorist Bombing and the 1999 Convention on Terrorist Financing (negotiated at the initiative of the US).

### **Arbitrary Use of Force and International Law:**

Now the question is to assess the justification of unilateral use of coercion by the United States and NATO against Afghanistan, while on the other hand the UN Security Council was all out for it. As discussed earlier all the uses or threats of use of force by a State against the political independence or territorial integrity of another State are strictly prohibited by international law. There are only two types of use of force allowed in the Charter: one, through the UN Security Council on behalf of the international community; two, the right of self defense of each State, either individually or collectively.

The right of self-defense in Article 51 of the UN Charter is provided only in case of armed attack. It must be, however subject to the principle of proportionality in reprisals, and the principles of International Humanitarian Law are to be observed in any case. Every action of reprisal is necessary to be reported to the United Nations Security Council. After receiving such report, the Security Council is duty bound to take further effective steps to restore the international peace, good order and the security.

However, in the present case the justification of the self-defense does not apply

on the United States and the NATO countries. The reason is that this principle cannot be when the Security Council is already in action and has taken the initial measures. In deed the Afghan situation was already before the Council since 1993. So is the case of international terrorism being a threat to international peace and security.

In all of its resolutions the UN Security Council decided "to remain seized of the matter. Further, specifically in respect of the September 11 attacks, its resolutions repeatedly expressed determination to fulfill its responsibilities as mentioned in the Charter and its decisions to remain seized of the issue. Under such a situation the only legitimate course of action left for the US was to persuade the Security Council to fulfill its Charter responsibilities"<sup>24</sup>. Under Article 99 of the Charter the Security Council, is empowered to invoke its awesome powers of the use of force, either on its own or at the Secretary General's initiative. However, the US and its allies bypassed the International Organization and opted for their own way. "They started carpeted bombing in Afghanistan exactly after less than three weeks after the September 12 resolution of the Council, and a week after its September 28 'earth shaking' resolution, falling in line with President Bush's executive order on terrorist funds and support system".<sup>25</sup>

Before starting the action or launching so called 'war against terrorism' US even did not wait any outcome of the various enquiries. The War in Afghanistan began on October 7, 2001, even before constitution of all the enquiries. This factor is enough to believe that the US administration had no faith in the diplomatic or legal channels available to solve this issue.

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<sup>24</sup> V.S. Mani, op. cit.

<sup>25</sup> *Ibid.*

"The National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission), an independent, bipartisan commission created by congressional legislation and the signature of President George W. Bush in late 2002, was chartered to prepare a full and complete account of the circumstances surrounding the September 11, 2001 terrorist attacks, including preparedness for and the immediate response to the attacks. On July 22, 2004, three years after the war, the report was released."<sup>26</sup>

### **Why US did not depend on UN and other diplomatic channels?**

It is said that if the US could not, in law, resort to the right of self-defense, then NATO's claim for legitimacy of collective self defense would automatically fall through. Added to this, NATO congenially suffers from a doubtful legality of status. Because, a regional organization is not legally competent to resort to force except with the prior approval of the UN Security Council vide Article 53 of the Charter.

Iran's President, Mahmoud Ahmadinejad, said in July 2010 that "the terrorist attacks in the United States on Sept. 11, 2001, were *a big fabrication*, wrote to the United Nations secretary general, Ban Ki-moon, on Tuesday to ask him to open an investigation into the events of that day. In a letter to the secretary general, Mr. Ahmadinejad asked him to form an independent fact-finding committee trusted by regional countries on major elements behind the September 11 attack which was carried out as the main pretext to attack the Middle East and Afghanistan."<sup>27</sup>

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<sup>26</sup> [http://www.9-11commission.gov/press/911report\\_cover\\_HIGHRES.jpg](http://www.9-11commission.gov/press/911report_cover_HIGHRES.jpg)

<sup>27</sup> New York Times Dated: Aug, 1, 2010



A known American writer Chomsky criticized the US attitude towards United Nations as its subservient institution. According to him the US led war in Iraq went forward without UN backing. Washington acted in line with National Security Strategy that the Bush administration announced in Sep 2002, which asserted the US right to use force without, unilaterally if necessary against a perceived enemy<sup>28</sup>.

“Even when The US army failed to discover Iraqi weapons of mass destruction, the administration shifted its stance from ‘absolute certainty’ about the existence of the weapons and argued that the United States is entitled to act against any nation that has even intent to develop weapons of mass destruction. Lowering the bar for the resort to force is the most significant consequence of the collapse of the proclaimed rationale for the invasion”<sup>29</sup>

United States, the most powerful nation of the world, declared its National Strategy<sup>30</sup> in Sep 2002. It further expressed its determination to maintain it permanently. Any threat to it will be blocked forcibly.

Consistently, when the UN fails to serve as a US instrument, Washington dismisses it. Chomsky argues in this regard. “In 2002 the UN Committee on Disarmament and International Security adopted a resolution that called for

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<sup>28</sup> Noam Chomsky, *Interventions*, City Lights, San Francisco: 2007, p. 41.

<sup>29</sup> Ibid, p. 43,

<sup>30</sup> The National Security Strategy of the USA is a document prepared periodically by the executive branch of the government of the United States for Congress which outlines the major national security concerns of the United States and how the administration plans to deal with them.

stronger measures to prevent the militarization of space, and another that reaffirmed the 1925 Geneva Protocol against the use of poisonous gases and bacteriological warfare. Both resolutions were passed unanimously, with two abstentions; the United States and Israel. In practice US abstention amounts to veto<sup>31</sup>. This incidence shows US attitude of ignoring UN as well as international law for its so called national interests.

The forum of OIC could have been used very effectively by the United States through its friendly Muslim States such as Saudi Arabia or Pakistan. But this organization never was mobilized towards this end. Even it did not play any role on the issue of Iraq or Al-Qaida.

It is further criticized by Chomsky that even such type of reaction from United States had no rationale at all. In an interview he was asked a question "If bin Ladin planned the actions (of 9/11), and especially if popular fears of more such actions to come are credible, what is the proper approach to reducing or eliminating the danger. What steps should be taken by the US or others, domestically or internationally". Chomsky, while answering, used the analogy of British deal with IRA. It did not send the RAF to bomb the source of their finances, or commandoes to kill those who were suspected for being involved in supporting the IRA. He pointed out another possibility; "it was to consider realistically the background concerns and grievances and to remedy them, while at the same time following the rule of law to punish the criminals. That would make a lot more sense, one would think."<sup>32</sup>

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<sup>31</sup> Nom Chomsky, *Intervention, op cit*, p. 42

<sup>32</sup> Nom Chomsky, *9/11*, New York: Seven Stories Press, 2002, pp. 62-3

### **Public reaction was another reason of bypassing the international forums:**

When the US started so called war against terrorism, a strong reaction from international public opinion was expected. Such reaction could have created hurdles in the US war against Afghanistan. Hence the implementation of its planed actions regarding 9/11 incident might have been jeopardized. It might have to face opposition at international forums including UN. Resultantly it preferred to initiate the reprisals at its own, and invite its allies to participate later on.

The demonstrations against the US invasion in Afghanistan started immediately on the same day. The New York Times reported that more than 10,000 people came out in New York City on Sunday, October 7 to demonstrate against the so-called war on terrorism of the Bush administration. "The demonstration, which had been planned for several weeks by a coalition of pacifist and activist groups, was expected to draw only a few thousand but grew in size as word spread that the US had begun bombing Afghanistan"<sup>33</sup>

The demonstrators were gathered at Union Square, which had been the site of an outdoor memorial to the victims of the 9/11 attacks. Ruben Schaffer, was included among the speakers. His grand-son, Gregory Rodriguez was the victim of the incident of the 9/11 at the World Trade Center. He read a letter of Mr. Gregory Rodriguez's parents which was addressed to President Bush: "Your response to this attack does not make us feel better about our son's death. It makes us feel worse. It makes us feel that our government is using our son's memory as a justification to cause suffering for other sons and parents in other lands."<sup>34</sup> Rita Lasar's brother was died at the same place. She was staying at the

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<sup>33</sup> New York Times, Sunday, October 7 2001

<sup>34</sup> *Ibid.*

stage supporting a wheelchair-bound friend. She also spoke at this occasion to criticize the government policy.

"Heeding the call of the organizing coalition, a number of marchers were wearing the white dress and carrying white dove-shaped placards. It was a symbol of mourning but desire for peace at the same time. However, the majority of people showed up in regular street-clothes, indicating a broad participation by layers not close to the usual radical activists"<sup>35</sup>.

"The participants covered their way up Broadway, at one point stretching out for about 15 blocks. They stopped in the south of Times Square. The rally included a number of delegations of students from the University of New York and the Hunter College, among. Slogans were as: 'New York, not in our name; Islam, Arabs and immigrants are not the enemy; Our grief is not a cry for War' Speakers at the rally on Broadway included two Nobel Peace Prize winners, Adolfo Perez Esquivel from Argentina and Mairead Maguire from Ireland. Passersby flashed peace signs in support of the marchers, while one small group of counter-demonstrators heckled"<sup>36</sup>.

"The intention of the organizers of this demonstration was restricted to appeals to the Bush administration as well as the Democrats to void the military action, and calling for bringing the terrorists before a new, specialized international tribunal with jurisdiction over terrorist crimes."<sup>37</sup>

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid*

<sup>37</sup> *Ibid*

This protest was significant as it showed the active opposition of the masses to the American army's one sided aggression against the terrorists. It is of worth to mention that the protesting city was the same which mainly affected by this terrorist activity, even in the face of patriotic media frenzy. This march was followed by a series of anti-war rallies in other major cities of US and the Europe. For example a protesting march of 5,000 people was organized in Paris from the Place de la Republique to the Place de Nation to condemn the US military action. It also included a rally of 20,000 people in the Capital Hill of the United States on September 29.

"The American Public Health Association had adopted a statement opposing the war in Afghanistan as an 'undertaking that runs counter to the health and wellbeing of our populations'. The statement specifically condemns the intentional killing of civilians as a crime against humanity and endorses efforts to bring terrorist attackers to justice. The association's annual meeting also called on Congress and the Bush administration to commit \$10bn (BP 6.5bn) to help public health authorities to respond to acts of biological terrorism over the next five years."<sup>38</sup>

"Mainstream media coverage of the protests has been minimal to nonexistent, compared to endless reports on every aspect of the war drive, including one retired general after another appearing as commentators. Despite repeated claims that there is widespread support for war, even the *New York Times* was forced, in its front-page news analysis October 8, to acknowledge the shakiness of popular support for the bombing with the headline 'Home Front: Edgy Sunday,

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<sup>38</sup> Charles Marwick, *British Medical Journal*, Vol. 323, No. 7321 (Nov. 10, 2001), p. 1086

Nagging Uncertainty About Consequences'. Indeed, as the consequences of US military adventurism become apparent, so will the split between millions of working and middle class Americans, on the one hand, and the ruling elite and their media mouthpieces on the other."<sup>39</sup>

**Conclusion:** The instantaneous, intense, overwhelming, and unanimous response of the total international community over 9/11 incident was even beyond the expectations of the US. The UN Security Council and other international organizations expressly indicated their determination to take the effective measures against the incident. Many declarations and resolutions were passed to this effect. However, unilateral, arbitrary, and dictatorial actions of the US did not allow international community to adopt such effective and peaceful measures for elimination of the terrorists. US demands left little options for the allied countries as well as the UN in this regard. The US demanded from the concerned countries to be either "with the terrorists or us" in the so called war against terrorism. It left no third option for other countries. War against terrorism could not even be defined properly and meaningfully. The US arbitrary steps and dictatorial decision/demands indicate its lack of confidence in international law and the institutions. It did not even bother about its international treaty obligations regarding human rights and essential adoption of peaceful measures before the use of coercive measures. One factor behind the quick and spontaneous reaction of the US was its fear of opposition from other global powers such as Russia, China, or the Muslim World against this blind use of force. Uprising of the human rights organization internally and externally might have also added to this opposition. Hence the US preferred to not wait for the materialization of the UN

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<sup>39</sup> New York Times dated October 9, 2001

resolutions and started action immediately. The detailed account of this War against terrorism in Afghanistan and gross violations of the human rights is discussed in the next pages.

## **Chapter-3**

### **MILITARY OPERATIONS OF US AND THE NATO FORCES IN AFGHANISTAN**

**Introduction:** After the incident of 9/11 the US President declared the so called war against terrorism without pin pointing the culprits. So it is a war in which the enemy was very vaguely identified and spread over on a large part of the globe. In other words it was started with the intention/strategy to disregard even the territorial boundaries of the sovereign states. This chapter will analyze the military operations of US and its allies in Afghanistan and the retaliation of the international public opinion. Violations of the humanitarian law will also be highlighted where ever necessary both by US and Allied Forces and the insurgents, i.e. Taliban.

US air strikes on Afghanistan, in collaboration with Britain, started on Oct 7, 2001. It was designated as Operation Enduring Freedom (OEF)<sup>40</sup>. The Start of these attacks was very intensive and severs. Such attacks were comprised mainly of the air strikes in collaboration with, and to support already fighting groups against the Kabul regime in the name of Northern Alliance. It was expected that the Afghan militants would not be able to resist longer. The immediate purpose was to overthrow the Kabul based government and install a puppet government which could provide and legitimize the American attacks. This action achieved its

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<sup>40</sup> Operation Enduring Freedom - Afghanistan, is a joint operation of UK, USA, and Afghanistan. It is separate from International Security Assistance Force known as ISAF. The later operation is handled by USA, UK and other NATO nations. Both of the operations are parallel and supportive to one another, and are run in full co-ordination and collaboration with each other. They may merge later stage.



objective within a few days, and ultimately resulted into presidency of Hamid Karzi and culmination of Bonn Agreement. The Taliban vacated Kabul and spread over the other areas of the country, comparatively safer for them.

A brief overview of OEF is presented here in the context of violation of human rights and sufferings of civilian population.

In response to the 9/11 attacks in the United States the war in Afghanistan began after less than one month, on 7<sup>th</sup> October 2001, when the US military's Operation Enduring Freedom (OEF) was launched, along with the British Military. Since 2002 the Britain has led her own military operation known as the Operation Herrick. It was part of the same war in Afghanistan. The character of the war gradually grew up from an aggressive struggle of US sponsored armed forces against the supporters of Taliban and Al-Qaeda, to complicated counter-insurgency efforts by US-led forces, against the Afghans who claim to be trying to expel the *invaders*. This war has killed tens of thousands of people, majority of were civilians. It is still continue.

Operation Enduring Freedom (OEF) launched by US was the first phase of the war against terrorism. The objective of this war, as claimed by the US was of "removing the safe haven of Al-Qaeda and its use of the Afghan territory as a base of operations for anti-US terrorist activities. In that first phase, the US and her allied forces, working with the Afghan anti-government forces, known as the Northern Alliance, quickly eliminated the Taliban government from Kabul. In the second phase under the Karzai administration, the nature of the war shifted to an effort aimed at crushing the insurgency hostile to the US sponsored Karzai

government."<sup>41</sup> The insurgent groups in this effort avoided to have any direct conflict with the International Security Assistance Force (ISAF) troops. Rather their struggle was a blend of the local population, and mainly they used improvised explosive devices (IEDs) and suicide bombings.

The US administration headed by President Bush claimed the following aims and objectives behind their Afghan invasion. These are to:

- find trace out Osama bin Laden companions so that they may be put up on trial;
- eliminate totally the organization of the Al-Qaeda. and
- over through the Taliban government from Afghanistan as it supports the Al-Qaida and provide them the safe.

American government made it clear that they would make no distinction between the terrorists and States or governments that flourish them directly or indirectly.

Other significant operation in progress at that time was that of International Security Assistance Force (ISAF). This force was established at the end of December 2001 by the UN Security Council with the purpose to vacate the Afghan capital and the neighboring areas. In 2003 the NATO forces took over the command of ISAF. Till July 2009 the total number of ISAF troops, from 42 different States, was 64500. The core of this force was from the NATO member States. In this force the US troops number was 29950 approximately.

For providing the support to the ground forces, supplied primarily by the Afghan

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<sup>41</sup> Washington Post dated October 18, 2001

Northern Alliance, the United States and the Britain started the aerial bombing, "In 2002, American, British and Canadian infantry were committed, along with special forces from number of allied countries, including Australia. Later, NATO troops were added"<sup>42</sup>.

The initial attack proved fatal for the Taliban. They were removed from the power. However, the Taliban forces have since regained strength and started a gorilla war. "Since 2006, Afghanistan has experienced increased Taliban-led insurgent activities, record-high levels of illegal drug production, with participation by Northern Alliance drug lords in the Karzai regime".<sup>43</sup> Karzai government is known as a corrupt government with limited control outside of Kabul. "The Taliban can sustain itself indefinitely, according to a December 2009 briefing by the top US intelligence officer in Afghanistan".<sup>44</sup>

### **US and NATO Bombing and the Civilian Sufferings:**

OEF forces are mainly based in North of Kabul, at the Bagram Air Base. These forces are deployed largely along the Pakistan's western border in the eastern and southern areas. OEF's operations has been staffed by the Para-military and

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<sup>42</sup> 'The United Front (United Islamic Front for the Salvation of Afghanistan, UIF, Jabha-yi Muttahid-i Islami-yi Milli bara-yi Nijat-i Afghanistan), known in the West as the Afghan Northern Alliance, was a military-political umbrella organization created by the Islamic State of Afghanistan in 1996 under the leadership of Defense Minister Ahmad Shah Massoud. The organization united all ethnic groups of Afghanistan fighting against the Afghan Taliban who were allegedly supported by Pakistan and Bin Laden's Al Qaeda. The United Front included Tajiks, Pashtuns, Hazaras, Uzbeks, Turkmen and others'.

<sup>43</sup> Gall, Carlotta, "Opium Harvest at Record Level in Afghanistan". *The New York Times*. September 3, 2006.

<sup>44</sup> MG Michael Flynn (Director of Intelligence), State of the Insurgency Trends, Intentions and Objectives, ISAF: 22 DEC, 2009

intelligence forces of the United States' CIA (Central Intelligence Agency),

"The US Military Special Operations Forces, and elements of the US Army's 82nd Airborne Division, The International Security Assistance Force (ISAF) was established by the United Nations on December 20, 2001. It came under NATO control on August 11, 2003. NATO operates a counter-insurgency mission in support of the Afghan government under UN Security Council Resolution 1386 and subsequent renewals and expansions."<sup>45</sup> The forces deployed by the NATO mission were from 26 member countries as well as 14 non-member contributing countries.<sup>46</sup> In June, 2008, ISAF had about 50000 NATO troops in Afghanistan, in addition to this there were nearly 2000 troops from non-NATO allied countries. The United States contributions of troops for NATO are in addition to those which are under the command of OEF. The NATO forces are mainly based in the Kabul and deployed throughout Afghanistan, However, their biggest concentrations are in the southern parts of the country. Its main target is mentioned as the provision of security for the Afghan government and the civilians. It is also stated that these forces are to provide defense against the insurgents' operations.

NATO and US forces are preferring for the air strikes under the policy of 'economy of force' battle against the insurgents. They are using relatively a very small number of ground forces instead of having a large ground army. The air strikes supplement the ground forces and enhance their ability. "The airpower manifests itself in a graduated scale of force, ranging from flyovers, intended to have a deterrent effect, to direct air attacks with canon rounds or bombs. Human

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<sup>45</sup> United Nations Security Council Resolutions 1413, 1444, 1510, 1563, 1623, 1659, and 1707,

<sup>46</sup> "NATO, ISAF Troop Contributing Nations," April 1, 2008, <http://www.nato.int/isaf/structure/nations/index.html> (accessed July 1, 2008).

Rights Watch defines an air strike as the use of aerial munitions, and not simply as the number of loose air support missions flown"<sup>47</sup>

Some of the reported casualties explained below indicate the level of gross violations of international law in general and the Humanitarian Law in particular. These violations were committed collectively by the NATO as well as the US forces. Such casualties of the civilians and other non-combatants had continuously been subject to very harsh criticism from the international human rights organizations and the international media. Some of the examples of different regions of Afghanistan in this regard are highlighted as under.

#### **District Nijrab in Kapisa Province:**

It was 4<sup>th</sup> March 2007, when nine civilian (five women, three children, and an old man) were killed. It happened in the province of Kapisa, north of Kabul. The mud-built house of these people was hit by 2000 pound bombs dropped by the United States aircrafts.<sup>48</sup> One survivor of this incident named Mujib of 7 years old told a journalist, "I saw my mom, my sisters, and my brother and my grandfather were dead. And our house was destroyed."<sup>49</sup> US forces explained the excuse of this activity "they were targeting two insurgents seen entering the house after they had fired a rocket at a US military outpost. The US announced that it had killed the two Taliban fighters who had been targeted. But a provincial Afghan official suggested the two men were injured and escaped, and journalists at the scene reported no evidence of the two among the nine victims. The Afghan government

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<sup>47</sup> Human Rights Watch, *Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan*, 2008, p12.

<sup>48</sup> Carlotta Gall & Abdul Waheed Wafa, "US Strike Kills 9 Family Members, Afghans Say," *The New York Times*, March 6, 2007.

<sup>49</sup> 60 Minutes interview with President Hamid Karzai, "Bombing Afghanistan," broadcast October 28, 2007, <http://www.cbsnews.com/stories/2007/10/25/60minutes/main3411230.shtml>.

reportedly sent a delegation to investigate the incident, and both NATO and the US forces said they were investigating”<sup>50</sup>.

The available information regarding this air attack indicates that it was into the knowledge of the US forces that only civilians were living in that house. “This particular evidence raised very serious concerns that the air attacks violated the provision of international humanitarian law which strictly prohibit against such disproportionate attacks. The absence of any solid evidence about the presence of the Taliban fighters in the house at the time of the attack raised the possibility that it was unlawfully targeted, just because it was known to be the home of a local Taliban leader.”<sup>51</sup>

These deaths of the civilians in the province of Kapisa air fueled anti-government and anti-US demonstrations in Kabul, which had already been organized to protest against another sad incident occurred on 3<sup>rd</sup> March 2007, in Kapisa where one suicide bomber attacked on a US/NATO convoy. Resultantly, “Marine Special Operations Forces (MSOF) fired repeatedly on fleeing civilians, killing at least ten.”<sup>52</sup>

**Shindand District of Province of Heart:** 25 Afghan civilians were killed on 29<sup>th</sup> April 2007 when OEF had an air strike to support the US Special Operations Forces (SOF) busy in operations in the Zerkoh Valley of the province of Heart.

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<sup>50</sup> Carlotta Gall & Abdul Waheed Wafa, *Op.cit.*

<sup>51</sup> 60 Minutes “Bombing Afghanistan,” broadcast October 28, 2007, <http://www.cbsnews.com/stories/2007/10/25/60minutes/main3411230.shtml>.

<sup>52</sup> . Carlotta Gall and Abdul Waheed Wafa, *op.cit.*

Afghan government's investigation also confirmed this news.<sup>53</sup>

According to the Afghan government's officials 42 civilian people were dead by the said bomb attacks. They did not find any evidence of presence of the Taliban forces in that area. and that local residents also strictly refused such presence of any Taliban there at that time. However, a very small group of the insurgents which had ties with the Taliban in the province of Helmand was doubted to be actively operating in the valley of Zerkoh.<sup>54</sup> One spokesperson of the provincial government explained that the said civilian losses were due to the lack of coordination between the NATO/US and the Afghan forces<sup>55</sup>. Deaths of the civilians lead to serious public unrest and demonstrations against the Afghanistan's government. In an interview the residents showed their reaction: "the bombardments were going on day and night. They didn't care it was women, children or the old men"<sup>56</sup>. In the same way the Afghan President Karzai also complained by expressing his displeasure over the casualties. He said, "We are not happy about that and we can no longer accept the civilian casualties the way they are occurring."<sup>57</sup>

### **District Sangin in the Province of Helmand:**

On 8<sup>th</sup> May 2007 in the night time the OEF's aircrafts killed nearly 21 Afghan

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<sup>53</sup> *Ibid.*

<sup>54</sup> "Afghanistan: Attacks mainly threatened girls schools in Shindand," IRIN: UN Office for the Coordination of Humanitarian Affairs, July 14, 2008; Waliullah Rahmani, "Farah Province: The New Focus of the Taliban Insurgency," The Jamestown Terrorism Monitor: Volume 5, Issue 23, December 10, 2007.

<sup>55</sup> *Ibid.*

<sup>56</sup> Mohammad Zarif Achakzai, whose family was among those who fled, "Afghans' anger over US bombing," BBC World Service Radio and BBC online, May 31, 2007, [http://news.bbc.co.uk/2/hi/south\\_asia/6705607.stm](http://news.bbc.co.uk/2/hi/south_asia/6705607.stm)

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

civilians in the district of Sangin, the province of Helmand. The dead bodies of these persons were brought in the hospital for examination. Many of them were women or children.<sup>58</sup> However, the local residents did not agree with this reported number of the killed persons. They claimed that more than 80 people were dead in that incident. The very next day when the US Army Special Operations Command issued a news release, there was no mention of the said civilian casualties:

“The then Commander of NATO forces General Dan McNeil told the media that the air strikes were called in after the US special forces were ambushed by what he called a far superior force”. He said, “It does appear there were civilian casualties—exactly what caused them, we’re working our way through all that.”<sup>59</sup>

One resident of that affected village named Abdul Nasir, told the representative of The New York Times: “It was round 4 p.m. when the foreign vehicles came through on the main road. The Taliban shot at them and they turned back. Then airplanes came and bombed the village at 10 pm. The Taliban forces were in the village during the day, but not at the time of the air raid”<sup>60</sup>. The residents of the area told that the heavy damage of the civilian’s lives caused high level violence between the local villagers and the Taliban. “One villager told The New York Times that villagers had pursued the Taliban commander who led the ambush, Wali Mahmud, to the village of Heratian and had killed him. Another villager said he had heard that when Taliban fighters came to a village near Sarwan Qala with

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<sup>58</sup> ‘Appropriate’ force used in civilian death incident: US,” Agence-France Presse, May 16, 2007.

<sup>59</sup> Carlotta Gall, “Afghans Say Civilian Tolls in Strikes is Much Higher than Reported,” The New York Times, May 11, 2007.

<sup>60</sup> *Ibid.*



the aim of attacking international forces, a group of tribal elders asked them not to attack out of concern that the village would be bombed; after an argument, the leader of the tribal elders killed the Taliban commander and two of his bodyguards"<sup>61</sup>.

"After about two months of the raid, a man named Mohammadullah told a journalist that the air strikes had killed 20 people in his village after Taliban fighters had come through. He said the bombing had killed six members of his family, including his children's grandmother, and wounded five. He believed the village was bombed in mistake because at that time insurgents were fighting US forces well below the village. Villagers were so angered by the bombing that many men from the village reportedly left to join the insurgents. Support for the international forces depends on the behavior of ISAF, he said. If they treat the civilians well, they will win."<sup>62</sup>

### **District Greshk in the Province of Helmand:**

It was June 22, 2007, when the NATO air attacks killed more than 25 Afghans, including mainly women and children. This happened in an air attack on the insurgents allegedly staying in the two buildings in Gereshk district. "The provincial police chief reported that these deaths included nine women, three babies, and the mullah of a local mosque. He said about 20 insurgents died in the attack. The insurgents had reportedly fled to the compounds after an attack on a police station in the area"<sup>63</sup>. President Karzai of Afghanistan gave comments on

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

<sup>62</sup> *Ibid.*

<sup>63</sup> "NATO air strike kills 25 Afghan civilians," Agence France Presse, June 22, 2006.

this incident saying, "It is difficult to accept or understand."<sup>64</sup> According to Associated Press, Karzai said "the incident in Gereshk was an example of NATO troops using disproportionate force and exposed a serious lack of co-ordination with the Afghan Government".<sup>65</sup>

Exactly one week after the mentioned incident, in another air attack of the US the residents of the Haderabad town of the district Gereshk told that about 105 insurgents along with 45 to 65 civilians were killed.<sup>66</sup> An inquiry conducted by the government of Afghanistan showed that "45 civilians had been killed, though NATO disagreed it and stressed that only 12 persons were killed."<sup>67</sup>

"The air strikes occurred after Taliban forces ambushed a combined US-Afghan armed force in Haderabad and destroyed two US military vehicles with mines. A firefight ensued and US-Afghan forces called in air strikes in response to heavy small arms and mortar fire. Coalition spokesperson Major Chris Belcher stated the air strikes targeted Taliban firing positions in the village".<sup>68</sup> According to a NATO spokesperson, "Remains of some people who apparently were civilians were found among insurgent fighters who were killed in firing positions in a trench

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<sup>64</sup> Amir Shah, "25 Civilians Killed in Afghanistan Violence," Associated Press, June 22, 2007; "NATO accuses Taliban of using children in suicide missions," The Guardian Unlimited, June 23, 2007

<sup>65</sup> Rahim Faiez, "Karzai blasts NATO for civilian deaths," Associated Press, June 23, 2007.

<sup>66</sup> Noor Khan, "Airstrikes Kill 62 Taliban, 45 Civilians," Associated Press Online, July 1, 2007; "Afghan Elders say 45 Civilians Killed in Airstrikes," Agence France-Presse, July 1, 2007.

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

<sup>68</sup> Barry Bearak and Taimoor Shah, "More Afghan Civilians Killed in Airstrikes," The New York Times, July 1, 2007.

line.”<sup>69</sup>

Representative of The New York Times when contacted the residents of the area regarding the air strikes, a local tribal elder named Haji Zahir disclosed, “I had spoken to the residents from the bombed villages. They told that the people tried to escape from the area with their cars, trucks and tractors. But the coalition airplanes bombed them because they thought they were the enemy fleeing. They told me that they had buried 170 bodies so far.”<sup>70</sup> This incident indicates the civilians suffering are due to poor communication between the local population, Afghan troops and the international forces.

### **District Deh Bala in the Province of Nangahar:**

“On the morning of July 6, 2008, a wedding party was hit by an OEF air strike as it traveled to a wedding near the village of Kacu in Deh Bala district in Nangahar province and killed more than 40 people.”<sup>71</sup>

The US military sources, as usual, quickly denied the said civilian casualties, and instead blamed them on militants’ propaganda. One chief governmental official in Deh Bala named Haji Amishah Gul, on the day of attack said, “The wedding party was attacked when it was going to the groom’s house. They stopped in a narrow location for taking rest. The plane came and bombed the area. There were between 80 to 90 people altogether. We have carried six of the injured to the hospital, and more might be coming. The exact number of casualties is not

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<sup>69</sup> “Afghan Elders say 45 Civilians Killed in Airstrikes,” Agence France-Presse, July 1, 2007.

<sup>70</sup> Barry Bearak and Taimoor Shah, “More Afghan Civilians Killed in Airstrikes,” The New York Times, July 1, 2007.

<sup>71</sup> Amir Shah, “47 Afghan Civilians Killed by US Bombs, Group Says,” Associated Press, July 11, 2008.

clear.”<sup>72</sup> However, the United States’ spokesman 1<sup>st</sup> Lieutenant Perry, said, “Whenever we do an air strike the first thing they’re going to cry is *Air strike killed civilians*, while the missile actually struck militant extremists we were targeting in the first place. At this time we don’t believe we’ve harmed anyone except for the combatants.”<sup>73</sup> President Karzai ordered for an investigation of the incident. The inquiry was constituted headed by a senior member of the Afghan Senate. The findings of the inquiry were that 47 members of a wedding party were killed by the air strikes. The same number was also confirmed by the Human Rights Watch officials. President Karzai had a visit of that affected village on 17<sup>th</sup> July where he met with the relatives of the victims of that incident. He showed his concern about the problem of civilian casualties in the war in Afghanistan.<sup>74</sup>

### **Carpet and Cluster Bombing:**

As the hide of Osama Bin Laden was not exactly known to the invading US soldiers, they used ‘Carpet and Cluster Bombing’ technique.

“Carpet bombing is the large scale bombing of large targets e.g. cities, usually by dropping many unguided bombs. The tactic aims for complete destruction of a target region, either to destroy personnel and materiel, or as a means of demoralizing the enemy. The phrase invokes the image of bombs completely covering an area, in the same way that a carpet covers a floor.”<sup>75</sup>

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<sup>72</sup> *Ibid*; Amir Shah and Jason Straziuso, “Afghan Officials: US Missiles Killed 27 Civilians,” Associated Press, July 6, 2008.

<sup>73</sup> *Ibid*.

<sup>74</sup> “Afghan leader visits site where US-led strike hit wedding,” Agence France-Presse, July 17, 2008.

<sup>75</sup> Giulio Douhet, *Command of the Air (USAF Warrior Studies)*, Office of Air Force History, United States Government Printing Office (1983)

Primarily multiple aircraft were used for such type of carpet bombing, often returning to the target in waves. This idea of carpet bombing strongly was influenced by the Italian strategist Admiral Giulio Douhet's inter-war theories, who suggested: "The future wars would be fought by armies and navies fighting holding actions, while opposing sets of air forces attacked the enemy's civilian centers of population. A few days of such destruction would, he opined, cause one side to rapidly sue for peace."<sup>76</sup>

"The concept of total annihilation of civilian targets as a method of shortening wars" was and is notoriously being used in Afghanistan. American B-52 bombers did the carpet-bombing for the first time, on the front line in the north of Kabul. The details started to appear in the media on the very next day. "American jets pounded positions where the Northern Alliance says it is about to launch offensives, around the northern city of Mazar-i-Sharif and Bagram airport just north of Kabul"<sup>77</sup>. From October 2001 onward, the United States had deployed the forces in Afghanistan under the banner of Operation Enduring Freedom (OEF) in "counter-terror and counterinsurgency operations" against the al-Qaeda, Taliban, and some other forces fighting against government. "Initially the United States had approximately 19,000 forces operating independently of NATO command as part of OEF."<sup>78</sup>

**Cluster Bombs:** Cluster bombs were another aspect of US anger directed towards Bin Laden, but causing heavy sufferings for the Afghan public. "Cluster

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<sup>76</sup> *Ibid*

<sup>77</sup> Justin Huggler, "Afghanistan War on Terrorism: Strategy" *The Independent: Thursday*, 1 November 2001

<sup>78</sup> Tom Shanker, "Gates Pushing Plan for Afghan Army," *The New York Times*, August 8, 2008.

bombs are large weapons that contain dozens and often hundreds of smaller submunitions. They come in at least 208 models and can be delivered from the air or the ground, releasing 'bomb lets' or 'grenades' respectively. At least fifty-six nations stockpile these weapons and at least thirty-three produce them. At least nine states have used them in combat in thirteen different countries".<sup>79</sup>

### **Cluster Bombing in Afghanistan:**

Another aspect of human sufferings emerged at international scene and attracted the attention of international community when in October 2001 the United States started its campaign of air attacks in Afghanistan to support of its ground forces. The United States had already tried this technique very extensively, first in the Gulf War of 1991; and second in NATO campaign of 1999 in Yugoslavia which lead to discussion about the prospects and consequences of such a weapon containing submunitions. This debate was again renewed in this Afghan conflict. "The US military considered cluster bombs a valuable part of their Afghan arsenal. In 232 strikes during the first six months of the war, the United States dropped about 1,228 CBUs with 248,056 bomb lets. Their use, however, generated wartime criticism from governments and NGOs and gave new life to the push for cluster bomb regulation"<sup>80</sup>.

In the first few days the war mainly consisted of "strategic attacks" on the specific military targets. Later it was followed by weeks of "tactical attacks" on moving targets and command-and-control activities. The American aircrafts, as part of the plan of Operation Enduring Freedom (OEF), dropped cluster bombs daily on

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<sup>79</sup> Human Rights Watch, "Cluster Bombs and their use by the United States in Afghanistan", 12/ 2002, Vol. 14, No.

7 (G)

<sup>80</sup> *Ibid.*

terrorist training camps, their military bases, communication facilities, airfields, and other targets. A small number of US ground troops were deployed on October 19, 2001 to help, work with or coordinate such air attacks with the Afghan proxy forces. With the help from these air attacks, the Taliban's opposing forces fought their way in the major urban centers of the country. By the 2nd week of November 2001, these forces jointly captured the major cities such as Jalalabad, Taloqan, Mazar Sharif, and Herat. The major success was the fall of the capital city Kabul on 13<sup>th</sup> Nov 2001. The Taliban's strongest center Kunduz was captured on Nov 25, and Kandhar on Dec 7 of the same year. On Dec 22 the Interim Afghan Government was eventually planted by the US and the allies under the chairmanship of Hamid Karzai. "In the same month (December 2001), the United States shifted its attention to Afghanistan's mountain caves where Taliban and al-Qaeda troops were hiding. It began a month-long bombardment of the mountains around Tora Bora on November 30. Operation Anaconda, which lasted from March 2 to March 18, 2002, targeted pockets of al-Qaeda in the Shahi-Kot area south of Gardez. As of November 2002, US forces continued to carry out operations in the mountain regions and in central Afghanistan"<sup>81</sup>.

No doubt, the use of Cluster Bombing during the air strikes of the United States and its allies played a vital role in their success. "In the first week alone, B-1 bombers of the Air Force allegedly dropped fifty CBU-87s, containing 10,100 bomb lets, in five missions."<sup>82</sup>

"The first widely publicized case of cluster bomb use occurred on 22<sup>nd</sup> October. In

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

<sup>82</sup> William M. Arkin, "A Week of Air War," [washingtonpost.com](http://www.washingtonpost.com), October 14, 2001, at <http://www.washingtonpost.com/wp-dyn/nation/columns/dotmil/>

this attack at least one weapon apparently went astray near Herat.”<sup>83</sup> According to the UN reports, “eight people died during a strike on Qala Shater and a ninth died from an unexploded bomb let after the attack. The bomb lets also injured fourteen others and completely or partially destroyed twenty of the village’s forty-five homes.”<sup>84</sup> Officials of the United States admitted these air attacks openly. However, they avoided to pass any comments on any specific air strike. For example the Chairman of the Joint Chiefs of Staff Gen. Richard Myers during a press briefing on 25<sup>th</sup> October said, “as we said before, we’re going to use the entire spectrum of our conventional weaponry. And ... yes, we have used cluster-bomb units.”<sup>85</sup> Later, “the incident of Qala Shater attracted the great attention of the media and started a public debate and criticism on the use of the cluster bombs in Afghanistan.”<sup>86</sup>

Regarding the use of the cluster bombs the journalists and the whole media in the country became alert and watchful as the war gained the momentum. “At the end of October the United States dropped CBUs near Herat and against frontline troops near Mazar Sharif”<sup>87</sup> and soon after it in the Shomali Plains, North of Kabul.

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<sup>83</sup> Many newspapers picked up this story. See, e.g., Vernon Loeb and Thomas E. Ricks, “Pentagon Says Taliban Is Ready for Long Fight”, *Washington Post*, October 25, 2001; Gregg Jones, “US Criticized for Cluster Bomb Use”, *Dallas Morning News*, October 25, 2001; Paul Richter and Peter Pae, “‘Precision Bombing’ Still a Very Imperfect Art”, *Los Angeles Times*, October 25, 2001.

<sup>84</sup> Karl Malakunas, “US Cluster Bomb Attack Kills Nine, Empties Village: UN,” Agence France-Presse, October 25, 2001.

<sup>85</sup> D of Defense News Briefing—Secretary Rumsfeld and General Myers,” US DoD News Transcript, October 25, 2001.

<sup>86</sup> Steven Edwards, “Cluster Bomb Use Raises Cry of Protest: Indiscriminate Killers,” *National Post* (Canada), October 26, 2001.

<sup>87</sup> Justin Huggler, “US Jets Open Up New Front As Assault Intensifies,” *The Independent*, October 29, 2001; Paul



Further, the cluster bomb use was witnessed by more than 68 reporters in Nov 2001 outside the Kunduz.”<sup>88</sup> Then, this use apparently shifted to the South of Afghanistan because the United States and the allied forces moved towards Kandahar. By the end of November, journalists, interested in Afghanistan situation, started writing continuously about the effects and aftereffects of cluster bomb attacks. “Countless civilians were killed by those unexploded bomb lets that littered the country, especially in the Shomali Plain and near Herat and Khanabad.”<sup>89</sup>

“The United States also used cluster bombs extensively in its campaigns in the caves near Tora Bora and Shahi-Kot mountains. Forty-six of the reported 232 strikes fell on these regions.”<sup>90</sup> Reporters who arrived at an al-Qaeda camp in mid-December described “the aftermath of a cluster strike, including denuded trees, shredded clothing, twisted cooking pots, torn religious books, and dead al-Qaeda fighters.”<sup>91</sup>

### **The Humanitarian Issues in the Cluster Bombing:**

Cluster bombs are quite risky during attacks because they are they are always imprecise on multiple levels. Most of the cluster bombs are “unguided dumb

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Watson and Lisa Getter, “Silent Peril Lies in Wait for Afghanistan’s People,” *Los Angeles Times*, December 1, 2001 (reporting that cluster bombs fell near Mazar on October 26

<sup>88</sup> Eric Schmitt and James Dao, “Use of Pinpoint Air Power Comes of Age in New War,” *New York Times*, December 24, 2001; Luke Harding, “Frontline Troops Await the Final Act,” *Guardian*, November 26, 2001.

<sup>89</sup> Watson and Getter; C.J. Chivers, “An Afghan Village Where Errant Bombs Fell and Killed, and Still Lurk in Wait,” *New York Times*, December 15, 2001.

<sup>90</sup> US Cluster Bomb List—March. The United States reported dropping about eighty-four cluster bombs, containing 16,968 bomblets, in Shahi-Kot.

<sup>91</sup> Jon Swain, “Air Blitz on Running Men of Tora Bora,” *Sunday Times* (London), December 16, 2001.

bombs". I means that cannot be bombarded on the precise targets. "Even the WCMD attached to the CBU-103 is not designed to give this model the accuracy of a laser- or satellite-guided bomb. Once a cluster casing opens, it releases hundreds of bomb lets, which are also unguided and disperse over a wide area. While these weapons are designed to blanket an area, in so doing, they sacrifice control over individual bomb lets, which are vulnerable to wind currents. As a result, users have more difficulty ensuring harm is confined to the combatants or military objects targeted than they do with other weapons."<sup>92</sup>

Such a lack of control on both, bombs and the bomb lets means that cluster munitions always have tendency to cause very extensive damage to the civilians. The cluster bombs, if unguided, can miss their target and hit any nearby civilian population or other non-military objects. NO doubt the unitary dumb bombs have almost the similar threats, however, accident of a cluster bomb have more serious humanitarian effects because the bomb lets' always disperse widely in the targeted area. In case the a cluster bomb precisely hits its target, even then the bomb lets may affect the citizens within the footprint or, if they blow astray, nearby. If a party uses such weapons close to a thickly populated area the potential threats to the civilian's life or property increase. Civilian casualties are sure when the cluster bombs are used in such an area where the combatants and the civilians are intermix or live together.

### **the International Community's Reaction Against Cluster Bombs:**

The European Parliament in one of its Resolution passed In December 2001, in reaction to the events occurring in Afghanistan, called for an "immediate

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<sup>92</sup> *Ibid.*

moratorium” on cluster bombs until an international agreement was reached. This Resolution said “it was extremely concerned at the difficulty in accurately targeting cluster bombs during conflict, the high proportion of cluster bomb lets which are found to have failed to detonate on impact, and the wide area of coverage of the bomb lets, all of which means they pose a serious long-term threat to the civilian populations.”<sup>93</sup>

In the meantime the UN officials inquired from the United States’ military for necessary information regarding the “nature, timing and targets of daily bombing runs so that innocent civilians would not be needlessly injured. They further asked the United States for provision of the technical advice and assistance for BLU clearance in Afghanistan.”<sup>94</sup> The UN agency which oversees the process of demining in the affected areas of Afghanistan said, “its local deminers put themselves at risk when clearing BLUs because they were unfamiliar with this kind of submunition. A Pentagon official responded that the US military does not assume responsibility for clearing unexploded ordnance.”<sup>95</sup>

### **Taliban Shielding and Air strikes:**

The civilian population in Afghanistan is being suffered from both ends. On one hand non-combatants are being bombarded from the NATO and US forces while at the same time subject to the cruelties of the Taliban and other insurgent

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<sup>93</sup> European Parliament, “Resolution on Cluster Bombs.” This resolution was aimed at CCW negotiators who were considering a new protocol.

<sup>94</sup> Brian Toohey, “US Strategy in Afghanistan May Have Missed Its Target,” Australian Financial Review, October 27, 2001

<sup>95</sup> Human Rights Watch, *Cluster Bombs and their use By the United States in Afghanistan*, December 2002, Vol. 14, No. 7 (G)

forces. Often they use the civilians for shielding against the US attacks.

Though the international law related to the human rights and protection of the non-combatants during war does not absolutely prohibits the belligerent parties from deploying or fighting in the residential areas of each other, but they are strictly bound to take all possible steps to minimize the harmful effects to the civilian population. The Belligerents are strictly not allowed the use of civilians to shield military targets against any strike from the enemy. "Shielding refers to intentionally using the presence of civilians to render areas or forces immune from military attack."<sup>96</sup> For instance, "taking over a family's home and not permitting the family to leave for safety so as to deter the enemy from attacking is using 'human shields.'"<sup>97</sup> The prevention against the shielding is entirely distinctive from the compulsion for the belligerent parties to extend a constant protection to the civilian population of the area subject to the war activities and avoid from locating the armed forces in thickly populated areas. Similarly, shielding by a defending party does not allow the attacking party to over look the presence of the civilians in the area subject to the attack; a constant precautionary measures must be adopted to minimize the human sufferings. The attacks should never be indiscriminate resulting into a disproportionate civilian loss. Human Rights Watch<sup>98</sup> had published its surveys of this type of incidents expressing the shielding of the civilians by the insurgents, particularly the rural population which resulted into a huge number of casualties. There are a large number of instances

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<sup>96</sup> *Ibid.*

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

<sup>98</sup> Human Rights Watch, *Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan*, Sep 2008; The Human Rights Watch, *Human Cost: The Consequences of Insurgent Attacks in Afghanistan*, Volume 19, No. 6(C) April 2007

where the civilian citizens of a locality or town had to face heavy losses due to unlawful and repeated use of this device by the warring parties. Some of such cases are referred below:

### **District of Arghandab in Province of Kandāhar:**

In 2007 summer, 4 citizens were killed by the United States' air attacks and tank's firing during a fighting with Taliban insurgents in a village of Arghandab district in the Kandahar Province. The local residents, when contacted, told that Taliban forces occupied the said village five days before this fighting. They forced the villagers for providing the food items and other necessities with shelter. They did not even permit them to leave the village. The Taliban insurgents then spent the next few days in preparation of the attacking positions in the residences of the villagers and dig the trenches around the houses. They further compelled the residents to stay indoors for all the time.

Villagers tried to convince them to be permitted to leave the place. One farmer told the representative of the Human Rights Watch, "We told them that we are Muslims and that their presence in my house would kill us. They didn't listen to us and now my two sons and my two brothers are dead." <sup>99</sup>

### **District of Chora in the Province of Uruzgan:**

On 16<sup>th</sup> of June, 2007, Taliban insurgents attacked many villages in district Chora (Uruzgan Province) and captured them. The NATO forces in collaboration with the Afghan forces reacted in a violent war, which continued for more than three days. This war resulted into a huge number of casualties.

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<sup>99</sup> Human Rights Watch, *Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan*, Sep. 2008, p.24

The villagers told the representatives of the Human Rights Watch:

“When the Taliban entered the villages they told the villagers that they had to join in their fight against Afghan government forces or they would be killed. In the village of Sarab the Taliban reportedly executed approximately 30 civilians both for not joining in the fight and as a message to the local population. At least 12 civilians fled the village and fought with Afghan and NATO forces against the Taliban during the ensuing battle.”<sup>100</sup>

An eyewitness of this bloody scene told Human Rights Watch that: “his mother-in-law’s hands were first cut off and she was then set on fire. His brother-in-law and brother were also killed, and other villagers were also set on fire. His son was taken by the Taliban, tortured, and set on fire, but was able to escape and survived. The Taliban forced villagers to house and feed them, and would not allow them to leave the homes for fear of allowing NATO forces to learn of the specific locations of Taliban fighters. The eyewitness said that during the battle the Taliban forced people to remain in their homes. NATO aircraft bombed the homes from which the Taliban were firing, causing the deaths of at least 15 civilians in his village. He estimated that at least 30 civilians were killed in the battle.”<sup>101</sup>

This war prolonged and expand to some other villages of that area. One resident of a neighboring village of Qala-e-Ragh said:

“His village was attacked by the Taliban on June 16. The Taliban shelled the village, but the villagers put up armed resistance until learning from Afghan forces that NATO was going to counterattack

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<sup>100</sup> *Ibid.*

<sup>101</sup> Human Rights Watch interview with survivor (name withheld), Kabul, July 25, 2007..

with air strikes, at which point they took shelter. One hour later, NATO aircraft bombed the village. Taliban forces, apparently realizing that the villagers must have received advance warning of the air attack, beheaded two villagers and shot another one. On June 19, Afghan forces told the residents they could return to their village but the Taliban resumed their attack later that same day, and NATO bombings killed another three civilians and injured five.”<sup>102</sup>

One resident of another village of Chora District told: “In the same fight on June 19 his village was caught in the crossfire between the NATO forces and Taliban. The Taliban insurgents came to his village and ordered the villagers either to join in the fight against the NATO and government forces or be ready to be killed. The Taliban took positions inside the homes but at the same time did not allow the residents villagers to go out... the Taliban wanted to have NATO attacks kill civilians so the village elders would turn away from NATO and support the Taliban. He said bombs fell on civilian homes between 11 p.m. and 1 a.m. on June 17, without NATO giving warning so they could leave. He said that 13 members of his family were killed in the bombing and he was the sole survivor.”<sup>103</sup>

### **District Zhare in the Province of Kandahar:**

It was 10<sup>th</sup> of June, 2007 when the US had air attacks on District Zhare in the province of Kandahar. It resulted into death of about eight citizens. The villagers further told, “in the days before the attack numerous Taliban insurgents arrived in the village. They forced the villagers to shelter their fighters and feed them. When

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<sup>102</sup> *Ibid.*

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

US ground forces were in the vicinity, Taliban fighters fired at them from occupied civilian homes. The US forces responded with air strikes, destroying several homes and killing both Taliban fighters and villagers."<sup>104</sup>

One farmer told Human Rights Watch:

"The Taliban came to my village and forced us to stay close to them. The Taliban then came into my house and forced me and my family to stay with them. They then started firing their weapons at the Americans. The Americans then bombed my village. People in my village were getting killed because the Taliban would not let us leave. Once the Taliban withdrew, the villagers fled their homes to the surrounding countryside for fear of being caught in further air strikes."<sup>105</sup>

The same farmer told Human Rights Watch: "We fled after the Taliban left my house because we knew the Americans would bomb my house. They did. My house was completely destroyed because of the Taliban."<sup>106</sup> Both of the parents and the sons of that farmer were killed in that US air strike.

Other than shielding against the US or NATO attacks, the insurgent groups usually adopt the following categories of attacks against the civilians, government officials or public buildings to create chaos, terror and exerting pressure on the government and the NATO forces:

Remote Bomb: It is usually an improvised explosive device, either buried anywhere in the ground or hidden in a bag, box, basket or the luggage bag linked with a remote control or a timer.

Suicidal Bomber: A person walking on foot, usually carrying the explosive

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

<sup>105</sup> Human Rights Watch interview with Afghan farmer (name withheld), Kabul, July 29, 2007.

<sup>106</sup> *Ibid.*



material, worn in a concealed jacket. He normally who detonates the explosives manually or remotely controlled by someone else.

Vehicle Bomb or "Vehicle Borne Improvised Explosive Device: It is an explosive device, may be placed inside or tied up with a vehicle, detonated manually by a suicidal bomber deriving the vehicle.

Assaults: Direct armed attacks on the individuals of small groups, usually with the small arms.

Arson Attacks. It is setting the fire to the governmental buildings or strategic installations, more frequently the girls educational institutions. It is usually done at night time.

Abductions or Executions: It is the abductions of the civilians. It sometimes is followed by the execution, typically by gunshot, knifing, or beheading.

### **The Legal Analysis:**

All of the belligerent parties to the armed conflict of Afghanistan i.e. Afghan governmental forces, United States, NATO and the other allied forces, and the insurgents' groups are legally bound to observe the rules regulations of the law of war and the international humanitarian law as a whole.

The international humanitarian law and the law of war impose certain bindings on the constants. They are bound to take necessary and possible measures to minimize the public sufferings during the belligerent activities. They must ensure the protection of the civilian population and all the noncombatants. Regardless of the legal status/excuse of the conflict or any specific situation, these obligations are binding to the parties concerned. It is equally applicable even to the conflict illegal under international law or any domestic law, and to the unlawful combatants, i.e. fighting armed groups without any state authority.

In case of violation of any provision of International Humanitarian Law (IHL), the

responsible authorities, groups, or individual can be tried and convicted by the international or domestic courts, or special tribunals formed for this purpose. The insurgents though not belong to the regular army of any country cannot be exempted from the applicability of these standards of the IHL.

Insurgency itself, if gets recognition from the international community, is not a violation of international humanitarian law. There is no prohibition of the existence of the insurgent groups in international law, nor are these groups prohibited from attacking any legitimate strategic targets of the State. However, they are strictly made subject to the prevailing law of war. Their activities should be bound to the military and the strategic targets, cause minimum damage to the civilian life and property. "International Humanitarian Law does not regulate whether states and armed groups can engage in hostilities, but rather how states and armed groups engage in hostilities".

### **Applicable Law of Treaties or Customary Law:**

During the last many years mostly the provisions of the international humanitarian law relevant to the Afghan conflict have evolutionary been changed to a considerable extent along with the changing Afghan situation.

In the very beginning when the US led NATO forces' armed operation was started against the Taliban's Afghan Government, it was considered as an international armed conflict between the two independent and sovereign States. The law applicable to such type of conflicts includes the four Geneva Conventions signed in 1949. Both, the US and the Afghanistan are the parties to these Conventions. Further, the Hague Regulations of 1907, (which are considered reflective of

customary international law) are also relevant to this conflict.<sup>107</sup>

This international armed conflict was ended as soon as the Taliban Government was forcefully replaced by the 'National Government' of Afghanistan headed by President Hamd Karzai. After this, the international armed conflict was converted into a 'non-international armed conflict', in which official Afghan armed forces, United States and NATO's forces and the other allied coalition forces are fighting against the anti-government insurgent groups. The conflict now was no more an international armed conflict, Rather than an internal insurgency within the state boundaries.

In a non-international armed conflict, the parties are obligated to be bound to observe all the applicable standards as mentioned in all of the four Geneva Conventions of 1949, particularly the article 3 which is common in all these conventions, 'common article 3'. It provides the standards essentially to be observed in such non-international armed conflicts. Further, all the parties to such a conflict must be bound by the rules and obligations of customary international law related to the armed conflicts of non-international nature.<sup>108</sup> "Much of the

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<sup>107</sup> "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1<sup>st</sup> Geneva Conv); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (2<sup>nd</sup> Geneva Conv); Geneva Convention relative to the Treatment of Prisoners of War (3<sup>rd</sup> Geneva Conv); Geneva Convention relative to the Protection of Civilian Persons in Time of War (4<sup>th</sup> Geneva Conv), all entered into force on October, 21, 1950. See also Convention (IV) Respecting the Laws and Customs of War on Land and the Annexed Regulations Concerning the Laws and Customs of War on Land of 18 October 1907 (Hague Regulations), 3 Martens Nouveau Recueil (ser. 3) 461, 187 Consol. T.S. 227, entered into force January 26, 1910. Afghanistan became a party to all these Conventions in 1956".

<sup>108</sup> Art. 3 is common to the four 1949 Geneva Conventions. The customary rules of armed conflict have been set out in International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, Cambridge, UK:

customary rules concerning the means and methods of warfare can be found in the two Additional Protocols of 1977 to the Geneva Conventions, which are largely considered reflective of customary international humanitarian law”<sup>109</sup>

Afghanistan also ratified the Rome Statute of the International Criminal Court (ICC)<sup>110</sup> in 2003. Resultantly it went into effect in Afghanistan immediately. Accordingly, all persons and parties in Afghanistan which are responsible for the war crimes and other violations of IHL and the Rome Statute committed after May 2003 are subject to the exercise of jurisdiction of ICC.

International law of human rights is also applicable in the current conflict of Afghanistan. “In the context of hostilities occurring as part of armed conflict, international humanitarian law, as the *lex specialis*, or specialized law, takes precedence but does not replace human rights law. Persons under the control of government or armed opposition forces in an internal armed conflict must in all cases be treated in accordance with international humanitarian law, which incorporates important human rights standards. Where that law is absent, vague,

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Cambridge University Press, 2005.

<sup>109</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 609, entered into force December 7, 1978 (hereinafter “Protocol I”). Protocol I applies as treaty law only to international armed conflict, and Afghanistan has not ratified it, but many of its provisions, including those in articles 48-54, are widely considered reflective of customary international law applicable to international and non-international conflict. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, 1125 U.N.T.S. 3, entered into force December 7, 1978, art. 13(2). Afghanistan has not ratified this protocol, but as with Protocol I, many of its articles are widely considered to be reflective of customary international law.

<sup>110</sup> Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002.

or inapplicable human rights law still applies. Human rights law can be found, for instance, in the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, both of which have been ratified by Afghanistan.”<sup>111</sup>

The rules mentioned above neither arbitrary standards nor alien to Afghanistan. Even they do not contradict Islamic principles of war. These rules or standards are considered as universally recognized ‘costmary international law. As customary international law these are supported through the practice and statements of the combatants through the world.

These standards and rules have regularly been tried to be invoke or cited by both State and the non-State actors, not only in Afghan conflict, but also Asia, Africa, the Middle East and the South America. The Geneva Conventions have been ratified by almost all the nations of the world. The common article 3 of these Conventions and several other articles and provisions have been recognized as universal customary rules of international law.

Afghanistan has long accepted the Geneva Conventions and the general rules of the law of nations, particularly the international humanitarian law.

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<sup>111</sup> *International Covenant on Civil and Political Rights*, adopted on December 16, 1966 by the UNGA. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, acceded to by Afghanistan on January 24, 1983; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted December 10, 1984, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by Afghanistan on April 1, 1987.)

All the Geneva Conventions were ratified by Afghanistan long time ago in Sep 1956. Afghanistan, since late 1970s is benefiting from the Geneva Conventions through ICRC (International Committee of the Red Cross). This is the international agency which ensures thorough the observance of and promote the Geneva Conventions. The representatives of this Committee had also been in interaction with the Commanders of different resistant groups, including Taliban, against the Soviet invasion and providing necessary instructions regarding IHL standards and other humanitarian activities. The resisting groups, now allegedly insurgents, have been availing the medical and other assistance under International Committee of Red Cross's mandate under these Geneva Conventions of 1949.

It is worth of noting that the commanders of the insurgent groups of Afghanistan themselves have been invoking the international standards for all the time in past. During the Afghan Mujahidin's resistance against Soviet invasion in 1970s and 1980s the Mujahidin Commanders had constantly been invoking the standards of International law of war to condemn the violations of such standards by the Soviet forces and the Soviet sponsored Afghan armed forces.

In October 1985, for example, when the Soviet occupation of Afghanistan was at its peak, many representatives of the mujahidin groups went to the UN Headquarters in New York. They condemned the war crimes, atrocities, human rights abuses, and violations of the Geneva Conventions of 1949 committed by the Soviet and the Afghan forces. They submitted a statement to the Secretary General of the United Nations, signed by Gulbudin Hekmatyar, stating that

“Soviet conduct in Afghanistan makes a mockery of the U.N. Charter, the Declaration of Human Rights, international law and the norms of civilized behavior.”<sup>112</sup> Again, “during US-led military operations against the Taliban in late 2001, Taliban officials repeatedly invoked human rights and law of war norms in condemning US actions.”<sup>113</sup> Violations of these laws from both of the belligerent parties are alarming for international community concerned for the serious violations of human rights.

### **Unlawful Detentions and Interrogations:**

Another aspect of the violations of international humanitarian law and resultantly the civilians’ sufferings is the story of unlawful detentions of the Afghan resistant by the United States. In this regard the most significant is the role of the notorious prison of Guantanamo Bay situated in Cuba, originally a US Naval Base<sup>114</sup>.

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<sup>112</sup> Human Rights Watch, “The Human Cost: The Consequences of Insurgent Attacks in Afghanistan”, April 2007, Volume 19, No. 6(C)

<sup>113</sup> “Taliban deny US air supremacy, claim high civilian toll,” Agence France-Presse, October 10, 2001 (citing Taliban official Abdul Salam Zaefi: “It is our message to the Muslims of America and all human rights organizations that they should show their opposition to such atrocities being made by America against the people of Afghanistan.” See also “Taliban execute key rebel leader as US jets hit civilians, aid depot,” Agence France-Presse, October 27, 2001.

<sup>114</sup> Originally it was a US Naval Base located on 45 square miles (120 km<sup>2</sup>) of land and water at Guantánamo Bay, Cuba which the United States leased for use as a coaling (fueling) station following the Cuban-American Treaty of 1903. The base is located on the shore of Guantánamo Bay at the southeastern end of Cuba. It is the oldest overseas US Navy Base, and the only one in a country with which the United States does not have diplomatic relations.[1] The Cuban government opposes the presence of the naval base, claiming that the lease is invalid under international law. The US government claims that the lease is valid. Since 2002, the naval base has contained a military prison, the Guantanamo Bay detention camp, for persons alleged to be unlawful combatants captured in Afghanistan and later in Iraq. The alleged mistreatment of the prisoners, and their denial of protection under the Geneva Conventions, has been a source of international controversy.

Regarding the commission of violations of the human rights this is the most controversial prison internationally as well as in the US domestic politics. The Center of Human Rights of the Law School in the University of California, Berkeley has published a very detailed report<sup>115</sup> about the treatment of the US interrogating agencies with the detainees in Guantanamo Bay, Kandahar and Bagram. It shows a number of serious flaws in the Bush Administration's system of the apprehension, detention, interrogation, and release of the suspected members of the Taliban and Al Qaeda captured by the US or NATO forces after the start of the War on Terror resulted from the attacks of 9/11/2001. "One of the most egregious aspects of this system was a series of high-level directives issued between September 2001 and April 2003 authorizing the use of enhanced interrogation techniques."<sup>116</sup> Most of these methods applied during interrogation, whether used individually or simultaneously over prolonged periods of time, appear to be serious violations of international law or the domestic law, posing various prohibitions regarding torture or other, inhuman, cruel, or degrading treatment. These violations of international law and human rights by the Americans can be classified into various categories:

### **Detentions on the Basis of Doubt:**

Many people were arrested by the US authorities from Afghanistan, Iraq and Pakistan, just on the basis of doubts or confusion of the names. Sometimes the informers played the role because of temptation of the prize declared by the US or Afghan government. The results of false identification were very serious and

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<sup>115</sup> Laurel E. Fletcher, Eric Stover, *Guantánamo and Its Aftermath*, Human Rights Center, Law School, UC Berkeley: 2008

<sup>116</sup> Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), 51–52



problematic. Particularly, the temptation from the American Government for the payment of cash bounties “created an indiscriminate and unscrupulous dragnet in Afghanistan and elsewhere that resulted in the detention of thousands of people, many of whom, it appears, had no connection to Al Qaeda or the Taliban and/or posed no threat to US security. Once in US custody, the screening procedures of detainees often failed to distinguish civilians from combatants. Instead of holding battlefield hearings mandated by the Geneva Conventions to determine the combat status of detainees.”<sup>117</sup> President Bush determined unilaterally that all prisoners captured in the “war on terror” were “unlawful enemy combatants” and could be held indefinitely.”<sup>118</sup>

The prisoners in Guantánamo had to face many years of detention without any significant opportunity to prove their innocence or irrelevance to the allegations. One very senior analyst of CIA having an extensive experience in the Middle East had an opportunity to assess the detainees at the base in summer 2002. In a top secret report he concluded that about one third of the total detainees on the base (200 out of 600 detainees at that time) had no link with the alleged terrorism. He

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<sup>117</sup> “On January 19, 2002, Secretary of Defense Donald Rumsfeld sent an order to the Joint Chiefs of Staff declaring that the military no longer needed to follow the Geneva Conventions in their handling of Al Qaeda and Taliban prisoners. The next day, he rescinded an earlier order by General Tommy Franks, Commander of the Coalition Forces in Afghanistan, which had set up Article 5 hearings to screen captives. Now that the United States was no longer following the Geneva Conventions, there would be no need for Article 5 hearings. See Donald Rumsfeld, *Memorandum for Chairman of the Joint Chiefs of Staff*, January 19, 2002, available at <http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf> (accessed September 30, 2008). See Article 5 of Geneva Conventions III, available at <http://www.unhchr.ch/html/menu3/b/91.htm> (accessed September 30, 2008).”

<sup>118</sup> President George W. Bush, “Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” available at [http://www.law.uchicago.edu/tribunals/exec\\_order.html](http://www.law.uchicago.edu/tribunals/exec_order.html) (accessed September 30, 2008).

said, “many of them had been caught in the dragnet. They were not fighters, they were not doing jihad. They should not have been there.”<sup>119</sup>

### **Detainees Had Little Access to Justice:**

The prisoners detained on the basis of doubt had not been provided any access to the American Courts for a long time. They were not provided even any legal aid, though the capturing power was bound for it. “In June 2008, more than six years after the first detainees arrived at Guantánamo, the Supreme Court ruled in *Boumediene v. Bush* that detainees held there had the right to access US courts to review the legal basis of their continued confinement, and to date no full habeas hearing has been held.”<sup>120</sup>

### **Exposed to Tortures for Extraction of the Information:**

UC Berkeley Human Rights Center’s report<sup>121</sup> indicates certain serious loop holes in the system adopted by the Bush Administration’s for the detention, apprehension, interrogation, or release of the detainees or the suspected persons allegedly linked with the terrorist groups of Pakistan or Afghanistan since the incident of 11<sup>th</sup> September, 2001 happened. “One of the extremely bad aspects of this system were high level instructions/directives issued in series in the period of September 2011 to April 2003. These directives authorized the use of notorious

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<sup>119</sup> Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), 183; see also Tim Golden and Don Van Natta, “The Reach of War: US Said to Overstate Value of Guantánamo Detainees,” *New York Times*, June 21, 2004; Christopher Cooper, “Detention Plan: In Guantánamo, Prisoners Languish in Sea of Red Tape,” *Wall Street Journal*, Jan. 26, 2005.

<sup>120</sup> *Memorandum from White House Counsel Alberto Gonzalez to President George W. Bush*, January 25, 2002, reprinted in Jameel Jaffer and Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (New York: Columbia University Press, 2006), A-1–3.

<sup>121</sup> Laurel E. Fletcher, Eric Stover, op.cit.

and enhanced techniques during interrogations. These directives “include (1) a secret directive by President Bush on September 17, 2001, granting the Central Intelligence Agency the authority to employ an alternative set of interrogation procedures; (2) a directive by Secretary of Defense Donald Rumsfeld on December 2, 2002, authorizing 24-hour interrogations, isolation for 30 days at a time, and the exploitation of ‘individual phobias (such as fear of dogs) to induce stress’, which was later rescinded on January 15, 2003; and (3) a directive by the Secretary of Defense on April 16, 2003, authorizing the use of 24 interrogation methods, including environmental manipulation, sleep adjustment, and extended solitary confinement. These directives were largely based on legal memoranda prepared by staff at the Department of Justice.”<sup>122</sup>

Most of the above mentioned interrogatory techniques, whether used individually or at the same time over prolonged periods of time, are very clear and naked violations of international humanitarian law. Similarly it also falls under the serious violations of domestic prohibitions on the use of violence, torture, or other degrading, inhuman, and cruel treatment with the prisoners.

## Conclusion:

In Afghanistan the civilian population and other non-combatants are being suffered continuously since the Soviet invasion. The only difference after 9/11 is the replacement of the Soviets by US led NATO forces, similarly collaborated with the Afghan government. It is surprising that all the warring parties at the moment

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<sup>122</sup> *Memorandum from Deputy Assistant Attorney General John Yoo to General Counsel of Department of Defense, January 9, 2002, reprinted in Karen J. Greenberg and Joshua L. Dratel, The Torture Papers: The Road to Abu Ghraib (Cambridge: Cambridge University Press, 2005), pp. 38-79; Memorandum from White House Counsel Alberto Gonzalez to President George W. Bush, January 25, 2002, reprinted in in Jameel Jaffer and Amrit Singh, Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond (New York: Columbia University Press, 2006), A-1-3*

recognize the rules regulations of the human rights law and have been provoking them from time to time in the past. But at the same time the civilians are brutally targeted by the Taliban fighters on the one hand and by the Allied forces under US command on the other. They are also used as shields against the enemy. People caught under suspension are even not provided access to the courts for justice in the US. It seems that all the laws of war, IHL, international conventions regarding protection of human rights have been failed to provide any effective protection to the Afghan People. This situation is not confined in Afghanistan only, rather it crossed the Durand Line at the same time and entered into Pakistan. Its details are discussed in the proceeding pages.

## **Chapter-4**

### **Target Killings on the Eastern Side of the Durand Line**

The military operations of the US-NATO-Afghan Forces not only increased the sufferings of the Afghan people but also those living on the other side of the Durand Line, i.e. Pakistan's territory. Resultantly the civilian population on that side suffered a lot. Violation of a State's sovereignty though does not fall in the purview of this study, however, human rights sanctity is a matter of concern. This chapter is bounded in terms of providing the explanations for foreign policy behavior of the US while borrowing different explanations proposed by the intellectuals. It looks in realist perspective as well as liberal perspective (legalist or liberal institutionalism); the case study is explained not only with these grand theories but also by great deal of legal means that is international law as well just war framework. The research in this chapter is carried out in an interpretive way. The purpose of this chapter is to explain the American foreign policy and the underlying principles behind it. It tries to observe the philosophy and practice both. This work strives to rationalize it with a purpose and the purpose is to explain the post 9/11 US foreign policy behavior and its impacts on the society of Pakistan. The case study of US-drone attack inside Pakistan has been taken to probe into the rationale more fully. Keeping in restrictions, options are also proposed under the grand theories. Focus of this chapter draws guidance from just war framework and international humanitarian law and takes these two variables as measures.

Again debate is a normative one, the concepts of 'just' and 'unjust', 'lawful' versus 'unlawful' and the answers are hermeneutic as well empirical in their nature. Legalist and moralist questions are raised and addressed in moral,

legal and normative way as well as in realist way that is empirical one. For few, it may depict the effort of ensuing balance in the work.

This portion of thesis answers some core questions; what are the underlying interests of American foreign policy and how they are fulfilled? What legal and moral justifications America has in promoting war beyond the 'Durand Line'. What has been the state of human rights violations in post September 11, 2001 foreign policy practice of the US? What is Pakistan's response over killings of people by US-drone attacks in the Pakistan-side of Durand Line? What are its overall effects on the State of Pakistan? Do drone attacks comply with international law? The chapter is organized in the order of theory, practice and findings respectively.

### **A Theoretical Framework:**

History of human relationship portrays immense challenge to both; the writer and the reader especially when one turns to research the right thread to fabricate the saga or at least tries to appreciate it. History is full of unending debates of virtue and evil, just versus unjust, ideal versus reality, power verses principles, liberal versus tyrannical and so on. Along with other multiple purposes, one rationale behind these intellectual debates has been to provide explanation to understand human behavior or human interaction with fellow humans. If so is the case, then this discussion also extends to explain group behavior or State behavior.

Today, the most pressing query of world politics is same as it was in the period of Greek historian Thucydides; how to understand State behavior and causes of conflict? To answer these types of questions intellectuals coined various explanations at individual, State and international level sometimes

called as “level of analysis debate”. Intellectuals of social sciences have made great efforts to construct the precise interpretations of world politics as well as recipes to control the human behavior. These interpretations earned considerable fame over the period of time whereas taking place of one another in academy and policy of states. The well-known for everyone are political idealism and political realism.

Political realism has been ever dominant theory to explain the security requirements of a State along with idealism that ensue the same task with different strategy than that of realism. For realists, units of international political system behave according to power distribution in an anarchic realm. Realism stresses on military and economic power rather than power of ideas. They start their saga from Peloponnesians Wars up to the contemporary history to establish their thesis of righteousness.

Since the American War of Independence to the present War on Terrorism, US has experienced that power is the most important for the establishment of peace, liberty and virtue on the earth for America. They have used it to serve their interests. Coining the term of power of ideas, US has also discovered another form of power-the soft power. Often called as idealism or liberalism, in academic circles it has become an alternative to political realism.

Political idealism has been the competitor to balance the reality of world given by the ‘realists’. Unlike power and balance of power recipe of realism, idealism purposed international law, international norms, and regimes in order to regulate the State behavior in international political system.

Idealism now called as liberalism in various circles can generally be traced back to the time period of post WWI in the writings of US President Woodrow

Wilson. Wilson was a man of great political ideals same as those the American founding fathers narrated in the Declaration of Independence. It would be fruitful to stare the slice of Declaration in order to understand the foreign policy behavior of the US then and now.

After this very abstract introduction to theory it would be fruitful to underpin the idea of nation interest in the US foreign policy due to obvious reason. The orientation to national interest is the only key to understand the bridge between various competing theories, and the naive confusion over the application of international law (that why sometimes it is exhaustive and sometimes partial).

In a narrow perspective, 'national interest'<sup>123</sup> encompasses the country's perceived needs and aspirations in relation to other sovereign states constituting its external environment. Scholarship on national interest holds that every State has four basic, relatively unchanging, national interests, and all of its interests and foreign policies can be fitted in to these four categories: Defense, trade and commerce, the building of or (adjustment in) a stable world order and the promotion of your values abroad.

In nutshell, national interest of every State is bounded in four points:

- 1) Defense of homeland
- 2) Economic well-being
- 3) Favorable world order
- 4) Promotion of vales (ideology)

These four interests are enduring but transitory. It means that it is the intensity of interest that determines the priority of one of the categories. A prioritized

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<sup>123</sup> Wittkopf, *American Foreign Policy* (New York: MacMillan, 1986), p.3.



category is transitory because it is subject to change depending on the government's perception of their urgency at any given time. Government's focus might keep on shifting but these four always remain relevant.

The term 'transitory' suggests that certain specific issues falling under any of the basic interests may receive more attention from policy-makers at some times than others. The degree of interest involved usually depends on the decision-makers' perception of the international environment. Transitory scale needs to be understood in four categories;

- 1) Survival Interest: where the very existence of the nation is in peril,
- 2) Vital Interests: where the probable serious harm to the security and well being of the nation will result if strong measures, including military ones, are not taken by the government within a short period of time,
- 3) Major Interests: where potential serious harm could come to the nation if no action is taken to counter an unfavorable trend abroad,
- 4) Peripheral Interests: where little if any harm to the entire nation will result if a "wait and see" policy is adopted.

Time dimension is crucial in marking priority. Time dimension to measure intensity of an interest holds:

- Survival Interests require the immediate attention of the chief executive,
- Vital Interests require urgent planning in the executive branch,
- Major Interests require serious study,
- Peripheral ones suggest "watchful waiting"

Many people find a contradiction between American ideals and reality. The

American Declaration of Independence says that all men are created equal, and endowed with same inalienable rights, and it follows that equality is a basic principle of American political tradition. The Declaration of Independence refers to "natural rights,"<sup>124</sup> and also specifies some rights, with which all men are endowed by the Creator, like the rights to life, liberty, and pursuit of happiness. The Declaration also purports, and commits to protect all men

The Declaration of Independence<sup>125</sup> requires full credit on its behalf as it offers rationale and purpose behind the birth of a new nation as well as it sets mission abroad. It accommodates grand schools and their proponents, the idealists and realists. It provides blueprints of American thinking home and abroad. In this study we will confine them to abroad that is American foreign policy.

The American foreign policy presents dichotomy for most of the students of Law and Social Sciences, hence, it needs clarity. Even learned people asks common questions like laymen, why America is behaving in duality. They exemplify it too; at times US talks to help repressive citizens on humanitarian grounds in Iraq and Libya and at the same time it has killed hundreds of human beings in Afghanistan, Iraq and now killing hundreds of people by drone attacks in tribal areas of Pakistan. In nutshell confusing query is protection and violation of human rights at the same time by the same country.

For academic convenience, let us coin some ideas to construct intellectual

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<sup>124</sup> Kendall-Carey, *The Basic Symbol of the American Political System* (Baton Rouge: Louisianan State University Press, 1970), pp.10

<sup>125</sup> The American Constitution.

grounds. For this purpose, 'justified intervention'<sup>126</sup> takes priorities in this work. Virginia Gamba provided articulated analysis of the term justified intervention in *emerging norms of justified intervention*. For Gamba, debate between guilt feeling (morality) and pure rationality is as old as human history. How much space this guilt gets in a State's foreign policy is our concern.

In post WWI (World War I) period, the need for peaceful co-existence and search for it remain constant part of intellectuals. The question of 'ethical framework' and quest in this right has been matter of great deal. The phenomenon of war was probed as a recipe to ensure peace. Many scholars proposed peace as end and war as means and many concluded other measures to achieve this end without using the means of war. In this way two paths are moving towards same destiny. Both have been acknowledged and practiced with very journalistic name 'realism', and 'liberalism'.

The necessity of war to punish rouge states as last resort or at least its presence in the history of international relations sees no debate over it, but the issue of first or last option sounds well for debate. A minimal part of this realist debate incorporate idealist (legalist) question of morality. To introduce a space for morality in the use of force was needed following the European experience of first half of twentieth century. The international order established after the end of the World War II was based on non-intervention principle. This principle is given in Article 2 (4) of the UN Charter:<sup>127</sup> It says: "All members shall refrain in their international relations from the threat or use of force against the

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<sup>126</sup> Virginia Gamba, *justified Intervention? A View From the South*, "International Politics" (New York: Harper Collins College Press, 1996), p. 537.

<sup>127</sup> [www.un.org](http://www.un.org)

territorial integrity or political independence of any State.” As nothing is self-evident, there is exception to Article 2(4) under Article 51, that: “the inherent right of individual or collective self-defense if an armed attack occurs.”<sup>128</sup>

Whether Art. 51 is supplementary and supportive or weakness to the Art 2(4) is arguable. Most of the legal experts believe that Art. 51 provides strength to the non-intervention principle and provides a set up for its implementation or enforcement. Further, international law does not provide any recognized provision for intervention for the humanitarian rights/reasons. Even foreign intervention is not permissible for the purpose of stopping the cruelties of another State<sup>129</sup>

### **Just War Framework:**

“Just war tradition”<sup>130</sup> is considered as the pounding tradition for just discourse in international law. The just war tradition ensue provision of a framework supportive to the moral appraisal for all sort of military or economic sanctions/interventions. Just War Framework is not any legal document or enforceable mechanism to stop war rather it is facilitator for a justifiable use of war. Hence, “it accepts the reality of war, its need, its constructive elevation and hence its just purpose”<sup>131</sup>.

“The Just War Tradition” determines such situation under which, a country

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<sup>128</sup> Robert Jervis, *International Politics: Enduring Concepts and Contemporary Issues* ( New York: Harper Collins College Publishers, 1996), p. 538.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid

<sup>131</sup> Ibid

may legally opt for war. It further defines the ways and means through which the belligerent parties can conduct the hostilities. The *jus ad bellum* defines the circumstance in which war is allowed according to international law. Accordingly to it the war can be allowed if and when/if:

- a) The war is formally declared by any authority competent or it;
- b) All possible means for the peaceful settlement of the dispute have been exhausted;
- c) Any justifiable cause does exist;
- d) Most significantly, the damage expected from the war is not proportionate to those positive results or achievements which are hoped to be achieved in case of the success.
- e) Expected damages of the non-combatant/civilians can surely be minimized.

It means that the concept of 'Just war tradition' conditions that armed, economic or other sort of interventions must ensure the above mentioned conditions. The first condition, i.e. declaration of war by any legitimate authority means that it should be declared by the State or government itself. It indicates the fact that the exercise of the military power is the monopoly of the governments and not individuals or the groups of individuals. However, the governments using such monopoly in a brutal or tyrannous way can be deprived of it, as it may provoke a just rebellion in the country. It seems applicable frequently to the armed attacks or military intervention in the internal matters of one State by any external power.

Next condition - exhaustion of the peaceful means of settlement of the dispute before opting the coercive means – is very effective because the use of the armed forces, even at a restricted level, can result into highly harmful consequences. Hence other possible measures, short of war, should be given

priority to achieve the targets. However, it does not mean that the limited use of the military force for non military objectives such as distribution of the food stuff or assistance to a community on humanitarian basis is absolutely prohibited. Sometimes the economic sanctions or embargo on the supply of the basic needs such as medicines can bring a greater loss to the humanity than a limited military operation.

Certainly it can be argued that economic sanctions are used by the community too eagerly because of the reason that such measure is considered as easy and low cost preference. It can be right in case of certain selected and limited targeted sanctions e.g. embargo on arms supply. However, the use of some general sanctions on economic transactions may be too hard for the people subject to these sanctions. They may have to face fatal consequences such as starvation, death, or other hardships. This use of this indiscriminate harm can be appreciated if it is sure that it inevitable for a greater and noble return. Otherwise the economic sanctions if bring heavy losses just to the poor masses, it is hard to be justified. In this situation it is better to prefer for the use of little military force for limited objectives.

The other perquisite for satisfaction of the “just war theory” is presence of a noble cause for the coercive use of force. The recent interpreters of the just war concept think that such war should be restricted for self defense against foreign aggression as mentioned in the United Nations Charter’s Art. 51. It can be either collective or individual. On the bases of limited interpretation of the just war theory, the military operations of US and its allies to restore Kuwait’s status from Iraq’s occupation seems justified.

The following section of dissertation probes the post 9/11 scenario in to just

war tradition—justification of US attack on Afghanistan, Iraq and US-drone attacks in Pakistan under this tradition.

Survey of just war framework application shows that assisting a country to defend itself against aggression constitutes the paradigm 'just cause for intervention'.

An excuse of intervention, most often been used is to provide support to either side in a civil war. However, It does not constitute a just cause at its own. In 19<sup>th</sup> century a famous writer Montague Bernard gave arguments for rejecting such type of interventions:

The inference in the case supposed either turns the balance, or it does not. In the latter event, it misses its aim; in the former it gives superiority to side which would not have been uppermost without it and establishes a sovereign or a form of government, which the nation, if left to itself, would not have chosen.

"Suppose, however, that one of the parties to dispute has successfully established its *bona fides* in representing a distinctive political community and has gained control of sizeable area of territory. It is being prevented from achieving full statehood only by a repressive colonial or imperial power. It could, perhaps, be argued that this case fits the self-defense paradigm, with the repressive colonial power representing the role of the external aggressor. In such a case, intervention on behalf of the oppressed community could be considered legitimate. Suppose further that an outside power has been moved to prop up the crumbling imperial regime and crush the movement of national liberation. Support for the struggling people than be regarded as a special

case of the self-defense paradigm and so be justified.”<sup>132</sup>

“This was certainly the view of John Stuart Mill, who generally regarded interventions as futile. In his view, only a political community by its own struggles could determine its own freedom. He, nonetheless, argued in favor of intervention in the case of Hungary’s revolt against the Hapsburg Empire in 1848-49:

“It might have been right for England (even apart from the question of prudence) to have taken part with Hungary in its noble struggle against Austria; although the Austrian government in Hungary was in some sense a foreign yoke. But when the Hungarians having shown themselves likely to prevail in this struggle, the Russian despot interposed, and joining his force to that of Austria, delivered back the Hungarians, bound hand and foot, to their exasperated oppressors, it would have been an honorable and virtuous act on the part of England to have declared that this should not be, and that if Russia gave assistance to the wrong side, England would aid the right.”<sup>133</sup>

“In the event, Britain did not intervene since Palmerstone feared that such a move could upset the balance of power and so risk general war, which were similar reasons to those offered by the West in 1956 when it did not support Hungary for a second time against the Russian aggression.”<sup>134</sup>

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<sup>132</sup> Gamba, p. 539.

<sup>133</sup> Gamba, p. 540.

<sup>134</sup> Ibid



Sometimes the interventions are made by the external power/powers in a civil war, not to favor one party against the other, but to minimize the bloodshed by keeping the warring parties away from each other and implementing the peace. It currently is known as “peacemaking”. The objective of such intervention is to impose peace to the war-affected region by deploying superior armed forces. It could be done under the United Nations peace keeping forces. Such situation may constitute a ‘just cause’ for intervention. The justification of this just cause of intervention depends on the fact that to what extent chances of a real output and achievement of the target exists at a ‘proportionate cost’. Peacekeeping is often resisted on the grounds that intervening party itself may be involved in the insurgency and fail to achieve the targets of the peacekeeping.

The above mentioned conditions are willingly when the use of armed force is just to compel the belligerent parties for peaceful settlement of the dispute or enforcement of truce if already agreed upon. Certainly it constitutes a ‘just cause’.

In the last but not least are such interventions which attract the external powers for the humanitarian cause. These are known as humanitarian interventions. They are meant not for any political target, rather to stop the human suffering. The humanitarian interventions may be to stop the genocide by the armed forces or any wider scale massacres. Intervention of French, British and some other European troops in the ex-Yugoslavia is an example where the objective is to extend effective protection to the convoys carrying the humanitarian aid for the civilians. “Such type of the humanitarian objectives constitutes *prima facie* just causes for intervention.”<sup>135</sup>

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<sup>135</sup> Virginia Gamba, p. 541.

However, here again a level of caution is needed as it involves a serious breach of sovereignty of a State. Hence its initiators must provide some solid proof of need of such type intervention, preferably from the forum of the United Nations. In case the redress of the complaints of the people is available within the States limits and the threats to the human rights are at limited scale, the foreign elements intervention should always be discouraged or avoided. However, if the human rights are subject to large scale threats, torture, genocide activities, the humanitarian intervention seems justified.

Another interesting point is whether it is duty of an external power to intervene if it feels that it is necessary to stop the alleged atrocities being done within the territorial boundaries of a State. Is it ethical or obligatory for foreign State make interference in the internal matters of other state in the name of humanitarianism? This kind of extension of moral responsibility can hardly be welcomed. "It may, therefore, be tempting to suppose that foreign atrocities can be kept at a safe moral distance by the use of the act/omission distinction."<sup>136</sup>

"This distinction argues that whereas that we have a clear moral duty not to take the life of another person (an act), we have no such duty to prevent a life being taken by someone else (an omission), particularly when the lives are at risk as a result of 'a quarrel in a far away country between people of whom we know nothing'. The problem is that it is extremely difficult to clarify the

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<sup>136</sup> Ibid

act/omission distinction sufficiently for it to bear the moral."<sup>137</sup>

If this is how the moral dividing line is drawn then the arguments against the humanitarian intervention, when there are large-scale abuses of human rights, are less convincing. If it is really within our power to stop genocide and we fail to act, it definitely amounts to consent to what is happening. In such a situation, we certainly have a duty to intervene and prevent the appalling suffering.

Very recently the world has seen the United States' intervention in Qadifée's Libya in the name of 'democratic' rights of the people, in contrast with its attitude towards the Palestinians rights of existence and their conflict with Israel. Here the question rises that why the same priority of US is not for the people of other countries such as Saudi Arabia and many other Arab States, Indian Kashmir etc. There are very obvious violations of the human rights in so many States. US has always been supportive to its favourite dictatorial regimes in the world including Pakistan. It indicates that it is not simply a matter of the just cause. Rather the global powers use this tool for their hidden interests. Even if there is any genuine just cause, the other condition should also be satisfied, i.e. the balance between the cost and gain and the human sufferings resulted from such intervention. As a whole the these interventions made in the name of 'humanity' or 'war against terror' are always driven by the national interests of the intervening power. The conditions required to be fulfilled before any humanitarian intervention. Problems will always be there if the individual states or their groups are allowed to decide arbitrarily to take the steps for this type of intervene. Hence it must be decided on the realistic

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<sup>137</sup> Ibid.

grounds from the United Nations platform whether the intervention is necessary and safe and not injurious to the humanity.

These requirements would not appear to need special interpretation to be applied to all kind of military interventions and not simply to the conduct of military operations in war. The requirement to minimize the noncombatant casualties is, however, one that may, as we have seen, make the imposition of general economic sanctions difficult to justify.

### **Just War Framework and Targeted Killings by US-Drone Attacks on the Eastern-side of the Durand Line:**

#### **The Targeted Killings:**

Earlier part of this chapter has introduced the available grand theories or framework for State behavior. This portion maintains its focus on the relevant part of theoretical framework; “the legalists and the targeted killings”.

In the recent years, the US government has followed such policies which allow the use of “targeted killings” in all the countries of the world. Target killings are justified as essential response against terrorism and “asymmetric warfare.” Especially in post 9/11 period the US has followed this policy in Afghanistan, Iraq and Pakistan’s tribal areas.

The target killing phenomena is not something new in the political history of mankind. Rather it has been present throughout the history. However, in the present times this practice has been very much confined and the States cannot afford to adopt it explicitly. They have to give full justification for it. In

case a State adopts this policy, it would always be unofficial, covert, undeclared, and usually denied. In the previous chapter many such instances are given where the US and the Allied Forces had either denied or gave lame excuses for such type of their operations which fall under the category of target killings.

Whenever any blame for unlawful targeted killings could be realistically assigned, the international community always condemned such type of killings, including those States which had been alleged for this illegal practice. However, after 9/11 incident the US and a few other States have adopted such policies which indirectly not very different from target killings. On the other hand openly they never ready to acknowledge the existence of this phenomenon. This growing tendency among the nations is highly injurious to world peace and good order. This trend can set precedents for the other nations as well. For example India is floating the Idea of "Strategic Strikes" on the 'suspected' areas of Pakistan. There are the areas where, as per claims of India, terrorists are trained and flourished. Same trend of strategic strikes has also been adopted by Israel in the Middle East against the Palestine and other Arab countries.

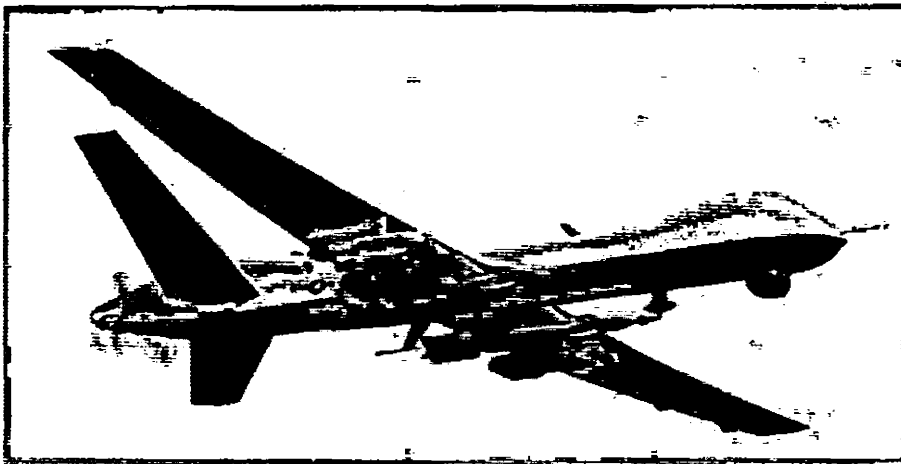
### **The Drones:<sup>138</sup>**

Initially the Drones were built up to collect intelligence and conduct surveillance and investigation. This technology is currently under the use of more than forty States. Many countries like UK, Turkey, Russia, China, Israel, and France have either achieved or striving to get Drones which have the

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<sup>138</sup> [www.presstv.com](http://www.presstv.com)

potential shoot laser guided missiles of weight from 35 to <100 pounds. "The appeal of the armed drones is very obvious, particularly in hostile terrain, they permit killings at a little or zero risk to the State personnel carrying them out, and they can be operated remotely from the home State. It is also conceivable that non-state armed groups could obtain this technology."<sup>139</sup> The excessive use of drones for the purpose has created very alarming controversy at world



level. Some have suggested that "the drones as such are prohibited weapons under International Humanitarian Law (IHL) because they cause, or have the effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person. It is true that IHL places limits on the weapons States may use, and weapons that are, for example, inherently indiscriminate (such as biological weapons) are prohibited. However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles.

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<sup>139</sup> Ibid.

The critical legal question is the same for each weapon: whether its specific use complies with IHL.”<sup>140</sup>

The growing concern of the international community regarding the use of drones is because they can be used against the enemy without risk to the State force. The policy makers, defense persons or strategists will inclined to interpret the legal restrictions in a way providing excuse of its use. However, during the use of this devise distinction can hardly be made between lawful or unlawful combatants and non-combatants. To determine, “Who can be killed? Under what circumstance? What constitute the direct participation in the hostilities?” are the most important questions to be satisfied before legitimizing the use of such devise. Interpretations of such questions provide much latitude to the users of this devise.

Actually Drones’ supporters plead their case on the basis that these weapons are more precise, hence have the potential to achieve the exact target. This characteristic has minimized the chances of collateral civilian damages and injuries. However, it may be true to some extent, but they give an incomplete picture of the reality. No doubt the accuracy and precision of the drones matters, but all these features depend on the intelligence of the human upon which the targeting decision is based. Drones may provide the capability of making distinction between the combatants who are directly involved in hostilities and the innocent civilians.

“Sitting thousands of miles away from the environment in which a potential target is located may well be at an even greater human intelligence gathering

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<sup>140</sup> Ibid.

disadvantage than ground forces, who themselves are often unable to collect reliable intelligence. In the tribal areas of Pakistan and Afghanistan it is even harder for the forces on the ground to obtain accurate information.”<sup>141</sup>

Evidences indicate that international armed forces are usually found too ill-informed about the local customs and practices, and too much gullible in interpreting/using that information to get the true understanding of the targeted place. Often the manned aircrafts are used for raids and air attacks, which result into killings on faulty information. The legitimacy of any targeted killing operation mainly depends upon the dependability of the information on which it was initiated.

Before planning the targeted hitting, the relevant state parties must ensure that the necessary procedural safe guards are intact, and the intelligence which forms the bases of the operations is foolproof, accurate, and verifiable. Drones are operated at thousands miles away from the battlefield and completely through the computer screens and remote controls, hence risk is there that “play station mentality of killing” may develop. The operators must have a proper training, not only in warfare, but also in international humanitarian law as well.

“Outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a State’s own territory, over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force. Outside its own territory (or in territory over which it lacked control) and where the situation on the

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<sup>141</sup> [www.un.org/rights](http://www.un.org/rights)



ground did not rise to the level of armed conflict in which IHL would apply, a State could theoretically seek to justify the use of drones by invoking the right to anticipatory self-defense against a non-state actor.”<sup>142</sup>

Theoretically it may also be claimed that the requirement of the law of human rights ‘first employing less-than-lethal’ means cannot be possible if the State is without the capacity of capturing or assist the other State for capturing the targets. However, there are very few chances that anticipatory self defense test requirement is met before the start of the operations.

In drone attacks there are overwhelming chances of killing other than the target, like the family members or people living in the surroundings. It amounts to arbitrary deprivation of life of someone which is a serious violation of humanitarian international law on part of the State concerned or the individuals involved. They are liable to be tried under the law for war criminals as mentioned in the Rome Statutes.

A Study conducted by the UN Human Rights Council in May 2010 with title “Report of the special Rapporteur on Extrajudicial or Arbitrary Execution”<sup>143</sup> shows the way human rights has been violated by the US in its ‘War on Terrorism’. According to this report, in the period after September 11, 2001 the US behavior in terms of foreign policy has not only posed serious challenges to the boundaries of legal framework of just war tradition but also to international humanitarian law.

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<sup>142</sup> Ibid.

<sup>143</sup> [www2.ohchr.org/English/bodies/hrcouncil/.../A.HCR](http://www2.ohchr.org/English/bodies/hrcouncil/.../A.HCR).

This report propounds the case of extrajudicial killings by the US-drone attacks in the border areas of North West Province of Pakistan now known as Khyber Pakhtun Khawa. It borders with Afghanistan where the US is hunting the leadership of Al-Qaida. This hunting mission has been extended to Pakistan while ignoring and violating the territorial bound of Pakistan-the Durand line. Since it is a serious test case for International law as well as International theory, this section will chase both time and again to provide neat understanding and limitations to both theory and practice.

The term of 'targeting killing' is extensively used in international law as well the other relevant studies such as criminology. This technique or instrument is used in several contexts by the States or their agents, both in time of peace and war. Some organized groups, busy in armed struggle also use it to achieve their targets. The means and tools of this technique vary from person to person or place to place.

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The common element in all these contexts is that: "Lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator. In a targeted killing, the specific goal of the operation is to use lethal force."<sup>144</sup> This distinguishes targeted killings from unintentional, accidental, or reckless killings, or killings made without conscious choice. It also distinguishes them from law enforcement operations, e.g., against a suspected suicide bomber. Under such circumstances, it may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill. Although in most

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<sup>144</sup> Ibid.

circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal. This is in contrast to other terms with which "targeted killing" has sometimes been interchangeably used, such as "extrajudicial execution", "summary execution", and "assassination", all of which are, by definition illegal.

In this study we are more concern with irresponsible behavior of world leader of our age as its foreign policy behavior is setting disturbing trends in international political order as well as violating international human right charter. "Illegal" killings by the US which are not only challenge to international peace but also to international law.

The US has excessively been using the drone technology for target killing during the military operations in the Muslim countries such as Iraq, Afghanistan, and Pakistan. In these the operations are being conducted by the armed forces of the United States. There are also reports that after 9/11 incident the United States had secretly adopted the policy of target killings in the foreign States' territories. This programme is allegedly being handled by the CIA through Predator or Reaper Drone. It is further reported that certain special operational forces are also involved in these operations. For the implementation of this programme the services of some civilian contractors have also been sought. The first Drone attack of CIA was in Yemen on November 3, 2002 with Predator Drone. Al-Qaeda leader Qaed Senyan al-Harithi was killed in this attack. The precision and accuracy of the drones attacks is highly challenged, though not possible to verify it for the outsider

Drones fleet is reportedly controlled by the American CIA in its headquarters situated in state of Virginia through their pilots present in the field in Pakistan and Afghanistan. These pilots are responsible for the field operations of the

drones as directed from the headquarters. It is said that most of the drone fleets are operated by the civilians or retired military officers.

Foreign Relations Committee of the US Congress released a report on August 10, 2009. It explains the military targets in Pakistan and Afghanistan. This list of the targets included the kings of the drugs business who were allegedly providing the financial support to the Al-Qaida and the Taliban in Pakistan and Afghanistan. The report indicates the US intention of 'unrestricted' use of force in the region. The report says, "...the military places no restrictions on the use of force with these selected targets, which means they can be killed or captured on the battlefield . . . standards for getting on the list require two verifiable human sources and substantial additional evidence."<sup>145</sup>

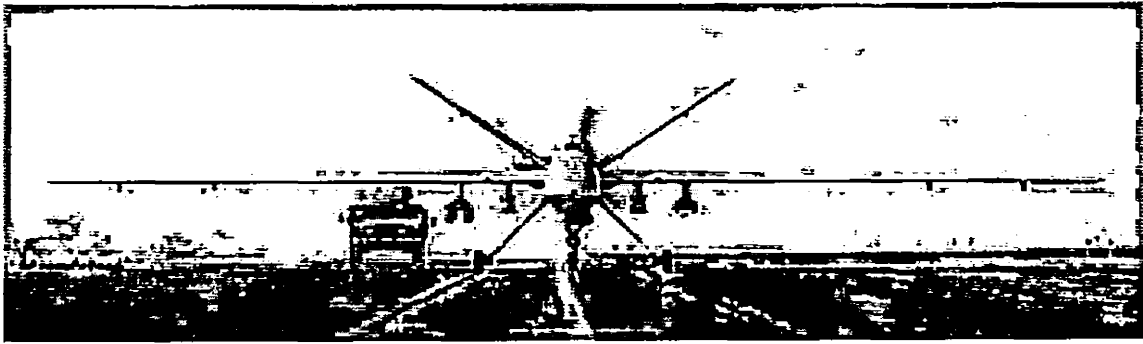
One of the legal advisers of the US State Department tried to legally justify the military target killings in Pakistan and Afghanistan. His arguments were mainly focused of right of self defense of a state as well as on Humanitarian International Law. He argued, "US is in an armed conflict with Al-Qaeda, as well as the Taliban and associated forces."<sup>146</sup> Though this statement is pointing out very basic issue, it does not cover many central legal and the humanitarian questions in the war torn areas of the region. For example, it does not explain the scope and the boundaries of such armed conflict; standard or criteria of the targeted individuals is not mentioned. Furthermore, the legality, accuracy, precision of the targets is again not clear. In case of violations of the IHL, no mechanism of accountability is provided.

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<sup>145</sup> [www.us.gov.org](http://www.us.gov.org)

<sup>146</sup> Ibid.

## Drone Attacks in North –West of Pakistan<sup>147</sup>



### Pakistan's Response:

Since 2004, the US is practicing the tactic of targeting Al-Qaida and Taliban leaders in Pakistan by using drones. In spite of hue and cry from Pakistan's side (both at public and government level) CIA lead drones are continue to follow the suit. Most recently, Pakistan's army chief has condemned the latest raid by US unmanned drones as "intolerable and unjustified".

In a strongly worded statement, General Ashfaq Parvez Kayani said the attack, which killed about 40 people, was "in complete violation of human rights"<sup>148</sup> According to the BBC, most of the victims were believed to be civilians attending a tribal meeting near North Waziristan's regional capital, Miranshah. Tension has been growing in recent weeks between the US and Pakistan. The US drone attacks are a long-running source of bad feeling, but the acquittal of CIA contractor Raymond Davis of murder has sparked protests across Pakistan.

Keeping in view the same situation in past, the present situation is worsening.

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<sup>147</sup> [www.wikipedia.com](http://www.wikipedia.com)

<sup>148</sup> [www.bbc.com](http://www.bbc.com)

If we look at the matter since 2004, Pakistan has repeatedly protested these attacks as they are an infringement of its sovereignty and because civilian deaths have also resulted, including women and children, which has further angered the Pakistani government and people. Although the US State Department allegedly said that drones attacks are in comply with Pakistan agreement with the US, however, (ex) foreign minister of Pakistan Shah Mahmud Qurashi denied that this was true.

Between November 2008 and January 2009 Aryana Institute for Regional Research and Advocacy<sup>149</sup> (AIRRA), a think tank of researchers and activists from FATA and NWFP conducted a survey of the public opinion about the drone strikes in Federally Administered Tribal Areas. Five teams of five researchers each interviewed 550 people from all walks of life. Based on the responses the researchers concluded 'The popular notion outside the Pakhtun belt that a large majority of the local population supports the Taliban movement lacks substance'. Most people thought that the drone attacks were inaccurate and led to anti-American sentiment and were not effective in curbing militancy rather they are counterproductive.

The drone attacks continue, despite repeated requests made by Pakistani President Asif Ali Zardari through different channels.<sup>150</sup> A famous Taliban leader of Pakistani Taliban, Baitullah Mehsud while claiming responsibility for the 2009 Lahore police academy attacks, stated that it was in retaliation for the drone attacks.

President Zardari has also requested that Pakistan be given control over the

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<sup>149</sup> [www.huffingtonpost.com](http://www.huffingtonpost.com)

<sup>150</sup> *The Daily Times, March 3, 2011*

drones but this has been rejected by the US who is worried that Pakistanis will leak information about targets to militants. In December 2009 Pakistan's Defence minister Ahmad Mukhtar acknowledged that Americans were using Shamsi Airfield but stated that Pakistan was not satisfied with payments for using the facility.

An interesting and worth noting development has been seen in this view was the March 10, 2011 statement of the General Officer Commanding of 7th division of Pakistan Army Major General Ghayur Mehmood delivered a briefing "Myths and rumors about US predator strikes" in Miramshah. He said that most of those who were killed by the drone strikes were Al-qaeda and Taliban terrorists.<sup>151</sup>

Above content compels that the drone-debate or drone-controversy needs more investigation to reach the facts. An American foundation known as New America Foundation worked in this regard. It has analyzed the US drone strikes in Pakistan from 2004 to 2011. Sources of this analysis have been media from Pakistan and international media as *CNN* and *BBC*.

This study shows that the 234 reported drone strikes in northwest Pakistan, including 22 in 2011, from 2004 to the present have killed approximately between 1,439 and 2,290 individuals, of whom around 1,149 to 1,829 were described as militants in reliable press accounts. Thus, the true non-militant fatality rate since 2004 according to this analysis is approximately 20 percent. In 2010, it was more like six percent.

Estimated Total Deaths from US Drone Strikes in Pakistan, 2004 - 2011

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<sup>151</sup> Isi-interservicesintelligence.blogspot.com/2011

Year	Deaths (low)	Deaths (high)
2011*	102	148
2010	607	993
2009	368	724
2008	273	313
2004-2007	89	112
Total	1,439	2,290

\*Through April 14, 2011

	Deaths (low)	Deaths (high)
2011*	89	122
2010	581	939
2009	265	501
2008	133	164
2004-2007	81	103
Total	1,149	1,829

Estimated Militant Deaths from US Drone Strikes in Pakistan 2004 - 2011

\*Through April 14, 2011

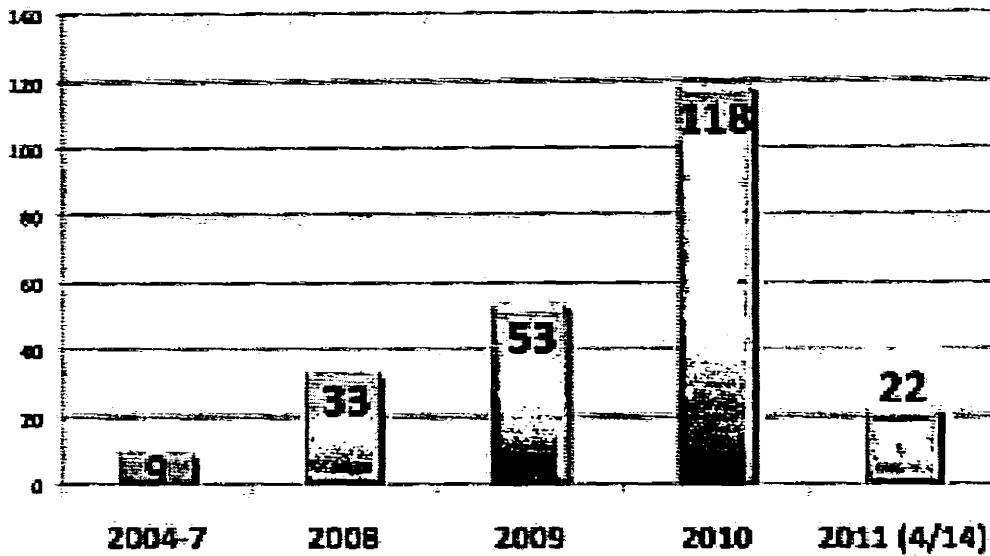
Estimated Militant Leader Deaths from US Drone Strikes in Pakistan, 2004-2011

2011	1
2010	12
2009	7
2008	10
2004-2007	3
Total	33

\*Through April 14, 2011. Included in estimated militants and estimated totals,

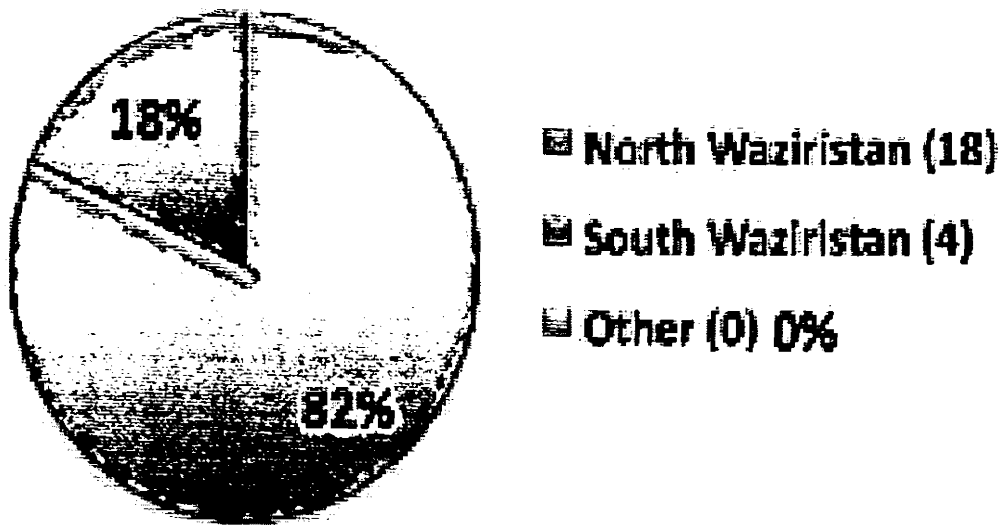
Source: [www.longwarjournal.org/Pakistan-strikes.php](http://www.longwarjournal.org/Pakistan-strikes.php)





Source: [www.longwarjournal.org/Pakistan-strikes.php](http://www.longwarjournal.org/Pakistan-strikes.php)

### Location of 2011 drone strikes (4/14)



Source: [www.longwarjournal.org/Pakistan-strikes.php](http://www.longwarjournal.org/Pakistan-strikes.php)

This factual introduction is debatable on figures and categorical level with one exception that is 'fact'.

## **The US Response:**

The US drone strikes in Pakistan can be traced back from 2004 at the time of Bush Administration. In 2009 the US President Barrack Husain Obama authorized the continuation of these drone strikes. Top US officials consider these strikes very successful and believe that the senior al-Qaeda leadership has been 'decimated' by these strikes. A list of the high-ranking victims of the drones was provided to Pakistan in 2009. Obama has broadened these attacks to include targets seeking to destabilize Pakistani civilian government and the attacks of February 14 and 16, 2009 were against training camps run by Baitullah Mehsud.

In December 2009 expansion of the drone attacks was authorized by President Barack Obama to parallel the decision to send 30,000 more American troops to Afghanistan. Senior US officials are reportedly pushing for extending the strikes into Quetta in Baluchistan against the Quetta Shura. Speaking at a news conference in Islamabad on January 7, 2010 Senators John McCain and Joe Lieberman stated the drone attacks were effective and would continue but stated that US would make greater efforts to prevent collateral damage. In an effort to strengthen trust with Pakistan 'US sharing drone surveillance data with Pakistan, says Mike Mullen. US defense budget for 2011 asked for a 75% increase in funds to enhance the drone operations.

On February 25, 2009 Leon Panetta, the director of the CIA indicated the strikes will continue. The US has also been planning targeted drone-strikes in Baluchistan Province where the US Administration thought top leadership of Al-Qaida is hiding. However, Pakistan strongly oppose the US claims and plans about Quetta-Shura and termed them as destabilizing for Pakistan.

On March 25, 2010 US State Department legal advisor Harold Koh stated that the drone strikes were legal because of the right to self-defense. According to

Koh, the US is involved in an armed conflict with al-Qaida, the Taliban, and their affiliates and therefore may use force consistent with self-defense under international law.<sup>152</sup>

Former CIA officials state that the agency uses a careful screening process in making decisions on which individuals to kill via drone strikes. The process, carried out at the agency's counterterrorist center, involves up to 10 lawyers who write briefs justifying the targeting of specific individuals. According to the former officials, if the briefs' arguments are weak, the request to target the individual is denied.

US military reports asserted that al-Qaeda is being slowly but systematically routed because of these attacks, and that they have served to sow the seeds of uncertainty and discord among their ranks. They also claimed that the drone attacks have addled and confused the Taliban, and have led them to turn against each other. In July 2009 it was reported that (according to US officials) Osama Bin Laden's son Saad bin Laden was believed to have been killed in a drone attack earlier in the year.

Interestingly, Some US politicians and academics have condemned the drone strikes. US Congressman Dennis Kucinich asserted that the United States was violating international law by carrying out strikes against a country that never attacked the United States. Georgetown University professor Gary D. Solis asserts that since the drone operators at the CIA are civilians directly engaged in armed conflict, this makes them "unlawful combatants" and possibly subject to prosecution.

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<sup>152</sup> [www.statedepartment.gov.org](http://www.statedepartment.gov.org)

On July 14, 2009, Daniel L. Byman of the Brookings Institution<sup>153</sup> stated that although accurate data on the results of drone strikes is difficult to obtain, it seemed that ten civilians had died in the drone attacks for every militant killed. He suggested that the real answer to halting al-Qaeda's activity in Pakistan will be long-term support of Pakistan's counterinsurgency efforts.

These facts are self-evident that the US has continuously been involved in targeted killings in Pakistan, number and discussion of accuracy or inaccuracy. Acceptance from both ends, attacking and attacked (US and Pakistan) about drone-attacks and the evidence on ground is available openly.

### **Do drone attacks comply with international law?**

Let us coin the first question by focusing on the US-point of view without which it may sound biased; two drive the answer with one-sidedness. In a ABC's programme, "This Week" on 27<sup>th</sup> June 2010 Mr. Leon Panetta, the CIA Director gave comments on many high profile issues of the national security matters. The Drone attacks from the United States against the Taliban in Pakistan was also included in this discussion. Replying a question from Mr. Tapper regarding the legal aspect of the drone attacks and the target killings he said, "There is no question that we are abiding by international law and the law of war."<sup>154</sup>

According to Panetta, "the United States of America on 9/11 was attacked by

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<sup>153</sup> [www.brookings.org](http://www.brookings.org)

<sup>154</sup> [www.executivegov.com](http://www.executivegov.com)

al-Qaida. They killed 3,000 innocent men and women in this country. We have a duty, we have a responsibility, to defend this country so that al-Qaida never conducts that kind of attack again. Does that make some of the al-Qaida and their supporters uncomfortable? Does it make them angry? Yes, it probably does. But that means that we're doing our job. We have a responsibility to defend this country and that's what we're doing. And anyone who suggests that somehow we're employing other tactics here that somehow violate international law is wrong. What we're doing is defending this country."<sup>155</sup>

The reality is that there is no credibility of Mr. Panetta's statement about law abidance by the United States during Drone attacks in Pakistan, and that whatever, the CIA is doing in Pakistan is lawful and humanitarian. Experts of international law and the law of war ask many questions about the Drone attacks in Pakistan.

Mary Ellen O'Connell, a University of Notre Dame law professor, argues that "without a right to use military force on Pakistan's territory, we not only violate that State's rights under international law, we are violating the human rights of all victims, regardless of whether they are Taliban militants on a CIA hit list or bystanders. Some of the publicly acknowledged strikes in Pakistan have not been part of Pakistan's own armed conflict hostilities with Taliban. I know of no justification in international law for those."<sup>156</sup> Peter Spiro, a Temple University law professor, agrees that "Panetta is too quick to deny the existence of dissent over these questions. This is a novel application of international law"<sup>157</sup>

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<sup>155</sup> Ibid.

<sup>156</sup> [abcnews.go.com/ThisWeek/week-transcript-panetta/story](http://abcnews.go.com/ThisWeek/week-transcript-panetta/story)

<sup>157</sup> Ibid.

In this context one Professor of Law in New York University and UN's Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston gave most valuable response. On 28<sup>th</sup> May, 2010, the report was addressed in the UN General Assembly's Council of Human Rights. In this report, Alston discussed the legal aspect of the targeted killings. He defined the target killings as, "the intentional, premeditated and deliberate use of lethal force, by states or their agents acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator. Drone attacks are one type of targeted killings."<sup>158</sup> Alston, in this report acknowledged that "such policies have been justified both as a legitimate response to 'terrorist' threats and as a necessary response to the challenges of 'asymmetric warfare.'"<sup>159</sup> However, at the same time this report poses many other questions particularly expected conflicts of this phenomenon with the present IHL

International humanitarian law expert, Alston, ask few questions over the matter and they are well answered in his report, there is an account of questions and very brief summary of answers given below:

First: under which circumstances target killings can be justified?

Second: does it covers all type of suspected terrorists or only highly dangerous ones are targeted under international law.

Third: under which conditions the excuse of self-defense is valid for the target killings?

Fourth: do the attackers ensure sufficient care for safety of the civilians and

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<sup>158</sup> [www2.ohchr.org/English/bodies/hrcouncil/.../A.HCR](http://www2.ohchr.org/English/bodies/hrcouncil/.../A.HCR).

<sup>159</sup> Ibid.

minimize the chances of collateral loss?

Fifth: are the attacks proportional to the threat?

Sixth: does the decision making for target killing take place transparently and accountability is ensured?

These questions are essential to be satisfied, particularly for the drone attacks because such attacks are remotely controlled from thousands of miles away by the persons working for the secret intelligence agencies, instead of the military men present in the battlefield. And last not the least is the question often raised about the way of handling the targeted killings, especially by the Drones from the United States. It poses a serious threat to the credibility of international law. The report finds that: "a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks — human rights law, the laws of war, and the law applicable to the use of inter-state force. Even where the laws of war are clearly applicable, there has been a tendency to expand who may permissibly be targeted and under what conditions. Moreover, the states concerned have often failed to specify the legal justification for their policies, to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, or to provide accountability mechanisms for violations. Most troublingly, they have refused to disclose who has been killed, for what reason, and with what collateral consequences. The result has been the displacement of clear legal standards with a vaguely defined license to kill with a challenge to the sanctity of international law. The report doesn't flat-out state that what the United States is doing is illegal, but it raises tough questions that would lead some observers to make that conclusion. Nevertheless this report generously challenges the CIA Director Panetta's stance over the complete legality of drone attacks in Pakistan, in which he said, "There is no question that we are abiding by

international law and the law of war.”<sup>160</sup>

### **The UN Concern and Response:**

The UN concern and response can be seen under Alston report over the issue of human rights violation under the charter of international humanitarian law. This report was delivered on June 3, 2009. The United Nations Human Rights Council (UNHRC) delivered a report, which very harshly criticized the US tactics used in Afghanistan and Pakistan. The report emphasized on the American government's failures for keeping the track of civilian casualties of its military operations in the region which also includes the drone attacks in Pakistan. The US government, according to the report, even could not provide the exact information to the affected States and their citizens regarding the casualties or legal inquests resulted from these attacks. Any such information with the American government is already not accessible for the citizens because of the extreme secrecy regarding the Drone attacks planning.

In response to this report the United States representative at the UNHRC challenged the jurisdiction of UNHRC's investigator Alston and said that he had no right to give comments or investigate the US military operations in Pakistan or Afghanistan. Another US diplomat claimed that their military command is probing into the matter of casualties, and that they had complete record of the casualties.

On the other hand the investigator of the United Nations Human Rights Council Mr. Alston called on the United States on 27<sup>th</sup> Oct 2009 to show that the killings of the people along Pak-Afghan border by the Drones were not

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<sup>160</sup> [www.ciaexecutive.com](http://www.ciaexecutive.com)



random. It was very severe violation of international law. He further criticized US for having refused to respond the UNHRC's concerns.

It is worth-noting on the behalf of Alston to the US, "Otherwise you have the really problematic bottom line, which is that the Central Intelligence Agency is running a program that is killing significant numbers of people and there is absolutely no accountability in terms of the relevant international laws."<sup>161</sup>

Alston's group, on 2<sup>nd</sup> June 2010 issued a detailed report consisting of its inquiry into the drone attacks along Pak-Afghan border. The US was criticized for being "the most prolific user of targeted killings"<sup>162</sup> Alston, however, recognized that the right of self defense can provide the justification of the drones use in war. He demanded from the United States to keep the programme more open.

## **UN Response over War on Terrorism and Human Rights:**

UN Secretary General Kofi Annan while addressing to the session of the Security Council said: "We should all be clear that there is no trade-off between effective action against terrorism and protection of human rights. On the contrary, I believe that in the long term, we shall find that human rights, along with democracy and social justice, are one of the best prophylactics

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<sup>161</sup> [www2.ohchr.org/English/bodies/hrcouncil/.../A.HCR](http://www2.ohchr.org/English/bodies/hrcouncil/.../A.HCR).

<sup>162</sup> Ibid.

against terrorism”<sup>163</sup> He further elaborated, “In the war against terrorism, human rights norms are not respected by many states but if great powers become the violators of such norms then it will open doors to unrestricted wars”<sup>164</sup>

The Human Rights Watch observed, “Since September 2008, US aerial drones are believed to have carried out dozens of missile attacks on suspected militant hideouts in Pakistan's tribal areas, killing hundreds of civilians in addition to alleged militants, and prompting allegations that the US attacks have violated the laws of war”<sup>165</sup>

From the above discussion it can safely be concluded that international law can be interpreted in variety of the ways. However, to establish the legality and morality of the drone attacks, there are minimum four common factors/conditions which must be satisfied. These are: distinction of the targets; proportionality; the agent carrying out the strikes; openness and accuracy of the planning of the attacks.<sup>166</sup> The United States fail to fulfill these conditions in this case. Hence it is difficult to justify under IHR as well Law of War.

The unlawfulness of the target killings by the US drones in Pakistan's territory is actually the counter-productive of the US desire of achieving the political and security gains in this region. However, to legalize these operations, the

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<sup>163</sup> [www.san-pips.com/download.php](http://www.san-pips.com/download.php)

<sup>164</sup> Ibid.

<sup>165</sup> Ibid

<sup>166</sup> Ibid

United States needs to enter into some agreements/treaties with the Government of Pakistan with effects of extending the military aid to Pakistan's territory, and getting the consent of Pakistan for all such military operations on its territory. Such a step will definitely legalize its efforts to destroy or disrupt the alleged 'safe heavens' of the Al-Qaida on Pakistan's territory along the Afghan border. Further, Pakistan's law enforcing agencies' capacity of fighting against the terrorists is needed to be improved. It should be done by the United States by extending the latest war techniques, including the drone technology to Pakistani forces. Even after getting the technology the Pakistani forces will be needed to show necessary respect for all the standards of domestic legal restrictions as well as those of international law, particularly the IHL.

### **Appreciation of the Case-Study:**

The post September 11, 2001 world is challenging for post-Westphalia nation State system. The ethical system in terms of recognition of State sovereignty is going to be challenged by the new paradigm of globalization and its play-non-state actors. The emerging trends are making every aspect of world politics as globalize and same is true in the case of enemies and friends. Today, the US is hunting its global enemy the extremists and Al-Qaida (non-state actor) all over the world and it named as global terrorist network. As enemy is global in its nature, so the existing paradigm that is primarily state-bounded is going to be obsolete. It is debatable whether or not this shift in international political system is stabilizing or destabilizing but at this point of time it is shaking the existing order.

The case of US-drone-attacks in the North-West of Pakistan and the resulted extrajudicial targeted killings has raised serious questions over the compliance

of international law. The measure available in the form of theory (just war framework) and the relevant articles of international law specifying the legal and illegal connotation of a war provides clear indication of unjust actions on behalf of the US. The evidence from the Pakistan side and the US side about killings is unambiguous although with contradictory ends. Pakistan is taking the US drone strikes and killings of people as clear violation of its sovereignty as well as severe violation of human rights according to the UN Charter.

From the US point, drone attacks are the continuity of the US war against terrorism and the killings by these aerial strikes involve mainly hide-outs of terrorist who were involved in 9/11 events. According to American Administration at any time these terrorists can plan another attack on the US. Hence, by taking plea of self-defense the US preserves all rights of self-defense according to international law. So, the US is acting according to the pre-emption doctrine. From the legal point of view the US has done illegal or unlawful acts in the territory of Pakistan in the form of extrajudicial killings as well as violating the territorial sovereignty of Pakistan.

There can be another explanation too, that is power politics and national interest. Theories of international politics pave the way for this explanation. Political realism simplify the problem by asserting that in global world order the super powers merely count the interests of satellite states in the international political system and they shape the law and explain the law according to their practice. The current US practice is shaping the theory of international politics and the international political system is serving the purpose of uni-polar world order. The US is setting rules of the game as it has been the practice of world powers. There is a debate between those who strongly favor the offensive use of American super power and those who favor the defensive use of American

enormous power.

The history of empires provides a lesson that when empires or super powers widely misuse their enormous power, they fade away. The usage of hard power without complying law, morality or ethics (the soft power) is self-destructive recipe. This usage of hard power with or morality or without caring law is what that faded the Romans and same might be true with the super power of today – the United States of America.

## **Chapter-5**

### **CONCLUSION**

International Humanitarian Law provides a full range protections and safeguards to the individuals and all the non-combatants in the belligerent or hostile activities. International Law is full of such written articles and provisions in this regard. However, its effectiveness is facing the biggest challenges of the history.

The 9/11 incident has actually put under threat not only the humanitarian international law but also the validity of all international instruments related to protection of human rights, protection of non combatants in war, and law of war in general. Blind use of military and bypassing the UN and other international organizations has become a common feature of international conflicts in these days.

Unilateral reaction of the United States on 9/11 incident shows its extreme lack of confidence in the UN and other international organizations, which in turn is alarming for the future of the International Humanitarian Law and human rights. Despite quick and effective response of the entire international community to 9/11 incident the US decided its own way of reaction by giving a dictation to the other allies and concerned nations and leaving no option for them. UN' resolutions were backed with full determination of the international community for uprooting the terrorism, but it never was allowed by the US and the NATO countries. Even the 'enemies' in this war were undefined and vague. It actually opened the ways for the powerful states of different regions for arbitrary use of power. Freedom fighters can now easily be labeled as 'terrorists' and targeted brutally by the State

power. Resultantly a new component of state-terrorism has been emerged in different regions of the world.

9/11 incident practically has shown the brutal use of global power by this "civilized" world. Global powers are more concerned for their international status/image rather than for human sufferings and protection of the human rights. As mentioned earlier that in September 2002, US announced a new National Security Strategy<sup>167</sup> **asserting that it will maintain global hegemony permanently.** Any challenge will be blocked by force. The use of power never had been so unchecked earlier since World War II. All the humanitarian international law is presently under threat, and practically being nakedly violated in the region under study.

In Afghanistan the masses had suffered by the militancy due to the Soviet invasion in 1980s. After 9/11 they are badly affected by the belligerency between Taliban on one hand and the US and NATO forces on the other hand. No proper protection is provided to the non-combatants or civilians in the region of the so called war. Violations of laws of war and international humanitarian law had been highlighted repeatedly by the human rights organizations but the international community and the UN agencies remained silent or helpless on this issue.

In Pakistan, the militants are being targeted through drones by the allied and NATO forces. However, it results into the local frustration as well as retaliation.

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<sup>167</sup> The National Security Strategy of the USA is a document prepared periodically by the executive branch of the government of the United States for Congress which outlines the major national security concerns of the United States and how the administration plans to deal with them.

Drone attacks have turned the public opinion against US and its supporters. On the other hand the Talibans have actually won the sympathies of the local population in the tribal areas of Pakistan. Such a situation may be a turning point for US future in this area.

Other concern related to the human rights is the political aspect of this war against terror. Articles of UN Charter related to self respect of a nation, respect for nations' political independence and sovereignty have lost their significance due to constant violations by the global power and its allies. Silence of the international organizations further contributed towards this end. The doctrines of political independence and territorial sovereignty are now vanishing gradually. All standards of war crimes, old charters, conventions, treaties for peaceful settlement of international disputes have been outdated, ineffective or totally irrelevant. They need a complete overhauling.

Actually American Policy of so called war against terror directly contradicts with those high ideas on the basis of which its war of independence was fought. Such ideas were expressed in the Declaration of Independence 1776. It refers to the natural human rights which are declared as inalienable. All men are endowed by God with certain specific rights such as equality, liberty, pursuit of happiness. Same is the case of nations. They have inherited the right of equality, liberty, fraternity, and on top of all, the right to keep up their political independence and sovereignty. The war against terrorism being fought at the moment in the region under study is a total negation of these high ideas expressed in the Declaration of Independence by the American Forefathers. In reality those ideas gave the stability to the United States. To maintain this stability, and even its present status of global power, the US will have to stick with those same ideas. Unilateral definitions/interpretations of just or unjust war cannot prevail for a longer time.



The international community will have to give universal meanings to this terminology.

Effective checks against the violation of human rights in any case should be ensured. For this purpose the smaller/developing nations or regional organizations may play an effective role against the one power monopoly. Further, the NGOs role in this context is significant. Many NGOs such as 'Human Rights Watch' are already active. Though they are fighting without any State power, they have the capacity to mobilize the international public opinion as well as the masses within the United States.

Implementation of all humanitarian laws, confinement of the human sufferings during the belligerencies, and over all international peace and law and order is impossible without strengthening the UN and its relevant or allied institutions.

### **Recommendations:**

- The human rights organizations or NGOs are playing their role to generate the awareness among the masses at international level. This is a positive phenomenon; however, its effects are very slow-spreading. It should remain continue but more effectively.
- The international as well as the regional organizations are needed to be effective as well as assertive regarding the implementation of their resolutions or decisions. They should build up an effective infrastructure for the purpose of enforcement of their decisions.
- Old and classical treaties, conventions, declaration regarding the protection of civilian population during war should be re-drafted/revised in the light of the modern challenges. It will certainly help to revitalize the international humanitarian law.

- Sovereignty of all the states and the sanctity of international boundaries must be maintained very strictly by the UN in any case.
- The International Court of Justice and International Criminal Court should be given compulsory jurisdiction, particularly in the matters of violations of the human rights.
- Regional organizations should play the role of watch dogs for the protection of human rights on the same lines as the European Community is playing through its different organs.
- The so called war against terror should strictly be controlled and confined by the UN Security Council. The boundaries and the parties as well targets of this war are needed to be well defined.

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