

## Legality of US Drone Strikes

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**ABSTRACT:** *The fundamental principles of international law are the apex legal definitions that sit at the very top of the legal theory. Professor Alain Pellet has highlighted the distinction between the fundamental principles of international law and the general principles of international law.<sup>1</sup> Pellett (2000) states that the general principles are reflected in the municipal laws as various subsets of international law principles such as adherence to the universal human rights as part of the municipal legislation for human rights.*

*The 'fundamental' nature is derived from international treaties that are the underline body giving it the credence as the apex body of law. These fundamental principles of international law are, for example, the principle of equality and sovereignty of nations, the principle of the prohibition on the use of force, the principle of the threat to the use of force, the principle of human dignity etc.*

*The United States (US) has been using Drones to target persons deemed a threat to the US interests outside the territorial United States. The US Central Intelligence Agency (CIA) run drone strikes in Pakistan, Afghanistan, Iraq, Yemen, Somalia, Syria and other countries are authorized by the US municipal law. The US Congress authorized the strikes in 2001 pursuant to Resolution 23 in the 107<sup>th</sup> Sitting of the US Congress. International community, as well as International legal scholars, have raised concerns over the 'extra-judicial' nature of these killings as a violation of International Law (IL). This paper presents a birds-eye view of the nature of these drone strikes under the IL concerning right to life.*

**Keywords:** *Drones, Drone Strikes, US Drone Strikes, International Law*

### I. INTRODUCTION

The American Civil Liberties Union (ACLU) organised an international conference in 2012 to explore the legality of the United States (US) government's extrajudicial killings using the Central Intelligence Agency (CIA) drone programs.<sup>2</sup>

The United Nations (UN) Special Rapporteur on Extrajudicial Killings, Mr Christof Heyns spoke at the 2012 ACLU conference. Heyns criticised the CIA drone strikes in countries like Pakistan, Iraq, Yemen, Libya and Syria stating that the US actions international treaties on protecting human rights. Heyns went as far as stating on the record that some of the US drone strikes may even constitute 'war crimes'.<sup>3</sup>

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<sup>1</sup>Alain Pellet, "State Sovereignty and the Protection of Fundamental Human Rights: An International Law Perspective," 2000, 11.

<sup>2</sup>Owen Bowcott, "Drone Strikes Threaten 50 Years of International Law, Says UN Rapporteur," *The Guardian* 21 (2012): 2012.

<sup>3</sup>Binoy Kampmark, "Patriotism, Weapons Fetishism and Accountability: An Examination of the US UAV Program," *Fast Capitalism* 12, no. 1 (2019).

The legality of US drone strikes across the world have become a topic of hot debate amongst scholars of international human rights law.<sup>4</sup> The right to life is one of the fundamental rights enshrined in the UN Universal Declaration of Human Rights (UDHR). However, UDHR is non-binding in nature. European Convention on Human Rights (ECHR) right to life is enshrined in law and is enforceable through domestic law. Similarly, the European Union Charter of Fundamental Rights (CFREU) also protects the right to life and is enforced through the supranational EU Law binding the EU Members States to protect the right.

The US has withdrawn from the UN Human Rights Council since June 2018. The US withdrawal from the UN Human Rights Council does not mean that the UDHR while being non-binding in nature, does not apply to the US. It is an entirely separate debate if the US has considered the UDHR while initiating its global extrajudicial killings program using CIA drones.<sup>5</sup>

This paper examines the legality of the US drone strikes resulting in extrajudicial killings of civilians and even US nationals in the light of international human rights law.

## II. US JUSTIFICATIONS UNDER *IUS AD BELLUM*

The legal doctrine of use of force, *ius ad bellum* and the doctrine of *jus ad bellum* or just use of force, also called just war are the focal arguments used by the US government to justify its extrajudicial killings using drone strikes in other sovereign states.<sup>6</sup> Most of the scholarly literature points to *jus ad bellum* doctrine at play in the US drone attacks. This article examines the *ius ad bellum* as its central theme of investigation.

The fundamental aim of international rule of law pertaining to *ius ad bellum* is to establish an international order that defines a constrained use of power to limit violence. It is this aim within the international legal system that has led to the development of detailed legal rules governing the use of force within the international community of states.

In the seminal case of *Nicaragua v United States*, in the judgment read by the International Court of Justice (ICJ) President Nagendra Singh, stated that “*the international law on the use of force is the very cornerstone of the human effort to promote peace in a world torn by strife*”.<sup>7</sup>

Scholarly literature points to the fact that by 2013, the US had deployed over 20,000 unmanned drone systems across its international military bases. The US drone strikes in Pakistan killed 2300 people between 2004 and 2014. The reports by independent observers confirmed that at least 420 of the victims of those strikes were children and innocent civilians. During the same period, the US drone strikes in Yemen resulted in over 300 children and civilians were killed.<sup>8</sup>

To understand the nature of the US, drone strikes killing children and innocent civilians in other sovereign states, the doctrine of *ius ad bellum* must be examined under the law governing the use of force by one State within another sovereign State's territory.

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<sup>4</sup>Milena Sterio, “The United States’ Use of Drones in the War on Terror: The (II) Legality of Targeted Killings under International Law,” *Case W. Res. J. Int’l L.* 45 (2012): 197.

<sup>5</sup>Susan Mapp and Shirley Gatenio Gabel, “The Decreasing Role of the USA in Promoting Human Rights,” *Journal of Human Rights and Social Work* 4, no. 2 (2019): 101–2.

<sup>6</sup>Craig Martin, “Going Medieval: Targeted Killing, Self-Defence, and the Jus Ad Bellum Regime,” *TARGETED KILLINGS: LAW & MORALITY IN AN ASYMMETRICAL WORLD*, 2011, 223.

<sup>7</sup>Thomas J. Pax, “Nicaragua v. United States in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion,” *BC Int’l & Comp. L. Rev.* 8 (1985): 471.

<sup>8</sup>Kevin Jon Heller, “‘One Hell of a Killing Machine’ Signature Strikes and International Law,” *Journal of International Criminal Justice* 11, no. 1 (2013): 89–119.

Under the doctrine of *ius ad bellum*, the law on the inter-State use of force aims to firstly protect State sovereignty and by protecting the State sovereignty, it secondly protects the individual members of the state. It follows by analogy that the State sovereignty under the doctrine of *ius ad bellum* acts as an additional element providing protection to the right to life.

Drones strikes are not illegal. Drones as military equipment do not qualify as banned instruments under Article 8 of the Rome Statute concerning armed conflict. Article 8 of the Rome Statute speaks to the illegality of weapons that cause indiscriminate harm or unnecessary suffering.<sup>9</sup>

It is an entirely different matter altogether to justify the lawful action of drones under the customary principles of international law such as necessity and proportionality for military actions that result in killing of innocent civilians and civilian objects.<sup>10</sup>

Protocol I, Article 51 (2) of 1977 Geneva Convention prohibits terrorizing civilian populations. For the purposes of illustrating the use of drones as a potential war crime, Article 51 (2) provides some substance. The buzzing heard from drones can cause fear or terror, particularly as those who hear the drones are unaware as to know whether the drones are armed or not. Scholarly literature has documented the long-term psychologically adverse permanent damage to children in regions where US drone strikes are a norm.<sup>11</sup> Factual uses of drones are increasingly being seen by legal scholars to induce terror or fear into civilian populations as drones are used for even reconnaissance missions. These drones sometimes follow, hover over, and maintain visual connections with movements and populations-at-large.<sup>12</sup> These drones terrorise families, children and, civilians that potentially result in violations of personal dignity and general concern for the safety and welfare of those not part of any adversarial or terrorist activities. Article XXII of The Hague Rules of Aerial Warfare states,

“Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited.”<sup>13</sup>

In view of the above rules of IHL, it is asserted that the use of drones in the present scenarios of aerial warfare, terrorizes innocent civilian populations. The continued use of the drones in its present form presents an issue of possible war crimes.

The international laws protecting State sovereignty and by extension, the State's territorial integrity also serves as a barrier to any potential breaches and threats to human rights. The doctrine of *ius ad bellum* in this very broad sense forms an important component of the international legal systems to protect individuals against the use of lethal force by another State.

Within the context of International Human Rights Law (IHRL), the US use of force resulting in the killing of children and innocent civilians must be understood by describing the three fundamental features of a particular drone strike which are: (1) how the drone strike was carried out, (2) who was specifically the target of the strike and, (3) what consequences followed the drone strike.<sup>14</sup>

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<sup>9</sup>Michael N. Schmitt, “Drone Attacks under the Jus Ad Bellum and Jus in Bello: Clearing the ‘Fog of Law,’” *Yearbook of International Humanitarian Law* 13 (2010): 311–26.

<sup>10</sup>Ryan J. Vogel, “Drone Warfare and the Law of Armed Conflict,” *Denv. J. Int'l L. & Pol'y* 39 (2010): 101.

<sup>11</sup>Ian GR Shaw, “Predator Empire: The Geopolitics of US Drone Warfare,” *Geopolitics* 18, no. 3 (2013): 536–59.

<sup>12</sup>Michael J. Boyle, “The Costs and Consequences of Drone Warfare,” *International Affairs* 89, no. 1 (2013): 1–29.

<sup>13</sup>The Hague Rules, “The Hague Rules of Air Warfare,” 1923, [http://lawofwar.org/hague\\_rules\\_of\\_air\\_warfare.htm](http://lawofwar.org/hague_rules_of_air_warfare.htm).

<sup>14</sup>Daniel R. Brunstetter and Arturo Jimenez-Bacardi, “Clashing over Drones: The Legal and Normative Gap between the United States and the Human Rights Community,” *The International Journal of Human Rights* 19, no. 2 (2015): 176–98.

The three general schools of thought regarding the interpretation of treaties pose a challenge for legal practitioners arguing for and against the use of drones by the US that result in the killing of children and innocent civilians. It is because of interpretation of IHRL that a generic use of force may satisfy some requirements of the *ius ad bellum* doctrine, while the strike may still be in violation of other with applicable rules of IHRL, thus being unlawful under international law. Similarly, the inverse of this statement may be true.

But in the specific case of a drone strike by a State, any strike that may appear to comply with the applicable rules of IHRL would still constitute an **unlawful act** if it does not satisfy the conditions for lawful force under the doctrine of *ius ad bellum*. The unlawfulness of the act under international law flows from the breach of the responsibility of the State to protect innocent lives, knowing fully well that the act of the use of drones will result in the killing of innocent children. The hundred of US drone attacks that resulted in the killing of innocent children and civilians makes it even harder for the US to defend its action for the use of force under the IHRL and the doctrine of *ius ad bellum*.

Article 51 of the UN Charter justifies response to an armed attack using force in another State's territory. However, any claim to use force in another State's territory for acting in self-defence under the purposes of Article 51 is *irrelevant* since the obligation of the State using force in response still requires compliance with the rules of IHRL that oblige the State to protect the right to life of those being targeted by the drone strikes.<sup>15</sup>

### III. CONSENT & USE OF FORCE

Scholarly literature points to the issue of compliance with the rules for the inter-state use of force in the case of drone attacks by one State to target individuals located in another State. IHRL specifically directs the protection of the individuals affected by a drone strike. While the law on the use of inter-State force focuses on State sovereignty and protecting the legal rights of States. These laws include the right and interest of the State to have the lives of its citizens and inhabitants protected against any acts of aggression by another State.

Article 2(4) of the UN Charter and normative international law prohibit any State from threatening another State or the use of inter-State force. The presentation of consent by a State to allow the use of force on its territory by another State prevents engaging of Article 2(4). In the absence of consent, the UN Charter provides two exceptions to the Article 2(4) prohibition. The first exception is when action is taken *lawfully* in self-defence under Article 51. The second exception is when the Security Council authorizes the use of force under Chapter VII of the UN Charter.<sup>16</sup>

Indeed, when a State consents to another State targeting individuals on the consenting State's territory with drones, no issue in principle are likely to arise under the doctrine of *ius ad bellum*, for the purposes of Article 2(4) of the UN Charter. Pakistan withdrew its consent and this fact was highlighted in 2013 during the visit by Ben Emmerson QC, the UN's special rapporteur on counter-terrorism and human rights. Ben Emmerson QC declared US drone strikes in Pakistan as the violation of its sovereignty by the US government.<sup>17</sup>

In the cases of Yemen and Somalia, there is consent from the factional governments. Both the countries are bitterly divided amongst factions that are supported by various powers fighting proxy wars in the two countries. Regardless of the political dimension of the consent, there are considerable issues that create great

<sup>15</sup>Jessica Dorsey and Christophe Paulussen, "Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism," *Yearbook of International Humanitarian Law* 16 (2013): 219–50.

<sup>16</sup>John D. Becker, "The Continuing Relevance of Article 2 (4): A Consideration of the Status of the UN Charter's Limitations of the Use of Force," *Denv. J. Int'l L. & Pol'y* 32 (2003): 583.

<sup>17</sup>Owen Bowcott, "US Drone Strikes in Pakistan 'Carried out without Government's Consent,'" *The Guardian*, 2013, sec. World news, <https://www.theguardian.com/world/2013/mar/15/us-drone-strikes-pakistan>.

legal difficulties in the case of states that are grappling with institutional issues. The difficulties of consent in such situations give rise to examining (1) who may give consent, (2) is there public knowledge of the given consent, (3) the consent was given explicitly or implicitly and last but not the least, (4) the consent was obtained through economic or means of coercion by the state intending to use the force.<sup>18</sup>

There are two significant points that need to be raised before this crucial discussion can be closed. The first is the ILC commentary (2001) on Article 20, 'Articles on Responsibility of States for Wrongful Acts' at para 5 which states,

“whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State ... For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State<sup>19</sup>”.

The second is from the UN Special Rapporteur's Christof Heyns Report on Lethal Autonomous Robots that came out in April 2013 about the consent,

“certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance”.<sup>20</sup>

The serious nature of consent under the IHRL necessitates that consent given by a state cannot be implied. Also, if the force used exceeds the limits of the consent given, that use of force will be a violation of Article 2(4).

#### IV. ACCOUNTABILITY FOR VIOLATIONS

The contemporary concept of human rights necessitates that those responsible for unlawful violence against humanity must be held accountable. Any failures to investigate such violations and not holding those responsible is in itself a violation of IHRL. In the ECtHR case of *Kaya v Turkey*,<sup>21</sup>, paras 86–92, the Court examined the unlawful killings by the State security forces under the ECHR Article 2 right to life and ECHR Article 3 protection against torture and inhumane treatment. The Court also found that the State has the responsibility to investigate and hold those accountable for the breach of the right to life and protection from torture. Similarly, in the ECtHR case of *McCann and others v United Kingdom*, App No 18984/91, Judgment of 27 September 1995, at para 169, the Court examined the extrajudicial killing of suspected members of IRA by

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<sup>18</sup>James Crawford and Crawford James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002).

<sup>19</sup>Erika De Wet, “Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request,” *International & Comparative Law Quarterly* 67, no. 2 (2018): 287–313.

<sup>20</sup>Christof Heyns, “Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development” (Koninklijke Brill NV, 2013), [https://doi.org/10.1163/2210-7975\\_HRD-9970-2016149](https://doi.org/10.1163/2210-7975_HRD-9970-2016149).

<sup>21</sup>ECtHR, “KAYA v. TURKEY,” 1998, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58138%22%5D%7D>.



the British special forces in Gibraltar. The Court found that the killing of the IRA suspects was a breach of ECHR Article 2 right to life by the British government. The killing of the suspects to prevent a bombing plan by the suspects was found to be disproportionate to the 'threat' posed by the suspect's plan.

The US uses drones with lethal effects to kill civilians and innocent children by stating their objective to kill suspects who harbour animosity against the interests of the US outside the territorial limits of the US. This raises serious question about the ability of the international courts like the ICJ and others to hold the US accountable, under those human rights treaties to which the US is a party and for the US deadly extraterritorial actions.

## V. CONCLUSION

The US drone strikes across the world have killed over 12,000 people since the start of the program post 9/11. The exact numbers of innocent civilians and children killed by the US in those strikes is not clearly known. The question of proportionality and meeting the thresholds of the stated conditions within the IHRL have never been a concern for the US.

The US drone strikes post 9/11 has increasingly desensitised the extrajudicial nature of those killings. The Westphalian concept of sovereignty has been destabilised by US drone strikes. The legal concept of sovereignty of states is the core concept in building an international order of human rights law protected under the UDHR and other charters. State sovereignty has never been an absolute concept. The emergence of human rights law has altered the normative standing of State sovereignty within the international law context. Regardless of the fraying at the edges, the concept of State sovereignty allows to maintain the balance against unpredictable international conflict.

The US has repeatedly pronounced its intentions to use force on the territory of other sovereign states with or without their consent. The US invasion of Syria and the US continued presence in Iraq and Afghanistan suggests that the State sovereignty concept is not likely to stand in the way of US use of force to safeguard its interests. The problem becomes, even more, exacerbated since the United States is the *self-appointed* arbiter of assigning any threats to its interests or the proportionality of the force used by it to neutralize the threats.

The US drone strikes not only pose a challenge of breaking international law, but the US insistence on having its way in the interpretation of IHRL is also a potential issue of international law's brokenness. The sustained US assaults on the meaning of core legal concepts pertaining to the doctrine of *ius ad bellum* have left the international law on the use of armed force or *ius ad bellum* not merely ambiguous but rather render it effectively indeterminate.

There is little in the way of efforts at the level of the international judicial bodies to check the increasing boldness on part of the US to kill with impunity officials of the governments deemed hostile to the US in any way. The killing of an Iranian Major General by the US in Iraq is the example of the escalations by the US to act as the arbiter of 'good and evil' in the world. Such actions by the US place the world closer to the cusp of another global conflict. There is an urgent need for the international community to act and reach a consensus on the interpretation of the constraints that international law can impose on the use of drones beyond State boundaries. This legal order is crucial to keep a viable and strong system of international security intact.

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