

Drone Strikes: The Future of *Jus ad Bellum* in the Age of Pre-Emptive Warfare

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The Law of War refers to the component of international law that regulates the conditions for war (*jus ad bellum*) and the conduct of warring parties (*jus in bello*).¹ Over the past two decades, the conduct of warfare has changed drastically, and has become more asymmetric in nature. A prominent feature of this new kind of warfare is the increased use of armed drones or unmanned aerial vehicles (UAV). A sharp increase in the use of these weapons occurred under the Obama administration, which sought to stop expected future attacks by non-state actors residing in different states by using the theory of “pre-emptive” self-defense.² This theory incidentally is not in keeping with the established values under customary international law. Moreover, it has been argued that this practice runs afoul of international criminal law.³

International criminal law (ICL), generally speaking, is aimed at punishing acts carried out by individuals or groups that adversely affect fundamental human rights, namely: life, liberty and security.⁴ In addition, ICL aims to punish actions which may have been carried out as part of a broader state policy – therefore the perpetrators are unlikely to be punished at the domestic level as long as the responsible administration remains in power.⁵ Article 2(4) of the UN Charter governs the laws of the use of force by states. “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence

¹ Waseem Ahmad Qureshi, “The Legality and Conduct of Drone Attacks” (2017) 7:2 Notre Dame J Intl & Comp L 91 at 92.

² *Ibid* at 95.

³ *Ibid*.

⁴ International Justice Resource Center, “International Criminal Law” online: IJR Center <<https://ijrcenter.org/international-criminal-law>>.

⁵ *Ibid*.

of any state, or in any manner inconsistent with the purposes of the United Nations”.⁶ The exception to this rule is Article 51, which preserves a state’s innate right to self-defense.⁷ Article 51 was invoked by the US as a justification for the post 9/11 invasion of Afghanistan.

However, the International Court of Justice (ICJ) has established that Article 51 can only legitimately be invoked in the face of such aggression that constitutes a **substantial** use of force. Trivial frontier incidents or acts of terror committed by a small number of actors does not qualify.⁸ In addition, the ICJ held that the consequent use of force in self-defense must follow the established doctrines of “necessity” and “proportionality”.⁹ International law is also clear on the fact that the consent of a host nation must be obtained before a foreign ally (like the US) can legitimately carry out drone strikes within their sovereign territory.¹⁰

Although the US has received the (grudging) consent of the Afghan government to conduct drone operations within Afghanistan, the strikes have often taken place within the territorial boundaries of other countries such as Pakistan. In 2012, the Pakistani parliament unanimously ordered the immediate termination of US drone attacks in the territories of Pakistan. Despite this, the strikes continued.¹¹ In terms of “necessity” and “proportionality”, counterterrorism experts believe that drones are not able to pursue military goals because the legal requirements of proportionality must be followed. Drone strikes assassinate far more innocent people in collateral

⁶ Supra note 1 at 93.

⁷ Ibid.

⁸ Ibid at 94.

⁹ Ibid.

¹⁰ Ibid at 96.

¹¹ Ibid at 97.

damage than the actual target – who is more often than not a single individual. The number of casualties is around 10 innocent people per attack.¹²

One person who took umbrage with President Obama's heavy reliance on drones was General (Ret.) Stanley McChrystal, who questioned the efficacy and indeed legality of targeted killings. He said "the resentment created by American use of unmanned strikes is much greater than the average American appreciates. They are hated on a visceral level".¹³ This, according to McChrystal, "exacerbates a perception of American arrogance that says we can fly where we want, we can shoot where we want, because we can".¹⁴ He was also quoted as saying "that for every innocent person you kill, you create 10 more enemies".¹⁵ A legal consultant for the US State Department added that drone strikes in the absence of valid permission establish an act of war against a sovereign state.¹⁶

The US may claim that drone strikes are legitimate due to an existing state of armed conflict. However, the International Law Association defines armed conflict by setting criteria for the use of force, under which an armed conflict must include the presence of an organized group, *inter alia*, intensely fighting with other groups. Isolated attacks by armed groups acting as terrorists do not constitute an armed conflict.¹⁷ As previously mentioned, the US has conducted drone strikes off the battlefield, where there are no aggressions or skirmishes and where the consent of the state has not been given. Recall the recent killing of Iranian General Qasem Soleimani who was

¹² Ibid at 96.

¹³ David Alexander "Stanley McChrystal on Drones: Retired General Cautions Against Overuse of 'Hated' Strikes", Huffington Post (7 January 2013), online: www.huffpost.com.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Supra note 1 at 97.

¹⁷ Ibid at 95.

transiting through an airport in Iraq. All possible culpability aside, he was not engaging in any aggression at the time, and no battle was occurring in that local. Due process, right to a trial? Moreover, CIA operatives (who may have carried out this operation) are neither members of the military nor trained in legal understandings of distinction, proportionality, or necessity in armed conflicts – are operating these drones. Drones are not law enforcement weapons but military weapons, and therefore must be governed by *jus ad bellum* and *jus in bello*.¹⁸

Imagine, a small village in a rural part of South West Asia. There is conflict in the greater region, but this place has been relatively peaceful for months. Farmers harvest their crops; marketeers pedal their wares – and children play. Then one night, the villagers are awoken by a thunderous, ground shaking blast. A house in the village has just been destroyed by a hellfire missile lunched from a drone. The family that lived in the house are all killed, including the “visitor” that was bedding down with them for the night. Question – is this a legal use of force, or an extrajudicial assassination? The locals know who is responsible and any good will or sentiment towards the West evaporates in an instant. Advisors to President Obama often referred to operations like this as a “cleaner” option. Cleaner for who?

¹⁸ Ibid at 104.

Table of Authorities

Secondary Material: Articles

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