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Strikes under International
Humanitarian Law**

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Abstract

The use of drones raises quite a few questions and there is an ever-present debate about the legality and morality of employing drones in combat. Drones cross borders of states and pave the way for fatalities of terrorists (alleged or proven) as well as non-combatants. This consequence of drone strikes is one reason for the numerous debates regarding this topic in light of international law discourse. The issue of drones presents the field of international law with a fascinating argument, which contends that drones are operating inside a legal vacuum because there is legal ambiguity due to it being a contemporary development. This paper argues that according to International Criminal Law (ICL) and International Humanitarian Law (IHL) drone strikes could be prosecuted as war crimes before the International Criminal Court (ICC).

Keywords: *International Humanitarian Law, Unmanned Aerial Vehicles, International Criminal Law, civilians, combatants, Afghanistan, Rome Statute, Proportionality Principle, Precautionary Principle, Distinction Principle, Drones.*

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Introduction

Two weeks after officially withdrawing from Afghanistan, the United States conducted a drone attack on 29 August 2021. This attack, while intended to target an Islamic State of Iraq and Syria-Khorasan (ISIS-K) terrorist instead killed Zemari Ahmadi in his driveway along with nine other members of his family (including 7 children). A New York Times investigation pressured President Joe Biden to call it a 'tragic mistake' but unfortunately, this is a mistake that the people of Afghanistan, Iraq, Yemen, Syria, Somalia, and Pakistan have to face again and again. There have been over 13,000 confirmed drone strikes in Afghanistan since 2015 and 430 confirmed strikes in Pakistan since 2008 with tens of thousands of people killed.

Drones or Unmanned Aerial Vehicles (UAVs)¹ have become more common in the contemporary battlefield in the aftermath of 9/11 and the war on terror. Former US President Barrack Obama had declared them as an extremely effective method of combating terrorism and a weapon of the future.² The use of drones, however, raises quite a few questions and there is an ever-present debate about the legality and morality of employing drones in combat. Drones cross borders of states and pave the way for fatalities of terrorists (alleged or proven) as well as non-combatants. This consequence of drone strikes is a reason for the numerous debates regarding this issue in light of the international law discourse. There is also a lack of transparency and accountability within drone warfare and it is causing a lot of tension and strife in countries where such raids are being conducted. Over the course of the past twenty years, drone strikes have been greatly criticized by UN special rapporteurs along with

representatives of Amnesty International and many other international human rights organizations.

The Former UN Special Rapporteur on human rights and counter terrorism, Ben Emerson, focused on the importance of legal clarification. He stated that there exists murkiness when it comes to figuring out whether it is legal to eliminate targets by drones. Although this technology multiplied very fast, there is no agreement among international lawyers and countries on the basic and fundamental legal principles.³ A resolution was approved by the UN Human Rights Council in March 2014, drafted by Pakistan which stated that whenever using armed drones, it's absolutely vital to adhere to the obligations under international law, "as well as the UN Charter, human rights and international humanitarian law (IHL), in particular the principles of distinction and proportionality."⁴

The former Director of the US Central Intelligence Agency (CIA), Leon Panetta, retorted in May 2009 against the escalating criticism about the US use of drones. The counter argument presented by Panetta explicitly stated that drone strikes are 'precise' and lead to 'limited collateral damage'.⁵ Additionally, Panetta asserted that it is the only tool that can prove successful in opposing and disrupting Al-Qaeda and other terrorist leaderships. David Kilcullen and Andrew Exum have stated that drones are not precise and civilian casualties cannot be controlled. They also wrote that it can be estimated that the US was killing 50 unintended targets for each intended target.⁶

Debate surrounding the Legality of Drones

The issue of drones presents the field of international law with a fascinating argument, which contends that drones are

operating inside a legal vacuum because there is legal ambiguity due to it being a contemporary development. Hence, it is necessary to create new legal discourse around this changing technology. This paper argues that according to International Criminal Law (ICL) and International Humanitarian Law (IHL) drone strikes could be constituted as war crimes before the International Criminal Court (ICC). The US drone strikes fail to meet the standards of international law, particularly when we consider that many scholars, UN officials, and human rights organizations have declared in various reports that drone strikes leading to a large number of civilian casualties may constitute a war crime. There is no legal bearing to the US argument that such drone strikes adhere to the principles of war. The principles of distinction, precaution, and proportionality of customary IHL have also failed to have been met by the US in majority of the drone attacks. Thus, it is necessary to determine whether these strikes could be considered as a violation of IHL.

The US Drone Warfare

Drones were initially invented during World War I for purposes of gathering intelligence and conducting surveillance. The world's first combat drone was invented around 2001 and was named the Predator.⁷ The US Department of Defence states, "Unmanned systems can help in countering threats by reducing risk to human life and increasing standoff from hazardous areas."⁸ The United States is adamant that drones are an accurate and highly effective weapon. Both the CIA and Pentagon both like to highlight the cases which were deemed successes in regards to effectiveness and precision of drone attacks. Such successful cases whereby drones have eliminated High Value Targets (HVTs)

include the August 2009 attack, when the leader of Tehrik-i-Taliban Pakistan (TTP) Baitullah Mehsud was killed in a drone strike. The US annual budget for drones grew to about \$6.97 billion in 2018. Additionally, the drones' quantities in the US military have gone from under 3,100 to over 11,000.⁹

Afghanistan has been one of the most affected countries when it comes to drone strikes, however, very few in-depth studies exist which delve into detail regarding this topic. The number of minimum confirmed strikes, just till 2020, was 13,072. The total number of civilians killed during these strikes has varied from 300 to 1,000 and the number of children killed is anywhere from 66 to 184. Table 1 below shows countries with the number of casualties from drone strikes.

Table 1

Number of Casualties from Drone Strikes by Country

Country	Minimum strikes	Civilians dead	Children dead	Total dead	Injured	Total casualties
Afghanistan	13,072	300–909	66–184	4,126–10,076	658–1,769	4784–11,845
Somalia	202	12–97	1–13	1,197–1,410	55–101	1252–1,511
Pakistan	430	424–969	172–207	2,515–4,026	1,162–1,749	3,677–5,775
Yemen	336	174–225	44–50	1,020–1,389	155–303	1175–1,692
Total	14,040	910–2,200	283–454	8,858–16,901	2,030–3,922	10,888–20,823

Source: <https://www.thebureauinvestigates.com/projects/drone-war>

Drones in International Humanitarian Law

Generally, the use of drones in conventional war is, for the most part, uncontroversial under *jus in Bello* as there may be very few practical differences between the use of a Cruise Missile or an

aerial bombardment and the use of a drone equipped with exclusive weapons. The UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions stated that although “in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal.”¹⁰ The use of armed drones will, thus, have to comply with, at a minimum, the IHL rules applicable to the conduct of hostilities. In particular the rules relating to precautions in attacks, distinction, and proportionality and they must not employ weapons that are deemed unlawful under IHL. The central rules of IHL prohibit indiscriminate targeting or the use of weapons incapable of distinction.¹¹

States use drones for three basic aims; accuracy, efficiency, and protection and prevention of human risk. As a consequence of this ‘accuracy’ of drones, any crimes committed during a drone strike could only mean that either there was a deliberate intent to ignore the laws of war by irresponsibility and negligence or unlawful targets were knowingly fired upon which implies direct accountability. However, accountability and liability, in terms of drone strikes, rest upon leadership decision. This implies liability under Article 28 of the Rome Statute, because it is the military leaders that have the authority to allow the strike.¹² Precautions must be taken by the commanders in cases where the status of targets is doubted. In such cases the conjecture that the target is civilian should stand and the order should not be given.¹³

Drones and Proportionality Principle

Rule of Proportionality prohibits those actions which can be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof,

which would be excessive in relation to concrete and direct military advantage anticipated.¹⁴

There are clear restrictions within the Rome Statute and customary IHL prohibiting a direct attack against civilians. Furthermore, states are also prohibited from launching attacks that would result in excessive or unnecessary harm to civilians. Consequently, a war crime may occur if the strikes fail the test of proportionality in the following terms, "Launching an attack which may be expected to cause incidental loss of civilian lives, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited."¹⁵

To achieve its aims of terminating high value Al-Qaeda and terrorist leaders, the US has also been killing a large number of civilians. Also, it is violating the proportionality principle if the anticipated injury to civilians is a lot more than the strategic military advantage which can be achieved from the strike.¹⁶ The US administration claims that its drone campaign in Afghanistan and Pakistan has killed many high value targets but a report by Stanford Law School claimed that only 2% of the total casualties were of HVT while the rest of the 98% were non-combatants or LVT.¹⁷ David Kilcullen stated in 2009, "I realized that they do damage to Al-Qaeda leadership. Since 2006 we have killed 14 senior Al-Qaeda leaders and in the same period we have killed 700 Pakistanis."¹⁸ A report by the Bureau of Investigative Journalism has estimated the number of casualties in Afghanistan to be around 4126-10076 till 2020.

Boyle has argued that the ideals of the proportionality principle have been swept aside by the onslaught of drone attacks as the US led drone strikes lead to greater civilian

casualties than those of HVT or LVT. Likewise, Alston has also written that the problem with drones is that they make killing very easy without any threat to the country's armed forces personnel. Hence, the leaders and policy advisors would find it in their best interest to stretch the legal boundaries of IHL.¹⁹

Drones and the Distinction Principle

The Distinction Principle states that it's necessary for the parties to any conflict must to always distinguish between civilians and combatants. Any attacks can only be directed against combatants and not against civilians.²⁰ The distinction principle is a rule of customary IHL and the primary goal of this principle is to minimize civilian casualties and suffering.²¹ However, the drone strikes conducted in Afghanistan and Pakistan have killed entire families, children, women, and many of the targeted militants and their families along with other innocent civilians who were in the nearby vicinity.

An extremely disturbing element of the US drone strike strategy mentioned in the Amnesty International's report was the 'double-tap' method. This method is an extremely contentious feature of the US drone strategy. It consists of striking a target many times within a short time frame. It almost always leads to the killing of first responders. On June 2009, the CIA conducted a drone strike to kill a low-ranking Taliban commander. The intention of this strike was to use his death as a hook to bait the bigger fish.²² The assumption at the time was that the leader of the Pakistani Taliban would attend the deceased commander's funeral, which he proceeded to do. Five thousand other people, including civilians, attended the funeral services. However, the CIA was not deterred in its mission and promptly deployed drones

to attack the funeral, killing anywhere from 60 to 83 people. It has been approximated that 45 of the deaths from this attack were those of civilians, including 10 children.

According to Article 51(3) of Additional Protocol I of 1977-79 Geneva Convention, "Civilians shall enjoy the protection given by this piece of law unless they take part in hostilities."²³ International Committee of the Red Cross stated, "Al-Qaeda members can be targeted through drones only if one can prove that particular target is directly engaged in hostilities."²⁴

To adhere to the principles of distinction and precaution in certain areas is not very simple as militants have merged into the civilian population. The US 'signature strikes' which are based on behavioural patterns can also be deemed a clear violation of law because through these types of strikes all the people who have similar appearance and behaviour to militants are targeted. The strike is based merely on observation of "suspicious buildings or activities."²⁵ Signature strikes lead to a higher number of civilian casualties since the targets are loosely profiled.

Intrinsically, states that are deploying drones against individuals in other countries are doing so to achieve "a systematic elimination" of their intended targets. Consequently, this "systematic elimination" when undertaken as an official state policy fulfils standard set forth in Article 8 of the Rome Statute and, therefore, means that the state in question is committing war crimes. Article 8(2)(b), under provisions of i-v, includes intentionally directed attacks against the civilian populations or civilian objects and otherwise knowingly and intentionally attacking targets where civilians or civilian objects could be potentially harmed or damaged. These systematic policies show

how a state is involved in deliberate attacks against a civilian population.

Human Rights Watch has stated that “some of those targeted as terrorist suspects may not in fact have been valid military targets,” since US is “applying overly broad definition of ‘combatant’ in targeted attacks, for example by designating persons as lawful targets based on their merely being members, rather than having military operational roles in the armed group.”²⁶ Likewise, Lubell wrote that “the question of targeting leadership or low-level militants” as “there is difficulty in assessing the meaning and accuracy of these terms”, especially due to “states’ likely inclination to aggrandize the value of the target.”²⁷ United States is majorly targeting people who are “lower and lower down the terrorist food chain” and whose links to the Al-Qaeda and 9/11 may be weak at best. In 2010, a journalist from Reuters reported that out of a total of 500 militants that the US declared it had terminated since 2008, only 14 were ‘top-tier militant targets’.²⁸

Some critics have also stated that the US uses a secret and possibly defective classification for differentiating between non-combatants and combatants. Becker and Shane have stated that this system of classification, “in effect counts all military age males in a strike zone as combatants, according to several administrative officials, unless there is explicit intelligence posthumously proving them innocent.”²⁹

Drones and the Precautionary Principle

The precautionary principle expressly lays forth that during the course of military operations, constant care shall be

taken to spare the civilian population, civilians, and civilian objects.³⁰

Drones are considered as extremely precise technology and, thus, could be considered as an effective way to take precautionary measures against excessive and disproportionate damage and destruction. However, miscalculations and negligence could result in war crimes. Civilian casualties do not automatically mean that a state is guilty of war crimes; rather, allegations of a war crime become credible when drones are deployed with recklessness or excessive attacks occur.³¹

Wilful killings and murder is said to be committed if IHL principles are not taken into consideration before launching a strike. Collateral damage is something that is allowed and lawful if it follows the principle of proportionality. However, it is absolutely essential for the military leader and the person in charge of the drone to reduce the chances of harm that could befall civilians or civilian objects.³² It is the responsibility of the command to oversee and dictate targeting. It requires, "commander oversight and involvement to ensure proper execution."³³ That is the reason why the commander is responsible and accountable for the war crimes committed using drones under Article 28 of the Rome Statute.

US administration has not been successful in upholding the precautionary principle throughout its recurring practice of signature strikes and follow-up strikes leading to extensive collateral damage. Furthermore, the classification by certain US officials that every male of fighting age present in the area of an intended drone strike as a combatant (unless proven innocent posthumously) is a clear violation of the precautionary principle.³⁴

Conclusion

The United States drone strikes can be constituted as violations of international law. They violate customary international humanitarian law, in addition to international criminal law. Under Article 8 of the Rome Statute, they can be termed as war crimes. Many scholars have argued that since drones are a relatively modern innovation, they need a separate legal framework to govern them. Contrary to this, it has been proven that drones can easily fit into the existing legal frameworks available; however, the issue is not whether there are sufficient laws to govern them, it is whether existing laws are being followed compliantly.

The complete lack of transparency and available information is a grave problem with conducting research on the US drone warfare. It is extremely difficult to find any official data on drone strikes, with the numbers being reported differently at each source. The US has refused to declassify large swathes of information regarding drone strikes, civilian casualties, the classification of who to target and what areas to target by declaring these as a matter of national security. The world has stepped into a novel age of warfare and has reached a crucial juncture. It is all the more reason that the US and other states deploying drones should be pressured into declassifying documents and adopting more transparency and accountability. This, in turn, would lead to a clearer and more definitive analysis of the legality of drone strikes.

Although, modern drones are becoming more technologically advanced and the scale of collateral damage can be greatly reduced, the August 2021 killing of Zemari Ahmadi along with members of his family show that there is still a long

way to go when it comes to advancing and improving drone technology.

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