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Conveniently Legal? - Shaky Legal Basis for Inter-State Drone Operations **Jason Lee**

BACKGROUND

On August 17, 2022, the United States conducted another set of drone strikes in Somalia, killing 13 members of the terrorist group al-Shabab.¹ In Afghanistan alone, the U.S. conducted over 13,000 drone strikes since 2015, killing over 10,000 souls including at least 66 confirmed deaths of children.² Following President Bush’s declaration of “the Global War on Terror” or “War on Terror” (hereinafter referred to as “War on Terror”)³ after the September 11 attacks, all Administrations—regardless of their political inclinations—actively utilized unmanned aerial vehicles, also known as “drones”, in order to conduct surgical, targeted strikes as well as various reconnaissance operations around the globe.⁴

Of course, the U.S. is not the only nation that is expanding its military application of drones in targeted strikes and reconnaissance missions. Nation states like Russia, India, China, and Saudi Arabia are investing heavily in purchasing and upgrading their defensive capabilities, including drone operation abilities.⁵ As evident in Russia’s military activities in Ukraine, some nations are not hesitant to actively use their fleet of drones in their military operations over a sovereign state.⁶ Türkiye has also expanded its drone operation—for both reconnaissance and offensive roles—beyond its borders, sparking concerns from the governments of Greece and Syria.⁷

Drones in themselves are not illegal.⁸ However, the lawful operation of drones rests upon customary international principles such as military necessity and proportionality, “with due regard for protection of civilian and civilian objects.”⁹ Legal complications may—and most definitely will—emerge when drones are flown into a sovereign nation absent a clear declaration of war or prior consent.¹⁰ This begs the question: when the United States has already called the end to two of the longest wars in its history,¹¹ what justifications under international law does it have to continue its inter-state drone operations? How are these justifications shaping customary international law in ways that are expanding the wider usage of drones in inter-state conflicts by other nations?

This report will briefly examine the two main international legal principles—self-defense and “unwilling or unable” doctrines—which have been utilized by the United States as justifications for their drone operations continuing through today. Afterward, it will turn its attention to how the United States’ practices involving drone operations are widening customary international principles applicable to thereof, which may result in a greater degree of inter-state drone operations already exacerbated by the increasing drone acquisitions around the globe.

SELF-DEFENSE JUSTIFICATION

One of the most commonly used justifications for inter-state use of force by drones is the idea of “self-defense.”¹² Article 51 of the Charter of the United Nations provides that “if an armed attack occurs[,]” then it is justified that the state may exercise its right of self-defense.¹³ Furthermore, it is also recognized by most states and scholars that a state may exercise its right to self-defense in order to prevent the “imminent” threat of an armed attack.¹⁴

In the twenty-first century, it became clear that the definition of “armed attack” was, at times, applicable to non-state parties and their armed actions. United Nations Security Council Resolutions 1368 and 1373¹⁵, adopted immediately after the 9/11 attacks, created a legal foundation for adopting policy justifications supporting that individual terrorist attacks, or an ongoing series thereof, may serve to meet the “armed attack” requirement of the Article 51 for nations to exercise their self-defense rights.¹⁶ Such recognition of self-defense rights against non-state actors was also presented in *Democratic Republic of the Congo v. Uganda*¹⁷, where the International Court of Justice found that it does not need to determine “whether and under what conditions contemporary international law provides for a right of self-defence against . . . attacks by irregular forces.”¹⁸

As the War on Terror continued, however, the United States began to expand the application of its self-defense rights beyond Afghanistan. The nameplate of War on Terror allowed the United States to exercise its military projection, including drone strikes, into nations such as Iraq, Libya, Somalia, and Yemen, arguing that “as a matter of international law, the United States is in armed conflict with al-Qaeda, as well as the Taliban . . . in response to . . . 9/11 attacks” and that it may use military force under the “inherent right to self-defense under international law.”¹⁹

However, it is still heavily debated as to whether a state is warranted to “preemptively” conduct airstrikes in another sovereign nation in self-defense. The most noteworthy support for the U.S. is the “Caroline” principles or “Caroline” test.²⁰ Based on the “Caroline” principles, it has often been cited under international law that there must be the necessity of self-defense against an instant and overwhelming attack with no moment of deliberation that an armed attack on another sovereign state is justified by necessity.²¹ In other words, a use of lethal force against a purported threat in another sovereign state’s territory without meeting the “Caroline” necessities would be unlawful under international law and violate Article 51.²² The United States has often alluded to a broader application of the “Caroline” doctrine in justifying the preemptive nature of its drone operations by asserting that missing a window of opportunity to act may cause potential harm to civilians and future attacks to the United States.²³

This line of justification is often criticized and debated in the international law community. For one thing, some scholars argue that no “doctrine” was ever formed after the “Caroline” incident.²⁴ Because customary international law at the time allowed an absolute self-reservation right—that is, a country could use all necessary means if one posed any threat to another—it is argued that the “Caroline” principle was not a correct recitation of international law to begin with.²⁵

Other scholars also argue that, even with the “Caroline” principles in place, the broad interpretation of “preemptive” nature is not warranted. Constructionist scholars, for instance, have asserted that, because Article 51 only recognizes an act of self-defense in an event when “an armed attack occurs,” neither anticipatory self-defense nor preemptive self-defense can be lawful prior to an actual armed attack’s occurrence.²⁶

“UNWILLING OR UNABLE” JUSTIFICATION

Another most frequently used legal justification for United States’ drone strikes is the “unwilling or unable” doctrine in international law. Since the 9/11 attacks, the United States has constantly argued for the right to exercise self-defense military actions against non-state actors, even when the group is located

within the territory of a sovereign nation—or a “host” nation—that does not consent to the territorial incursion.²⁷ In other words, when the United States decides that the host nation is “unwilling or unable” to handle the threat posed by a non-state actor within its territory, the United States is permitted to “surge into foreign territory” in an “application of the . . . necessity” under the self-defense doctrine.²⁸

It has been constantly noted among policymakers that the United States may legally conduct drone operations where a nation is “unwilling or unable to control its territory.”²⁹ In the *Operational Law Handbook* by the Judge Advocate General’s Legal Center & School, it is noted that the United States has cited the “unwilling and unable standard” as justification for airstrikes in Syria.³⁰

“Unwilling or unable” doctrine is a highly debated principle among international legal scholars and state governments. Some argue that this doctrine provides a key legal foundation for regulating non-state threats across the globe.³¹ Others argue that a lack of any clarity in the doctrine only provides “greater room for conflicting and self-serving interpretations.”³²

CUSTOMARY INTERNATIONAL LAW

As shown above, self-defense justification is neither robust nor well recognized as a firm legal foundation for drone operations in another sovereign nation(s) beyond a declared war period. It is also clear that the United States is continuing to use these legal reasonings to justify its drone attacks—and so are other nations which are aggressively expanding both the inventory and usage of drones.³³ Perhaps, it is strongly arguable that these justifications, without any active objection by the international community, may ripen into customary international law.

Under the general principles of international law, customary law is built from general state practices.³⁴ According to the International Law Commission, physical actions and inactions, diplomatic correspondences and conferences, and public state practice may ripen into customary international law.³⁵ Without being a “persistent objector”—that is, a state which made itself exempt from the rule of customary international law by claiming “persistent objector status” from the very initial emerging of the rule—once a rule exists, a state may be subject to the customary law regardless of its subsequent preference.³⁶

As the employment of combat drones increases, the overwhelming reliance on the “self-defense” doctrine and the “unwilling and unable” doctrine is likely to have a significant impact on state practice concerning the broad application of these doctrines. These justifications, which had historically been reserved for armed conflict applications, have slowly encroached into the territory of peacetime military operations into sovereign states’ borders.³⁷ Without an active attempt to establish a more robust threshold of drone operations based on new or existing international law doctrines, current practice will only lower the customary threshold of war.³⁸

CONCLUSION

As discussed above, the military drone market is expanding as much as its actual implementation by states around the globe. Unfortunately, the United States’ post-9/11 drone operations have set the legal foundation for uncontrolled and intrusive drone operations by other states—regardless of their fondness for the U.S. To prevent further broadening of the application of international legal doctrines reserved for armed conflicts and incursions, the United States and its allies should more cautiously but firmly establish binding and comprehensive legal grounds for inter-state drone operations.

¹ Ronn Blitzer & Liz Friden, *US Drone Strike Kills 13 al-Shabab Fighters in Somalia*, FOX NEWS (Aug. 17, 2022, 10:45 AM), <https://www.foxnews.com/world/us-drone-strike-kills-thirteen-al-shabab-fighters-somalia> [<https://perma.cc/EY5T-RFYX>].

² *Strikes in Afghanistan*, THE BUREAU OF INVESTIGATIVE JOURNALISM, https://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&show_injuries=1&show_strikes=1&location=afghanistan&from=2015-1-1&to=now [https://perma.cc/3T2Z-EHKR] (last visited Sept. 17, 2022).

³ “The Global War on Terror” is used to describe not only the military action taken place immediately after the September 11, 2001 terrorist attacks, but also used to describe a campaign of “diplomatic, financial, and other actions taken” to counter both state and non-state parties harboring or supporting terrorist groups around the world. See Global War on Terror, *George W. Bush Presidential Library and Museum*, NAT’L ARCHIVES, <https://www.georgewbushlibrary.gov/research/topic-guides/global-war-terror> [https://perma.cc/4JLZ-J5TM] (last visited Oct. 5, 2022). Other terms such as “war on terrorism” and “war on terror” were used to refer to the same campaign or operations related to the Global War on Terror. See *War on Terrorism*, Britannica, <https://www.britannica.com/topic/war-on-terrorism> [https://perma.cc/8WQ9-DTBJ] (last visited Oct. 5, 2022); Mark N. Katz, *What Exactly is the “War on Terror?”*, Middle East Policy Council, <https://mepc.org/commentary/what-exactly-war-terror> [https://perma.cc/JC8S-RRBM] (last visited Oct. 5, 2022).

⁴ Mary Ellen O’Connell, *International Law and Drone Attacks beyond Armed Conflict Zones*, in DRONES AND THE FUTURE OF ARMED CONFLICT: ETHICAL, LEGAL, AND STRATEGIC IMPLICATIONS 63, 63 (David Cortright ed., 2015).

⁵ See *Military Drone Market Size, Share & COVID-19 Impact Analysis*, Unmanned Systems / Military Drone Market, FORTUNE BUS. INSIGHT, <https://www.fortunebusinessinsights.com/military-drone-market-102181> [https://perma.cc/89MB-CDA7] (last visited Sept. 17, 2022).

⁶ Max Hunder & Tom Balmforth, *Russia Steps Up Attacks with Iranian Drones, Ukraine Plans Defenses*, REUTERS (Sept. 26, 2022, 08:13 AM), <https://www.reuters.com/world/europe/russia-steps-up-attacks-with-iranian-drones-ukraine-plans-defences-officials-2022-09-26/> [https://perma.cc/6RBX-JTGW].

⁷ See Paul Iddon, *Greece Is Deploying Israeli Systems to Counter Turkish Drones*, FORBES (Jul. 3, 2022, 08:15 AM), <https://www.forbes.com/sites/pauliddon/2022/07/03/greece-is-deploying-israeli-systems-to-counter-turkish-drones/?sh=69696af7165e> [https://perma.cc/6XH8-YRQE], for reported Turkish drone activities in Greek airspace and Greece’s defense concerns; see also *27 People, Including 7 Children, Killed in Turkish Drone Attacks in NE Syria in August*, ANF NEWS (Aug. 31, 2022, 02:29 PM), <https://anfenglish.com/rojava-syria/27-people-including-7-children-killed-in-turkish-drone-attacks-in-ne-syria-in-august-62206> [https://perma.cc/7J64-XA6U], for Turkish drone attacks in North and East Syria, killing 27 people.

⁸ Rachel Alberstadt, *Drones Under International Law*, 4 OPEN J. OF POL. SCI. 221, 223-24 (2014).

⁹ *Id.* at 223.

¹⁰ Rosa Brooks, *Drones and the International Rule of Law*, 28 J. ETHICS & INT’L AFF. 83, 84 (2013).

¹¹ The Iraq War, also called Second Persian Gulf War, officially ended in 2011, with the last of main U.S. troops leaving Iraq on December 18 of that year. See *The Iraq War*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/timeline/iraq-war> [https://perma.cc/TQ4Y-4G9E] (last visited Sept. 16, 2022). The U.S. War in Afghanistan officially ended in 2021 as the last U.S. military personnel departed Kabul on August 31 of that year. See *The U.S. War in Afghanistan*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/timeline/us-war-afghanistan> [https://perma.cc/KDD4-7A9T] (last visited Sept. 16, 2022).

¹² See Brooks, *supra* note 10, at 89-91.

¹³ U.N. Charter art. 51.

¹⁴ See Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. OF INT’L L. 483, 492 (2012) (citing Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 1, 4 (1972) (“It was never the intention of the Charter to prohibit anticipatory self-defense and the traditional right certainly existed in relation to an ‘imminent attack.’”)).

¹⁵ See S.C. Res. 1368 (Sept. 12, 2001) (“[r]ecognizing the inherent right of individual or collective self-defence in accordance with the Charter”); see also S.C. Res. 1373 (Sept. 28, 2001) (“[r]eaffirming its resolution[.] . . . 1368 . . .”).

¹⁶ See Stuart Casey-Maslen, *Armed Unmanned Weapons Systems Under Jus ad Bellum*, in DRONES AND OTHER UNMANNED WEAPONS SYSTEMS UNDER INTERNATIONAL LAW 62, 84 (Stuart Casey-Maslen et al. eds., 2018).

¹⁷ Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 147 (Dec. 19).

¹⁸ See Casey-Maslen, *supra* note 16, at 80.

¹⁹ O’Connell, *supra* note 4, at 68; see also Harold Hongju Koh, Legal Adviser, U.S. Dep’t St., The Obama Administration and International Law, Address Before the 104th Annual Meeting of the American Society of International Law, Washington, DC (March 25, 2010), <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> [<https://perma.cc/A64Q-F3K2>].

²⁰ The emergence of “Caroline” principles tracks itself to 1837, when a group of British-Canadian troops launched a surprise attack on a steamship, *Caroline*, that was clandestinely supplying Canadian rebels at Navy Island. See Maria Benvenuta Ocelli, *Sinking the Caroline: Why the Caroline Doctrine’s Restrictions on Self-Defense Should Not Be Regarded as Customary International Law*, 4 SAN DIEGO INT’L L. J. 467, 473-74 (2003). Daniel Webster, the Secretary of State with President Harrison’s cabinet at the time, in exchange of several correspondence with Lord Ashburton, the British foreign secretary at that time, asserted that the British Government should “show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation[.]” to justify an armed attack on a sovereign soil for the reason of self-defense. See *id.* This phrase is often cited as evidence for the temporal, “imminence” requirement under customary international law. See *id.*; see also JENS DAVID OHLIN, INTERNATIONAL LAW: EVOLVING DOCTRINE AND PRACTICE at 393 (2d ed., 2021).

²¹ See Nicolas J.S. Davies, *The Caroline Case and American Drone Strikes in Pakistan*, 21 PEACE REV.: A J. OF SOC. JUST. 429, 432 (2009).

²² Robert Donaldson, *The Lawfulness of US Drone Strikes in Pakistan: An International Perspective* (Jun. 2012) (Graduation Thesis, School of Advanced Air and Space Studies, Air University) (on file with the Homeland Security Digital Library, Center for Homeland Defense and Security).

²³ See Eric Holder, Attorney General of the United States, Speech at Northwestern University School of Law (March 5, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> [<https://perma.cc/BXZ2-3YC8>] (“The evaluation of whether an individual presents an “imminent threat” incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States.”).

²⁴ Ocelli, *supra* note 20, at 478-79.

²⁵ See *id.*

²⁶ See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 708 (2005).

²⁷ See OHLIN, *supra* note 20, at 394.

²⁸ See *id.*

²⁹ *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on Nat’l Sec. and Foreign Aff. of the Comm. on Oversight and Gov’t Reform*, 111th Cong. 61 (2010) (“[T]he United States regards it as lawful to be able to go and strike those persons where a country is unwilling or unable to control its territory.”).

³⁰ THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 7 (2022); see also Casey-Maslen, *supra* note 16, at 75.

³¹ See Deeks, *supra* note 14, at 491.

³² See Dawood I. Ahmed, *Defending Weak States Against the “Unwilling or Unable” Doctrine of Self-Defense*, 9 J. OF INT’L L. & INT’L REL. 1, 14 (2013) (“A lack of any substantive clarity robs the ‘unwilling or unable’ doctrine of much of its efficacy in guiding state behavior. . . . Alleging that another state is unwilling or unable/ineffective can be a very subjective claim that is open to significant manipulation . . . provid[ing] greater room for conflicting and self-serving interpretations.”).

³³ Turkish government has constantly asserted “self-defense” rights for its drone operations in neighboring Iraq and Syria. See Rebaz Majeed & Namu Abdulla, *Turkish Drone Strike Leaves Civilian Casualties*, VOA (Jul. 2, 2020, 08:08 PM), https://www.voanews.com/a/extremism-watch_turkish-drone-strike-leaves-civilian-casualties/6192158.html [<https://perma.cc/674W-CEYC>] (writing that the Turkish Foreign Ministry told VOA that Türkiye’s “counterterrorism operations are based on [Türkiye’s] inherent right of self-defense enshrined in the Article

51 of the U.N. Charter” after incursion into Iraqi airspace); *see also* Elizabeth Flock, *Turkey Capitalizes on Afghanistan Distraction to Attack Kurdish Forces in Syria*, FOREIGN POLICY (Sept. 20, 2021, 11:42 AM), <https://foreignpolicy.com/2021/09/20/turkey-airstrikes-kurds-syria-ypj-ceasefire/> [<https://perma.cc/8LGT-JK6C>] (citing Turkish President Recep Tayyip Erdogan, who made a statement that the drone operation into Syria was to “prevent the creation of terror corridor across our southern border . . .”). For Russia’s self-defense justifications on its military operations, including drone operations, see Sławomir Dębski, *Russia’s Approach to International Law as a Foreign Policy Tool: the Case of the Annexation of Ukraine Crimea*, in DISINFORMATION, NARRATIVES AND MEMORY POLITICS IN RUSSIA AND BELARUS 121, 125-127 (2022); *see also* Kelsey Vlamis, *Why is Russia Attacking Ukraine? Here Are 5 Reasons Putin and Others Have Given for the Invasion*, BUS. INSIDER (Feb. 24, 2022, 10:55 PM), <https://www.businessinsider.com/why-russia-is-attacking-ukraine-putin-justification-for-invasion-2022-2> [<https://perma.cc/TK5C-GL54>].

³⁴ OHLIN, *supra* note 20, at 34.

³⁵ *See* Sean D. Murphy, *Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission*, 109 AM. J. INT’L L. 822, 823-24 (2015).

³⁶ *See* OHLIN, *supra* note 20, at 51.

³⁷ *See* Sebastian Wuschka, *The Use of Combat Drones in Current Conflicts*, 3 GOETTINGEN J. OF INT’L L. 891, 902-03 (2011).

³⁸ *See id.* at 902.