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Cross-Border Drone Operations and International Law: Airspace Sovereignty, the Prohibition on the Use of Force, and the Unwilling or Unable Doctrine

ARINDAM SOOD* AND ADITY SRIVASTAVA**

ABSTRACT

This critical research article examines the tension between the principle of exclusive airspace sovereignty under Article 1 of the Chicago Convention and the prohibition on the use of force under Article 2(4) of the United Nations Charter. In the context of cross-border drone operations against non-state actors, this article interrogates whether such operations constitute independent violations of sovereignty or amount to unlawful uses of force.

The analysis entails the distinction between breaches of territorial sovereignty and armed attacks while critically evaluating the legal status of the ‘unwilling or unable’ doctrine. The two competing hypotheses examined are: H_0 — whether cross-border drone strikes violate airspace sovereignty; and H_1 — whether such actions may be reconciled with international law under limited conditions.

Keywords: *Article 1 of the Chicago Convention; Article 2(4) of the United Nations Charter; cross-border drone operations; sovereignty; unwilling or unable doctrine.*

I. INTRODUCTION

The principle of territorial sovereignty has remained a cornerstone of public international law since its inception, entailing a State’s exclusive authority over its land, territorial waters and airspace.¹ This principle is codified in Article 1 of the Convention on International Civil Aviation (‘Chicago Convention’), which affirms “complete and exclusive sovereignty over the airspace above its territory.”² In parallel, Article 2(4) of the United Nations Charter establishes a general prohibition on the use of force, safeguarding the territorial integrity and political independence of States.³

* Author is a Student at Symbiosis Law School, Pune, Maharashtra, India.

** Author is a Student at Symbiosis Law School, Pune, Maharashtra, India.

¹ IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 289 (1963).

² Convention on International Civil Aviation art. 1, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

³ U.N. Charter art. 2, para. 4.

In May 2025, Operation Sindoor between India and Pakistan introduced a new dimension to these norms: cross-border drone operations against non-State actors. Such operations often occur below the threshold of conventional armed conflict, raising the question whether they merely constitute violations of sovereignty or qualify as unlawful uses of force.⁴ The jurisprudence of the International Court of Justice (‘ICJ’) has historically distinguished between an unlawful use of force and less severe violations,⁵ yet offers limited guidance in the context of technological warfare.⁶

In response, States have increasingly invoked the ‘unwilling or unable’ doctrine to justify such operations,⁷ although its status under customary international law remains deeply contested.⁸

II. LEGAL FRAMEWORK: CONCEPT AND ANALYSIS

A. Territorial Sovereignty and Airspace Regulation

The regulation of airspace in public international law is anchored in the principle of territorial sovereignty, which extends across land, the territorial sea and the airspace above a State’s territory.⁹ Article 1 of the Chicago Convention expressly codifies this rule.¹⁰ Originally framed for civil aviation, its provisions have acquired broader significance in reinforcing the integrity of territorial boundaries in all forms of aerial activity.¹¹ Accordingly, any aerial intrusion, whether by a manned or unmanned aerial vehicle, constitutes a *prima facie* violation of sovereignty.¹²

B. The Doctrinal Distinction Between Sovereignty and Use of Force

The legal consequences of such violations are not uniform. The prohibition under Article 2(4) of the Charter operates as a distinct legal rule.¹³ The ICJ, most notably in *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), held that not every breach of territorial sovereignty amounts to a prohibited use of force; only the “most grave form” of force, constituting an ‘armed attack,’ can trigger the full consequences of

⁴ Mary Ellen O’Connell, *Unlawful Killing with Combat Drones*, 94 NOTRE DAME L. REV. 1965, 1970 (2010).

⁵ *Military and Paramilitary Activities in and Against Nicaragua* (*Nicar. v. U.S.*), Merits, 1986 I.C.J. 14, *para.* 191 (June 27).

⁶ TOM RUYS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER 135 (2010).

⁷ Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L L. 483, 486 (2012).

⁸ OLIVIER CORTEN, *THE LAW AGAINST WAR* 403 (2010).

⁹ MALCOLM N. SHAW, *INTERNATIONAL LAW* 492 (9th ed. 2021).

¹⁰ Chicago Convention, *supra* note 2, art. 1.

¹¹ JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 457 (9th ed. 2019).

¹² RUSSELL BUCHAN, *CYBER ESPIONAGE AND INTERNATIONAL LAW* 78 (2018).

¹³ U.N. Charter art. 2, *para.* 4.

the *jus ad bellum* regime.¹⁴ This legally ambiguous threshold makes it difficult to identify the precise point at which a sovereignty violation escalates into a use of force.¹⁵ In practice, drone operations cause this distinction to collapse.¹⁶

The law of self-defence further complicates the picture. While Article 51 of the Charter recognises the inherent right of self-defence in response to an armed attack,¹⁷ its application to non-State actors operating from within another State's territory remains contested. Traditional interpretations requiring the attribution of an armed attack to a State have increasingly relaxed, permitting defensive action against non-State actors in certain circumstances.¹⁸ This shift reflects a recalibration of the balance between sovereignty and security in the context of transnational terrorism.¹⁹

C. The 'Unwilling or Unable' Doctrine

It is within this evolving landscape that the 'unwilling or unable' doctrine has gained prominence.²⁰ The doctrine postulates that a State may use force within the territory of another State if that State is unwilling or unable to prevent non-State actors from carrying out attacks.²¹ Although invoked in several counter-terrorism operations, its legal status remains contested before the ICJ.²² Critics argue that it lacks a clear basis in law and risks introducing a subjective and potentially abusive standard into the *jus ad bellum*.²³ Moreover, its application effectively conditions a State's sovereignty on its capacity to control internal threats, transforming sovereignty from a legal entitlement into a standard based on control and performance.²⁴

D. Expanding the Scope of Self-Defence

This doctrine effectively collapses the distinction between responsibility and sovereignty. By justifying external intervention on the basis of internal incapacity, international law is made to prioritise functional governance over sovereign equality.²⁵ This risks normalising a hierarchy of

¹⁴ *Nicar. v. U.S.*, *supra* note 5, para. 191.

¹⁵ RUYS, *supra* note 6, at 168.

¹⁶ Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 381 (2009).

¹⁷ Michael N. Schmitt, *Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the "Fog of Law"*, 13 Y.B. INT'L HUMAN. L. 311, 315 (2010).

¹⁸ U.N. Charter art. 51.

¹⁹ Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defence*, 107 AM. J. INT'L L. 563, 568 (2013).

²⁰ Mary Ellen O'Connell, *Unlawful Killing with Combat Drones*, 94 NOTRE DAME L. REV. 1965 (2010).

²¹ Deeks, *supra* note 7, at 487.

²² Daniel Bethlehem, *Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 769, 770 (2012).

²³ OLIVIER CORTEN, *THE LAW AGAINST WAR* 403 (2d ed. 2021).

²⁴ Mary Ellen O'Connell, *The True Meaning of Force: A Further Response to Tom Ruys*, 108 AJIL UNBOUND 153, 155 (2014).

²⁵ Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1, 8 (2015).

sovereignty in which technologically capable States are afforded greater operational latitude while weaker States bear the burden of compliance.²⁶ While the formal rules remain intact, their application to drone warfare remains unsettled.²⁷

III. CRITICAL ANALYSIS: DRONE WARFARE VIS-À-VIS SOVEREIGNTY

A. Expanding Self-Defence and the Problem of Thresholds

The legality of cross-border drone operations broadly turns on how expansively the right to self-defence is interpreted. States increasingly argue that attacks by non-State actors justify defensive force even absent direct attribution to a State.²⁸ While this position finds support in recent State practice such as Operation Sindoor and Operation Epic Fury,²⁹ it runs contrary to the traditionally restrictive approach adopted by the ICJ.³⁰ A pertinent question arises: whether the “scale and effects” test remains adequate where the use of force is more technological than ever.³¹ Hakimi argues that such ambiguity can be exploited by States to justify force without technically breaching the Charter.³²

B. Sovereignty in Reference to H₀

From the perspective of H₀, the legality of cross-border drone strikes must be assessed in reference to Article 1 of the Chicago Convention, which affirms absolute sovereignty over airspace and renders any unauthorised intrusion unlawful, regardless of scale.³³ This position finds support in recent developments relating to the Iran, Israel and United States conflict, where States have pushed to treat sovereignty as a primary rule rather than as merely derivative of the prohibition on force.³⁴ The increasing normalisation of cross-border drone operations, however, risks diluting this rule by reclassifying violations as permissible security measures.³⁵ O’Connell similarly holds that drone warfare reduces political and legal accountability alike.³⁶

C. The ‘Unwilling or Unable’ Doctrine in Reference to H₁

The ‘unwilling or unable’ doctrine represents an attempt to reconcile sovereignty with contemp-

²⁶ CHRISTIAN HENDERSON, *THE USE OF FORCE AND INTERNATIONAL LAW* 214 (2018).

²⁷ ADIL AHMAD HAQUE, *THE LAW OF ARMED CONFLICT* 92 (2017).

²⁸ *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, *para.* 51 (Nov. 6).

²⁹ Bethlehem, *supra* note 22, at 770.

³⁰ Deeks, *supra* note 7, at 487.

³¹ Akande & Liefländer, *supra* note 19, at 568.

³² MARCO ROSCINI, *CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW* 52 (2014).

³³ Hakimi, *supra* note 25, at 8.

³⁴ Chicago Convention, *supra* note 2, art. 1.

³⁵ Marko Milanovic, *The Concept of Sovereignty in International Law*, 32 EUR. J. INT’L L. 1, 5 (2021).

³⁶ Harold Hongju Koh, *The Obama Administration and International Law*, 107 AM. SOC’Y INT’L L. PROC. 266, 270 (2013); BUCHAN, *supra* note 12, at 78.

oratory security concerns.³⁷ Jurists such as Deeks regard it as a ‘necessary adaptation,’ permitting States to act where territorial governments fail to address threats posed by non-State actors.³⁸ Yet the doctrine lacks sufficient consistency in State practice to qualify as customary international law,³⁹ rendering it susceptible to unilateral interpretation⁴⁰ and risking its conversion from a narrow exception into a broad justification for the indiscriminate use of force.⁴¹ Milanovic has observed that such developments reflect a shift towards ‘pragmatism’ at the expense of legal certainty.⁴²

D. A Critique of Both H₀ and H₁

While H₁ offers a practical framework for addressing security concerns, it relies on vague and open-ended standards that weaken the foundations of public international law.⁴³ H₀, though doctrinally coherent and consistent with established principles, proves insufficient to dictate outcomes in the present state of affairs.⁴⁴ This raises a legitimate question whether sovereignty can continue to function as a meaningful limiting standard on the use of force.⁴⁵

IV. CONCLUSION

The legality of cross-border drone operations exposes a growing tension within public international law between the security imperatives of States and established legal principles. While sovereignty and the prohibition on the use of force remain formally unchanged, their practical application has become increasingly uncertain.

The ‘unwilling or unable’ doctrine attempts to bridge this gap, but does so at the cost of legal clarity, blurring the line between lawful and unlawful uses of force.⁴⁶ If this trajectory continues, the real risk is not merely to the States directly involved but to public international law itself.

V. SUGGESTIONS

1. Greater clarity is needed as to what constitutes an ‘armed attack’ in the context of cross-border drone operations.

³⁷ O’Connell, *Unlawful Killing with Combat Drones*, *supra* note 4, at 1972.

³⁸ Jens David Ohlin, *The Assault on International Law*, 29 TEMP. INT’L & COMP. L.J. 1, 5 (2015).

³⁹ Dire Tladi, *The Use of Force Against Non-State Actors*, 18 MAX PLANCK Y.B. U.N. L. 3, 10 (2015).

⁴⁰ Harriet Moynihan, THE DOCTRINE OF UNWILLING OR UNABLE 12 (Chatham House 2016).

⁴¹ NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS (2010).

⁴² Tom Dannenbaum, *The Use of Force Against Non-State Actors*, 56 COLUM. J. TRANSNAT’L L. 1 (2018).

⁴³ Milanovic, *supra* note 35, at 5.

⁴⁴ Nicholas Tsagourias, *Self-Defence Against Non-State Actors: The Interaction Between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule*, 24 NETH. INT’L L. REV. 1 (2016).

⁴⁵ Laurie R. Blank, *The Use of Force Against Non-State Actors: The State of Play*, 46 N.Y.U. J. INT’L L. & POL. 1 (2014).

⁴⁶ INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS (Elizabeth Wilmshurst ed., 2012).

2. Given the increased reliance on doctrines such as ‘unwilling or unable,’ these should be addressed and formally recognised under treaty law.
3. International law must affirm that violations of airspace sovereignty are unlawful, irrespective of whether they amount to a use of force.
4. States using drones as a method of warfare should be subject to clearer reporting and accountability standards, to ensure that legal justifications are not abused.
