20 The Use of Drones for Cross-Border Law Enforcement and Military Purposes in Another State's Sovereign Airspace: A Legal Analysis

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20.1 Introduction

Traditional methods of warfare and traditionally-defined battlefields have given way to targeted killings in both law enforcement and military operations.[1] The beginning of the twenty-first century has heralded an upsurge in non-international armed conflicts[2] where civilian population centres have become targets of insurgents and terrorist groups.[3] Even our ideas of what constitutes a war are challenged by the United States (US) which proclaims that it is fighting a 'war on terror' which entitles it to hunt down terrorists associated with Al Quaeda anywhere in the world.[4]

Weaponry, too, has changed from traditional arms to unmanned robotic devices, including unmanned aerial vehicles (UAVs) or drones. All indications are that the use of UAVs is on the increase: during 2009 the US purchased more unmanned than manned aircraft.[5] US defence and budget reports further clearly indicate that America plans to

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1 C. Finkelstein et al.(eds), *Targeted Killings Law and Morality in a Asymmetrical World*, Oxford, Oxford University Press, 2012.

2 See Para. 20.4 below.

3 N. Melzer, *Targeted Killings in International Law*, Oxford, Oxford Monographs in International Law, 2012.

4 C. Gray, *International Law and the Use of Force*, Oxford, Oxford Foundations of Public International Law, 2008.

5 www.cbsnews.com/stories/1998/07/08/60minutes/main5001439.shtml?tag=cbsnewsSidebarArea.

triple its inventory of high-altitude armed and unarmed drones by 2020.[6] Various countries are following in its footsteps.[7]

Some claim that these UAVs are a cleaner and more precise method of warfare and that, therefore, we should applaud their use.[8] However, such claims disregard the potential ethical and legal challenges imbedded in the appropriate use of these weapons, not to mention the array of infringements of international law that occur when these weapons are used inappropriately. Peter Singer warns that the 'introduction of unmanned systems to the battlefield doesn't change simply how we fight, but for the first time changes who fights at the most fundamental level. It transforms the very agent of war, rather than just its capabilities'.[9] In light of these potential infringements, this article focuses on the use of UAVs in peacetime cross-border law-enforcement and military operations without the prior consent of the targeted state, with specific reference to US drone operations in Pakistan. We investigate whether existing aviation law, specifically the principle of aerial sovereignty as contained in the Convention on International Civil Aviation,[10] and the prohibition imposed by the United Nations (UN) Charter on the cross-border use of force to protect the sovereign territorial integrity of states, may be considered a sufficient framework to regulate the cross-border law-enforcement and anti-terrorist exercises currently being undertaken by the US in Pakistan.

A review of the current legal framework governing aerial sovereignty and territorial integrity against intrusions and cross-border use of force by means of UAVs is the starting point in determining whether US action in Pakistan is legal. Next the concept of aerial sovereignty pertaining to state and military aircraft as mentioned in the Chicago Convention is explored and the Vienna Convention on the Law of Treaties is employed to show conclusively that, under the laws of treaty interpretation, UAVs are not subject to the provisions of the Chicago Convention. In order to further the object of ascertaining the legality of US drone operations in Pakistan, Article 2(4) of the United Nations (UN) Charter is invoked in as far as it deals with sovereignty and sovereign integrity due to the illegal use of force.

As it is the premise of this article that US drone operations in Pakistan may violate Pakistani aerial sovereignty, it is apposite that the discussion begins with an excavation of the concept of sovereignty.

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6 I.G.R. Shaw & M. Akhter, 'The Unbearable Humanness of Drone Warefare in FATA Pakistan', *Antipode*, 44, 1490, 2012.

7 D. Brunstetter & M. Braun, 'The Implications of Drones on the Just War Tradition', *Ethics and International Affairs*, 25, 337, 2011.

8 P. Love, *The UAV Question and Answer Book*, IOXbooks, 2011.

9 P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century*, New York, Penguin Press, 2009.

10 *Convention on International Civil Aviation*. Signed at Chicago on 7 December 1944.

20.2 Sovereignty

20.2.1 Introduction

The US has been deploying drones in Pakistani airspace since 2004 for surveillance and targeting purposes.[11] Pakistan has repeatedly stated that it has not and will never give the US permission to enter its territorial airspace with drones.[12] This was confirmed when a Pakistani court ruled that the US's use of drones in that country is a clear violation of its territorial sovereignty.[13]

The next section of the article focuses on the principle of sovereignty in general and the concept of aerial sovereignty in particular. The basic legal underpinnings of these legal terms are provided.

20.2.2 Principle of Sovereignty

Max Huber gives an accurate and often-quoted definition of the meaning of the term 'sovereignty' in *The Island of Palmas (or Miangas) US v. The Netherlands* case:[14]

> Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is a right to exercise therein to the exclusion of any other state, the function of that state.

The concept of sovereignty is one of the founding principles of international law. As such, it receives protection in the UN Charter. Art 2(1) of the Charter states that 'the organisation is based on the principle of the sovereign equality of all its Members.' The UN Charter further confirms that the concepts of territorial integrity and sovereignty are closely intertwined and that one of the organisation's core principles is to protect sovereignty (territorial integrity or political independence of any state)[15] against the threat or use of force by one state against another in Article 4(2).

The prohibition on the use of force by one state against another's territorial integrity as confirmed in article 2(4) of the UN Charter and its link to the sovereignty principle has

11 C. Orr, 'Unmanned, Unprecedented and Unresolved: The Status of American Drone Strikes in Pakistan under International Law', *Cornell International Law Journal*, 729, 2011.
12 Orr, *above* n. 11.
13 Peshawar High Court Writ Petition 1551-P/2012.
14 *Island of Palmas Case* 2 RIAA 829 at 838.
15 Cf., Libarona, I.U. (2012) Territorial Integrity and Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo. *REAF*, *16*, 107.

been confirmed by the UN General Assembly in Resolution A/res/60/1, the 2005 World Summit Outcome:[16]

> We are determined to establish a just and lasting peace over the world in accordance with the purposes and principles of the Charter. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations….

Both Alston and Heyns (former and current UN Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions) have indicated that cross-border targeted killing operations, with particular reference to US drone operations in Pakistan, raise sovereignty concerns, and that Article 2(4) of the UN Charter prohibits such action.[17]

20.2.3 Aerial Sovereignty

The principle of aerial sovereignty is the most basic principle of international air law.[18] The principle acknowledges the sovereignty of all nations individually, thereby acknowledging that by virtue of that sovereignty every nation exercises absolute power over its airspace.[19]

To fully understand this principle, an analysis of what exactly is meant by the term 'airspace' is crucial.[20] First, it is important to note that airspace extends both horizontally and vertically. International law has as yet failed to provide a binding definition of the term 'airspace'.[21] Its vertical dimension has nevertheless traditionally been set at between 80 to 120 kilometres above the earth's surface.[22] The Karman line which establishes the boundary between the earth's atmosphere and outer space at 100 km above sea level also enjoys wide acceptance.[23] The horizontal dimension refers to the state's sovereign borders.

16 M.E. O'Connel, 'Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan under International Law', *Cornell International Law Review*, 44, 729, 2009.
17 A/HRC/14/24/add.6; Heyns address to the International Law Journal symposium on 'State Ethics' Harvard Law School, February 2012.
18 D.M. Hughes, 'Airspace Sovereignty Over Certain International Waterways', *Journal of Air Law and Commerce*, 19, 144, 1952.
19 E.M. Giemulla & L. Weber, *International and EU Aviation Law: Selected Issues*, Alphen aan den Rijin, Kluwer Law International, 2011.
20 D.M. Honing, *The Legal Status of Aircraft*, The Hague, Nijhoff, 1956.
21 W.H. Boothby, *The Law of Targeting*, Oxford, Oxford University Press, 2012.
22 Giemulla & Weber, *above* n. 19.
23 Giemulla & Weber, *above* n. 19.

The principle of aerial sovereignty was adopted into treaty law for the first time in the Paris Convention of 1919. This treaty 'solemnly affirmed the principle of the sovereignty of the subjacent states over the airspace and forbade military aircraft to enter foreign airspace without the authorisation of the territorial sovereign.'[24] At the time of the signing of the Paris Convention, both contracting and non-contracting states deemed the principle of aerial sovereignty to be a basic rule of international law.[25] Article 1 of the Chicago Convention is nearly an exact iteration of Article 1 of the Paris Convention. This principle has been adopted into national laws and contemporary aviation agreements.[26] Defining the sovereign airspace of a country is important as it aims to exclude other states from using sovereign airspace without explicit authorisation.[27] This includes the penetration of sovereign borders by state craft without consent.

However, although the principle that states should enjoy sovereignty over their territorial air space is well-established, the nature and content of this sovereignty are less clear.[28] In fact, in the contemporary world the nature and content of this principle are continuously challenged by new technologies such as drones.

A clear understanding of the concept of aerial sovereignty in the context of this article is necessary to establish whether the unauthorised use of drones by the US in Pakistani airspace constitutes a violation of Pakistan's aerial sovereignty. This brings us then to an analysis of the Chicago Convention.

20.3 Chicago Convention

20.3.1 Introduction

There is at present no international treaty that exclusively regulates the operation of military aircraft;[29] therefore, we need to turn to the sole treaty law in existence which regulates aerial sovereignty. Indeed, some scholars hold that a general international understanding exists that the principle of aerial sovereignty applies universally to all types of aircraft – civil and military. An overflying aircraft of whatever kind, therefore, has to obtain autho-

24 O.J. Lissitzyn, 'The Treatment of Aerial Intruders in Recent Practice and International Law', *The American Journal of International Law*, 47, 559, 1953.
25 Lissitzyn, *above* n. 24.
26 Giemulla & Weber, *above* n. 19.
27 Giemulla & Weber, *above* n. 19.
28 D. Goedhuis, 'The Air Sovereignty Concept and United States Influence on its Future Development', *Journal of Air Law and Commerce*, 22, 209, 1955.
29 Cf., Parks – 'The legal vacuum that existed before World War II remains today'; Boothby, *above* n. 21.

risation from the overflown state before it enters its territorial airspace, failing which, such *de facto* entry would constitute a violation of the aerial sovereignty of the state thus entered.[30]

The Convention on International Civil Aviation, signed at Chicago on 7 December 1944.[31] (Chicago Convention), is often termed the *Magna Carta* of international air law Both the US and Pakistan are contracting states to the Chicago Convention. Articles 1, 3(c) and 8 of the Convention regulate aerial sovereignty between contracting parties. Article 8, dealing specifically with unmanned aircraft, is regarded by some as the *lex specialis* regulating drones in international law.[32]

However, as Article 3(a) of the Convention states clearly that the Convention is relevant only to civil aircraft, the status of the craft used in the incursions under discussion will have to be determined as a preliminary issue to deciding whether Articles 1, 3 and 8 provide a valid framework within which to regulate aerial sovereignty issues pertaining to the peace-time use of drones by the US in Pakistan. Once the validity of the legal framework is settled, the next question is whether the relevant parties to the Convention have met their obligation to respect each other's aerial sovereignty, with particular reference to the operation of drones.

20.3.2 Classification of Drones

Article 3(a) of the Convention states that the Convention applies to civil aircraft and not state aircraft. This raises the question of whether drones fall within the classification of 'aircraft' in terms of this treaty, and, furthermore, whether drones operated by the US in Pakistan are categorised as civil or state aircraft.

The US Department of Defense defines an UAV or drone as a '[…] powered aerial vehicle that does not carry a human operator […] can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload.'[33] Although the term 'aircraft' is not defined in the Chicago Convention itself, it is described in the annexures to the Convention. In Annexures 6, 7 and 10, the definition of 'aircraft' reads: 'Aircraft: Any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface.' It is important to note that this broad definition does not state that such a 'machine' must be manned. Consequently, drones may be included in the Chicago Convention's definition of an 'aircraft'.

30 Boothby, *above* n. 21.

31 M. Bourbonniere & L. Haeck, 'Military Aircraft and International Law: Chigaco Opus 3', *Journal of Air Law and Commerce*, 66, 885, 2001.

32 Cf., F. Fedele, 'Overflight by Military Aircraft in Time of Peace', *Air Force law Review*, 9, 8, 1967.

33 O'Connell, *above* n. 12.

Section 3(b) of the Convention defines 'state aircraft' to include aircraft used in military, police, or customs services. There is debate amongst aviation law scholars over the exact definition of state aircraft as there does not appear to be an internationally-accepted interpretation.[34] There seems, however, to be consensus that the key to the classification of an aircraft as 'civil' or 'state' is contained in the word 'use'.[35] The term 'services' may also be understood to include the use of the aircraft to fulfil military, police, or customs 'purposes'.[36] Such an interpretation is consistent with the definition of public aircraft in the Draft Hague Rules of Air Warfare of 1923, as well as the definition of military aircraft in Article 1(k) of the Harvard Research Draft on Rights and Duties of Neutral States in Naval and Aerial War.[37]

As drones are operated by the USA in Pakistan for law enforcement and/or military purposes, in the service of the CIA and/or police and/or the military, such drones fall within the definition of 'state aircraft'.

20.3.3 Sovereignty under the Chicago Convention

Having established that drones as used by the US in its operations in Pakistan conform to the definition of 'state aircraft', we turn to the question of whether the sovereignty principle in the Chicago Convention applies to state aircraft.

Article 1 of the Chicago Convention

Article 1 of the Chicago Convention reads: 'The contracting States recognize that every State has *complete and exclusive sovereignty* over the airspace above its territory.'[38] It could be argued that the aerial sovereignty principle as defined in article 1 applies exclusively to civil aircraft. This argument can be made owing to the inclusion in the Convention of Article 3(a) which reads, '[t]his convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.' Furthermore, a first reading of the Preamble seems to support the idea that the sole purpose of the Convention is the regulation of civil aviation, and the conclusion, therefore, may be drawn that the sovereignty principle, within the spirit of this Convention, relates to civil aircraft only. Many air law scholars are of the

34 E. Sochor, 'Civil and Military Aviation: Who Rules over the Rulemaker?', *Comparative Strategy*, 7, 311, 1988.
35 Sochor, *above* n. 34; I H Diederiks-Verschoor, *An Introduction to Air Law*, Kluwer Law International, 2012; Honig, *above* n. 20.
36 Diederiks-Verschoor, *above* n 35.
37 Fedele, *above* n. 32.
38 Authors' italics.

opinion that, based on sub-article 3(a) and (b), the Convention was never intended to regulate anything but civil aircraft.[39]

Conversely, it could be argued that because article 1 gives 'complete' and 'exclusive' sovereignty to states above the airspace of their territory without limiting this with the words 'in terms of civil aviation', the article applies equally to military aircraft. In line with this argument, the words 'complete' and 'exclusive' bestow power on the territorial state to exercise its aerial sovereignty in terms of *all* aircraft. If the sovereignty principle is indeed applicable to all aircraft – state and military – then the sovereignty principle gives greater protection to the territorial state and better ensures overall aerial safety and regulation. Support of this view may be found in Articles 3(c) and 8 of the Convention. Because Article 1 (which excludes civil aircraft) was placed numerically before Article 3, Giemulla and Webber are of the opinion that this numerical order may indicate that Article 1 is not subject to the limitation contained in Article 3(a) – i.e. the limitation that the Convention applies solely to civil aircraft[40]:

> This statement has to be understood in the context that article 1 of the Chicago Convention emphasizes the general international principle of sovereignty of the air as a principle that claims universal application and therefore also – but not exclusively – is a basic precondition for the Convention and its interpretation. Placing it in front of the description of the area of application of the Convention thus not only is an editorial question, but also serves to show that this principle shall apply to all possible cases. That is not only for civil aircraft and thereby for the application area of the Convention, but also for State aircraft.

The inclusion of Articles 3(c) and 8, therefore, is seen to confirm that the sovereignty principle applies to all aircraft, including pilotless and state aircraft.[41] As such arguments are considered by some too weak to justify a *contra legem* interpretation against the clear object and purpose of this treaty, these arguments will be discussed later in the article in relation to the international rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties.

Article 3(c) of the Chicago Convention

Article 3(c) determines that '*[n]o state aircraft* of a contracting State *shall fly over the territory of another State* or land thereon without authorization by special agreement or other-

39 Cf., S M Beresford, 'Surveillance Aircraft and Satellites: A problem of International Law', *Air Law & Commerce*, 1960, 107, 112.

40 Giemulla & Weber, *above* n. 19.

41 Cf., Fedele, *above* n. 32

wise, and in accordance with the terms thereof.'[42] A general rule of aviation law is included in the Convention in Article 3(c) as it prohibits the unauthorised overflight of the territory of any nation by foreign state aircraft.[43] This does not alter the fact that the treaty as a whole applies exclusively to civil aviation. This view can be supported by the fact that the Chicago Convention did not confer any rights on military aircraft as had the Paris Convention.[44] It did not do so as the Convention, simply put, does not regulate state aircraft.[45] The work of Lissitzyn can be construed to support this sentiment:[46]

> Is the omission in the Chicago Convention of the rules on the privileges of foreign military and other state aircraft contained in Articles 32 and 33 of the Paris Convention intended to imply some change of law? Or is it merely due to a feeling that provisions dealing with jurisdiction over military aircraft are out of place in a civil aviation convention? The published records of the Chicago Convention give no clue to the answer, but the second explanation seems to be the likely one.

The inclusion in Article 3(c) of this general rule of international law has limited significance as the rule of total aerial sovereignty is deemed to be customary international law.[47] This is thus merely a restatement of a rule that would be applicable whether the treaty as such is applicable or not.

Bourbonniere and Haeck, however, are of the opinion that the ostensible transparency of Article 3 of the Chicago Convention is deceptive, and that a conclusion that the application of the Convention is limited to civil aircraft is incorrect.[48] They argue that an in-depth analysis of Article 3 reveals its prime importance to both civil and military international aviation.[49] Bourbonniere and Haeck consider that Article 3(c) of the Convention not only regulates the flight of state craft of contracting states into foreign territory, but also places a duty of 'due regard' (when read in relation to Article 3(d)) on the operators of state aircraft for the safety of the navigation of civil aircraft.[50] In terms of such an interpretation, the US has indeed failed to comply with the 'due regard' requirement, with

42 Authors' italics.
43 T. Phelps, 'Aerial Intrusions by Civil and Military Aircraft in Time of Peace', *Military Law* Review, 107, 255, 1985.
44 Phelps, *above* n. 42.
45 Phelps, *above* n. 42.
46 Lissitzyn, *above* n. 24.
47 Phelps, *above* n. 42.
48 Bourbonniere & Haeck, *above* n. 31.
49 Bourbonniere & Haeck, *above* n. 31.
50 Bourbonniere & Haeck, *above* n. 31; cf., Boothby, *above* n. 20.

particular reference to the safe operation of Pakistani civil craft as well as the sovereignty principle.

The purport of sub-article 3(c) is clearly that '*no* state aircraft of a contracting State *shall fly over the territory of another state* […] without its permission.' This subsection, therefore, includes state aircraft and subjects them to the sovereignty principle.[51] Article 3(c) may be an additional measure to ensure that the sovereignty principle, as enshrined in Article 1, applies to *all* aircraft. This is merely a reiteration of existing international law.

Article 8 of the Chicago Convention

Article 8 is potentially applicable to UAVs as it determines that '*[n]o aircraft capable of being flown without a pilot* shall be flown without a pilot *over the territory* of a contracting Sate *without special authorization* by that State and in accordance with the terms of such authorization.'[52] Article 8, therefore, regulates the use of all unmanned aircraft within the scope of the Convention.

It is important to note that Article 8 is a self-executing treaty provision in terms of US law.[53] The US Court of Appeals for the District of Columbia has decided that certain provisions of the Chicago Convention impose direct obligations upon member states and that they require no implementing legislation.[54] These provisions include Article 8. Therefore, the US is, without doubt, bound to comply with this provision and cannot argue a lack of implementing legislation as an excuse for its non-adherence.

The plain meaning of Article 8 is that the state which is to be entered by a pilotless aircraft has full sovereignty over its territory, and special authorisation has to be sought from and granted by that state for overflight of its territory. Such authorisation is the 'sole prerogative' of the state to be overflown and therefore under potential threat of violation. Should this provision find application to the intrusion of Pakistan by US Drones, it would entail that Pakistan could provide special terms for such authorisation and that the US may not enter its airspace without adhering to those terms and having received such authorization.[55]

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51 Fedele, *above* n. 32.

52 Authors' italics.

53 J.J. Paust, 'Self-Executing Treaties', *American Journal of International Law*, 760, 1988.

54 *British Caledonian Airways ltd v. Langhorne BOND, Balair AG, Lufthansa German Airlines, Swissair, Swiss Air Transport Co, Ltd v. Langhorne BOND, Alitalia-Linee Aeree Italiane-S.P.A* Nos 79-1662, 79-1737, US Court of Appeals, District of Columbia Circuit, (1981) Paras. 23-28.

55 Nevertheless, the opposite argument could be adduced: that this provision is not applicable to the situation in Pakistan. Indeed, that Art. 3(a) expressly provides that Art. 8 applies exclusively to civil aircraft because that is the purport of the Convention as a whole (Bazyler 1987; Dalamagkidis et al. 2008). When one compares the wording of Art. 8 with that of Art. 1 where sovereignty is defined, it appears that Art. 8 is a strong iteration of the sovereignty principle as encapsulated therein. Art. 8, however, goes a step further by ensuring that the sovereignty principle is undeniably applicable to pilotless aircraft.

In support of our argument, some scholars contend that Article 8 of the Convention may apply also to state UAVs.[56] Firstly, a literal interpretation of the words '[n]o aircraft capable of being flown without a pilot' can indicate that this phrase includes *any* aircraft capable of being flown without a pilot, whether they are state or non-state aircraft. The key word here is 'no'. '*No*' which, by common understanding, implies that *all* aircraft – military, civil and state – are included in this prohibition.

The argument may also be presented that consideration should be given to the drafting history of the treaty, with particular reference to the context in which Article 8 was drafted, in consideration of the use made of unmanned balloons during World War II to carry bombs over international borders to bomb neighbouring states and to spy on foreign territory.[57] This practise closely resembles the US's use of drones in Pakistan. It would, therefore, be correct to infer that the purpose of this provision is to protect the territorial sovereignty of every state against unlawful entry by pilotless vehicles of any sort – civil and state.

20.3.4 Drones, the Chicago Convention and the Vienna Convention

As noted above, the interpretation of Articles 1, 3(c) and 8 of the Chicago Convention with respect to drone warfare remains undecided at the present juncture. The problem of conflicting views in this regard fall within the scope of Article 1 of the Vienna Convention on the Law of Treaties (VCLT).[58] The VCLT is a uniform system of international rules regulating treaty interpretation. It serves as an interpretive tool to establish the meaning of treaty provisions. We therefore turn to the VCLT as the final word on the interpretation of Articles 1, 3(c) and 8 of the Chicago Convention.

Part III, Section 3 of the VCLT sets the primary and secondary rules of treaty interpretation. Article 31 contains the general rules of interpretation. Secondary rules may be employed only if the general rules fail to give relief. Article 31(1) of the VCLT helps to clarify any confusion relating to Articles 1, 3(c) and 8 of the Chicago Convention: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'.

The object and purpose of the Chicago Convention are enshrined in its Preamble. The scope of application of the treaty also provides answers as to the context of the terms. The scope of application of the principle contained in the Preamble is clearly stated in Article 3(a) of this Convention as being only to civil aircraft. According to the guidance provided

56 Cf., S A Kaiser 'Legal Aspects of Unmanned Aerial Vehicles', *German Journal of Air and Space Law*, 344, 2006.

57 D.M. Marshall, 'International Regulation of Unmanned Aircraft Operations in Offshore and International Airspace', *Issues in Aviation Law and* Policy, 8, 87, 2009.

58 Vienna Convention on the Law of Treaties 1969.

in Article 31(1) of the VCLT, the term 'aircraft' in Article 8 of the Chicago Convention clearly means nothing but civil unmanned craft, and, furthermore, Article 1 and the treaty are exclusively concerned with the regulation of civil aircraft. It is thus indisputable that the textual interpretation of the Chicago Convention means that words should be read in their context. In the context of a treaty applying only to civil aircraft, therefore, the provisions should also be read and interpreted as such.[59]

Arguments made by some that Article 8 should be read in the context of the circumstances at the time of the Convention's conclusion are precluded as Article 32 of the VCLT states that recourse may be had to the supplementary rules of interpretation only under two conditions:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> Leaves the meaning ambiguous or obscure; or
> Leads to a result which is manifestly absurd or unreasonable.

It is clear that, since neither of these two conditions is apposite as regards the interpretation of the Chicago Convention, it follows that the Convention is exclusively applicable to civil aircraft and civil drones, and not state drones as operated by the US in Pakistan. Nonetheless, Article 3(c) of the Chicago Convention is applicable to the extent that it contains the customary norm of international air law which dictates that the state aircraft of one state may not enter the foreign territory of another state without prior authorisation.

20.3.5 Conclusion

The Chicago Convention is not, as a whole, applicable to the regulation of US drones operated in Pakistan. The reason for this is that drones as used by the US in Pakistan are classified as 'state aircraft' and are therefore excluded from the scope of the treaty (art 3(c)). Article 8, the provision regulating unmanned craft, is thus exclusively applicable to civil aircraft. However, Article 3(c) is applicable to the extent that it contains the customary norm of international air law which dictates that the state aircraft of one state may not enter the foreign territory of another state without prior authorisation.[60]

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59 F.G. Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference', *International and Comparative Law Quarterly*, 18, 318, 1969.

60 Cf., Boothby, *above* n. 21; Lissitzyn, *above* n. 24.

Therefore, a treaty exists to which both the US and Pakistan are signatories which expressly prohibits the infringement of another state's sovereign airspace without the prior authorisation from the state whose territory is being subjected to aerial encroachment. Consequently, the US is in breach of this requirement as it does not have permission to enter Pakistan's sovereign airspace.

20.4 Possible Justifications for an Infraction of Aerial Sovereignty

20.4.1 Introduction

As it has been established above that its actions are an infraction of Pakistani aerial sovereignty, there are three exceptions on which the US may rely to justify its crossing of Pakistan's borders. Two exceptions allow for the crossing of sovereign aerial borders during peace-time and the other exception relates to the applicability of the law of war.

A state's peace-time incursion into foreign territorial airspace through the agency of its aircraft can be justified if the perpetrator of the intrusion has authorisation from the foreign state's government to do so, or if perpetrator is acting in self-defence. It has been made clear that Pakistan has not consented to this infraction and has no intention ever to do so. On the other hand, the US has defended its incursive actions on the grounds of pre-emptive self-defence with a view to eliminating Al Qaeda operatives hiding in Pakistan. This 'justification' will be explored further in detail below, as well as the US's argument that it is conducting a putative 'war on terror'.

20.4.2 A 'War on Terror'

Until recently the general perception has been that the described categories of international and non-international armed conflict covered all conceivable forms of contemporary armed conflict. Since the events of 11 September 2001, however, this categorisation has been challenged by the claim by the US that it is engaged in a 'war on terrorism' or 'war on terror' and by the ensuing debate on the possibility of a new kind of 'transnational armed conflict.'[61]

The 'war on terror' was proclaimed by President George W. Bush on 20 September 2011 before a Joint Session of Congress in the aftermath of the events of 9/11. Shortly thereafter he added that 'the war… will not end until every terrorist group of global reach

61 Melzer, *above* n. 3.

has been found, stopped, and defeated'.[62] On 3 November 2002 the US launched a drone strike against a suspected Al Qaeda operative in Yemen.[63] Yemen claimed that there was no armed conflict in its territory at the time of the strike, nor was the US at war with Yemen.[64] Condoleeza Rice, National Security adviser at the time, explained that the US was engaged in a 'new kind of war' and that this would be fought on different battlefields.[65] This implies that the US deems it within the scope of the 'war on terror' to target Al Qaeda operatives wherever they are, as the 'war on terror' is a borderless war.

The concept of a 'borderless war' is central to this article as it is argued that the US's intrusion into Pakistani airspace is an infringement of Pakistan's national aerial sovereignty. If the US wins credence for its advocacy of a 'borderless war' on terror, it will have won legitimacy for any intention it may have of entering foreign airspace without violating the customary and treaty law principle of aerial sovereignty.[66] Put differently, if a 'war on terror' indeed exists as a legitimate war enterprise in the eyes of the world, then it would be justifiable to regard the members of Al Qaeda as combatants who may be targeted if they have a continuous combat function or if they participate directly in hostilities.[67] This justification could legitimise drone strikes by the US without Pakistan's permission, which would mean, effectively, that the principle of Pakistani territory's sovereignty would be set aside, thus laying that territory open to attack.

The concept of a 'war on terror' has led to much academic debate.[68] At present, most international law scholars agree that the concept carries no weight in law and does not constitute a legitimate defence providing justification for acts of military aggression across borders.[69] In fact, the notion of a 'war on terror' does not meet the principal criteria that define a traditional war.[70] Despite the lack of legal cogency of the idea, however, a school of thought exists in the US and further afield to the effect that acts of terrorism have justi-

62 M.E. O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, Notre Dame Law School Legal Studies Research paper No. 09-43, http://ssrn.com/abstract=1501144, 2010.

63 O'Connel, *above* n. 61.

64 O'Connel, *above* n. 61.

65 O'Connel, *above* n. 61.

66 Cf., J.J. Paust, 'Self-defence Targeting of Non-State Actors and Permissibility of US use of Drones in Pakistan', *Journal of Transnational Law and Policy*, 20, 1, 2010.

67 Cf., R P Bandridge 'A Qualified Defene of American Drone Attacks in Northwest Pakistan under International Humanitarian Law', *Boston University International Law* Journal, 409, 2012.

68 Cf., B.G. Williams, 'The CIA Covert Predator Drone War in Pakistan, 2004-2010: History of an Assassination Campaign', *Studies in Conflict and Terrorism*, 33, 871, 2009; Bandridge, *above* n. 66; Shaw & Akther, *above* n. 6; cf., Dempsey; Gogerty & Hagger 2008; C. Gray, 'President Obama's 2012 United States National Security Strategy and International Law on the Use of Force', *Chinese Hournal of International Law*, 10, 35, 2010; O'Connel, *above* n. 61.

69 Gray, *above* n. 67.

70 Gray, *above* n. 67; O'Connel, *above* n. 61.

fiably led to the development of a new kind of warfare that has carved an undeniable niche for itself in the modern world.[71]

The movement by some US scholars to support the existence of such a law on terror does, indeed, show that the law is under pressure. However, this article holds in concert with international legal opinion that the concept of a 'war on terror' is indefensible in international humanitarian law.[72] The crossing of territorial borders for purposes of military aggression, especially without the prior knowledge or consent of the authorities controlling the territory in question, remains illegal, whether the incursion is perpetrated by air or otherwise.

20.4.3 Pre-Emptive Self-Defence

The US relies on an 'inherent right to self-defence' or a right to anticipatory self-defence to justify its drone missions into Pakistani airspace in order to execute targeted killing operations.[73] If the notion of a 'war on terror' is rejected by the international community,[74] this defence is the US's fall-back position. Self-defence is, indeed, the exception to the prohibition imposed on the use of force by virtue of Article 2(4) of the UN Charter. This defence will also be applicable in a human rights paradigm. The question whether self-defence is a tenable justification for incursions into Pakistani territory, thus breaching Pakistani aerial sovereignty, is considered here with reference to the following criteria: prohibition on the use of force; self-defence by virtue of Article 51 of the UN Charter; and the application of a case study based on the current drone activities in Pakistan.

A general prohibition on the use of force exists in international law. Article 2(4) of the UN Charter is preeminent in deciding questions about the legality of cross-border use of force. It reads as follows:[75]

All Members shall refrain in their international relations from the threat or *use of force against the territorial integrity or political independence of any state*, or in any other manner inconsistent with the purpose of the United Nations.

The normative objectives of the UN (Art. 1 of the UN Charter) can be interpreted as offering persuasive guidance on interpretation. The US may argue that its use of force is consistent with the normative objectives of the United Nations, namely, to maintain international peace and security. In response, Pakistan could offer the counterargument that US drone strikes are, in fact, achieving the opposite effect by destabilising the very qualities they claim to be protecting in Pakistan.

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71 Williams, *above* n. 66; Bandridge, *above* n. 67; Shaw & Akther, *above* n. 6.
72 Cf., Gray, *above* n. 67.
73 www.state.gov/s/l/releases/remarks/139119.htm.
74 Id.
75 Authors' italics.

Self-defence or legitimate self-defence is a legal exception to the use of force, articulated in Article 51 of the UN Charter:[76]

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be *immediately reported to the Security Council* and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The above article allows an exception to the terms laid down in Article 2(4).[77] In the *Corfu Channel* case,[78] the International Court of Justice (ICJ) underscored the broad prohibition on the use of force, even deciding that some actions taken for purposes of self-defence may be considered unlawful if their purposes are misaligned with the UN Charter.[79] The ICJ further upheld the inviolability of the principle of territorial sovereignty, even when the justification of self-defence was attempted. In its response to the Court's rejection of the justification of self-defence, the United Kingdom classified 'Operation Retail' instead as a method of self-protection or self-help.[80] The Court could not accept this defence either, and stated that '[r]espect for territorial sovereignty is an essential foundation of international relations' between independent states.[81] Self-defence, therefore, needs to be defined quite strictly as laid down in Article 51 of the UN Charter, to the exclusion of self-protection and reprisals. As the ICJ sets great store by the sovereignty principle, it would probably insist on that principle to contradict the US's use of self-defence as justification for its violation of Pakistan's territorial integrity.

De Wet points out that there exists considerable controversy amongst scholars regarding the type of situations that constitute an armed attack in accordance with Article 51 of the UN Charter, but that, according to the dominant opinion, only the gravest forms of military force in violation of Article 2(4) of the UN Charter qualify for such classification.[82] De Wet further notes that the right to anticipatory self-defence may be exercised

76 Authors' italics.

77 De Wet states that, according to the restrictive line of argument which regards the Security Council as the cornerstone of collective security, the right to self-defence can only be asseverate in exceptional circumstances. O'Connel, *above* n. 61; Hestermeyer et al. 2012.

78 *Corfu Channel* Case *(UK v Alb)* ICJ Rep. 1949, Paras. 29 – 35.

79 Cf., O'Connel, *above* n. 61.

80 *Corfu Channel* case, *above* n. 77, Para. 34.

81 *Corfu Channel* case, *above* n. 77, Para. 35.

82 Heystermeyer et al., *above* n. 70.

'in the face of an imminent threat of large-scale use of force, where no other means would deflect it and the action is proportionate.'[83] It is unknown whether the US is acting in Pakistan against a threat of large-scale use of force, as the CIA keeps the intelligence of whom they target and why strictly classified, but it is doubtful whether this is indeed the case.

'Self-defence' in the traditional sense[84] may justify the use of force entailing an incursion into foreign territory in response to an armed attack. On 11 September 2001 an attack launched by foreign nationals was perpetrated against the US. The question here is whether the incident referred to can be considered an armed attack in the sense of a non-international armed conflict,[85] given that it certainly qualifies as a terrorist attack. Regardless of whether the attack launched by Al Qaeda against the US falls within the ambit of armed conflict (Art. 51), however, the self-defence argument is hard to be sustained at this juncture, twelve years after the fact. Grounds for the charge are effectively vitiated by the time lapse involved. The threat is no longer imminent as legally required. Even statements made by President Obama seem to imply that the US admits that this argument is invalid as no armed attacks since 2001 have been perpetrated on US territory by the organisation claiming responsibility.[86]

Heyns contributes to the nuances by stating that 'states are not entitled to continue to act in self-defence until the absolute destruction of the enemy is achieved, such that the enemy poses no long-term threats.'[87] This cements the argument that the US cannot continue to target Al Qaeda operatives wherever they are until every last member has been hunted down. The 'imminence' requirement is no longer met, and once the threat has ceased the attack should stop.

Authors generally agree that, in principle, targeted killings undertaken on foreign soil (beyond the perpetrating political entity's national boundaries) fall under Article 2(4) of the UN Charter.[88] Article 2(4) requires a situation of interstate self-defence to authorise such action.[89] In the case of targeted killings, the US adduces pre-emptive self-defence against Al Qaeda and its affiliates. In the *Caroline* case[90], Court held that self-defence is admissible and justified by necessity, provided that the necessity is instant, overwhelming,

83 Heystermeyer et al., *above* n. 70.
84 Cf., Art. 51 of the UN Charter.
85 Id.
86 '…today, the core of al Quada in Afghanistan and Pakistan is on the path to defeat. Their remaining operatives spend more time thinking about their own safety than plotting against us. They did not direct the attacks in Benghasi or Boston. They have not carried out a successful attack on our homeland since 9/11' (Remarks by President Obama at the National Defense University, Fort McNair, Washington DC on 23 May 2013).
87 UN Doc. A/68/382.
88 UN Doc. A/68/382; Melzer, *above* n. 3; Boothby, *above* n. 21.
89 Melzer, *above* n. 3.
90 *Caroline Incident*, 29 B.F.S.P. 1137 – 1138.

leaving no choice of means and no moment for deliberation.[91] Although hailing from the 19th century, this case is still deemed to articulate the decisive requirements to justify necessity. This is illustrated by the inclusion of these principles as the starting point of any such academic discussion, as in the Heyns 2013 Drone report dealing with the 2005 World Summit outcome, as well as in contemporary scholarly writings.[92]

Further, Article 51 of the UN Charter justifies self-defensive action not only against 'an actual use of force, or hostile act', or against an imminent use of force, but also against so-called 'continuing threats'. Melzer would claim that a military action undertaken in anticipatory self-defence would accommodate the possibility of arbitrary or speculative use of force.[93] Article 25 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts allows 'necessity to act' in situations such as self-defence, provided that it is the only way for the state to safeguard an essential interest against a grave and imminent peril.

The proportionality requirement on which the legitimacy of the self-defence argument depends, demands that a state acting defensively may employ no more force than is reasonably required to overcome the threat.[94] In the situation under review, which is a cross-border operation, the limitation entails that only necessary actions may be taken.[95]

The authors appreciate the principles as laid down in the *Caroline* case and agrees that a prohibition of pre-emptive self-defensive action would contradict the purposes of the Charter since it would effectively allow an aggressor to strike the first blow, which could be fatal.[96] The test in *Caroline*, however, states clearly that the threat must be *imminent* and that there must be *no alternative* but to use force. The World Summit Outcome reaffirmed the criterion set in the *Caroline* case. It is evident from President Obama's speech and the purport of news reports that Al Qaeda does not pose an immediate threat to the US and has not used force against the US since 9/11.[97] It is therefore unlikely that the requirement of 'imminence' would be considered met in the situation under review. It may also be argued that the use of force against Pakistani territory is unjustifiable since the threat does not emanate from that quarter.

The second condition stated in *Caroline* is that there must be no alternative cause of action. The purport of the US 2013 Drone Policy speech seems to imply a realisation by

91 Authors' italics.

92 UN Doc. A/68/382; D Bethlehem 'Self-Defence Against an Imminent of Actual Armed Attack by Non-State Actors' *The American Journal of International Law* 177, 2012; Gray, *above* n. 4.

93 Melzer, *above* n 3.

94 Gray, *above* n 4.

95 P. Alston, *The CIA and Targeted Killings Beyond Borders*, NYU Working paper No. 11-64, September 2011, http://ssrn.com/abstract=1928963, 2011.

96 O'Connel, *above* n. 16.

97 Remarks by President Obama at the National Defense University, Fort McNair, Washington, DC on 23 May 2003.

the US that a claim to that effect would be unlikely to gain decisive credence[98] (Remarks by President Obama at the National Defense University, Fort McNair, Washington DC on 23 May 2013):

> Beyond the Afghan theatre, we only target Al Qaeda and its associated forces. And even then, the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate and to prosecute. America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.

The question whether the use of force is indeed a last resort in the conduct of drone operations undertaken by the US is difficult to answer since there is little information available from which to discover how the US determines whom to target, when to target, and how to exclude other possible methods as required by the *Caroline* case. At first, avowal of these self-imposed constraints may have brought some hope to scholars who anticipated that the condition for cross-border military intervention as a last resort would be more rigorously observed and upheld by the US. Similar drone strikes have occurred in Pakistan since this statement, however, and justification by the US Defence Department is still not forthcoming.

The *Nuclear Weapons* case[99] confirmed that the admissibility of self-defence is contingent on observing the rules of necessity and proportionality in accordance with customary international law, and that this dual condition applies equally to Article 51, whatever the means of force. In the *Oil Platforms* case the court confirmed that when acting in self-defence, the requirements of necessity and proportionality are immutable.[100] This means that the US will have to prove in accordance with Article 51 that the use of drones for the purported purpose of self-defence is unavoidable, and that there can be no other recourse. Heyns observed in his 2013 Drone Report that:[101]

> […] there is an emerging view that the level of violence necessary to justify a resort to self-defence ought to be set higher when it is in response to an attack by non-state actors than to an attack by another state. This specific intensity requirement for the definition of an armed attack must be met *vis-a-vis* each host State on whose territory action in self-defence is taken.

98 Ibid.
99 *Nuclear Weapons* case Advisory Opinion ICJ Rep. 1996, 226.
100 Hestermeyer, *above* n. 70; cf., *Case Concerning Oil Platforms* ICJ Rep. 2003.
101 UN Doc. A/68/382.

The legal implication of the above statement is that the 'violence' or, rather, 'lack of violence' on Pakistani territory does not constitute sufficient grounds for the US to justify a claim that it is acting in self-defence against a non-state actor.

It is further important to note that convenience and necessity are by no means synonymous. It may be convenient for the US to use drones, but action thus motivated would not meet the criterion of necessity. The proportionality requirement would not be a formidable barrier to overcome as civilians often fall prey to collateral damage caused by drone strikes. Such an analysis should be done on a case-by-case basis.

De Wet notes that 9/11 revived the academic debate regarding the legal justifiability of launching a retaliatory armed attack against non-state entities whose actions cannot be attributed to a state.[102] This issue was addressed in the *Palestinian Wall* case, in which the court admitted the argument of self-defence provided that defensive acts could be shown to be in reaction to an armed attack mounted by a state against another state.[103] The current US operations in Pakistan are aimed at Al Qaeda (a non-state actor) and not at the state of Pakistan. The purport is clear, namely, that the actions of the US in this instance do not meet the criteria for self-defence according to the Court's ruling, as Al Qaeda is not a state.

Drone strikes by the US in Pakistan, therefore, remain an infringement of Pakistan's territorial sovereignty. This is so in view of the case law which supports a narrow interpretation of self-defence permitted under Article 51 of the UN Charter. Some scholars support the US's position;[104] however, the authors submit that it is evident from the primary sources of international law that this defence is baseless.

20.5 Conclusion

The purpose of this article has been to show that the US is in violation of international law on aerial sovereignty as a result of its drone intrusions into the territory of Pakistan.

The principles of aerial sovereignty have been explored, prompting the finding that Article 2(4) of the UN Charter and the customary principle of aerial sovereignty as contained in Article 3(c) of the Chicago Convention confirm that the US is in breach of Pakistani sovereignty. It has illustrated, further, the vacuity of purported arguments based on such expressions as 'the war on terror' and 'pre-emptive self-defence'.

It may thus be concluded that the current drone operations by the US in Pakistan constitute a breach of Pakistani aerial sovereignty and are a violation of international law.

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102 Hestermeyer, *above* n. 70.

103 Hestermeyer, *above* n. 70.

104 The authors agree with De Wet who notes that '[w]ith each expansion of the notion of self-defence, the collective security system is weakened in favour of the unilateral use of force exercised under the exclusive control of the states affected.' Orr, *above* n. 11; cf., Hestermeyer, *above* n. 70.