



Justified Drone Strikes are Predicated on R2P Norms

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The U.S. has conducted or does conduct “personality” and “signature” drone strikes into Afghanistan, Pakistan, Iraq, Syria, Yemen, Somalia, and quite possibly other states as well.¹ The U.S. does this in order to disrupt, dismantle, and defeat terrorist organizations (such as Al Qaeda and associated entities). In some of these attacks, states have given their expressed (e.g. Afghanistan, Iraq, Yemen) or tacit (e.g. Pakistan) consent to the U.S. to conduct these drone strikes. However, some states do not consent to the U.S. conducting drone strikes within their territory. In these cases, it seems *prima facie* reasonable to suggest that these strikes are unjustified because they violate political sovereignty and territorial integrity of a non-consenting state. Furthermore, the U.S. is not at war *per se* with these states so there does not seem to be any reason to suggest that the U.S. has a right to conduct these operations against those states.

Traditional just war principles of going to war (*jus ad bellum*) regulate the moral permissibility of a state’s resorting to armed force. Based on contemporary just war doctrine, a state can justifiably resort to war as a result of individual or collective self-defense in order to defend a state’s political sovereignty, territorial integrity, or the human rights of its people. These forms of defense (individual and collective) are a state’s inherent right. By extension, the U.S. declares that drone strikes can be used to stop imminent threats from abroad because doing so is consistent with a state’s inherent right self-defense.² However, drone strikes for that reason constitutes a violation of traditional *jus ad bellum* principles (just cause and last resort) according to just war theory. In addition, and even more alarming is that conducting drones strikes into a state that the U.S. is neither at war with nor morally justified to be at war with (since that state or a non-state actor operating in that state) does not *actually* constitute an imminent threat *per se*.

To lay to rest these objections to drone strikes, I shall put forth what might be a plausible framework from which the U.S. can morally justify its use of armed drone strikes into those states that do not consent to such action. I shall primarily focus on three theses: 1) The U.S. policy concerning imminent threat is way too permissive and does not constitute self-defense. 2) A more plausible account of justified drone strikes is one in which such strikes are predicated on the Responsibility to Protect (R2P) and thereby justified. And lastly 3) according to James Pattison’s Moderate Instrumental Approach, the U.S. is the most reasonable entity to intervene when there is a responsibility to protect.

Imminent Threat:

Congress authorized the use of military force (AUMF) against those responsible for the attacks on September 11, 2001. The AUMF granted the President the authority to use all necessary and appropriate force against those whom he determined planned, authorized, committed, or aided in those attacks. Nonetheless, the AUMF does not mean that every use of military force that the U.S. implements is morally (or even legally) justified. The U.S. has also implemented a policy regarding the targeting of U.S. citizens abroad who are considered to be terrorists—at the senior level—in Al Qaeda and associated entities (e.g. Anwar Al-Awlaki). This policy only sets relatively rigorous criteria for targeting U.S. citizens. If a person is not a U.S. citizen, then the criteria for such targeting are incredibly low—sometimes equivalent to the criteria for a signature strike (aka suspicious activity). Current U.S. drone policy is so malleable that it essentially sanctions any drone strike. According to the U.S., the target is



lawful when it poses an imminent threat, capture is not possible, and the attack is conducted in accordance with international law or the law of armed conflict. CIA director John Brennan was the first administration official publicly to acknowledge drone strikes in a speech last year, calling them “consistent with the inherent right of self-defense.” And Attorney General Eric Holder specifically endorsed the constitutionality of targeted killings of Americans, saying, “They could be justified if government officials determine the target pose an imminent threat of violent attack.”⁴

However, the underlying problem is the U.S.’s conception of imminent threat. According to the Justice Department “020413 White Paper,” “The threat posed by al-Qa’ida and its associated forces demands a broader concept of imminence.”⁵ That is: “‘Imminent’ threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”⁶ Since the U.S. cannot be aware of all plots, in essence it cannot be confident that none are about to occur. So “imminent threat” does not actually refer to specific intelligence about any ongoing plot against the U.S..

According to just war theory, just cause is constituted by an act of aggression (armed violence against the political sovereignty, territorial integrity, and human rights of the people of a state). Some suggest that preemption is morally permissible defense because of an imminent threat (seriousness and closeness of the actual threat) which is about to occur and “waiting or doing nothing other than fighting greatly magnifies the risk” to a state’s people.⁷ However, the U.S.’s imminent threat policy is so porous and malleable that, I believe, it in effect eliminates the distinction between mere threats and imminent ones.

Responsibility to Protect:

The use of armed drones is a recent innovation that will continue to evolve. With this innovation comes a need for establishing a set of moral guidelines on a state’s implementation of them. We need to look at drone strikes not as an act of war but as an act of force short of war and elaborate what constitutes the just use of force (*jus ad vim*) in such a case, since drones are like not only to stay but also likely to be used more often as the 21st century unfolds.

It seems reasonable to suggest that states have the right to use force such as drones in limited ways but also to ask how and when those limited ways can really be justified. Currently, though, ‘actual’ imminent threat, consent, or UN Security Council authorizations are the only three reasons a state can justifiably use such force, leading us to ask: can drone strikes be morally justified in situations other than imminent threat (war), consent, or UNSC authorization?

I would like to propose that drones strikes *can be* morally justified as acts short of war in which the justification for those acts is predicated on the Responsibility to Protect (R2P). That is, the Responsibility to Protect (R2P) should be the guiding norms with regard to *jus ad vim* (the just use of force short of war). Incorporating R2P into a *jus ad vim* account provides a framework for when states—in particular the U.S.—can morally resort to the use of force short of war.

I will show that the justification for use of force short of war rests on a state’s failure (whether intentional or not) to honor basic human rights. First, I will discuss R2P and explain why a state loses its moral right to non-intervention when it does not comply with certain necessary conditions. Showing this alone does not justify the use of force short of war. It only shows that the state in question has lost its moral right to non-intervention. Because my argument mainly turns on using an R2P account of when force short of war is justified, I will explain how this loss of right is possible before moving on to offering an account of the sufficient conditions for justified drone strikes into another state.

In 2001, the International Commission for Intervention and State Sovereignty (ICISS) published “The Responsibility to Protect,” replacing the term *Humanitarian Intervention* with the term *The Responsibility to Protect*



(RtoP or R2P). The ICISS replaced the term because “1) state sovereignty implies primary responsibility for the protection of citizens rests with the state itself, and 2) where a state is unable to or unwilling to avert grievous issues,⁸ the principle of non-intervention yields to the international responsibility to protect.”⁹ The Responsibility to Protect doctrine consists of three specific responsibilities: 1) the responsibility to prevent—to identify early warning signs of trouble and take action to mitigate underlying issues; 2) the responsibility to react—to respond to the situation with appropriate measures; and 3) the responsibility to rebuild—to provide (after military intervention) full assistance with restoration efforts.¹⁰

In order to justify the use of military force (the react phase), there has to be serious and irreparable harm occurring to human beings: 1) large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or the neglect or inability to act, or a failed state situation; or 2) large scale ethnic cleansing, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror, or rape.¹¹

In addition, the ICISS states that the UNSC should take into account that if the UN fails to discharge its R2P obligations, then the UNSC may not rule out other means (states acting unilaterally, sub-regionally, or regionally) to meet the seriousness of the situation.

In 2005, at the World Summit (WS) of the UN General Assembly agreed that the responsibility to protect was an important feature in safeguarding the innocent, and unanimously adopted (Resolution 63/308) paragraph 139 of the 2005 WS report regarding R2P: “The UN will be prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.”¹²

Article 138 of the 2005 WS report declares that, “Individual sovereign states still bear the primary responsibility to protect their populations, and we accept that responsibility and will act in accordance with it.”¹³ This is analogous to the Lockean conception of the rights of government which presupposes that legitimacy is conditional upon the fulfillment of certain moral criteria.¹⁴ That is, we have moral criteria governing the legitimacy and standing of states. “Political entities are legitimate only if they achieve a reasonable approximation of minimal standards of justice, again understood as the protection of basic human rights.”¹⁵ States that adequately protect core human rights are recognized as “a member in good standing of the system of states, with all of the rights, powers, liberties, and immunities that go along with that status.”¹⁶ David Luban points out: “When State A recognizes State B’s sovereignty it accepts a duty of non-intervention in B’s internal affairs; in other words, it commits itself to pass over what B actually does to its own people.”¹⁷ If a state does not meet this minimum standard of justice, then that state loses its moral right to non-interference, because “a state must be legitimate in order for a moral duty of non-intervention in its affairs to exist.”¹⁸

Sovereignty, insofar as it entails a right to non-intervention, presupposes legitimacy and legitimacy presupposes the effective realization of core human rights, including physical security, subsistence, and basic liberty rights. “Human rights set a necessary, though not sufficient, standard for the decency of domestic political and social institutions.” This necessary standard implies a dual responsibility: “externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.” A state that adequately protects and respects the human rights of its own people as well as respects the human rights of citizens in its external relations with other states can be considered a member in good standing in the international community because “it successfully carries out the requisite political functions” needed to guarantee its legitimacy.

Although members of the international community share principles and common ground, they do not take interest in everything other states do. However, they do take interest when states fail (whether deliberately or



not) to reasonably secure the basic rights of their citizens. That is true not only of acts such as genocide, ethnic cleansing, war crimes, and crimes against humanity but also of allowing terrorist groups which not only deliberately strip civilians (which are in relative geographical close proximity to these terrorist groups) of their basic human rights but also plot and scheme in order to strip other civilians (in a distant region or land) of their basic human rights as well. The key point here is that to guarantee a state's right to political non-intervention it must reasonably honor the core rights of not only its own people but others as well.

A state that manifestly violates core human rights (whether intentionally by imposing unjust actions, by allowing terrorist organizations to operate within its borders, by lacking the ability to secure its own population, or by not being able to prevent a terrorist organization's operations) loses its moral right to non-intervention because it not only violates the basic rights of its citizens but also "poses a fundamental threat to peace and stability within the international order."²² A state that has failed the moral conditions of legitimate sovereignty leaves the state system with a gap: there is a population neither organized nor represented by a legitimate state. The result is the destabilization of the state system and international community. It is as if a population becomes 'stateless' since its state fails to fulfill certain conditions necessary for recognition as a legitimate state in the international community. The state system is a system of states. If we have moral criteria governing the standing of states, then the system is compromised when those conditions are not fulfilled. Failure of the state leaves its own population exposed as well as invites significant concern and further acts of aggression outside that state, including against U.S. citizens and U.S. interests.

There are many conditions, including a fairly wide range of human rights conditions, a state must fulfill in order to merit recognition and a right to non-intervention. Failing any of these will leave it without a claim to recognition and without a right to non-intervention. But other states cannot justify the use of force by simply pointing out that the 'state' they are intervening into has no right to non-intervention. That it has no such right to non-intervention is a necessary condition for the justified use of force, but not a sufficient condition.

Military force short of war is justified only if a number of further conditions are fulfilled. Each is a necessary condition. Only when all are fulfilled, are they sufficient to justify force short of war (e.g., drone strikes). In addition to a state's *inability or lack of intent to secure basic physical security rights*, the other necessary conditions are: *a right intention, a reasonable chance of success, a proportionate response, and voluntariness.*

The idea of *right intention* is the overarching constraint on *war*; a right intention aims at a just and lasting peace. A lasting peace is not possible unless certain standards of basic justice are secure. The same standard should apply with regard to the implementation of the use of force. The implementation of drone strikes—although permissible when all of the necessary conditions materialize—should be complemented before, during, and after with diplomatic communications and negotiations between states. That is, the use of drones needs to be a part of a comprehensive doctrine using diplomatic, informational, economic, and military resources. Drones—although important—should play a supporting effort in a much broader approach to R2P issues. Implementing signature and personality drone strikes should not negate the implementing state's responsibility of using political discourse and other peaceful measures. Having a right intention also includes incorporating a reasonable timeline in order to mitigate precipitous drone strikes. The offending state should be given a reasonable amount of time to redress the violation at hand before drone strikes are initiated.

The implementation of the use of force should have a *reasonable chance of success*. Conducting drone strikes in order to disrupt terrorist organizations could be reasonably successful in several ways. "Compared to acts of war, *jus ad vim* actions present diminished risk to one's own troops, have a destructive outcome that is more predictable and smaller in scale, severely curtail the risk of civilian casualties, and entail a lower economic and military burden."²³ There are significant advantages to using drones instead of trying to mobilize men, materiel, and resources in order to fight. In addition, public support is much easier to obtain when using drones instead of risking soldiers. Additionally, drones have the ability to avoid detection, have extensive loiter time, can gather



up-to-date intelligence, surveillance, and reconnaissance before a strike, and are able to conduct operations in remote areas and inhospitable terrain.

The use of force must be *proportionate*. By its very nature, the use of force (drone strikes) is much more proportionate than ordinary warfare. It is much easier for drone strikes to abide by principles of discrimination, military necessity, proportionality, and due care to the civilian population.

Moderate Instrumental Approach:

The last necessary condition that I mentioned is that force short of war (drone strikes) should be *undertaken voluntarily* by states.

Human rights are a practical political creation based on common ground and shared principles which are “minimum reasonable demands upon the rest of humanity.”²⁴ If states are committed to realizing human rights, then they must be committed to protecting them. This commitment requires them to do more than simply not violate the human rights of noncompatriots. States must also act together to ensure that there is some international system in place that will reliably protect the human rights of noncompatriots, remedy violations, etc. Without any effective international system that takes positive action to protect those rights, basic human rights will be violated by governments directly, by terrorists organizations, or by governments unable or unwilling to stop terrorist organizations.

This being the case, it is not enough for the home state to be the primary obligee without any back-up. Having back-up obligees provides a level of guarantee and protection of subsistence, basic liberty, and physical security rights that could not be met otherwise. This is important because basic human rights impose the same duties on all states. It binds all of us together. Human rights are what each person owes each other. Every person and therefore every state is a bearer of that responsibility. If one state fails in its responsibility, then others have a responsibility to step in.

Critical to this is that the force short of war is a viable act that should be implemented when justified. Although peaceful measures provide options, they may fail to accomplish what their sponsors intend.²⁵ Recognizing not only that force short of war may be necessary but also just is as important as recognizing that force short of war should not depend on whether there is UNSC authorization. As Michael Walzer says, “Collective security depends on collective recognition.”²⁶ This not only means that states collectively speaking are responsible for providing protection and defense to others but that they must also collectively agree that in fact force needs to be implemented, and this can be inherently problematic. Both the strength and weakness of the UN comes from its voluntary aspect. If the international community or federation of states fails in its duties, then individual states may have a duty to act individually.

There is a strong demand for competent global institutions that decisively enforce positive duties when states fail to. Human rights are supposed to be capable of guiding political action. If states fail to adequately protect basic human rights, there needs to be an institution that is capable of stepping.

As it currently stands, the UN is more prepared to implement peaceful measures, although these are often less effective. The practical problem is that the UN does not have a standing military. The state system constrains what sort of military capacity the UN can have at its disposal. We should therefore acknowledge the legitimacy of unilateral action. Given the voluntary nature of the international community, states have a right to act on their own reasonable judgments in R2P situations. That is, a state is justified to implement force short of war when all necessary conditions obtain.

I would like to implement James Pattison’s moderate instrumental approach as the principle that not only applies to R2P intervention but to justified drone strikes as well. The moderate instrumental approach stipulates which state should intervene against a state that loses its moral right to nonintervention. The primary



responsibility for a state's population belongs to that state. However, that responsibility can transfer to the international community. Although securing human rights is the fundamental value to be vindicated, the moderate instrumental approach holds that, "achieving good consequences is necessary—and sometimes sufficient—for an intervener's legitimacy."²⁷ Moral philosophy regarding just war is an amalgamation of different emphases and values: just cause and right intention (deontological), proportionality and chance of success (teleological), and legitimate authority and formal declaration (procedural). Since just war doctrine is an amalgamation of these different perspectives, it seems plausible to suggest that a state that has the ability to maximize the good in a situation would be a legitimate intervener. This approach "takes the good to be increased as the enjoyment of human rights."²⁸ That is, an intervener that increases the enjoyment of human rights of those currently suffering is effective."²⁹ Four measures of effectiveness are that the intervener secures the peace, fulfils its R2P obligation, protects civilians, and significantly reduces the killing and basic human rights violations. Doing any of these would increase the enjoyment of human rights.

If a state allows or cannot stop terrorist organizations from doing harm and neither the state nor the UNSC authorizes the drone strikes, then the U.S.'s legitimacy as a reasonable intervener is predicated by its effectiveness as long as the other necessary conditions obtain.

Conclusion:

U.S. drone strikes are morally justified against terrorist organizations (such as Al Qaeda) when all necessary conditions have been met. The only sufficient condition is the fulfillment of all the necessary conditions. In addition to a state's inability or lack of intent to secure basic physical security rights, other necessary conditions (a right intention, a reasonable chance of success, a proportionate response, and a voluntarily act) must be met. If one of the necessary conditions is not met then the strike is not justified. Although the UN has a responsibility to protect all people, there are inherent complexities and competing interests that at times leave the UNSC unable to act. However, when the UN fails to act or does not act adequately, a state may have the moral responsibility to protect the life of innocent people. The justification to use force short of war is predicated on the responsibility to protect. According to the responsibility to protect and the moderate instrumental approach, the U.S. is justified using force short of war (drone strikes) to disrupt, dismantle, and defeat terrorist organizations.

NOTES

1. Personality strikes are those that are directed against a specific person. Signature strikes are those that are directed against persons who are engaged in suspicious behavior, e.g. digging a ditch near a road, armed men meeting or traveling in a convoy, etc.
2. 020413 *Department of Justice (DOJ) White Paper, "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al Qa'ida or An Associated Force,"* <http://www.lawfareblog.com/wp-content/uploads/2013/02/020413_DOJ_>. Although not an official legal memo, the DOJ White Paper was represented by administration officials as a policy document that closely mirrors the arguments of classified memos on targeted killings by the Justice Department's Office of Legal Counsel, which provides authoritative legal advice to the President and all executive branch agencies.
3. http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans
4. Ibid.
5. 020413 *Department of Justice (DOJ) White Paper, 7.*
6. Ibid.
7. Michael Walzer, *Just and Unjust Wars*, New York: Basic Books, 2006, 81.



8. According to the R2P doctrine, in order to justify the use of military force, there has to be serious and irreparable (grievous) harm occurring to human beings. Grievous harms/issues are the “product either of deliberate state action, or the neglect or inability to act, or a failed state situation.” (“The Responsibility to Protect,” International Commission on Intervention and State Sovereignty (ICISS), December 2001, XII). Grievous issues—in this context—refer to genocide, war crimes, ethnic cleansing, and crimes against humanity. I think it can be argued that terrorist activities are consistent with the classification of acts that constitute crimes against humanity. Crimes against humanity “are namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated” (Charter Nuremberg Trial 1945 (Article 6), <<http://www.icrc.org/ihl.nsf/WebSearch?SearchView&Query=war+crimes&SearchFuzzy=TRUE&SearchOrder=4>>). Furthermore, “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan” (Ibid). Even if there is murder, or even potentially widespread but isolated murder, it does not necessarily mean that these are human rights violations on a grand scale. If a state reasonably fulfills its duty of policing, prosecuting, imprisoning criminals and aiding the victims, then it has acted reasonably within the domestic jurisdiction. We should assume no right to intervene unless it can be shown that there are widespread human rights failures and that there is no local prospect of them being corrected in a reasonable time frame. The international community only fulfills that obligation after the attempt to pressure the state has not worked and systematic and widespread harm remains.

9. ICISS, xi. Although the ICISS states that the principle of non-intervention yields to the international responsibility to protect, I will make the case for an international responsibility to protect based on basic human rights as what we all owe to one another.

10. Ibid., xi.

11. Ibid., xii.

12. United Nations General Assembly 2005 World Summit, para 139. <<http://www.un.org/summit2005/documents.html>>, 2005.

13. UN GA 2005 WS, para 138. <<http://www.un.org/summit2005/documents.html>>.

14. “The fundamental law of nature is the preservation of mankind.” John Locke, *Second Treatise of Government*, ed. C.B. Macpherson, (Cambridge: Hackett Publishing, Inc., 1980), 71. Men voluntarily unite into a community of government—a body politic—for public good and safety. It is the consent of the people from which a ruler derives his power.

15. Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, (Oxford: Oxford University Press, 2004), 5.

16. Such powers and liberties include the right to territorial integrity, to self-determination, to non-interference, to make treaties, to make just war, and to enforce legal rules within its boundaries (Ibid. 261-63).

17. David Luban, “Just War and Human Rights,” in *Philosophy & Public Affairs*, (Vol. 9, No. 2: 1980), 165. Although Luban uses this statement to explain that the UN has been indifferent regarding the moral dimension of legitimacy, I use his statement to explain that when State A recognizes State B’s sovereignty that implies that State B has met necessary conditions that gives it the moral right to non-intervention.

18. Ibid.

19. “Human Rights fulfillment is 1) a necessary condition of the decency of a society’s political institution and of its legal order, and 2) sufficient to exclude justified and forceful intervention by other peoples” (John Rawls, *The Law of Peoples*, (Cambridge: Harvard University Press, 1999), 80).



20. ICISS, 8.
21. Andrew Altman and Christopher Wellman, *A Liberal Theory of International Justice*, (Oxford: Oxford University Press, 2009), 3.
22. David Reidy, "Political Authority and Human Rights" in *Rawls's Law of Peoples: A Realist Utopia?*, eds. Rex Martin and David Reidy. (Oxford: Blackwell Publishing, 2006), 175.
23. Daniel Brunstetter and Megan Braun, "From Jus ad Bellum to Jus ad Vim: Recalibrating Our Understanding of the Moral Use of Force," *Ethics & International Affairs*, 2, No. 1 (2013), 87.
24. Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980), 19.
25. In 2011, the Secretary-General published "The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect." This document highlights the problematic nature of peaceful measures as a strategy to mitigate situations and the necessity of coercive means. "Financial tools like travel bans, targeted sanctions, and restrictions on arms and equipment often take too long to become effective, are difficult to implement and monitor, and can cause collateral damage to trading partners and neighboring countries." Cognizant that sanctions (peaceful measures) can be problematic and unreliable, the report recognizes the importance of coercive means/use of force, but also recognizes its lack of procedural development regarding the implementation of coercive means. "The Report notes that these methods [military intervention] are necessary but underdeveloped, needing further discussion." "Summary of the Report of the Secretary-General on 'The Role of Regional and Sub-regional arrangements in Implementing the Responsibility to Protect,'" International Coalition for the Responsibility to Protect (ICRtoP), <<http://www.responsibility-toprotect.org/7%20July%20Summary%20of%20the%20SG%20report.pdf>>, 2011, 4.
26. Walzer, xvi.
27. James Pattison, *Humanitarian Intervention and the Responsibility to Protect* (Oxford: Oxford University Press, 2010), 70.
28. Ibid.
29. Ibid., 72.