THE CONCEPT OF EXTRA-JUDICIAL KILLING: AN ANALYSIS

MIRA SAJJAN
Lecturer
Department of Law & Justice
Southeast University, Dhaka, Bangladesh

Abstract

Every man remains innocent until proven guilty is a universally accepted legal term. The purpose of the judicial administration is to provide justice in each and every case that appears before the court. Therefore, no one should be killed by any reason without defending himself. However, it's harsh but true that extrajudicial-killing is an undeniable fact which is happening around the world under various eye-catching covers given by the concerned authority of the State. This article tries to find out different modes of extra-judicial killings that are happening around the globe and also tries to argue whether the international measures are sufficient to stop such unlawful or extrajudicial killings. Focus has been brought on the issue how killing of civilians and suspects during international armed conflict and killings of innocent individuals, suspects and criminals by State and non-State actors can be minimized or stopped.

KEYWORDS: Extra-judicial killing, summary execution, arbitrary execution, targeted killings and State responsibility.

1. Introduction

An extra-judicial killing is the unlawful or illegal killing of an individual by either the State government, the State authorities like the armed forces, the police or criminals without following the due process of justice or without the permission of a court.

An arbitrary execution is the execution of an individual in a case where there is no evidence that he committed a crime against legal statute.

A summary execution is an execution in which a person is killed without a formal trial under the legal system of a State or without any trial at all. Summary executions are practiced by military and other related organizations and are associated with guerrilla warfare, terrorism and counterinsurgency (Thessismun, 2013).

Generally the issue of extra-judicial, arbitrary and summary executions encompasses any killing by government forces as well as killings by other groups or individuals which the government fails to investigate and prosecute when it is in a position to do so (Thessismun, 2013). Though these terms played a vital role in the historical evolution of this subject as a whole but nowadays they suggest little about the real circumstances, such as targeted killings; which is continuing despite the existence of numerous resolutions of the UN General Assembly and the Commission on Human rights.

2. Categories of extra-judicial killings

2.1. Killings by law enforcement officials or other security forces:

Killings by law enforcement officials and other security forces can take many forms. Very common form is intentional murders where police shoot to kill alleged criminals without proper implementation of appropriate measures. In countries where the security forces may be directly controlled by politicians, security officials may conduct politically motivated killings, including of political opposition members or supporters, and election related killings (Alston, 2010). In many other countries, police kill people while they are in off duty, for profit even.
2.2. Killings during armed conflict:

In recent times, in many countries, unlawful killings are committing during armed conflicts. Countries including Afghanistan, the Central African Republic, Colombia, the Democratic Republic of the Congo, Israel, Lebanon, the Philippines and Sri Lanka are facing such unlawful executions. Means of such unlawful execution of war include air strikes; cluster bombs; raids; perfidy; suicide attacks; human shielding; issues arising in urban counter-insurgencies; and killings of persons hors de combat (HRC, 2004).

2.3. Killings during counter-terrorism operations & targeted killings:

Some refer to targeted killings of suspected terrorists as extra-judicial executions; others claim they are legitimate acts of war (Kretzmer, 2004) and counter-terrorism responses must not themselves human rights and humanitarian law.

Nowadays except for the extensive use of car bombs, especially around the Arab World, our attention needs to be focused on the use of Unmanned Aerial Vehicles (UAVs), the so-called Drones as a means of target killing (Thessismun, 2013).

A drone is generally an aircraft that flies without a human crew on board and can be controlled from a certain remote location or can fly autonomously based on a pre-programmed flight plan. The machine serves the purposes of reconnaissance, target and decoy, research, electronic attack and combat. The combat drones are used in high risk operations and through their detective systems, map a region. Subsequently, they move into missile operations destroying wide areas and killing a multitude of individuals. This is a clear image of target killing operation (Thessismun, 2013).

According to the Special Rapporteur of Human Rights Council, Philip Alston’s report, there are about 40 States that posses drone technology. Some of them have already used it and some are waiting to use in the combat purposes.

The United States of America is the prime user of drones. Significantly they used drone in the operation Enduring Freedom (in Afghanistan, Philippines, Africa and Sahara) as well as in the Operation Iraqi Freedom. Drone was used by America in the lawless tribal territories of Pakistan, in operations under George W. Bush administration as part of the Global War on Terror. Drone was used as well under the president Obama’s administration. Drones seem to be the weapon of choice of the Obama administration against the Taliban and Al Qaeda. Between January and October 2009 there were 43 drone attacks, compared to a total of 34 in 2008 (Thessismun, 2013). Such attacks are characterized by the US as a “lawful” military action authorized by the Congress after the terrorist attack on September 11th, 2001.

In June 2010 the United Nation identified the United States of America as the prime user of targeted killings. The United Nation warned the United States to follow properly the international rules governing warfare. The United Nation also stated to provide the rationale behind the direct killing of individuals instead of capturing.

In October 2009, Philip Alston, the UN special Rapporteur on extra-judicial, arbitrary, or summary executions Report, declared that the use of combat drones will be regarded as a fundamental breach of international law unless the United States can demonstrate that appropriate prosecutions and accountability mechanisms are in place. He stated that the growing use of armed drones by the United States undermined global constrains on the use of military force, expressing his fear that this example would lead to a chaotic and dark world. He also asked the “key military powers” to organize a summit and set some limits to the use of such weapons. Warning that the technology facilitates targeted killings, the report raised concerns that drone operations, based away from the battlefield may develop a “PlayStation” mentality towards killing’. The Rapporteur’s report reflects the general concern that war has taken on a ‘video-game’ quality.

2.4. Killings by non-state actors:

Killings by non-State actors involve killings by rebel and insurgent groups, paramilitary groups, militias, vigilantes, death squads, criminal
gangs, bandits, mobs, family members and private individuals. Such killings may occur for the purpose of “social cleansing”, to “restore honour” or to punish suspected criminals. They might also occur for profit, domestic violence and inter-communal violence.

In 2004, Philip Alston, the Special Rapporteur of Human Rights Council identified four general categories of non-State actors and explained the legal implications (E/CN.4/2005/7):

(a) The State has direct responsibility for the actions of non State actors that operate at the behest of the Government or with its knowledge or acquiescence. Examples include private militias controlled by the Government (which may, for example, be ordered to kill political opponents) as well as paramilitary groups and death squads;

(b) Government are also responsible for the actions of private contractors (including military or security contractors), corporations and consultants who engage in core State activities(such as prison management, law enforcement or interrogation);

(c) Where non State armed groups are parties to an armed conflict, such groups have their own direct legal responsibilities for any killings they commit in violation of international humanitarian law;

(d) The State is directly responsible for “private” killings, such as murders by gangs, vigilante justice, “honour killings” or domestic violence killings. In most cases, an isolated private killing is a domestic crime and does not give rise to State responsibility. However, where there is a pattern of killings and government’s response (in terms either of prevention or of accountability) is inadequate, the responsibility of the State is engaged. Under human rights law, the State is not only prohibited from directly violating the right to life, but is also required to ensure the right to life, and must meet its due diligence obligations to take appropriate measures to deter, prevent, investigate, prosecute and punish perpetrators.

2.5. Deaths in custody

Suicides, deaths resulting from prison conditions, including poor health care, overcrowding and inadequate food, death resulting from torture, killing of prisoners by guards, inter-prisoner violence etc. are common in most of the countries.

The responsibility of the State is not only to stop and prosecute the death by guards but also to find out the cause of the deaths and its prevention. Obligation of the State include: providing adequate health care to the detainees (HRC, 2004), ensuring appropriate prison oversight and monitoring; providing appropriate budgets to prisons (HRC,2004), stopping practices of prisoners running prisons, ensuring accurate records of detainees and their sentences and to prevent inter-prisoner violence.

2.6. Death penalty

Most of the countries of the world still follow death penalty as highest punishment. Also no prohibition is imposed over it by international laws. However, considering the fundamental right of right to life, the lawful application of death penalty has some limits. Death penalties carried out in violation of those limits are unlawful killings.

Various reports examining the legal limits on the application of death penalty show that (Alston, 2010):

(a) The death penalty is only lawful if imposed after a trial conducted in accordance with fair trial guarantees, including judicial independence, the right to counsel, an effective right to appeal, and the right not to be coerced or tortured to give evidence;

(b) States that impose death penalty must provide transparency in relation to the specifics of the processes and procedures under which it is imposed. This obligation is firmly grounded in existing law. States retaining the death penalty should undertake periodic reviews to determine whether international standards have been complied with, and report to the council on their findings;
(c) International law prohibits the application of death penalty to juveniles;

(d) International law prohibits the mandatory imposition of the death penalty;

(e) International law only permits the death penalty for “the most serious crimes”.

(f) A person sentenced to death has the right to seek pardon or commutation of the sentence.

2.7. Sexual violence and unlawful killings

Gender-based violence is increasing day by day in most of the countries. Situations in which women are literally raped to death have actually been significantly unreported, and the links between rape and killings have been understudied.

While men are also subject to sexual violence linked killings, women have been subject to such killings in situation after situation around the world (Alston, 2010):

(a) Women are killed if they resist rape or murdered immediately after it;

(b) Women are taken into sexual slavery and then killed;

(c) Family members (generally men) or others, who attempt to stop a rape, or refuse orders to rape their female relatives, are killed;

(d) Women who have been attacked die as a result of rape related injuries, or contracting HIV/AIDS or other sexually transmitted diseases;

Rape/killings may be particularly brutal when conducted as a reprisal attacks for alleged cooperation with an opposition group.

2.8. Non-State armed actors and their use of death penalty

Countries including Afghanistan, the Central African Republic, Colombia, Kenya etc., without the presence of the state, non-State armed actors have set up “tribunals” to hear cases of civilian wrong-doing. These tribunals have the power to impose death sentence even.

Philip Alston, the Special Rapporteur of Human Rights Council rightly observed it as “black market criminal justice”.

2.9. Civil defence groups

One particular subgroup of non-State actors – civilians who band together to form “civil defence groups” or “village self-defence forces” with a view to exercise force against other armed actors, such groups are most likely to exist when (Alston, 2010):

(a) Civilians face daily threats to their lives and property in situations of armed conflict, high levels of lawlessness, or similar heightened insecurity;

(b) The States security presence is minimal or entirely absent because, for example, territory is remote, or held or contested by rebel groups or criminal gangs;

(c) State forces are themselves a source of threat.

The international community has long been concerned about the existence of such groups, and the risks they pose (Commission on HR resolution, 1992), but there has been little analysis or understanding of how best to mitigate the risks, and when or how such groups should be supported or disbanded.

2.10. Corruption and unlawful killings

Corruption can be both of a cause and a consequence of killings and of impunity. In most of the countries there has a strong link between corruption and killings. For example corruption can constitute unlawful killings through violence by police against civilians who refuse to pay a bribe.

Countries may reduce corruption and their impact of killing by implementing some effective measures. Such measures include requiring audits of government institution; obligating senior officials to declare their assets; instituting zero tolerance policies on investigation and prosecution; strengthening police oversight mechanisms; or instituting radical structural reforms (HRC, 2004).
3. International legal framework

Governments have failed to describe the legitimacy of above mentioned categories of extrajudicial and unlawful killing of individuals and to explain why the attacks are in conformity with international law. The usual justification is that these policies are a necessary and proportionate response to terrorism and warfare and that the terms “illegal assassinations” and “legal efforts to kill specific individuals” are different.

Human rights law, humanitarian law and international law on State responsibility require that individuals should have an effective remedy when their rights are violated, and that the State must provide reparations for its own violations (HR Committee, 2004). International law requires that States must ensure that victims’ families are able to enforce their right to compensation, through judicial remedies where necessary.

3.1. Legal framework in cases of armed conflict

According to the Geneva Convention of 1949 and Hague Regulations, attacks are permissible only against military objectives or civilians if they “directly participate in the hostilities”. That directs the conclusion that attacks against civilians are not always unlawful and may be considered as self-defence.

3.2. Legal framework in cases outside the armed conflict

If we are not dealing a case of armed conflict, the UN Basic Principles on the use of force and firearms by the law enforcement officials clearly state that the “international lethal use of firearms may only be made when strictly unavoidable in order to protect life”. The principles of necessity and proportionality are required and impose the minimum use of force. We should underline, however, that State does have the right, with respect to international law and the aforementioned principles, to exercise its authority and ‘due diligence’ in order to protect its civilians from terroristic attacks and criminals (Thessismun, 2013).

3.3. The right to self-defence

According to United Nations Charter (1945), “All Members shall refrain in their international relations from the threat of use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of United Nations”.

In cases of extraterritorial use of force, a State may justify its actions only by invoking the right to self-defence, which is defined in if the UN Charter (1945), as following: “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 his right to 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.”

Furthermore, the majority of ICJ judgments support that the right to self-defence cannot be invoked against non-State actors (Oil Platforms, 2003).

The Caroline Doctrine can also be considered as a subsidiary source of the general principle of self-defence its general applicability has been doubted by many States (Thessismun, 2013). The Caroline Doctrine is the product of an incident in the 1840s where British soldiers crossed into the United States to destroy a Ship ferrying arms to insurgents in Canada. Both the United Kingdom and the United States agreed that anticipatory action was allowed only when the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.” After World War II, the Nuremberg Tribunal reaffirmed the Caroline Doctrine.

4. U.N. response towards extra-judicial killing

Constitutions of almost all the countries or legal systems have prohibited death penalty without the fair trial and the decision of a competent judge. The United Nation’s International
Covenant on Civil and Political Rights (1966) has declared the same: “Every human being has the inherent right to life. The right shall be protected by law. No man shall be deprived of his life arbitrarily.”

“The death penalty can only be carried out pursuant to a final judgment rendered by a competent court” (ICCPR, 1966).

In 1982, United Nations have created the post of Special Rapporteur on extrajudicial, summary or arbitrary executions. His job is to search and evaluate the cases of extrajudicial killings around the world while at the same time holding Governments to account the extent of their or their agents’ responsibility and the cases where the preventive measures of the state towards unlawful killings or its response towards the same actions were inadequate (Thessismun, 2013).

The United Nations currently deploys more peacekeepers than ever. Some peacekeeping missions, like the one in Democratic Republic of the Congo, have very strong mandates to protect civilians. Missions are also increasingly mandated to perform range of activities, from active combat to development, justice reform and human rights monitoring.

5. Recommendations to minimize or stop extrajudicial killings

United Nation and other international organizations have implemented so many rules and regulations as well as several techniques to minimize the unlawful or extrajudicial killings. However, the situation of the most of the countries including Arab territories, Republic of South Africa, Pakistan, Afghanistan etc raises a question in front of us: are those measures of international organizations sufficient to give protection to the innocent individuals?

Dealing with the inter-State armed conflict situations, United Nations must be stricter to make States follow its regulations. In recent times, the United States and Israel are the prime user of drone technologies and UN has been quite unable to show effective measures to stop them or held them responsible for the killing of innocent individuals. In case of inter-State armed conflict, UN is in the better position to impose war regulations towards the States and held states responsible to justify its every war conduct. Also States should value the life and securities of civilians of other State as its own.

In case of killings by non-State actors, deaths in custody, death penalty, killings with sexual violence, killings because of corruption, State must be more cognizant to punish the offender so that it creates an example for others. Fair trial and justice must be ensured in every States to reduce the amount of intra-State unlawful killings. Victim’s family must have adequate access to information about investigations, prosecutions and their outcomes. Transparency must be ensured by the State of its Governmental bodies like police department, judges, and other security forces. To prevent deaths in custody prison condition must be improved and the international standard of minimum rights of the prisoner must be provided by the State.

6. Conclusion

States undertaking targeted killings and extrajudicial, arbitrary or summary executions should hold accountable under international law and they must justify the basis of their actions. Furthermore, before taking any action towards suspects or criminals they should respect their rights and take measures to eliminate the use of force and seek ways to bring them under fair trial rather the ultimate thought of killing. Executions by governmental authorities without the proper judicial proceedings are unlawful and constitute a violation of international humanitarian law, as well as numerous human rights principles. To minimize or stop extrajudicial killings the international Organizations and States should take collective measures respecting the rights of the innocent civilians, suspects or criminals.

REFERENCES

3. A/HRC/2004/14/24/Add.3.


