



Drones and the use of force under international law

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NO LONGER DOWN UNDER

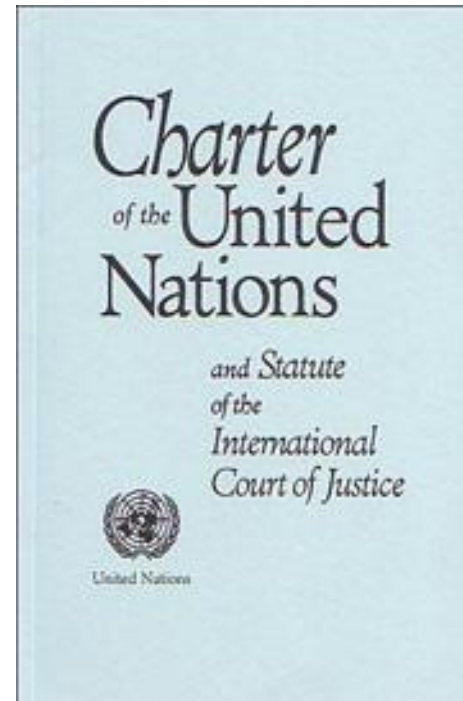
Topic

- Law concerning the resort to the use of force versus law regulating/governing the use of force

Human rights law

‘[T]he fundamental human rights protection of persons apply at all times, in peace, during emergency situations, and in war’ — Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*,

OEA/Ser.L/V/II.116, Doc. 5 Rev. 1 Corr (2002), [49] <<http://www.cidh.oas.org/Terrorism/Eng/exe.htm>>



What specific legal paradigm might apply when determining whether or not there has been an arbitrary deprivation of the right to life?

In my view, there are 3 (not 2) primary legal paradigms of interest:

1. an international armed conflict
2. a non-international armed conflict
3. not an armed conflict



Armed Conflict / Non-Armed Conflict

- Exclusive binary?
 - Armed conflict / law enforcement; or
 - A third option
- Article 51 UN Charter
 - necessity, proportionality and imminence as both *jus ad bellum* and *jus in bello*
 - No other means, such as capture or nonlethal incapacitation, of preventing that threat to life.
 - Threat must be one that is ‘likely to cause death or serious physical injury’.
 - If strike will occur in a 3rd State, the 3rd State is unable or unwilling to prevent/stop the threat.



Other legal consequences of strike occurring outside an armed conflict

- What about the effects of any use of force on bystanders and their property?
 - Has been suggested that the test would be similar to how the concept of proportionality is used inside an armed conflict.
 - ‘Proportional’ collateral injury and damage is legally permissible and no legal obligation to pay compensation arises.
 - No current clear authority on this point.
- Lawful to employ means and methods that are prohibited under the law of armed conflict but are not otherwise generally prohibited under international law
 - eg, to use bullets that expand or easily flatten in the human body



Targeting the targeteers

- ‘Direct participation in hostilities’ (DPH) is a law of armed conflict concept.
 - In an international armed conflict, either side can attack a civilian who takes a DPH.
 - In a non-international armed conflict, the Government can attack a civilian who takes a DPH.
 - The non-government forces never get a legal right to target the Government forces.



Summary

- The government may choose to authorise civilian intelligence agents to use lethal force on its behalf.
- The agent is not liable to lawful attack on his or herself.
- The agent commits no international law crime where the agent's act was part of a bona fide act of national self-defence on behalf of a State and that acts meets all applicable legal requirements.
- While there is an argument that such acts should enjoy immunity from domestic criminal law prosecution, the state of international law on that point is uncertain.

Reference material

- National self-defence

- *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14
- *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 131
- Abraham Sofaer, 'Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense' (1989) 126 *Military Law Review* 89
- Yoram Dinstein, *War, Aggression and Self-Defence* (4th ed, 2005)
- Michael Schmitt, 'Responding to Transnational Terrorism under the Jus ad Bellum: a Normative Framework' (2008) 56 *Naval Law Review* 1

- As to the lawfulness of acting against an “imminent” threat:

- Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility* (2004) [188]
- Mary O'Connell, 'The ban on the bomb—and bombing: Iran, the U.S., and the international law of self-defense' (2007) 57 *Syracuse Law Review* 497, 503
- *Extraterritorial Use of Force Against Non-State Actors* (2010), 55–63 (a particularly good discussion on 'pre-emptive', 'anticipatory' and 'interceptive')

Reference material cont'd

- Drones and international law
 - Subcommittee on National Security and Foreign Affairs, *Opening Statement*, Hearing on “Rise of the Drones II: Examining the Legality of Unmanned Targeting” (2010) Committee on Oversight and Government Reform, U.S. House of Representatives <http://oversight.house.gov/index.php?option=com_content&task=view&id=4903&Itemid=30>
- CIA use of drones and US domestic law
 - William Banks *Written testimony*, Hearing on “The Rise of the Drones II: Examining the Legality of Unmanned Targeting” (2010) Committee on Oversight and Government Reform, U.S. House of Representatives, <http://oversight.house.gov/index.php?option=com_content&task=view&id=4903&Itemid=30>
 - Kenneth Anderson *Statement*, Hearing on “Rise of the Drones: Unmanned Systems and the Future of War” (2010) Committee on Oversight and Government Reform, U.S. House of Representatives, <http://oversight.house.gov/index.php?option=com_content&task=view&id=4840&Itemid=30>

Reference material cont'd

- Exclusive binary

- Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* (A/HRC/14/24/Add.6) 28 May 2010
- Mary O'Connell, *Written testimony*, Hearing on "The Rise of the Drones II: Examining the Legality of Unmanned Targeting" (2010) Committee on Oversight and Government Reform, U.S. House of Representatives, <http://oversight.house.gov/index.php?option=com_content&task=view&id=4903&Itemid=30> at 15 July 2010
- Hina Shamsi, *Statement*, Hearing on "The Rise of the Drones II: Examining the Legality of Unmanned Targeting" (2010) Committee on Oversight and Government Reform, U.S. House of Representatives, <http://oversight.house.gov/index.php?option=com_content&task=view&id=4903&Itemid=30> at 15 July 2010

- Non-exclusive binary

- Harold Koh, *The Obama Administration and International Law* (2010) U.S. Department of State <<http://www.state.gov/s/l/releases/remarks/139119.htm>> at 14 July 2010. (Legal Adviser for the US Department of State)
- Kenneth Anderson, *Written testimony*, Hearing on "The Rise of the Drones II: Examining the Legality of Unmanned Targeting" (2010) Committee on Oversight and Government Reform, U.S. House of Representatives, <http://oversight.house.gov/index.php?option=com_content&task=view&id=4903&Itemid=30> at 15 July 2010
- Gabriella Blum and Philip Heymann 'Law and Policy of Targeted Killing' (2010) 1 *Harvard National Security Journal* 145

Reference material cont'd

- Further reading

- Nils Melzer, *Targeted Killing in International Law* (2008)
- Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010)
- For a succinct discussion on the use of lethal force inside and outside of an armed conflict and the role of human rights law: Michael Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 *Harvard National Security Journal* 5, 41–2