Drones and the use of force under international law

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Topic

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

Human rights law

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

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

• CIA use of drones and US domestic law
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

• Non-exclusive binary
Reference material cont’d

• Further reading