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Drones under International Law

by

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Professor Anderson and I were asked to debate two questions, one respecting the legality of United States use of unmanned aerial vehicles or drones and the other respecting the wisdom of such use for U.S. foreign policy.

The public record today shows that the United States has used drones to kill persons in Afghanistan, Iraq, Pakistan, Somalia, and Yemen.

The essential basic points to make about the legality of this practice are, first, as configured today, drones are battlefield weapons; they serve as launch vehicles for delivering bombs and missiles. The U.S. is using drones the same way it uses rocket launchers and bomber aircraft. The use of drones is no different than our use of these other launch vehicles. In other words, drones are weapons for military operations not police operations.

Second, as battlefield weapons, we look to the legal regime governing military force to govern the use of drones, not the peacetime law governing resort to lethal force by law enforcement authorities. The legal regime governing military force has three primary components—the *jus ad bellum* governing initial resort to military force; the *jus in bello* governing the conduct of armed force, and aspects of human rights law that apply at all times regardless of whether situations are ones of armed conflict or not.

At the heart of the *jus ad bellum*—the legal regime governing resort to military force—is the United Nations Charter. The Charter forms the legal standard against which to judge U.S. drone use. The Charter generally prohibits resort to military force. For any such resort to be lawful, it must comply with one of the Charter exceptions or have an invitation from the state where force is used to join with it in armed conflict hostilities. In addition to having an initial right to resort to force, the use of military force must also comply with the principles of necessity and proportionality. In other words, in addition to a basis in the Charter, if a state resorts to the use of drones, doing so is lawful only if there is a reasonable prospect of success in accomplishing the military objective. If alternatives to military force have not yet been exhausted or if the

¹ My position in the debate is based on research undertaken for several publications, especially: Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in *SHOOTING TO KILL, THE LAW GOVERNING LETHAL FORCE IN CONTEXT* (Simon Bronitt ed., forthcoming) available at <http://ssrn.com/abstract=1501144> and Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, *J. NAT. SEC. L.* (forthcoming) available at <http://ssrn.com/abstract=1654049>.

military predicts the resort to force will have little or no chance of succeeding, resort to drones or other forms of military force would be unlawful.

Even if a resort to military force is a last resort and has a chance of success, the principle of proportionality requires that the cost in civilian lives lost and civilian property destroyed may not be disproportionate to the value of the military objective.

These are the main principles of international law relevant to analyzing the first question—the legality of resort to drones. In the course of applying this law, I will have the opportunity to consider the second question respecting the wisdom of drone use. The principles of necessity and proportionality require assessing the effectiveness and importance of any resort to military force. If a resort to military force is unlikely to be effective and proportionate, it is also unlikely to be wise. Indeed, history teaches that resort to military force in violation of international law rarely if ever results in a positive outcome for the law violator. I will return to the question of wisdom more explicitly in my conclusion.

I. On the Battlefield

Drone technology is developing rapidly and legal assessments will require regular updates. Nevertheless, we can say today that as currently configured drones involve significant firepower. It is not the force of the police, but of the military. Hellfire missiles and 500 pound bombs are not weapons appropriate for law enforcement operations. Everyone will be aware that police do not deploy bomber aircraft or rocket launchers even against very dangerous criminal suspects or criminal organizations. This fact is for the straightforward reason that beyond armed conflict hostilities we limit the use of lethal force to what is necessary to save a human life immediately.² The corollary of this principle is that we do not tolerate the loss of collateral lives. In law enforcement there is no principle proportionality where in the intentional use of lethal force we tolerate the deaths of innocent bystanders so long as those deaths are not disproportionate to the objective in using force. We tolerate such loss of innocent lives only on the battlefield in the exigent circumstances of armed conflict hostilities.

Resorting to the military force of drones in the first instance, prior to the development of armed conflict hostilities, is governed by the law on resort to military force found most importantly in the United Nations Charter. The Charter, in Article 2(4), generally prohibits the use of major

² See Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, Study on Targeted Killings*, UN Doc. A/HRC/14/24/Add.6, at 3, 54, 85-86 (May 28, 2010) and NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* xiii (2008).

military force.³ It does not deal with minor uses of force such as a single shot across a border or firing across the bow of a ship to accomplish an arrest at sea. The police-type operations used to arrest pirates or rescue hostages, for example, are not regulated by Article 2(4). Article 2(4) prohibits military force of more than a minor or *de minimis* nature. The Charter contains only two express exceptions to this prohibition: First, states may use force in self-defense, and, second, states may use force with the Security Council's authorization. We need not consider the second exception any further here because the Security Council has not authorized any current uses of force by the United States.⁴

As for self-defense, this is a highly circumscribed right in the Charter. The Charter provides in Article 51 that states may respond in self-defense "if an armed attack occurs."⁵ The armed attack requirement has come under some pressure over time, particularly from American academics, who seem to see some national interest for the U.S. in having an expanded legal right to resort to military force. Regardless of this academic interest, however, the world agreed without dissent in 2005 at the United Nations World Summit in New York to reconfirm the Charter rules as written. In addition to this renewed support by high-ranking national representatives, the International Court of Justice has ruled in many cases over the years that the Charter means what it says and that the rules of the Charter are the current governing law respecting the use of force.

Professor Anderson at times refers to "state practice" perhaps to indicate that new rules of customary international law may have grown up in place of the Charter's treaty rules restricting the use of force. The World Summit of 2005, however, represents the latest general practice of states on the question of use of force. The Summit Outcome document is an excellent source of *opinio juris* of states respecting their view that the Charter is binding as written. There is

³ U.N. Charter art. 2(4): 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 Purposes of the United Nations.

⁴ The Security Council did refer to Article 51 and to a U.S. right of self-defense following the 9/11 attacks in Resolution 1368 (2001), but the Council did not authorize the use of force in that resolution. The resolution was useful in making a finding that the 9/11 attacks could give rise to a right of self-defense, but the actual exercise of force was under Article 51, not the Council's authority in Articles 39-42. See Mary Ellen O'Connell, *Preserving the Peace: The Continuing Ban on War Between States*, 38 CAL. W. INT'L L.J. 41 (2007) and Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 889-904 (2002).

⁵ U.N. Charter art. 51: Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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-defense 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.

certainly no state practice, let alone a general practice with *opinio juris*, that even comes close to the World Summit for the purposes of creating new rules on the use of force contrary to the Charter. Indeed, the United States argued in 1984 that Article 2(4) is a peremptory norm or *jus cogens* norm that may not be trumped by a new customary international law or even a new treaty. Thus, any practice Professor Anderson may be referring to is likely to be a violation of the Charter, not practice in conformity with any new rule of customary international law.⁶

In addition to the clear terms of the Charter, the International Court of Justice (ICJ) has also made clear that the term “self-defense” is a term of art in international law. “Self-defense” is the right of a victim state to use offensive military force on the territory of a state legally responsible for a significant armed attack on the defending state. In at least five separate cases, the ICJ has said that the attack giving rise to the right of self-defense, must be attributable to the state on whose territory the defending states exercises its right of self-defense. The ICJ has also ruled that the armed attack giving rise to the right of self-defense must be an attack that involves significant force. It must be more than a mere frontier incident, sporadic rocket fire across a border, or a single terrorist attack.

The U.S. began its use of force in Afghanistan in 2001 under an Article 51 self-defense argument.⁷ The U.S. is no longer using force in Afghanistan under that argument. In other words, the self-defense use of force that the U.S. was engaged in is over. It ended in 2002 when the *loya jurga* established new leadership for Afghanistan in place of Mullah Omar and his Taliban loyalists. Today in Afghanistan, the U.S. has the right to use military force because the elected leadership of Afghanistan has formally requested assistance. The U.S., NATO, and others, are present to suppress a significant military insurgency. These foreign state forces have an invitation to intervene. Invitation is, admittedly, a controversial basis on which to use major military force. It is not mentioned in the Charter, but we have seen a good deal of acquiescence in accepting the use of force based on an invitation or the consent of a government. It must be regarded as at least a colorable basis for intervention.

Beyond Afghanistan, and the invitation to use force there, the U.S. has possibly been invited to assist in some military operations in Pakistan, but it is not clear whether those invitations have

⁶ For more on customary international law in the area of use of force and a reference to the U.S. position on Article 2(4) as *jus cogens*, see, Mary Ellen O’Connell, *The Nicaragua Case, Preserving World Peace and the World Court*, in INTERNATIONAL LAW STORIES 339 (John Noyes, et al. eds. 2007).

⁷ See Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889 (2002).

come from the elected leader, President Zardari.⁸ Following the tragic floods in Pakistan in mid-2010, Pakistan's own military operations on its territory appeared to be suspended as troops joined the rescue and rebuilding effort. It seems unlikely, therefore, that drone attacks in that same period were pursuant to an invitation to join with Pakistan in armed conflict hostilities against insurgents. NATO helicopter gunship attacks from Afghanistan into Pakistan in September were heavily condemned by Pakistan and the border closed as a countermeasure against further such attacks.⁹

It may also be that Ethiopia asked the U.S. for some assistance in Somalia in 2006, but that operation also raised some serious questions respecting legality under the Charter. Finally, in Yemen, I have seen no evidence that the government of Yemen has asked the U.S. to assist it in any of its military operations, which have been quite intermittent and inconsistent with the U.S.'s use of drones in that country.¹⁰

Terrorist attacks are generally treated as criminal acts and not as the kind of armed attacks that can give rise to the right of self-defense. Because terrorist attacks have all the hallmarks of crime, not of armed attacks that may give rise to a right of self-defense. Terrorist attacks are sporadic and are rarely the responsibility of the state where the perpetrators are located. The Supreme Court of Israel found in 2006, that Israel was engaged in "a continuous state of armed conflict with various terrorist organizations due to the constant, continual, and murderous waves of terrorist attacks and the armed response to these." The court described the situation that was more than crime and would seem to share the important features of a textbook case for self-defense under the U.N. Charter.

Even where militant groups remain active along a border for a considerable period of time, their armed, cross border incursions are not armed attacks under Article 51 that can give rise to the right of self-defense unless the state or the group is present is responsible for their actions. And, if their military acts are significant enough to give rise to an Article 51 self-defense case.

⁸ An anonymous source in the Pakistani intelligence service recently told U.S. media that while some drone operations had been permitted, a request to expand them had been refused. Kay Johnson, *U.S. Drone Request Refused*, SOUTH BEND TRIB. Nov. 21, 2010, at A6.

⁹ Alex Rodriguez, *U.S. Apologizes to Pakistan for NATO Attack that Led to Shutdown of Key Border Crossing into Afghanistan*, L.A. TIMES, Oct. 6, 2010, available at <http://articles.latimes.com/print/2010/oct/06/world/la-fg-pakistan-tankers-2010006>.

¹⁰ Robert F. Worth, *Is Yemen the Next Afghanistan?* N.Y. TIMES MAG. July 6, 2010.

In the ICJ judgment *Congo v. Uganda*,¹¹ decided in 2005, Congo charged Uganda with violating Article 2(4) by sending troops into Congo to respond years of cross border incursions into Uganda by armed groups living in Congo. Congo, however, did not control those groups. So Congo's failure or inability to take action against them did not give rise to any right by Uganda to cross into Congo and attack the groups itself. Uganda was found to have violated Article 2(4) of the U.N. Charter, for attacks on Congolese territory. It needed to take defensive measures on its own territory.

Also, as discussed above, a state may have the right to invite in outside assistance in dealing with insurgencies or secession. International human rights law, however, limits the amount of force a state may use at home in dealing with violent challenges of any kind. To have the right to use military force, a government must be facing an organized armed group. Otherwise, the state risks using excessive use of force. The European Court of Human Rights and the Inter-American Commission on Human Rights, among other adjudicatory bodies, have made a number of decisions on the legal line between armed conflict and non-armed conflict situations relative to assessing a state's use of military force. Where a government has no right to use military force it may not, of course, consent to an outside state using force. It may only consent to what it has a right to do in its own right.

Professor Anderson has suggested that the armed conflict that began in Afghanistan in 2001 and ended in 2002 may have spread to other places where it is still occurring. State Department Legal Advisor Harold Koh might have been referring to such a possibility in his speech to the American Society of International Law in March 2010.¹² As explained above, international law does not support attacks on states not responsible for any armed attack on the defender under Article 51. As also explained, the presence of an organized armed group, even one engaged in attacks on the defender does not justify attacking a state not responsible in Article 51 terms. Thus, international law certainly does not support attacking individuals or small groups far from armed conflict hostilities occurring or that once occurred on the territory of the responsible state. This means that Professor Anderson's statement that there is no international law restricting self-defensive measures to a particular location is incorrect. The law of state responsibility combined with territorial jurisdiction creates the restriction. Even on the territory of a state responsible for an armed attack, the principles of necessity and proportionality may also limit the territorial extent of military operations in self-defense. States may only use that force necessary to accomplish the military purpose without disproportionate losses to the civilian population. In Afghanistan in 2001, the coalition's purpose was to eliminate the offensive capacity of al Qaeda.

¹¹ Armed Activities on the Territory of the Congo (*Congo v. Uganda*) 2005 I.C.J. 301 (Dec. 19).

¹² Harold Hongju Koh, *The Obama Administration and International Law* (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

That existed where al Qaeda had Taliban protection. Once the Taliban was driven from power, the coalition has no basis in necessity to continue the fight. It had no reason and did not continue the fight to areas where the Northern Alliance had control.

Another weakness in the arguments by Professor Anderson and Legal Adviser Koh is their effort to limit the logical extension of their argument. If individual members of terrorist groups may be killed with military force wherever found, they could lawfully be killed in places where we know they live in sizeable numbers: Germany, the United Kingdom, France, Canada, Saudi Arabia, Indonesia, Egypt, and the United States itself. Yet, how does it sound for the U.S. to argue it has the legal right to carry out military operations in these states that recognize no armed conflict on their territory and would certainly not consent to such operations by the U.S. even if there were hostilities? So Professor Anderson and the Legal Adviser attempt to mitigate their argument by assuring audiences that the decision to resort to military force will be based on such factors as a foreign government's "capacity." International law, however, has no rule with respect to the resort to military force that concerns a government's "capacity." There is no right to resort to armed force against weak states versus strong ones. Those arguing for the legal right to resort to military force on the territory of Yemen or Somalia must also argue for the right to use military force against Germany or Canada.¹³ To do otherwise only demonstrates current attacks are not based on any argument under the law of self-defense—not even one suggesting that the armed conflict in Afghanistan has spread to other states.

The other argument that the U.S. may be trying to make is that members of Al Qaeda are known to be plotting to attack the United States so killing them wherever they are is an act of pre-emptive self-defense. This argument is completely antithetical of the law of self-defense. The law of self-defense does not permit states to attack before they possess evidence of an armed attack occurring—evidence of plots does not suffice. Moreover, this law does not permit attacks on individuals and small groups lacking state sponsorship even if they are carrying out actual attacks.

Even where the U.S. may have permission from Pakistan and is engaging in hostilities along with the authorities of that state, counter-terrorism experts have raised real concerns about the wisdom of drone strikes. Whether attacking with drones is wise, leads us to question the necessity and proportionality of resorting to this sort of military force. Counter-terrorism experts have told us that our drone attacks are actually fueling interest in the insurgency in Afghanistan

¹³ It may be that in a state without a government—today this is the case in Somalia—law enforcement operations may be permissible as a countermeasure. The Security Council has authorized such operations to combat pirates in Somalia. Countermeasures, however, may not involve military force.

and in Pakistan and in taking lethal action against the government of Pakistan.¹⁴ As for proportionality, we know the CIA is working from a “kill list.” Most strikes are associated with one person’s name. Yet, every strike kills a number of persons. It is difficult to make the argument that killing 30, 12, or even six persons is proportional in the killing of one person.

So in conclusion, we see that U.S. use of drones is failing the relevant tests of the lawful use of force. It is failing under Article 51; failing under the principle of necessity and failing under the principle of proportionality. Let me quote Professor Anderson’s assessment of how most of the world views the law under review here:

To put the matter simply, the international law community does not accept targeted killings even against al Qaeda, even in a struggle directly devolving from September 11, even when that struggle is backed by U.N. Security Council resolutions authorizing force, even in the presence of a near-declaration of war by Congress in the form of the AUMF, and even given the widespread agreement that the U.S. was both within its inherent rights and authorized to undertake military action against the perpetrators of the attacks. If targeted killing in which the international community agreed so completely to a military response against terrorism constitutes extrajudicial execution, how would it be seen in situations down the road, after and beyond al Qaeda, and without the obvious condition of an IHL armed conflict and all these legitimating authorities?

In the view of much of the international law community, a targeted killing can only be something other than an extrajudicial execution—that is, a murder—if

- It takes place in an armed conflict;
- The armed conflict is an act of self-defense within the meaning of the UN Charter, and
- It is also an armed conflict within the meaning of IHL; and finally,
- Even if it is an armed conflict under IHL, the circumstances must not permit application of international human rights law, which would require an attempt to arrest rather than targeting to kill.¹⁵

The U.S.’s use of drones in many cases does not meet these criteria. Professor Anderson correctly concludes: “[A] strategic centerpiece of U.S. counterterrorism policy rests upon legal

¹⁴ See David Kilcullen & Andrew McDonald Exum, Op-Ed, *Death From Above, Outrage Down Below*, N.Y. TIMES, May 17, 2009, at A13; David Kilcullen, Testimony Before the House Armed Services Committee Hearing on HR 1886, The Pakistan Enduring Assistance and Cooperation Enhancement (PEACE) Act 2009 (Apr. 23, 2009), available at http://armedservices.house.gov/pdfs/FC042309/Kilcullen_Testimony042309.pdf. See also SETH G. JONES & MARTIN C. LIBICKI, HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA’IDA (2008), available at http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf.

¹⁵ Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 16 (May 11, 2009), <http://ssrn.com/abstract=1415070>.

grounds regarded as deeply illegal...by large and influential parts of the international community.”¹⁶

¹⁶ *Id.*