



Center for  
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Studies

Center for Research and Security  
Studies (CRSS), Islamabad, Pakistan

A CRSS Discussion Forum Report on

# The Legality of Drone Attacks

*June 30, 2010 – ISLAMABAD*

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## EXECUTIVE SUMMARY

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In the wake of the increasing drone attacks in Pakistani tribal areas, the CRSS organized a seminar on ‘Legality of Drones’ to debate the legal aspect of the issue, on June 30<sup>th</sup>, 2010.

Ahmar Bilal Soofi, noted expert on international law, Ayaz Amir, member National Assembly from Pakistan Muslim League-Nawaz [PML-N] and independent analyst, and Chris Rogers, research fellow at Campaign for Innocent Victims in Conflict [CIVIC], expressed their views on the question whether the drone attacks being carried out in Pakistan are legal under any law of the world.

“No international or domestic law permits indiscriminate use of drones and thus such attacks not only violate international humanitarian law, but also Pakistani law and sovereignty”, declared Ahmar Bilal Soofi.

He believed that in the absence of a clearly defined legal mechanism or a declared government policy on the CIA-operated drone strikes it is difficult to determine the legality of these attacks.

“The United States is applying drones in the name of self-defense and the war on Al-Qaeda,

but even this is a violation of international law and Pakistani sovereignty,” Soofi maintained.

Ayaz Amir said that the criticism against drones by the people of Pakistan toned down after the killing of Baitullah Mehsud, through, as he said, people in the beginning were strongly opposing to them.

“As the American venture in Afghanistan is not working, many Pakistanis are questioning the utility of the drones,” said Ameer adding, “Debate on drones would not have been so sharp had there been signs of American success in Afghanistan.”

Chris Rogers said that since Pakistan formally never raised the issue at any international forum nor did it formally issue official statement against it, there seemed to be a tacit understanding between the United States and Pakistan over it.

He, however, believed that the US argument of carrying out drone strikes in Pakistan in self-defense is not convincing and remains questionable.

## *DISCUSSION FORUM'S REPORT*

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**Mariam Yazdani**

**Director Programmes CRSS:**

Pakistan is in a state of crisis as militancy continues affecting different parts of the country. The army remains engaged against the Taliban in the tribal areas to rid the people of militants. At the same time, the United States is also carrying out drone attacks in FATA [Federally Administered Tribal Areas]. The question arises whether any country can use drones as a law enforcement mechanism? There are international conventions that regulate the sort of weapons that you can use in different situations.

I think it will be helpful if Ahmar Bilal Soofi, expert on international law, could first talk about these issues.

**Ahmar Bilal Soofi**

Expert on international law:

Let me first put a little frame on the matter before discussing its various aspects. The frame is what exact action is being done here in Pakistan and what is the legal positioning of this action? While from an international law point of view, one may argue that it is a situation of a non-international armed conflict or a situation bordering on international armed conflict. However, purely from a domestic law of Pakistan, what is this action being carried out now? Is it a simple law enforcement action? Is it a war where the forces have been mobilized? Is it a law enforcement action? Is it a counter terrorism measure? Is it an action in aid of civil power?

I believe that what is going on in Pakistan is an action in aid of civil power. Article 245 of the Constitution of Pakistan says the federal government can call upon the armed forces in

aid of civil power. Armed forces have been called in writing by the federal government that they need their assistance. In response to that, the army has been sending out troops.

If it is so then do we have a law in Pakistan that mends, streamlines or regulates action in aid of civil power? We do not have it right now. What I am suggesting is that there is a bit of a legal vacuum here in Pakistani legislation, and the vacuum is that we don't have action in aid of civil power law, which should regulate properly and comprehensively the conduct of military operations in Pakistan.

With this framework in mind of the domestic legislation we now move on to the issues of the drones. One option is that which is being considered by the country's president in a recent discussion that drones should be handed over to Pakistan. If that technology is given to Pakistan, what is the legality of the use of the drones by the Pakistanis pursuing civil power? The second; if of course the US government continues to use the drones, there is no international law provision, treaty which approves drone strikes the way they are now being done in Pakistan.

The argument that the US government is probably raising is of self defense – article 51 – that 'we have the right of self-defense'. While if you have the right of self-defense then can self defense be exercised with or without the consent of the state? Where it is being done is a political factor and then we talk about whether this argument of article 51 stretches to the legitimacy for drones; I think there is no consensus for that. In fact right now the leaning is against it; Article 51 does not permit the extension of self-defense argument that far. So what is the legitimacy of the drone

attack? At least my understanding is that there is no legal basis as of now.

The studies which have been conducted are looking at the consent of the state where drone attacks are happening as a basis to confer legitimacy. But in case of Pakistan, this raises further questions because the evidence of consent official is not there. And if that consent is there to a certain degree a legitimacy will be there but that consent does not exist officially; albeit unofficially, there does exist a kind of a defective go ahead. The informal go ahead is not being viewed as sufficient by international lawyers to confer the legitimacy.

Apart from the go ahead of the consent of the whole state, the other issue is even if there was a go ahead, would you use drone technology in an indiscriminate manner? Here again the principle of privacy would apply in addition to that. These principles will dictate and make an assessment of each and every instant separately and independently. So if a drone has struck a wedding ceremony, the question is does it translate and become a war crime in terms of the ICC (International Criminal Court) because the ICC has jurisdiction now to examine war crimes in any excess of the use of force.

### **Chris Rogers**

Research fellow at Campaign for Innocent Victims in Conflict (CIVIC):

I think there are four very key areas that need to be discussed. Firstly, Pakistani sovereignty – you have already heard some comments about this issue, particularly on the idea of consent. Here perhaps we may have some difference. I think there has been an unofficial and more informal level of communication of consent between the two countries, which would obviate concerns regarding violations of Pakistani sovereignty, but there is the issue of

what actually constitutes consent. I am not really sure what consensus is or what we consider it to be by international legal experts, but I do think the threshold might be slightly lower than commonly suggested. I do not think that Pakistan has raised the issue formally on a number of avenues diplomatically, as well as with an international forum. The fact that it has not done this perhaps constitutes itself consent.

Though I do think that it is worth to have the discussion and a debate about whether or not self-defense is a legally justifiable reason for US strikes, I would argue that the Obama administration has moved away on a very rhetorical level from the arguments made by the Bush administration regarding global war on terror. This essentially conceptualizes the conflict as one which knows no territorial boundaries, nor temporal limitations and essentially gives power to the US government to attack suspected terrorists and combatants anywhere in the world at any given time, which is obviously a very disturbing and overreaching assertion of power.

I think there is an argument that the strikes can be seen in Pakistan as an extension of the ongoing conflict in Afghanistan that they are not a part of global war on terror but instead they are acts of collective self-defense related to the US presence in Afghanistan and defense of Afghan national sovereignty that has numerous implications and problems for current US practice which we can talk about, but I do think that is an argument that has not been sufficiently investigated.

In the context of drones, distinction is the biggest problem as to who is a civilian and who is a combatant. That line particularly in non-international conflicts is a confused one to be drawn but there has been very important guidance mostly by the ICRC [International Committee of Red Cross] on who would be considered a combatant in non-international

armed conflict. At this point we do not know what standard the United States does use since it clearly does not adhere to the ICRC guidelines.

Another issue that I think has not been talked about sufficiently is Pakistan's human rights obligations, aside from the issue that whether Pakistan itself possesses strong technology. I think there is a real question as to if Pakistan is consenting to drone strikes. Is it violating its own human rights obligations to its citizens and individuals within its territory? Just because a country gives consent to another state to use force within its borders, does not obviate the human rights obligations that target country has to its own citizens.

**Ayaz Amir:**

Pakistan Muslim League MNA and independent analyst:

The issue of legality here is very important as to whether they are legal or not. The paper presented here says that there is a large measure of Pakistani consent as far as the drone strikes are concerned. Pakistani consent has been with the drone strikes from the start. We have a troubled position; we say something in public and there is an internal position to which the Pakistan government from 2001 has subscribed. So there is a public posture [against drone strikes], but even the public posture has been diluted from the time there was a drone strike targeting Baitullah Mehsud. You will see that even public condemnation of drone strikes has toned down after the killing of Baitullah Mehsud as people are thinking that drones may be serving a purpose.

The debate about drone strikes is again emerging, but I think the larger questions are arising about the entire American military operation in Afghanistan. Is there a public perception or a feeling in America that

whatever the US military is doing in Afghanistan is leading to some kind of a solution? Are they able to defeat the elements that they have taken on? If these questions are debated, I think the debate about the legality of the drone strikes would not have risen and assumed this sharp focus that it occasionally does. The entire American venture in Afghanistan is not working, and when it is not working then I want to make a point that drone strikes are part of a very large military spectrum and they are just one element of many other things that the Americans are doing.

Questions are arising about the wisdom or effectiveness of what the US is trying to attempt in Afghanistan. As we all know that now there are different things about the Americans wanting to get out. The Americans are not succeeding; the Taliban have not been defeated. When that is the case then more and more people in Pakistan are asking that what are the purposes of the drone strikes? They are not serving the larger military purpose; they are not able to take out the entire Al Qaeda elements?

The military action that our army undertook, I think, the drone strikes were an essential element of that entire military strategy that made the skies very unsafe, dangerous and threatening for the TTP or the Al Qaeda. Give them whatever name you want but when the whole thing is not succeeding then people will ask and they are asking that why then are you carrying out the drone strikes? When you have a drone strike, many people are killed; you have civilians, children and women dying and that only complicates the over all situation both for the US and for Pakistan.

**Question-Answer Session:**

**Question 1:**

We know there is a widespread criticism in Pakistan against these drone attacks, but if we conduct a survey in FATA, we will find most of the people there indifferent to this opinion.

**Ahmar Bilal Soofi:**

When we talk about the sovereignty of Pakistan then we question if the people from outside who enter FATA [Federally Administered Tribal Area] without having any official documents, passports and continue to disturb the lives of the people are not hitting the sovereignty of Pakistan? Secondly, as for the accuracy of the attacks; when we talk about FATA, there is a popular opinion that the drone attacks are very much inaccurate with respect to the attacks made by our own army. So I think the drone attacks are about the US mistrust on Pakistan that they are not extending their genuine support when it comes to the Al Qaeda operatives in FATA. But, at the same time, we see that the US officials are making statements that there are only one hundred Al Qaeda operatives in Afghanistan including those in Pakistan. If that is the case, why are they making five hundred attacks in FATA in the last year?

**Chris Rogers:**

I think it is right that the presence of Al Qaeda has been severely depleted over the last couple of years but in the context of drone strikes, I think it is important to know that majority of the strikes have not actually targeted Al Qaeda operatives. Although the United States particularly in a domestic context emphasizes the role of drone strikes as attacking Al Qaeda in its capacity to hurt the United States, the majority of the strikes have been aimed at other militant groups such as Haqqani network, the Tehreek-e Taliban Pakistan etc-- particularly those that have been involved in operations in Afghanistan. As to the issue of difference in opinion in FATA and the

perception that the drones are quite accurate, I think that this is what I have observed as well. I have interviewed drone victims, people from North and South Waziristan as well and that is a sentiment thing.

**Question 2:**

Does the UN Security Council authorize the United States and its allies to take the war on terror beyond Afghanistan?

**Ayaz Amir:**

None of what the Americans are trying to do in Afghanistan is working, and if it is not working then more and more Pakistanis will question the drone strikes. As I said that at the time of the Baitullah Mehsud strike, people in Pakistan said, "Oh, this is very effective, it is working, we have taken out the leader of the TTP." But after that we have seen that the Taliban have gone from one place to another. The uncertainty in Afghanistan instead of being weakened has become stronger. So it is not working and when it is not working then the drone strikes really become pointless.

**Chris Rogers:**

Support for the US drone strikes or the dampening of the criticism, I think actually came about when there was recognition that the drone strikes were helping Pakistan strategically and I actually think there was some deliberateness on that part by the United States. There was some agreement between the Americans and the Pakistani military that they would go after some targets that were perhaps less important to the United States but more important to Pakistan. It is very clear that there is coordination on this level as well.

**Imtiaz Gul**

Executive Director CRSS:

I wonder how we could deduct from the statements coming from the Department of Defense that the majority of the drone strikes are targeting the Taliban or the Haqqani network. If we look at the number of casualties that have been given out I think at least twenty nine or thirty Al Qaeda people have been killed. I think the stated objective of the United States, regardless of whether it was under Bush or now under Obama, is the elimination of Al Qaeda. Nowhere, I think, have they mentioned the Tehrik-i-Taliban Pakistan per say. Yes, the Haqqani network is part of that and that is reported to be in North Waziristan. That is how it is getting complicated, but I think that the strikes are primarily targeting the Al Qaeda—the enemy number one. As far as the impact of militancy or its linkage with events in Afghanistan, I think there is a linkage. That is why the attacks are taking place, because they believe that North and South Waziristan are responsible for the violence in Afghanistan. That is why, they would first like to take out these elements and then hope for something better.

**Chris Rogers:**

As for the statements of the State Department, it does seem that the stated purpose of the strikes is to target Al Qaeda and its members to degrade its capacity. But, the numbers the New America Foundation has gathered suggest that majority of those targeted were not Al Qaeda. I think 20 percent since 2004 of those killed were believed to be Al Qaeda members. This implies that one of the other goals of the program really is to affect the nature of militancy in the conflict in Afghanistan. I thus completely agree on that note.

**Question 3:**

What sort of hope do people have to get compensation if their status has not really been

ascertained as to whether they are combatants or non-combatants in the Pakistani tribal areas?

**Chris Rogers:**

When it comes to the issue of compensation and victim assistance, the problem of distinction is massive. Precisely as you pointed out, there is no policy as to who counts as a combatant and who does not. Getting accurate numbers of casualties is difficult to begin with and secondly, when comes to actually providing compensation to people; it becomes that much more difficult. So I think, hopefully we will move into the direction where compensation will be paid to innocent victims of these strikes, but one of the pieces that is absolutely necessary before we can move forward is to have a very clear understanding of what the distinctions between combatants and non-combatants are.

Also, if Pakistan is consenting to the strikes it raises a question as to what its responsibilities might be vis-a-vis its citizens and other individuals who are innocently harmed by these strikes. I think there is a very strong argument that its complicity and in fact act of support in some situations would trigger some responsibility on its part to provide compensation to its citizens.

Pakistan already provides compensation to victims of terrorism and many civilians who are killed or injured in military operations and I think that this very same logic should be applying to drone strikes. The Pakistan government should try to convince Washington in this respect.

**Question 4:**

It seems that this war is in between visible and invisible people. So my fundamental question is do you really think that this is a war of ideas

between the modern world and some people who have their own definition of the way of living? And secondly, IDPs from South Waziristan are currently being forced to get registered for going back to their homes which are not there actually and for this purpose the government of Pakistan has withdrawn cash grants, other non food items and all the support. So I am unable to understand that we are talking about compensation and people who are living in Dera Ismail Khan are really being dealt with surprisingly by the government of Pakistan and the US.

**Chris Rogers:**

The first question is a very big question, perhaps beyond my capacities to address very well. I would, however, say that the conflict is very complex and does not lend itself to very easy narratives. Sometimes those narratives can play into certain people's advantages; so I think those should be avoided or questioned very often. On the issue of IDPs [Internally Displaced Persons] in South Waziristan, I think there have been government announcements of compensation and programs of rebuilding and so forth, but it does not seem like there is a whole lot of coordination in this respect.