

Legality of U.S. Drone Strikes in Pakistan

U.S. drones have struck targets in Pakistan an estimated 140 times since 2004, with 44 strikes already this year. Property and homes have been destroyed and unknown hundreds, perhaps thousands, have been killed or injured.

While many challenge U.S. drone strikes as a matter of strategy, there are also serious concerns over the fundamental legality of such strikes. The U.S. is not at war with Pakistan, yet conducts air strikes in its territory on a near daily basis. Individuals are targeted for killing without any due process of law or attempts to detain. Almost nothing is known about how the program operates or what measures are taken to ensure compliance with international law.

This paper highlights and analyzes four key areas of concern in an effort to help structure the debate over the legality of U.S. drone strikes in Pakistan.

Pakistani Sovereignty: Consent and Self-Defense

U.S. drone strikes are frequently assailed as violations of Pakistani sovereignty. Under international law, states are prohibited from using force in the territory of another state unless the target state has consented, or the attacking state is acting in legitimate self-defense.

But Pakistan has effectively, if not publicly, consented to drone strikes. Reports indicate that Pakistani officials not only consent to such strikes, but share relevant intelligence and even allow drones to use Pakistani airfields. While important questions remain regarding the scope and substance of its consent, Pakistan has never advanced formal complaints in any international forum. Pakistan's failure to avail itself of international remedies or formal means of protest strongly suggests—and perhaps actually constitutes—consent to the strikes.

However, statements by various U.S. officials suggest that they do not consider the legality of the strikes to rest exclusively upon Pakistani consent. According to the U.S., the drone strikes are also justified by self-defense.

The Bush Administration argued that 9/11 triggered the right of self-defense against al-Qaeda and the Taliban, sparking an armed conflict with those entities-- a 'Global War on Terror' (GWOT). The GWOT was conceptualized as a non-international armed conflict against non-state actors without any territorial boundaries.

The Obama Administration may formally reject the GWOT moniker, but its legal position remains effectively unchanged from that of the Bush Administration. The U.S. still considers itself at war with al-Qaeda, the Taliban, and their ‘associates,’ and can therefore kill any of their members virtually anywhere in the world (provided the country in which the individual is located is unable or unwilling to address the threat posed by such persons).

But this fundamental premise—that the U.S. can be in an armed conflict without any apparent territorial restrictions and against such an ill-defined enemy is contested by many. It also sets a dangerous precedent that empowers states to disregard fundamental human rights protections and use deadly force outside the traditional bounds of an armed conflict.

However, another version of the self-defense argument is also available to the U.S. in the context of Pakistan: that its attacks are justified as acts in collective self-defense of its ally Afghanistan. Seen through this lens, the drone strikes in Pakistan are in defense of Afghan sovereignty and part of an ongoing armed conflict with well-organized armed groups operating in Afghanistan. Such an argument would be more territorially circumscribed, against a more well-defined party, and consistent with international law.

In fact, despite U.S. emphasis on drones as a weapon against al-Qaeda, less than 20% of targets in Pakistan since 2004 have been al-Qaeda members. The majority of attacks target Tehrik-e-Taliban Pakistan (TTP), Afghan Taliban, or other militant groups such as the Haqqani network. These groups, particularly the Haqqani network and Afghan Taliban, are closely tied to the conflict in Afghanistan, providing logistical and financial support, training, fighters, and also plan and execute operations against Afghan and US forces. Likewise, al-Qaeda, though supportive of operations elsewhere in the world, also plays an operational role in Afghanistan.

Of course, this self-defense justification applies only to strikes against those individuals or groups sufficiently involved in operations in Afghanistan to deem them combatants—mere political support or affiliation is insufficient. Moreover, the disparate and complex nature of militancy in northern Pakistan means that one cannot paint all groups with the same brush—some operate only in Pakistan, some only in Afghanistan, some in both, and some elsewhere in the world. In assessing the legal justification for strikes, the focus should be on the link between drone strike targets and the conflict in Afghanistan.

Though the Obama Administration has thus far held tight to Bush-era war powers, for those interested in moving towards a legally defensible and more circumscribed

targeted killing policy, it may be worth driving a wedge between strikes in Pakistan and those in elsewhere in the world, like Yemen and Somalia. Characterizing drone strikes in Pakistan as extensions of an ongoing armed conflict in Afghanistan and linked to the right of collective self-defense implies more robust territorial and personal limitations consistent with international law. It also distinguishes such attacks from perhaps much more worrying killings far from traditional battlefields and with vanishingly small connections to true armed conflict.

Jus in bello: Distinction and Proportionality

A completely separate set of legal concerns relate to *how* force is used—specifically, whether drone strikes conform to international humanitarian law (IHL) requirements of distinction and proportionality.

While the distinction between civilians and combatants in drone strikes is an undisputed requirement of international law, it is not so clear *who* counts as a civilian, or to be more legally precise, a non-combatant.

Strictly speaking, civilians can be targeted in an armed conflict if and when they directly participate in hostilities—by picking up a gun to shoot a soldier, for instance. Members of armed forces or organized armed groups may also be targeted. The difficulty is distinguishing when a non-combatant civilian crosses the line into direct participation or membership in an armed group, thereby becoming a potential target of attack. In Pakistan, this distinction is even more difficult given societal and environmental factors such as the proliferation of weapons in tribal areas and mixing between civilian and combatant populations.

According to the ICRC Interpretative Guidance on Direct Participation in Hostilities, criminal activity, political support, financial assistance, or other general and indirect war supporting activities is not considered conduct that would constitute ‘direct participation in hostilities’ or qualify as a ‘continuous combat function’ such that the individual engaging in such activity may be targeted for attack. But the U.S. has refused to clarify where it draws the line between civilians and combatants, on what basis, or the standard of proof applied.

Reports that the US has targeted drug traffickers in Afghanistan—criminals, not combatants—raises serious questions about whether the US has classified non-combatant civilians as targetable individuals. The targeting of unknown individuals based on “pattern of life” analysis also raises serious concerns over target selection process and the evidentiary standard applied. Protecting civilians and accurately

assessing the costs to civilian life requires robust procedures as well as legally sound standards that clearly differentiate between combatants and non-combatants.

Lack of transparency and clear legal policy also prevents the public and international community from assessing the proportionality of drone strikes. Without more information on U.S. policy with respect to distinction or accurate estimates of civilian casualties, it's nearly impossible to assess the proportionality of U.S. strikes, bringing their legality further into doubt.

Pakistan's Human Rights Obligations

One legal issue too often overlooked is Pakistan's legal obligations when it comes to drone strikes. Even if Pakistan has consented to such strikes, obviating concerns regarding national sovereignty, Pakistan still has a responsibility to respect and protect the human rights of its own citizens and other individuals within its territory.

Extrajudicial killing is prohibited under international law and Pakistan cannot support or even acquiesce in the extrajudicial killing of individuals within its territory by other states unless certain conditions are met.

If Pakistan were itself engaged in armed conflict with those groups or individuals being targeted by U.S. drones, then it could consent to such killings. For some groups, such as the TTP, it seems clear that Pakistan is in a state of armed conflict and could legally target members of the group as combatants. However, it seems doubtful that Pakistan is in a state of armed conflict with many other groups targeted by U.S. drones, such as al-Qaeda or the Haqqani network. Pakistan may therefore be violating its obligations under human rights law in consenting to the extrajudicial killing of members of such groups. Such individuals should be arrested and tried—an obligation that cannot be skirted by permitting a foreign state to engage in summary execution.

It's also worth emphasizing that Pakistani consent to U.S. strikes should also bring with it a responsibility to ensure such attacks conform to IHL. Pakistan should demand more information from the U.S., including increased transparency and articulating of clear policies on distinction and proportionality. Any Pakistani consent should be conditioned upon the U.S. demonstrating its activities conform with IHL.

CIA Operatives and Unprivileged Combatancy

The use of CIA personnel to operate and conduct drone strikes is another serious legal issue. CIA individuals are not part of the U.S. armed forces, are not subject to

military command structure, and do not wear uniforms. Under international law, they are therefore civilians directly participating in hostilities, much like the very fighters whom they target.

Under IHL, the consequence of this is two-fold. First, assuming an armed conflict exists, such individuals may be targeted as combatants (the targeting of CIA agents in Khost, Afghanistan, for example, could be considered a legitimate attack on unlawful combatants); and second, such persons lose immunity from prosecution for crimes under domestic laws—meaning Pakistan could prosecute them for murder.

It is not the case, as commonly suggested, that such individuals are in violation of IHL simply in virtue of their participation in hostilities. Civilians that partake in hostilities do not violate the laws of war. But they do lose the privileges granted to lawful combatants.

The unprivileged status of CIA operatives conducting drone strikes reflects the preference in international law for distinction between civilian and military personnel. This helps protect non-combatants and encourages states to grant the power to kill in the hands of trained military personnel subject to military law, codes of conduct, and a responsible command. Placing the CIA in control of drone strikes, a clandestine entity not traditionally trained in the laws of war, may increase the risk of IHL violations and also obstructs the adoption of proper mechanisms of transparency and accountability.

Conclusion

Doubts over the legality of the drone strikes undermine the legitimacy of U.S. and Pakistani efforts against militancy while legal uncertainty raises the risk to civilians. U.S. practice may also establish potentially dangerous precedents regarding targeted killings and the scope of armed conflict.

Addressing these legal concerns will ultimately require lifting the shroud of secrecy that has surrounded the drone program. The U.S. and Pakistan must publicly explain the operation and scope of the drone program, investigate civilian casualties, adopt measures to ensure transparency and accountability, and provide clear legal rationales for their policies and actions.

More information and a clearer understanding of the legal issues raised by drone strikes is necessary to ensure the long-term implications of such a practice is appreciated and the rights of states and individuals are respected.