

Drone Wars

By Jefferson Flanders

MADRID, 12 March 2013 (or 2017) - *Former US President Barack Obama today abruptly canceled a scheduled trip to Spain after learning that he might be arrested on war crimes charges stemming from past American drone attacks on Al Qaeda leaders. The Nobel Peace Prize winner postponed his planned address to Madrid University students after judge Baltasar Garzón, acting on a request by human rights lawyers, issued arrest warrants for Obama and former CIA Director Leon Panetta under the legal doctrine known as “[universal jurisdiction](#).” It allows for the local prosecution of grave human rights crimes regardless of where they were committed.*

Amnesty International, Human Rights Watch, and the United Nations Human Rights Council (UNHRC) have all condemned US “Predator” and “Reaper” strikes on Al Qaeda and Taliban members as illegal extrajudicial executions, and have characterized collateral civilian deaths as a violation of international human rights law.

Does this scenario seem far-fetched? It’s not.

US government officials face the real possibility of future arrest and trial in Europe over Washington’s “drone war” in Pakistan—the targeted killing of Al Qaeda and Taliban leaders using missiles fired from remotely-controlled Predator and Reaper aircraft (orUCAV, for Unmanned Combat Aerial Vehicles in military jargon). And the problem underscores a fundamental deficit in US policy since 2001: an inability or unwillingness by Washington to directly confront the limitations of international law in dealing with terrorism in the post-9/11 world.

The use of drones in regions where US forces are not declared combatants represents, in a nutshell, many of the moral and legal quandaries the United States has struggled with since 9/11. If the conflict with Al Qaeda is a war without borders, then targeted killings are scarcely different than taking down a combatant in any war. But if a state of armed conflict doesn’t exist, or if targeted killings aren’t regarded as a legitimate act of self-defense, then these attacks violate current international law.

Looking at it another way, if Khalid Sheikh Mohammed (KSM), the mastermind behind 9/11, were driving in the Pakistani tribal areas in a Land Rover today, according to US policy, it would be entirely legitimate to put him in the cross-hairs of a lethal

drone. Instead, he is slated to stand trial in New York where he will be presumed innocent and where the emphasis will be on proving his guilt. Theoretically at least, KSM could walk out of court a free man.

This inexplicable contradiction underscores the inability of the United States and the world community to devise new legal conventions in the wake of 9/11. An internationalist-minded president would seek to shape international law to present conditions, rather than continually bending the law until it snaps back, with unintended consequences.

Threat of Prosecution

There are several precedents for future prosecutions of US officials for sanctioning or carrying out drone warfare. Lawyers in Spain and Britain sought to initiate legal action against Israeli government officials for the 2002 targeted killing of Salah Shehadeh, a Hamas military commander, in a Gaza City attack that also killed 14 civilians. And just last month, a London Magistrates' court issued, and then withdrew, an arrest warrant for former Foreign Minister Tzipi Livni over alleged war crimes stemming from Israel's Gaza offensive.[\[1\]](#)

An embarrassed British government appears ready to bring universal jurisdiction cases under tighter control (requiring the approval of the attorney general, not just a magistrate, on warrants for foreign leaders). Even so, that still leaves some maverick judges around, such as Spain's [Baltasar Garzón](#), who relied on the universal jurisdiction doctrine in an unsuccessful 1998 attempt to put former Chilean dictator Augusto Pinochet on trial. Indeed, Garzón is continuing to explore a possible universal jurisdiction case against six senior Bush administration officials for their role in facilitating alleged torture at Guantánamo Bay.[\[2\]](#)

As President Obama escalates US involvement in the war in southwest Asia, he faces a dilemma. Drone attacks have become a supposedly indispensable part of the American strategy to eliminate Taliban and Al Qaeda safe havens in northwestern Pakistan. As CIA Director Leon Panetta observed last May, "Very frankly, it's the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership."[\[3\]](#) But such targeted killings increasingly place the Washington at odds with the international law community. It is particularly awkward position to be in for a president who embraced multilateralism and vowed to rededicate the United States to international norms of behavior.

Judging from news reports, the tension over targeted killings is only going to heighten. According to a December article by Scott Shane of *The New York Times*, Obama has authorized the expansion of Predator forays deeper into Pakistan's tribal areas. Some American officials even want to strike at Taliban leaders in Baluchistan, outside the tribal region.[\[4\]](#) And CIA-operated drones are also being employed in other countries with shaky central governments, such as Yemen, where al Qaeda or its affiliates enjoy

sanctuary. In 2002, a Predator strike in Yemen killed Al Qaeda leader Abu Ali al-Harithi, the suspected mastermind in the bombing attack on the *USS Cole* in 2000. More such attacks will probably follow given Yemen's involvement in the Christmas day attempt to bring down a US airliner over Detroit.

The Current Legal Framework

The 2001 Authorization for the Use of Military Force Against Terrorists (AUMF), a congressional resolution, authorized the president to employ "all necessary and appropriate force" against those who were involved in carrying out the 9/11 attacks.^[5] The Bush administration relied on this authorization to launch the policy of targeted killings, and Obama, too, has used it to justify targeting Al Qaeda jihadists and their accomplices.

In a way, Obama's support for CIA-directed drone attacks in Pakistan should come as no surprise. As American University law professor [Kenneth Anderson](#) has noted, Obama was the first presidential candidate ever to explicitly support targeted killings, famously vowing in 2008 that, once elected, "if we have actionable intelligence about high-value terrorist targets and [then-Pakistani] President Musharraf won't act, we will."^[6]

Although several campaign promises have fallen by the wayside, this is one instance where Obama as president has been true to his word. About 53 drone air strikes occurred inside Pakistan in 2009, compared to 36 the year before, resulting in the deaths of an estimated 463 militants and 43 civilians, according to Bill Roggio of [The Long War Journal](#). And since January 2008, Roggio calculates, US drone strikes in Pakistan have killed 15 senior al Qaeda leaders and one senior Taliban leader.^[7]

Regardless of drones' efficacy, it's clear that the international law community and elements of the American liberal-left (the ACLU, Human Rights Watch, Code Pink, and anti-war activists such as Cindy Sheehan and Bruce Gagnon) do not intend to be silent about Obama's drone war, no matter how much they may prefer the president to his unilateralist predecessor. Sheehan is planning an [anti-drone protest](#) at CIA headquarters on January 16.

Meanwhile, the UN's special rapporteur on extrajudicial, summary or arbitrary executions, NYU law professor [Philip Alston](#), has asked the US government to clarify its legal justification and provide details of the program, warning that otherwise "it will increasingly be perceived as carrying out indiscriminate killings in violation of international law."^[8] After delivering a critical report on the practice to the UN Human Rights Committee in October 2009, Alston told the BBC:

My concern is that these drones, these Predators, are being operated in a framework which may well violate international humanitarian law and international human rights law. The onus is really on the government of the United States to reveal more about the

ways in which it makes sure that arbitrary executions, extrajudicial executions, are not in fact being carried out through the use of these weapons.[\[9\]](#)

A series of interlocking legal questions about targeted killing are now on the table, and they present challenges to Obama's Justice and State Departments, given his internationalist bent. Can the "war on terror" be considered an armed conflict (a war) as defined by the Geneva Conventions? Do the drone attacks, and any collateral civilian deaths, fall under international humanitarian law (the laws of war, which has traditionally governed armed conflicts) or more restrictive international human rights law? Would these attacks be acceptable under the "self-defense short of war" international law doctrine? What of Pakistani sovereignty? If Washington doesn't have a formal legal agreement allowing the drone attacks, do the strikes represent an illegal violation of Pakistan's "territorial integrity or political independence"?

The operating procedures--and the underlying morality--of the expanded CIA drone program has also come under scrutiny. On what basis does the United States conclude that someone is a terrorist and a legitimate target? What level of certainty is required before launching a laser-guided missile? *The New Yorker's* Jane Mayer has raised questions about whether the CIA is targeting militant opponents of the Pakistani government who clearly aren't covered under the 2001 AUMF as 9/11-related combatants.[\[10\]](#) Further, what about the dangers to noncombatants, i.e., innocent civilians? What standards are applied, who decides to "pull the trigger," and what level of "collateral damage" is deemed acceptable (since the law of war requires adhering to the principle of proportionality)?

In the end, as Anderson has noted, for many international law players there are no acceptable targeted killings :

In many situations in which any American president, Obama certainly included, would want to use a targeted killing, it is unclear to some important actors--at the United Nations, among our allies, among international law scholars, and among NGO activists--as a matter of international law that a state of armed conflict actually exists or that a targeted killing can qualify as an act of self-defense. The legal situation, therefore, threatens to become one in which, on the one hand, targeted killing outside of a juridical armed conflict is legally impermissible and, on the other hand, as a practical matter, no targeted killing even within the context of a "war" with al Qaeda is legally permissible, either.[\[11\]](#)

For a president who vowed unprecedented transparency in his administration, there is the added complexity of the "covert" status of the CIA-directed drone program, since Washington will not openly acknowledge its responsibility for the Predator strikes in Pakistan. While it may be politic to continue with this legal fiction, escalating these lethal attacks in North and South Waziristan (or elsewhere) will increase scrutiny by the United Nations, human rights activists, and anti-war groups and raise questions about the legitimacy of US actions. After all, if the program conforms to international law

(however the administration chooses to define it) and is condoned or endorsed by the Pakistani government, what need can there be to keep it secret?

Some in the US military and in the intelligence community have been wary about the legal basis for targeted killings from the start. Prior to 9/11, it should be noted, Washington had harshly criticized Israeli targeted killing of Palestinian militants as extrajudicial assassinations.^[12] Who could blame CIA officers today for wondering whether the legal assurances they've been given about the Predator program will protect them against future prosecution, domestic or international? The deepened involvement of the CIA has other costs: the death of seven CIA officers and operatives in a suicide bombing at an American forward base near the Afghan-Pakistan border on December 30 was quickly characterized by a senior Taliban commander as retaliation for the drone strikes.

There are also tactical concerns. Counterinsurgency expert David Kilcullen, for example, opposes the drone strikes in Afghanistan and Pakistan, arguing that they create more enemies than they eliminate. Yet the drones remain a very popular weapon in Washington: they are relatively cheap to deploy and operate, they eliminate the danger of capture or death for American pilots, and they produce tangible results for a public impatient with a long war.

Irony and Expediency

It is ironic that Obama the internationalist has endorsed and expanded a policy that challenges some of the tenets of international law in much more fundamental ways than, say, the Bush Administration's employment of harsh interrogation tactics. Hellfire missiles are lethal, after all, and water-boarding is not (or is not supposed to be). Even when drone strikes hit the target, innocent civilians can be killed—to say nothing of errant missiles or those inevitable cases of mistaken identify. Obama has opened himself to charges of hypocrisy, of abandoning principle for expediency, and critics will say that he supports the international rule of law only when it is convenient to do so.

Obama's authorization of continued drone attacks also highlights his administration's confusion over whether it is engaged in a war or running down terrorist criminals, i.e., whether to treat Al Qaeda operatives as enemy combatants or criminal suspects. If Attorney General Eric Holder believes that 9/11 mastermind Khalid Sheikh Mohammed deserves due process and a trial in federal court, what about those same rights for Al Qaeda leaders targeted by Predator missiles? How can the Justice Department countenance extrajudicial killings of terrorist "suspects" when no attempt is made to arrest them and there is no proof that they are about to immediately commit a crime (the classic legal justification for the police to use deadly force)? If enemy combatants have constitutional rights, as Holder has suggested, then how can CIA drone operators and a handful of government lawyers act as "judge, jury and executioner"?

Some legal scholars believe that Obama should, at the very least, more clearly establish a legal basis for the Predator attacks by relying on traditional US constitutional and statutory authority, while not accepting the international law community's interpretation of acceptable self-defense. American University's Anderson (who asserts that targeted killings can be a moral and legal counterterrorism weapon), argues that such a legal justification should be grounded in a broad assertion of the right of anticipatory self-defense, "including the right to use force even in circumstances not rising to the level of an 'armed conflict' in order to have firmly fixed in place the clear legal ability of the United States to respond as it traditionally has."^[13]

Will Obama openly advance such a legal rationale, one that smacks of "American exceptionalism" and "cowboy foreign policy," or otherwise challenge the prevailing international law regime? Will he have US officials spell out the legal checks and balances and the conditions (the operational review and approval process, etc.) for these targeted strikes? Probably not. The president will, most likely, continue to dodge the question, avoiding any public discussion of the legality or morality of US policy, since such an open engagement with the issues surrounding targeted killings will inflame the anti-war Left in the United States and Europe.

That will not, however, quiet the looming debate over Obama's remote-control drone war. And someday the legal contradictions and deficit may be played out in a European courtroom for keeps.

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[1] Afua Hirsch and Ian Black, "[Outcry Over Plan to Give Attorney General Veto on War Crimes Warrants](#)," *The Guardian*, 16 December 2009.

[2] "[Pinochet Set Free](#)," BBC News, 2 March 2000; Andy Worthington, "[Spanish Judge Resumes Torture Case Against Six Senior Bush Lawyers](#)," *Huffington Post*, 8 September 2009.

[3] Noah Shachtman, "[CIA Chief: Drones 'Only Game in Town' for Stopping Al Qaeda](#)," *Wired*, 18 May 2009. A *Wall Street Journal* editorial recently echoed Panetta's argument; see "[The Drone Wars](#)," 9 January 2010.

[4] Scott Shane, "[CIA to Expand Use of Drones in Pakistan](#)," *New York Times*, 3 December 2009.

Washington Decoded

[5] [Authorization for Use of Military Force](#), 18 September 2001, courtesy of Yale's Avalon Project. For articles that explore the ethical, practical and legal distinctions between targeted killings and assassination, see Jeffrey T. Richelson, "[When Kindness Fails: Assassination as a National Security Option](#)," *International Journal of Intelligence and CounterIntelligence*, Volume 15, Number 2, 2002; and Gary Solis, "[Targeted Killing and the Law of Armed Conflict](#)," *Naval War College Review*, 22 March 2007.

[6] Remarks of Senator Obama, "[The War We Need to Win](#)," Washington, DC, 1 August 2007.

[7] "Casualties from Predator Strikes Inside Pakistan: Civilian vs. Taliban/Al Qaeda," in Bill Roggio and Alexander Mayer, "[Analysis: US Air Campaign in Pakistan Heats Up](#)," *The Long War Journal*, 5 January 2010. For an earlier and detailed analysis of drone attacks in southwest Asia, see Peter Bergen & Katherine Tiedemann, "[Revenge of the Drones: An Analysis of Drone Strikes in Pakistan](#)," New America Foundation, 19 October 2009.

[8] Edith M. Lederer, "[UN Investigator Warns US on Use of Drones in Extrajudicial Killings](#)," Associated Press, 27 October 2009.

[9] "[US Warned on Deadly Drone Attacks](#)," BBC News, 28 October 2009.

[10] Jane Mayer, "[The Predator War: What Are the Risks of the CIA's Covert Drone Program?](#)" *New Yorker*, 26 October 2009.

[11] Kenneth Anderson, "[Targeted Killing in US Counterterrorism Strategy and Law](#)," A Working Paper of the Series on Counterterrorism and American Statutory Law, Brookings Institution, 11 May 2009.

[12] Joel Greenberg, "[Israel Affirms Policy of Assassinating Militants](#)," *New York Times*, 5 July 2001.

[13] Anderson, "[Targeted Killing in US Counterterrorism Strategy and Law](#)," 11 May 2009.