Rethinking Anti-Drone Legal Strategies: Questioning Pakistani and Yemeni “Consent”

By Dawood I. Ahmed

Abstract—The United States has been carrying out drone strikes within Yemen and Pakistan since 2002 and 2004 respectively. Opponents have attempted to halt the use of drones by invoking legal arguments against the United States government. In doing so, they have overlooked the possibility that it may have taken ‘two to drone.’ In light of claims that the Pakistani and Yemeni governments have consented to drone strikes, the article queries why anti-drone lawyers have not yet employed similar legal arguments to determine whether and on what terms these governments have consented or acquiesced to drone strikes, even if such consent was forced. It also argues that a narrow strategy of constraining only the United States government while not engaging in parallel lawsuits that will shed light on the alleged involvement of these governments not only reduces the effectiveness of anti-drone advocacy but may also allow the Pakistani and Yemeni governments to dodge domestic accountability for harms caused by drone strikes.

A History of Drone Warfare in Pakistan and Yemen

Predator drones have been operating for almost a decade in Pakistan and Yemen. While the first drone strike in each of these countries was launched by President George W. Bush, President Obama’s administration has increased the breadth of the program manifold. By September 2012, “[President Obama] had already authorized 283 strikes in Pakistan, six times more than the number during President Bush’s eight years in office.” Indeed, much to the chagrin of Obama supporters, the underlying premise of...
counterterrorism policy has barely changed between the two administrations, though there has been some shift in approach.³

Drone strikes have led to thousands of deaths. The New America Foundation has estimated total deaths to range somewhere between 1,963 to 3,293 individuals in Pakistan alone, of which at least 261 killed were civilians.⁴ The Bureau of Investigative Journalism has put the number of civilian victims of drone strikes in Pakistan at between 411 and 884, at least 168 of whom were children.⁵ U.S. Senator Lindsey Graham (R–SC), a proponent of drone strikes, has recently acknowledged that about 4,700 people have been killed by drone strikes. A recent study carried out by New York and Stanford Universities argues that “U.S. drone strike policies cause considerable and under-accounts-for harm to the daily lives of ordinary civilians, beyond death and physical injury.” ⁶ For its part, the United States government has claimed that here have been “no” or “single digit” civilian casualties.⁷ In fact, John Brennan, Obama administration counterterrorism advisor and now Director of the CIA, has argued in the past that “there hasn’t been a single collateral death because of the exceptional proficiency, precision of the capabilities that we’ve been able to develop.” ⁸

Recently, it became clear that the methodology the United States government used to distinguish between civilians and combatants was highly controversial and of dubious legality under international law since it rather arbitrarily treated “all military-age males in a strike zone as combatants.” ⁹ Based on this revelation and the variety of sources reporting civilian casualties, it would be incredulous to claim that no civilian has been killed in almost a decade of drone strikes.

### Legality of Drone Strikes

There has, and continues to be, heated debate within legal and policy circles about drones. Two legal issues have dominated the agenda: the legality, under domestic and international law of drone strikes generally, and the separate question of the legality of targeting U.S. citizens through drone strikes. These debates have taken on a particular salience after three U.S. citizens were killed in Yemen in 2011; Anwar al-Awlaki, his 16-year-old son, Abdulrahman al-Awlaki, and Samir Khan.

In terms of domestic law, domestic debate in the United States tends to focus mostly on the constitutional due process, civil liberty and legislative implications of the United States engaging in drone strikes against U.S. citizens. For example, the American Civil Liberties Union has argued that “the idea that the executive branch can be judge, jury, and executioner... totally undoes the system of checks and balances” contained in the U.S. Constitution.¹⁰ Similarly, Senator Rand Paul’s (R–KY) filibuster on the confirmation of John Brennan to be nominated as the Director of the CIA, was focused on issues surrounding the domestic legality of killing U.S. citizens.¹¹

International lawyers, on the other hand, focus not on U.S. citizen deaths, but on broader questions about the international law legality of drone strikes and targeted
killings. Two questions dominate these debates: first, under international law, is it legal to use force in states such as Pakistan, which have not attacked the United States, with which the United States is not at war, and which deny consent to the use of drones on its territory? Second, are drones illegal because their use arguably results in excess civilian casualties, does not allegedly distinguish between enemy combatants and civilians, or does not provide a means of surrender for combatants?

Regarding the first question, the most pressing point of disagreement amongst international law scholars has been whether the United States can use force within the territory of a state, such as Pakistan, without its consent, simply because it may allegedly be “unwilling or unable” to prevent potential attacks. There clearly isn’t a treaty right to do so; the United Nations Charter allows the use of force by a state within the territory of another state in self-defense only once an “armed attack” has taken place against the defending state or, according to some scholars, is imminent. The International Court of Justice, also popularly known as the “World Court” has in fact decided, on two occasions—one concerning Uganda and the other Israel—that international law does not allow a state to attack the territory of another state that is not responsible for the attack but where militants simply happen to be based, that is, so-called “unwilling or unable” states. Scholars are divided over the question, with some arguing that customary international law provides for such a right, while many others disagree. The use of drones in Pakistan remains particularly contentious because the Pakistani government denies that it has granted the United States consent and it does not accept that it is unwilling or unable to prevent attacks. After having recently visited Pakistan, Ben Emmerson QC, the United Nations Special Rapporteur on Human Rights and Counter-Terrorism, argued that U.S. drone strikes did indeed violate Pakistan’s sovereignty because he could not find any record of the Pakistan government having given consent.

As a separate yet related question, scholars also debate whether the United States can legally export its war against al Qaeda into Pakistani territory under the laws of war, since Pakistan, as compared to Afghanistan, is not part of the “hot battlefield” — that is, it is not an active theater of “armed conflict.” While these questions have to do with whether drones can be used at all in Pakistan, and possibly Yemen, there are also other international legal questions — of international human rights and humanitarian law — that are to do more with how drones are used to kill individuals. These rules forbid killing combatants when capture is possible and require states to distinguish enemy soldiers from civilians and avoid disproportionate civilian casualties. The legal answers to these questions depend very much on facts-on-the-ground that are disputed at present (e.g., was it possible to capture the target of the strike, did the target have an opportunity to surrender, how many civilians died in the attack, can a drone distinguish between civilians and combatants adequately and so forth), and are thus very muddy). In fact, the international legal basis for drone strikes has become even murkier after it was recently revealed that scores of drone strikes in Pakistan have killed not just senior leaders of al Qaeda and affiliated groups but also many suspected lower-level Afghan, Pakistani, and unidentified individuals who may pose no threat to the United States.

For its part, the U.S. government continues to claim that its actions are legal as both a matter of domestic and international law, and that it is engaged in a global “armed
conflict” with al Qaeda that is not limited by sovereign borders. In a leaked Justice Department memo, the Obama administration argued that it has domestic legal authority to use drones globally and to kill its own citizens, since the Authorization for the Use of Military Force empowers the president “to use all necessary and appropriate force” in pursuit of those responsible for the 9/11 terrorist attacks. The memo also argues that, even as a matter of international law, the United States can legally target U.S. citizens whenever they “pose an imminent threat of attack to the United States” in other states without their consent, if that state is “unable or unwilling” to suppress the “threat.” As far as the killing of non-U.S. citizens is concerned, which account for the vast majority of drone killings, no similar constraint was elaborated in the memo.

In an op-ed titled “President Obama Can Do Anything He Wants To Fight Terrorism,” law professor Eric Posner argues that, based on interpretations of law advanced in the memo, it would be fair to say that “Obama and Bush administration lawyers have stretched the Constitution and traditional rules of international law to accommodate the threat posed by terrorism.”

It would be accurate to conclude then, that while drone usage may have a firmer footing in domestic law, ultimately, as a matter of international law at least, the arguments the U.S. government makes are not watertight. Since international law scholars disagree strongly about both the “unwilling or unable” doctrine and whether an armed conflict extends outside Afghanistan, and facts about the feasibility of capture of suspected enemy soldiers and civilian casualties remains contested, it is fair to assert that the international legality of drone strikes and/or targeted killings abroad is doubtful. Indeed, as I have written elsewhere, certainly in the case of Pakistan, absent evidence that the government has consented to drone strikes, as a matter of international law, any drone strike carried out in Pakistani territory is illegal.  

“Invoking Law” against Drones

Considering these remarkably divergent legal views about the legality of drones and targeted killings, it is not particularly surprising that drone opponents have acted legally to either prevent or hinder the use of drones. For example, in March 2010, the ACLU filed a Freedom of Information Act (FOIA) lawsuit demanding that the government disclose basic information about the use of drones in conducting targeted killings. On February 1, 2012, the ACLU filed a FOIA lawsuit seeking information about the killings of three U.S. citizens in Yemen (in September and October 2011). On July 18, 2012, the ACLU and the Center for Constitutional Rights (CCR) filed a lawsuit challenging the government’s killing of three U.S. citizens in drone strikes far from any armed conflict zone. The New York Times also filed a FOIA lawsuit to force the U.S. government to disclose more information about its targeted killing of people it believes have ties to terrorism, including American citizens. These lawsuits demonstrate that a number of U.S.-based lawyers and activists are concerned about the general use of drones abroad and consider it valuable to constrain the government through legal advocacy, especially when the government targets its own citizens.

Drone opponents have also been active outside the United States. In 2012, Reprieve,
an NGO that advocates against capital punishment, launched litigation in British courts against the British government for assisting U.S. drone strikes. It alleged that the United Kingdom’s participation in, and cooperation with, the U.S. drone war in Pakistan may amount to war crimes or complicity in murder. Pakistani activists have engaged similarly in litigation in Pakistani courts on behalf of aggrieved victims. In July 2011, three Pakistanis brought a lawsuit against John Rizzo, former legal counsel of the CIA, after he told *Newsweek* that he was the person who signed off on drone strikes. At one point, Cameron Munter, the US ambassador to Pakistan, also faced a potential lawsuit in Pakistani courts. These lawsuits, unlike the ones in the United States, do not so much focus on U.S. citizens, but more so on the general international legality of drone strikes. The goal here is similar in that opponents seek to invoke law strategically, so as to restrain the U.S. government and its allies.

**The Need for a Revised Drone Strategy**

To the extent that such advocacy injects transparency and accountability into the program, these are valuable public goods. Opponents seem to believe that legal pressure against the U.S. government will force it to limit or halt drone strikes or become more transparent about their use. That is, if courts in the United States rule that the government needs to provide information about its program or public opinion turns against the program, the drone program will not be able to operate with the kind of impunity and secrecy with which it has done in the past decade. This forced transparency would mean that far fewer civilians in Pakistan and Yemen would pay with their lives. That is, underlying such advocacy is the powerful and reasonable narrative that law can be used to constrain killings by a government. All this is well and good, except for the fact that such advocacy is based on a misleading assumption. While there is much to criticize the United States about in relation to its drone program, it is important for drone opponents to question whether it has in fact taken “two to drone.” Arguments have made been made that the United States is operating its drones in Pakistan and Yemen with the consent of these governments and therefore drone strikes are legal. Admittedly, in the case of Pakistan, while it is true that the Pakistani government publicly objects to drone strikes, there is indeed some evidence to suggest that it has privately signaled its consent.

For example, Pakistan’s former president, Pervez Musharraf, recently admitted in an interview that he gave consent to drone strikes “only on a few occasions, when a target was absolutely isolated and [there was] no chance of collateral damage.” WikiLeaks cables show that General Ashfaq Kayani, Chief of Army Staff in Pakistan, actually asked
for more, rather than less, drone strikes. Apparently, the country’s military even appealed to the United States for greater drone assistance during its own military operations as early as January 2008.\textsuperscript{23} According to those same cables, Pakistan’s former Prime Minister Yousuf Raza Gilani is also on record suggesting that he would protest the attacks in parliament while ignoring them in practice. Bob Woodward’s book, \textit{Obama’s Wars}, makes a similar claim that, during a meeting with then-CIA Director General Michael Hayden in New York on November 12, 2008, Pakistan’s President Asif Ali Zardari commented that “collateral damage worries you Americans. It does not worry me.”\textsuperscript{24} Also, and perhaps most obvious, if the Pakistani government is furious about drone strikes, why did Pakistan allow Shamsi Air base, located well within the heart of Pakistan to be used as a “key launchpad” for drone attacks in Afghanistan?\textsuperscript{25} Additionally, the Pakistani government, for almost a decade now, has never complained about drone strikes to the UN Security Council or the General Assembly. In fact, Pakistan is currently a non-permanent member of the Security Council and could have easily used its seat to contest drone strikes on its territory. Indeed, as I have argued elsewhere, historically Pakistan is reasonably active within the United Nations. It has often employed resources on international legal matters when there is political will to do so. For example, in 1999, “Pakistan submitted a dispute to the International Court of Justice against India regarding an airspace incident. In 2009, Pakistan proposed a resolution at the U.N. Human Rights Council to prevent ‘defamation of religion’ or blasphemy. Last year, Pakistan sought to engage the International Court of Justice in a dispute with India concerning water rights. And, over the years, Pakistan has invested significant resources to highlight the Kashmir problem at the U.N.”\textsuperscript{26} All of this demonstrates that the Pakistani government possesses the ability to challenge issues in international fora if it desires, but the fact that is has not yet done so demonstrates a lack of will on its part—a lack of will that might imply its complicity—perhaps not free and unfettered consent, but support nonetheless. Yemen’s consent is not even disputed. In an interview with the \textit{Washington Post}, Yemen’s President admitted that he personally approves every U.S. drone strike in his country and described the remotely piloted aircraft as a technical marvel that has helped reverse al Qaeda’s gains.\textsuperscript{27} Now, none of this is to say that drone strikes are good. It is also beyond the scope of this short essay to consider the politics of why these governments have consented, publicly or not. Indeed, it is reasonable to argue that the United States may have coerced Pakistan or Yemen, far weaker countries, to “consent” to drone attacks against their will; certainly, it is not inconceivable to imagine that their options would have been severely limited where the national security interest of a superpower is at stake. As Eric Posner wrote, even if Pakistan has given its consent, such consent should not be confused with “coerced consent” — one where it had no other option but to agree to U.S. demands if it wished to avoid trouble. Certainly, in the case of Pakistan for example, it is far more politically feasible for the Pakistani government to table “blasphemy” resolutions at the UN Human Rights Council or arbitrate disputes against India—as it has done — then assert its international legal rights against the mighty United States. Similarly, one wonders whether Yemen could have really refused consent to opening up its skies to drone. Yet, even if these states have been “coerced” into consenting to
drone strikes, it would be in the interest of anti-drone lawyers to shed further light on this, since the matter of consent goes to the heart of legality. That is, in parallel to legally advocating against the United States government, anti-drone lawsuits should also be launched within these countries which aim to credibly determine whether these governments have indeed consented to drone strikes which injure their citizens, and if so, under what terms and on what domestic legal authority. That is, the law should and can be used to not only challenge the United States but also discover the extent to which these governments have acquiesced in—albeit coerced—in drone warfare. Certainly, if it is found in these lawsuits that the Pakistani government has not actually consented, as it claims and Ben Emmerson QC has agreed, then anti-drone advocates would greatly bolster their argument that drone strikes are illegal and must stop. On the other hand, even if such lawsuits reveal that the Pakistani government has, like the Yemeni government, consented, then ancillary lawsuits seeking to determine whether such consent was coerced and others aimed at revoking such consent can be initiated. Further, compensation can be claimed from these “consenting” governments, on behalf of many victims, who may otherwise have no other meaningful recourse for justice. One can only speculate why these types of lawsuits have not yet been launched despite their potential attractiveness. Perhaps, a narrative of a stronger country bullying and subsequently attacking a weaker government sounds more attractive and plausible than one in which the weaker state has “consented” in the forceful behavior of the stronger party. And of course, the United States is the stronger state and holds the key to the drones. Thus, it could be argued that Pakistan, Yemen, and Somalia are, at best, just passive participants; if the United States were to stop drone strikes, they would stop, period; whether or not Pakistan and Yemen would still want them. Alternatively, there could be a realpolitik-based, genuine, reasonably held belief amongst drone opponents that this is a true reflection of the state of the world, that the Pakistani and Yemeni governments are bona fide, innocent victims of super-power aggression. That is, even if they have consented, they have done so against their will, similar to how a robber might point a gun at his victim and provide him with an option of “your money or your life.” Alternatively, there might be a strategic reason for hesitancy among drone opponents. Some research shows, for example, that human rights NGO’s sometimes chose to target particular states for reasons other than the extent of their human rights violations, such as the likelihood of getting media attention and the power of the target state. The drone advocacy strategy does seem to correspond somewhat to this pattern. There may also be a view — credibly held and based on previous experience — amongst drone opponents

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that scarce advocacy resources would be better utilized in holding the United States accountable, to its own self-proclaimed moral standards of adherence to the rule of law and democratic scrutiny, and thus that a better outcome can be expected by pressuring mainly the United States. To be sure, it is not unreasonable to assume that it would be harder to challenge the Pakistani or Yemeni governments by appealing to arguments grounded in the rule of law due to lower levels of democratic accountability in these countries. Their courts and parliaments may be somewhat less effective in the grand scheme of representative accountability. Thus, a court order demanding information about governmental consent in drone strikes and censuring these governments may not have the type of powerful effects that a judgment by a court in the United States would. While this may be partly true, this does not necessarily mean legal arguments will be of no utility in scrutinizing the behavior of governments in these countries; anti-drone lawyers in the West can surely collaborate with a number of local human rights activists in Pakistan and Yemen to launch similar litigation against these governments. For example, similar to statutory FOIA requests in U.S. courts, Article 19A of the Pakistani constitution contains a fundamental right to information; Article 9 provides for the right to life. Activists could use these constitutional rights and other laws as a basis to mount a challenge that would pressure the Pakistani government come clean about whether it has consented. And if the government insists that it is not, activists could press the government on what it is proactively doing about these constant violations of its sovereignty that result in deaths of its citizens — both from an international legal and military perspective. In Yemen’s case, the issue is even clearer since the government has publicly consented. Opponents could, inter alia, employ constitutional rights in the Yemeni Constitution such as Article 48a which requires the state to guarantee to its citizens “their personal freedom, preserve their dignity and their security,” to question why the government is breaching its constitutional obligations by consenting drone strikes. Surely, apart from these constitutional provisions, there will also be other useful domestic criminal law statutes that could be invoked to challenge these government’s complicity in, inter alia murder. To be clear, the argument is not that such litigation will be wholly effective or that the Pakistani and Yemeni governments will have no legal rhetoric at their disposal to counter these arguments; only that such legal pressure will, at least on the margin, ensure that the Pakistani and Yemeni governments will be forced to “come clean” about the extent of their involvement (if any in the case of Pakistan) in making foreign policy choices that are injuring their citizens’ life and property. In fact, the only such litigation of the kind proposed in this article, that has been launched against the Pakistani government has been particularly useful. In May 2013, advocates in Pakistan have succeeded in getting a High Court to rule that drone strikes are “are absolutely illegal and a blatant violation of sovereignty of the state of Pakistan” and ask the government to make a formal complaint to the UN. Further, the court also ruled that the United States is liable to pay compensation to the victims. Ultimately, whatever the motivations for choosing a legal strategy that focuses mainly on the United States, it may prove to be only partly effective in the long term. This will be the case because much, though not all, of the domestic pressure that is being mounted on the United States government — whether legal or political — has to do with constraining the government only when it targets U.S. citizens and only therefore
marginally gets into the larger question of whether drone warfare in these countries is even legal in the first place. The Department of Justice memo, proposals for a drone court, Rand Paul’s filibuster, and Congressional concern seem to be overwhelmingly about assessing whether, and when, the United States can target its own citizens, not others. Therefore, even if such legal pressure does yield a positive outcome, it may simply end up constraining a small number of drone strikes—ones that kill U.S. citizens. If the broader goal of drone opponents is to constrain the killing of people, whether foreigners—who form the overwhelming bulk of casualties—or U.S. citizens, via drones generally, then it becomes clear why constraining the U.S. government will be inadequate. As long as facts remain murky about whether the Pakistani government has consented and similarly the legal premise of the Yemeni government’s consent is not questioned critically, nothing prevents the United States from engaging in a program that has proven to be popular with American citizens, as long as it strategically avoids targeting U.S. citizens even as it continues to target foreign citizens.

Such a “U.S.-focused” advocacy strategy should also be avoided for another reason: it has impeded domestic accountability within Pakistan. Since activists have focused all their energies on challenging the United States, they’re doing exactly what successive Pakistani governments want them to do; that is, overlook the question of whether the government has indeed acquiesced. As the Pakistani government is not being legally pressured and scrutinized in its courts, it can afford to be opaque about whether it has consented and continue to avert responsibility for stopping drone strikes. That is, while the Pakistani government repeatedly tells its people that it has not consented, it fails to explain why it hasn’t complained to the Security Council or used military means, albeit symbolic, to protest violations of its sovereignty that it is apparently so angry about. Blaming the United States allows it to conveniently detract domestic angst by telling their citizens that their loss of life and property through drone strikes is completely the fault of a foreign enemy, the United States, which is exploiting the vulnerability of their “weak” country. While this may not be a wholly untrue narrative, what those citizens also have a right to know is whether their government has consented—even if under duress—to these very drone strikes. If in the future, as this article suggests, lawyers advocating against drones begin to question the involvement and consent, if any, of the Pakistani government through domestic lawsuits or international legal pressure, the government arguably would no longer be able to dodge blame for not challenging drone strikes. Similarly, questioning the Yemeni government’s consent in the matter will mean that Yemenis will be able to constructively challenge and ultimately seek recompense from their government for their losses and even maybe, pressure the government to revoke consent. However, until lawsuits of this type are launched, drone opponents, will inadvertently be reinforcing the ability of these government to evade accountability and censure for consent they may have given for the execution of drone strikes in their territory. Thus, as things stand, domestic anger and resentment is building up against the United States—and this is true not just of Pakistan, but also of Yemen. Even though Yemen has consented to strikes, locals still seem to be directing much of their anger at the United States, not the Yemeni government. And both these governments will continue to find it expedient to aggravate and further capitalize on such populist anger since it diverts attention away from their own involvement.
To recap, the flaw of an anti-drone strategy focused on the United States is not only that it may fail in meaningfully preventing drone strikes, but it will also continue to further weaken democratic accountability within Pakistan, and possibly Yemen. Further, as resentment against the United States builds up in Pakistan and Yemen, this may create serious long-term security consequences to the United States if the people of these countries think the United States is more or less to blame for their loss, and they begin to seek revenge. No less than Army Gen. James E. Cartwright has expressed worry to President Obama that drone strikes may be causing “blowback.” It is thus time for both drone opponents and supporters to re-think their strategy.

– Judith Heistein Sabba served as Lead Editor for this article.

NOTES


28 This is not true because much of the legal advocacy against the U.S. government is to do with killing its own citizens, not operating drones more generally.


