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Will Media Question Legality of Drone Targeted Killings?

Coverage of civilians killed in U.S. air attacks targeting suspected insurgents in Afghanistan has increased in the wake of a report by the International Committee of the Red Cross (ICRC) that scores of women and children were killed in a U.S. air strike in Farah Province on May 4 and 5. Some of this coverage raises questions about the legality of these strikes, based on reports of civilian deaths. But could targeted killings of suspected terrorists be illegal acts of war, regardless of whether civilian lives are lost? And what is the legal status of U.S. unmanned drone attacks on suspected al-Qaeda terrorists in Pakistan?

According to an April 21 report by the *Los Angeles Times*, in June the ICRC will publish a new guidance document governing the practice of targeted killing. Previews indicate that the ICRC will limit the practice of targeted killing to those persons actively and "continuously" engaged in hostile actions and restrict the use of force to "no more than necessary under the circumstances." The State Department's lawyer responsible for law of war issues has called this new guidance "problematic" from the U.S. view point. What could the problems be?

The Obama administration has deployed unmanned predator drones to kill suspected al-Qaeda targets in Afghanistan and Pakistan at a greater rate than the Bush administration — 16 predator strikes in Pakistan in four months. Will the new ICRC standards require a significant rollback of the Obama targeted killing program? Will the U.S. media and public insist on compliance with the standards?

We might get some idea of the details of the ICRC standards and how they apply to U.S. targeted killing in Afghanistan and Pakistan by looking at a May 2008 book entitled *Targeted Killings in International Law* by Nils Melzer, Legal Adviser to the International Committee of the Red Cross (ICRC). The book is Melzer's analysis and not an ICRC's, but it is likely to inform the ICRC's document. (An 18 minute power-point presentation of Melzer's findings is available at www.dailymotion.com/video/x7nzcni_nils-melzer-part-ii_news.)

Melzer contends that targeted killings as a method of conducting armed hostilities "require a 'microscopic' interpretation of the law governing the conduct of hostilities" and concludes that targeted killings must be located at the outer limits of methods permitted. He defines "targeted killings" as "the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them."

According to Melzer, targeted killings must meet the requirement of military necessity, which means that they must target people who are in the act or about to commit hostilities against the state and cannot be stopped by any other means than lethal force. If capture is possible it must be attempted. An offer to surrender must be accepted. The practitioners of targeted killings must do everything feasible to distinguish between combatants and non-combatants and err on the side of doubt. Here he concludes that the designation of "suspected terrorists" does not meet these requirements, because it implies room for doubt, and suspicion does not equal a necessity. With pinpoint surveillance provided by drones, would the principle of necessity require attempts to capture before a targeted killing can be planned? Does a drone recognize an offer to surrender?

A targeted killing attack must be proportional (i.e., must not do more harm than it seeks to prohibit) and Melzer says the measure of proportionality extends over time, and is not limited to an attack-by-attack comparison. David Kilcullen, an adviser to General David Petraeus, the head of the U.S. Central Command, reports U.S. targeted attacks have killed 14 mid-level or lower level al-Qaeda leaders in Pakistan since 2006, but the strikes seeking to kill *suspected* al-Qaeda terrorists have killed over 700 civilians. Add to this the thousands of Pakistani civilians who have fled their villages in fear of drone attacks and it is clear that the attacks do not meet the requirement for proportionality.

Melzer goes on to examine the legality of international targeted killings, when one state commits a targeted killing in another state. The United Nations Charter prohibition against wars of aggression must be considered. A nation can only commit acts of war on another nation either as self-defense in response to an imminent threat of attack or when the Security Council has authorized a collective military action. Are U.S. targeted killings in Pakistan acts of self-defense? Did the Security Council authorize them?

In June, when the ICRC's new guidance on targeted killings is released, the U.S. media will have an opportunity to examine U.S. drone attacks in Afghanistan and Pakistan against the ICRC standards. Will journalists set aside their working assumptions that each attack is justified, unless dozens of civilian casualties are documented? Will they provide the U.S. public with a more comprehensive and systematic examination of the practice of targeted killing? The residents of remote villages throughout Pakistan and Afghanistan have rights and deserve no less.

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