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THE LEGALITY OF THE U.S. DRONE WAR IN PAKISTAN

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INTRODUCTION AND HISTORICAL BACKGROUND

Few would deny that Pakistan faces an existential threat, given that its writ is becoming increasingly non-existent within its own territory. The inception of parallel judicial systems, coupled with official accords between Islamabad and Pakistan-based Taliban militias responsible for heinous crimes and acts of terrorism, is alarming.¹ Equally distressing is the realization that these accords are, in actuality, acts of desperation that further dilute the government's effective control over its own national territory.² From a human rights perspective, Islamabad is condoning reprehensible and criminal modes of conduct in the country's heartland by appeasing radicals who subscribe to a contorted and purist version of Islamic law and beliefs. Numerous Pashtun tribes retain their traditional administrative control of this territory, and matters have historically been regulated under the Pashtunwali code.³ This phenomenon, along with the complete lack of sustainable development, has caused the recent and horrible repression of civilians, the perpetuation of religious and political intolerance, and the fostering of militancy in the region.

Historical contingencies are also to blame for the tribal belt's ongoing radicalization. The Soviet invasion of neighboring Afghanistan during the height of the cold war eventually led to a proxy Soviet-American war that allowed massive amounts of money and modern weaponry to flow into Pakistan and Afghanistan without

any real accountability.⁴ After the Soviet departure, Afghanistan was plagued with incessant civil unrest and turmoil, continual political instability, and a complete absence of law and order. The United States, after accomplishing its goal of driving out the Soviets, completely withdrew all support and aid. Thus, the international assistance required to develop and rebuild the devastated nation never materialized.⁵

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Civil war soon engulfed Afghanistan. The Taliban, who eventually established effective control over most of the country, were initially welcomed by the majority of Afghans because they were able to provide a certain level of stability and security. As time went on, however, this regime became increasingly repressive and fascist. Yet even as it systematically violated all norms of universal human rights,⁶ the majority of the international community and especially the United States for strategic interests continued to condone and tolerate it. In fact, only after the United States embarked upon its post-9/11 "war on terror" did it make

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The advent of the “war on terror” ended the Taliban regime, but not the movement. As a consequence, Afghanistan returned to a state of anarchy and the authority of the American-instituted Afghan government remained limited primarily to Kabul. Moreover, the American and NATO forces’ failure to control the region has enabled thousands of Central Asian, Middle Eastern, and other radicals to see it as a religious battlefield. Washington asserts that many of these fighters routinely flee into Pakistan’s frontier region, where the local tribal communities give them safe haven,⁷ and that many local fighters from this same area cross the border to fight American forces in Afghanistan.⁸ Although not everyone accepts the veracity of such claims, the fight against terrorism has nevertheless spilled over into Pakistan.⁹ The outcome of this ideological battle between state and non-state actors has engendered more radicalization as well as civilian deaths and suffering. In addition, this ongoing reality threatens to fragment a nuclear-armed Pakistan that is already beset with serious problems: an economic meltdown, religious fanaticism, sectarian violence, and a secessionist movement. Not surprisingly, the implosion of Pakistan would represent a serious threat to international peace and security.

One must therefore analyze the significance and legality of the Obama administration’s ongoing drone attacks on Pakistan’s people in light of these circumstances. It is quite troubling to witness this consistent use of force against and violation of the territorial sovereignty of a nation that Washington itself officially proclaims to be an important ally in its fight against global terrorism. This is especially so when Islamabad has explicitly and repeatedly condemned such actions as violations of its territorial sovereignty and as seriously undermining its own struggle against homegrown terrorism.

A diversity of views, presented below, analyzes the reasons behind such unilateral acts of aggression against Pakistan by American forces stationed inside Afghanistan. Vocal critics of Washington’s foreign policy maintain at the risk of oversimplification that

the following change: The averred heroic freedom-fighting Mujahedeen, once credited with defeating the Soviet Union and triggering its disintegration, were formally reclassified by it and much of Europe as an integral component of the global terrorist network and the new enemy of the twenty-first century.

these attacks are consistent with its past policy and practice of routinely disregarding the norms of international law, one element of which is respecting the sovereignty of relatively weak nations. They also assert that Washington has systematically shown impatience in having grievances and disputes addressed through multilateral paradigms and processes that enjoy international support and are based on global consensus, while maintaining the requisite due process. In addition, it troubles them that the United States eschewed international institutional involvement after 9/11 because this time a UN sanctioning of the American position, as well as an international consensus on a suitable course of action, was forthcoming.

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For critics, the United States' status as a hyperpower has allowed it to consider itself as neither effectively constrained by nor subject to the rules of international law, even though it demands that other nations be bound by them. This approach undermines both the short- and long-term role and effectiveness of important multilateral systems. Critics maintain that American foreign policy is, broadly speaking, blindly driven by a dangerous interplay of self-interest and short-term objectives, a policy that encourages it to act paternalistically and intrude into another country's domestic affairs at will.¹⁰ Such an "unholy" alliance eventually gives birth to mutual mistrust and may bring about either radical regime change or, perhaps, even a revolution.¹¹ Allies frequently transform into foes or, at the very best, Washington becomes

dissatisfied with a particular government's performance and inability to deliver what it has promised. American transgressions of international law, in the form of reprisals, are often a result of such processes taking a turn for the worse and therefore a consequence of its own creation.

Conversely, many supporters of this foreign policy pursue an approach centered on addressing symptoms instead of determining root causes. For example, they condone Washington's inappropriate use of force against perceived transgressors without factoring in the resulting adverse ramifications. For many of them, Washington is justified and must, at all costs, act as a bulwark against the scourge of international terrorism that threatens the continued existence of liberal values.¹² Proponents of this view see the drone strikes as completely justified because, they maintain, Islamabad is unable to constrain the global terrorist threat emanating from within its borders.¹³ To an extent, these strikes substantiate the claim that the United States is hesitant to rely on other countries to fulfill those of its commitments that promote American objectives. A closer inspection of this issue, however, highlights a more convoluted state of affairs.

There is some truth to the assertion that the United States and Pakistan might be fighting two completely different wars. Following 9/11, Pakistan, under intense American pressure, had no real choice but to assure the United States of its unstinted support in the "war on terror" in Afghanistan. But when the Pakistan army was forced to fight against tribal militias within its own borders in the Federally Administered Tribal Areas (FATA) under Washington's directives, it found itself engaging in an unpopular war against part of its own population.¹⁴ This course of action, which fomented indigenous insurgency and civil unrest, was overwhelmingly opposed by most segments of Pakistani society.¹⁵

The overwhelming majority of Pakistanis do not perceive FATA's indigenous tribal communities as being complicit in 9/11 and as involved in international terrorism per se. Most Pakistanis see the ongoing American drone

attacks as futile acts of reprisals in response to 9/11 and as a policy that only increases the threat of global terrorism.¹⁶ To make matters worse, Islamabad's inability to stop these attacks bolsters the extremists' morale, for the whole country can see that the government cannot move against them effectively. This fact encourages them to become even more belligerent.

International terrorism, whether in the form of state or non-state action, clearly poses a threat to international peace and security.¹⁷ Yet it also must be realized that global terrorism presents a highly convoluted situation and that its resolution, however possible, is even more so. To work toward this, it is essential to understand the role of international law governing the use of force.

INTERNATIONAL LAW GOVERNING THE USE OF FORCE IN SELF-DEFENSE

The International Law of Self-Defense and Terrorism

Most western scholars agree that the United States' use of force in Afghanistan, based on its right of self-defense as regards 9/11, was legal.¹⁸ For some, the grave nature of 9/11 radically altered international law's "use of force" paradigm, in light of the presence of global terrorism undertaken by elaborate non-state-actor-based networks. This resulted in the formation of instant customary international law that, according to some, entitles countries to unilaterally attack and violate the sovereignty of any country(ies) where these networks are perceived to be thriving, both in the form of anticipatory and preemptive self-defense, even when there is no immediate need to do so. Other academics view the international laws governing the use of force as a set of dynamic principles founded at the inception of the UN Charter (hereinafter Charter) that have been transformed and broadened relative to the need of the hour.¹⁹ Yet other scholars have reinterpreted the concepts defining self-defense and its limits in a constructed manner that synthetically justifies American actions.²⁰

But customary international law, defined in tandem with the legal framework governing the use of force formalized under the Charter, is still in force and has not undergone any material change. Forced acquiescence to an expansive right of self-defense relative to global terrorism has dangerously provided some powerful countries with an excuse to unilaterally and preemptively attack relatively weaker ones illegally. Out of this has come the alarming "Bush Doctrine" and the successive U.S. National Security Strategies, both of which encourage preemptive American strikes on the basis of vague parameters. Such developments directly undermine the legitimacy of the UN's Security Council.

Before the Charter's development, the right of self-defense was construed quite broadly. In the aftermath of World War II and the magnitude of the devastation caused, the Charter was formulated to reflect the altered customary international norms that prohibited one country from threatening or using force against another unless it was solely to exercise the inherent right of self-defense. Under Article 2, Section 4, countries are to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."²¹ Exceptions to this rule are narrowly confined.

In the aftermath of World War II, a few countries have used force against others both in response to perceived past attacks and to deter future attacks based on anticipatory and preemptive self-defense. Their justifications for such actions refer to conventional threats coming from enemy countries and terrorist threats emanating from both state and non-state actors. The international community, however, has not been receptive to such justifications. While claiming to act in self-defense, such governments argue that they are fulfilling the requirements of customary international law in order to derive from the law their authority to undertake such preventive actions.

The customary international law requirements of immediacy and necessity are inextricably linked. Necessity can only be met when alternative peaceful means of resolving the dispute have been exhausted, given the time constraints involved. Proportionality, another requirement, requires the response to be proportional in relation to both the wrong suffered and “the nature and the amount of force employed to achieve the objective or goal.”²² Interestingly, as preemptive self-defense does away with the requirement of immediacy, it is quite tenuous to argue that such rights of action derive from customary international law.

Under Article 51,²³ a country can exercise its right to use force in self-defense only after another country or its organs and agents undertake an armed attack against it. Non-state actors cannot undertake an armed attack until governmental sponsorship is present,²⁴ and the country from which the non-state actors are operating cannot be attacked on the basis of self-defense.²⁵ Furthermore, the supply of weapons and logistical or other support to such actors does not qualify as an armed attack.²⁶

Historically, the Security Council has passed numerous resolutions declaring terrorist acts to be threats to international peace and security. It has called upon governments to refrain from providing support to terrorist organizations, prevent and suppress terrorist activities and their financing, and actively coordinate with each other to prevent acts of terrorism emanating from within their borders. None of its resolutions, however, have affirmed the right to use force against another country on the basis of terrorism. In fact, its resolutions have focused on tackling international terrorism by peaceful means.²⁷ These resolutions have made no reference to the right to use force in self-defense, even when al-Qaeda admitted responsibility for the 9/11 events. The General Assembly, which has adopted a similarly peaceful approach to combating terrorism, has strongly condemned international terrorism and adopted measures to help eliminate it. Like the Security Council, it has not condoned the use of force against other

countries on the basis of terrorism and has frequently stated that any such reprisals are unlawful.

In light of these facts, one must critique the level of international recognition of the United States’ attacks on Afghanistan in response to 9/11. The grave nature of this event, as well as the level of devastation caused to the world’s only superpower, rendered it practically impossible for almost all governments to openly criticize and question the legality of Washington’s subsequent actions in Afghanistan. Most of the world community was willing to accept this outcome as a consequence of geopolitical realities; this acceptance, however, is not synonymous with the assertion that the world community recognized the legality of these actions or the principles upon which they were based.

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Muted international criticism of these post-9/11 attacks, which were carried out on the basis of self-defense in response to terrorism, has had tremendous negative ramifications vis-à-vis the respect for international law and global peace and stability. For instance, it has provided an impetus to many countries to freely and disproportionately attack others on the basis of terrorism, either on whim or pretext, and has perpetuated the development of unacceptable attitudes such as the Bush Doctrine, which also allows for the use of force against non-imminent threats.²⁸ Even more disturbing is that this espoused framework of preemptive and retaliatory acts, when justified on the basis of a terrorist connection, however tenuous the asserted connection

might be, has the serious potential to ignite a far more dangerous armed conflict involving the use of nuclear weapons, for instance, between Pakistan and India.

The Legality of These Attacks

American and British forces commenced their aerial bombing campaign on Afghanistan on October 7, 2001, with Washington proclaiming that it was exercising its inherent right of self-defense. As the ensuing disproportionate use of force cannot be justified according to either the Charter or the norms of customary international law, this action violated Article 2, Section 4.

Many eminent western scholars of international law somewhat impetuously determined the Taliban's responsibility for 9/11, which ran the risk of fomenting armed aggression globally.²⁹ For instance, one prominent international law scholar, while acknowledging the Taliban's non-involvement in planning or carrying out the attacks, still determined that the regime was an accomplice because by "refusing to take any measures against al-Qaeda and bin Laden—and continuing to offer them shelter within its territory—Afghanistan endorsed the armed attacks against the U.S. [and the] ... Taliban led government assumed responsibility of the terrorist acts."³⁰ This was sufficient reason for the United States to invoke the right of self-defense against Afghanistan.

However, even if the Taliban continued to offer a safe haven to al-Qaeda after 9/11 and had endorsed the terrorist attacks, these actions, according to Article 51, do not amount to committing the attacks themselves. In other words, a country cannot be held responsible, post facto and via imputation, for armed attacks against another one that have already occurred, without having any material involvement during their commission, when by definition such a priori governmental involvement is a requirement not only for according blame to a specific country, but also for the advent of an armed attack under international law.

An interesting question arises at this juncture: Did the Taliban qualify as a government capable of sponsoring al-Qaeda and its terrorist activities for the purpose of committing an armed attack under international law? The question, however, is not whether Afghanistan fulfills the requirement of a country, for the international community has recognized it as such and it has always been an established member of the UN. The response to the above query would be in the affirmative, especially when determined under the widely recognized Declarative Theory of Statehood, because the Taliban exercised effective control and sovereignty over ninety percent of the country's territory and population.³¹ However primordial, the Taliban had in place the only functional system of government within Afghanistan, and thus was, as an entity, legally capable of committing armed attacks against other nations. Under the Draft Articles on State Responsibility adopted by the International Law Commission (ILC) and supported by a General Assembly resolution, the Taliban government would be liable for international wrongful acts perpetrated by it even if its authority was not internationally recognized.

Likewise, both the initiation of the American armed campaign and its continuance were unlawful acts of self-defense under customary international law. Washington's assault came four weeks after the 9/11 attacks. It is hard to fathom how the immediacy and necessity requirements of self-defense, under which a country is allowed to respond, were met.

Additionally, a nationwide aerial bombardment campaign employing heavy-handed weaponry causing thousands of civilian casualties, millions of refugees, large-scale destruction of the already decrepit public infrastructure, and tremendous suffering was hardly "necessary."³² A well-planned, targeted ground offensive with commando units would have been more effective against al-Qaeda and sympathetic armed militias. In addition, such an approach would have kept collateral damage, including civilian causalities, to a minimum. A full-fledged war was also unnecessary because the

United States did not earnestly pursue and exhaust all peaceful means of resolution. Even a staunch consequentialist would find this war unnecessary and counterproductive, as both the military campaign and its mode of operation fueled and strengthened, rather than neutralized, the cancer of global terrorism or al-Qaeda.

To anyone familiar with the Afghan region and its complexities, the adverse ramifications of Operation Enduring Freedom were expected, given how it was implemented. To root out terrorism emanating from Afghanistan, vital state- and nation-building initiatives were required; a full-scale war was counterproductive and unnecessary. Washington's continued avoidance of its obligation to adequately promote effective state- and nation-building efforts during its occupation only exacerbates the situation.³³ In fact, it has sought to sustain this war on the cheap by deploying an insufficient number of ground troops while simultaneously funding, promoting, and relying upon several of the very same ruthless and corrupt local warlords, whose oppressive rule had prompted the original inception of the Taliban from within the lower classes, to defeat al-Qaeda and the Taliban. As a result, Kabul is bankrupt and its authority is virtually non-existent, while the coffers of these criminal warlords fill up with reconstruction funding.³⁴

Furthermore, American operations were not proportional in relation to the wrong it suffered and as regards the nature and intensity of the force employed to achieve its objectives. To make matters worse, its aerial bombing campaigns, which might have been effective in minimizing military casualties, came at the cost of the massive loss of civilian life and related suffering. Hospitals, mosques, old homes, and even buildings belonging to international aid agencies were bombed, creating millions of Afghan refugees. The weaponry utilized was also controversial; non-precision-guided carpet and cluster bombs,³⁵ as well as daisy cutters, weighing around 15,000 pounds each destroyed everything within a 600-yard radius.³⁶

INTERNATIONAL SECURITY ASSISTANCE FORCE (ISAF) AND OPERATION ENDURING FREEDOM

It is true that the Security Council welcomed the regime change in Afghanistan, as evinced from the adoption of Resolution 1386 on December 20, 2001. Earlier, Resolution 1378, adopted while the demise of the Taliban was not yet complete, condemned the government for its involvement in terrorism and was supportive of "the efforts of the Afghan People to replace the Taliban regime."³⁷ These occurrences, however, are not synonymous with the view that Washington's reason for using force against Afghanistan was legal *per se* or the belief that the international community accepted Washington's response as a legitimate exercise of self-defense.

Deciding whether a lawful exercise of self-defense has been employed is the result of a legal and objective determination made in light of the surrounding facts. In making this determination, international recognition of the resulting state of affairs caused by the exercise of such force is of ancillary, at best, evidentiary value. Furthermore, the belief that the international community recognized this action as a valid exercise of self-defense is questionable, given that most countries accepted regime change on another basis, such as any combination of political, strategic, or human rights considerations. At best, the resulting international acceptance of the resulting state of affairs in Afghanistan was based on non-legal justifications.³⁸

While the Taliban government was collapsing, the Security Council accepted the change of circumstances in Afghanistan, recognized an interim governmental authority, and authorized "the establishment for 6 months of an International Security Assistance Force [(ISAF)] to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas."³⁹ Although ISAF's mandate was subsequently extended for an additional six months, its jurisdiction was not expanded to other areas of Afghanistan due

to Washington's opposition. NATO assumed control of ISAF in August 2003. In October 2003 under Resolution 1510, ISAF's jurisdiction was extended beyond Kabul and then, by October 2006, to the whole of Afghanistan. Periodically, numerous resolutions have extended its mandate for additional periods of time. In contrast to ISAF, the Security Council never authorized Operation Enduring Freedom. The United States justifies the continued and indefinite presence of its forces and actions under this operation on Afghan soil on the basis of exercising its right of self-defense against the terrorists responsible for the 9/11 attacks.⁴⁰ Collateral damage and civilian deaths in the ongoing military actions and armed exchanges remain alarmingly high. The United States has been consistently criticized, at times even by the weak Afghan government, for such attacks.

Washington has established numerous military prisons. The Bagram Air Base facility alone contains over 600 prisoners, the majority of them Afghan nationals, who are being held without charge and without being accorded any due process of law. Many have been routinely subjected to torture, which in some cases has proved to be fatal. There are allegations of private contractors being authorized to interrogate prisoners and run jails.⁴¹ Many of these individuals were subsequently found guilty of torturing and murdering many of the Afghans in their custody. In violation of the Geneva Conventions, the United States avoids according these captives "prisoner of war" status by classifying them "unlawful enemy combatants."⁴²

Afghanistan's continued occupation under the aegis of Operation Enduring Freedom, which many Afghans and critics view as a belligerent occupation, violates the law of occupation under international humanitarian law. This operation can also be challenged on the basis of the UN Charter's Article 51, which allows a country to act in self-defense only until "the S.C. has taken measures necessary to maintain international peace and security."⁴³ The establishment of a large and

multilateral UN-mandated ISAF in Afghanistan, one that exercises both peacekeeping and enforcement functions, means that the "necessary measures" requirement relative to Article 51 has been fulfilled. Therefore, the continued presence of American forces under Operation Enduring Freedom is unwarranted under the Charter.⁴⁴

THE LEGALITY OF AMERICAN DRONE ATTACKS ON PAKISTAN

As part of its global "war on terror," Predator drones carry out countless sorties over Pakistan and regularly bomb FATA with Hellfire missiles. Credible recent reports suggest that the Obama administration is seriously considering expanding the scope of such attacks. While such targeted strikes have killed numerous high-level al-Qaeda operatives,⁴⁵ they have also killed scores of innocent civilians, including women and children.

The Prime Minister of Pakistan has frequently condemned such assaults in public as violations of Pakistani sovereignty and a dangerous course of action that fuels militarism. The Legislative Parliamentary Committee on National Strategy, which echoes this same sentiment, has called for this campaign's immediate termination and proclaimed it a violation of the country's territorial integrity. The public's anger is being exploited by militant extremists, who have launched serious acts of terrorism in the major metropolises of Pakistan, which had, until recently, been unaffected by Washington's "war on terror."

Justifications

When asked whether its drone attacks violate Pakistan's sovereignty, Washington generally evades the issue by declaring that it will take out al-Qaeda members wherever they may be hiding. The offered justifications, which are convoluted and difficult to sustain under international law, are based primarily on arguments

supporting preemptive or reactionary attacks against non-state actors. Interestingly, as enunciated earlier, both preemptive attacks and reprisals, especially in the context of terrorism, have not received international recognition as a legitimate use of force for self-defense.⁴⁶

Many people assert that the primary purpose of these drone attacks is to kill senior members of both al-Qaeda and Afghanistan's Taliban leadership hiding in the mountainous frontier region of Pakistan and are provided safe haven by homegrown Pakistani Taliban or sympathetic tribal militia leaders.⁴⁷ However, the drone attacks have often targeted senior members of Pakistani-based Taliban and tribal militias.

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At this juncture, it is necessary to closely examine the basis of these targeted strikes against the three groups delineated under Operation Enduring Freedom: members of al-Qaeda, Afghani Taliban, and local tribal militia leaders in Pakistan and Pakistani Taliban. Attacks on the first group, which includes Central Asian and Middle Eastern radicals associated with al-Qaeda in Afghanistan, are primarily preemptive in nature and designed to decimate their leadership in order to extirpate these networks and thereby prevent future terrorist attacks. In addition, however, these strikes on the al-Qaeda leadership are viewed as reprisals for 9/11.⁴⁸

Attacks on Afghani Taliban are carried out to neutralize its leadership, which the United States claims commands and controls insurgents across the border in Afghanistan. Washington also claims that these commanders often cross back into Afghanistan to engage in hostile operations against American forces.

Local tribal militia leaders in Pakistan, as well as Pakistani Taliban commanders, are principally targeted by drones because of the logistical support, weapons, and safe havens they provide to the other two groups.

The United States classifies all of these groups as terrorists and thus within the purview of its global "war on terror." In reality, however, those targeted have very different agendas and modes of operation, albeit with some overlap at times. Al-Qaeda's overall goal is grounded in a civilizational and ideological battle against American forces wherever possible, as part of its perceived holy war (jihad). The Taliban's primary objective, held by both the insurgents and their leadership, is to regain power and reinstate their purist version of an Afghan Islamic state. Although Pakistan-based militant extremists and insurgents are sympathetic with the ousted Taliban regime and support its fight to end the American occupation, the extremists' main goal is to create a similar purist state within Pakistan.

Even though al-Qaeda and the Taliban have an alliance of sorts, their modes of operation are actually quite distinct. Al-Qaeda seeks to inflict maximum harm upon the United States anywhere in the world and by whatever means possible, even if doing so involves killing innocent civilians, whereas Taliban insurgents are principally engaged in an armed conflict involving guerilla warfare and recently, even conventional warfare, to regain control of Afghanistan.⁴⁹ They frequently kidnap or kill foreign aid workers and contractors and utilize terrorist tactics (e.g., suicide bombings) that kill scores of innocent civilians. They do not seem to be systematically involved in carrying out, or even have the capacity to carry out, any terrorist or other attacks on American soil, against American civilians not present in Afghanistan, or against American assets abroad. Taliban insurgents ostensibly see their campaign as a war of liberation against an unlawful occupation, quite similar to their perception of the Soviet occupation (1979-89). In light of these facts, it is hard to see how their actions against American forces

can be classified as acts of terrorism against the United States, especially when, unlike 9/11, no attacks are being conducted on American soil or against American civilians. Instead, they are being conducted against American forces during active combat operations. Washington's drone attacks on Pakistan against al-Qaeda members, both Afghani and Pakistani Taliban, and the militias' leadership as preemptive self-defense against terrorism rest on a justification unrecognized in international law. If these attacks are acts of reprisal, they are unlawful under international law. As discussed, it is quite tenuous to argue that the Afghan Taliban are engaged in terrorism against the United States when they are guilty of terrorism against Afghan civilians. In the same vein, the Pakistani Taliban are only guilty of terrorism against Pakistan. Consequently, the only group left that the United States might argue for attacking on the basis of preemptive self-defense against terrorism is that of genuine al-Qaeda members residing in Pakistan.

By attacking non-state actors on Pakistani soil, however, the United States is carrying out armed attacks on Pakistan. Such a policy can only be defended if the terrorist acts of non-state actors residing in Pakistan qualify as armed attacks against the United States under Article 51 and if Pakistan itself were guilty of sponsoring them. Besides, when the United States carries out preemptive or reprisal drone attacks on Pakistani soil, how can it proclaim self-defense, because in the case of preemptive attacks no armed attack has been committed, and with regard to reprisals armed attacks have already ended.

Pakistan neither sponsors al-Qaeda's or the Afghani Taliban's operations by directing, controlling, or commanding these groups, nor does it exercise "effective control"⁵⁰ or "overall control"⁵¹ over them. In fact, even the level of support provided to such groups by non-state actors of Pakistani origin located within Pakistan, such as the Pakistani Taliban and the tribal militias, does not rise to the level of sponsorship that requires control of al-Qaeda or the Afghan Taliban. It is,

at most, a level of support that involves the provision of weapons, logistics, and safe haven. According to the International Court of Justice, such support does not qualify as an "armed attack."⁵²

Terminating the drone attacks poses no instant or overwhelming danger to the United States. These strikes, in actuality are no more than preemptive strikes undertaken to weaken al-Qaeda and the Taliban in the long-term by neutralizing their leadership, and thus are just one of Washington's many measures designed to achieve its inchoate long-term objectives. Thus, they have little to do with self-defense as recognized under international law. This determination is further evinced by the presence of the controversial Bush Doctrine and the 2006 U.S. National Security Strategy, both of which disregard principles of international law constraining the use of force.

This use of drones for self-defense is impermissible because it is unnecessary, as other, peaceful means of facing the threat have not yet been exhausted, given the time parameters involved. After years of bombing Pakistan's tribal areas despite Islamabad's official and consistent protests, the Obama administration has only recently formally shown a willingness to conduct joint operations.⁵³ Even though Pakistan has rejected this particular offer, due to its lopsided terms, it has confirmed that it is more than willing to conduct such targeted strikes itself when provided with the requisite intelligence, drones, and missiles.⁵⁴ The United States, however, has ignored this proposal.

As has been historically proven, the United States has enough influence to coerce the Pakistani Government and, more importantly, its armed forces, which have until recently tackled the Taliban threat rather sluggishly, to deal with militarism more effectively. All parties know that Islamabad and the Pakistani military depend heavily upon American economic and military aid for their survival. Given that the United States also holds immense diplomatic sway with Pakistan, it can also successfully use various Security Council mechanisms to pressure

Pakistan into adopting a more aggressive policy against militant extremists under the mandate of international law.

The use of force is unnecessary in self-defense when, rather than diminishing the dangers involved, it augments the gravity of the threat posed. American drone attacks exacerbate the threat of terrorism, both from a regional and global perspective, and intensify the region's existing militancy and insurgency. These strikes have given birth to an unprecedented level of resentment and anger among the tribal populace, which fanatical factions have transformed into successful organized propaganda drives to recruit thousands of disillusioned and impressionable young fighters. The resulting proxy war, which is dangerously destabilizing Pakistan, directly increases the danger of international terrorism to all nations, including the United States. Therefore, the asserted claim that drone attacks are eliminating the threat of terrorism emanating out of the country's tribal areas is highly questionable.

In addition, these operations are in no way proportional to the injustice suffered by the United States, given the intervening events, the long passage of time, and the partial disconnect between those responsible for 9/11 and those being targeted. In any case, Pakistan played no role in 9/11. If the injustice suffered is being measured in terms of the costs borne by the United States and its armed forces, along with its war efforts in restive regions of Afghanistan bordering Pakistan, then it is debatable whether 9/11 could be classified as legally sufficient for Washington's legitimate exercise of the right of self-defense against Pakistan under international law.

Additionally, if these drone attacks are considered preemptive strikes against the amorphous threat of global terrorism, then the wrong has yet to come into existence or is, at best, conceptual in nature. Moreover, by definition global terrorism is a wrong suffered by the entire world community. If any one country is allowed to use it as a basis to attack another country, then the whole system of international relations risks disintegration.

The intensity and frequency with which these attacks

have been carried out over the past three years have resulted in the unnecessary death and maiming of hundreds of civilians and the needless destruction of infrastructure.⁵⁵ As they are carried out by unmanned robotically controlled planes whose targeted strikes are determined by intelligence, their performance, in retrospect, has often proved to be quite faulty. While a pilot can potentially distinguish between civilian and militant targets, drones lack this ability. This can only be considered a serious if not outright fatal weakness, given that civilians and militants live together in the vicinity of the planned strike. This explains why "between January 14, 2006 and April 8, 2009, only 10 [strikes] were able to hit their actual targets, killing 14 wanted al-Qaeda leaders, besides perishing 687 innocent Pakistani civilians. The success percentage of the U.S. Predator strikes thus comes to not more than six per cent."⁵⁶

RECOMMENDATIONS FOR STAKEHOLDERS

R esolving the complex conflict in Afghanistan and western Pakistan will take a long time to achieve. It will take decades to eradicate the region's militancy and fanaticism, even if long-term meaningful policies are implemented on the ground. The recent and direct involvement of foreign powers, citing various self-defense arguments and the curbing of terrorism, has worsened the region's already considerable turmoil. All parties have used primarily military means to influence the outcome, when real peace and development can only be achieved through purposeful political dialogue and negotiations. Thus major stakeholders must revise their policies and take the measures necessary to attain both regional and international peace and security.

In the case of the United States, it must immediately end its aggressive military strategies by (1) terminating all drone attacks on Afghanistan and Pakistan; (2) withdrawing its troops from Afghanistan at the earliest possible time and, in the interim, restrict its own forces

and those of ISAF to peace-keeping operations; (3) actively help develop a viable and properly trained Afghan police force to maintain peace and security while a developing Afghan armed forces strives to maintain law and order with international assistance until it can stand on its own feet. The police forces must be ethnically diverse, corruption free, and trained to transcend ethnic loyalty; and (4) conduct no military operations inside Pakistan, which only creates resentment, fans extremism, and weakens democratic institutions there.

On the political and policy front, Washington needs to (1) engage, along with the UN, in talks with all Afghan political factions, including the Taliban, to find a political solution to the conflict; (2) actively fund and promote initiatives undertaken by credible governmental and non-governmental organizations that focus on sustainable development, reconstruction, and rehabilitation; (3) help develop the education sector – Afghanistan is in dire need of educational facilities, including universities – as education will eventually facilitate the development of political, social, and civic rights and awareness that will underlie the country's future stability; and (4) actively seek to improve the decrepit infrastructure, create jobs, promote drives facilitating civilian empowerment, and develop and strengthen democratic institutions with a specific focus on the judiciary to achieve the rule of law.

The Pakistani establishment, like its American counterpart, must rely on peaceful means and development-driven initiatives. It needs to (1) engage in genuine political dialogue with FATA's militants to reach an acceptable political solution that does not comprise its sovereignty vis-à-vis either Washington or indigenous militants; (2) institute measures to guarantee that the armed forces' operations are transparent and in compliance with human rights and international humanitarian law. In short, the country's media, civil society, and humanitarian organizations must be allowed to function independently in war-torn areas, and any transgression of the law of armed conflict must be effectively punished by an empowered judiciary. In

the recent past, the judiciary has taken note of missing persons and the legality of drone attacks, even though the government has created serious impediments to such judicial activism; (3) ensure that the military and civilian intelligence agencies work in a far more transparent manner and are held accountable for their actions; and (4) actually carry out sustainable development initiatives in Pakistan's lawless and poverty-stricken tribal areas.

The international community also needs to (1) become more proactive in criticizing, and hence influencing, the militarily aggressive role of American and NATO forces in the region; (2) hold Pakistan more accountable for its violation of human rights treaties, humanitarian, and other sources of international law pertaining to intra-state armed conflict; (3) do more to help rehabilitate the region's millions of refugees; and (4) be more actively involved in sustainable development and human security initiatives.

CONCLUSION

The dangers from the Taliban movement are real. Fostering an environment of repression and intolerance, the Talibanization of the region's society has created a level of anarchy that challenges the very fabric of society. This must be halted before irreparable harm results. One must be absolutely clear that the dangers of this transformation in a moderate society are most damaging not only for Afghanistan and Pakistan, but also for the adjoining countries as well.

Recognizing the problem, however, is part of the solution. Tackling Talibanization requires a multi-faceted approach that both recognizes the reasons behind the process as well as mandates a comprehensive and, as far as possible, a peaceful approach to the root causes fueling such radicalism and militarism. Such an approach is consonant with the newly conceptualized human security paradigm that focuses on protecting the person, rather than the country, by promoting sustainable development, equality, political and

economic security, and poverty alleviation in troubled regions.⁵⁷ Support from the international community would do a great deal to stabilize radicalized tribal societies and would, in turn, make it practically impossible for terrorism to thrive in this part of the world. This is the only way to win the “war on terror.”

The situation in Afghanistan and Pakistan requires an approach that is primarily centered on resolving all disputes peacefully, fostering nation-building through political dialogue and compromise, strengthening democracy, and making the rule of law supreme. Force, which is surely required in particular instances, must be applied as a last resort and be limited in duration and scope. Its use should remain the prerogative of the sovereign state, unless its refusal to act is proving to be a threat to international peace and security as determined by the entire international community multilaterally, for only the sovereign state is accountable for its actions to democratic institutions and its citizens. Moreover, military force generally targets the symptoms of a diseased state of affairs, rather than the root causes themselves and, as has been historically witnessed, causes more damage in the long-run. The country’s internal judicial system should be employed to punish criminal behavior carried out by non-state actors, rather than the interstate use of force, which has historically been reserved to deal with belligerent states. Such a course of action would not only strengthen and reinforce the rule of law in the troubled country, but would also lower interstate conflict.⁵⁸

From a global institution-building perspective, a powerful country’s unilateral attempt to achieve its objectives by violating the territorial sovereignty of a weaker one is extremely damaging to the interstate paradigm. Ascribing to multilateralism and peaceful modes of conflict resolution would force powerful state actors to develop constructive modes of engagement for addressing matters that are more heavily focused on diplomacy, political dialogue, and compromise. Such an approach would also provide the necessary impetus

for furthering the development and recognition of such multilateral judicial institutions as the International Criminal Court that would, when accorded the optimal level of authority and jurisdiction, most appropriately adjudicate serious international crimes.

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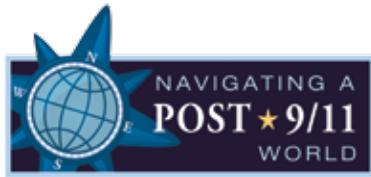
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