U.S. Drone Policy and the International Criminal Court

Written for AMICC by Lailey Rezai on July 22nd, 2014

The Issue:

This paper analyzes the issue of whether U.S. drone strikes could constitute crimes within the jurisdiction of the International Criminal Court (ICC). The military and Central Intelligence Agency (CIA) heavily rely on the practice of targeted killing in the country’s fight against terrorism. Unmanned Aerial Vehicles (UAVS), commonly known as drones, are the method of choice for carrying out this practice. The most controversial aspects of the drone program include attacks that result in civilian deaths. As the practice continues, our opponents are likely to claim this as a reason for the U.S. to stay away from the Court, fearing that the Court could bring charges against American leaders. The talking points below offer a way to respond to their claims.

Talking Points:

1. If the Court decides to investigate drone strikes, there are safeguards built into the Rome Statute which will protect the United States. The Court may return the issue to U.S. national courts because of the principle of “complementarity.” Additionally, the “gravity threshold” may prevent the Court’s jurisdiction.

2. The U.S. is not a member of the Court, but there are ways in which the Court could reach the drone program. However, the Court may conclude the drone strikes are not ICC crimes.

The remainder of this paper describes the context for the drone program and the potential applicability of the ICC. Major points will include:

- The possibility that the Court could take jurisdiction over drone strikes supports the argument of those in the U.S. who believe that the strikes violate international law.
- If the Court were to gain jurisdiction over a strike, the U.S. Administration may be liable for crimes against humanity and/or war crimes. Potential crimes against humanity include: murder, imprisonment or other severe deprivation of physical liberty, and other inhumane acts. Potential war crimes include: murder, cruel treatment, attacking civilians, and attacking protected objects.
- Looking at the drone strikes in the context of the applicability of the Court’s jurisdiction should be an element in the U.S. internal debate of whether drone strikes are in the U.S. national interest.

1. The Court has built in safeguards to protect national courts. The two most relevant to the drone program are the principle of complementarity and the gravity threshold.

**Complementarity:** The Court complements national judicial systems, meaning the Court will only exercise jurisdiction when national courts are “unwilling or unable genuinely to carry
out the investigation or prosecution” of perpetrators. Therefore, the Court must defer to the U.S. national courts because the U.S. is primarily responsible for preventing and prosecuting the commission of crimes. This principle, complementarity, is an essential component of the Court’s system.

*Gravity Threshold:* The Court investigates and prosecutes crimes of concern to the international community—genocide, crimes against humanity, and war crimes. These crimes “shock the conscience of humanity” and are of “worldwide concern.”

Limiting the Court’s jurisdiction to the most serious crimes acts as a “gravity threshold.” For a crime to satisfy the gravity threshold, 

(1) the relevant conduct must be either systematic or large-scale, and

(2) due consideration must be given to the ‘social alarm’ such conduct may have caused in the international community.

The U.S. is not a member of the Court, but there are ways in which the Court could reach the drone program. However, the Court may conclude the drone strikes are not ICC crimes.

Parties to the Rome Statute, which establishes the structure and procedure of the Court, accept ICC jurisdiction for crimes committed on their territory or by their nationals. Additionally, jurisdiction may be triggered by the United Nations Security Council (UNSC), which may refer a situation to the Court regardless of whether the states involved in it are parties to the Court. Moreover, a non-state party may make a declaration with the Registrar and accept the Court’s exercise of jurisdiction in respect to a specific situation.

The U.S. is not a member of the Court, and therefore, the Court does not have jurisdiction over crimes carried out on U.S. soil or by U.S. nationals. However, if the U.S. conducted a strike on a state party, like Afghanistan, the Court might gain jurisdiction over the attack.

It is extremely unlikely that the UNSC could successfully refer to the Court a situation implicating the U.S.. This is because the U.S. is a permanent member of the Council, and therefore, has the power to veto a potential referral.

However, a non-state party, like Pakistan, may make a declaration giving the Court jurisdiction over all parties involved in a drone strike if it is alleged to amount to ICC crimes.

The possibility that the Court could take jurisdiction over drone strikes supports the argument of those in the U.S. who believe that the strikes violate international law.

To avoid the jurisdiction of the ICC, the drone program must meet the standards of the Rome Statute. Most important, attacks must discriminate between combatants and civilians. The expected loss of civilian life or property cannot be disproportionate to the anticipated military gain of an attack.

Furthermore, if it is unclear whether a person is a civilian or a combatant, the person is to be assumed a civilian. It has been suggested that the U.S. labels unidentified individuals
(especially military-age males) as combatants rather than civilians. This “guilt by association” approach benefits the Administration when an attack may otherwise violate the proportionality principle. Additionally, this presumption leads to a lower number of reported civilian causalities because the unidentified deceased are assumed combatants.

A civilian who participates in hostilities becomes a lawful target. However, civilian immunity may be regained when the person is no longer participating in hostilities. “Members of armed forces who laid down their arms and persons placed hors de combat by sickness, wounds, detention or any other reason”iii are therefore unlawful targets.

**If the Court were to gain jurisdiction over a strike, the U.S. Administration may be liable for crimes against humanity and/or war crimes. Potential crimes against humanity include: murder, imprisonment or other severe deprivation of physical liberty, and other inhumane acts. Potential war crimes include: murder, cruel treatment, attacking civilians, and attacking protected objects.**

The U.S. has targeted individuals in Afghanistan, Iraq, Pakistan, Yemen, Somalia, Libya and the Philippines. Out of the seven countries, Afghanistan and the Philippines have ratified the Rome Statute. Therefore, by becoming state parties, Afghanistan and the Philippines accept the full range of the Court’s jurisdiction.

In determining whether a drone strike may be within the reach of the Court, those responsible for the attack must have the material and mental elements of intent under the Rome Statute. Like U.S. criminal law, a criminal act in the Rome Statute consists of a material (objective) element and a mental (subjective) element. Objective elements concern conduct and result. The Court uses the principles of self-defense, proportionality, necessity and discrimination in determining whether the resulting harm is unlawful.

The mental element consists of intellectual (knowledge) and moral (intent) sub elements. Existence of intent and knowledge can be inferred from relevant facts and circumstances. A person acts with intent when they mean to engage in the conduct. Furthermore, a person means to cause a specific consequence if he is aware that it will occur in the ordinary course of events.

The Court is concerned with individual criminal responsibility. A person may be liable if they commit a crime alone, jointly with another or through another person. Moreover, Article 27 provides that the Rome Statute applies equally to all without any distinction based on official capacity.

**CRIMES AGAINST HUMANITY:**

The Court will only address a drone case if the attack on civilians was “widespread” or “systematic.” This qualification distinguishes crimes against humanity from war crimes—crimes against humanity are only prosecuted if they are planned or committed on a large-scale.

The Court may characterize strikes as crimes against humanity; specifically: murder, imprisonment or other severe deprivation of physical liberty, and other inhumane acts.
In examining whether a drone strike satisfies the requirements of the Rome Statute, it is useful to apply the Rome Statute elements of a crime to a particular attack. For example, to be found guilty of the crime against humanity of murder: (1) the perpetrator must have killed one or more persons; (2) his conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (3) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

On June 23, 2009, the CIA targeted a Taliban commander’s funeral in Pakistan. It aimed to kill other militants, but up to 5,000 people were in attendance. The drone strike killed up to 83 people, including 45 civilians—10 of whom were children. The intended target escaped unharmed.iv

In this case, (1) the perpetrator killed 83 people, 45 of whom were civilians. (2) The perpetrators conduct (targeting a funeral) was committed on a widespread level—the CIA knew up to 5,000 people were in attendance. Also, if it is assumed that the CIA implements the same standards as the military in carrying out drone strikes, then the targeting was part of a methodical plan, making the attack systematic. Furthermore, the funeral consisted of a civilian population, and “the presence of certain non-civilians among the targeted population does not change the character of that population.”v (3) The perpetrator had knowledge of the attack. The operation entailed directing an attack against a civilian population. Moreover, existence of knowledge and intent may be inferred by the circumstances. Therefore, even if the CIA assumed that a few militants were going to be killed, the ICC would probably conclude that targeting a crowd of 5,000 mourning people is not lawful.

**WAR CRIMES:**

The elements of war crimes are detailed in the Rome Statute. The first element is whether or not the party involved is participating in an international or non-international armed conflict. The U.S. asserts that it is fighting in a non-international armed conflict. However, the Prosecutor may challenge this assertion. If the Prosecutor determines the U.S. is involved in an international armed conflict, she would investigate a different set of war crimes under the Rome Statute. However, for the purpose of our advocacy, we will assume the U.S. is, as it claims to be, participating in a non-international armed conflict.

The Statute focuses on crimes committed as part of a plan or policy, or committed on a large-scale. The Court prosecutes an individual war crime if it is of “such gravity as to indeed be of concern to the international community as a whole.”vi Incidental killing of civilians is not criminal if the civilian causalities are not “clearly excessive in relation to the concrete and direct military advantage anticipated.”vii

War crime charges against the Administration may include: murder, cruel treatment, attacking civilians, and attacking protected objects.

The double tap method is the most controversial aspect of the U.S. drone program. The method entails striking a target multiple times within a short period. The result—double
tapping attacks first responders. The method terrorizes people on the ground who must decide whether they should risk their life helping the injured or watch them suffer.

This policy violates the Rome Statute and is of concern to the international community as a whole. The second strike targets first responders and hors de combat. Attacks against persons hors de combat are prohibited by the Rome Statute. An hors de combat is “(a) anyone who is in the power of an adverse party; (b) anyone who is defenseless because of unconsciousness... wounds or sickness....”viii

Double tapping is used in Afghanistan, Pakistan and Yemen. Between May 2009 and June 2011, double tapping occurred at least 15 times in Pakistan. Evidence showed civilians died in 10 of the attacks.ix

Looking at the drone strikes in the context of the applicability of the Court’s jurisdiction should be an element in the U.S. internal debate of whether drone strikes are in the U.S. national interest.

Top national security officials alongside senior lawyers of relevant departments and agencies conduct pre and post strike investigations. The Obama Administration insists that first, there must be a legal basis for using lethal force outside areas of active hostilities. Secondly, the target must pose a continuing and imminent threat to U.S. persons. Furthermore, there must be: (1) near certainty that the terrorist target is present; (2) near certainty that non-combatants will not be injured or killed; (3) an assessment that capture is not feasible at the time of the operation; (4) an assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and (5) an assessment that no other reasonable alternative exists to effectively address the threat to U.S. persons.x Lastly, the Administration asserts that it respects international legal principles when using force in foreign territories. xi

The Administration justifies its drone program in accordance with general international law- this applies to the ICC because the Rome Statute includes much of the general international at the time it was adopted. The U.S. maintains it is using force in self-defense to prevent an imminent attack. Self-defense is an exception to the U.N. Charter’s prohibition of the use of force. Traditionally, imminence was understood as instant and without choice. Today, the U.S. construes the term very broadly.

If the ICC were to address a drone case, the U.S. domestic legal justifications would not be relevant in the Court’s application of law. However, domestic justifications remain important because of the principle of complementarity, which requires the Court to defer to U.S. courts.

Acting as commander in chief, the president makes decisions involving national security and the use of force. In the days following 9/11, Congress passed the Authorization for the Use of Military Force (AUMF) - authorizing the president to use “all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on Sept. 11, 2001.”xii An
associated force includes “(1) an organized, armed group that has entered the fight alongside Al Qaeda, and (2) is a co-belligerent with Al Qaeda in hostilities against the United States or its coalition partners.”

Additionally, the CIA carries out clandestine targeted killing. The U.S. routinely “neither confirms nor denies” the CIA’s drone program, resulting in a lack of transparency. The lack of transparency could make it difficult for the Prosecutor to gather evidence of the attacks.

Conclusion:

*Living Under Drones* reported that the number of high-level targets killed as a percentage of total causalities is estimated at just 2%. In Pakistan, drone strikes have killed between 2,116 and 3,475 people, including between 258 and 307 civilians. In Yemen, drone strikes have killed between 781 and 1024 people, and between 81 and 87 of the deceased were civilians.

The Prosecutor will have a difficult time charging the Administration with crimes against humanity because the Rome Statute requires that attacks against civilians be committed in a widespread or systematic manner. While there have been many civilian casualties, civilians are not the primary targets of the drone program. However, if the Court determines that the U.S. is in fact categorizing all military aged males as combatants, then the U.S. program may fall out of line with the proportionality principle, thus making the attacks widespread or systematic.

However, the Prosecutor will have an easier time charging the Administration with war crimes. The definition of war crimes make it easier for the Court to bring charges of war crimes than charges of crimes against humanity. Additionally, double tapping and targeting civilians may well be violations of war crimes at the ICC. The challenge will be whether the number killed can justify the Court’s time- because the Court is of limited resources, it cannot prosecute all cases.

In summary, we can say to opponents about drone strikes and the Court that the U.S. can protect itself by using complementarity. There is also a good possibility that the Court could conclude that the strikes do not meet the seriousness standard. The Prosecutor might also decide that the secrecy around the strikes would make gathering evidence strong enough to satisfy the ICC judges too difficult. However, there is enough of a possibility that the Court could exercise jurisdiction over the strikes that this prospect must be considered in the extensive review of the legality and feasibility of the strikes that is now underway inside the U.S. government.

---

Prosecutor v. Palve Strugar, Case No. IT-01-42-T, Judgment (TC), 31 January 2005, paras. 282, 284


pdfs/task_force_report_FINAL_WEB_062414.pdf

