

TAPPER THROWS SOFTBALL ON DRONES TO PANETTA

Jake Tapper's interview with Leon Panetta has made a lot of news already and he deserves credit for getting the CIA Director on film in the first place. But one question he asked did more harm than good. Tapper asked Panetta to assure us that the US use of drones was legal. But he limited that question to Pakistan.

Tapper: Will you give us your personal assurance that everything the CIA is doing in Pakistan is compliant with US and international law?

Panetta: There's no question that we are abiding by international law, and the law of war.

As the UN report on targeted killing (which Tapper references in setting up his question) makes clear, the problem with drones is not so much their use against combatants in active war zones (as the borderlands of Pakistan, at least, is).

79. The use of drones for targeted killings has generated significant controversy. Some have suggested that drones as such are prohibited weapons under IHL because they cause, or have the effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person.¹⁴² It is true that IHL places limits on the weapons States may use, and weapons that are, for example, inherently indiscriminate (such as biological weapons) are prohibited.¹⁴³ However, **a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a**

soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL. [my emphasis]

Rather, the problem is using drones in places like Somalia and Yemen, where we are not at war.

86. Outside its own territory (or in territory over which it lacked control) and where **the situation on the ground did not rise to the level of armed conflict in which IHL would apply, a State could theoretically seek to justify the use of drones by invoking the right to anticipatory self-defence against a non-state actor.**¹⁴⁷ It could also theoretically claim that human rights law's requirement of first employing less-than-lethal means would not be possible if the State has no means of capturing or causing the other State to capture the target. **As a practical matter, there are very few situations outside the context of active hostilities in which the test for anticipatory self-defence – necessity that is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation”¹⁴⁸ – would be met.** This hypothetical presents the same danger as the “ticking-time bomb” scenario does in the context of the use of torture and coercion during interrogations: a thought experiment that posits a rare emergency exception to an absolute prohibition can effectively institutionalize that exception. Applying such a scenario to targeted killings threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life. In addition, drone killing of anyone other than the target (family members or others in the

vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability. [my emphasis]

So by phrasing the question as he did, specifically limiting it to one of the few places where it is legal, Tapper invited Panetta to claim legality for the wider drone program.

Now, Tapper prefaces this question by noting that Panetta can't discuss classified programs, perhaps suggesting that the drone attacks in countries with which we are not at war are a secret (though our first strike in Yemen was widely reported in 2002!).

But if the effect of the question, as asked, is to allow the government to specifically obscure the legal issues, is it really worth asking?