

MODERN WAR CRIMES BY THE UNITED STATES: DO DRONE STRIKES VIOLATE INTERNATIONAL LAW? QUESTIONING THE LEGALITY OF U.S. DRONE STRIKES AND ANALYZING THE UNITED STATES' RESPONSE TO INTERNATIONAL REPROACH BASED ON THE REALISM THEORY OF INTERNATIONAL RELATIONS

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I. INTRODUCTION

In some parts of the Middle East, the near-constant presence of a U.S. drone hovering in the skies has become a normal part of life. On the other side of the world, Americans sit in their homes and hear frequent reports of successful drone strikes that allegedly target high-ranking members of terrorist organizations. Yet, these drone strikes also have significant collateral effects on the local citizens near them, such as in North Waziristan, where thirteen-year-old Zubair Rehman's grandmother exploded before his and his two younger sisters' eyes when a missile fired from a U.S. Predator drone detonated nearby.¹

Rehman, who traveled to Washington, D.C. with his surviving family, is just one of many victims of the collateral damage from such military operations who has recently appeared before Congress to testify regarding the full extent of the U.S. program.²

The United States began conducting targeted killings of suspected terrorists and high-ranking officials of terrorist groups, such as Al Qaeda,

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1. Amnesty International, "Will I Be Next?" *US Drone Strikes in Pakistan*, at 19–20, AI Index ASA 33/013/2013 (Oct. 2013).

2. Matt Sledge, *Why Did America Kill My Mother? Pakistani Drone Victim Comes to Congress for Answer*, HUFFINGTON POST (Oct. 19, 2013, 7:33 AM), http://www.huffingtonpost.com/2013/10/29/pakistani-drone-victim-congress_n_4171975.html.

after the terrorist attacks of September 11, 2001.³ Since the first drone strike in 2001 or early 2002,⁴ drone usage has greatly expanded to include over five hundred operations in Iraq, Afghanistan, Pakistan, Somalia, Libya, and Yemen.⁵ In these attacks, the estimated number of deaths varies from source to source according to bias and difficulty in collecting reliable data, but is approximately 4000–5000 people, including hundreds of civilians and children.⁶ Since sources often manipulate these numbers in light of political and ideological motivations, no objectively reliable estimate exists. Moreover, as drone strikes are shrouded in secrecy necessary for security purposes, no unbiased data exists to verify government and third party estimates.

Although drone strikes are a recent development, drones themselves existed long before their use in the twenty-first century, originating around the end of World War II.⁷ Drones were also in use for U.S. surveillance during the Vietnam War.⁸ They were again deployed during the Gulf War in 1990 and 1991 and conflicts in the Balkans in the 1990s.⁹ Drone usage, however, was uncontroversial before the twenty-first century because they were not used as combat vehicles. The drone strikes in late 2001 or early

3. INTERNATIONAL HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC OF STANFORD LAW SCHOOL & GLOBAL JUSTICE CLINIC AT NEW YORK UNIVERSITY SCHOOL OF LAW, *Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan*, (2012), available at <http://www.livingunderdrones.org/report/> [hereinafter *Living Under Drones*].

4. Compare Chris Woods, *Ten Years Since First Deadly Drone Strike, Industry Gathers in London*, BUREAU OF INVESTIGATIVE JOURNALISM (Nov. 21, 2011), <http://www.thebureauinvestigates.com/2011/11/21/drone-manufacturers-in-london-on-10th-anniversary-of-1st-strike/> (reporting the first drone strike to be November 8, 2001) and Mary Ellen O'Connell, *The International Law of Drones*, AM. SOC'Y OF INT'L LAW (Nov. 12, 2012), available at <http://www.asil.org/insights/volume/14/issue/37/international-law-drones> (reporting the first drone strike to be early October 2001), with John Sifton, *A Brief History of Drones*, NATION, Feb. 7, 2012, <http://www.thenation.com/article/166124/brief-history-drones#> (reporting the first drone strike to be February 4, 2002).

5. U.N. Secretary-General, *Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 29–38, U.N. Doc. A/68/389 (September 18, 2013); Jack Serle, *September 2013 Update: US Covert Actions in Pakistan, Yemen and Somalia*, BUREAU OF INVESTIGATIVE JOURNALISM (Oct. 1, 2013), <http://www.thebureauinvestigates.com/2013/10/01/september-2013-update-us-covert-actions-in-pakistan-yemen-and-somalia/>.

6. *Living Under Drones*, *supra* note 3; *U.S. Senator Says 4,700 Killed in Drone Strikes*, AL JAZEERA, Feb. 21, 2013, 12:06 PM, <http://www.aljazeera.com/news/americas/2013/02/201322185240615179.html>.

7. O'Connell, *supra* note 4.

8. *Id.*

9. *Id.*

2002 in Afghanistan were the first instance of armed drone operations and catapulted the issue into international focus.¹⁰ Today, the United States is not the only country that conducts armed drone operations: it is also accompanied by the United Kingdom and Israel.¹¹ Moreover, at the end of 2013, eighty-seven countries had operational aerial drones, with at least twenty-six capable of arming drones.¹² The rapid proliferation and weaponization of drones explains the international interest in U.S. armed drone operations, as the consequences here will likely shape future legal regulations surrounding drone warfare.

This Note addresses the current disagreement between the United States and the international community over the legality of U.S. drone strikes. First, in Section II, the applicable international legal framework is summarized. Next, in Section III, specific instances of drone usage are analyzed in light of the international law discussed in Section II. Last, in Section IV, the response to international backlash relating to the United States' lack of transparency and accountability is discussed in light of the realist theory of international relations. In sum, this Note concurs with many transnational organizations that some instances of drone strikes do violate international law, which constitute war crimes, and argues that the United States' conduct is the result of either conflicting interpretations of international law or disobedience based on the realist model. Unfortunately, a lack of reliable information hinders a conclusive analysis of the issue.

II. APPLICABLE LAW

Determining which laws will govern U.S. drone strikes in a foreign country in pursuit of suspected terrorists allegedly planning and participating in military action against the United States depends on how the scenario is classified under international law. The field of international law is composed of a myriad of different sources of law governing relations between states, including treaties between states, treaties establishing transnational organizations, customs engrained through historical adherence, and declarations, guidelines, rulings, and principles adopted by

10. See generally *supra* note 4 and accompanying text (summarizing the controversial history of U.S. drone operations).

11. Peter W. Singer, *The Proliferation of Drones*, DEUTSCHE GESELLSCHAFT FÜR AUSWÄRTIGE POLITIK E.V. [DGAP] (June 19, 2013), <https://ip-journal.dgap.org/en/ip-journal/topics/proliferation-drones>.

12. *Id.*

those transnational organizations. Furthermore, each instrument targets specific, often overlapping and complementary, subjects. Of this conglomeration of law, the most important to this issue are International Humanitarian Law, International Human Rights Law, and jus ad bellum.

International Humanitarian Law (“IHL”) is intended to “limit the effects of armed conflict . . . [and] protect persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.”¹³ This set of rules originated in antiquity, when warfare was accepted under particular customs and standards.¹⁴ Modern codification of these rules began with the Geneva Conventions of 1949 and continued through the twenty-first century.¹⁵ It is important to emphasize that IHL applies only in “armed conflicts.”¹⁶ Within this classification there are different rules applying to international armed conflicts (“IAC”), which involve at least two states, and non-international armed conflicts (“NIAC”), which only involve the territory of a single state and only a single state’s armed forces.¹⁷

International Human Rights Law (“HRL”) is primarily composed of treaties and customary law adopted since 1945, which have codified and solidified what many call “inherent human rights.”¹⁸ The most important of these is often referred to collectively as the International Bill of Rights.¹⁹ Although this was not the first instrument to organize human rights, it has since been proclaimed by the United Nations as a “historic document articulating a common definition of human dignity and values.”²⁰ Since its

13. Int’l Comm. of the Red Cross (ICRC), *What is International Humanitarian Law?* (July 2004), available at http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

14. *Id.*

15. *Id.* (Modern Codes of IHL also include both Additional Protocols of 1977 and a series of conventions regarding specific weapons and issues).

16. *Id.*

17. *Id.*

18. *International Human Rights Law*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (last visited Dec. 17, 2013), <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx> [hereinafter *International Human Rights Law*].

19. Office of the United Nations Commissioner for Human Rights, Fact Sheet No.2 (Rev.1), The International Bill of Human Rights, <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (The International Bill of Rights consists of the Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1948, and the International Covenant on Civil and Political Rights of 1966 and its two Optional Protocols).

20. *Id.*

promulgation, the main components of the International Bill of Rights have been ratified by 132 states, but it is still authoritative even in states that have not ratified any portion of it.²¹ In essence, these laws obligate states to “respect, protect, and fulfill human rights.”²²

Jus ad bellum, or the law on the use of inter-state force, governs justifications for entering an armed conflict, or, in more common parlance, going to war.²³ This body of law comes into play when one state enters another state’s borders with hostile intentions. Since the mid1900s this has been codified primarily in the U.N. Charter, which lays out specific reasons and scenarios for when one state may enter another’s borders.²⁴ This issue is important because of sovereignty concerns, as intruding into another state’s territory violates that state’s sovereignty unless there is appropriate justification. Also, if one state violates another state’s sovereignty, then all actions taken within the latter state’s borders are illegal due to the prohibition on the use of force.

Because the applicable law depends on the classification applied to extraterritorial drone strikes by the United States, the following sections highlight what laws apply in each instance. Part A explains justifications that make it reasonable to violate another state’s sovereignty. Part B explains applicable laws in the absence of armed conflict. Part C explains applicable laws in a classified NIAC. Finally, Part D explains applicable laws in a classified IAC.

A. JUS AD BELLUM

U.N. Charter Article 2 paragraph 4 has become the overarching law prohibiting the use of force against another state and is the “main governing rule of state relations.”²⁵ Article 2 declares that states must refrain from “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent

21. *Id.*

22. *International Human Rights Law*, *supra* note 18.

23. *IHL and Other Legal Regimes—jus ad bellum and jus in bello*, ICRC (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>.

24. U.N. Charter art. 51.

25. Müge Kinacıoğlu, *The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate*, PERCEPTIONS, Summer 2005 at 15, 39, available at <http://sam.gov.tr/wp-content/uploads/2012/01/Muge-Kinacioglu.pdf>.

with the Purposes of the United Nations.”²⁶ Although relatively short, this clause of the U.N. Charter has been interpreted to extend beyond war to include other threats and unilateral actions by hostile states.²⁷ Article 2 paragraph 6 expands this blanket prohibition even further by declaring that even non-members are subject to observation of the United Nations’ principles “so far as may be necessary for the maintenance of international peace and security.”²⁸ Effectively, Article 2 paragraph 6 elevates this prohibition on the use of force from an obligation between member states to an international norm. As mentioned previously, this prohibition stems from concerns over sovereignty and represents the United Nations’ and the international community’s high respect for a state’s sovereignty.

In order for a targeted killing in the territory of a foreign state to not violate that state’s sovereignty, one of two conditions must be met: either (1) the foreign state consents, or (2) the acting state has a right to use self-defense under U.N. Charter Article 51.²⁹ Article 51 states that nothing in the U.N. Charter acts to prevent the “inherent right of individual or collective self-defense” in the event of an “armed attack” until the Security Council takes action.³⁰ To complicate the matter, this has been subject to different and contradictory interpretations. For example, the International Court of Justice (“ICJ”) has held that Article 51 only allows one state to enter the territory of another without consent when armed attacks by non-state actors are traceable to that state.³¹ Also, in *Nicaragua v. United States*, the ICJ ruled that an attack giving rise to self-defense must be significant and not just a “frontier incident.”³² Repeatedly, the ICJ has also found that even if a state is responsible for a significant attack, the right to self-defense arises only if the use of force is actually necessary to defend oneself, and others will not suffer disproportionate economic and social costs.³³

26. U.N. Charter art. 2, para. 4.

27. Kinacıoğlu, *supra* note 25, at 19.

28. U.N. Charter art. 2, para. 6.

29. Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 35, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter ES&A Execution Report].

30. U.N. Charter art. 51.

31. ES&A Execution Report, *supra* note 29, ¶ 40.

32. *Id.* ¶ 35.

33. *Id.* ¶¶ 39, 44.

By contrast, the United States and others argue that the customary right to act in self-defense trumps Article 51, even against non-state actors.³⁴ According to the United States, three justifications create the right to use self-defense against the aggressor: (1) after an actual armed attack occurs; (2) in the presence of “a real and imminent threat when ‘the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation;’”³⁵ and (3) as pre-emptive self-defense against a “continuing threat.”³⁶ This third justification is the most controversial, with ongoing debate regarding its legitimacy.³⁷ A key takeaway is that none of these justifications identify the aggressor, which allows the United States to act against non-state actors as well, according to the United States’ interpretation that Article 51 does not restrict such action.

B. THE EXISTENCE OF AN ARMED CONFLICT

As stated previously, the applicability of international law depends on the classification of the conflict. First, it must be determined whether there is an armed conflict between the two parties. The presence of an armed conflict is determined objectively, independent from the declarations and subjective beliefs of each state or armed group.³⁸ To be considered an armed conflict, two threshold requirements must be met: first, “the parties involved must demonstrate a certain level of organization,” and second, “the violence must reach a certain level of intensity.”³⁹ Based on international jurisprudence, these vague criteria have been interpreted to encompass not only state actors but also armed groups, and factors have been enumerated for consideration relating to intensity.⁴⁰ Historically,

34. *Id.* ¶ 40.

35. *Id.* ¶ 45.

36. Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR 346, 367 (Benjamin Wittes ed., 2009).

37. Compare *id.*, with ES&A Execution Report, *supra* note 29, ¶ 39.

38. ES&A Execution Report, *supra* note 29, ¶ 46.

39. See 31st International Conference of the International Red Cross & Red Crescent, Geneva, Switz., Nov. 28–Dec. 1, 2011, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 8, ICRC Index 31IC/11/5.1.2 [hereinafter 31st International Conference]; see also International Law Association, Use of Force Committee *Final Report on the Meaning of Armed Conflict in International Law*, (2010) [hereinafter International Law Association]; ES&A Execution Report, *supra* note 29, ¶ 46.

40. 31st International Conference, *supra* note 39, at 8–9 (indicative factors for assessment include the number, duration, and intensity of individual confrontations; the type of weapons and other military equipment used; the number and caliber of munitions fired; the number of persons and types of

states have not acknowledged hostilities with armed groups as constituting armed conflicts to prevent giving the groups recognition as a formidable force or appearing weak.⁴¹ If it is determined that an armed conflict is occurring, IHL is triggered and applies to the situation. Without an armed conflict classification, IHL does not apply.⁴²

C. NON-ARMED CONFLICT

In a non-armed conflict, domestic law and HRL are still applicable, and the state is required to treat any violence as common criminal activity. As this Note focuses on international law, relevant domestic laws will not be analyzed because such a discussion raises constitutional and federalism issues that are outside the scope of this Note. Nonetheless, HRL imposes stringent conditions on when killing is justified. HRL is not concerned with the necessity of violence to armed conflict; instead, it relies on the notion of law enforcement.⁴³ This is most pronounced regarding the use of force, where HRL mandates that lethal force can only be used as the last resort in order to protect human life or great bodily harm, or when alternatives would be ineffective or unable to achieve the intended outcome.⁴⁴ Customarily, it must be “strictly” or “absolutely” necessary to constitute an appropriate last resort option.⁴⁵ Also, HRL views proportionality in relation to the target itself, not to a greater military objective like IHL, which necessitates using the smallest amount of force possible to achieve an objective.⁴⁶ Lastly, HRL contains obligations outside limitations on the use of force. These obligations include protections of the right to life and against arbitrary deprivations of life, the right to a fair and public trial with a presumption of innocence until proven guilty, the right to privacy, and the right to equal protection under the law.⁴⁷

It thus follows that drone strikes are almost certainly illegal in a non-armed conflict because of HRL’s proportionality limitation and because

forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones).

41. ES&A Execution Report, *supra* note 30, ¶ 46.

42. *See id.* ¶¶ 34–48.

43. 31st International Conference, *supra* note 39, at 19.

44. *Id.*

45. *Id.*

46. *Id.*

47. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR 21st Sess. Supp. No. 16, U.N. Doc. A/6316 (Dec. 19, 1966).

their sole objective is to kill.⁴⁸ Moreover, in the absence of an armed conflict, a state is prohibited from violating another state's sovereignty by entering the latter's territory without consent because of the prohibition on the use of force found in U.N. Charter Article 2 paragraph 4, discussed above.⁴⁹ Any actions within the other state in violation of its sovereignty are additionally prohibited. Also, drone strike's homicidal objective violates HRL's protection of the right to life, privacy, and a fair and public trial. This prohibition on entering another state's territory and the proportionality limitation likely makes drone strikes illegal in the absence of an armed conflict.

D. NON-INTERNATIONAL ARMED CONFLICT

Under international law, an NIAC's existence depends on the level of organization of the non-state armed forces and both the intensity and duration of the hostilities.⁵⁰ It has been determined that for armed forces to be sufficiently organized, they must be able to identify an adversary, incorporate an adequate command structure, be involved in collective action, and necessitate the use of a state's military forces in response.⁵¹ The duration of the hostilities must be "protracted" and the intensity must extend beyond "the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature."⁵² Yet, even with the clarifications from international jurisprudence mentioned above, the criteria for an NIAC remain ambiguous and open to interpretive conflict.⁵³ For example, it has been determined that an NIAC may cross state boundaries if it qualifies as a "transnational

48. U.N. Secretary-General, *supra* note 5, ¶ 60.

49. U.N. Charter art. 2 para. 4.

50. ES&A Execution Report, *supra* note 29, ¶ 52.

51. *Id.*; see also U.N. Secretary-General, *supra* note 5, ¶¶ 66–67.

52. ES&A Execution Report, *supra* note 29, at ¶ 52; see also U.N. Secretary-General, *supra* note 5, ¶¶ 63, 68.

53. *Supra* Section II.B; see also ES&A Execution Report, *supra* note 29, ¶ 51; OSCAR M. UHLER, ET AL., ICRC, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton, trans., 1958) available at http://www.loc.gov/frd/Military_Law/pdf/GC_1949-IV.pdf; U.N. Secretary-General, *supra* note 5, ¶ 64 ("ICRC has noted the absence of a clear international consensus on the issue [of whether an NIAC has come into existence]"); 30th International Conference of the Red Cross and Red Crescent, Geneva, Switz., Nov. 26–30, 2007, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, ICRC Doc. 30IC/07/8.4. at 21 [hereinafter 30th International Conference] ("the clarification . . . of the law applicable in NIACs remains a major challenge"); 31st International Conference, *supra* note 39, at 9–10 (describing seven "types" of NIACs).

conflict,”⁵⁴ or a conflict that crosses states’ borders, despite the plain meaning of “non-international.” Even so, a transnational conflict would still have to have an identifiable and organized non-state armed “party,”⁵⁵ and armed forces in all territories would have to have “continued direct participation,” which is also known as the nexus requirement.⁵⁶

Non-International Armed Conflicts and IACs differ in many respects. The primary categorical difference between an NIAC and an IAC is that the latter involves conflict between two or more states while the former involves conflict between one or more states and non-state armed forces.⁵⁷ Additionally, NIACs require a higher threshold showing of intensity and duration than IACs to qualify as an armed conflict.⁵⁸

Departing from the tradition of not acknowledging hostile, armed groups, the United States has declared that it is engaged in an ongoing NIAC with alleged terrorist organizations.⁵⁹ The United States justifies its ongoing hostilities under the transnational conflict classification.⁶⁰ This is no surprise, as the previous section concluded drone strikes are illegal unless an armed conflict is in place. An armed conflict is necessary because IHL supersedes any conflicting HRL for the parties of an armed conflict, which effectively relaxes the limitations on the use of force and concerns over proportionality, increasing acceptable justifications for killing.⁶¹ Yet, the United Nations contends that IHL is, in fact, not more permissive than HRL because of a “strict IHL requirement that lethal force be necessary,” similar to the requirement mandated by HRL.⁶² But, because IHL does relax standards for collateral damage, capture, arrest, detention, and extradition, the appeal of classifying hostilities as an armed conflict is obvious.⁶³

54. *Id.* at ¶¶ 53, 55; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

55. ES&A Execution Report, *supra* note 29, ¶¶ 53, 55.

56. 31st International Conference, *supra* note 39, at 22.

57. International Law Association, *supra* note 39, at 8.

58. ES&A Execution Report, *supra* note 29, ¶ 52.

59. U.N. Secretary-General, *supra* note 5, ¶ 62; ES&A Execution Report, *supra* note 29, ¶ 47.

60. U.N. Secretary-General, *supra* note 5, ¶ 62; ES&A Execution Report, *supra* note 29, ¶ 47.

61. ES&A Execution Report, *supra* note 29, ¶¶ 4849.

62. *Id.* ¶ 48.

63. *Id.*

It is important to reiterate that even in an NIAC, prohibitions on arbitrary deprivations of life are still in effect.⁶⁴ However, as mentioned previously, IHL supersedes conflicting HRLs during an armed conflict; thus, the applicable standard for arbitrary deprivation of life depends on IHL.⁶⁵ This body of law operates under three guiding principles of proportionality, distinction, and necessity.⁶⁶ Proportionality governs the standard for arbitrary deprivation of life and is treated differently under IHL and HRL.⁶⁷ The former compares collateral damage to civilians against “the concrete and direct military advantage anticipated,” while the latter considers damage to the target as well.⁶⁸ This effectively allows for an operation causing some collateral damage under IHL as long as it does not exceed the military value gained. A similar operation would be illegal under HRL.⁶⁹ Distinction requires separation of armed forces and civilians, and necessity requires that the use of force be unavoidable to achieve the desired objective and no more force is used than is required.⁷⁰

IHL also includes customary laws, which are applicable in all armed conflicts without ratification or consent by the parties.⁷¹ Over the years, the customary law aspect has become expansive, growing to include over 161 accepted and categorized rules.⁷² Applicable rules include prohibitions against the denial of quarter, which also prohibits killing all survivors,⁷³ obligations that “each party . . . must do everything feasible to verify that targets are military objectives,”⁷⁴ prohibitions on murder of civilians,⁷⁵ guarantees to a fair trial for all civilians and prisoners-of-war,⁷⁶ protections

64. U.N. Secretary-General, *supra* note 5, ¶ 61.

65. *Id.*; Amnesty International, ‘Targeted Killing’ Policies Violate the Right to Life, AI Index AMR 51/047/2012 at 5 (June 2012).

66. *Overview of International Humanitarian Law*, GSDRC APPLIED KNOWLEDGE SERVS., <http://www.gsdrc.org/go/topic-guides/international-legal-frameworks-for-humanitarian-action/concepts/-principles-and-legal-provisions/overview-of-international-humanitarian-law> (last visited Mar. 13, 2014) [hereinafter *Overview of International Humanitarian Law*].

67. 31st International Conference, *supra* note 39, 19.

68. *Id.*

69. *Id.*

70. *Overview of International Humanitarian Law*, *supra* note 66.

71. 30th International Conference, *supra* note 53, at 20–21.

72. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 161 (2009), available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

73. *Id.*

74. *Id.* at 55.

75. *Id.* at 311.

76. *Id.* at 352.

against “persons Hors de Combat,” or people who are no longer participating in hostilities due to injury, sickness, detention, or surrender,⁷⁷ and obligations to respect family life.⁷⁸

To complicate matters further, the codified IHL applies differently to NIACs than it does to IACs, with less than thirty treaty rules applicable to NIACs, compared to almost six hundred rules applicable to IACs.⁷⁹ To address this, customary IHL,⁸⁰ which is applicable to all parties of a conflict without ratification, is used to fill in many of the gaps.⁸¹ Still, even with customary law to supplement treaty rules, the lack of applicable IHL can cause conflicts in interpretation and application.⁸² The most important difference in IHL application to an NIAC is the inability to afford members of armed forces a “combatant” or “prisoner-of-war” status.⁸³ These status terms give certain rights to members of each state’s armed forces: “combatants” forego their protection from direct attack and “prisoners-of-war” receive protection from prosecution for acts committed during war.⁸⁴ In an NIAC, armed forces are deemed to be civilians who “directly participate in hostilities” instead of “combatants.”⁸⁵ While directly taking part in hostilities, these civilians also forego protection against direct attack “for such time as they take a direct part in hostilities.”⁸⁶ The lack of clarity surrounding what constitutes directly participating in hostilities has led to controversy and remains subject to a state’s own interpretation.⁸⁷

77. *Id.* at 164.

78. *Id.* at 379.

79. *Id.*

80. *International Humanitarian Law*, INT’L JUSTICE RESOURCE CTR., <http://www.ijrcenter.org/international-humanitarian-law/> (last visited Mar. 13, 2014) [hereinafter “International Humanitarian Law”].

81. 30th International Conference, *supra* note 53, at 20–21.

82. *International Humanitarian Law*, *supra* note 80 (“this dearth of guidance can pose a challenge. . .”).

83. 30th International Conference, *supra* note 53, at 10.

84. *Id.*; ES&A Execution Report, *supra* note 29, ¶ 58.

85. *Id.*

86. *Id.*; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609; HENCKAERTS & DOSWALD-BECK, *supra* note 72, at 19; 31st International Conference, *supra* note 39, at 42.

87. ES&A Execution Reports *supra* note 29, ¶¶ 57–69; 30th International Conference, *supra* note 53, at 15–17; *see also* U.N. Secretary-General, *supra* note 5, ¶¶ 71–72 (the extent to which U.S. targeting rules incorporate international criteria remains unclear).

It follows that drone strikes may not be legal in an NIAC. Necessity must outweigh collateral damage to justify lethal force and certain actions are prohibited under IHL, such as the targeting of civilians. Also, the ambiguity in applying international law to an NIAC compounds this problem. This makes a generalization regarding drone strikes' legality as a whole necessarily inaccurate regarding NIACs; therefore, specific instances of drone usage must be analyzed to determine legality. These individual analyses are performed in Section III below.

E. INTERNATIONAL ARMED CONFLICT

As briefly discussed above, IACs are conflicts between two or more states, according to Common Article 2 of the Geneva Conventions of 1949.⁸⁸ While NIACs are typically determined by looking at the organization of opposing forces and both the duration and intensity of hostilities, traditionally these factors do not come into play in analyzing IACs.⁸⁹ IHL also applies in full effect to IACs and is considerably better understood in this scenario than when it is applied to NIACs. This section will analyze first the defining characteristics of IHL in relation to an IAC and second instances of IACs in relation to U.S. drone activity.

As with NIACs, IHL principles of proportionality, distinction, and necessity apply to IACs, prohibiting attacks that cause excessive loss of civilian life, direct attacks on civilians, and the use of excessive force. Customary IHL also applies to IACs. However, unlike NIACs, IHL does recognize "combatant" and "prisoner-of-war" statuses in an IAC. While this still allows for direct targeting of combatants, it prevents legal prosecution against those combatants for the acts committed during hostilities, except for war crimes. Immediately, it is apparent that this legal protection is undesirable in the context of terrorist organizations. If captured terrorists were protected as "prisoners-of-war," they would have to be released without legal penalties at the conclusion of the conflict. Because of the stigma and illegality of terrorist acts, it is obvious that a state would want the ability to prosecute any individuals for crimes committed during terrorist activity. One can assume it is for this reason that the United States chooses to classify its hostilities with terrorist

88. 31st International Conference, *supra* note 39, at 7.

89. *Id.* at 7–8 (refuting recent debate that a minimum threshold of intensity or duration should exist).

organizations as an NIAC—precisely to prevent granting members of the opposing armed forces “prisoner-of-war” protection.

Of the different operations conducted by the United States, only the early operations in Afghanistan and Iraq actually amount to IACs.⁹⁰ This is apparent because in each instance the United States was in conflict with the government of another state. In Afghanistan, for instance, the United States came to the aid of the Northern Alliance, a non-state armed group, which was engaged with the Taliban regime in power at the time.⁹¹ It is important to note that both Afghanistan and Iraq ceased to be IACs near the end of the hostilities when the respective opposing governments were overthrown, thus transitioning them to NIACs.⁹² In no other instance has the United States taken part in hostilities with another state’s armed forces. Thus, because the two U.S. operations that did constitute IACs have since ceased to be IACs, no more analysis will be spent on the applicable laws for this scenario.

F. THE AMBIGUITY IN APPLICABLE INTERNATIONAL LAW

The diversity of available classifications and indeterminacy of IHL regarding what constitutes each type of conflict exacerbates the controversy of whether U.S. drone strikes are legal under IHL. Moreover, some argue that the United States’ “global war on terror” does not fit into the existing classifications because the criteria in place do not encompass modern changes in combat.⁹³ ICRC maintains that an additional criterion for “terrorist” activities has “little added value,” since existing international law already prohibits “acts of terrorism” and allows for prosecution of war crimes during armed conflicts.⁹⁴ Nonetheless, for the purposes of this Note, it is sufficient to recognize that there is no consensus on whether, and to what extent, U.S. drone strikes may constitute a conflict.

90. 30th International Conference, *supra* note 53, at 7 (Afghanistan as an IAC); David Turns, *The International Humanitarian Law Classification of Armed Conflicts in Iraq Since 2003*, 86 U.S. NAVAL WAR C INT’L LAW STUDIES 97, 109 (2010).

91. Laurie R. Blank & Benjamin R. Farley, *Characterizing US Operations in Pakistan: Is the United States Engaged in an Armed Conflict?*, 34 FORDHAM INT’L L.J. 151, 179–180 (2011).

92. See 30th International Conference, *supra* note 53, at 7 (discussing change in Afghanistan).

93. *Id.*

94. *Id.* at 5–6.

III. CURRENT ISSUES CONCERNING DRONE STRIKES & POTENTIAL WAR CRIMES

Due to the widespread use of drones and the questionable tactics they utilize, many instances of U.S. drone strikes do not appear to comport with international law. Therefore, they may constitute war crimes. The Section below summarizes specific questionable instances of drone usage that will be analyzed in light of the applicable laws from Section II above.

A. TARGETING CIVILIANS AND SIGNATURE STRIKES

Perhaps the most widespread controversy surrounds the number of civilian casualties associated with drone strikes and the methods of targeting suspected terrorists. A striking example of such tactics occurred in mid-2009 when the Central Intelligence Agency (“CIA”) killed a mid-ranking Taliban commander with the intention of using “his body as bait to hook a larger fish.”⁹⁵ It was expected that the leader of the Pakistan Taliban at the time would attend the deceased commander’s funeral, which he did along with as many as five thousand other people, including civilians.⁹⁶ Still, this did not stop the CIA from striking the funeral, killing between sixty and eighty-three people.⁹⁷ It is estimated that as many as forty-five of the deaths from this attack were civilian casualties, including ten children and four tribal leaders.⁹⁸ Still, out of all of this death, the Taliban leader escaped unharmed and was attacked in another strike six months later.⁹⁹

Another controversial method for targeting terrorists is known as a “signature strike,” a tactic pioneered by the Obama Administration. In these operations, the identity of the targeted individual(s) remains unknown. The strike is based merely on observation of “suspicious buildings or activities.”¹⁰⁰ In addition to the unknown identity of the target, this practice purportedly requires no evidence of a threat to the United

95. Chris Woods & Christina Lamb, *CIA Tactics in Pakistan Include Targeting Rescuers and Funerals*, BUREAU OF INVESTIGATIVE JOURNALISM, Feb. 4, 2012, www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/.

96. *Id.*

97. *Id.*; Pir Zubair Shah & Salman Masood, *U.S. Drone Strike Said to Kill 60 in Pakistan*, N.Y. TIMES, June 23, 2009, <http://www.nytimes.com/2009/06/24/world/asia/24pstan.html?ref=global-home>.

98. Woods & Lamb, *supra* note 95.

99. *Id.*

100. Amnesty International, ‘Targeted Killing’ Policies Violate the Right to Life’, *supra* note 65, at 4.

States.¹⁰¹ Signature strikes tend to produce higher levels of civilian casualties than other drone strikes because of the loosely profiled targets.¹⁰²

The controversy in operations such as these stems from both the ambiguity regarding whether the deceased posed any threat to the United States and the U.S. government's own lack of information and transparency surrounding the operations. Besides providing no information to justify the necessity and proportionality required under IHL, the government does not release specific casualty figures to the public. With a lack of reliable data and information, many independent sources can only speculate as to the number of civilian casualties associated with U.S. drone strikes in the past decade. Moreover, these independent sources may suffer from bias.¹⁰³ Despite these shortcomings, independent casualty estimates typically range from 4000–5000 people, including hundreds of civilians and children.¹⁰⁴ This estimate is directly at odds with repeated statements by U.S. government officials, including President Obama, reassuring the public that all operations are a “targeted, focused effort” without “a huge number of civilian casualties.”¹⁰⁵ CIA Director John Brennan once claimed that not “a single collateral death” had taken place from June 2010 to June 2011.¹⁰⁶ Other officials are more candid, with one senator estimating the casualty rate at 4700 and admitting that civilians were included.¹⁰⁷ Other sources present drastically different estimates. Pakistani sources claim that an average of fifty civilians are killed for every terrorist, equating to an accuracy of two percent.¹⁰⁸ While this statistic may seem extreme, a prominent American think tank, the Brookings Institute, arrived at a similar, more conservative, estimate of ten civilians killed for every terrorist—an accuracy of ten percent.¹⁰⁹ Other independent American

101. *Id.*

102. Philip Giraldi, *The End of Drone War?*, AM. CONSERVATIVE (Mar. 4, 2014), <http://www.theamericanconservative.com/articles/the-end-of-drone-war/>.

103. *Living Under Drones*, *supra* note 3; *US Senator Says 4,700 Killed in Drone Strikes*, *supra* note 6.

104. *Id.*

105. Woods & Lamb, *supra* note 95

106. Mark Bowden, *The Killing Machines*, ATLANTIC (Aug. 14, 2013), <http://www.theatlantic.com/magazine/archive/2013/09/the-killing-machines-how-to-think-about-drones/309434/3/>.

107. *US Senator Says 4,700 Killed in Drone Strikes*, *supra* note 6.

108. David Kilcullen & Andrew McDonald Exum, *Death from Above, Outrage from Below*, N.Y. TIMES (May 16, 2009), http://www.nytimes.com/2009/05/17/opinion/17exum.html?_r=4&.

109. David L. Byman, *Do Targeted Killings Work?*, BROOKINGS (July 14, 2009), <http://www.brookings.edu/research/opinions/2009/07/14-targeted-killings-byman#>.

sources estimate that, of the total number of casualties, children composed 5.5 percent and civilians 16.7 percent of victims, while “high-profile individuals” were only about 1.5 percent.¹¹⁰

Part of the discrepancy between such casualty estimates might be attributed to the manner in which investigators classify individuals in drone-strike zones. Numerous reports allege that the current U.S. administration uses sweeping generalizations when classifying targets, such as classifying all military-aged males in a strike zone as “militants,”¹¹¹ or classifying children as militants rather than civilians because of heightened concerns of terrorists recruiting children.¹¹² On the other hand, a Pakistani high court, in considering whether American drone strikes violated international law, reportedly included damage to livestock and cattle in its number of “civilian casualties.”¹¹³ If true, this could account for the low civilian casualties official U.S. sources report when compared to the drastic and unsettling figures given by unofficial or foreign sources.

This problem is aggravated by the fact that a remarkably small number of targets are ever captured rather than killed.¹¹⁴ It is alarming that there is an “overwhelming reliance” on lethal force because customary IHL prohibits denial of quarter.¹¹⁵ This prohibition does not require giving an enemy the opportunity to surrender, nor does it create a duty to capture; however, it does prohibit ordering the execution of all survivors.¹¹⁶ The

110. Rhiannon M. Kirkland, *Obama's Drones v. Bush's Extraordinary Renditions: By the Numbers*, WASH. MONTHLY TEN MILES SQUARE BLOG (Apr. 15, 2013, 3:42 PM), http://www.washingtonmonthly.com/ten-miles-square/2013/04/obamas_drones_vs_bushs_extraor044184.php.

111. Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=3&r=3&>; Glenn Greenwald, “Militants”: *Media Propaganda*, SALON, May 28, 2012, http://www.salon.com/2012/05/29/militants_media_propaganda/; Bowden, *supra* note 106.

112. Dan Lamothe & Joe Gould, *Some Afghan Kids Aren't Bystanders*, MILITARY TIMES (Dec. 3, 2012, 7:08 AM), <http://www.militarytimes.com/article/20121203/NEWS/212030312/Some-Afghan-kids-aren-t-bystanders>.

113. Alice K. Ross, *The Legality of War: Pakistani Court Rules CIA Drone Strikes Constitute a War Crime*, GLOBAL RES. (May 11, 2013), <http://www.globalresearch.ca/the-legality-of-war-pakistani-court-rules-cia-drone-strikes-constitute-a-war-crime/5334665>.

114. Scott Shane, *Targeted Killing Comes to Define War on Terror*, N.Y. TIMES, Apr. 7, 2013, <http://www.nytimes.com/2013/04/08/world/targeted-killing-comes-to-define-war-on-terror.html?pagewanted=all&r=0>.

115. *Id.*; HENCKAERTS & DOSWALD-BECK, *supra* note 72, at 161.

116. Ofilio Mayorga, *Double-Tap Drone Strikes and the Denial of Quarter in IHL*, Post on *Program on Humanitarian Policy and Conflict Research*, HARVARD UNIVERSITY (May 8, 2013),

current CIA director has publicly declared that the United States has no preference for killing suspected terrorists rather than capturing them, and has stated that the United States “only undertake[s] lethal force when [it] believe[s] that capturing the individual is not feasible.”¹¹⁷ Yet, out of the over three thousand people killed by drone strikes, only a “handful” have been captured.¹¹⁸ Indeed, Amnesty International has noted that the United States has never “mentioned the words ‘human rights’” when discussing civilian casualties, elaborating that “the human rights standards and any criticisms based upon them have simply been ignored.”¹¹⁹ In fact, the U.S. government is likely aware of the reliance on lethal force, but has taken years to correct the problem. For example, Hellfire missiles, the bombs currently equipped on armed drones and used on individuals, were developed to destroy armed tanks and bunkers, but only in the past few years have defense companies begun to consider alternatives.¹²⁰

Still, the imbalance in the number of prisoners relative to casualties may be partly attributed to the nature of drone operations. Drones are not able to capture targets themselves and most drone operations are not supported by ground troops in the area.¹²¹ The imbalance may also be attributed to the U.S. policy regarding when capture is considered “feasible.”¹²² This policy considers the risk of American casualties, the resistance of foreign authorities to incursions by U.S. ground forces, and the decreasing need of interrogation as the terrorist threat wanes.¹²³ Despite this, critics continue to claim that such criteria are subjective and opine that the main reason for the government’s preference for killing rather than capturing targets is rooted in convenience rather than necessity.¹²⁴

Even in the midst of an armed conflict, targeting civilians and the use of signature strikes seems to violate international law. On their face, these acts appear to breach IHL’s principles of proportionality and necessity.

<http://www.hpcrresearch.org/blog/ofilio-mayorga/2013-05-08/double-tap-drone-strikes-and-denial-quarter-ihl>; HENCKAERTS & DOSWALD-BECK, *supra* note 72, at 161.

117. Shane, *supra* note 114.

118. *Id.*

119. Amnesty International, ‘Targeted Killing’ Policies Violate the Right to Life, *supra* note 65, at 4.

120. William Matthews, *Smaller, Lighter, Cheaper*, DEF. NEWS (May 31, 2010, 3:45 AM), <http://www.defensenews.com/article/20100531/DEFFFEAT01/5310311/Smaller-Lighter-Cheaper>.

121. Mayorga, *supra* note 116.

122. Shane, *supra* note 114.

123. *Id.*

124. *Id.*

Signature strikes, for example, do not verify that the target is actually a threat and that violence is necessary for protection. Both of these standards must be met under IHL. Targeting civilians also violates the principle of distinction, prohibitions on murdering civilians, and a civilian's right to a fair trial, in addition to the principles of proportionality and necessity. The prohibition on denial of quarter may also be violated if the United States is intentionally avoiding any possibility of capturing its targets; yet, such intentions cannot be confirmed because of the secrecy surrounding drone strikes.

Outside the context of an armed conflict, the concern over targeting civilians becomes even more pronounced. Under HRL, lethal force can only be used in cases of strict necessity, allowing civilian casualties to be permitted in very few scenarios. Moreover, the identity of the target in signature strikes remains unknown, precluding confirmation that the target is not a civilian or that lethal force is necessary. Thus, in the absence of an armed conflict, targeting civilians and signature strikes would be illegal under the HRL.

In the end, however, both tactics of targeting civilians and signature strikes cannot be properly analyzed due to a deficiency of information regarding the drone operations themselves, the lack of accurate casualty numbers and accurate identification of these casualties, and repeated attempts by the U.S. government to justify its actions through international law. Without more information, it cannot be determined whether the United States committed war crimes through the use of drone strikes in an armed conflict by violating IHL.¹²⁵ While President Obama has publicly claimed he is committed to increasing transparency surrounding drone strikes, adequate government information regarding such strikes has yet to be released.¹²⁶

B. TARGETING FIRST RESPONDERS

The United States is also accused of attacking people immediately responding to assist survivors of drone strikes.¹²⁷ These attacks on “first

125. John Knefel, *Reports: U.S. Drone Strikes Violate Laws of War*, ROLLING STONE, Oct. 22, 2013, <http://www.rollingstone.com/politics/news/reports-u-s-drone-strikes-violate-laws-of-war-20131022>.

126. Shane, *supra* note 114.

127. Woods & Lamb, *supra* note 95; Chris Woods, ‘Drones Causing Mass Trauma Among Civilians,’ *Major Study Finds*, BUREAU OF INVESTIGATIVE JOURNALISM (Sept. 25, 2012),

responders” violate customary IHL relating to the prohibition on denial of quarter, attacks against “persons Hors de Combat,” and treaty rules relating to distinction.¹²⁸ The United States has responded to allegations of such activity by reaffirming that drone operations remain “a targeted, focused effort” and downplaying estimates of civilian casualties.¹²⁹ Still, there is widespread demand for accountability for perceived war crimes and the detrimental effects such strikes have on civilian populations.¹³⁰

From May 2009 to June 2011, international news agencies reported fifteen separate armed drone attacks on rescuers, with local researchers independently confirming ten of the reported attacks.¹³¹ Such instances were again corroborated in a joint study by Stanford Law School and New York University School of Law.¹³² In these reported instances, the U.S. launched two missiles per target, with the second hitting seconds or minutes after the first.¹³³ In the joint study, one interviewee described witnessing a drone strike only a few hundred meters away and approaching the wrecked vehicle to check for survivors.¹³⁴ Upon nearing the vehicle, a voice from the wreckage asked him to leave immediately in case another missile struck, which occurred moments later as he was returning to his own vehicle.¹³⁵

Such reports are particularly relevant because intentional attacks on rescuers are unjustifiable and illegal under both HRL and IHL. HRL’s prohibition on lethal force does not allow justifications for targeting those attempting to help the injured, regardless of the cause of their injury. Second, IHL’s prohibition on targeting persons Hors de Combat prevents targeting injured armed forces because they are, by definition, a person outside of the conflict.¹³⁶ Third, IHL’s denial of quarter prohibition also

<http://www.thebureauinvestigates.com/2012/09/25/drones-causing-mass-trauma-among-civilians-major-study-finds/>; Jack Serle, *UN Expert: CIA Drone Strikes “A War Crime,”* BUREAU OF INVESTIGATIVE JOURNALISM (June 21, 2012), <http://www.thebureauinvestigates.com/2012/06/21/un-expert-labels-cia-tactic-exposed-by-bureau-a-war-crime/>.

128. *Supra* Section II.D.

129. Woods & Lamb, *supra* note 95.

130. *Living Under Drones*, *supra* note 3.

131. Woods & Lamb, *supra* note 95.

132. *Living Under Drones*, *supra* note 3.

133. *Id.* at n.429.

134. *Id.* at n.437–42.

135. *Id.*

136. HENCKAERTS & DOSWALD-BECK, *supra* note 72, at 164.,

prevents attacking a combatant once they are taken out of combat, such as by injury.¹³⁷

Still, the United States stands by its secretive policies, asserting that they are indeed legal.¹³⁸ There is some unofficial speculation, however, indicating that the United States does not intentionally target rescuers but is instead attempting to make up for the inaccuracy and unreliability of the missiles used in drone strikes.¹³⁹ If true, this would raise IHL proportionality and distinction concerns regarding the ability of drones to inflict damage only to the intended targets. Yet, until the United States officially makes a statement, the motivations behind these reported operations remain unknown.

Transnational and non-governmental organizations (“NGOs”) also took up arms once the reports mentioned above arose and, shortly after, U.N. special rapporteur Christof Heyns spoke in Geneva, declaring drone strikes targeting rescuers to be “war crimes,” and asserting “there is no doubt about the law.”¹⁴⁰ The International Human Rights and Conflict Resolution Clinic of Stanford Law School and the Global Justice Clinic at New York University School of Law also ran a joint study calling for accountability by the U.S. government.¹⁴¹ These reactions stem from the illegality of attacking rescuers and the detrimental effects such tactics have on civilian populations. The practice of using two strikes for each target effectively discourages rescuers from helping any survivors of a first attack.¹⁴² Locals are reportedly so fearful of multiple strikes in succession that for “two or three hours nobody goes close to [the location of the strike]” and the identities of the victims often remain a mystery until it is thought safe to approach.¹⁴³ Furthermore, substantive accounts of people residing near the strikes describe life beneath the constant surveillance of drones as “hell on earth.”¹⁴⁴

137. Mayorga, *supra* note 116.

138. Woods & Lamb, *supra* note 95.

139. Matthew J. Nasuti, *Hellfire Missile Accuracy Problems Uncovered in Pentagon Data*, KABUL PRESS, Nov. 27, 2011, <http://kabalpress.org/my/spip.php?article89242>.

140. Serle, *UN Expert: CIA Drone Strikes “A War Crime”*, *supra* note 127.

141. *Living Under Drones*, *supra* note 3.

142. *Id.*

143. *Id.*

144. *Id.*

C. LACK OF AN ARMED CONFLICT

Not all agree with the United States' opinion that it is in an NIAC with terrorist organizations and argue that such hostilities do not constitute an armed conflict.¹⁴⁵ As discussed above, the United States frames its hostilities with terrorist organizations as an NIAC that spans multiple states, specifically a "transnational" NIAC.¹⁴⁶ However, as an armed conflict requires a minimum threshold of intensity and organization of the opposing armed forces, critics voice concern over whether such thresholds have been reached.¹⁴⁷ Specifically, the United States often considers multiple terrorist organizations as part of a single group in which the individual organizations would otherwise not satisfy the requisite level of organization necessary to qualify as non-state armed forces.¹⁴⁸ Amnesty International has described such organizations as "a diffuse network," advocating that these hostilities are not armed conflicts.¹⁴⁹ A critic has even analogized the United States' grouping of terrorist organizations as similar to grouping together the "Korean war, the Vietnam war, and the Cuban Missile Crisis," combined with any communist sympathizers worldwide, as "part of a single armed conflict."¹⁵⁰

In the absence of an armed conflict, HRL acts as the governing body of law. It is worth reiterating here that under HRL intentional killings such as those performed by drone strikes would be illegal and, if civilian casualties occurred, they would be war crimes.¹⁵¹ This is because HRL views hostilities from a law enforcement standpoint, which only permits

145. *Id.* (Yet numerous experts have raised questions about whether the U.S. is, in fact, in an armed conflict with all of the groups whose members the U.S. has targeted. This is because of factors such as the lack of centralization and organization within some non-state groups, [622] and the existence of only sporadic and isolated attacks by some groups. [623]); Amnesty International, *'Targeted Killing' Policies Violate the Right to Life*, *supra* note 66, at 6.

146. U.N. Secretary-General, *supra* note 5, ¶ 62.

147. *Living Under Drones*, *supra* note 3. (Yet numerous experts have raised questions about whether the United States is, in fact, in an armed conflict with all of the groups whose members the U.S. has targeted. This is because of factors such as the lack of centralization and organization within some non-state groups, and the existence of only sporadic and isolated attacks by some groups.

148. ES&A Execution Report, *supra* note 29, at 54–56; Paul R. Pillar, *Still Fighting Bush's GWOT*, CONSORTIUM NEWS (June 23, 2012), <http://www.consortiumnews.com/2012/06/23/still-fighting-bushs-gwot/>.

149. Amnesty International, *'Targeted Killing' Policies Violate the Right to Life*, *supra* note 65, at 8.

150. NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS, 120–21 (2010).

151. *Living Under Drones*, *supra* note 3; O'Connell, *supra* note 4.

intentional lethal force in instances of “strict” necessity in response to a threat to life.¹⁵² Analysts also find that the technologically unique nature of drones poses no problem for applying HRL because the weapons they deploy are not novel.¹⁵³

Still, transnational organizations have shown caution in accusing the United States of war crimes in violation of international HRL, recognizing that a reliable conclusion is impossible without more information surrounding its drone operations.¹⁵⁴ Amnesty International, for example, approaches the question of determining whether a conflict exists in specific instances “on a case-by-case basis,” recognizing that conflicts may come in to and out of existence. Yet, from available information, it appears that multiple drone strikes by the United States do appear to be illegal when viewed in light of HRL, which is the governing law in the absence of an armed conflict.¹⁵⁵

D. VIOLATIONS OF OTHER NATION’S SOVEREIGNTY

The issue of state sovereignty is not a problem for some U.S. drone operations because the states exposed to them consent to the activities. Yemen, for example, informed a special rapporteur of the United Nations that the United States “routinely seeks prior consent.”¹⁵⁶ Yet in other states, like Pakistan, the government publicly admonishes the United States for operations in their territory and claims that such acts are in violation of their sovereignty. Under U.N. Charter Article 2 paragraph 4, as discussed above, states are prohibited from using force in another state’s territory without consent unless responding to an attack in self-defense or with permission from the U.N. Security Council.¹⁵⁷ Thus, without the consent of the states where drones are active and without endorsement from the U.N. Security Council,¹⁵⁸ the United States must rely on the right of self-defense grounded in international law. However, controversy surrounds the United States’ interpretations of what constitutes justified self-defense. Despite

152. *Supra* Section II.C; O’Connell, *supra* note 4.

153. O’Connell, *supra* note 4.

154. Amnesty International, ‘*Targeted Killing’ Policies Violate the Right to Life*,’ *supra* note 65, at 12.

155. O’Connell, *supra* note 4.

156. U.N. Secretary-General, *supra* note 5, ¶ 52.

157. U.N. Charter art. 2, para. 4.

158. Amnesty International, ‘*Targeted Killing’ Policies Violate the Right to Life*,’ *supra* note 65, 8–9.

this, evidence does exist showing that Pakistan quietly acquiesced to U.S. drone operations, which would make any debate surrounding self-defense irrelevant in this instance.

The government of Pakistan publicly takes the position that it is opposed to U.S. drone operations carried out in its airspace. Especially within the last year, U.S. operations have been called illegal under international law and a violation of Pakistan's sovereignty.¹⁵⁹ Recently, a Pakistani high court officially ruled that the "random" drone strikes in Pakistan are a "war crime" and a "blatant violation of basic human rights."¹⁶⁰ Of the rulings' foundations, one important factor the court considered was the cruelty to animals and collateral damage to livestock, which was then added to "civilian casualties."¹⁶¹ Although the United States was not a party to the case and the court has admitted it lacks the ability to force the U.S. government to provide compensation for its crimes, the court did instruct the Pakistani government to file complaints with the United States—and if the United States did not comply, to "sever all ties with the U.S.A." and deny access to Pakistani facilities.¹⁶² In a recent drone strike to receive popular media attention, which occurred November 1st, 2013, and allegedly killed Pakistani Taliban leader Hakimulla Mehsud, the Pakistani government condemned the attacks and voiced concerns over how such operations make it impossible to create peace in the region.¹⁶³

Without Pakistani consent, the United States is only allowed to use force in Pakistan's territory under Article 2 paragraph 4 of the U.N. Charter as self-defense "in response to an armed attack or imminent threat, and where the host state is unwilling or unable to take appropriate action."¹⁶⁴ As discussed above, the United States employs three tests to determine when self-defense may be justified. Here, two were possibly in effect, either as a response to the terrorist attacks of September 11, 2001, or as pre-emptive self-defense against the continuing threat of suspected terrorist

159. *Living Under Drones*, *supra* note 3.

160. Kevin Gosztola, *Pakistan Court Decision Finds US Drone Strikes Are 'War Crimes,' Which Are 'Absolutely Illegal'*, *DISSENTER* (May 9, 2013, 6:09 PM), <http://dissenter.firedoglake.com/2013/05/09/pakistan-court-decision-finds-us-drone-strikes-are-war-crimes-which-are-absolutely-illegal/>.

161. Ross, *supra* note 113.

162. Gosztola, *supra* note 160.

163. *Pakistani Taliban Meet to Pick Mehsud's Successor*, *YAHOO NEWS* (Nov. 2, 2013), <http://en-maktoob.news.yahoo.com/pakistani-taliban-meet-pick-mehsuds-successor-102823701.html>.

164. *Living Under Drones*, *supra* note 3 (see material relating to FN 602).

organizations in Northern Pakistan.¹⁶⁵ While the first test (responding to actual attacks) used by the United States is generally accepted, there is growing international consensus that too much time has passed since the 2001 attacks to justify such prolonged operations.¹⁶⁶ Although more controversial, the second test (pre-emptive self-defense) is still asserted by some scholars and officials. This test appears to hold less water than the self-defense theory based on the 2001 attacks, as evidenced by analysts finding a lack of significant evidence to support a similar claim also applying to North Pakistan.¹⁶⁷ Other analysts conclude that self-defense may be justified only against an actual attack.¹⁶⁸ Moreover, Amnesty International believes a pre-emptive self-defense theory is legally implausible and has “grave implications” for possible human rights abuses.¹⁶⁹ Indeed, the ICJ has ruled that self-defense is limited by proportionality to only the attack justifying its use and is still bound by IHL principles of necessity and distinction.¹⁷⁰ Amnesty International takes this position, interpreting Article 51 to allow for self-defense only “after an attack has already taken place and only on a temporary basis pending action by the U.N. Security Council.”¹⁷¹ Amnesty International continues to speculate that such an interpretation does not justify the “global” U.S. policy of “deliberate killing.”¹⁷² Some hold even stronger views, arguing that self-defense can never justify an armed attack against terrorist organizations since terrorist acts are inherently criminal and not capable of constituting armed attacks for the purposes of self-defense.¹⁷³

According to the United States, a second prong of the requirement for extraterritorial self-defense is that the other country must be “unwilling or unable” to independently confront the non-state armed group.¹⁷⁴ This test is

165. *Supra* Section II.A; *Living Under Drones*, *supra* note 3.

166. Amnesty International, ‘*Targeted Killing*’ *Policies Violate the Right to Life*’, *supra* note 65, at 8–9; O’Connell, *supra* note 4.

167. *Living Under Drones*, *supra* note 3.

168. O’Connell, *supra* note 4.

169. Amnesty International, ‘*Targeted Killing Policies Violate the Right to Life*’, *supra* note 65, at 9–10.

170. O’Connell, *supra* note 4.

171. Amnesty International, ‘*Targeted Killing Policies Violate the Right to Life*’, *supra* note 65, at 9–10.

172. *Id.*

173. Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in *SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE* (Simon Bronitt et al. eds., 2012).

174. O’Connell, *The International Law of Drones*, *supra* note 4.

heavily grounded in recent tradition, having stemmed from the Reagan administration, and has been subsequently adopted by all successive administrations, thus the emphasis on the continuity of the United States' opinions on the subject.¹⁷⁵ Support for this test is found in the practice of other states as well.¹⁷⁶ The United States justifies its claim that Pakistan is unwilling or unable to address terrorist activity in its territory based on suspicions that the Pakistani government playing both sides by supporting terrorism and combating it selectively.¹⁷⁷ Still, much like other legal interpretation surrounding drone strikes, not all agree that this test comports with the U.N. Charter.¹⁷⁸ Some believe that it is in fact contradictory.¹⁷⁹

To complicate matters further, recent reports indicate that leaked documents dating back to 2010 show that the Pakistani government has secretly agreed to the drone strikes despite public outcry.¹⁸⁰ The reports, which span years of U.S.-Pakistani collusion, detailed drone strikes, maps, and photos that were reportedly provided to, and then secretly endorsed by, the Pakistani government. These reports were implicitly confirmed when one U.S. House of Representatives Foreign Affairs Committee member, Rep. Alan Grayson, said on record that “drone strikes ‘could end tomorrow’” if Pakistan wanted them to.¹⁸¹ If true, secret Pakistani consent would eliminate concerns regarding the violation of the state's sovereignty. However, while Pakistan is the most prominent state in regards to this debate, the United States conducts armed drone strikes in other states that may not have consented the way Pakistan apparently has.

175. Kenneth Anderson, *Stop Presses: “Even Eric Posner Says Drone Strikes in Pakistan Are Illegal”*, LAWFARE (Oct. 9, 2012, 8:32 PM), <http://www.lawfareblog.com/2012/10/stop-presses-even-eric-posner-says-drone-strikes-in-pakistan-are-illegal/>.

176. *Id.*

177. Jayshree Bajoria & Eban Kaplan, *The ISI and Terrorism: Behind the Accusations*, COUNCIL ON FOREIGN RELATIONS (May 4, 2011), <http://www.cfr.org/pakistan/isi-terrorism-behind-accusations/p11644>; *Living Under Drones*, *supra* note 3.

178. Anderson, *supra* note 175.

179. *Id.*

180. Greg Miller & Bob Woodward, *Secret Memos Reveal Explicit Nature of U.S., Pakistan Agreement on Drones*, WASH. POST (Oct. 24, 2013, 4:31 AM), http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story_1.html; *Secret Memos ‘Show Pakistan Endorsed US Drone Strikes’*, BBC NEWS (Oct. 24, 2013), <http://www.bbc.co.uk/news/world-asia-24649840>; Syed Fazl-e-Haider, *Pakistan Takes U-Turn on Drone Strikes*, ASIA TIMES ONLINE (Nov. 1, 2013), http://www.atimes.com/atimes/South_Asia/SOU-02-011113.html.

181. Syed Fazl-e-Haider, *Pakistan Takes U-Turn on Drone Strikes*, ASIA TIMES ONLINE (Nov. 1, 2013), http://www.atimes.com/atimes/South_Asia/SOU-02-011113.html.

Ultimately, whether the United States is conducting drone operations in violation of the prohibition on the use of force under Article 2 paragraph 4 depends on which government's rhetoric is believed and which test for self-defense is applied. While it seems unlikely that the Pakistani government would publicly admonish the United States while secretly permitting the drone strikes, the possibility cannot be discounted. Without a state's consent, the United States must justify its actions under the right of self-defense. Moreover, the United States' unique tests for self-defense are not shared by the international community, which hinders attempts to reach a consensus on whether the use of self-defense is justified. Even if pre-emptive self-defense were accepted internationally, Amnesty International and the ICJ are likely correct in concluding that such a theory still does not encompass the hostilities between the United States and terrorist organizations. Thus, the only means the United States has available to avoid violating Article 2 paragraph 4 is through Pakistani consent because there is no justification for the use of self-defense applicable to the ongoing hostilities. Again, the conflicting reports on whether Pakistan actually consents to U.S. operations prevent conclusively determining whether U.S. drone strikes actually do violate Pakistani sovereignty.

E. CONCLUSION

In sum, many U.S. drone strikes appear to violate international law and thus constitute war crimes. Specifically, tactics such as targeting civilians and first responders, using signature strikes, grouping together separate and isolated terrorist groups to justify classification as an armed conflict, and operating within Pakistan without the state's consent are illegal under IHL. In the absence of an armed conflict, wherein HRL functions as the governing law, these acts are even more clearly illegal.

All the issues discussed above, however, share a lack of reliable, official information needed to conduct a sufficient analysis of the legality of U.S. drone operations. Some instances apparently violate international laws and do not have possible justifications to excuse such action, and the issues discussed above include the most flagrant candidates. Still, near unanimous demand for the United States to increase transparency and take accountability for its actions is gaining momentum in the international arena. As both international and domestic pressure increases, the United States may begin declassifying information to appease popular demand,

which would allow for definitive analysis and the controversy surrounding drone strike legality to be put to rest.¹⁸² Indeed, in 2014 the U.S. attorney general declassified a memo to the President from 2010 dealing with the legality of targeting American citizens suspected of terrorism against the U.S. while abroad, signaling a possible change in the government's policy.¹⁸³

IV. A THEORETICAL ANALYSIS OF THE U.S. RESPONSE TO INTERNATIONAL WAR CRIME ACCUSATIONS

This Section will analyze the United States' current political stance and foreign policies adopted in response to the international desire for increased transparency and accusations of international law violations. The analysis will take into account international relations theories that may potentially explain U.S. actions. First, the discussion will focus on the U.S. response to international fervor by contrasting official claims with factual data. Second, a possible explanation is posited for why the present disagreement exists at all. Finally, the U.S. response is framed based on the realism theory of international relations and specific variants therein.

A. THE U.S. RESPONSE

Due to the far-reaching outcry from transnational organizations, NGOs, and other countries, the United States has noticed the tension. United States officials have recently repeated that drone strikes in Pakistan, and indeed the entirety of the "war on terror," are not indefinite and may end "very, very soon."¹⁸⁴ Still, the United States stands by its reassurances that such operations are legal under international law, but has not released

182. See generally Eric W. Dolan, *House Democrats Demand Obama Release 'Full Legal Basis' For Drone Strikes*, RAW STORY (March 11, 2013, 7:12 PM), <http://www.rawstory.com/rs/2013/03/11/house-democrats-demand-obama-release-full-legal-basis-for-drone-strikes/> (discussing domestic outcry surrounding U.S. government transparency and accountability and its secretive nature).

183. Memo for the Att'y Gen. Re: Applicability of Fed. Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anway al-Aulaqi, Op. O.L.C. (July 16, 2010).

184. *John Kerry Says Pakistan Drone Strikes Could End as Bilateral Talks Resume*, GUARDIAN, Aug. 1, 2013, 3:59 PM, <http://www.theguardian.com/world/2013/aug/01/john-kerry-us-pakistan-talks-drones>; Dan Roberts, *Obama Restricts Drone Killings and Foresees End to 'Perpetual War'*, GUARDIAN, May 23, 2013, <http://www.theguardian.com/world/2013/may/23/obama-drone-policy-counter-terrorism> [hereinafter *Kerry*].

information for independent analysis.¹⁸⁵ Regardless of what government officials say, independently collected statistics regarding drone strikes show that U.S. operations have drastically decreased in 2012 and 2013 compared to the two years prior, which lends credibility to the statements made.¹⁸⁶ In fact, in recent months, drone strikes in Pakistan have recently ceased, corresponding with diplomatic discussions between the Pakistani government and terrorist organizations.¹⁸⁷ Nonetheless, international condemnation of drones appears to be continuing, as the European Union recently passed legislation banning the use of drones outside designated armed conflicts.¹⁸⁸

In a deviation from its past claims that the “war on terror” is ongoing, the Obama administration is now asserting that efforts are being made to bring drone strikes to an end while also reassessing current tactics employed against terrorist organizations.¹⁸⁹ These reassurances were reiterated by the U.S. Secretary of State in meetings with Pakistani officials, which implicitly signals that such a policy shift is partially to repair strained relations with the Pakistani government.¹⁹⁰ Critics are skeptical and they speculate that while the processes to externalize drone strike authorization from the White House may “take a more traditional form with a law-enforcement lead,” drone strikes will not stop.¹⁹¹ The actual motivations behind the policy shift remain unclear, with critics saying that the change was begrudgingly adopted only as a response to “a

185. *Rights Groups Accuse US of Breaking Law in Drone Strikes*, DAWN, (Oct. 23, 2013, 1:46 AM), <http://www.dawn.com/news/1051040/us-drone-strikes-may-be-tantamount-to-war-crimes-amnesty>; *US Refutes Reports, Insists Drone Strikes Are Legitimate*, DAWN, (Sept. 23, 2013, 10:42 AM), <http://www.dawn.com/news/1051086/us-refutes-reports-insists-drone-strikes-are-legitimate>.

186. Compare Jack Serle & Alice K. Ross, *February 2014 Update: US Covert Actions in Pakistan, Yemen, and Somalia*, BUREAU OF INVESTIGATIVE JOURNALISM (March 4, 2014), <http://www.thebureauinvestigates.com/2014/03/04/february-2014-update-us-covert-actions-in-pakistan-yemen-and-somalia/> with Jack Serle & Alice K. Ross, *January 2014 Update: US Covert Actions in Pakistan, Yemen, and Somalia*, BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 3, 2014), <http://www.thebureauinvestigates.com/2014/02/03/january-2014-update-us-covert-actions-in-pakistan-yemen-and-somalia/>.

187. Patrick Galey, *Is Pakistan Drone Strike Hiatus Linked to Peace Talks*, BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 6, 2014), <http://www.thebureauinvestigates.com/2014/02/06/is-pakistan-drone-strike-hiatus-linked-to-peace-talks/>; Girdali, *supra* note 102.

188. Op-Ed, *Drones Strikes to Continue Despite EU Ban*, RT (Feb. 28, 2014, 10:10 AM), <http://rt.com/op-edge/eu-ban-on-drone-strikes-158/>.

189. Kerry, *supra* note 184; Roberts, *supra* note 184.

190. *Id.*

191. Bowden, *supra* note 106.

rising level of worldwide condemnation.”¹⁹² By contrast, an intelligence official posited that the decrease in drone strikes has been due to the fact that they were so effective; thus, the United States is running out of drone targets.¹⁹³ Still, other independent studies cast doubt on whether drone strikes are really as effective as drone advocates claim.¹⁹⁴

What available and reliable information can confirm is that drone strikes have decreased in the past two years, which supports the claims by U.S. officials. For example, in Pakistan, the most active territory for U.S. drone operations, not a single strike has occurred this year.¹⁹⁵ This represents a drastic decrease from the height of drone activity in the region in 2010, in which 122 drone strikes occurred in Pakistan alone.¹⁹⁶ Indeed, the trend appears to be continuing with fewer drone strikes launched in 2014 than in any other year under Obama’s presidency.¹⁹⁷

Even as drone strikes decrease, the United States adamantly defends its decision to use such tactics. Following the publication of the reports discussed in this Note, a White House spokesman stated that the United States “would strongly disagree” with any accusations of illegal activity under international law.¹⁹⁸ The spokesman went on to defend drone strikes as “the course of action least likely to result in the loss of innocent life.”¹⁹⁹ No information has been released to confirm these claims. Still, the U.S. Senate Intelligence Committee took the first steps toward credibly supporting these claims by approving legislation that requires U.S. spy agencies to disclose drone injuries and casualties.²⁰⁰ Even with this small step toward transparency, the language agreed upon was still not disclosed,

192. *Id.*

193. See Wajid Ali Syed, *US Phasing Out Drone Attacks*, NEWS INTERNATIONAL (Dec. 7, 2012), <http://www.thenews.com.pk/Todays-News-13-19321-US-phasing-out-drone-attacks>.

194. Scott Neuman, *Study: Effectiveness of U.S. Drone Strikes Doubtful*, NPR (Sept. 26, 2013), <http://www.npr.org/blogs/thetwo-way/2013/09/26/226565310/study-effectiveness-of-u-s-drone-strikes-doubtful>.

195. Kerry, *supra* note 184; *Drone Wars Pakistan: Analysis*, NEW AMERICA, <http://natsec.newamerica.net/drones/pakistan/analysis> (last visited March 14, 2014).

196. Kerry, *supra* note 184; *Drone Wars Pakistan: Analysis*, *supra* note 195.

197. Serle & Ross, *February 2014 Update*, *supra* note 186; Serle & Ross, *January 2014 Update*, *supra* note 186.

198. *US Refutes Reports, Insists Drone Strikes are Legitimate*, *supra* note 185; *Rights Groups Accuse US of Breaking Law in Drone Strikes*, *supra* note 185.

199. *US Refutes Reports, Insists Drone Strikes are Legitimate*, *supra* note 185.

200. Mark Hosenball, *Senate Intelligence Committee Quietly Approves Plan to Step Up Drones Oversight*, HUFFINGTON POST (Jan. 23, 2014), http://www.huffingtonpost.com/2013/11/09/senate-intelligence-committee-drones_n_4242845.html?utm_hp_ref=politics.

as some politicians felt that covert operations should not be promulgated in a public law.²⁰¹

B. DIVERGENT INTERPRETATIONS

The current debate over U.S. compliance with international law is surprising given that the United States was a primary actor in the creation of many of the applicable international legal principles. Furthermore, the United States is a signatory to the International Bill of Human Rights, all four Geneva Conventions, and both the Additional Protocols, which include the applicable HRL, IHL, and *jus ad bellum*. Additionally, international relations theory accepts the fact that it is uncommon for a state to withdraw from a treaty once the ratification process is complete.²⁰² An economic analysis reaches the same conclusion: it is a waste of a state's effort and resources to negotiate and ratify a treaty if the state did not intend to comply with the terms.

So what led to the rift between the United States' and the international community's interpretation of international law on drone strikes? It likely came about due to the divergent interpretations of various forms of international law.²⁰³ The fact that law is open to multiple interpretations is "obvious with respect to international law."²⁰⁴ International legal theory supports this hypothesis; it is recognized that if interpretations change the scope or substance of a law to the detriment of a powerful state, that state may act to promote reinterpretation of the law or refuse to continue to comply.²⁰⁵ This also comports with the theory that a state will not expend effort to ratify a treaty with no intent to comply.²⁰⁶

201. *Id.*

202. Jana von Stein, *The Engines of Compliance*, in *INTERDISCIPLINARY PERSPECTIVE ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS*, 477, 492 (Jeffrey L. Dunoff & Mark A. Pollack, 2013).

203. *See generally* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (March 1998) (discussing U.S. treaty interpretations).

204. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1818 (May 2009).

205. Richard H. Steinberg, *Wanted—Dead or Alive: Realism in International Law*, in *INTERDISCIPLINARY PERSPECTIVE ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS*, at 163.

206. Von Stein, *supra* note 202, at 486 (A study on factors behind state noncompliance with international treaties found that it is rare that a state intend not to comply, and common causes of non-compliance stem from "inadequate planning, agreement ambiguities, capacity limitations, and significant changes over time").

To focus on the U.S. interpretation of the law strengthens this hypothesis and allows for a connection with domestic politics. Neomi Rao, a law professor with experience as legal counsel for the White House, details how “internal disputes among the agencies that handle questions of international law are commonplace.”²⁰⁷ These interpretive conflicts among the agencies “thereby shape the scope and form of compliance” with international law itself.²⁰⁸ The interpretive conflict exists primarily because the agencies involved have agendas and ideologies that often collide with one another and offer the executive branch conflicting interpretations of law. These conflicting interpretations, coupled with a deficiency in the executive branch for properly adjudicating these conflicts, ultimately lead to the agencies “taking advantage of indeterminacy in international law.”²⁰⁹ This bureaucratic turmoil, occurring over a period of fifty years, shows how a state’s interpretation of international law can shift concurrently with domestic politics.

The U.S. response over the past decade is an apparent fit with rhetoric advanced by the United States. First, it is clear from the ongoing international debate surrounding the application of international laws to drone operations that the United States and the international community disagree on the subject. Second, international relations theory predicts a powerful country may act to reinterpret a conflicting law or refuse compliance; the United States has done both. By reiterating its *opinio juris* that drone strikes are legal and satisfy obligations under international law, the U.S. government can be seen as promoting re-analysis of the situation. Although overarching secrecy effectively hindered any effective reinterpretation, the effort was made nonetheless. While defending its legal position, the United States did not change its tactics or reduce the frequency of drone strikes until recently. Furthermore, the United States refused to comply with laws that would have stopped what is possibly its most effective strategy for combating terrorism.²¹⁰ Lastly, U.S. noncompliance can be seen as stemming from either capacity limitations or significant changes over time. Independent analysts agree that strategic

207. Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a “They,” not an “It”*, 96 MINN. L. REV. 194, 197 (November 2011).

208. *Id.* at 199.

209. *Id.* at 199–201.

210. Joshua Keating, *Drone Lawfare*, SLATE (Sept. 4, 2013), http://www.slate.com/blogs/the_world_/2013/09/04/drone_debate_did_laws_against_targeting_civilians_encourage_the_use_of_drones.html.

considerations concerning terrorist operations make the use of traditional air strikes and ground forces ineffective due to the urban settings and civilian nature of the enemy. Moreover, the manner of warfare has drastically shifted since the ratification of these international laws, especially in relation to terrorists combating a powerful nation, which involves using civilian populations as cover and operating from crowded areas.

This analysis shows that the United States likely ratified these treaties with the intention of compliance and either believes it is still in compliance or was pushed into noncompliance by apparent necessity. Such factors would offset the standard behavior of a state to comply with a treaty that it spent time and resources ratifying and explains the U.S. interpretation and behavior relating to international laws with respect to drone strikes.

C. A REALIST ANALYSIS

Within international relations theory, realism is the traditional and arguably most prevalent school of thought.²¹¹ Realism manifests itself in various forms, yet all these manifestations share several commonalities. First, realism views the state as the primary actor on the international stage. Second, each state desires certain interests that it will attempt to fulfill. Third, each state possesses certain “material power capabilities” it employs in an attempt to fulfill those interests.²¹² In light of these core assumptions, three causal claims are typically advanced: (1) states use their power to advance their interests and enshrine those interests in international law; (2) a state may be better off with international law than it would be without it; and (3) if an international law and the long-term interests of a powerful state conflict, the powerful state will refuse to comply with the law.²¹³ Thus, most schools of realism focus on the relationship between states’ comparative power and the interests desired. More recent schools expand the theory by attempting to incorporate self-interest and factors extraneous to the state.²¹⁴ Nonetheless, the most distinguishing aspect of realism is the emphasis on the state as the primary actor and the lack of an “overarching authority to enforce rules.”²¹⁵

211. Rachel Saloom, *A Feminist Inquiry Into International Law and International Relations*, 12 ROGER WILLIAMS U. L. REV. 159, 166 (Fall 2006).

212. Steinberg, *supra* note 205, at 148–149.

213. *Id.* at 150.

214. Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545, 548 (2004).

215. *Id.*

It is because of the third causal claim, which asserts that a powerful state will ignore an international law if it conflicts with the state's long-term interests, that realism potentially finds substantive application in light of the situation surrounding U.S. drone strikes. Analyzed in light of realist assumptions, the current situation may be seen as the United States, a powerful state, desiring to promote its interests through its overseas hostilities. Yet, as discussed above, the international community interprets international law as prohibiting actions taken by the United States and rejects the United States' interpretation that its actions are legal. Realism predicts under these circumstances that the United States, the powerful state, will ignore the conflicting laws and instead solely advance its interests. One prominent realist scholar has recognized that realist assumptions also "makes it easy for the strong to . . . violate the law."²¹⁶ Indeed, the most profound examples of powerful states violating the law are in security affairs surrounding terrorism, such as the United States' invasion of Iraq.²¹⁷ Still, there exists a more critical viewpoint—the concept of an "organized hypocrisy" by powerful states wherein these states regularly disregard other nations' sovereignty and intervene in the affairs of weaker states.²¹⁸ Regardless of the reasons for why the United States may not comply, it is clear that realism predicts non-compliance, whether as routine or as an exception to standard procedure.

Indeed, in the first decade of armed drone strikes, this prediction of non-compliance correlated almost perfectly with U.S. foreign policy. The United States continued its drone operations and even increased their usage dramatically in 2008 when President Obama took office. However, current U.S. policy may not correlate with such a prediction. The recent reports discussed above, which recognize that the United States may be changing its policies, might undermine the application of realism to this situation. This determination hinges on the motivations behind the U.S. policy shift, which, as previously discussed, are unclear and may be attributable to international pressure, military effectiveness, or possibly the United States shifting its interpretation of international law to align with that of the international community. If it is the latter, or something similar, then such motivations misalign with what realism would predict.

216. Alexander Thompson, *Coercive Enforcement of International Law in* INTERDISC. PERSPECTIVE ON INT'L LAW AND INT'L RELATIONS, at 514.

217. *Id.*

218. Steinberg, *supra* note 205, at 158.

Realism could still accurately model the current U.S. foreign policy surrounding drone strikes, if one limits the claim that a powerful state will ignore a conflicting law to only the existence of the conflicting law itself, and not include international political pressure.²¹⁹ In this interpretation, the United States did act in ongoing noncompliance with the conflicting law itself, but it eventually succumbed to international political pressure and “worldwide condemnation.”²²⁰ In this manner, the continuation of U.S. drone strikes may be seen as an exemplary instance of a powerful state refusing to comply with international law that conflicts with its desire to further its interests. Alternatively, from a critical perspective, a traditional realist model would postulate that the United States has no intention of ending drone strikes and is instead employing a red herring to move the issue out of the spotlight by adopting rhetoric that correlates with popular opinion and apparently appeases the international community. Yet, it is likely these theories are too critical or require too narrow an interpretation of a causal claim to hold much water.

From a different perspective, new schools of thought within realism have begun to identify and address instances where realist premises do not align with actual state action. One such critique posits that these instances constitute “hard cases” for realism, where a state’s desire for power contradicts “international institutions, rules, or norms,” thus leading states to exit treaties based on “their relative power capabilities.”²²¹ In this theory of “constrained realism,”²²² these hard cases arise due to international institutions with a high degree of “legalization,” or “the degree of obligation, precision, and delegation achieved by regime rules,” and “enmeshment,” or a state’s involvement with the institution or regime.²²³ Institutions and regimes are formed due to states’ cooperation in specific areas, in which the rules and customs created by the cooperation act as the foundation.²²⁴ This school of thought also recognizes that a state may not always obey international rules or laws, even within a regime to which the state belongs. Again, this is based on the traditional realist concern of

219. The author disagrees with this interpretation and is including it for recognition only. As such, it will not be discussed in significant detail.

220. Bowden, *supra* note 106.

221. Kelly, *supra* note 214, at 546, 566.

222. I have coined this term for identification purposes to distinguish this theory of realism from traditional realism, as the cited author proposing the realist critique did not choose a unique name.

223. Kelly, *supra* note 214, at 545, 547.

224. *Id.* at 557.

relative power.²²⁵ Yet, the central premise is that such institutions do strengthen enforceability of international law through legalization and enmeshment, which creates incentives that would persuade even a powerful state to comply with an undesirable law.²²⁶

Constrained realism apparently fills many of the shortcomings revealed in a traditional realist model when applied to U.S. drone operations. While traditional realism claims that a powerful state will not comply with a conflicting international law no longer fits with U.S. action, constrained realism accounts for the existence of motivators that would convince even a powerful state such as the United States to change its position. Here, the institution or “regime” that the United States belongs to includes signatories to the HRL and IHL treaties and organizations such as the United Nations, which also exhibit the high degrees of “legalization” and “enmeshment” required to create a “highly legalized” institution or regime necessary to influence a state’s behavior in light of power concerns. Abbott, Slaughter, and Snidal have defined “legalization” as referencing particular characteristics an institution/regime may possess, which are defined along the dimensions of “obligation, precision, and delegation,” although characteristics across all three dimensions are not necessary.²²⁷ This high degree of legalization occurs over time from states ratifying individual treaties that complement one another to effectively become expansive, which occurred within this regime through the four Geneva Conventions, the two Additional Protocols, the U.N. Charter, and the various weapons conventions and treaties signed into HRL.²²⁸ “Enmeshment” refers to the domestic effect of increased “legalization,” in which a state’s domestic values and laws shift to support “regime” rules due to increased efficiency from being a member of the “regime.”²²⁹ As a state’s domestic identity aligns closer to that of the institution or regime, this “enmeshment” functions as a compliance mechanism because “their entanglement with the regime makes exit difficult.”²³⁰ Additionally, as a state becomes more intertwined in a particular institution or regime, its reputation among its fellow members becomes a more powerful motivating factor. Based on this analysis, the U.S. policy shift may be attributed to the

225. *See id.* at 557–59.

226. *Id.* at 604.

227. *Id.* at 576.

228. *Id.* at 578 (explaining the legalization process of the EU and WTO).

229. *Id.* at 585–87.

230. *Id.* at 586.

“highly legalized” institutions and regimes that the United States has “enmeshed” itself with over the last century as human rights has gained international and domestic support and momentum. This analysis still allows for adverse state action, which also may explain the slow policy shift by the United States.

Indeed, some scholars recognize the increased power of reputation in the modern international community. Berkeley School of Law Professor Andrew Guzman notes that if reputation is not accounted for when modeling international relations, a unitary model such as realism will lack an important factor of analysis.²³¹ Guzman is not alone in his analysis; another legal scholar notes that reputation plays a greater role in international relations than is commonly realized and can even impact state action in the highly volatile field of national defense, an area where realist assumptions probably hold most true.²³² Reputation often complements existing unitary models; for example, it acts as another motivating factor in the “constrained realism” model discussed above. Moreover, without including factors unique to a particular situation, such as reputation in the international arena, models that could lend an explanation to state action become inapplicable. Thus, it is critical to take reputation into account when considering U.S. actions regarding the drone controversy. Furthermore, reputation will continue to exert an increasing influence over powerful states as the international community becomes more intertwined.

In sum, it is important to take note of the diversity of possible explanations for U.S. conduct. This spectrum is partly due to the variance in perspectives within the field of realism, but more so from the secrecy surrounding U.S. operations. The need for alternative theories within a particular discipline stems from the lack of data, which allows more than one model to fit a given situation. For example, it remains unclear whether traditional realism explains and predicts U.S. action more accurately than constrained realism because the motivation behind the U.S. government policy shift is unknown. This problem, among others that stem from a lack of transparency, acts as part of the driving factor behind the international pressure mounting against the United States’ secret drone operations.

231. Andrew Guzman, *Reputation and International Law*, 34 GA. J. INT’L & COMP. L. 379, 380 (2006).

232. See Andrew C. Blandford, *Reputational Costs Beyond Treaty Exclusion: International Law Violations as Security Threat Focal Points*, 10 WASH. U. GLOBAL STUD. L. REV. 669, 670 (2011).

V. CONCLUSION

In conclusion, the United States is apparently responsible for multiple war crimes under the various international laws by employing questionable tactics in drone strikes conducted in the Middle East. These strikes have led to increasingly widespread international pressure to which the United States has responded by announcing that it seeks an end to drone operations and the war on terror. It is unclear, however, what the United States' motivations are in decreasing the use of drone strikes. Constrained realism posits that the power of transnational organizations and agreements has grown since promulgation in the 1900s and is now at a level to influence U.S. power decisions because of a high degree of legalization and enmeshment. Alternatively, the United States' delayed reaction may be explained by the divergent interpretations of the United States and the international community concerning the applicable multinational treaties. This interpretive hypothesis also posits that the U.S. perspective on applicable international law has changed based on decades of bureaucratic conflict between competing agencies and strategic concerns. This analysis also allows for cynical extensions through which the United States could advance its strategic interests by exploiting the indeterminacy in international law until international pressure grows too great, and only then change its policy to realign with the legal framework.²³³

Indeed, international pressure is continuing to grow. For example: the United Nations is conducting investigations through a special unit to examine allegations of civilian deaths in U.S. drone operations, and U.N. officials are becoming more outspoken when discussing war crimes in relation to the U.S.²³⁴ Also, the European Union, the United Kingdom, Switzerland, Russia, Pakistan, and China are jointly calling for greater transparency relating to drone operations, driven by accusations of legal and ethical violations.²³⁵ NGOs have also taken up arms, often driving the

233. Some legal scholars expand this theory. See Rao, *supra* note 207.

234. *UN Team to Investigate Civilian Drone Deaths*, BUREAU OF INVESTIGATIVE JOURNALISM (Oct. 25, 2012), <http://www.thebureauinvestigates.com/2012/10/25/united-nations-team-to-investigate-civilian-drone-deaths/>.

235. Chris Woods, *Consensus Grows Among UN States for Greater Transparency on Drone Civilian Deaths*, BUREAU OF INVESTIGATIVE JOURNALISM (Oct. 26, 2013), <http://www.thebureauinvestigates.com/2013/10/26/consensus-grows-among-un-states-for-greater-transparency-on-drone-civilian-deaths/>; United Nations, Human Rights Council, *Switzerland, Clustered ID on Expression and Executions (Cont.), 5th Meeting* (June 20, 2012),

anti-drone movement.²³⁶ Furthermore, the European Union has recently passed legislation banning the use of drones outside designated armed conflicts.²³⁷ This growing consensus indicates that this issue will not fall to the wayside, but will instead be an aggravating factor for U.S. foreign relations until a resolution occurs. It has potentially already grown to such vast proportions that ceasing controversial actions might not appease popular opinion, with investigations and political fallout continuing even beyond the operations themselves. Because of this, action needs to be taken immediately to address what will only escalate into a more severe problem.

Lastly, a lack of information from the U.S. government will continue to hinder analysis of this issue. This Note can act as a foundation to model future developments, expanding upon existing theories or employing more accurate theories as the information dictates. Also, future U.S. actions will illuminate whether an actual policy change occurred within the government or if recent statements have simply been an act to quell international pressure. Further, and perhaps most importantly, after a proper analysis of this situation occurs, future regulations and frameworks can be established to reduce the ability for states to conduct operations in a grey area of the law. At the least, theoretical models can improve to more accurately predict state action in a similar future scenario.

<http://www.unmultimedia.org/tv/webcast/2012/06/switzerland-clustered-id-on-expression-and-executions-cont-5th-meeting.html>.

236. *Id.*

237. Giraldi, *supra* note 102.

