

# THE COVERT USE OF DRONES: HOW SECRECY UNDERMINES OVERSIGHT AND ACCOUNTABILITY

*Milena Sterio\**

I. INTRODUCTION .....	130
II. THE PROBLEM OF SECRECY.....	132
III. RELEVANT LEGAL QUESTIONS REGARDING THE USE OF DRONES .....	136
A. <i>Are Drone Strikes Legal Under Domestic Law?</i> .....	136
1. The Legality of Covert Drone Strikes Under the United States Constitution.....	136
2. The Legality of Drone Strikes Under Federal Statute.....	139
3. The United States Government’s Legal and Policy Rationale for Using Drones.....	141
B. <i>Are Drone Strikes Legal Under International Law?</i> ..	148
C. <i>Jus In Bello: Is There an Armed Conflict Between the United States and Terrorist Suspects?</i> .....	155
D. <i>Where is the Battlefield?</i> .....	159
E. <i>What Types of Strikes are Conducted? Personality Versus Signature?</i> .....	162
IV. CONCLUSION: SECRECY PREVENTS OVERSIGHT AND ACCOUNTABILITY .....	164

---

\* The Charles R. Emrick Jr. – Calfee Halter & Griswold Professor of Law and Associate Dean for Faculty Enrichment, Cleveland-Marshall College of Law. The author would like to thank the Cleveland-Marshall College of Law for its generous research support, as well as Cleveland State University and its Graduate Faculty Travel Award Program, which has enabled the author to attend scholarly conferences where she could meaningfully discuss and debate the content of this Article.

## I. INTRODUCTION

United States Department of Defense, definition of an “unmanned aerial vehicle”:

[a] powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload. Ballistic or semiballistic vehicles, cruise missiles, and artillery projectiles are not considered unmanned aerial vehicles.<sup>1</sup>

In an effort to combat terrorism threats throughout the world, the United States has increasingly used unmanned aerial vehicles or drones to target and kill enemies.<sup>2</sup> Leon Panetta, the then-Central Intelligence Agency (C.I.A.) Director, famously boasted that drones were “the only game in town.”<sup>3</sup> The most commonly used drones include the Predator drone, the Global Hawk, the Shadow, the Hunter, the Raven, and the Wasp; additional drones to be operated in the near future include the Reaper, the Peregrine, and the Vulture.<sup>4</sup> Larger drones, such as the Predator and the Reaper, are equipped with Hellfire missiles and used to conduct lethal strikes, whereas smaller drones are used primarily for surveillance and target acquisition.<sup>5</sup> Drones are not unmanned, but rather remotely piloted by both a pilot and a sensor operator, from remote locations; typically, a drone operation also involves launch and recovery teams, intelligence

---

<sup>1</sup> U.S. DEP'T OF DEF., THE DICTIONARY OF MILITARY TERMS 577 (2009).

<sup>2</sup> David Rohde, *The Drone Wars*, REUTERS (Jan. 26, 2012, 9:11 AM), <http://www.reuters.com/article/2012/01/26/us-david-rohde-drone-wars-idUSTRE80P11I20120126>. For the purposes of this Article, the more commonly used term “drone” will be used to refer to “unmanned aerial vehicles.” In addition, this Article will focus on legal issues pertaining to the covert C.I.A.-conducted use of drones. While many of these legal issues also apply to the non-covert use of drones by the United States military, this Article will particularly focus on issues raised by the covert use of drones by the C.I.A. Moreover, while drones can be used for both surveillance and lethal targeting operations, the focus of this Article will be on the latter, more controversial utilization of drones. See discussion *infra* Parts II, III.A–E.

<sup>3</sup> Pam Benson, *U.S. Airstrikes in Pakistan Called 'Very Effective'*, CNN (May 18, 2009, 6:48 PM), <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/>.

<sup>4</sup> P.W. Singer, *Military Robots and the Laws of War*, 23 NEW ATLANTIS 27, 38–41 (2009).

<sup>5</sup> *Id.* at 39–41.

analysts, and other law and policy decision-makers.<sup>6</sup>

Under the Obama Administration, the number of drone strikes has sharply increased, prompting criticism and concern.<sup>7</sup> As one commentator has noted, “[u]nder Obama, drone strikes have become too frequent, too unilateral, and too much associated with the heavy-handed use of American power.”<sup>8</sup> Many scholars have focused on the legal issues arising from the use of drones, analyzing their legality under applicable law of self-defense, as well as under international humanitarian law and international human rights law. This Article will highlight another problematic aspect of the current American use of drones, which is secrecy. As will be argued below, because a large number of lethal strikes are conducted by covert C.I.A. operations, it is impossible to determine whether most strikes comply with relevant legal provisions of both domestic and international law.<sup>9</sup>

Section II will examine the so-called “problem of secrecy,” by describing the current C.I.A. unwillingness to release records and documents pertaining to targeted killings conducted through drone strikes, and by asking questions about the utility of such secrecy in a democratic society.<sup>10</sup> Section III will then focus on all the relevant legal issues related to the use of drones, including the relevant domestic legal authority to conduct targeted killings, associated international law issues, as well as the definition of the battlefield and an examination of the legality of different types of strikes. This Article will conclude that while it is possible that drone strikes may be legal under relevant domestic and international law, this conclusion cannot be reached because of secrecy. Secrecy, as perpetuated through the C.I.A.’s refusal to publicly discuss the drone program and to provide relevant guidelines, policy, and legal rationales toward the use of drones, has disabled all of us from reaching appropriate legal, moral, and humanitarian judgment about the legality of drone strikes. This

---

<sup>6</sup> Laurie R. Blank, *After “Top Gun”: How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT’L L. 675, 677 (2012).

<sup>7</sup> See Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.’s Covert Drone Program?*, NEW YORKER (Oct. 26, 2009), [http://newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://newyorker.com/reporting/2009/10/26/091026fa_fact_mayer); David Rohde, *How Obama’s Drone War is Backfiring*, REUTERS (Mar. 1, 2012), <http://blogs.reuters.com/david-rohde/2012/03/01/how-obamas-drone-war-is-backfiring/>.

<sup>8</sup> Rohde, *supra* note 7.

<sup>9</sup> See discussion *infra* Part III.A–E.

<sup>10</sup> See discussion *infra* Part II.

Article will argue that any use of lethal force by the United States, including the use of drones to conduct targeted killings, must be properly legally justified, and that such legal justifications should become a part of public discourse.

## II. THE PROBLEM OF SECRECY

The United States currently operates two separate drone programs: an overt one and a covert one.<sup>11</sup> The first program, which has been overt and publicly acknowledged by the United States government, is directed by the Pentagon and Joint Special Operations Command (JSOC) in declared combat theaters of Afghanistan, Iraq, and Libya.<sup>12</sup> The second, covert program is commanded by the C.I.A. and operates in Pakistan, Somalia, and Yemen.<sup>13</sup> According to various investigative reports, it appears that most lethal strikes are conducted by the C.I.A.<sup>14</sup> Because the C.I.A. drone program has been covert, little public information has been available about the policy and legal framework of the C.I.A.-run targeting operations.<sup>15</sup> Secrecy in this context is highly problematic, because it has disabled the public, as well as our courts, from asking pertinent questions about the legality of the drone program. Secrecy in this context has been called into question both internationally as well as domestically, within the United States.<sup>16</sup>

International concerns over the use of drones culminated in September 2014, when “the U[nited] N[atations] Human Rights Council’s (HRC) expert panel on the use of armed drones and international law, expressed clear consensus around the need for greater transparency and accountability, and that what is most required is respect and implementation of existing law around

---

<sup>11</sup> ASHLEY S. BOYLE, CONTEXTUALIZING THE DRONES DEBATE 1 (Am. Sec. Project 2012), *available at* <http://www.scribd.com/doc/102775947/Contextualizing-the-Drones-Debate>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See generally* Mayer, *supra* note 7 (noting that the Obama Administration has authorized C.I.A. missile strikes averaging about one bombing a week since taking office).

<sup>15</sup> *See id.*

<sup>16</sup> *See, e.g.*, Christopher Rogers, *Towards a Global Debate? UN Human Rights Council Takes on Drones*, JUST SECURITY (Sept. 25, 2014, 9:48 AM), <http://justsecurity.org/15521/global-debate-human-rights-council-takes-drones/> (discussing the need for both U.S. and international transparency).

the use of such weapons.”<sup>17</sup> The expert panel, “which included the U[nited] N[atations] Special Rapporteurs on Counter-Terrorism and Human Rights as well as on Extrajudicial Executions . . . was organized pursuant to a Pakistan-sponsored resolution.”<sup>18</sup> Experts discussed several legal questions raised by the use of armed drones, “from the nature and scope of their use in armed conflict against non-state actors to the applicability and requirements of international human rights law (IHL) with respect to the use of armed drones, and the legal responsibilities of states affect by or hosting lethal drone operations.”<sup>19</sup> The expert panel highlighted the problem of secrecy, by emphasizing the need for greater government accountability and transparency, for any nation using drones to conduct targeted strikes.<sup>20</sup> While it is unclear what the next steps regarding any United Nations’ involvement in the member states’ use of drones may be, “[w]hat is clear from the council’s panel is that there is agreement among most states and experts that addressing the unique risks that drones pose to international law demands an international response.”<sup>21</sup>

Domestic concern over the secret use of drones by the C.I.A. has not been negligible either. In June 2014, a bipartisan panel of experts, composed of former senior intelligence and military officials, condemned a “long-term killing program based on secret rationales” and recommended that the bulk of drone operations be shifted from the C.I.A. toward the Pentagon.<sup>22</sup> In addition, in January 2010, the American Civil Liberties Union (ACLU) filed a Freedom of Information Act (FOIA) request seeking the release, by the C.I.A., of records concerning the use of drones to carry out

---

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Mark Mazzetti, *Use of Drones for Killings Risks a War Without End, Panel Concludes in Report*, N.Y. TIMES, June 26, 2014, at A11. This Article’s focus is on secrecy, and how secrecy inherent in C.I.A.’s covert drone operations has inhibited the existence of any true public debate about the program itself, and has made it extremely difficult to reach concrete conclusions about the legality of the drone program. While this Article urges the C.I.A. to remedy this issue by releasing more information about the policy and guidelines regarding its targeting operations, another potential solution, as recommended by the Panel, would be to shift all drone operations from the C.I.A. toward the military. This Article agrees with that recommendation, but maintains that in the present, because the C.I.A. continues to conduct drone strikes, it is important to continue to discuss secrecy concerns regarding the Agency.

targeted killings.<sup>23</sup> The C.I.A. responded several months later asserting a “Glomar” defense by refusing to reject or acknowledge the mere existence of such records.<sup>24</sup> In March 2013, the D.C. Circuit court rejected the Glomar response, and in August 2013, the C.I.A. provided a “no-number no-list” response, in which it acknowledged that it had responsive documents, but it refused to list or describe them.<sup>25</sup> In April 2014, the Second Circuit rejected the “no-number no-list” response, and finally, in September 2014, the C.I.A. agreed to search for a subset of records which the ACLU had requested almost five years earlier.<sup>26</sup> In the meantime, between January 2010 and September 2014, the Obama Administration had publicly acknowledged the existence of the C.I.A.-operated drone program, and had offered legal rationales for the use of drones to lethally target foreign and American citizens.<sup>27</sup>

In light of such Administration disclosures, one has to ask about the usefulness and arguably wastefulness of litigation resources by the C.I.A. Why did the Agency choose to stall for almost five years and to continue to refuse to provide any information about its use of drones?<sup>28</sup> Such unnecessary secrecy has prevented the development of true public debates about the scope of American drone operations, and about their compliance with relevant domestic and international law.<sup>29</sup> Secrecy has also prevented the existence of any judicial review over “lethal targeting” operations.<sup>30</sup> While the inherent goal of any secrecy is to limit the flow of information, in this instance, information had already been circulating through President Obama

---

<sup>23</sup> *Predator Drones FOIA*, ACLU, <https://www.aclu.org/national-security/predator-drones-foia> (last visited Oct. 30, 2014).

<sup>24</sup> Steve Vladeck, *D.C. Circuit Rejects Glomar Response in ACLU/CIA Drone FOIA Suit*, LAWFARE (Mar. 15, 2013, 10:21 AM), <http://www.lawfareblog.com/2013/03/d-c-circuit-rejects-glomar-response-in-aclucia-drone-foia-suit/>.

<sup>25</sup> See Jameel Jaffer, *Selective Disclosure About Targeted Killing*, JUST SECURITY (Oct. 7, 2013, 9:25 AM), <http://justsecurity.org/1704/selective-disclosure-targeted-killing/>.

<sup>26</sup> See Jameel Jaffer, *The Erosion of a Secret*, JUST SECURITY (Sept. 12, 2014, 11:56 AM), <http://justsecurity.org/14908/erosion-secret/>.

<sup>27</sup> See *infra* Part III.A.3 for a complete account of high-level Administration officials’ disclosures and speeches about the drone program.

<sup>28</sup> See Jaffer, *supra* note 26.

<sup>29</sup> See generally CTR. FOR CIVILIANS IN CONFLICT & COLUMBIA LAW SCH. HUMAN RIGHTS CLINIC, *THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS* (2012) (discussing various concerns of secrecy).

<sup>30</sup> See *id.* (noting legal concerns addressing lethal targeting).

Administration's disclosures about the drone program.<sup>31</sup> Moreover, difficult discussions about difficult choices are inherent features of any democratic nation, and the C.I.A.'s withholding of information regarding the use of drones undermines the very existence of democratic debate in our country. It also appears unfair that high-level government officials have consistently leaked documents and provided some disclosure about the drone program, while the C.I.A. has been permitted to maintain almost total secrecy.<sup>32</sup> As Jameel Jaffer, deputy legal director of the ACLU, argued:

In media interviews and speeches . . . officials have defended the [drone] program's legality, effectiveness, and necessity. They've dismissed concerns about civilian casualties. And through not-for-attribution interviews with reporters, they've engaged in what one appeals-court judge called "a pattern of strategic and selective leaks at the highest level of government." . . . [T]he administration shouldn't be permitted to pretend that everything about the program is a secret while its most senior officials conduct a public-relations campaign about it.<sup>33</sup>

It will be interesting to find what type of information the C.I.A. will ultimately release in the ACLU-filed FOIA request lawsuit,<sup>34</sup> and whether such information will be useful toward assessing the lawfulness of the drone program. Nonetheless, any additional information will be valuable toward the existence of public debate about this difficult issue.

In Part III below, this Article will discuss relevant legal questions pertaining to the United States' use of drones; such questions arise under both domestic and international law. As this Article has already argued, answering such questions requires public access to information regarding each drone operation, and because the C.I.A. has, until now, refused to disclose much of such relevant information,<sup>35</sup> many questions below remain unanswered. It may be that the C.I.A. drone program comports with all the relevant requirements of domestic and international law, but secrecy has prevented any of us from reaching that conclusion.

---

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*; *see Predator Drones FOIA*, *supra* note 23.

<sup>33</sup> Jaffer, *supra* note 25.

<sup>34</sup> *See id.*; *Predator Drones FOIA*, *supra* note 23.

<sup>35</sup> *See supra* Part II.

### III. RELEVANT LEGAL QUESTIONS REGARDING THE USE OF DRONES

The United States has used drones to conduct lethal strikes on the territories of other sovereign states.<sup>36</sup> This type of use of deadly force requires an examination of two sets of questions.<sup>37</sup> First, does the use of drones comport with domestic law, including the Constitution and all relevant federal statutes,<sup>38</sup> and second, whether the use of drones satisfies all the requirements of international law, including *jus ad bellum*, *jus in bello*, and international human rights law?<sup>39</sup> These questions will be analyzed below, but, as this Article argues throughout, it may be impossible to satisfactorily answer each of these questions because of secrecy.

#### A. *Are Drone Strikes Legal Under Domestic Law?*

The first and most important question to ask regarding the use of drones is whether the United States has domestic legal authority to use lethal force in the territory of other sovereign nations. Drone strikes have been conducted in Afghanistan, Iraq and Libya, our declared combat zones, as well as in other states such as Pakistan, Somalia and Yemen;<sup>40</sup> they may be used in other countries, such as Syria.<sup>41</sup> Each of such drone strikes represent the use of military force by the United States President, and each of such drone strikes must find domestic legal authority in either the Constitution or a federal statute.<sup>42</sup> Each of these questions will be analyzed below.

#### 1. The Legality of Covert Drone Strikes Under the United States Constitution

Scholars have made various arguments regarding the constitutionality of the C.I.A. drone program. Jamie Kleidman

---

<sup>36</sup> See Leila Sadat, *Second Annual Katherine B. Fite Lecture: Drone Wars and the Nuremberg Legacy*, 45 *STUD. TRANSNAT'L LEGAL POL'Y* 9, 11–12 (2012).

<sup>37</sup> *Id.* at 12–13.

<sup>38</sup> See *infra* Part A.

<sup>39</sup> See *infra* Part B.

<sup>40</sup> Sadat, *supra* note 36, at 12.

<sup>41</sup> *Drone Strikes in Syria? CIA 'Boosting' Intelligence Force to 'Size Up' Syrian Extremists*, RT (Mar. 17, 2013), <http://rt.com/news/syria-usa-rebel-drone-356/>.

<sup>42</sup> See generally Sadat, *supra* note 36, at 28–33 (explaining the justification for the use of lethal force against terrorists).

has argued that the United States Constitution authorizes covert action, of the type conducted via drone strikes.<sup>43</sup> Kleidman reaches this argument after analyzing several provisions of the Constitution, which relate to military and foreign affairs and “evidence[] the framers intent to create a strong national government and country that was less susceptible to outside attacks.”<sup>44</sup> According to Kleidman, these provisions include the preamble, art. I § 8, as well as art. IV § 4, which all represent evidence that the framers intent was that the United States should have a means to protect itself against foreign nations and attacks.<sup>45</sup> Kleidman thus concludes that drone attacks, because they are conducted to prevent future al-Qaeda attacks against our country and because they are employed as part of the United States’ inherent right of self-defense “fall under the types of activities the framers thought would be necessary to protect the U.S.”<sup>46</sup> Additionally, Kleidman argues that the early history of covert actions evidences further belief that the United States has the authority to engage in such actions.<sup>47</sup> Because the Predator drone program is a covert action, and because covert actions are constitutional, according to Kleidman the drone program itself must be constitutional.<sup>48</sup>

Kleidman has further argued that both the legislative and the executive branches have concurrent authority over the authorization of covert actions, such as drone strikes.<sup>49</sup> Congress has the power to issue letters of marque and reprisal, which are “commissions by Congress that grant private individuals permission to use force against foreign nations.”<sup>50</sup> Although Congress has not formally issued any letters of marque and reprisal since the 1800s, the United States has continued to use covert paramilitary force, at times led by the C.I.A, in order to advance foreign policy interests abroad.<sup>51</sup> Although Kleidman herself acknowledges the distinction between letters of marque and reprisal clause and covert drone strikes, she argues that the

---

<sup>43</sup> See Jamie L. Kleidman, *The Constitutionality of the Predator Drone Program*, 4 VIENNA ONLINE J. ON INT’L CONST. L. 359, 361–62 (2010).

<sup>44</sup> *Id.* at 362.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 361–64.

<sup>48</sup> *Id.* at 363–64.

<sup>49</sup> *Id.* at 371.

<sup>50</sup> *Id.* at 366.

<sup>51</sup> *Id.*

framers must have been “aware of incidents short of war that would require the use of force, and delegated the authority to authorize such force to Congress.”<sup>52</sup> Congress also has authority to declare war; this according to Kleidman encompasses all kinds of war, whether declared or undeclared.<sup>53</sup> If a covert action takes place as part of an ongoing war, the power to “declare war” clause is relevant and “evidences the framers intent that Congress should be involved to some degree any time the U.S. decides to engage in some use of force.”<sup>54</sup>

In addition, the Constitution provides that the President serves as commander in chief of the armed forces, and is the nation’s sole organ in foreign affairs.<sup>55</sup> Although scholars have debated whether the President has the ability to deploy troops and engage in military operations, it is undisputed that the President has authority to direct operations on the battlefield.<sup>56</sup> To the extent that covert drone operations are congressionally authorized via statute, and used as part of the so-called “War on Terror[,]” Kleidman argues that the President has authority to order drone strikes.<sup>57</sup> Additionally, Kleidman argues that history and past precedent support the argument that the President has some constitutional independent authority to conduct covert actions, such as drone strikes.<sup>58</sup>

Throughout history Presidents have continued to claim authority to introduce troops into limited hostilities and engage in covert action. . . . [T]he President maintains plenary, exclusive, and inherent authority in matters of foreign relations and national security, and thus executive power in this realm is not necessarily limited to those powers enumerated in the constitution.<sup>59</sup>

In light of the above, Kleidman concludes that the legislative and executive branches have concurrent authority over the authorization for covert actions, such as drone strikes.<sup>60</sup> More

---

<sup>52</sup> *Id.* at 367.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 368.

<sup>55</sup> U.S. CONST. art. II, § 2; Kleidman, *supra* note 43, at 370.

<sup>56</sup> See Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 393, 396 (2008).

<sup>57</sup> See Kleidman, *supra* note 43, at 369.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 370.

<sup>60</sup> *Id.* at 371.

particularly, in this context, the President has delegated his authority to conduct drone strikes to the C.I.A.<sup>61</sup> According to Kleidman, this is constitutionally permissible because the President “may delegate parts of his authority, like the decision to target certain terrorists as part of an on-going covert action.”<sup>62</sup> Kleidman believes that this type of delegation to the C.I.A. is beneficial, because “the CIA maintains a level of expertise over covert action that the President does not possess[.]” because the decision to use drones must be made in a matter of seconds and the C.I.A. may be in the best position to assess the situation, and because the C.I.A. has “expertise to determine when and how to target an individual.”<sup>63</sup>

While Kleidman may be correct that the use of drones as a covert action is constitutionally permissible, this conclusion on its own should not prevent the public from asking questions about the drone program itself. It is not enough to simply conclude that the C.I.A. is best suited to engage in this type of lethal operations; that conclusion would presume that the C.I.A.’s constitutional authority to conduct covert drone strikes knows no limits. This is simply not true. Each drone strike must comport with relevant domestic statutes and international law which will be discussed below, and in order to know whether each drone strike has satisfied such domestic and international law more public information should be available and willingly shared by the C.I.A. While everyone would agree that the need for secrecy is implicit in covert operations, and that the C.I.A. could not possibly release information about the particularities of each drone strike it conducts, the Agency could release more general information about the legal and policy guidelines that it follows as a general matter. Concluding that the Constitution authorizes the C.I.A. to conduct covert actions does not support the argument that the C.I.A. can secretly conduct drone operations anywhere in the world without having to answer any questions to anyone.

## 2. The Legality of Drone Strikes Under Federal Statute

The Authorization for Use of Military Force (AUMF), a Congressional statute passed in the wake of the September 11 terrorist attacks on the United States, authorizes the use of

---

<sup>61</sup> *Id.* at 377–78.

<sup>62</sup> *Id.* at 378.

<sup>63</sup> *Id.*

drones against leaders of al-Qaeda forces, to target or to kill enemies.<sup>64</sup> The AUMF has been cited by the Bush and Obama Administrations as domestic authorization for the use of force via drones, in both traditional warfare, as well as, against terrorist suspects.<sup>65</sup> The argument that drone strikes are specifically authorized through the AUMF goes as follows: because members of al-Qaeda and the Taliban can constitute a continuing threat to the safety of the United States, eliminating such continuing threat via drone strikes is a means to prevent future acts of international terrorism.<sup>66</sup> The AUMF specifically authorizes the President to do this, and this expansive reading of the AUMF would place almost no limitations on the President's authority to wage the so-called "war on terror."<sup>67</sup> While the Obama Administration no longer uses the term "war on terror," it has interpreted the AUMF in virtually the same way as the Bush Administration.<sup>68</sup>

Many scholars have disagreed with this type of expansive interpretation of the AUMF.<sup>69</sup> Moreover, this rationale invites a host of legitimate questions regarding the localization of ongoing

---

<sup>64</sup> See generally S. J. Res. 23, 107th Cong., 115 Stat. 224 (2001) (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons" that he determines in some way aided the attacks of 9/11, "in order to prevent any future acts of international terrorism against the United States . . .").

<sup>65</sup> See Ryan Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 105 (2010).

<sup>66</sup> See *id.* at 108.

<sup>67</sup> "War on terror" was a term coined by the Bush Administration, to describe the conflict that the United States entered as of September 11, 2001, against those responsible for the terrorist attacks of September 11, 2001. While the AUMF does not use the term "war on terror," it does provide the President with authority to use force against "nations, organizations, or persons' [which] the President determined 'planned, authorized, committed, or aided' the terrorist attacks [of September 11,] as well as those who 'harbored such organizations or persons.'" *Id.*; see Richard W. Stevenson, *President Makes it Clear: Phrase is 'War on Terror'*, N.Y. TIMES (Aug. 4, 2005), [http://www.nytimes.com/2005/08/04/politics/04bush.html?\\_r=0](http://www.nytimes.com/2005/08/04/politics/04bush.html?_r=0) (discussing President Bush's use of the phrase "war on terror"). Moreover, the AUMF contemplates a global war against specific terrorist groups, such as al-Qaeda and the Taliban and associated forces. Vogel, *supra* note 65, at 108.

<sup>68</sup> Vogel, *supra* note 65, at 108; see Stevenson, *supra* note 67.

<sup>69</sup> One of the most vocal opponents of this type of rationale has been Professor Mary Ellen O'Connell. See, e.g., Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT 13 (Simon Bronitt ed., forthcoming, Notre Dame Law Legal Studies Paper No. 09-43), available at <http://ssrn.com/abstract=1501144>.

drone strikes. For example, how do we know that drone strikes conducted presently are truly linked to al-Qaeda forces responsible for the attacks of September 11 (because only those targets are contemplated through the AUMF)?<sup>70</sup> What is the link between current terrorism suspects targeted through C.I.A. drone operations, and al-Qaeda and Taliban leaders engaged in the conflict back in 2001? And why does this conflict have no geographic boundaries? Accepting the AUMF as authorization for the use of lethal force by the United States against those responsible for the attacks of September 11 does not amount to accepting the AUMF as a perpetual statutory authorization to use deadly force through covert operations throughout the world against suspects who may have only circumstantial ties to the master-minds of September 11. Because most lethal drone strikes are conducted through covert C.I.A. operations,<sup>71</sup> we do not know whether suspects targeted today are those covered by the AUMF. Accepting the agency's promise that they are, simply is not enough.

### 3. The United States Government's Legal and Policy Rationale for Using Drones

In addition to assessing the legality of drone strikes under the United States Constitution and federal law, it is important to highlight the legal rationales advanced by the Bush and the Obama Administrations within domestic theaters; as such rationales form a basis for arguing toward the legality of this type of use of lethal force under domestic law.

The Bush Administration used the term "war on terror" to describe an ongoing global conflict against terrorism that the United States had been engaged in starting from September 11, 2001, when terrorists attacked the World Trade Center.<sup>72</sup> The Obama Administration has adopted a slightly different rhetoric, and has argued that the United States is engaged in an armed

---

<sup>70</sup> See S. J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

<sup>71</sup> See Greg Miller, *CIA Remains Behind Most Drone Strikes, Despite Effort to Shift Campaign to Defense*, WASH. POST (Nov. 25, 2013), [http://www.washingtonpost.com/world/national-security/cia-remains-behind-most-drone-strikes-despite-effort-to-shift-campaign-to-defense/2013/11/25/c0c07a86-5386-11e3-a7f0-b790929232e1\\_story.html](http://www.washingtonpost.com/world/national-security/cia-remains-behind-most-drone-strikes-despite-effort-to-shift-campaign-to-defense/2013/11/25/c0c07a86-5386-11e3-a7f0-b790929232e1_story.html).

<sup>72</sup> See Stevenson, *supra* note 67 (discussing President Bush's use of the phrase "war on terror").

conflict against al-Qaeda, the Taliban, and associated forces.<sup>73</sup> As will be argued below, the Obama Administration has essentially followed the Bush Administration's approach in determining that the conflict is global in nature and that targeted strikes can be carried out anywhere; the change in terminology appears to be pure semantics.<sup>74</sup> In recent speeches, high-level officials of the Obama Administration, as well as President Obama himself, have offered more detailed legal justification about the use of drones to conduct targeted killings.<sup>75</sup> These disclosures, although welcome, illustrate further the unreasonableness of the C.I.A.'s unwillingness to disclose information about its targeting practices. If high-level government officials and our President choose to discuss law and policy surrounding drone use, then the C.I.A. can no longer rely on secrecy to justify its silence on this issue.

In 2010, Harold Koh, then Legal Advisor to the State Department, justified the use of drones arguing "that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."<sup>76</sup> Koh relied both on the AUMF and on international law in his remarks.<sup>77</sup> Koh argued that the United States engages in targeted strikes in accordance with the laws of war, respecting principles such as distinction and proportionality to ensure that the targets are legitimate and that collateral damage is minimized.<sup>78</sup> Koh offered four different reasons to support the legality of targeted strikes.<sup>79</sup> First, Koh argued that United States' drone targets have been legitimate because they are belligerent members of an enemy group in a war

---

<sup>73</sup> See Vogel, *supra* note 65, at 108.

<sup>74</sup> See *infra* Part III.D for a discussion of the global battle field.

<sup>75</sup> See Greg Miller, *Legal Memo Backing Drone Strike that Killed American Anwar al-Awlaki is Released*, WASH. POST (June 23, 2014), [http://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1\\_story.html](http://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1_story.html); see also Josh Gerstein, *Official Memo Justifying Drone Strikes Leaks*, POLITICO (Feb. 4, 2013, 11:55 PM), <http://www.politico.com/blogs/under-the-radar/2013/02/official-memo-justifying-drone-strikes-leaks-156106.html> (discussing a white paper written by the Department of Justice detailing legal justifications for drone strikes).

<sup>76</sup> Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

against the United States.<sup>80</sup> Second, Koh argued that drones can constitute appropriate instruments for such missions, so long as their use conforms to the laws of war.<sup>81</sup> Third, Koh emphasized that enemy targets are always selected through robust procedures, and that because of this, they require no other legal process.<sup>82</sup> Finally, Koh argued that targeting high-level belligerent leaders via drone strikes does not violate domestic law banning assassinations.<sup>83</sup>

Second, Attorney General Eric Holder confirmed the above-discussed view of targeted killings, in a 2012 speech, which followed the confirmation of a targeted killing via a C.I.A.-operated drone strike of a U.S. citizen, Anwar al-Awlaki, on September 30, 2011.<sup>84</sup> Al-Awlaki had been accused of holding prominent roles within the ranks of al-Qaeda and had been placed on a “hit list,” authorized by President Obama.<sup>85</sup> His assassination marked the first time in history that an American citizen had been targeted abroad without any judicial involvement or proceedings in determining the guilt of such a citizen.<sup>86</sup> Holder argued that targeted killings of American citizens are legal if the targeted citizen is located abroad, if he/she is a senior operational leader of al-Qaeda or associated forces, if he/she is actively engaged in planning to kill Americans, if he/she poses an imminent threat of violent attack against the United States government and cannot be captured, and if the targeted strike is conducted in a manner consistent with applicable law of war principles.<sup>87</sup> Following Attorney General Holder’s remarks,

---

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *Al Qaeda’s Anwar al-Awlaki Killed in Yemen*, CBS NEWS (Sept. 30, 2011, 3:18 PM), <http://www.cbsnews.com/news/al-qaedas-anwar-al-awlaki-killed-in-yemen/>; *US Attorney General Justifies ‘Targeted Kill’ Programme*, GUARDIAN (Mar. 5, 2012, 6:03 PM), <http://www.theguardian.com/world/2012/mar/05/attorney-general-targeted-kill-programme>.

<sup>85</sup> See Steve Coll, *Kill or Capture*, NEW YORKER (Aug. 2, 2012), <http://www.newyorker.com/news/daily-comment/kill-or-capture>; Glenn Greenwald, *The Due-Process-Free Assassination of U.S. Citizens Is Now Reality*, SALON (Sept. 30, 2011, 6:31 AM), [http://www.salon.com/2011/09/30/awlaki\\_6/](http://www.salon.com/2011/09/30/awlaki_6/).

<sup>86</sup> See Coll, *supra* note 85.

<sup>87</sup> See Joe Palazzolo, *Key Excerpts from Holder’s Speech on Targeted Killing*, WALL ST. J. LAW BLOG (Mar. 5, 2012, 5:13 PM), <http://blogs.wsj.com/law/2012/03/05/key-excerpts-from-holders-speech-on-targeted-killing/> (including excerpts of the most relevant portions of Attorney

the Department of Justice published a White Paper entitled “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” in which it confirmed this approach by concluding that:

[I]t would be lawful for the United States to conduct a lethal operation outside the United States against a U.S. citizen who is a senior, operational leader of al-Qa’ida or an associated force of al-Qa’ida without violating the Constitution or the federal statutes discussed in this white paper under the following conditions: (1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation is conducted in a manner consistent with the four fundamental principles of the laws of war governing the use of force.<sup>88</sup>

Last but not least, President Obama himself addressed the use of targeted strikes, in a much-commented-upon speech delivered at the National Defense University on May 23, 2013.<sup>89</sup> President Obama emphasized that the war against terrorists is different than traditional warfare, and that the United States continues to be threatened by terrorists.<sup>90</sup> However, President Obama distanced himself from the Bush-era “war on terror” policy, by stating that “[b]eyond Afghanistan, we must define our effort not as a boundless ‘global war on terror,’ but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.”<sup>91</sup> Instead, President Obama argued that the United States was engaged in a “war with al Qaeda, the Taliban, and their associated forces.”<sup>92</sup> In the

---

General Holder’s speech on targeted killings).

<sup>88</sup> U.S. DEP’T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 16 (2011) (released Feb. 5, 2013), *available at* [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

<sup>89</sup> Barack Obama, President of the United States, *Remarks by the President at the National Defense University* (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

<sup>90</sup> *See id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

President's view, American actions, in using drones to conduct targeted killings, are legal under both domestic and international law, and the war "is a just war—a war waged proportionally, in last resort, and in self-defense."<sup>93</sup>

President Obama next attempted to alleviate concerns about the drone program's lack of transparency.<sup>94</sup> He announced that his Administration had developed a framework that would govern the use of force against terrorists, and that this framework, "insisting upon clear guidelines, oversight and accountability[.]" had been codified in Presidential Policy Guidance, signed by President Obama on May 22, 2013.<sup>95</sup> President Obama also emphasized that drone strikes are not undertaken as a punitive measure, but instead as lethal actions against "terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat."<sup>96</sup> In addition, President Obama highlighted that the risk to civilian injury by drone strikes would be minimized because "before any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set."<sup>97</sup> Next, President Obama acknowledged the lack of transparency which had accompanied covert drone operations and which had shielded the American government from any real scrutiny.<sup>98</sup> To remedy this issue, President Obama announced stronger oversight of all lethal operations: he announced that his Administration had begun briefing appropriate Congressional committees on all strikes conducted outside of Iraq and Afghanistan, the traditional theaters of war, and he confirmed that such committees had been briefed on the targeting of a United States citizen, Anwar Awlaki.<sup>99</sup> President Obama confirmed the policy of targeting United States citizens, already announced by Attorney General Eric Holder, only in exceptional circumstances.<sup>100</sup>

---

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> President Obama also acknowledged that drone strikes have caused civilian injury and death, and that they would likely continue to do so in the future. However, in what looks like a proportionality analysis, he asserted that "[d]oing nothing is not an option" in instances where terrorist actions would cause more civilian deaths than civilian deaths caused by drone strikes. *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Terry Frieden, *Holder Does Not Rule Out Drone Strike Scenario in U.S.*,

But when a U.S. citizen goes abroad to wage war against America and is actively plotting to kill U.S. citizens, and when neither the United States, nor our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team.<sup>101</sup>

Finally, President Obama announced that his Administration would review proposals to extend appropriate oversight of lethal operations conducted outside traditional war theaters, beyond reporting to Congress.<sup>102</sup> President Obama acknowledged that such oversight would be politically, constitutionally, and bureaucratically challenging, but he pledged to engage Congress in exploring these options.<sup>103</sup>

Following President Obama's speech in which he referenced a newly developed Presidential Policy Guidance on the use of drones, this Guidance was published under the title "U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities."<sup>104</sup> The Guidance is a brief, three-page document, which codifies and confirms most of the arguments advanced by President Obama in his May 23, 2013 speech.<sup>105</sup> The Guidance states that for any lethal operation, there must be a legal basis, and that lethal strikes will only be conducted if the target poses a continuing imminent threat to American citizens.<sup>106</sup> The Guidance also states that for every strike, five conditions must be met:

1. Near certainty that the terrorist target is present;
2. Near certainty that non-combatants will not be injured or killed;
3. An assessment that capture is not feasible at the time of

---

CNN (Mar. 6, 2013, 5:53 PM), <http://www.cnn.com/2013/03/05/politics/Obama-drones-cia/index.html>; see Obama, *supra* note 89.

<sup>101</sup> Obama, *supra* note 89.

<sup>102</sup> *Id.*

<sup>103</sup> *See id.*

<sup>104</sup> *See Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, WHITE HOUSE (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> [hereinafter *Fact Sheet*].

<sup>105</sup> *See id.*

<sup>106</sup> *Id.*

the operation;

4. An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
5. An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.<sup>107</sup>

The Guidance concludes that because drone operations are always carried out on the territory of foreign nations, the United States conducts such operations while respecting the sovereignty of territorial nations where targets may be found and while abiding by law of armed conflict principles.<sup>108</sup> The Guidance also addresses the oversight issue.<sup>109</sup> It provides that each targeting operations will be reviewed by key officials at relevant governmental departments and agencies, who may reach the ultimate decision to approve the use of deadly force via a drone strike.<sup>110</sup>

These decisions will be informed by a broad analysis of an intended target's current and past role in plots threatening U.S. persons; relevant intelligence information the individual could provide; and the potential impact of the operation on ongoing terrorism plotting, on the capabilities of terrorist organizations, on U.S. foreign relations, and on U.S. intelligence collection. Such analysis will inform consideration of whether the individual meets both the legal and policy standards for the operation.<sup>111</sup>

The Guidance also provides more specific considerations in the case when the targeted individual is an American citizen; in this instance, "the Department of Justice will conduct an additional legal analysis to ensure that such action may be conducted against the individual consistent with the Constitution and laws of the United States."<sup>112</sup> Finally, the Guidance confirms the ongoing existence of congressional oversight, by stating that members of the Congress will be regularly provided with updates identifying any individuals against whom lethal force has been approved, and that the appropriate congressional committees will be notified whenever a counterterrorism operation covered by the

---

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *See id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

Guidance has been conducted.<sup>113</sup>

All three above-referenced speeches, by Harold Koh, Eric Holder, and President Obama himself, as well as the drone Guidance and the Department of Justice White Paper, shed light on the Obama Administration's general policy on targeted strikes.<sup>114</sup> To that extent, the speeches can be interpreted as a willingness of the Obama Administration to expose itself to a higher level of scrutiny regarding its drone use. However, none of the speeches truly addressed the issue of secrecy—the fact that the C.I.A. has not released any documents regarding its targeting practices, and that the public has been kept in the dark about any specifics of the lethal use of force by the C.I.A. in counter-terrorism operations. Koh, Holder, and President Obama have all argued that the Obama Administration respects national and international laws, and that the public should trust them, without asking too many questions.<sup>115</sup> Concluding that drone operations comply with all relevant national and international laws, however, requires knowledge about the details of such operations, which the C.I.A. has not shared thus far.

The section below will analyze the legality of drone strikes under international law; it will also conclude that assessing difficult legal issues under international law would necessitate the sharing of information about particular drone operations. Secrecy seems to have inhibited a proper application of an international legal framework to the use of drones by the C.I.A.

### *B. Are Drone Strikes Legal Under International Law?*

Article 2(4) of the United Nations Charter prohibits states from using force against the territorial integrity or political independence of any other states.<sup>116</sup> This general ban on the use of force applies to any use of military force, including to the use of drones.<sup>117</sup> The two accepted exceptions to this general ban on the use of force under international law include situations where the Security Council authorizes the use of force against a particular state, and self-defense.<sup>118</sup> The United States has been using

---

<sup>113</sup> *Id.*

<sup>114</sup> See discussion *infra* Part III.A.3.

<sup>115</sup> See discussion *infra* Part III.A.3.

<sup>116</sup> U.N. Charter art. 2, para. 4.

<sup>117</sup> See Raul A. Pedrozo, *Use of Unmanned Systems to Combat Terrorism*, 87 INT'L L. STUD. 217, 218 (2011).

<sup>118</sup> Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the*

drones in multiple countries without Security Council involvement or authorization;<sup>119</sup> thus, the only manner in which the United States can justify its use of force in these instances is through self-defense. The United States has argued that the terrorist attack on September 11 was an act of war, that the United States is entitled to respond, in self-defense, against the terrorist groups, anywhere that such terrorist groups may be found.<sup>120</sup>

Article 51 of the United Nations Charter authorizes any state which is under an “armed attack” to use force in response, under the paradigm of self-defense.<sup>121</sup> International law is presently unclear as to what constitutes an armed attack, and whether any type of attack by a non-state actor, such as a terrorist group, can constitute an armed attack and as such trigger a self-defense response by the attacked states.<sup>122</sup> The International Court of Justice (ICJ) has held in the well-known Nicaragua case that only “grave forms of the use of force” trigger a State’s right to use self-defense under the United Nations Charter.<sup>123</sup> Some scholars, including United Nations Special Rapporteur Philip Alston, have similarly argued that armed attacks which give rise to the right of self-defense are limited to “‘massive armed aggression’ that ‘imperils . . . life or government,’ and that individual acts[, such as the al Qaeda attack of 9/11 against the United States,] do not . . . constitute an ‘armed attack’ under the [United Nations] Charter.”<sup>124</sup> The ICJ Nicaragua case mentioned above has been

---

*Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL L. REV. 1655, 1662 (2012).

<sup>119</sup> See *id.* at 1655.

<sup>120</sup> See, e.g., Koh, *supra* note 76; Obama, *supra* note 89; Vogel, *supra* note 65, at 107; see also Exec. Order No. 13239, 66 Fed. Reg. 64907 (Dec. 12, 2001); Military Order, 66 Fed. Reg. 57833 (Nov. 16, 2001).

<sup>121</sup> U.N. Charter art. 51.

<sup>122</sup> Because many scholars have already grappled with the parameters of self-defense in response to terrorist attacks, this Article will only discuss some of the main viewpoints on this complex issue. See, e.g., YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENCE* 182–87 (2d ed. 1994); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?*, 16 EUR. J. INT’L L. 171, 203 (2005); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 238 (2010); Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1, 8 (2008).

<sup>123</sup> Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CO INT’L L.J. 729, 736–37 (2011).

<sup>124</sup> *Id.* at 737.

similarly interpreted to require such a high bar.<sup>125</sup> Moreover, a more recent ICJ case limits the concept of “armed attack” to actions by state actors, which would also exclude any acts by non-state actors, such as al-Qaeda, from constituting an armed attack triggering the United States’ right of self-defense.<sup>126</sup>

However, recent scholarship has questioned this type of textualist reading of Article 51 because it is neither “natural nor realistic.”<sup>127</sup> First, Article 51 does not state that the right of self-defense is only available when an armed attack is launched by a state actor.<sup>128</sup> Three different ICJ judges, Koojimans, Higgins, and Simma, have pointed this out and have questioned whether armed attacks are limited to state actors.<sup>129</sup> “In an era where non-state groups project military-scale power, the better view is that non-state actors, such as al-Qaeda, can carry out armed attacks.”<sup>130</sup> In addition, in an ICJ case subsequent to the Nicaragua case, the so-called *Oil Platforms* case, the Court made it clear that an individual act of violence could be sufficient to constitute an armed attack.<sup>131</sup> Customary international law can also be interpreted as embracing a definition of “armed attack” as carried out by a non-state actor. The famous *Caroline* paradigm permits states to use self-defense against non-state actors, and the case itself involved non-state actors and hostilities.<sup>132</sup> Finally, many have argued that the international community’s acquiescence to the United States’ use of military force in Afghanistan following 9/11 supports the proposition that attacks by non-state actors can trigger a state’s right to self-defense under Article 51.<sup>133</sup>

---

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 738

<sup>127</sup> *Id.* at 739.

<sup>128</sup> *See id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *See Case Concerning the Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6).

<sup>132</sup> The Caroline Incident occurred when British troops crossed the Niagara River to the American side and attacked the steamer *Caroline*; the British justified the attack as an act of self-defense. United States Secretary of State Webster wrote a letter to his British counterpart, in which he famously stated that any use of force in self-defense should be limited to situations in which the “necessity of self-defence, [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation.” R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 89 (1938).

<sup>133</sup> *See* Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*,

The Obama Administration has embraced the latter view: that a state's right to self-defense applies against non-state actors, if and when such non-state actors operate out of the territory of states which are not doing much to stop such terrorist activity. The Obama Administration officials have claimed publicly that international law does not prohibit the use of deadly force against an active enemy "when the country involved consents or is unable or unwilling to take action against the threat."<sup>134</sup> In a speech delivered at Harvard Law School, John Brennan, Assistant to the President on Homeland Security and Counterterrorism, stated:

The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to "hot" battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action *if or when other governments are unwilling or unable to take the necessary actions themselves*.<sup>135</sup>

While the United Nations has largely stayed out of this "war," the United States' position finds limited support in some United Nations' documents. The United Nations Security Council has stated that "[e]very State has the duty to refrain from . . . acquiescing in organized activities within its territory directed towards the commission of such acts, when [such] acts . . . involve a threat or use of force."<sup>136</sup> And the United Nations Special Rapporteur Philip Alston has argued that:

[a] targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty [where] . . . the first, targeting, State has a right under

---

43 CORNELL INT'L L.J. 439, 451–52 (2010) (arguing that post-9/11, the law of self-defense rapidly evolved to embrace the concept of self-defensive war against non-state actors); Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENVER J. INT'L L & POL'Y 209, 213–15 (2011).

<sup>134</sup> Peter Bergen, *John Brennan, Obama's Drone Warrior*, CNN (Jan. 9, 2013, 8:39 AM), <http://www.cnn.com/2012/07/13/opinion/bergen-brennan-drones/>.

<sup>135</sup> John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Program on Law and Security at Harvard Law School (Sept. 16, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (emphasis added).

<sup>136</sup> G.A. Res. 2625 (XXV), ¶ 1, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970).

international law to use force in self-defence under Article 51 of the UN Charter . . . [and] the second State is unwilling or unable to stop armed attacks against the first State launched from its territory.<sup>137</sup>

If one accepts the argument that the United States can lawfully exercise its right of self-defense under Article 51 of the United Nations Charter against terrorist suspects, then the United States could act on the territory of any nation that is harboring such terrorist suspects, by being unwilling or unable to stop their harmful activity against the United States. In order to assess this question, however, one would have to focus on each country where drone strikes are currently conducted. For example, one could conclude that drone strikes are legal in Yemen but illegal in Pakistan, under this rationale. And, in order to fully assess whether any nation is unwilling or unable to combat terrorism within its borders, one would need access to intelligence information and other relevant data about each state where targeting operations are proposed. The C.I.A. has not shared any such data thus far and it is very difficult to determine whether drone operations are justified under the “unwilling or unable” standard in each nation in which they have been used (Yemen, Somalia, Pakistan). Thus, it is difficult to assess the validity of the United States’ self-defense argument, because of its lack of geographic constraints—while the self-defense argument could be valid in some places where the C.I.A. conducts drone strikes, it could be perfectly invalid in others.

Even if one accepts the argument that the United States can lawfully exercise its right of self-defense against terrorist suspects pursuant to Article 51, any exercise of self-defense must comply with the *jus ad bellum* requirements of necessity and proportionality. Under *jus ad bellum*, the initial use of force must be necessary and proportionate to the campaign’s objective.<sup>138</sup>

The requirement of proportionality in *jus ad bellum* measures the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy. The requirement of necessity addresses whether there are adequate

---

<sup>137</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24 (May 28, 2010) (by Philip Alston).

<sup>138</sup> See Blank, *supra* note 118, at 1658 (explaining the term *jus ad bellum*).

non-forceful options to deter or defeat the attack.<sup>139</sup>

The necessity requirement within the paradigm of targeted strikes, used against a terrorist group who poses a threat to American national security, can be further subdivided into two prongs: imminence and alternatives.<sup>140</sup> First, an imminent threat is “a clear and present danger” which unless addressed can cause harm to civilians.<sup>141</sup> Moreover, the targeting state must ask itself whether targeting a terrorist suspect is necessary because the host state is unable or unwilling to act against the threat which the terrorist poses, and also “whether targeting [such a suspect] would advance the goal of preventing further attacks.”<sup>142</sup> Second, the targeting state must demonstrate the lack of alternative to the use of lethal force as a way of deterring the threat posed by the terrorist suspect.<sup>143</sup> Thus, “the targeting of suspected terrorists must be restricted to cases in which there is credible evidence that the targeted persons are actively involved in planning or preparing further terrorist attacks against the victim state and no other operational means of stopping those attacks are available.”<sup>144</sup>

In order to assess whether any of these requirements of *jus ad bellum* have been respected during C.I.A.-led covert drone operations, one would need information about the specificity of each proposed operation. Why did the targeted individual pose an imminent threat? How does the agency define “imminence”? What kind of evidence existed to indicate that the target was in the process of planning additional attacks on the United States? How would the targeting of the suspect advance the goal of prevent subsequent attacks? What other means, short of conducting a lethal strike, were available to neutralize the target? Secrecy has prevented all of us from gauging answers at these difficult questions.

An additional inquiry relevant for determining the legality of targeted strikes under international law is which legal regime applies to the use of force by the targeting state against the targeted individual him or herself. If the targeted strike occurs within an armed conflict, then the law of armed conflict

---

<sup>139</sup> *Id.* at 1665.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1666.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1667.

<sup>144</sup> *Id.*

determines the legality of each targeted strike; as this paper discussed above, both the Bush and the Obama Administrations have consistently claimed that the United States is engaged in an armed conflict against al-Qaeda and the Taliban.<sup>145</sup> However, to the extent that the United States uses targeted strikes outside of armed conflict, then international human rights law and the principles governing the use of force in law enforcement apply. Because international human rights law provides that every human being has the right to life, and that the use of lethal force by state authorities against an individual can be justified only under limited circumstances, when such use of force is absolutely necessary,<sup>146</sup> it follows that “[t]he use of lethal force against suspected terrorists outside of armed conflict can therefore only be used when absolutely necessary to protect potential victims of terrorist acts.”<sup>147</sup> The definition of “absolute necessity” for the purposes of determining when lethal force may be used against individual terrorist suspects by targeting states remains somewhat uncertain.<sup>148</sup> In fact, some scholars have recently argued that there exists an additional paradigm of “self-defense targeting,” which stands for the proposition that the traditional “jus ad bellum right of self-defense creates sufficient . . . authority for the use of military force to target a threat without relying on either the law of armed conflict . . . or human rights law for regulating authority.”<sup>149</sup>

It is beyond the scope of this Article to assess the validity of the above-mentioned “self-defense targeting” argument. It suffices to state that in the context of American drone operations conducted against terrorism suspects, the United States has consistently argued that the law of armed conflict, as *lex specialis*, applies to the ongoing war against al-Qaeda, the Taliban, and associated forces, and that the law of armed conflict displaces other potentially applicable legal frameworks, such as international human rights law.<sup>150</sup> Here, secrecy appears less problematic, as it plays almost no role in determining which legal regime applies to

---

<sup>145</sup> See *supra* Part III.A.3.

<sup>146</sup> Blank, *supra* note 118, at 1667–68.

<sup>147</sup> *Id.* at 1668.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See *supra* Part III.A.3 (providing a detailed description of statements made by Obama Administration officials, and the president himself, declaring that the United States is engaged in an armed conflict against specific terrorist groups and their associates).

the use of lethal force via drone strikes. It can be argued, nonetheless, that secrecy has inhibited the public from questioning the validity of the United States' argument that it is engaged in an ongoing armed conflict against specific groups. It may be that this conflict has ended, but we simply do not know about it. Or it may be that it is ongoing in Pakistan and Yemen, but not in Somalia.

These questions are relevant, because they determine the applicability of particular legal regimes to targeting operations, which are more easily justifiable under the law of armed conflict than under the law enforcement paradigm or international human rights law. One could conclude, for example, that drone operations are only legal under the law of armed conflict and thus only legal in places where the armed conflict has not ended; conversely, one could then conclude that drone operations are illegal per se in places where armed conflict has ended. We can ask these questions, but until the C.I.A. releases more information about its drone operations, we will likely not obtain any solid answers.

*C. Jus In Bello: Is There an Armed Conflict Between the United States and Terrorist Suspects?*

The Bush and Obama Administrations have consistently characterized the conflict with al-Qaeda, Taliban, and other associated force as an armed conflict.<sup>151</sup> This characterization is relevant, because if accepted, it dictates the applicability of the law of armed conflict as *lex specialis*.<sup>152</sup> In the view of the Bush and Obama Administrations, the terrorist attacks of 9/11 constituted an act of war by a non-state terrorist actor, thereby triggering the application of the law of armed conflict.<sup>153</sup>

Law of armed conflict, otherwise known as *jus in bello* or international humanitarian law, governs the conduct of states as well as non-state actors during armed conflict.<sup>154</sup> Its primary

---

<sup>151</sup> See *supra* Part III.A.3.

<sup>152</sup> *Lex Specialis Law & Legal Definition*, USLEGAL, <http://definitions.uslegal.com/lex-specialis/> (last visited Nov. 17, 2014) (defining the term “*lex specialis*” as a Latin phrase meaning “law governing a specific subject matter.” The doctrine relates to the interpretation of laws in both domestic and international law).

<sup>153</sup> See discussion *supra* Part III.A.3.

<sup>154</sup> U.N. Office of the High Comm’r on Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, U.N. Doc. HR/PUB/11/01 (2011).

purpose is to minimize suffering during war time by protecting categories of individuals not participating in hostilities and by limiting the methods of warfare.<sup>155</sup> Three main principles of law of armed conflict, relevant for the purposes of determining the legality of targeted strikes, include the principles of distinction, proportionality, and precautions.<sup>156</sup>

The principle of distinction requires that any party to an armed conflict distinguish between those who participate in the conflict and those who do not; only the former can be lawfully targeted.<sup>157</sup> The obligation to distinguish between participants to an armed conflict and non-participants is one of the core principles of the law of armed conflict; it applies to both international and non-international armed conflict, and it is enshrined in both treaty law, as well as in customary international law.<sup>158</sup> In order for a targeting state to respect the principle of distinction, it must first identify a lawful target.<sup>159</sup> “A lawful attack must be directed at a legitimate target: either a combatant, member of an organized armed group, a civilian directly participating in hostilities, or a military objective.”<sup>160</sup> “In non-international armed conflicts, . . . individuals who are members of an organized [non-state] armed group are legitimate targets of attacks at all times.”<sup>161</sup> In addition, civilians who directly participate in hostilities can also be legitimately targeted during the time that they engage in such

---

<sup>155</sup> Blank, *supra* note 118, at 1669.

<sup>156</sup> *Id.*

<sup>157</sup> *See id.* at 1671.

<sup>158</sup> *See* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 111 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (emphasizing the need “for measures to ensure the better protection of human rights in armed conflict of *all types* . . .”) (emphasis added); *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) (noting that distinction is one of the “intransgressible principles of international customary law.”). The principle of distinction is set forth in Article 48 of Additional Protocol I to the Geneva Conventions; “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Its purpose is set out in Article 51 of Additional Protocol I; “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 48, 51 [hereinafter Protocol I].

<sup>159</sup> *See* Blank, *supra* note 118, at 1671.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

hostilities.<sup>162</sup> While scholars, courts and commentators have struggled to define the exact parameters of “direct participation” for determining when and under which circumstances civilians may be targeted during armed conflict, almost all agree that civilians lose their protected status under the law of armed conflict if they choose to engage in the conflict itself.<sup>163</sup>

The United States government has argued that it is engaged in a non-international armed conflict with al-Qaeda, the Taliban, and associated forces, and that almost any member of al-Qaeda, the Taliban, or associated forces is targetable.<sup>164</sup> A scholar has described the United States’ approach to defining lawful targets in the following manner: “that any military aged male in a kill zone is properly determined to be targetable.”<sup>165</sup> Former C.I.A. Director, Michael Hayden, was probably correct when he stated that no other governments in the world, except for Afghanistan and maybe Israel, would agree with this rationale.<sup>166</sup>

The second principle of the law of armed conflict is “the principle of proportionality, [which] requires that parties refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained.”<sup>167</sup> This principle is derived from two ideas: first, that the means of attacking the enemy should never be limited, and second, that the legal requirement of non-targeting civilians, described above, does not entail a total prohibition on civilian

---

<sup>162</sup> Protocol I, *supra* note 158, at art. 51.

<sup>163</sup> See, e.g., HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. ¶ 6 [2005] (Isr.); Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025, 1033–34 (2004); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 519 (2005); Kenneth W. Watkin, *Combatants, Unprivileged Belligerents and Conflict in the 21<sup>st</sup> Century*, 1 ISR. DEF. FORCES L. REV. 69, 72 (2003).

<sup>164</sup> Kenneth Anderson, *Self-Defense and Non-International Armed Conflict in Drone Warfare*, OPINIO JURIS (Oct. 22, 2010, 6:17 AM), <http://opiniojuris.org/2010/10/22/self-defense-and-non-international-armed-conflict-in-drone-warfare/>.

<sup>165</sup> Gabor Rona, *The Last Word (For Now) on Targeted Killings: Rona Responds to Lewis*, OPINIO JURIS (Aug. 3, 2012, 11:00 AM), <http://opiniojuris.org/2012/08/03/the-last-word-for-now-on-targeted-killings-rona-responds-to-lewis/>.

<sup>166</sup> *Former CIA Director Hayden Slams Obama Drone Program*, DEMOCRACY NOW (Feb. 07, 2012), [http://www.democracynow.org/2012/2/7/headlines/former\\_cia\\_director\\_hayden\\_slams\\_obama\\_drone\\_program](http://www.democracynow.org/2012/2/7/headlines/former_cia_director_hayden_slams_obama_drone_program).

<sup>167</sup> Blank, *supra* note 118, at 1673.

casualties.<sup>168</sup> Instead, each military commander is directed to assess the military advantage to be gained from a lawful military operation in relation to the likely number of civilian casualties.<sup>169</sup> The principle of proportionality, thus, encompasses two other ideas—military necessity and humanity—by balancing them against each other.<sup>170</sup> The proportionality analysis is to be conducted prospectively by a military commander; it serves as a guideline to ensure that commanders refrain from types of attacks which will cause excessive civilian suffering and deaths.<sup>171</sup> Like the principle of distinction, the principle of proportionality is espoused by both treaty and customary international law.<sup>172</sup>

The third principle of the law of armed conflict is the principle of precautions.<sup>173</sup> Scholars have argued that in addition to the obligation of state parties to an armed conflict to properly identify military objectives and to respect the principle of proportionality, such state parties have an increased duty to take precautionary measures to protect civilians.<sup>174</sup> “Precautions are, understandably, a critical component of the law’s efforts to protect civilians and are of particular importance in densely populated areas or areas where civilians are at risk from the consequences of military operations.”<sup>175</sup> Various methods of taking precautions involve ensuring that targets are military

---

<sup>168</sup> *Id.*

<sup>169</sup> *See id.*

<sup>170</sup> *See id.*

<sup>171</sup> *See id.*

<sup>172</sup> The principle of proportionality can be found in three separate provisions of Additional Protocol I. Article 51 prohibits “an[y] attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Protocol I, *supra* note 158, at art. 51(5)(b); Blank, *supra* note 118, at 1673. The same language appears again in Articles 57(2)(a)(iii) and 57(2)(b), which also refer to precautions. Protocol I, *supra* note 158, at art. 57(2)(a)(iii) and 57(2)(b). In addition, courts and scholars have concluded that the principle of proportionality is a well-accepted norm of customary international law. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8); *see also* Michael N. Schmitt, *Fault Lines in the Law of Attack*, in *TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW* 277, 292 (Susan Breau & Agnieszka Jachec-Neale eds., 2006); Yoram Dinstein, *The Laws of Air, Missile and Nuclear Warfare*, 27 *ISR. Y.B. on H. R.* 1, 7 (1997).

<sup>173</sup> Article 57(1) of Additional Protocol I states that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” Protocol I, *supra* note 158, at art. 57(1).

<sup>174</sup> *See, e.g.*, Blank, *supra* note 118, at 1674.

<sup>175</sup> *Id.*

objectives in every instance, choosing means and methods of attack with the aim of minimizing incidental civilian losses and damage, launching attacks at night when the civilian population is less likely to be in public places, refraining from any disproportionate attack, and warning civilians of attacks in advance, whenever circumstances so permit.<sup>176</sup>

It is extremely difficult to assess whether C.I.A.-led drone strikes satisfy these fundamental principles of *jus in bello*. All *jus in bello* inquiries are highly fact-specific. It may be that most, if not all, drone strikes satisfy the requirements of distinction, proportionality, and precautions, but unless and until the C.I.A. releases more factual information regarding specific operations, all we will be able to do is continue to ask these questions.

#### *D. Where is the Battlefield?*

Another issue that has been raised in the context of drone operations and that has already been tangentially explored above, is where precisely the United States may lawfully conduct lethal strikes. In other words, where exactly is the battlefield in this global war against terrorists?

Mary Ellen O'Connell has argued that:

[T]he United States is engaged in armed conflict only in Afghanistan. To lawfully resort to military force elsewhere requires that the country where the United States is attacking has first attacked the United States (such as Afghanistan in 2001), the U.N. Security Council has authorized the resort to force (Libya in 2011) or a government in effective control credibly requests assistance in a civil war (Afghanistan since 2002).<sup>177</sup>

According to this view, the battlefield where the United States could legally engage in military operations can lie in Afghanistan only pursuant to the self-defense rationale, and in Libya, pursuant to Security Council authorization. The battlefield may not lie in places such as Pakistan, Somalia, or Yemen, because the United States is not engaged in armed conflict in those places. The United States' government position, on the contrary, has consistently been that the battlefield follows al-Qaeda, Taliban,

---

<sup>176</sup> See *id.* at 1674–75.

<sup>177</sup> Mary Ellen O'Connell, *When Are Drone Killings Illegal?*, CNN (Aug. 16, 2012, 11:12 AM), <http://www.cnn.com/2012/08/15/opinion/oconnell-targeted-killing>.

and associated forces members, and that, accordingly, the United States can launch a strike anywhere that such persons may be found.<sup>178</sup>

Under the Bush Administration, the position of the United States was that the country was engaged in an armed conflict against al-Qaeda and the Taliban, and that the applicable law, as *lex specialis*, was the law of armed conflict, no matter where our enemies may be found.<sup>179</sup> The Obama Administration has followed this approach, and has expanded the definition of our armed conflict opponent, which now includes al-Qaeda, the Taliban, and any associated forces.<sup>180</sup> According to the view of the Obama Administration, drone strikes may be carried out both within a recognized theater of active armed conflict, such as Afghanistan and Iraq, but also in countries which either consent to drone strikes, appear unwilling, or unable to combat non-state terrorist actors, such as Pakistan (consent), Somalia, and Yemen.<sup>181</sup> “U.S. officials have argued that the fight with AUMF enemies is global, not confined to the territory of one country.”<sup>182</sup> According to the legal rationale advanced by then Legal Advisor to the State Department, Harold Koh, deciding “whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to . . . the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.”<sup>183</sup> This rationale would arguably exclude the possibility of conducting drone strikes in countries which are able and willing to combat terrorist threats, but would allow the United States to use lethal force in self-defense, in the territory of countries which are not engaged in any armed conflict against the United States but which harbor al-Qaeda and Taliban associates.<sup>184</sup> It is uncertain whether the United States would,

---

<sup>178</sup> See Vogel, *supra* note 65, at 108, 130.

<sup>179</sup> See, e.g., *id.* at 107 (noting that “in both the Bush and Obama Administrations, the Executive Branch has consistently characterized the current conflicts to be armed conflicts, governed primarily by the *lex specialis* of the laws of war.”); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (characterizing the conflict with al-Qaeda as armed conflict to which the laws of war apply); *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

<sup>180</sup> See Koh, *supra* note 76.

<sup>181</sup> See Vogel, *supra* note 65, at 132.

<sup>182</sup> *Id.* at 130.

<sup>183</sup> Koh, *supra* note 76.

<sup>184</sup> See Vogel, *supra* note 65, at 132.

under this rationale, choose to conduct drone strikes in “neutral states,” such as Kenya, the Philippines, and Saudi Arabia, which do appear willing and capable to combat terrorist groups within their borders, in a scenario where high-level terrorist suspects were located in these countries.<sup>185</sup> What is unquestionable is that the United States believes that because it is engaged in an armed conflict of a global nature, the law of armed conflict applies in each instance, regardless of the location of each drone strike.<sup>186</sup> It can be argued, therefore, that under the current view of the Obama Administration, location of drone strike matters but it is not prohibitive. Location matters because drone strikes cannot be carried out in countries which have not consented or which are able and willing to combat terrorist threats; location is not prohibitive because drone strikes can be carried out in any country which has consented or which is not able or willing to combat terrorist threat.<sup>187</sup>

Scholars have defended this view,<sup>188</sup> because modern-day conflicts oppose state versus non-state actors, who often do not have a strict territorial nexus to any particular state, thus interjecting a layer of complexity into the definition of a battle field.<sup>189</sup> “Once we are outside the belligerent-neutral framework that defined the traditional battlespace, determining the parameters of the contemporary battlefield or zone of combat becomes significantly more complicated.”<sup>190</sup> Others, however, would disagree with this view and would argue that expanding the definition of a battlefield without any legal limitations represents a dangerous precedent, as it places no limits on where the war may be waged.<sup>191</sup> The secrecy of C.I.A.-run drone operations has disabled the public from knowing where the armed conflict may be occurring; coupled with the legal rationale mentioned directly above—that the war is of a global nature and that the battle field follows our terrorist enemies—secrecy in this context has allowed the C.I.A. to target anyone anywhere, with very little accountability.<sup>192</sup> Releasing information about geography of C.I.A.-conducted strikes would at least allow the

---

<sup>185</sup> *See id.*

<sup>186</sup> *See id.* at 130.

<sup>187</sup> *See id.* at 132–33,

<sup>188</sup> *See, e.g., id.*

<sup>189</sup> *See* Blank, *supra* note 6, at 711.

<sup>190</sup> *Id.*

<sup>191</sup> *See, e.g.,* O’Connell, *supra* note 177; Rona, *supra* note 165.

<sup>192</sup> *See* Vogel, *supra* note 65, at 135–36.

public to begin to ask relevant questions about the legal parameters of the battle field, in this new type of warfare.<sup>193</sup>

*E. What Types of Strikes are Conducted? Personality Versus Signature?*

Last but not least, it has been reported that the C.I.A. conducts two different types of drone strikes.<sup>194</sup> The covert nature of these operations has precluded the public from the ability to inquire about the different types of drone operations, toward the goal of ensuring that such operations are run with appropriate regard for domestic and international law.<sup>195</sup>

Drone strikes fall into two essential categories: personality strikes and signature strikes.<sup>196</sup> Personality strikes are those conducted against a specific individual, who has been identified as posing a significant threat to the United States and whose targeting has been specifically approved by the President.<sup>197</sup> Personality strikes appear less controversial because they can somewhat easily comply with the relevant legal requirements, assuming that the target has been properly identified as a combatant, and assuming that the strike itself is conducted in a manner consistent with jus in bello principles.<sup>198</sup> If one were to reject the argument that the United States is engaged in an armed conflict against non-state actors belonging to al-Qaeda and Taliban groups, then even personality strikes become of dubious legality, because the relevant legal framework shifts to a law enforcement paradigm and international human rights law, which allows for the targeting of individuals only when absolutely necessary.<sup>199</sup> It does not appear that most personality strikes are conducted in instances where such targeting is one of strict necessity; instead, it appears that personality strikes are carried out when targets of high value are identified and when their neutralization seems beneficial toward the United States

---

<sup>193</sup> *See id.*

<sup>194</sup> *See* Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. TIMES, Nov. 25, 2012, at A1.

<sup>195</sup> *See id.*

<sup>196</sup> *See id.*

<sup>197</sup> *See* Brian Glyn Williams, *Inside the Murky World of 'Signature Strikes' and the Killing of Americans With Drones*, HUFFINGTON POST (May 31, 2013, 4:41 PM), [http://www.huffingtonpost.com/brian-glyn-williams/inside-the-murky-world-of-\\_b\\_3367780.html](http://www.huffingtonpost.com/brian-glyn-williams/inside-the-murky-world-of-_b_3367780.html).

<sup>198</sup> *See supra* Part.III.C.

<sup>199</sup> *See supra* Part.III.B.

military's advantage.<sup>200</sup> A signature strike, on the contrary,

is a drone strike on suspected terrorists or militants whose identities are not known, but whose "pattern of life activity" would seem to indicate that they are involved in some militant/terrorist activity. These activities could range, for example, from associating with known terrorists in an Al Qaeda hujra (guest house) to sneaking across the border into Afghanistan from Pakistan's Taliban-controlled tribal zones with a group of Taliban insurgents.<sup>201</sup>

Signature strikes are inherently harder to justify under any applicable legal framework, including the law of armed conflict, because it is uncertain whether they can adequately comply with the principles of distinction, proportionality, and precautions.<sup>202</sup> Some have criticized the development of signature strikes, by arguing "that a program that began as a carefully focused effort to kill senior al-Qaeda leaders had morphed into a bombing campaign against low-level Taliban fighters[.]" and that the Obama Administration had adopted "a de facto 'kill not capture' policy . . . ."<sup>203</sup>

Whether one accepts the argument that the law of armed conflict applies to the war against terrorists, or whether one believes that the law enforcement paradigm and international human rights law provide the adequate legal framework, it is impossible to assess the legality of personality and signature strikes without knowing more about their respective specifics.<sup>204</sup> It appears that personality strikes may better comply with both *jus in bello* and international human rights law and that signature strikes may comply with *jus in bello* but violate international human rights law.<sup>205</sup> However, these conclusions, in the absence of more information provided by the C.I.A., remain purely speculative. The only way that any scholar or expert could

---

<sup>200</sup> See *Background and Context*, LIVING UNDER DRONES, <http://www.livingunderdrones.org/background-and-context/> (last visited Oct. 25, 2014).

<sup>201</sup> Williams, *supra* note 197; see also Rohde, *supra* note 7 (arguing that when using signature strikes, "CIA drone operators could carry out strikes based on the behavior of people on the ground. Operators could launch a drone strike if they saw a group, for example, crossing back and forth over the Afghanistan-Pakistan border.").

<sup>202</sup> See *supra* Part.III.C.

<sup>203</sup> Rohde, *supra* note 7.

<sup>204</sup> See *supra* Part.III.C.

<sup>205</sup> See *supra* Parts III.B, III.C.

provide legal conclusions about the lawfulness of targeted strikes is if he or she were provided with more detailed information about the circumstances of each strike.

#### IV. CONCLUSION: SECRECY PREVENTS OVERSIGHT AND ACCOUNTABILITY

The purpose and overall conclusion of this Article is that the covert nature of C.I.A.-run drone operations has precluded experts, scholars, judges and the public at large from assessing the lawfulness of the overall drone program, and of particular operations. This Article recognizes that the C.I.A.'s primary goal and mission is to run covert operations, and that the release of information would, in many instances, jeopardize the success of prospective operations and put the lives of operators at risk.<sup>206</sup> However, this Article argues that the C.I.A. could provide more policy and legal guidelines about its targeting operations as a general matter, without prejudicing the likelihood of success of any specific operation.<sup>207</sup> For example, the C.I.A. could release documents about its overall guidelines and policy regarding signature versus personality strikes. What types of circumstances and intelligence information typically trigger the decision to use one versus the other? What kind of information is analyzed regarding each prospective target, in order to properly distinguish the target and ensure that its neutralization will not cause excessive harm to those who are lawfully non-targetable? And what kind of oversight and accountability does the C.I.A. truly face?

While President Obama has argued in his speech, and in the above-discussed Guidance, that congressional oversight is an integral part of the targeting process,<sup>208</sup> very little is known about actual targeting practices, and the C.I.A. has not been forthcoming in releasing any particular information about such practices.<sup>209</sup> In addition to congressional oversight, many have argued that courts should be involved in reviewing and approving targeting decisions, especially when targets are American citizens.<sup>210</sup> Actual judicial review would require the Agency to

---

<sup>206</sup> See *supra* Part III.A.1.

<sup>207</sup> See *supra* Part III.A.1.

<sup>208</sup> See Obama, *supra* note 89; *Fact-Sheet*, *supra* note 104.

<sup>209</sup> See Rohde, *supra* note 7.

<sup>210</sup> *Id.* (noting that Jameel Jaffer, deputy legal director of the ACLU, has argued that keeping C.I.A. drone operations covert has prevented American

2015]

## COVERT USE OF DRONES

165

release information about the particularities of its drone operations.<sup>211</sup> “The administration has claimed the power to carry out extrajudicial executions of Americans on the basis of evidence that is secret and is never seen by anyone . . . .’ ‘It’s hard to understand how that is consistent with the Constitution.’”<sup>212</sup>

It appears that the C.I.A. will be forced to release at least some information, in light of ACLU-led litigation, mentioned above. It is this Article’s conclusion that the release of any information by the C.I.A. should be the appropriate starting point of a public discussion about the legitimacy of the American drone program.

---

courts from reviewing the constitutionality of such operations).

<sup>211</sup> *See id.*

<sup>212</sup> *Id.* (quoting Jameel Jaffer, deputy legal director of the ACLU).