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Double-Tap Warfare: Should President Obama Be Investigated for War Crimes?

Samuel Alexander

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DOUBLE-TAP WARFARE: SHOULD PRESIDENT OBAMA BE INVESTIGATED FOR WAR CRIMES?

*Samuel Alexander**

Abstract

A “double-tap” drone strike involves bombing a target, waiting a period of five to twenty minutes, often during which first responders arrive, and then bombing the target a second or even third time. This Note argues that such attacks, by virtue of their indiscriminate nature, are likely serious violations of Common Article 3 of the Geneva Conventions of 1949, which prohibits targeting civilians, the wounded, or those placed *hors de combat*. Thus, such attacks are likely war crimes under international law and under the War Crimes Act of 1996, a U.S. law that criminalizes carrying out, or ordering to be carried out, grave breaches of Common Article 3. The First Geneva Convention of 1949, to which the United States is a party, requires that states enact legislation to punish those who carry out grave breaches of the Convention, and further requires that states take the appropriate steps to enforce these penalties. This Note argues that to conform to international law, the United States should cease the use of double-tap drone strikes immediately, if it has not already. Additionally, the United States should make the criteria it uses to target individuals for drone strikes as transparent as necessary to determine the process’s legality under international law. Without transparency on the part of cooperating governments, it is nearly impossible to determine the legality of a covert military program. Furthermore, this Note proposes that the United States and the appropriate legal bodies are legally and morally required to investigate the use of double-tap drone strikes to determine if war crimes have been committed.

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* J.D. candidate 2017, University of Florida Levin College of Law. This Note is dedicated to my wife, Alicia Blanchard. I would also like to thank my Note advisors, Iesha Nunes and Kevin Paule, for their invaluable input.

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INTRODUCTION

The method of employment was to imitate a favorite tactic of Hamas, the “double tap;” a device is set off, and when police and other first responders arrive, a second, larger device is set off to inflict more casualties and spread panic.¹

Where one drone attack is followed up by another in order to target those who are wounded and hors de combat or medical personnel, it constitutes a war crime in armed conflict and a violation of the right to life, whether or not in armed conflict.²

A “double-tap” drone strike involves bombing a suspected military target and then waiting a period of five to thirty minutes before bombing

1. HOMELAND SEC. INST., UNDERLYING REASONS FOR SUCCESS AND FAILURE OF TERRORIST ATTACKS 28 (2007).

2. Christof Heyns (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, ¶ 73, U.N. Doc. A/68/382 (Sept. 13, 2013).

the same location again.³ Often, during the period between strikes, family members, first responders, and other locals arrive at the scene to provide assistance.⁴ These civilians and the remaining wounded are often killed in the second strike.⁵ The United States has employed double-tap drone strikes since 2009.⁶

While much commentary exists regarding drone strikes in general, and signature strikes in particular, there is a noticeable lack of scholarship on double-tap drone strikes and their unique legal implications. At best, they are briefly noted as a practice of questionable legality.⁷ This Note aims to fill that gap by arguing that double-tap drone strikes, as used by the United States in Pakistan, are likely war crimes under both domestic and international law. International humanitarian law, the applicable law for a non-international armed conflict, includes Common Article 3 of the Geneva Conventions of 1949, which provides that violence cannot be done to civilians or to persons placed *hors de combat* by wounds or sickness.⁸ A grave breach of Common Article 3 is a war crime under international law⁹ and is a war crime under U.S. domestic law.¹⁰

3. See Jerome Taylor, *Outrage at CIA's Deadly 'Double Tap' Drone Attacks*, INDEPENDENT (Sept. 25, 2012), <http://www.independent.co.uk/news/world/americas/outrage-at-cias-deadly-double-tap-drone-attacks-8174771.html> (reporting that the second strike occurred five minutes after the first strike); Chris Woods & Mushtaq Yusufzai, *Get the Data: The Return of Double-Tap Drone Strikes*, BUREAU INVESTIGATIVE JOURNALISM (Aug. 1, 2013), <https://www.thebureauinvestigates.com/2013/08/01/get-the-data-the-return-of-double-tap-drone-strikes> (reporting ten-, twenty-, and thirty-minute waits before second strikes).

4. See, e.g., AMNESTY INT'L, "WILL I BE NEXT?": US DRONE STRIKES IN PAKISTAN 29 (2013), <https://www.amnestyusa.org/sites/default/files/asa330132013en.pdf>; INT'L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC & GLOB. JUSTICE CLINIC, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN 55, 74–75 (2012), <http://chrgj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf> [hereinafter LIVING UNDER DRONES]; Woods & Yusufzai, *supra* note 3.

5. See, e.g., AMNESTY INT'L, *supra* note 4, at 29.

6. Woods & Yusufzai, *supra* note 3.

7. See, e.g., Kristina Benson, "Kill 'em and Sort It Out Later:" Signature Drone Strikes and International Humanitarian Law, 27 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 17, 49 (2014).

8. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3116 [hereinafter Common Article 3].

9. See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 590–91 (4th prt. 2009) (noting that the violation of Common Article 3 "has been recognised as . . . a war crime in the Statutes of the International Criminal Tribunal for Rwanda, of the Special Court for Sierra Leone and of the International Criminal Court, as well as by the International Criminal Tribunal for the Former Yugoslavia"); see also Rome Statute of the International Criminal Court, art. 8(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute] (defining "war crimes" to include "[i]ntentionally directing attacks against civilian objects").

10. War Crimes Act of 1996, 18 U.S.C. § 2441 (2012).

This Note argues that because double-tap drone strikes likely fail to distinguish between combatants and noncombatants (the principle of distinction), and because they likely cannot be justified by military necessity (the principle of proportionality),¹¹ they are likely grave breaches of Common Article 3. This Note additionally argues that to conform to international law, the practice of double-tap drone strikes should stop immediately, if it has not already.¹² Further, this Note suggests that the criteria the United States uses for targeting and for civilian casualty minimization be made transparent to the extent necessary to determine its legality under international law. Without transparency on the part of cooperating governments, it is near impossible to determine the legality of a covert military program.¹³ Finally, this Note argues that the appropriate international and domestic actors are legally and morally required to carry out investigations into parties reasonably suspected of grave breaches of the Geneva Conventions.¹⁴

This Note is not intended to be a comprehensive overview of the international and domestic legality of double-tap drone strikes. Because determining whether any given drone strike is legal requires determining whether it satisfies the legal requirements under all international legal regimes,¹⁵ and for other reasons mentioned below, this Note limits its scope to international humanitarian law, namely the Geneva Conventions of 1949 and the customary case law that has developed since then, primarily in the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹⁶ This Note focuses geographically on double-tap drone strikes in Pakistan, where the United States has employed them most frequently and where the most research has been done.

Part I of this Note provides a brief history of modern military drones, categorizes the types of strikes they perform, and then discusses the legal significance of double-tap drone strikes in particular. Originally used exclusively for surveillance, drones did not begin performing remote

11. Unlike, perhaps, a single strike against a known individual based on intelligence gathered over months or years.

12. There have been no reports of double-tap drone strikes since 2012. *See infra* Section I.A.

13. *See* Heyns, *supra* note 2, ¶¶ 96–98.

14. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6.3 U.S.T. 3146 [hereinafter Article 49].

15. And for another reason provided below, namely if the practice of double-tap drone strikes is illegal under international humanitarian law, it is almost certainly illegal under international human rights law, which is far more restrictive of state violence.

16. *See* Heyns, *supra* note 2, ¶ 24 (“Although a particular drone strike may satisfy the requirements for the use of inter-State force, it may nevertheless be inconsistent with applicable rules of international humanitarian law and international human rights law, or vice versa, and thus unlawful under international law. The right to life can be adequately secured only if all the distinct requirements posed by the various constitutive parts of international law are met.”).

missile strikes until 1999. Double-tap strikes are an even more recent phenomenon: the first recorded strike did not take place until 2009. As far as is known, the United States, perhaps in response to much-cited UN reports on their likely illegality, temporarily ceased the use of double-tap drone strikes in 2011. Their use resumed in 2012, but since that year no reports of double-tap drone strikes have surfaced.

Part II begins by providing an overview of the relevant international legal regimes: international humanitarian law (IHL), international human rights law (IHRL), and domestic criminal law, specifically the War Crimes Act of 1996. Then Section II.A gives a defense of the selection of the international regime this note analyzes, namely IHL. To summarize, despite the fact that IHRL likely applies, this Note instead analyzes the legality of double-tap drone strikes under IHL. The reason is twofold: first, because the United States claims that it is engaged in a non-international armed conflict, and thus that IHL applies, this Note restrictively accepts that assertion while attempting to demonstrate that such strikes are nevertheless likely illegal under this much more permissive regime; and second, if double-tap drone strikes are illegal under IHL, then they are likely, *a fortiori*, illegal under IHRL, the far more restrictive regime.¹⁷ The final Sections of Part II describe in more detail the applicable international and domestic laws: Article 3 of the Geneva Conventions of 1949, which forbids targeting of civilians or those placed *hors de combat* by wounds, sickness, or any other reason, and the international case law developed since then, primarily under the ICTY; Article 50, which defines grave breaches of the Convention; Article 49, which requires states to enact legislation to criminalize “committing, or ordering to be committed, any of the grave breaches” of the Convention, as defined by Article 50; and finally the War Crimes Act of 1996, a U.S. law that, in accordance with Article 49, criminalizes grave breaches of Article 3.

Part III begins by introducing the concept of command responsibility. Then, using what information is available from journalists and other non-state actors, it analyzes the legality of double-tap drone strikes under the legal regimes described in Part II. The crux of the analysis occurs in relation to Article 3 and ICTY. While Article 3 provides the black-letter law, it is not a criminal statute. However, ICTY and other courts have provided interpretations that correspond to more traditional notions of criminality: they provide definitions of intent, willfulness, action, etc., that constitute the *mens rea* and the *actus reus* of serious violations of Article 3. This Part analyzes what is publicly known about double-tap

17. The general consensus is that in an armed conflict, both IHRL and IHL apply simultaneously, unless the two conflict, in which case the more permissive IHRL takes precedence.

drone strikes to make generalities regarding their legality under Article 3, using ICTY's interpretations as a guide.

Finally, in Part IV this Note suggests that, based on the analysis performed in Part III, international and domestic investigations into the legality of double-tap drone strikes are legally and morally required. The failure to distinguish between combatants and noncombatants, whether intentional or reckless, is a serious breach of international law. Furthermore, the relevance of international law is compromised when its enforcement is limited to punishing once-powerful regimes or individuals. For IHL to fulfill its purpose of setting a minimum standard of humane conduct by states, investigation and prosecution of all grave breaches must take place, lest it appear that the current international legal regime is ultimately no better than "might makes right" hidden beneath a veneer of legality.

I. DOUBLE-TAP DRONE STRIKES

Double-tap drone strikes are a relatively recent phenomenon. The United States employed them for only a few years,¹⁸ mainly in Pakistan, but also in Yemen and Afghanistan.¹⁹ There have been no reports of double-tap strikes in Iraq or Somalia, the other theaters of U.S. drone warfare.

A. *A Brief History of Double-Tap Drone Strikes*

General Atomics designed and built the first modern drone, the Predator, in 1994.²⁰ The CIA used its immediate precursor for surveillance in Bosnia and Albania.²¹ The United States has used drones in a military capacity since 1999, when they were first used to perform "target acquisition, using laser markers to designate a target that [was] then attacked by precision-guided missiles discharged" from convention aircraft.²² Their

18. See *infra* note 36 and text accompanying notes 44–46.

19. Michael B. Kelley, *More Evidence That Drones Are Targeting Civilian Rescuers in Afghanistan*, BUS. INSIDER (Sept. 25, 2012), <http://www.businessinsider.com/drone-double-tap-first-responders-2012-9> (reporting on double-tap strikes in Afghanistan); Jack Serle, *Suspected Drone Strikes Kill 12 Civilians in Yemen*, BUREAU INVESTIGATIVE JOURNALISM (May 15, 2012), <https://www.thebureauinvestigates.com/2012/05/15/suspected-drone-strikes-kill-12-civilians-in-yemen> (reporting on double-tap drone strikes in Yemen).

20. Peter Finn, *Rise of the Drone: From Calif. Garage to Multibillion-Dollar Defense Industry*, WASH. POST (Dec. 23, 2011), https://www.washingtonpost.com/national/national-security/rise-of-the-drone-from-calif-garage-to-multibillion-dollar-defense-industry/2011/12/22/gIACG8UEP_story.html.

21. *Id.*

22. Ben Emmerson (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Rep. of the Special Rapporteur on the*

use as originators of independent strikes began in 2001 or 2002, initially in CIA-run operations in Afghanistan.²³ The U.S. military had less than 200 drones in 2001, 7000 in 2011,²⁴ and nearly 11,000 by 2013.²⁵

In 2004, the 9/11 Commission produced its report on the terror attack of September 11, 2001 and the U.S. response, in which it “recommended that responsibility and legal authority [for drones] should be concentrated in one entity,” presumably under the Department of Defense (DOD), “in part . . . to ensure compliance with domestic law and to facilitate effective congressional oversight.”²⁶ As UN Special Rapporteur Philip Alston has noted, the United States did precisely the opposite: the CIA’s involvement in drones increased while the DOD created an “almost autonomous and at best minimally accountable force” in the form of the Joint Special Operations Command (JSOC).²⁷ These separate forces sometimes worked in conjunction.²⁸ Both are highly secretive—the CIA, for example, refuses to even confirm or deny the existence of the targeted killing program.²⁹ As of 2015, the Air Force (a branch of the DOD) flies most drone operations, including covert missions directed by the CIA.³⁰

There are three general categories of drone strikes: (1) personality strikes, in which the operators target an identified individual based on

Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, ¶ 25, U.N. Doc. A/68/389 (Sept. 18, 2013).

23. Tony Nasser, Note, *Modern War Crimes by the United States: Do Drone Strikes Violate International Law? Questioning the Legality of U.S. Drone Strikes and Analyzing the United States’ Response to International Reproach Based on the Realism Theory of International Relations*, 24 S. CAL. INTERDISC. L.J. 289, 290 & n.4 (2014). Although sources dispute the date, sources agree that the CIA carried out the strike and that it occurred in Afghanistan. See Chris Woods, *Ten Years Since First Deadly Drone Strike, Industry Gathers in London*, BUREAU INVESTIGATIVE JOURNALISM (Nov. 21, 2011), <https://www.thebureauinvestigates.com/2011/11/21/drone-manufacturers-in-london-on-10th-anniversary-of-1st-strike/>. By one account the target was a Taliban commander named Mullah Akhund, and by the other it was Osama bin Laden. Compare *id.* (naming Mullah Akhund as the target), with John Sifton, *A Brief History of Drones*, NATION (Feb. 7, 2012), <https://www.thenation.com/article/brief-history-drones/> (naming Osama bin Laden).

24. Finn, *supra* note 20.

25. DEP’T OF DEF., UNMANNED SYSTEMS INTEGRATED ROADMAP 5 (2013), <https://info.publicintelligence.net/DoD-UnmannedRoadmap-2013.pdf>.

26. Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT’L SECURITY J. 283, 284–85 (2011).

27. *Id.* at 285.

28. *Id.*

29. *Id.*

30. Gordon Lubold, *Pentagon to Sharply Expand U.S. Drone Flights over Next Four Years*, WALL ST. J. (Aug. 16, 2015, 7:40 PM), <http://www.wsj.com/articles/pentagon-to-add-drone-flights-1439768451>.

intelligence gathered on that individual;³¹ (2) signature strikes, in which drone operators target unidentified individuals based on patterns of behavior and characteristics;³² and (3) double-tap strikes, in which multiple guided weapons are fired at an identified or unidentified target in succession,³³ often killing the wounded and first responders.³⁴ The large majority of drone strikes are signature strikes.³⁵ The first confirmed double-tap strike was on May 16, 2009, in the North Waziristan portion of Pakistan.³⁶ According to the Bureau of Investigative Journalism (BIJ):

Taliban militants had gathered in the village of Khaisor. After praying at the local mosque, they were preparing to cross the nearby border into Afghanistan to launch an attack on US forces. But the US struck first.

A CIA drone fired its missiles into the Taliban group, killing at least a dozen people. Villagers joined surviving Taliban as they tried to retrieve the dead and injured.

But as rescuers clambered through the demolished house the drones struck again. Two missiles slammed into the rubble, killing many more. At least 29 people died in total.³⁷

31. Kevin Jon Heller, *'One Hell of a Killing Machine': Signature Strikes and International Law*, 11 J. INT'L CRIM. JUST. 89, 90 (2013) (stating that in personality strikes "the CIA has a 'high degree of confidence' that it knows the precise identity of the target").

32. *Id.*; Heyns, *supra* note 2, ¶ 72 ("In some cases, people may be targeted without their identities being known, based on insignia or conduct."); Vegas Tenold, *The Untold Casualties of the Drone War*, ROLLING STONE (Feb. 18, 2016), <http://www.rollingstone.com/politics/news/the-untold-casualties-of-the-drone-war-20160218> (quoting a former drone operator describing signature strikes and claiming that they are not "very accurate").

33. It is unclear whether double-tap strikes are generally personality strikes or signature strikes.

34. Woods & Yusufzai, *supra* note 3.

35. Heller, *supra* note 31, at 90 ("In 2010, for example, Reuters reported that of the 500 'militants' killed by drones between 2008 and 2010, only 8% were the kind 'top-tier militant targets' or 'mid-to-high-level organizers' whose identities could have been known prior to being killed.").

36. Chris Woods & Christina Lamb, *CIA Tactics in Pakistan Include Targeting Rescuers and Funerals*, BUREAU INVESTIGATIVE JOURNALISM (Feb. 4, 2012), <https://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals>. There are unconfirmed reports of U.S. drones targeting rescuers in Waziristan as far back as March 2008. Chris Woods, *Get the Data: Obama's Terror Drones*, BUREAU INVESTIGATIVE JOURNALISM (Feb. 4, 2012), <https://www.thebureauinvestigates.com/2012/02/04/get-the-data-obamas-terror-drones/>.

37. Woods & Lamb, *supra* note 36.

In 2012, U.S. drones fired multiple missiles into a tent in the village of Zowi Sidgi, instantly killing eight of the village day laborers who had gathered there to rest.³⁸ One witness recounted, “When we went to where the missiles hit to help people; we saw a very horrible scene. Body parts were scattered everywhere. [I saw] bodies without heads and bodies without hands or legs. Everyone in the hut was cut to pieces”³⁹ Villagers were gathered at the scene with stretchers and water and had begun the process of poring through the aftermath when U.S. drones fired another round of missiles into the same location, killing six people and wounding two others who died soon after.⁴⁰ According to an investigation by Amnesty International, “18 people were killed in the drone strikes that evening and at least 22 others were injured, including an eight-year-old girl named Shehrbano who sustained shrapnel injuries to her leg.”⁴¹

These are just two instances that exemplify a broader pattern of conduct. In Pakistan alone, “Between May 2009 and June 2011, at least fifteen attacks on rescuers were reported by credible news media, including the New York Times, CNN, Associated Press, ABC News and Al Jazeera.”⁴² According to the BIJ, reports of double-tap drone strikes in Pakistan ceased in July 2011 but began resurfacing again in May 2012.⁴³ In the spring and summer of 2012, the CIA was reported to have carried out six double-tap drone strikes in Pakistan,⁴⁴ killing fifty-three people and injuring fifty-seven.⁴⁵ For perspective, the total number of drone strikes in Pakistan as of August 19, 2016, is 424, causing between 2,499 and 4,001 deaths.⁴⁶

B. *The Legal Significance of Double-Tap Drone Strikes*

Double-tap drone strikes are legally significant because, in contrast to their personality- and signature-strike counterparts, it is more difficult to maintain that the targets of the strike are engaged in militant activity.⁴⁷ It

38. AMNESTY INT’L, *supra* note 4, at 24.

39. *Id.* (alteration in original).

40. *Id.*

41. *Id.*

42. Woods & Lamb, *supra* note 36.

43. Woods & Yusufzai, *supra* note 3.

44. *Id.*

45. Chris Woods, *Bureau Investigation Finds Fresh Evidence of CIA Drone Strikes on Rescuers*, BUREAU INVESTIGATIVE JOURNALISM (Aug. 1, 2013), <https://www.thebureauinvestigates.com/2013/08/01/bureau-investigation-finds-fresh-evidence-of-cia-drone-strikes-on-rescuers/>.

46. *Get the Data: Drone Wars*, BUREAU INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> (last visited Sept. 11, 2016).

47. For a discussion of the process required to determine if an individual is a legal target, see *infra* text accompanying notes 150–60.

is even more difficult to maintain that the strikes do not target civilians and the wounded. Therefore, it is much easier to demonstrate that double-tap drone strikes violate the laws of armed conflict than to demonstrate that other types of drone strikes do, because factual assumptions made by the United States are no longer tenable in the context of a double-tap strike.⁴⁸

In a standard personality strike, a drone is fired at a known military target.⁴⁹ These named targets come from the notorious “kill list” kept by the Bush and Obama Administrations.⁵⁰ The Executive Branch has also enacted an important and highly controversial policy: the assumption that all military-age males in the area surrounding a drone strike are militants “unless there is explicit intelligence posthumously proving them innocent.”⁵¹ This is a striking reversal of the ancient principle of the presumption of innocence,⁵² and it flies in the face of international humanitarian law, which maintains that a person is presumed to be a civilian until proven otherwise.⁵³

For all three types of drone strikes, the ultimate questions under IHL remain the same: whether the requirement of distinction has been met; in other words, whether a person is “targetable under international humanitarian law . . . by virtue of having a continuous combat function or

48. See *infra* notes 190–94.

49. See Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.

50. *Id.*

51. *Id.* In response to the *New York Times*’s claim, an unnamed official commented:

“As a general matter, it [the Times report] is not wrong that if a group of fighting age males are in a home where we know they are constructing explosives or plotting an attack, it’s assumed that all of them are in on that effort,” the official said. “We’re talking about some of the most remote places in the world, and some of the most paranoid organizations on the planet. If you’re there with them, they know you, they trust you, there’s a reason [you’re] there.”

Justin Elliott, *Dissecting Obama’s Standard on Drone Strike Deaths*, PROPUBLICA (June 5, 2012, 2:15 PM) (alterations in original), <https://www.propublica.org/article/dissecting-obamas-standard-on-drone-strike-deaths>; see also Ryan Devereaux, *Manhunting in the Hindu Kush*, INTERCEPT (Oct. 15, 2015, 7:57 AM), <https://theintercept.com/drone-papers/manhunting-in-the-hindu-kush/> (quoting an anonymous ex-drone operator who stated that, in drone strikes in Afghanistan, “[i]f there is no evidence that proves a person killed in a strike was either not a MAM, or was a MAM but not an unlawful enemy combatant, then there is no question [that] [t]hey label them [enemies killed in action]”).

52. DIG. 22.3.2 (Paulus, Ad Edictum 69) (“Ei incumbit probatio qui dicit, non qui negat.”).

53. NILS MELZER, INT’L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 75–76 (2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

directly participating in hostilities”;⁵⁴ and whether the requirement of proportionality has been met; in other words, whether the military advantage gained outweighs the loss of noncombatant life.⁵⁵ By definition, a presumed civilian cannot also be a presumed militant. And it is difficult to imagine how double-tap strikes could avoid targeting the wounded when strikes occur so soon after first responders arrive.⁵⁶ In any case, in a drone strike, the primary target, if wounded or killed, and anyone within the blast radius who is injured by the missile, are placed *hors de combat* by their wounds. Unless the second strike was so militarily necessary that it outweighed the cost of killing the wounded and civilians, targeting any of these wounded persons, whether militants, primary targets, or civilians, is prohibited by international law.⁵⁷ A violation of Geneva Conventions that results in serious death or injury to individuals protected by the Convention constitutes a grave breach.⁵⁸ Finally, grave breaches of Article 3 are considered war crimes under both domestic and international law.⁵⁹

This is the key distinction between double-tap strikes and their single-strike counterparts: while it is plausible to argue that a single target, or multiple targets, could be so immediately valuable that the loss of civilian life from an initial strike was proportional to the military advantage gained by killing the target, this reasoning no longer stands up to scrutiny when a second or third strike hits the same location and large numbers of civilians and other noncombatants are foreseeably killed. In light of the requirements of proportionality and distinction, which are the “cardinal rules” of international humanitarian law, double-tap drone strikes are much more likely to fail to distinguish between militants and civilians or noncombatants.⁶⁰

II. WHICH LAWS APPLY?

International law is a complex web of treaties, conventions, statutes, and customary case law. To be legal, a U.S. drone strike must satisfy the

54. Heyns, *supra* note 2, ¶ 72.

55. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 50, Aug. 12, 1949, 6 U.S.T. 3114 [hereinafter Article 50].

56. *See Obama 2012 Pakistan Strikes*, BUREAU INVESTIGATIVE JOURNALISM (Jan. 11, 2012), <https://www.thebureauinvestigates.com/2012/01/11/obama-2012-strikes/> (reporting a second strike five to seven minutes after the first); Taylor, *supra* note 3 (reporting a third strike five minutes after the second strike occurred).

57. *See* 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 46.

58. *See* Article 50, *supra* note 55.

59. 18 U.S.C. § 2441 (2012); 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 590–91.

60. Heller, *supra* note 31, at 92 (noting that the principle of distinction “is articulated most clearly in Article 51(2) of the First Additional Protocol (AP I), which provides that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack” (alteration in original)).

requirements of all applicable international legal frameworks, and may be required to satisfy the requirements of domestic laws as well.⁶¹ Because determining the legality of any given drone strike is such an arduous task, this Note focuses solely on whether double-tap drone strikes in Pakistan are legal under the law of non-international armed conflict. But first, it is important to determine which legal frameworks can be applied and to defend the choice of IHL, the appropriate legal framework for violence carried out by a state in a non-international armed conflict.

A. *International Humanitarian Law v. International Human Rights Law*

IHL, or *jus in bello*, is the law that governs state violence during armed conflict,⁶² while IHRL, or *jus ad bello*, governs state violence during peacetime.⁶³ IHL governs the use of force by states, whether in an international armed conflict, such as a war between nations, or a non-international armed conflict, such as military action by a state against non-state armed groups.⁶⁴ IHL's relevant sources are in the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949 and their additional protocols, and the customary international case law that has developed since then.⁶⁵ The United States is a signatory to the Hague Convention of 1907⁶⁶ and the Geneva Conventions of 1949,⁶⁷ and Congress ratified these treaties, making them domestic law through Article VI, Clause Two of the U.S. Constitution,⁶⁸ which provides that "all treaties made . . . shall be the supreme law of the land."⁶⁹

61. Heyns, *supra* note 2, ¶ 24.

62. Jeanne Mirer, *U.S. Policy of Targeted Killing with Drones: Illegal at Any Speed*, in DRONES AND TARGETED KILLING 136, 141 (Marjorie Cohn ed., 2015).

63. Heyns, *supra* note 2, ¶ 22 ("The most immediate protection for the right to life is provided by the international human rights law framework. This is the default legal regime from which deviations are permissible only when, and for as long as, those who justify the more permissive use of force under international humanitarian law can show that the requisite conditions have been fulfilled.")

64. See Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 110 (2010).

65. Mirer, *supra* note 62, at 141.

66. Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

67. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114.

68. See Mirer, *supra* note 62, at 139.

69. U.S. CONST. art. VI, cl. 2.

IHL requires states to abide by the principles of distinction and proportionality.⁷⁰ Distinction requires that states distinguish between combatants and noncombatants to ensure that civilians are not targeted.⁷¹ Distinction is addressed directly in Common Article 3, which prohibits violence against noncombatants.⁷² But it has also become a customary rule, applicable to all states, through continued state practice.⁷³ Additionally, courts and official interpretations provide further information regarding the principle. For example, the International Committee of the Red Cross (ICRC) has a “continuous combat function” test that can be used to determine whether an individual is targetable under IHL, thereby ensuring that this principle is met.⁷⁴ Although this test does not have the weight of international law, the test or something like it must be performed before every attack to meet the principle of distinction. Proportionality, often couched in terms of military necessity, requires that state violence must not cause “incidental loss of civilian life [or] injury to civilians” that is disproportional to the “concrete and direct military advantage anticipated” by an attack.⁷⁵ While proportionality is not mentioned directly in Article 3, it is mentioned in Article 50 of the First Geneva Convention of 1949,⁷⁶ and it has also, through state practice, become a rule of customary IHL that is binding on all states.⁷⁷

But before IHL applies to violence between groups or states, rather than or in addition to IHRL, the intensity of the violence must rise to the level of armed conflict.⁷⁸ The intensity of violence is judged by an objective standard, based on customary international case law.⁷⁹ If the level of violence does not rise to the requisite threshold, as defined by the landmark case *Prosecutor v. Tadić*,⁸⁰ or if the groups are not sufficiently

70. See Christoph Heyns & Sarah Knuckey, *The Long-Term International Law Implications of Targeted Killing Practices*, 54 HARV. INT’L L.J. 101, 110 (2013).

71. See 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 3.

72. Common Article 3, *supra* note 8.

73. 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 3.

74. MELZER, *supra* note 53, at 27.

75. 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 46.

76. Article 50, *supra* note 55.

77. 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 46.

78. Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT’L L.J. 293, 301 n.43 (2012) (“The idea that an armed conflict may only exist when a minimum threshold of violence has been met is widely accepted. The International Criminal Tribunal for the Former Yugoslavia enunciated factors for determining the existence of an armed conflict, including its intensity and the organization of the forces involved.”).

79. LIVING UNDER DRONES, *supra* note 4, at 110, 111 n.622.

80. Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 561–62 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (“[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”); see also Heyns, *supra* note 2, ¶¶ 55, 57

organized,⁸¹ then IHRL and domestic law apply.⁸² Both are more restrictive on the use of force than IHL.⁸³ Furthermore, the “default legal regime” is IHRL, and only by demonstrating that an armed conflict exists does the “more permissive use of force under international humanitarian law” govern state action.⁸⁴ While it is likely the case that “international human rights law continues to apply during armed conflict, as a complement to international humanitarian law,”⁸⁵ anything more than a cursory examination of the legality of double-tap drone strikes under IHRL is beyond the scope of this Note.

Under IHRL, “intentional force can be used only where strictly necessary to protect against an imminent threat to life.”⁸⁶ Further, arrest or capture is required if possible.⁸⁷ Therefore, barring something such as a hostage situation, under IHRL, “premeditated killing of an individual would generally be unlawful.”⁸⁸ Finally, it is important to know that a state cannot “consent to the violation of their obligations” under international law.⁸⁹

(“The armed violence should not be sporadic or isolated, but protracted.”); INT’L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 2 (2008) (stating that the *Tadić* definition “has been adopted by other international bodies since then”); Craig A. Bloom, *Square Pegs and Round Holes: Mexico, Drugs and International Law*, 34 HOUS. J. INT’L L. 345, 365–66 (2012) (stating that *Tadić*’s “groundbreaking definition has been widely used since 1995 as a test for the characterization of armed conflict”).

81. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 120 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (“[A]n organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group.”); Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69, 79 (“[C]ommon Article 3 . . . presumes that armed groups are able to demonstrate a degree of organization . . .”).

82. Lewis, *supra* note 78, at 301.

83. See *id.* (“In IHL’s absence IHRL would apply, as would the law enforcement restrictions on lethal force, including the requirement of a surrender offer.”).

84. Heyns, *supra* note 2, ¶ 22.

85. *Id.* ¶ 40 (“The right to life as provided under international human rights law . . . continues to apply in times of armed conflict . . .”).

86. *Id.* ¶ 33 (noting that a previous UN report on extrajudicial killings likened the international human rights proportionality requirement to that of police officers who “shoot to kill only when it [is] clear that an individual [is] about to kill someone (making lethal force proportionate) and there [is] no other available means of detaining the suspect (making lethal force necessary)”).

87. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 53–54 (1995) (holding that resorting to lethal force rather than arresting or capturing suspected terrorists is “a breach of Article 2 . . . of the Convention”).

88. Heyns, *supra* note 2, ¶ 35.

89. *Id.* ¶ 38.

Some groups maintain that the United States is not in an armed conflict at all.⁹⁰ Under that view, IHRL and domestic law apply and, as noted above, would severely restrict the United States' drone program.⁹¹ The UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions and many scholars and commentators take this position.⁹² Some commentators claim that although the United States may have been in a non-international armed conflict with Al-Qaeda after September 11, 2001, this status was lost during the organization's "subsequent transformation into a rather loosely connected network of terrorist cells."⁹³ Other commentators note that "the relative infrequency of organized armed attacks on the United States since [September 11, 2001]" does not satisfy the intensity requirement mandated by *Tadić*.⁹⁴ If that is the case, then the far more constrictive IHRL applies, meaning that the use of force by the United States would be governed by something akin to the guidelines civilian police operate under; the use of force resulting in death would only be acceptable in cases of imminent loss of life, such as an ongoing hostage situation.⁹⁵

The United States maintains it is in a non-international armed conflict with Al-Qaeda and associated forces, pursuant to the Authorization for

90. See, e.g., Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction and in Opposition to Defendant's Motion to Dismiss at 39, *Al-Aulaqi v. Obama*, No. 10-CV-01469 (D.D.C. Oct. 8, 2010) ("In the face of the evidence provided by the Plaintiffs as to . . . the non-existence of an armed conflict, the government's bald assertion to the contrary cannot stand.").

91. See Heyns, *supra* note 2, ¶ 22; Lewis, *supra* note 78, at 301.

92. Heyns, *supra* note 2, ¶ 63; Noam Lubell & Nathan Derejko, *A Global Battlefield?: Drones and the Geographical Scope of Armed Conflict*, 11 J. INT'L CRIM. JUST. 65, 78 (2013) ("It is therefore submitted here that drone strikes alone are unlikely to be sufficient for the determination of a [non-international armed conflict] and the ensuing applicability of IHL. The armed group must itself be an active party in the conflict; like a tango, it takes two to war.").

93. E.g., Emmerson, *supra* note 22, ¶ 66 ("Some argue that the core Al-Qaida group responsible for armed attacks on the United States may no longer meet this criterion because its leadership and command structure appear to have been so degraded that it no longer constitutes, in itself, a sufficiently organized armed group."); Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SECURITY L. 245, 261 (2010) ("And most certainly, individual terrorist action all over the globe carried out on the basis of an 'Al Qaeda franchise-model' cannot be attributed to Al Qaeda as a non-State party to a non-international armed conflict of global reach.").

94. E.g., Emmerson, *supra* note 22, ¶ 68 ("Even those who support the United States position recognize that groups engaging in infrequent armed attacks, however serious, do not cross the threshold of intensity required for the application of the law of armed conflict.").

95. Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Study on Targeted Killings*, ¶ 32, U.N. Doc. A/14/24/Add.6 (May 28, 2010) (noting that, under IHRL, "[t]he necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate, through, for example, the use of warnings, restraint and capture").

Use of Military Force signed by President George W. Bush on September 18, 2001, and thus that IHL, rather than IHRL, governs its use of force.⁹⁶ Although the Supreme Court has adopted this view,⁹⁷ as noted above it is a highly contentious position: it is very likely the level of violence between the United States and the groups it attacks does not rise to the level of intensity required to meet the threshold of an armed conflict under international law, and therefore IHL does not apply.⁹⁸

Without going into an analysis of whether the level of violence between the United States and the organizations that it targets rises to the level of intensity required by *Tadić*—“protracted armed violence between governmental authorities and organized armed groups”⁹⁹—this Note makes the restrictive assumption that the United States is correct in considering itself party to an armed conflict and that its conduct is thus governed by IHL rather than IHRL.¹⁰⁰ This is in part because if it can be demonstrated that double-tap drone strikes are illegal under IHL, they are likely, *a fortiori*, illegal under IHRL. This conclusion can be reached under the following assumptions: (1) either IHRL, IHL, or both apply to double-tap drone strikes; and (2) a willful killing that fails to satisfy the requirements of distinction or proportionality would fail to satisfy IHRL’s requirement that a killing be immediately necessary to preserve life, with its corresponding obligation that a state “minimize the level of force used, regardless of the amount that would be proportionate through, for example, the use warnings, restraint and capture.”¹⁰¹

It should also be noted that the assumption that the law of armed conflict applies to every drone strike is a restrictive one, in that normally it must be demonstrated for each strike; in other words, while the presumption is generally that a strike does *not* take place under the

96. See Emmerson, *supra* note 22, ¶ 62.

97. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 (2006).

98. E.g., Emmerson, *supra* note 22, ¶ 66–68; Mirer, *supra* note 62, at 139 (“In Pakistan, Yemen, and Somalia, the United States is not involved in armed conflict with these States.”). Also, non-international armed conflict is a territorial concept rather than an organizational one—although the United States claims it is in an armed conflict with Al-Qaeda and associated forces, the language of Common Article 3 does not seem to contemplate this type of armed conflict. See Common Article 3, *supra* note 8.

99. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 561 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

100. See Vogel, *supra* note 64, at 107–08 (“[A]ll three branches of government, in both Republican and Democrat Administrations and Congresses, have consistently characterized the situations in Afghanistan, Iraq, and with Taliban, al Qaeda, and associated forces as that of an armed conflict governed by the laws of war.” (footnote omitted)).

101. Alston, *supra* note 95, ¶¶ 32–33 (“This means that under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal . . .”).

conditions of armed conflict, this Note makes the opposite presumption.¹⁰² Finally, it is also important to note that while the United States argues that its strikes are in self-defense,¹⁰³ self-defense is not a general justification for individual acts of state violence that may violate IHL—rather it is a justification for the initiation of state violence under *jus ad bello*, or the law governing when the initiation of the use of force by states is acceptable.¹⁰⁴ In other words, regardless of the legality of extraterritorial state violence under *jus ad bello*, every instance of lethal force must meet the requirements of distinction and proportionality under IHL,¹⁰⁵ and simultaneously must meet the requirements of distinction and proportionality under IHRL, unless the two legal regimes conflict.¹⁰⁶

B. *Law of International Armed Conflict v. Non-international Armed Conflict*

IHL recognizes two types of armed conflict: Article 2's "armed conflict which may arise between two or more of the High Contracting Parties,"¹⁰⁷ and Common Article 3's "conflict not of an international character occurring in the territory of one of the High Contracting Parties."¹⁰⁸ In a non-international armed conflict, IHL and customary international law apply.¹⁰⁹ A conflict between two High Contracting Parties is also known as an international armed conflict, or a conflict between two opposing states, and is governed by Article 2.¹¹⁰ A "conflict not of an international character" is also known as a non-international

102. See Heyns, *supra* note 2, ¶ 22; see also *id.* ¶ 53 ("It is important to emphasize, however, that not all applications of violence by States against non-State actors meet the threshold requirements to be regarded as an armed conflict. Accordingly, if there is no armed conflict, there can be no non-international armed conflict, and international humanitarian law does not apply to such use of force."); *id.* ¶ 57 ("[T]he intensity of the armed violence is an issue that is determined on a case-by-case basis.").

103. See Mirer, *supra* note 62, at 147.

104. Heyns & Knuckey, *supra* note 70, at 108 ("The question of the legality of extra-territorial use of force should not be confused with the question of the legality of the use of lethal force against a particular target.").

105. *Id.*

106. Mirer, *supra* note 62, at 138. For a discussion regarding the applicability of IHRL during times of armed conflict, see Jordan J. Paust, *Human Rights on the Battlefield*, 47 GEO. WASH. INT'L L. REV. 509, 510 (2015) (concluding that the "claim that human rights law does not apply during war is decidedly false and cannot be taken seriously").

107. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114 [hereinafter Article 2].

108. Common Article 3, *supra* note 8.

109. See Vogel, *supra* note 64, at 110.

110. See Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006); INT'L COMM. OF THE RED CROSS, *supra* note 80, at 1.

armed conflict.¹¹¹ A non-international armed conflict exists “between governmental forces and non-governmental armed groups, or between such groups only.”¹¹² In short, Article 2 governs international armed conflicts between signatory states,¹¹³ while Article 3 governs non-international armed conflicts between states and non-state actors.¹¹⁴ Although there is some debate over whether non-international armed conflict refers solely to intranational or civil conflicts, this narrow view has generally been rejected.¹¹⁵

Although some commentators dispute the issue,¹¹⁶ this Note assumes, along with the U.S. Supreme Court, that the United States is in a non-international armed conflict and that Common Article 3 applies.¹¹⁷ At the very least, the United States is not in an international armed conflict between states—it is either in a non-international armed conflict or not in an armed conflict at all.¹¹⁸

C. Articles 3 and 50 of the Geneva Conventions of 1949

Common Article 3 of the Geneva Conventions of 1949 states that in a non-international armed conflict, violence is prohibited against “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.”¹¹⁹ Much of

111. *Hamdan*, 548 U.S. at 631; Heyns, *supra* note 2, ¶ 52.

112. INT’L COMM. OF THE RED CROSS, *supra* note 80, at 1.

113. *See id.*; *Hamdan*, 548 U.S. at 630.

114. *See Hamdan*, 548 U.S. at 630–31; INT’L COMM. OF THE RED CROSS, *supra* note 80, at 3.

115. *See Hamdan*, 548 U.S. at 631 (“Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of ‘conflict not of an international character,’ *i.e.*, a civil war, the commentaries also make clear ‘that the scope of application of the Article must be as wide as possible.’ In fact, limiting language that would have rendered Common Article 3 applicable ‘especially [to] cases of civil war, colonial conflicts, or wars of religion’ was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations.” (alteration in original) (footnote omitted) (citations omitted) (quoting 3 Jean de Preux et al., Int’l Comm. of the Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War (Jean S. Pictet ed., A.P. de Heney trans. 1960)); Heyns, *supra* note 2, ¶ 52. *But see* Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., & Robert J. Delahunty, Special Counsel, to Alberto R. Gonzales Counsel to the President 9 (Nov. 30, 2001), <http://www.justice.gov/olc/docs/aclu-ii-113001.pdf> [hereinafter Memorandum] (“There is substantial reason to think that this language refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its territory.”).

116. *See, e.g.*, Memorandum, *supra* note 115, at 1.

117. *See Hamdan*, 548 U.S. at 631 (finding that since the United States is engaged in a non-international armed conflict, “Common Article 3, then, is applicable”).

118. *See* Heyns, *supra* note 2, ¶ 52; LIVING UNDER DRONES, *supra* note 4, at 110.

119. Common Article 3, *supra* note 8 (mandating that “[t]he wounded and sick shall be collected and cared for”).

the case law interpreting Common Article 3 comes from the ICTY. From that case law emerged the elements that must be present to demonstrate a violation of Common Article 3: there must be an armed conflict;¹²⁰ there must be a nexus between the armed conflict and the alleged violation;¹²¹ the act must have been taken against civilians or non-combatants (the principle of distinction);¹²² and the appropriate mens rea need be present.¹²³ Furthermore, the violation Article 3 requires is “an act or omission.”¹²⁴ Finally, Article 50 requires that state violence be justified by military necessity (principle of proportionality).¹²⁵

More specifically, the crime of murder under Common Article 3 has been defined as “the death of the victim resulting from an act or omission of the accused committed with the intention to kill or to cause serious bodily harm which he/she should reasonably have known might lead to death.”¹²⁶ The elements for murder under Common Article 3, including mens rea, have been likened to the elements for “wilful killing” under Article 2.¹²⁷ In addition to intent to kill and intent to commit serious

120. Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 22 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (“Articles 2 and 3 of the Statute set forth provisions which reflect the laws of war; plainly a pre-condition to the applicability of these Articles is the existence of an armed conflict in the territory where the crimes are alleged to have occurred.”); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 258 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (“It is well established that for international humanitarian law to apply there must first be an armed conflict. . . . For the purposes of Article 3 of the Statute, the nature of this armed conflict is irrelevant.”).

121. *Kordić*, Case No. IT-95-14/2-T, ¶ 32 (“[I]n order for a particular crime to qualify as a violation of international humanitarian law under Articles 2 and 3 of the Statute, the Prosecution must . . . establish a sufficient link between that crime and the armed conflict.”).

122. Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 34 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) (“Common Article 3 protects ‘[p]ersons taking no active part in the hostilities’ including persons ‘placed *hors de combat* by sickness, wounds, detention, or any other cause.’ Victims of . . . bodily harm . . . placed *hors de combat* by their detention, are clearly protected persons within the meaning of Common Article 3.” (alteration in original)).

123. *Kordić*, Case No. IT-95-14/2-A, ¶ 229 (“To satisfy the *mens rea* for wilful killing, it must be established that the accused had the intent to kill, or to inflict serious bodily injury in reckless disregard of human life.”).

124. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 485 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

125. Article 50, *supra* note 55.

126. *Krstić*, Case No. IT-98-33-T, ¶ 485.

127. *Kordić*, Case No. IT-95-14/2-T, ¶ 233 (“[T]he elements of the offence of ‘murder’ under Article 3 of the Statute are similar to those which define a ‘wilful killing’ under Article 2 of the Statute, with the exception that under Article 3 of the Statute the offence need not have been directed against a ‘protected person’ but against a person ‘taking no active part in the hostilities.’”).

bodily harm that it would be reasonable to assume would lead to death,¹²⁸ “the *mens rea* constituting all the violations of Article 2 of the Statute includes . . . recklessness which may be likened to serious criminal negligence.”¹²⁹ Similarly, under Article 5, a “result is intended when it is the actor’s purpose, or the actor is aware that it will occur in the ordinary course of events.”¹³⁰

Article 50 of the Geneva Convention of 1949 defines “grave breaches” as those “involving . . . wilful killing [or] . . . wilfully causing great suffering or serious injury to body or health, . . . not justified by military necessity” against individuals protected by the Convention.¹³¹ While in the past Article 50 has been interpreted to refer solely to grave breaches under international armed conflicts, the current consensus is that a serious violation of Article 3 constitutes a grave breach of the Geneva Conventions and is a war crime under international law.¹³²

D. *The War Crimes Act of 1996*

The War Crimes Act of 1996,¹³³ 18 U.S.C. § 2441, states that a war crime is any conduct “which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character.”¹³⁴ Subsection (d)(1) states:

In subsection (c)(3), the term “grave breach of common Article 3” means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows:

. . . .
(D) MURDER.—The act of a person who intentionally

128. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 153 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (“The intent, or *mens rea*, needed to establish the offence of wilful killing exists once it has been demonstrated that the accused intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death.”).

129. *Id.* ¶ 152.

130. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 561 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) (“The requisite *mens rea* of murder under Article 5(a) is the intent to kill or the intent to inflict serious injury in reckless disregard of human life.”).

131. Article 50, *supra* note 55.

132. War Crimes Act of 1996, 18 U.S.C. § 2441(c) (2012) (“[T]he term ‘war crime’ means any conduct . . . which constitutes a grave breach of common Article 3”); see ICC Statute, *supra* note 9; 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9 at 590–91.

133. Pub. L. No. 104-192, 110 Stat. 2104 (codified at 18 U.S.C. § 2441 (2012)).

134. 18 U.S.C. § 2441(c)(3).

kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.¹³⁵

The statute also provides:

Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.¹³⁶

Finally, “The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States”¹³⁷

III. THEORIES OF LIABILITY

It is not enough to simply provide the current status of various international and domestic laws. It is important to analyze the common characteristics of double-tap drone strikes to determine if generalities concerning their international and domestic legality can be made. If they can, and if those generalities lean toward the illegality of such strikes, only then would it be appropriate to discuss the potential for investigation and prosecution under international and domestic law.

A. *A Note on Command Responsibility*

It is a general principle of the laws of war that superior officers are responsible for the crimes they order their subordinates to commit.¹³⁸

135. *Id.* § 2441(d)(1).

136. *Id.* § 2441(a).

137. *Id.* § 2441(b).

138. See 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 556; see also *In re Yamashita*, 327 U.S. 1, 15 (1946) (“It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. . . . Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.”); *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996) (“The principle of ‘command responsibility’ that holds a superior responsible for the actions of subordinates appears to be well accepted in U.S. and international law in connection with acts committed in wartime”).

President Barack Obama personally signed off on “the more complex and risky strikes in Pakistan.”¹³⁹ He personally approved every target on the “kill list.”¹⁴⁰ Further, Article 49 of the First Geneva Convention of 1949 requires that contracting parties “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, *or ordering to be committed*, any of the grave breaches of the present Convention defined in the following Article,” namely, Article 50.¹⁴¹ Likewise, as noted above, jurisdiction under the War Crimes Act extends not only to those who “intentionally kill[,]” but also to those who “conspire[] or attempt[] to kill.”¹⁴²

B. *Liability Under Articles 3 and 50*

As mentioned earlier, a violation of Common Article 3 has four elements: armed conflict, a nexus between the conflict and the alleged violation, targeting of noncombatants, and the appropriate mens rea for the crime.¹⁴³ The armed conflict element, discussed above, has been stipulated by the U.S. government and is an assumption made by this Note.¹⁴⁴ The nexus element requires that the alleged violation “be ‘closely related’ to the hostilities.”¹⁴⁵ If the term “hostilities” is defined as the armed conflict between the United States and the organizations and affiliates described in the 2001 Authorization for Use of Military Force (AUMF), then any drone strike taken pursuant to the AUMF is “closely related” to the hostilities. Furthermore, if the AUMF is what authorizes the President’s current war powers,¹⁴⁶ then every drone strike is taken pursuant to the AUMF and is related to hostilities between the United States and the groups referenced in the AUMF.¹⁴⁷ That leaves two

139. Becker & Shane, *supra* note 49; Cora Currier, *The Kill Chain: The Lethal Bureaucracy Behind Obama’s Drone War*, INTERCEPT (Oct. 15, 2015, 7:57 AM), <https://theintercept.com/dron-e-papers/the-kill-chain/> (according to top secret slides produced by the Pentagon’s Intelligence, Surveillance, and Reconnaissance Task Force, intelligence gathering ultimately leads to the creation of “a ‘baseball card’ on the target, which [is] ‘staffed up to higher echelons — ultimately to the president’”).

140. Becker & Shane, *supra* note 49.

141. Article 49, *supra* note 14 (emphasis added).

142. 18 U.S.C. § 2441(d)(1)(D).

143. See *supra* text accompanying notes 120–23.

144. See *supra* text accompanying note 100.

145. Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Judgment, ¶ 225 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003) (footnote omitted).

146. Hamdan v. Rumsfeld, 548 U.S. 557, 594 (2006) (“[W]e assume that the AUMF activated the President’s war powers . . .”).

147. This is precisely what the Obama Administration claimed. See Karen DeYoung, *Policy on Drone Strike Authorization Doesn’t Need to Change, Defense Official Says*, WASH. POST (May 16, 2013), <https://www.washingtonpost.com/world/national-security/policy-on-drone-strike->

elements of an Article 3 violation that can be reasonably debated: *mens rea* and the requirement that the violation be against a noncombatant, either a civilian or someone “placed *hors de combat* by sickness, wounds, detention, or any other cause”¹⁴⁸—the principle of distinction. Finally, to be a war crime under the Geneva Conventions, a violation must have been (1) “committed against persons or property protected by the Convention,” (2) “wilful,” and (3) “not justified by military necessity.”¹⁴⁹ The first two elements relate to the *actus reus* and *mens rea*, respectively, while the final element relates to the concept of proportionality.

As explained above, Article 3 prohibits states from targeting civilians or persons placed *hors de combat* by wounds or for other reasons. Importantly, under IHL, a person is presumed to be a civilian unless proven otherwise.¹⁵⁰ Furthermore, states are required to take “all feasible precautions” before using lethal force to determine whether or not a likely target is a civilian or *hors de combat*.¹⁵¹ The level of precaution required rises as the “capacity for extended surveillance” increases, meaning that the use of drones requires a greater level of precaution than the use of cruise missiles, for example.¹⁵²

The ICRC has a “continuous combat function” test to determine whether a person is a member of an armed group.¹⁵³ This stems from the organization’s interpretation of IHL, “with a view to strengthening the implementation of the principle of distinction.”¹⁵⁴ The ICRC definition presumes “lasting integration into an armed group.”¹⁵⁵ The ICRC’s definition of a civilian in the legal framework of non-international armed conflict is as follows:

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups

authorization-doesnt-need-to-change-defense-official-says/2013/05/16/84ce912e-be5e-11e2-97d4-a479289a31f9_story.html.

148. Common Article 3, *supra* note 8.

149. *See* Article 50, *supra* note 55.

150. Heyns, *supra* note 2, ¶ 67; MELZER, *supra* note 53, at 75–76.

151. Heyns, *supra* note 2, ¶ 71.

152. *Id.*

153. *Id.* ¶ 68.

154. MELZER, *supra* note 53, at 5.

155. Emmerson, *supra* note 22, ¶ 69 (“This encompasses individuals whose continuous function involves the preparation, execution or command of acts or operations amounting to direct participation in hostilities; individuals who have been recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf; and individuals who have directly participated in hostilities on repeated occasions in support of an organized armed group in circumstances indicating that their conduct reflects a continuous combat role rather than a spontaneous or sporadic or temporary role assumed for the duration of a particular operation.”).

of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).¹⁵⁶

Furthermore, it is insufficient that a targeted person simply be member of a party to the conflict: “he or she must at least be a member of the armed forces of that group.”¹⁵⁷ However, if individuals who are not members of an armed group that is a party to the conflict “engage in specific acts of direct participation,” they lose protection under IHL.¹⁵⁸

To determine that a civilian is directly participating in hostilities requires satisfaction of a three-part test: (1) the actions of the person “must be likely to adversely affect the military operations . . . of a party to an armed conflict or, alternatively,” must reach a certain “threshold of harm”; (2) “there must be a direct causal link between the act and the harm likely to result”; and (3) “the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.”¹⁵⁹ Finally, under the ICRC guidelines, if the actions of an individual “are not likely to adversely affect the military operations” of the opposing force, to meet the required threshold of harm the actions “must be likely to cause at least death, injury, or destruction.”¹⁶⁰ Although this test does not have the weight of customary international law, at least one court has used it to determine the civilian status of targets of drone attacks.¹⁶¹ Military lawyers in the United States have pressed back against the ICRC requirements,¹⁶² and critics maintain that the guidelines take “positions that cannot possibly be characterized as an appropriate balance of the military needs of states with humanitarian concerns.”¹⁶³

156. MELZER, *supra* note 53, at 27.

157. Heyns, *supra* note 2, ¶ 68; *accord* Emmerson, *supra* note 22, ¶ 70 (“If the criterion of continuous combat function is not met, then an individual who is otherwise affiliated with an armed group is to be regarded as having protected civilian status and may be targeted with deadly force only if and for so long as he or she is directly participating in hostilities.”).

158. Heyns, *supra* note 2, ¶ 69.

159. MELZER, *supra* note 53, at 46.

160. *Id.* at 49.

161. Heyns, *supra* note 2, ¶ 70.

162. Emmerson, *supra* note 22, ¶ 72.

163. *E.g.*, Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SECURITY J. 5, 44 (2010) (“In

The question of whether the ICRC test is required by international law ultimately does not bear on the conclusions reached in this Note, for the simple reason that even if the ICRC test is too exacting, something like it must take place before each act of state violence. The reason for this is that the principle of distinction requires that states differentiate between combatants and noncombatants; to do that, states must determine whether the targets of drone strikes are in fact combatants. As noted above, because of the higher surveillance capability of drones—compared with that of, say, cruise missiles—the requirement that precautions be taken against civilian casualties is more stringent.¹⁶⁴

Furthermore, the principle of proportionality also requires states to take precautions before targeting individuals for lethal strikes.¹⁶⁵ To determine whether an individual strike meets the requirement of military necessity in proportion to the amount of civilian life that will be lost, or serious injury sustained, a state must first determine whether the people targeted are civilians or combatants.¹⁶⁶ Without knowing the status of individual targets, including all those foreseeably killed by a strike, it would be impossible to determine whether the immediate military advantage gained by a strike outweighs the “incidental” loss of life.

Because the drone program has been kept mostly in secret, little is publicly known about the targeting methodology used by the CIA, JSOC, or the DOD. However, in 2013 the Obama Administration released a drone “fact sheet” containing references to legal principles and targeting methodologies.¹⁶⁷ The press release contains “preconditions for using lethal force” including, among other things, that the target poses a “continuing, imminent threat to U.S. persons,” that there be “near certainty” that the target is present, and that there be “near certainty” that civilians will not be killed.¹⁶⁸ While this could explain statements by U.S. officials that very few civilians have been killed in drone strikes,¹⁶⁹ the

particular, the Guidance proposes incompatible legal standards for conflicts between a state’s regular armed forces and non-state armed groups.”)

164. Heyns, *supra* note 2, ¶ 71.

165. *See* Article 50, *supra* note 55.

166. *See* Heyns, *supra* note 2, ¶ 69.

167. Mirer, *supra* note 62, at 148.

168. *Id.* at 149.

169. In stark contrast to evidence presented by, among other NGOs, the Bureau of Investigative Journalism and Amnesty International, in 2011 John Brennan, then Obama’s chief counterterrorism advisor, claimed that there had not been “a single collateral [civilian] death’ in Pakistan since August 2010.” Chris Woods, *Drone Strikes in Pakistan: US Claims of ‘No Civilian Deaths’ Are Untrue*, BUREAU INVESTIGATIVE JOURNALISM (July 18, 2011), <https://www.thebureauinvestigates.com/2011/07/18/washingtons-untrue-claims-no-civilian-deaths-in-pakistan-drone-strikes/>. In 2012, Brennan admitted that drones had killed civilians but described incidents as “exceedingly rare.” Alice K. Ross, *Documenting Civilian Casualties*, in DRONES AND TARGETED

existence of such preconditions is undercut by reports on the ground, which cite civilian casualty rates far higher than those provided by the U.S. government.¹⁷⁰ This, together with the stated U.S. policy that all military-age males in the vicinity of a drone strike are presumed militants unless proven otherwise post hoc, paints a troubling picture of the United States' targeting policy.¹⁷¹

Recent disclosures of classified government information have prompted a national debate over the appropriate reach of U.S. electronic surveillance programs. A side effect of this debate has been uncharacteristically blunt observations by U.S. intelligence officials regarding U.S. targeting policies. Revealingly, in 2013 the former General Counsel of the National Security Agency (NSA), Stewart Baker, said, "Metadata absolutely tells you everything about somebody's life If you have enough metadata you don't really need content" ¹⁷² The former Director of the NSA and of the CIA, General Michael Hayden, responded to Baker's comments by noting, "We kill people based on metadata."¹⁷³ Another issue is the inability of U.S. drone operators to accurately distinguish between combatants and noncombatants on the sole basis of visual identification. In some areas, Taliban and other militants may wear clothing identical to that of local tribesmen.¹⁷⁴

On a sunny day in October 2012, in a remote location in North Waziristan, near the Afghanistan–Pakistan border, a U.S. drone fired two Hellfire missiles simultaneously at Mamana Bibi, a sixty-eight-year-old grandmother, while she was picking okra in her garden.¹⁷⁵ Some of her nearby grandchildren—aged three, five, seven, eight, and fifteen—

KILLING, *supra* note 62, at 99, 103. By 2013, during his confirmation hearing for CIA Director, he acknowledged that more transparency was needed regarding civilian casualties. *Id.* at 105.

170. As of their latest estimate, on May 21, 2016, the Bureau of Investigative Journalism estimates that U.S. drones have killed 424–966 civilians in Pakistan out of a total of 2499–4001 persons killed. *Get the Data: Drone Wars*, BUREAU INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> (last visited Aug. 24, 2016). Of the 424 strikes in Pakistan since drone operations began there, 373 of them have taken place under the Obama Administration. *Id.*

171. Becker & Shane, *supra* note 49.

172. Alan Rusbridger, *The Snowden Leaks and the Public*, N.Y. REV. (Nov. 21, 2013), <http://www.nybooks.com/articles/2013/11/21/snowden-leaks-and-public>.

173. David Cole, 'We Kill People Based on Metadata,' N.Y. REV. (May 10, 2014, 10:12 AM), <http://www.nybooks.com/daily/2014/05/10/we-kill-people-based-metadata/>.

174. Ross, *supra* note 169, at 109.

175. AMNESTY INT'L, *supra* note 4, at 18, 21; Jon Boone, *US Drone Strikes Could Be Classed as War Crimes*, *Says Amnesty International*, GUARDIAN (Oct. 22, 2013), <https://www.theguardian.com/world/2013/oct/22/amnesty-us-officials-war-crimes-drones>. The United States has yet to acknowledge its role in her death or compensate the family. AMNESTY INT'L, *supra* note 4, at 7.

witnessed her death and, despite their own injuries, rushed to help.¹⁷⁶ Almost all of the grandchildren, even those standing as far as one hundred feet away, were injured—including three-year-old Safdar, who fell ten feet from the roof, fracturing bones in his chest and shoulders.¹⁷⁷ “There was a very bad smell” in the air, recalled one grandchild.¹⁷⁸

While the injured children were in the process of retrieving their grandmother’s body parts, another missile struck, approximately nine feet from the initial blast.¹⁷⁹ Had Mamana Bibi’s grandchildren not been aware of secondary strikes, it is likely that a worse fate would have befallen them; the second strike injured only one grandchild, who suffered a shrapnel gash to the thigh.¹⁸⁰ In total, nine people were injured in the two strikes, which occurred within a “few minutes” of each other, and large portions of the family home were rendered uninhabitable.¹⁸¹ According to Pakistani intelligence, “[A] local Taliban fighter had used a satellite phone on a road close to where Mamana Bibi was killed about 10 minutes before the strike, and then drove away.”¹⁸² Top secret Powerpoint slides produced by the U.S. intelligence community indicate that in the Kunar of province of Afghanistan, also along the Afghanistan–Pakistan border and no more than 150 miles from North Waziristan, nearly ninety percent of “people who died in airstrikes were not . . . direct targets.”¹⁸³

As UN Special Rapporteur Christof Heyns has noted, “If a signature strike rests on ‘targeting without sufficient information to make the necessary determination, it is clearly unlawful.’”¹⁸⁴ Although every double-tap drone strike is characterized by unique factual circumstances, including whether those who rush to the scene—or those who are initially targeted—are civilians or militants with a continuous combat function, generalities can be made. In general, the second and third rounds of double-tap drone strikes occur within five to thirty minutes of each other.¹⁸⁵ At issue is whether, in that time, drone operators have enough time to perform intelligence-gathering operations that allow them to determine with “near certainty” first, which first responders are militants with a “continuous combat function” and second, whether a second or

176. AMNESTY INT’L, *supra* note 4, at 18–20.

177. *Id.* at 20.

178. *Id.* at 19.

179. *Id.* at 19–20.

180. *See id.* at 20.

181. *Id.* One grandchild recounted, “I miss my grandmother, she used to give us pocket money and took us with her wherever she went.” *Id.* at 21.

182. *Id.* at 21.

183. Devereaux, *supra* note 51.

184. Steve Coll, *The Unblinking Stare: The Drone War in Pakistan*, NEW YORKER (Nov. 24, 2014), <http://www.newyorker.com/magazine/2014/11/24/unblinking-stare>.

185. *See supra* note 3.

third strike is so militarily necessary that it would outweigh the “incidental” loss of life the strike would cause. It is important to note the relationship between these requirements: it is impossible to determine whether any given strike is proportional in relation to the foreseeable injury and death caused to noncombatants without first determining whether those foreseeably injured are combatants or noncombatants.

In the discussion above, it was shown that satisfying these requirements involves, at the least, something akin to the following process: first, the operator or intelligence officer must determine whether, for each individual, that person’s actions “adversely affect[s] the military operations . . . of a party to an armed conflict” and in such a way as to meet the required “threshold of harm”; next, the operator must determine, again for each individual, whether there is a “direct causal link between” the actions of the incidentally targeted individual “and the harm likely to result” from their actions (in this case, generally, rushing to the scene of a strike); next, the operator must determine whether the incidentally targeted individual *intends* to “directly cause the required threshold of harm” and whether the harm will be “in support of a party to the conflict and to the detriment of another.”¹⁸⁶ Finally, and relatedly, to satisfy the principle of proportionality, the operator must determine whether the incidental loss of civilian life would be outweighed by the military necessity of a second or third strike, which requires knowing to what extent the first strike was successful.

In a single personality strike, it is theoretically possible for the United States to meet these requirements. Intelligence agencies can conceivably gather enough information, through human and signals intelligence, to determine whether a targeted individual has a continuous combat functions within an armed group. Additionally, the United States can theoretically gather further intelligence demonstrating that targeting the individual is militarily necessary to prevent the individual from committing violence against the United States or its forces, the level of which is above the required threshold. Finally, given adequate surveillance, U.S. intelligence can theoretically determine the identities of individuals within the immediate vicinity of a drone strike and can then weigh whether the incidental loss of life and serious injuries that will foreseeably occur are outweighed by the military necessity of the situation.¹⁸⁷ For a signature strike based on signals intelligence, primarily

186. See *supra* text accompanying note 159.

187. Based on reports on the ground, released information regarding targeting policies and procedures, and public statements by U.S. officials, it is doubtful this procedure is carried out even for personality strikes.

metadata, meeting these requirements is much more difficult.¹⁸⁸ Obversely, the assertion that secondary or tertiary strikes on first responders, within minutes of an initial strike, are able to satisfy this strict set of requirements is simply untenable. This is aside from the fact that metadata-based double-tap strikes, like the attack on Mamana Bibi (if Pakistani intelligence is to be believed), must certainly fail to meet these requirements. And when first responders arrive often in large numbers, five to thirty minutes is an insufficient period of time to make the necessary determinations of distinction and proportionality required by international law. This is aside from the fact that officials have admitted complete lack of knowledge of the identities or even presence of people killed in drone strikes.¹⁸⁹

Against these requirements, this Note compares stated U.S. policy and facts on the ground. Regarding distinction, the U.S. policy of assuming that all military-age males in the vicinity of a drone strike are militants unless proven otherwise posthumously directly contradicts the standard under international law, namely that individuals are presumed to be civilians unless proven otherwise.¹⁹⁰ A bare assertion that large segments of the population have a continuous combat function simply by virtue of their age, gender, and location cannot possibly satisfy the requirement of distinction. If this assumption and nothing more were to guide U.S. drone usage, drone strikes would likely be per se violations of the principle of distinction. Unfortunately, U.S. reliance on this policy can be inferred from starkly contrasting reports on civilian casualties from nongovernmental

188. This is aside from the fact that metadata determinations of terrorist activity have unacceptably high levels of error. See Cora Currier & Peter Maass, *Firing Blind: Flawed Intelligence and the Limits of Drone Technology*, INTERCEPT (Oct. 15, 2015, 7:58 AM), <https://theintercept.com/drone-papers/firing-blind/> (noting that classified JSOC documents “state bluntly that SIGINT is an inferior form of intelligence”); Adam Entous et al., *American, Italian Hostages Killed in CIA Drone Strike in January*, WALL ST. J. (Apr. 23, 2015, 8:43 PM), <http://www.wsj.com/articles/american-italian-hostages-killed-in-cia-drone-strike-in-january-1429795801> (noting that in a drone strike mistakenly killing American and Italian hostages, “[t]he intelligence that underpinned the drone strike turned out to have been tragically incomplete”); Scott Shane, *Drone Strikes Reveal Uncomfortable Truth: The U.S. Is Often Unsure About Who Will Die*, N.Y. TIMES (Apr. 23, 2015), https://www.nytimes.com/2015/04/24/world/asia/drone-strikes-reveal-uncomfortable-truth-us-is-often-unsure-about-who-will-die.html?_r=0. Furthermore, the fact that people can easily pass phones around means that a phone that is targeted based on metadata might not necessarily belong to a person scheduled for death.

189. See Shane, *supra* note 188 (“Military and intelligence officials said they did not know that the teenagers were present when they took a shot at a Qaeda operative who, it turned out, was not there. But such admissions, in the rare cases that officials were willing to discuss, undercut their argument that in most cases they were confident that they were killing only dangerous militants.”).

190. MELZER, *supra* note 53, at 75–76.

organizations (NGOs) and the U.S. government.¹⁹¹ Assertions by U.S. officials that there have been minimal civilian casualties, compared with widespread reports by NGOs of high civilian casualties,¹⁹² imply that the United States is likely operating under a different categorization process than NGOs.

Regarding proportionality, in terms of military necessity, the U.S. definition of “imminent threat” is troublingly broad: “The evaluation of whether an individual presents an ‘imminent threat’ incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States.”¹⁹³ As noted by Jeanne Mirer, such a definition could “amount to a preemptive strike.”¹⁹⁴ Aside from this, the assertion that second and third strikes are necessary to ensure that targeted individuals are so incapacitated as to no longer be a threat is difficult to maintain. After a successful first strike, the requirement of military necessity must necessarily be more difficult to meet, since the death or (temporary or permanent) incapacitation of the initially targeted individuals may have, and might even be likely to have, occurred. This occurrence, for example, is a characteristic of each of the double-tap strikes discussed in this Note. The requirement of proportionality also weighs against second and third strikes in cases where large numbers of first responders arrive after the first strike. Again, if the operating assumption is that all military-age male first responders have a continuous combat function, then the requirement that a strike be determined to be proportional must fail, since the foregoing process of determining combatant status is contrary to international law.

This Note does not attempt to prove the mens rea requirement under Article 3, Article 50, or domestic law. However, it is important to note, as shown above, that the mens rea requirement for violations of Article 3 have been likened to the mens rea requirement for “wilfull killing” under Article 2,¹⁹⁵ meaning it “includes . . . recklessness which may be likened

191. Compare Ross, *supra* note 169, at 103 (quoting CIA Director John Brennan, who stated that civilian deaths and injuries caused by drone strikes are “exceedingly rare”), with *Get the Data: Drone Wars*, BUREAU INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> (last visited Aug. 28, 2016) (estimating that as of May 21, 2016, between 424–966 civilians have been killed in Pakistan since 2004, 172–207 of them being children).

192. See Shane, *supra* note 188 (“Every independent investigation of the strikes has found far more civilian casualties than administration officials admit.”).

193. Att’y Gen. Eric Holder, Speech at the Northwestern University School of Law (Mar. 5, 2012), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>.

194. Mirer, *supra* note 62, at 152.

195. Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶ 233 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (“[T]he elements of the offence of ‘murder’ under Article 3 of the Statute are similar to those which define a ‘wilful killing’ under Article 2 of the Statute, with

to serious criminal negligence.”¹⁹⁶ Similarly, under Article 5, a “result is intended when it is the actor’s purpose, or the actor is aware that it will occur in the ordinary course of events.”¹⁹⁷ It suffices to say that double-tap drone strikes are not accidents nor are they isolated incidents, a mere bout of negligence. They are part of a broader policy of blatant disengagement with the requirements of international law.

C. Liability Under the War Crimes Act of 1996

The War Crimes Act of 1996, which Congress passed, in part to “fulfill U.S. obligations under the four Geneva Conventions of 1949,”¹⁹⁸ turned grave breaches of Common Article 3 committed by or against U.S. nationals into federal criminal offenses, whether committed inside or outside the United States.¹⁹⁹ The Act defines a “war crime” as any conduct defined as a grave breach of the Geneva Conventions of 1949.²⁰⁰ As explained below,²⁰¹ under IHL grave breaches include the type of conduct discussed: willful killing or causing serious injury in violation of Article 3.²⁰² As shown above,²⁰³ the War Crimes Act specifically mentions conspiring to kill, or the intentional or attempted killing of, persons *hors de combat*.²⁰⁴ The analysis from the previous section indicates that double-tap drone strikes are likely grave breaches of Article 3.

IV. INVESTIGATION INTO WAR CRIMES

Now that the case has been made that certain acts of violence carried out by the United States against noncombatants in Pakistan are possibly

the exception that under Article 3 of the Statute the offence need not have been directed against a ‘protected person’ but against a person ‘taking no active part in the hostilities.’”).

196. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 152 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

197. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 561 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

198. Laura M. Olson, *Prosecuting Suspected Terrorists: The “War on Terror” Demands Reminders About War, Terrorism, and International Law*, 24 EMORY INT’L L. REV. 479, 494 (2010).

199. 18 U.S.C. § 2441(a) (2012) (“Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.”). A war crime includes any conduct “which constitutes a grave breach of common Article 3.” *Id.* § 2441(c)(3).

200. *Id.* § 2441(c)(1).

201. See *infra* text accompanying note 211.

202. Article 50, *supra* note 55.

203. See *supra* text accompanying note 135.

204. 18 U.S.C. § 2441(d)(1)(D).

war crimes, it is appropriate to discuss the obligations of the international community and of the United States itself toward holding those responsible to account.

A. *International Investigation Pursuant to Article 49*

While the text of Common Article 3 does not explicitly state that violations incur criminal liability, “the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches.”²⁰⁵ Additionally, Article 49 requires states “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.”²⁰⁶ Furthermore, according to the United Nations, “if a targeted killing violates IHL (by, for example, targeting civilians who were not ‘directly participating in hostilities’), then regardless of who conducts it . . . the author, as well as those who authorized it, can be prosecuted for war crimes.”²⁰⁷ Furthermore, it is a moral and legal imperative that those who commit war crimes be held responsible.²⁰⁸ Customary international law holds that the “failure to investigate and . . . punish . . . violations of the right to life in itself constitutes a violation of that right.”²⁰⁹ This accountability depends on access to information in the hands of those who may be responsible for the violations.

Article 50 of the First Geneva Convention of 1949 states that grave breaches are acts of “wilfull killing . . . including . . . wilfully causing great suffering or serious injury to body or health” “against persons . . . protected by the Convention.”²¹⁰ Article 49 imposes an obligation on contracting parties to

search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also . . . hand such persons over for trial

205. Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 128 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); *see also* Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Judgment, ¶ 228 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003) (“[I]t appears from the jurisprudence that [C]ommon Article 3 of the Statute entails individual criminal responsibility.”).

206. Article 49, *supra* note 14.

207. Alston, *supra* note 95, ¶ 72.

208. Heyns, *supra* note 2, ¶ 95.

209. *Id.*

210. Article 50, *supra* note 55.

to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.²¹¹

According to Ben Emmerson, the UN Special Rapporteur on Human Rights and Counter-Terrorism, liability for double-tap drone strikes cannot be determined from the currently available data.²¹² His recommendation is that

users of targeted killing technology should be required to subject themselves, in the case of each and every death, to impartial investigation. If they do not establish a mechanism to do so, it will be my recommendation that the UN should put the mechanisms in place through the Human Rights Council, the General Assembly and the Office of the High Commissioner.²¹³

In 2013, the Turkel Commission,²¹⁴ formed to investigate the *Mavi Marmara* incident, released a report suggesting that a fact-finding mission “must take place in any case in which there have been, or appear to have been, civilian casualties that were not anticipated when the attack was planned.”²¹⁵ Importantly, a *prima facie* suspicion that a war crime was committed is not needed to trigger this requirement.²¹⁶ Because the United States has maintained that its drones do not strike unless there is “near-certainty that no civilians will be killed or injured,” a UN report notes that for U.S. drone strikes, a “preliminary fact-finding investigation would appear to be triggered whenever there is evidence to suggest civilian loss of life.”²¹⁷

If such a fact-finding mission reveals evidence that “discloses reasonable grounds to suspect that a war crime may have been committed, a formal criminal investigation must be opened.”²¹⁸ In the case of double-tap drone strikes, much of the information that could point to the

211. Article 49, *supra* note 14.

212. Terri Judd, *US ‘Should Hand Over Footage of Drone Strikes or Face UN Inquiry,’* INDEPENDENT (Aug. 20, 2012), <http://www.independent.co.uk/news/world/asia/us-should-hand-over-footage-of-drone-strikes-or-face-un-inquiry-8061504.html>.

213. *Id.*

214. The Turkel Commission was responsible for creating a “comprehensive review of Israeli mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law.” Emmerson, *supra* note 22, ¶ 42.

215. *Id.*; accord TURKEL COMM’N, THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, at 14 (2010).

216. Emmerson, *supra* note 22, ¶ 42.

217. *Id.* ¶ 42 n. 20, ¶ 76.

218. *Id.* ¶ 43 (“Any criminal investigation must meet the core international human rights law standards of independence, impartiality, promptness, effectiveness and transparency, suitably adapted to the context.”).

commission of war crimes is classified by the U.S. government.²¹⁹ Thankfully, much of the information is also in the hands of independent investigators.²²⁰

B. *Domestic Investigation Pursuant to the War Crime Act of 1996*

Criminal investigation of a U.S. president is a fraught subject. It implicates principles of constitutionalism and federalism that form the very basis of the U.S. government and that are not implicated by criminal investigation of other members of government.²²¹ Nevertheless, a system that fails to hold leaders responsible for violations of international and domestic criminal law is not a “government of laws” but is rather a “government of men,” in which the powerful are free to break the law without fear of repercussion. A government of laws thus requires that even the highest leaders, perhaps especially the highest leaders, face repercussions for violating the law.

CONCLUSION

While there is little customary international law that deals with drones explicitly,²²² there are customary rules regarding the use of force in general and killing in particular.²²³ In response to the leaking of the existence of Israel’s targeted killing program, the Israeli Supreme Court became the first court to rule on the use of targeted killing by a sovereign military force.²²⁴ Applying IHL, the court held that, in addition to the requirements of distinction and proportionality, the Israeli government is required to operate under “strict conditions of verification,” perform a “post-killing independent investigation,” and demonstrate that “the killing was carried out so as to prevent harm to civilians.”²²⁵

Where there are credibly documented instances of double-tap drone strikes targeting rescuers, the wounded, or civilians, the United States should provide all information it has regarding those strikes to an

219. *See id.* ¶ 47.

220. *See* Ross, *supra* note 169, at 107–08 (describing the work of nongovernmental organizations on the ground in Pakistan and how they have shown massive discrepancies between civilian casualties reported by the U.S. government and the apparent reality of the civilian casualty rate).

221. *See* Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 11–12 (1997).

222. Oren Gross, *The New Way of War: Is There a Duty to Use Drones?*, 67 FLA. L. REV. 1, 14 (2015).

223. *See generally* 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 3–24 (detailing restrictions on state violence required by the principle of distinction).

224. Mirer, *supra* note 62, at 137.

225. *Id.*

independent body for investigation.²²⁶ At least one scholar has suggested that the CIA Inspector General, the U.S. Department of Defense Inspector General, and Congress should begin investigations on a specific targeted killing operation.²²⁷ Additionally, the United States should release its guidelines for signature strikes and for determining whether a target is a civilian, *hors de combat*, or is actively engaging in hostilities.²²⁸

The UN Special Rapporteur on Human Rights and Counter-Terrorism, Ben Emmerson, has suggested the following criteria for a drone strike that deserves investigation: (1) credible, multiple, or reliable allegations of civilian death or bodily injury; (2) “the number and/or proportion of civilians harmed arguably raises a reasonable suspicion that the action taken may have been unlawful”; and (3) the time and location of the attack can be verified.²²⁹ Using these criteria, it is apparent that the Obama administration’s use of double-tap drone strikes deserves an investigation into whether those strikes were legal under international law.

226. Heyns, *supra* note 2, ¶ 96 (“The first step towards securing human rights in this context is transparency about the use of drones.”).

227. Thomas Michael McDonnell, *Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists*, 44 GEO. WASH. INT’L L. REV. 243, 314 & n.308 (2012).

228. Heyns, *supra* note 2, ¶ 98 (“The various components of transparency require that the criteria for targeting and the authority that approves killings be known” (footnote omitted)).

229. Ben Emmerson (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 33–34, U.N. Doc. A/HRC/25/59 (Mar. 11, 2014).

