

Research Article

Analysing the U.S. Drone Program's Deployment of Armed Unmanned Aerial Vehicles (UAVs) for Targeted Killings Outside of National Boundaries

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Abstract

Following the 9/11 attacks, U.S. counterterrorism efforts have gradually shifted focus from Afghanistan to regions like Pakistan, Yemen, and Somalia. The deployment of armed drones in these areas to target al-Qaeda members and their affiliates has sparked a contentious international law debate. While the U.S. drone policy claims adherence to international targeting rules, the reality of operations in remote locations has led to numerous civilian casualties. With a rising toll of civilian deaths, challenges in distinguishing between combatants and non-combatants, and concerns about accountability in drone operations, the approach taken by U.S. policymakers may have misconstrued existing laws governing hostilities. The policy lacks clarity on the applicable legal framework and necessary constraints to prevent potential misuse of drone technology, fostering a perception that the U.S. administration consistently employs armed drones without transparency or accountability. Despite extensive literature on the 9/11 attacks and scholarly discussions on U.S. drone use, the alignment between rules governing targeting under international humanitarian law and

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the practical implementation of drone operations by the U.S. remains an area with limited examination in international law. Consequently, given issues related to civilian casualties, collateral damage, and potential violations of humanitarian law principles, it becomes crucial to evaluate whether U.S. targeting practices violate the law of armed conflict.

Keywords drones • distinction • targeting • proportionality • United States

Introduction

It is no secret that the 9/11 attacks³ have profoundly affected the laws and policies concerning counterterrorism measures in the United States (the U.S.).⁴ In the aftermath of the attack, the U.S. administration implemented a set of new measures and reforms to act against an enemy (al-Qaeda), which was responsible for the single largest attack on American soil.⁵ The use of unmanned aerial vehicles (UAVs) or drones to win the war against al-Qaeda and its associated forces was one such measure adopted by the U.S. administration.⁶ It is noteworthy that, following the events of 9/11, the Bush administration turned to the use of armed drones in order to target and kill members of al-Qaeda with successive American Presidents (President Obama being the first to institutionalise and normalise drones as weapons) having embraced the same policy

³ "The 9/11 Terrorist Attacks," *Naval History and Heritage Command*, September 07, 2023, <https://www.history.navy.mil/browse-by-topic/wars-conflicts-and-operations/sept-11-attack.html> (accessed May 1, 2024) - On the morning of 11 September 2001, 19 terrorists from the Islamist extreme group al-Qaeda hijacked four commercial aircraft and crashed two of them into the North and South Towers of the World Trade Center complex in New York City. A third plane crashed into the Pentagon in Arlington, Virginia. After learning about the other attacks, passengers on the fourth hijacked plane, Flight 93, fought back, and the plane crashed into an empty field in western Pennsylvania about 20 minutes by air from Washington, D.C. The Twin Towers ultimately collapsed, due to the damage from the impacts and subsequent fires. Nearly 3,000 people were killed from 93 different countries. Most of the fatalities were from the attacks on the World Trade Center. The Pentagon lost 184 civilians and servicemembers and 40 people were killed on Flight 93. It was the worst attack on American soil since the Japanese attacked Pearl Harbor in 1941.

⁴ Victor V. Ramraj, Michael Hor and Kent Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), 1.

⁵ Ibid.

⁶ Peter L. Bergen and Daniel Rothenberg, eds., *Drone Wars: Transforming Conflict, Law, and Policy* (Cambridge: Cambridge University Press, 2015), 254.

even more aggressively.⁷

While the Bush administration, in its attempt to battle terrorism, emphasised heavily on an international military campaign against al-Qaeda (Global War on Terror), the Obama administration particularly began by fighting a 'secretive war', relying on the use of armed drones to dismantle terrorist networks across the globe that pose a threat to American security.⁸ Consequently, the increased use of drones, initiated by the Obama administration to target and destroy al-Qaeda and its associated forces, has been continued by subsequent administrations in response to global terrorism threats. This approach remains central to U.S. counterterrorism policy, despite recurrent criticism from various quarters regarding imprecise targeting and resulting civilian casualties.⁹ As per a report published in the New York Times, it is alleged that there is a wider institutional acceptance of an inevitable collateral damage during drone strikes.¹⁰ The available data is reflective of the acceptance of civilian casualties resulting from U.S. drone strikes on foreign soil. For instance, U.S. strikes in Afghanistan, Pakistan, Somalia, and Yemen from 2002 to 2020 killed between 10,000 and 17,000 people. Of these, between 800 and 1,750 are believed to have been civilians.¹¹

The August 29, 2021, drone strike conducted by the Biden administration resulted in the death of 10 innocent people, including 7 children, in Kabul, Afghanistan. This incident has once again renewed the debate on drone warfare, underscoring the failure on the part of the U.S. to minimise the unintended consequences of its counterterrorism

⁷ Alberto R. Gonzales, "Drones: The Power to Kill," *George Washington Law Review* 82, no. 1 (2013): 2.

⁸ Michael J. Boyle, "The Costs and Consequences of Drone Warfare," *International Affairs* 89, no. 1 (2013): 2.

⁹ Morris Davis, "The United States and International Humanitarian Law: Building it up, then tearing it down," *North Carolina Journal of International Law and Commercial Regulation* 39, no. 4 (2014): 17.

¹⁰ Azmat Khan, "Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes," *New York Times*, December 18, 2021, <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html> (accessed May 1, 2024).

¹¹ Sarah Kreps, Paul Lushenko and Shyam Raman, "Biden can reduce civilian casualties during US drone strikes. Here's how," *Brookings*, January 19, 2022, <https://www.brookings.edu/articles/biden-can-reduce-civilian-casualties-during-us-drone-strikes-heres-how/> (accessed May 1, 2024).

policies, namely civilian casualties resulting from drone strikes.¹² Irrespective of the question on how many strikes have been made and where, drones remain the preferred choice when it comes to counterterrorism measures as they have been found to be very effective in lethally targeting enemies and hence have been used extensively over the years by the U.S.¹³ Moreover, Obama's initial approach of supporting covert drone operations and use of drones for surveillance to destroy terrorist networks has been considered not only by members of his administration but also by his successors to be in compliance with both domestic and international laws.¹⁴ The reliance on drones to lethally target and kill terrorists and terrorist suspects is often considered to be morally justified, on the grounds of cost effectiveness and safety of American troops.¹⁵ As noted above, the U.S. administration has been deploying drones in Afghanistan, Pakistan, Yemen, and Somalia to kill terrorist suspects, although similar strikes have also been reported in other parts of the world.¹⁶

These drone operations are mostly run under the direct command of the Central Intelligence Agency (CIA) with little-to-no supervision by the U.S. Congress.¹⁷ As a consequence, the secrecy surrounding the use of drones in warfare is one of many reasons which has given rise to a debate under both international human rights law and international humanitarian law.¹⁸ Questions regarding the lawfulness of drone usage in combat situations, disputes over whether or not drone strikes are indiscriminate in

¹² Charlie Savage et al., "Newly declassified video shows US killing of 10 civilians in drone strike," *The Indian Express*, January 20, 2022, <https://indianexpress.com/article/world/us-drone-strike-kabul-declassified-video-7732820/> (accessed May 1, 2024).

¹³ Barack Obama, "Remarks by the President at the National Defense University," *National Defense University*, May 23, 2013, <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (accessed May 1, 2024).

¹⁴ Harold Hongju Koh, "The Obama Administration and International Law," *Annual Meeting of the American Society of International Law*, March 25, 2010, <https://2009-2017.state.gov/s//releases/remarks/139119.htm> (accessed May 1, 2024).

¹⁵ Boyle, "The Costs and Consequences of Drone Warfare," 2.

¹⁶ *Ibid.*

¹⁷ Boyle, "The Costs and Consequences of Drone Warfare," 2.

¹⁸ Michael W. Lewis and Emily Crawford, "Drones and Distinction: How IHL encouraged the rise of drones," *Georgetown Journal of International Law* 44, no. 3 (2013): 1129.

nature (because of the number of collateral civilian casualties being reported by the media, non-governmental organisations etc.), transparency, and accountability pertaining to the decision-making process involved in carrying out strikes and issues relating to *jus ad bellum* are a number of grounds on which the drone program has often been challenged by its critics.¹⁹

Today, the U.S. has crossed geographical boundaries and travelled to remote territories of the world with the help of drones, to seek and destroy terrorists that threaten its security and other national interests. However, the move to incorporate drones as a tool in its counterterrorism operations has only brought criticism to the U.S. administration and its policies over the years.²⁰ The use/misuse of drone technology by the U.S. in its campaign against terrorism has raised profound questions related to international law, especially in the area of rules on targeting.²¹ Nonetheless, as per the views of Former U.S. State Department Legal Adviser, Harold Koh, drone targeting practices are in full compliance with all applicable laws (principle of distinction, proportionality, etc.) and lethal operations conducted through the use of drones in remote locations has helped the U.S. in disrupting terrorist plots and dismantling core al-Qaeda networks.²²

Despite the vast literature on the 9/11 attacks and the discussion amongst scholars on the use of drones by the U.S., the compatibility between the rules on targeting under international humanitarian law and the drone operations conducted by the U.S. remains an area which is less examined under international law.²³ Therefore, in light of issues such as civilian casualties, collateral damage, violation of international humanitarian law principles, etc., that pose a challenge to the legality of drone operations, it is necessary to examine whether or not the U.S. targeting practices are in violation of the law of armed conflict. This paper, therefore, presents an overview of the development of the U.S. drone program in the aftermath of the 9/11 attacks in the backdrop of the

¹⁹ Ibid.

²⁰ Ryan J. Vogel, "Drone Warfare and Law of Armed Conflict," *Denver Journal of International Law and Policy* 39, no. 1 (2010): 102.

²¹ Ibid.

²² Koh, "The Obama Administration and International Law".

²³ Allen Buchanan & Robert O. Keohane, "Toward a Drone Accountability Regime," *Ethics & International Affairs* 29, no. 1 (2015): 19.

controversies resulting from the application and interpretation of the legal principles of *jus in bello* regarding the use of drones by the Bush and Obama administrations.

I. U.S. Drone Wars

A. Emergence of the Drone Warfare: Looking at the History of the Drone Program

The real transformation in the U.S. counterterrorism policy came immediately after 9/11, when the Bush administration authorised the CIA to use armed ‘Predator’ drones to target terrorists.²⁴ The Predator drone operates like an aeroplane which has the capability of flying in one place for hours offering surveillance and can be used to launch precision missiles to hit targets.²⁵ It is important to understand that the U.S. war against terrorism is mostly based upon the use of intelligence to target individuals who are scattered across many countries and in such a situation, the capabilities of the Predator drone have proven immensely useful to search and kill these individuals in remote corners of the world wherein deployment of troops has been either not possible or highly questionable.²⁶ Although the credit for developing the drone program as it exists today goes to the CIA, the origin of the program can be traced back to the Reagan administration.²⁷ As understood by Fuller, the current approach of the CIA towards counterterrorism measures only marks a return to a structure initially proposed by members like George W. Schultz (Secretary of State) and William J. Casey (Director of Central Intelligence) during the Reagan administration.²⁸ Both Schultz and Casey believed that terrorism could not be fought through debates and consultations. Instead, a move towards using force as a deterrent must be adopted. Schultz and Casey were of the view that the administration should consider going for pre-emptive or preventative

²⁴ Gregory S. McNeal, “Targeted Killing and Accountability,” *Georgetown Law Journal* 102, no. 3 (2014): 693.

²⁵ Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 254.

²⁶ *Ibid.*

²⁷ Christopher J. Fuller, “The Eagle Comes Home to Roost: The Historical Origins of the CIA’s Lethal Drone Program,” *Intelligence and Security Law* 30, no. 6 (2014): 5.

²⁸ *Ibid.*

armed strikes against terrorists to prevent future terrorist acts.²⁹ However, it was only after the establishment of the CIA's Counter Terrorism Center (CTC) that the use of pre-emptive force and technology became a driving force in dealing with terrorist threats.³⁰

It was only after 1986 that the idea proposed by Schultz and Casey started gathering attention when Duane Clarridge became the CTC's first director, who took it upon himself to bring a revolution within the CIA by pushing for offensive measures such as attacking terrorist safe havens preemptively.³¹ However, Clarridge's attempt of developing a pilotless drone program that could allow drones to be loaded with rockets to strike on predetermined targets never became operational.³² Notably, drones were only put to use for the purpose of battlefield surveillance during the late 80s and 90s. The idea to use armed drones to support intelligence operations was only put forward in late 2000 by Cofer Black (Head of the CIA's Counter Terrorism Center) and Richard Clarke (Chief Counter Terrorism Advisor for the National Security Council), after the Predator drone proved its effectiveness by providing conclusive evidence regarding the location of Osama bin Laden in Afghanistan.³³ After the Predator's successful mission in Afghanistan, the Air Force further modified the drone in early 2001 by adding laser guided missiles for improved targeting.³⁴ Regardless of the impact an advanced version of the Predator would have in locating and killing Osama bin Laden and other members of al-Qaeda, there was disbelief within the CIA itself vis-à-vis using armed drones in Afghanistan.³⁵ George Tenet (Head of CIA) questioned the use of drone technology for terminating terrorists by highlighting issues such as the CIA's right to use armed drones outside the control of the military, as well as authorisation and operation of the strikes.³⁶

²⁹ Fuller, "The Eagle Comes Home to Roost," 8.

³⁰ Ibid.

³¹ Fuller, "The Eagle Comes Home to Roost," 12.

³² Ibid., 15.

³³ Brian Glyn Williams, "The CIA's Covert Predator Drone War in Pakistan, 2004-2010: The History of an Assassination Campaign," *Studies in Conflict and Terrorism* 33, no. 10 (2010): 872.

³⁴ Ibid., 873.

³⁵ Williams, "The CIA's Covert Predator Drone War in Pakistan, 2004-2010," 872.

³⁶ Ibid.

He ultimately argued that the CIA had no authority to undertake covert operations involving the use of lethal force.³⁷

Following the events of 9/11, the armed version of the Predator was quickly put to use. Tenet himself proposed a response plan in which the Predator had a role of locating and killing Osama bin Laden and others. In only a week's time, there was a complete turnaround in Tenet's views over the militarised use of drones.³⁸ Tenet explained his position by stating that, 'now that we had been thrown onto a war footing, issues that had seemed intractable just days earlier suddenly seemed far less set in concrete.'³⁹ When President Bush supported the CIA drone strikes against members of al-Qaeda as part of the global war against terrorism with little or no debate on the merits of the program, the question of drone-associated risks hardly remained a concern among the people in his administration.⁴⁰ Moreover, the Authorisation for the Use of Military Force (AUMF), passed by the U.S. Congress, which authorised the President to use 'all necessary and appropriate force' against those whom he deemed responsible for the 9/11 attacks, further empowered the CIA to carry out lethal strikes against al-Qaeda.⁴¹

Taking into consideration the evolution of the drone program, the subsequent sections will now go on to discuss a major concern in relation to the use of drones, namely the issue pertaining to the decision-making process involved in selection of targets by focusing especially on personality strikes as well as signature strikes.

B. The Predator Effect: Making of Kill-List and the Issue of Accountability

Over the years, the Predator drone, in the hands of the CIA, has proved to be an indispensable tool for the U.S. administration in the fight against al-Qaeda, especially in responding to threats from terrorists who have established safe havens in remote

³⁷ Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 259.

³⁸ *Ibid.*

³⁹ Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 259.

⁴⁰ *Ibid.*

⁴¹ The Authorization for Use of Military Force 2001, sec. 2.

territories of the world.⁴² The unrestricted use of the drone technology by the CIA has provided the U.S. with a strategic advantage of greatly minimising the time-frame between identifying a potential threat which is located miles away and using deadly force against that particular threat.⁴³ However, the unrestrained manner in which drones have been used poses a serious challenge to international security and more importantly, presents a threat to the lives of people around the globe.⁴⁴

It is alleged by sectors of the media and several NGOs that drone strikes conducted by the CIA in Pakistan and elsewhere have killed individuals who are neither part of al-Qaeda nor any militant group associated with al-Qaeda and its ideology.⁴⁵ Attacks on innocent civilians have thus raised several questions over the manner in which the U.S. determines which individuals are to be targeted; therefore, critics of the drone program continue to question the process involved in identifying members of non-state armed groups from innocent civilians.⁴⁶ The Human Rights Committee has raised concerns about the U.S.'s extraterritorial use of unmanned drones for counterterrorism due to a lack of transparency and accountability, particularly regarding the legal justification and civilian casualties.⁴⁷

It should be noted that the Bush administration, within a year of the U.S. invasion of Afghanistan, realised that the war against al-Qaeda would require different tactics as

⁴² Kenneth Anderson, "Targeted Killing in U.S. Counterterrorism Strategy and Law," *Counterterrorism and American Statutory Law, a Joint Project of the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution*, 2009, <https://www.law.upenn.edu/institutes/cei/conferences/targetedkilling/papers/AndersonCounterterrorismStrategy.pdf> (accessed May 1, 2024).

⁴³ Ibid.

⁴⁴ United Nations General Assembly, "Extrajudicial, summary or arbitrary executions: note / by the Secretary-General, A/68/382," *United Nations*, September 13, 2013, <https://www.refworld.org/docid/5280b2914.html> (accessed May 1, 2024).

⁴⁵ Noam Lubell and Nathan Derejko, "A Global Battlefield? Drones and the Geographical Scope of Armed Conflict," *Journal of International Criminal Justice* 11, no. 1 (2013): 83.

⁴⁶ Ibid.

⁴⁷ United Nations Human Rights Committee, "Concluding observations on the fourth periodic report of the United States of America," *United Nations*, April 23, 2014, <http://justsecurity.org/wp-content/uploads/2014/03/UN-ICCPR-Concluding-Observations-USA.pdf> (accessed May 1, 2024).

many of the top al-Qaeda leaders had fled the battleground in Afghanistan.⁴⁸ With no major military targets left in Afghanistan, the war on terror soon became an intelligence operation, wherein the CIA took upon itself the task of identifying and tracking down al-Qaeda leaders and their associate forces with the Predator drone (the CTC maintained a 'kill-list' for the purposes of tracking down and killing al-Qaeda's top officials).⁴⁹ The 2002 Yemen attack on Al-Harethi consequently became the first drone strike against al-Qaeda outside the zone of active fighting in Afghanistan.⁵⁰ However, the decision of the U.S. administration to target terrorists through drones subsequently raised a number of questions regarding the nation's counterterrorism policy, such as who can be targeted, who approves adding names to the 'kill-list,' and who is responsible for carrying out the strikes.⁵¹

It is argued that when the CIA authorises a strike, it does so by maintaining a 'kill-list' which contains the names of high value targets.⁵² The names are added to the list through a bureaucratic process. Usually, high level intelligence information on an individual is required prior to adding a name to the list.⁵³ Once intelligence is gathered by various officials on a particular individual to add his name to the kill list, the collected data is updated and examined against the most current intelligence available. This is done to confirm whether or not the particular individual is still a part of an organised armed group.⁵⁴ After further validation takes place on the recommended names through a bureaucratic process, a team of senior officials, including top lawyers, deliberate upon the legal issues involved in going ahead with the strike.⁵⁵ If there are no objections to continuing with the strike, the decision to further recommend the names and seek approval from the President is made by the President's counterterrorism advisor. At this stage, targets are again evaluated to make sure that the information gathered is

⁴⁸ Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 262.

⁴⁹ *Ibid.*

⁵⁰ Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 262.

⁵¹ McNeal, "Targeted Killing and Accountability," 702.

⁵² *Ibid.*

⁵³ McNeal, "Targeted Killing and Accountability," 728.

⁵⁴ *Ibid.*

⁵⁵ McNeal, "Targeted Killing and Accountability," 729.

accurate, the selection procedure has been followed, and all relevant concerns have been brought forth for consideration.⁵⁶

The U.S. administration has time and again argued that lethal drone strikes targeting al-Qaeda members are well within the framework of international law.⁵⁷ According to former CIA Director, John Brennan, the process of targeting is committed to 'ensuring the individual is a legitimate target under the law; determining whether the individual poses a significant threat to U.S. interests; determining that capture is not feasible; being mindful of the important checks on our ability to act unilaterally in foreign territories; having that high degree of confidence, both in the identity of the target and that innocent civilians will not be harmed; and, of course, engaging in additional review if the al-Qaeda terrorist is a U.S. citizen.'⁵⁸ On the issue of accountability and transparency, Brennan further commented that the U.S. administration is continuously working towards setting up high standards and institutionalising its approach in a more formal manner.⁵⁹

However, to date, the U.S. administration has not made available to the public a set of formal guidelines which dictates its targeting policy in relation to drone strikes. Hence, in the absence of such a critical piece of information, it becomes difficult to analyse whether the U.S. drone strikes are compatible with international legal norms.⁶⁰ Even the document on 'written policy standards and procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities' fails to either provide a layout of the current targeting practices of the administration or justify them.⁶¹ As a result, a substantial number of questions about accountability remain

⁵⁶ Ibid.

⁵⁷ Richard Jackson and Samuel Justin Sinclair, eds., *Contemporary Debates On Terrorism* (Routledge, 2012).

⁵⁸ John O. Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy," *International Security Studies*, April 30, 2012, <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy> (accessed May 1, 2024).

⁵⁹ Ibid.

⁶⁰ McNeal, "Targeted Killing and Accountability," 703.

⁶¹ The White House-Office of the Press Secretary, "Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities," *The White House*, May 23, 2013,

unanswered, such as the extent of bureaucratic accountability, who approves names on the kill-list, whether the President or officials authorise and oversee attacks, and the President's responsibility for civilian casualties.⁶²

C. Moving from Personality Strikes to Signature Strikes

Following the success of personality strikes (kill-list strikes), the CIA persuaded President Bush during his second term to further expand the drone program and allow the CIA to target individuals (suspected terrorists) without knowing their identity.⁶³ These signature strikes 'target individuals on the basis of their observed pattern of behaviour, or signature, such as possession of explosives, travel to al-Qaeda compounds, or association with known militants.'⁶⁴ The U.S. has consistently justified conducting signature strikes in the Federally Administered Tribal Areas (FATA) of Pakistan, Yemen, and Afghanistan by arguing that such strikes are carried out on the basis of accurate intelligence, which indicates that the targeted persons' actions over a period of time had made it clear they were a threat.⁶⁵

However, the difficulty in assessing the legality of the U.S. claim with reference to signature strikes still exists since the government has classified all information on specific signature strikes.⁶⁶ In addition, the U.S. position on categorisation of the conflict with al-Qaeda (non-international armed conflict) along with issues of abiding by the principles of distinction and proportionality further complicate the matter.⁶⁷ According to Heller, the U.S. considers at least 14 distinct signatures to be sufficient, in order to establish that a drone attack is lawful under international humanitarian law.⁶⁸ The 14 signatures are: (1) Planning attacks- The U.S. administration targets individuals (without

<https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> (accessed May 1, 2024).

⁶² McNeal, "Targeted Killing and Accountability," 729.

⁶³ Kristina Benson, "Kill'em and Sort it Out Later: Signature Drone Strikes and International Humanitarian Law," *Pacific McGeorge Global Business & Development Law Journal* 27, no. 1 (2014): 18.

⁶⁴ Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 267.

⁶⁵ Benson, "Kill'em and Sort it Out Later," 18.

⁶⁶ *Ibid.*

⁶⁷ Benson, "Kill'em and Sort it Out Later," 24.

⁶⁸ Kevin Jon Heller, "One Hell of a Killing Machine: Signature Strikes and International Law," *Journal of International Criminal Justice* 11, no. 1 (2013): 94.

knowing their identities) who plan an attack against the U.S.; (2) Transporting weapons- The U.S. administration also uses drones to target individuals transporting weapons; (3) Handling explosives- Signature strikes are carried out on individuals involved in handling of explosives; (4) Al-Qaeda compound- The U.S. attacks buildings that are owned or controlled for the purposes of military advantage by al-Qaeda; (5) Al-Qaeda training camp- Training camps are also the subject matter of drone strikes for the reason that they contribute towards military action, for example, providing recruits with skills that are useful during combat; (6) Military-age male in area of known terrorist activity- U.S. drone strikes have targeted individuals who are of military age and are present in an area where terrorists operate; (7) Consorting with known militants- The U.S. targets individuals who consort with known militants; (8) Armed men travelling in trucks in Al-Qaeda in the Arabian Peninsula controlled area- The U.S. targets armed men travelling in trucks in areas controlled by al-Qaeda; (9) 'Suspicious' camp in al-Qaeda controlled area- the U.S. with the help of drones has been targeting 'suspicious' camps/compounds in areas controlled by al-Qaeda; (10) Groups of armed men travelling towards conflict; (11) Operating an al-Qaeda training camp; (12) Training to join al-Qaeda; (13) Facilitators; and (14) Rest areas- The U.S. also considers rest areas (place where fighters rest) to be targetable.

It should be noted that the legality of a signature strike depends not only on the validity of the signature but also on the evidence which is capable of establishing that the targeted individual is exhibiting the particular signature behaviour.⁶⁹ In the absence of such evidence, the attacking State is required to presume that the person is a civilian.⁷⁰ As noted earlier, despite the information made available by the U.S. administration on drone usage and policy, the issue on targeting of individuals remains highly debatable. Because the information provided is incomplete and insufficient, it becomes difficult to reach a decision regarding the applicability of law to facts or intelligence claims.⁷¹

⁶⁹ Ibid.

⁷⁰ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 50 (1).

⁷¹ Monika Hlavkova, "Reconstructing the Civilian/Combatant Divide: A Fresh Look at Targeting in Non-International Armed Conflict," *Journal of Conflict and Security Law* 19, no. 2 (2014): 265.

In light of the discussion above, it would not be incorrect to state that, over the last two decades, there has been an explosive growth in the use of drones by the U.S., and the same is likely to continue in the coming years.⁷² Drones certainly have changed the character of modern warfare but at the same time have presented new challenges in terms of their use and regulation vis-à-vis rules and principles of international law to the international community.⁷³ The main issue here is that drone warfare still thrives in the abstract with attacks taking place thousands of miles away in remote territories on ‘faceless’ targets based on often questionable surveillance with most of the process being hidden away from public scrutiny in the name of national security. This also highlights several ethical issues affecting the current form of the drone program.⁷⁴

In contemporary warfare, targeting non-state actors like insurgents and terrorists presents complex moral challenges. Unlike traditional warfare where combatants wear distinctive uniforms, many of these individuals blend into civilian populations, engaging in both combat and peaceful activities interchangeably.⁷⁵ Moreover, these groups often lack clear hierarchical structures, blurring the lines between political and military leadership. Adding to the complexity is the dual-use nature of many facilities and vehicles employed by these actors. These assets serve civilian purposes at one moment and are utilised for military activities the next, making it challenging to differentiate between legitimate targets and civilian infrastructure.⁷⁶ Unlike guerrilla fighters of the past, modern insurgents are deeply intertwined with civilian communities, making it extremely difficult, if not impossible, to separate combatants from non-combatants in certain contexts.⁷⁷ Governments grappling with insurgent warfare in the twenty-first century face a crucial ethical dilemma: how to effectively combat

⁷² Stuart Casey-Maslen, “Pandora’s box? Drone strikes under jus ad bellum, jus in bello and international human rights law,” *International Review of the Red Cross* 94, no. 886 (2012): 598.

⁷³ Hlavkova, “Reconstructing the Civilian/Combatant Divide,” 251.

⁷⁴ Nils Melzer, “Human Rights Implications of The Usage of Drones and Unmanned Robots in Warfare,” *European Parliament’s Subcommittee on Human Rights*, May, 2013, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET\(2013\)410220_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET(2013)410220_EN.pdf) (accessed May 1, 2024).

⁷⁵ Matthew Crosston, “Pandora’s Presumption: Drones and the Problematic Ethics of Techno-War,” *Journal of Strategic Security* 7, no. 4 (2014): 6.

⁷⁶ *Ibid.*

⁷⁷ Michael J. Boyle, “The legal and ethical implications of drone warfare,” *The International Journal of Human Rights* 19, no. 2 (2015): 121.

non-state actors while upholding the principle of distinction between combatants and civilians.⁷⁸

The Obama administration has acknowledged the above-mentioned challenges of identifying combatants in today's complex intra-state conflicts but has maintained that these difficulties should not hinder the use of drones for targeted killings.⁷⁹ They argued that drone technology enables operators to adhere to the principle of distinction by accurately distinguishing between combatants and civilians.⁸⁰ The administration claimed to prioritise distinction and proportionality, emphasising efforts to minimise civilian casualties and maintain proportionate responses in drone strikes compared to other military options. Ethically, the Obama administration argued that the drone program is humane, as it results in relatively few civilian deaths, which are considered under the principle of double effect due to the military necessity of the strikes.⁸¹

Having looked at some of the key features regarding the development of the U.S. policy on use of drones, Part II will address some of the core issues concerning the legal principles under international humanitarian law and their application and interpretation regarding the drone warfare which will also present a strong challenge to the ethical arguments in support of the usage of drone program.

II. Legality of Drone Warfare

A. Examining Drone Attacks, Casualties, and Policy under International Humanitarian Law

One of the major criticisms against the U.S. drone policy over the last two decades is related to the policy being violative of the principles of international humanitarian law.⁸² However, successive U.S. administrations have continued not only to justify their

⁷⁸ Ibid.

⁷⁹ Koh, "The Obama Administration and International Law".

⁸⁰ Ibid.

⁸¹ Boyle, "The legal and ethical implications of drone warfare," 122.

⁸² Martin S Flaherty, "The Constitution Follows The Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards," *Harvard Journal of Law & Public Policy* 38, no. 1 (2015): 26.

counterterrorism policy but have also claimed that the use of lethal force and drone strikes are well within the ambit of principles of international humanitarian law.⁸³ In view of the discussion in Part I of this paper (including recent U.S. drone strikes), it is important to examine the legality of drone strikes within the framework of international humanitarian law, particularly the law on targeting (indiscriminate attacks, proportionality, precaution, and distinction) to ascertain the lawfulness of the strikes keeping in mind the protection of civilians.⁸⁴

1. Indiscriminate Attacks

Although Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts 1977 (hereinafter, 'Additional Protocol II') does not define 'indiscriminate attacks', it is argued that the definition of this term under Article 51(4)(a) of Additional Protocol I Relating to the Protection of Victims of International Armed Conflicts 1977 (hereinafter, 'Additional Protocol I') forms part of Additional Protocol II's Article 13(2).⁸⁵ Since the rule on indiscriminate attacks is applicable to both international and non-international armed conflicts, it is crucial that the State conducting an attack clearly distinguishes military objectives from civilians and civilian objects.⁸⁶ This rule is crucial because it is highly likely (as is evident from recent U.S. drone strikes reported by the media) that while attacking members of an armed group in a given area, if the rule is not followed there is a possibility of death of innocent civilians including the destruction of that entire area.⁸⁷

⁸³ Koh, "The Obama Administration and International Law". See also, "US Democrats urge Biden to overhaul drone strike and lethal force policies," *Middle East Eye*, January 21, 2022, <https://www.middleeasteye.net/news/us-democrats-urge-biden-overhaul-drone-strike-lethal-force-policy> (accessed May 1, 2024).

⁸⁴ Shakeel Ahmad, "A Legal Assessment of the US Drone Strikes in Pakistan," *International Criminal Law Review* 13, no. 4 (2013): 925.

⁸⁵ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 51 (4) (a).

⁸⁶ International Humanitarian Law Databases, "Customary IHL Database," *International Committee of the Red Cross*, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter3_rule12 (accessed May 1, 2024).

⁸⁷ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2014).

In relation to drone strikes conducted extraterritorially by the U.S., the criticism levelled is that such strikes have resulted in large numbers of civilian casualties, raising questions over the intelligence gathered for conducting such strikes particularly and questioning whether the possibility of conducting such strikes away from populated areas was even considered by the administration.⁸⁸ Successive U.S. administrations have nevertheless argued that drone operations are lawful under international humanitarian law because not only are drones a safer alternative to traditional warfare but their use extraterritorially has always adhered to 'procedure' which is extremely rigorous, claiming that the advancement in technology has helped in making targeting operations more precise.⁸⁹

However, contrary to the above claim it is still not known publicly whether the U.S. requires 'evidence of targetability sufficient to rebut the presumption of civilian status that attaches under international humanitarian law to individuals and many kinds of objects.'⁹⁰ Further, as previously highlighted, the U.S. has been conducting drone strikes based on a number of signatures that are inconsistent with the rules on laws of war.⁹¹ Furthermore, it is still unclear what safety protocols the administration has in place to minimise loss of civilian lives while conducting drone strikes on members of an armed group who often tend to use civilian population as a shield to carry out their operations.⁹²

2. Proportionality

Like indiscriminate attacks, the principle of proportionality which is codified under Article 51(5)(b) of Additional Protocol I is also said to be part of Additional Protocol II and is applicable to all conflicts.⁹³ The drone program has been continuously referred to as a

⁸⁸ Buchanan & O. Keohane, "Toward a Drone Accountability Regime," 22.

⁸⁹ P.W. Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-first Century* (Penguin Press, 2009).

⁹⁰ *Ibid.*, 119.

⁹¹ Heller, "One Hell of a Killing Machine," 97-103.

⁹² Amos N. Guiora, "Determining a Legitimate Target: The Dilemma of the Decision-Maker," *Texas International Law Journal* 47, no. 2-3 (2012): 327.

⁹³ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 51 (4) (a).

great asset to the U.S. counterterrorism policy since 9/11. Recently, President Biden has referred to the drone program as a vital part of his ‘over the horizon’ strategy to respond to terrorist threats. His strategy can be understood by his remarks made to mark the end of war in Afghanistan wherein he stated that: ‘I firmly believe the best path to guard our safety and our security lies in a tough, unforgiving, targeted, precise strategy that goes after terror where it is today, not where it was two decades ago. That’s what’s in our national interest.’⁹⁴ Regardless of this claim that the current drone program is not only rigorous but is part of a precise strategy that also abides by the principles of proportionality in both the planning and execution of the strikes, the increased number of civilian casualties has raised considerable doubts over the overall success of the drone program.⁹⁵

It must be taken into consideration that the determination of whether a particular drone strike has met the requirements of the principle of proportionality remains highly subjective in nature.⁹⁶ Factors such as genuine military advantage, loss of future opportunity to target a high-profile terrorist, and termination of hostilities not only influence the decision-making process but also play a significant role in deciding the legality of strikes that result either in heavy losses to the civilian population or major damage to civilian objects. Therefore, it is important that both aspects (for example proportionality and ensuing military advantage) are weighed in together to assess each drone strike.⁹⁷

3. Precaution in planning and carrying out attacks

According to the International Committee of the Red Cross (ICRC), State practice establishes the precautionary principle as a customary international law norm applicable

⁹⁴ Joe Biden, “Remarks by President Biden on the End of the War in Afghanistan,” *The White House*, August 31, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/> (accessed May 1, 2024).

⁹⁵ W.J. Hennigan, “A Tragic Mistake. Botched Drone Strike in Afghanistan Raises Concerns Over Biden’s Counterterrorism Strategy,” *Time*, September 17, 2021, <https://time.com/6099377/afghanistan-drone-strike-counterterrorism/> (accessed May 1, 2024).

⁹⁶ J. Vogel, “Drone Warfare and Law of Armed Conflict,” 127.

⁹⁷ *Ibid.*

in both international and non-international armed conflicts.⁹⁸ Reducing collateral damage is central to the rule of precaution; for example, the attacking State is required to only target legitimate objectives and not civilians.⁹⁹ Whether drone strikes strictly abide by the rule of precaution remains difficult to ascertain largely due to unavailability of information in the public domain on the process involved in making a 'kill-list'. Nevertheless, the U.S. administration has always claimed that great care is taken in selecting targets and most importantly in ensuring accuracy of the strikes to limit civilian casualties (this is made possible through monitoring the target via video feed from the drone right before the strike).¹⁰⁰ Further, due to advancement in technology the missiles launched from armed drones have a smaller blast radius thereby reducing the likelihood of harm to innocent civilians.¹⁰¹

Despite the accuracy of the missiles, considerable failings have undeniably occurred by the U.S. in the conducting of drone strikes.¹⁰² Therefore, the question which drone technology presents before us is what constitutes 'all feasible precautions' and how this phrase is interpreted by the attacking State.¹⁰³ More importantly, can the surveillance and intelligence gathered be trusted when it comes to satisfying the principle of precaution given that no technology can be a reliable substitute for trained eyes on the ground.¹⁰⁴

⁹⁸ Jean-Marie Henckaerts and Louise Doswald-Beck, "Customary International Humanitarian Law Volume I: Rules," *International Committee of the Red Cross*, 2005, <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (accessed May 1, 2024). See also, Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 57 (1). – 'In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.'

⁹⁹ International Humanitarian Law Databases, "Customary IHL Database," *International Committee of the Red Cross*, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter5_rule15 (accessed May 1, 2024).

¹⁰⁰ McNeal, "Targeted Killing and Accountability," 728-729.

¹⁰¹ Casey-Maslen, "Pandora's box?," 607.

¹⁰² *Ibid.*, 533.

¹⁰³ Frederik Rose'n, "Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility," *Journal of Conflict and Security Law* 19, no. 1 (2014): 128.

¹⁰⁴ *Ibid.*

4. Distinction

Distinction is accepted as one of the fundamental principles of the law of armed conflict.¹⁰⁵ As per Article 48 Additional Protocol I, 'the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives.'¹⁰⁶ With respect to the law on targeting, it is vital that the principle of distinction is factored in for the lawful determination of the drone strike.¹⁰⁷ In other words, an individual may be lawfully targeted and killed based on their status category rather than an immediate perceived threat posed at that moment.¹⁰⁸ Under international armed conflict, the principle of distinction is therefore based upon the premise that an individual either falls into the category of a civilian or a combatant.¹⁰⁹ The term *combatant* is defined under Article 43 Additional Protocol I as an individual who is not allowed to take part in hostilities.¹¹⁰ The term 'combatant', however, is not referred to in the rules concerning non-international armed conflict, and as a result, combatant privilege is not accorded to those who take up arms against the State.¹¹¹ *Civilian*, on the other hand, is defined negatively as all non-combatants.¹¹² However, in the context of non-international armed conflict, there is uncertainty regarding the classification of individuals as combatants or civilians. This uncertainty primarily stems from differing interpretations of the clause "unless and for such time as they take a direct part in hostilities" found in Article 51(3) of Additional Protocol I.¹¹³ With regard to the rules on targeting, once a civilian takes active part in hostilities he/she can be

¹⁰⁵ International Humanitarian Law Databases, "Customary IHL Database," *International Committee of the Red Cross*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 (accessed May 1, 2024).

¹⁰⁶ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 48.

¹⁰⁷ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2011).

¹⁰⁸ *Ibid.*

¹⁰⁹ Michael N. Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements," *New York University Journal of International Law and Politics* 42, no. 3 (2010): 700.

¹¹⁰ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 43 (2).

¹¹¹ Lubell, *Extraterritorial Use of Force Against Non-State Actors*, 136.

¹¹² Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 50 (1).

¹¹³ W. Lewis and Crawford, "Drones and Distinction," 1146.

lawfully targeted.¹¹⁴ Nevertheless, States are mandated to comply with the principle of distinction when using force under international humanitarian law. For example, an attacking State can only target combatants or military objectives and not civilians or civilian objects, unless a civilian gives up the protected status by taking part in hostilities.¹¹⁵ Referring back to the drone program, the main criticism against the U.S. has been its failure to prove that the strikes meet the requirement of distinction. For example, the drone program adequately distinguishes between civilian and military targets by also taking into consideration the loss of civilian protected status by direct participation.¹¹⁶

5. Use of Artificial Intelligence (A.I.) in the Drone Program and the Evolving Battlefield

In September 2023, the U.S. Deputy Defense Secretary Kathleen Hicks gave strong indications regarding the need to modernise the U.S. drone program particularly through the use of A.I.¹¹⁷ This would be achieved by developing a number of lethal autonomous weapons systems relying on A.I. that could identify, track, and attack targets without any human intervention.¹¹⁸ As noted in the above sections, even with human oversight, the use of drones has raised significant humanitarian and human rights concerns such as respect for national sovereignty and the respect for territorial integrity under international law, compliance with the principle of distinction under international humanitarian law, and the unintended collateral damage to non-combatants.¹¹⁹ These concerns, though often raised by critics of the drone program, remain to be thoroughly addressed considering there is still no consensus on laying down clear procedures for

¹¹⁴ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 51 (3).

¹¹⁵ Andrew Clapham and Paola Gaeta, eds., *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014).

¹¹⁶ J. Vogel, "Drone Warfare and Law of Armed Conflict," 118.

¹¹⁷ Sue Halpern, "A.I. and The Next Generation of Drone Warfare," *The New Yorker*, September 15, 2023, <https://www.newyorker.com/news/news-desk/ai-and-the-next-generation-of-drone-warfare> (accessed May 1, 2024).

¹¹⁸ Brianna Rosen, "AI and the Future of Drone Warfare: Risks and Recommendations," *Just Security*, October 3, 2023, <https://www.justsecurity.org/89033/ai-and-the-future-of-drone-warfare-risks-and-recommendations/> (accessed May 1, 2024).

¹¹⁹ Rose 'n, "Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility," 128.

authorising strikes. The use of A.I. within the drone program as an innovative step is said to bring a 'game-changing shift' in the way the U.S. fights wars. However, this new technological approach poses greater, if not similar, risks to non-combatants than the conventional drones of the past, especially due to complete automation.¹²⁰ Under conventional drone warfare, it is believed that the human-machine interaction at nearly every stage of targeting ensures that only properly vetted combatants are legitimate targets. The ethical and legal concern persists regarding how artificially intelligent drones will analyse intelligence data and generate a list of targets while minimising the potential for human operators to intervene.¹²¹

Considering these concerns, during the inaugural United Nations Security Council meeting on AI in July 2023, UN Secretary-General António Guterres suggested that states should implement a 'legally binding instrument within three years to ban autonomous weapons systems that operate without human control or oversight and cannot be used in accordance with international humanitarian law.'¹²² Despite this initiative, several critical issues remain unresolved. These include determining the legal restrictions necessary to ensure autonomous weapons systems adhere to international humanitarian law. Additionally, ensuring consistent and reliable human oversight in future drone operations heavily reliant on A.I. for strike capabilities poses a significant challenge.

Conclusion

The primary issue highlighted in this paper is whether the U.S. counterterrorism policy allowing State authorities to target and kill suspected terrorists through the help of armed drones is justifiable considering the legal rules and principles applicable to conduct of armed operations. Today's global fight against terrorism heavily relies on

¹²⁰ Noah Robertson, "Replicator: An inside look at the Pentagon's ambitious drone program," *Defense News*, December 19, 2023, <https://www.defensenews.com/pentagon/2023/12/19/replicator-an-inside-look-at-the-pentagons-ambitious-drone-program/> (accessed May 1, 2024).

¹²¹ *Ibid.*

¹²² David Adam, "Lethal AI weapons are here: how can we control them?," *Nature*, April 23, 2024, <https://www.nature.com/articles/d41586-024-01029-0> (accessed May 1, 2024).

data analysis, where the distinction between combatants and civilians is determined by intelligence analysts operating remotely from the conflict zones. However, since data can be imperfect, errors may occur, potentially endangering the lives of innocent civilians. Moreover, issues like lack of adequate information about the target and the strike location raise fundamental questions on the legality and accountability of the drone operation. Yet, drone proponents have argued that because drones have greater surveillance ability and can also afford greater accuracy in operations than any other weapon, they can better prevent civilian casualties and injuries. This argument may be true to an extent, but it does not negate the fact that the accuracy factor in drone strikes still depends on human intelligence which can make mistakes. A greater concern highlighted in this paper is regarding the unregulated use of drones; for example, drones make it easier to kill without risking the lives of troops, therefore, policy makers and State authorities are more tempted to interpret the legal restrictions on who can be killed, and under what circumstances, too broadly. As detailed in this paper, the broad application of the law of armed conflict by the U.S. administration to justify covert drone operations is not only unjustified but also represents a misinterpretation of the relevant legal norms and principles.

Given that international humanitarian law imposes minimal procedural requirements beyond the obligation to take feasible precautions during military operations, the data-driven approach to combating global terrorism and concerns about accountability and misuse of drone technology underscore the need for the law to evolve to address the specifics of the U.S. drone program. In the absence of clarity on U.S. drone policy, it is required that the rules on targeting and identification of parties to the conflict are interpreted more comprehensively. To encourage this development, it is essential that the U.S. administration provides essential details about their targeting practices to the public. Furthermore, if upon scrutiny any of the standards and practices are found to be incompatible with existing laws, the U.S. should not include them as part of their counterterrorism policy. Finally, with the imminent deployment of A.I.-enabled drones on the battlefield, current regulations will likely prove inadequate unless existing laws and

standards evolve to accommodate the evolving practices of states engaged in extraterritorial drone warfare.

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