

THE LEGALITY UNDER INTERNATIONAL LAW OF TARGETED KILLINGS BY  
DRONES LAUNCHED BY THE UNITED STATES

---

Association of the Bar of the City of New York

International Law Committee

|  |                                 |
|--|---------------------------------|
| Laurence Shore, <i>Chair</i>                 | James G. Hunt                   |
| Francesca L. Fulchignoni, <i>Secretary</i>   | Jacob H. Johnston*              |
| Rory O. Millson, <i>Chair, Subcommittee*</i> | David Y. Livshiz*               |
| Laurie E. Brecher                            | Jennifer L. Permesly (Gorskie)* |
| Carolina Cardenas                            | John W. Reboul                  |
| Lauren R. Fox                                | Gandia Robertson                |
| Justin A. Fraterman*                         | Arthur W. Rovine                |
| Christian Diego Guevara                      | Anibal Sabater                  |
| Grant Hanessian                              | Liang-Ying Tan*                 |
| David A. Herman*                             | Ko-Yung Tung                    |

\*The full committee created a subcommittee, which undertook the writing of the Report for consideration by the full committee. The members of the subcommittee are indicated by an asterisk.

June 16, 2014

## TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| INTRODUCTION .....   | 1           |
| EXECUTIVE SUMMARY .....  | 3           |
| A. <i>Ius ad Bellum</i> : the Legality of the Use of Force in a Territorial State..... | 8           |
| B.    The Existence of an Armed Conflict .....   | 12          |
| C. <i>Ius in Bello</i> : International Humanitarian Law .....                          | 16          |
| FACTUAL BACKGROUND.....  | 19          |
| I.    ARMED CONFLICTS .....  | 19          |
| A.    The Conflict in Afghanistan (and Pakistan).....                                  | 20          |
| 1.    Al-Qaeda Before September 11, 2001 .....   | 20          |
| 2.    September 11, 2001 and the Invasion of Afghanistan .....                         | 23          |
| 3.    Al-Qaeda’s Migration to Pakistan .....   | 24          |
| 4.    Drone Strikes In Pakistan.....   | 28          |
| B.    Other Potential Armed Conflicts .....  | 30          |
| 1.    AQAP in Yemen .....  | 30          |
| 2.    AQI and ISIS in Iraq.....  | 35          |
| 3.    Al-Shabaab in Somalia .....  | 38          |
| 4.    AQIM in Mali .....   | 42          |
| 5.    AQIM in Libya .....  | 45          |
| II.   THE U.S. GOVERNMENT’S DISCLOSED LEGAL BASIS FOR THE DRONES CAMPAIGN .....        | 48          |
| A. <i>Ius ad Bellum</i> .....  | 48          |
| B.    The Existence of an Armed Conflict .....   | 51          |
| C. <i>Ius in Bello</i> .....   | 54          |
| LEGAL ANALYSIS.....  | 60          |
| I. <i>IUS AD BELLUM</i> .....  | 60          |
| A.    Self-Defense Against Non-State Actors .....                                      | 63          |
| B.    The Justification for Infringement on Sovereignty.....                           | 70          |
| C.    Armed Attacks by Non-State Actors .....  | 75          |
| D.    The Requirements of Necessity and Proportionality .....                          | 79          |
| E.    Anticipatory Self-Defense .....  | 84          |

|      |  |     |
|------|--|-----|
| 1.   | The Pre-Charter Regime and the Principle of Necessity .....      | 85  |
| 2.   | The UN Charter and the Concept of an “Armed Attack” .....        | 88  |
| F.   | Application to the Drones Program .....                          | 95  |
| G.   | Required Disclosure by the United States .....                   | 98  |
| II.  | THE EXISTENCE OF AN ARMED CONFLICT .....                         | 104 |
| A.   | The Illegality of Targeted Killings Under IHL .....              | 104 |
| B.   | The Legal Framework for the Existence of an Armed Conflict ..... | 106 |
| 1.   | The Applicability of Common Article 3 .....                      | 108 |
| 2.   | The Criteria for the Existence of an “Armed Conflict” .....      | 111 |
| (a)  | The “Intensity of the Conflict” .....                            | 113 |
| (b)  | Identification of the “Parties” .....                            | 115 |
| (c)  | The Alleged Territorial Nexus .....                              | 116 |
| C.   | Armed Conflict and the Drones Program .....                      | 120 |
| 1.   | Armed Conflict with Al-Qaeda .....                               | 120 |
| (a)  | September 11, 2001 .....   | 120 |
| (b)  | The Current Situation .....                                      | 122 |
| 2.   | Regional Armed Conflicts .....                                   | 130 |
| III. | <i>IUS IN BELLO</i> .....  | 135 |
| A.   | Distinction in a Non-International Armed Conflict .....          | 135 |
| 1.   | The ICRC Position on “Continuous Combat Function” .....          | 140 |
| 2.   | Reasons to Choose the ICRC Position .....                        | 143 |
| 3.   | “Civilians” and Direct Participation in Hostilities .....        | 150 |
| (a)  | Direct Participation in Hostilities .....                        | 150 |
| (b)  | For Such Time As .....   | 156 |
| 4.   | Distinction in the Drones Campaign .....                         | 160 |
| B.   | Necessity .....  | 166 |
| C.   | Proportionality .....  | 168 |
| D.   | Is There a Duty to Disclose? .....                               | 175 |
|      | APPENDIX A: TABLE OF AUTHORITIES .....                           | A-1 |
|      | APPENDIX B: GLOSSARY .....                                       | B-1 |
|      | APPENDIX C: SOURCES OF INTERNATIONAL LAW .....                   | C-1 |
|      | APPENDIX D: POLICY ARGUMENTS FOR FURTHER DISCLOSURE .....        | D-1 |

## INTRODUCTION

This Report analyzes the legality of targeted killings by drones launched by the United States in the context of current international law. In a world where States are increasingly engaged in military operations with non-State actors, targeted killings by drones and perhaps other remote means may over time become more common, and the availability of lethal drone technology is likely to spread beyond the United States. Therefore, it is essential that the legal principles applicable to targeted killings be clearly understood, within and among nations.

The legal issues are complex. We note where there is a lack of consensus as to the applicable law, and we have tried to distill the law in some but not all areas. We address current international law, including International Humanitarian Law and International Human Rights Law, but we do not suggest whether, or how, international law should evolve. Indeed, just as there is lack of consensus as to some aspects of current international law—and as to the application of that law to the limited available facts—there is no agreement on whether, or how, the law should evolve to address this new dimension in armed conflict—robotic, largely covert warfare—particularly with regard to disclosure.

To ground our analysis, we have come to certain conclusions, based on our understanding of the limited facts that have been made public. For example, since the legality of targeted killings involves initially an assessment of whether they are occurring in the context of an armed conflict (since the applicable law is quite different depending upon whether an armed conflict exists), we have had to address this mixed question of law and fact. We acknowledge there is a lack of consensus, at least in the United States, as to where armed conflicts have been and are occurring.

The Report does not address the legality of the targeted killings under domestic U.S. law. Nor does it discuss the appropriate policy that should be followed even if that policy is not prohibited by law.

However, we recognize that decisions regarding the U.S. targeted killings policy must be considered in the context of this nation's democratic process. There are serious constitutional and other implications of conducting a largely secret war, and policy issues on its wisdom and morality. Thus, this Bar Association has urged that the U.S. Government make public the legal justification of its targeted killings policy. In a 2012 letter to President Obama, Association President Carey R. Dunne said, "Given the importance and relative novelty of the drone strategy, we believe this program should be the subject of informed public discussion and that, so long as the program is in use, decisions to use drone strikes should be made with the strictest of scrutiny and in a manner best calculated to avoid collateral damage."

We are issuing this Report in the hope that it will spur public discussion of all aspects of targeted killings, including both law and policy. We believe the discussion should begin with the legal principles, and that is what we have sought to foster in the following pages with regard to international law. We urge further discussion and debate, both within the U.S. and on a global basis, and encourage further scholarship and analysis in this vital area.

## EXECUTIVE SUMMARY

This Report, prepared by the International Law Committee of the Association of the Bar of the City of New York, evaluates the legality under international law of “targeted killings” by drones launched by the United States Government.<sup>1</sup>

Six factors complicate the analysis in the Report.

*First*, there is no controlling authority for international law. Not only is there no central legislative body, but given the breadth of factors that can be considered as sources of international law, there is a profusion of “authority”. International treaties and State practice are considered the most authoritative sources of international law. We discuss the sources of international law in Appendix C. Where State practice is difficult to determine, we have found judicial decisions and scholarly writings to be helpful as a “subsidiary means” for determining the applicable rules of law. However, since the scholarly writings on this topic are often based on non-legal policy choices (such as the wisdom and/or effectiveness of drones or the desirability of more transparency), we have devoted considerable space to identifying the actual legal issues and specifying our choices on disputed points. This Report does not take a position on important questions such as whether the drones program constitutes good public policy, is effective or is morally justifiable.

*Second*, there is no obvious international court to resolve the legality of the drone strikes under international law.<sup>2</sup> In the first place, there are obstacles to the

---

<sup>1</sup> The Report does *not* address issues of domestic U.S. law, such as the rights of U.S. citizens under the Constitution of the United States or the scope of the AUMF. (See Appendix B, *infra*, for a glossary that provides terms relevant to the analysis in the Report.) Domestic law may yield different answers as to the legality of the conduct that we address in the Report.

<sup>2</sup> Although this Report does not address domestic law, including domestic U.S. law, we are aware of the possibility of decisions on legality under international law in domestic U.S. actions (such as ATS,

jurisdiction of the ICJ over a dispute between the United States and another affected State.<sup>3</sup> In the second place, the United States vigorously disputes the jurisdiction of the ICC<sup>4</sup> and has taken steps to prevent its nationals from being prosecuted in that court.<sup>5</sup>

---

*Bivens* or *Charming Betsy* cases), *see, e.g.*, *Al-Aulaqi v. Panetta*, Civ. A. No. 12-1192, 2014 WL 1352452 (D.D.C. Apr. 4, 2014), or in foreign courts purporting to have universal jurisdiction, *see, e.g.*, Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001) (discussing purported exercise by Spanish court of universal jurisdiction over former military ruler of Chile).

<sup>3</sup> The U.S. has not generally accepted the ICJ's jurisdiction, and we assume it would not consent to jurisdiction over a particular suit by a State claiming a violation of its sovereignty. Moreover, we are unaware of any treaty that could refer a dispute on that subject matter to the ICJ for resolution. *See Jurisdiction and Treaties*, ICJ, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4>. We take no position on whether those obstacles could be overcome. As a theoretical matter, the U.S. and another State could submit a particular dispute to the ICJ by special agreement. We consider that unlikely to occur, because such an agreement would involve the U.S. consenting to the ICJ's jurisdiction over the matter, which the U.S. generally has been unwilling to do. We are aware that the UN General Assembly could submit the question of the program's legality to the ICJ for an advisory opinion, even over an objection by the U.S. *See* ICJ Statute art. 65 (providing for the ICJ to issue advisory opinions at the request of bodies authorized to do so under the UN Charter); U.N. Charter art. 96, para. 1 (providing that "[t]he General Assembly . . . may request the International Court of Justice to give an advisory opinion on any legal question."); *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 47 (July 9) (explaining that "the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion"). We do not express any view as to whether that is likely.

<sup>4</sup> The U.S. has refused to ratify the Rome Statute and disputes that the ICC should have jurisdiction over its nationals. *See* Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to the Secretary General of the U.N. (May 6, 2002), *available at* <http://2009.state.gov/r/pa/prs/ps/2002/9968.htm> (stating that "the United States does not intend to become a party" to the Rome statute). We assume the U.S. would not consent to ICC jurisdiction and that it would use its veto power in the Security Council to block any attempt by that body to refer a matter regarding U.S. nationals to the ICC. Nationals of non-parties to the Rome Statute are subject to ICC jurisdiction when they have committed a crime on the territory of a State that *has* accepted the ICC's jurisdiction, but the U.S. contends that such an exercise of jurisdiction over U.S. nationals without the consent of the U.S. would be contrary to international law. *Compare, e.g.*, David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999) (contending that subjecting U.S. nationals to ICC jurisdiction violates international law); Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROB. 13, 27 (2001) (same); Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROB. 193, 199-200 (2001) (same); with Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618, 620 (2003) (arguing that U.S. nationals legally may be subject to ICC jurisdiction); Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROB. 67, 99-103 (2001) (same). We do not seek to resolve that dispute.

<sup>5</sup> The U.S. has executed treaties with other States, purportedly in accordance with Article 98 of the Rome Statute, by which those States have agreed to refrain from referring a U.S. national to the ICC. To our knowledge, of the States in which drone strikes reportedly have taken place—Afghanistan, Pakistan, Yemen, Iraq, Somalia, Libya, and Mali—only Mali both (a) is a party to the Rome Statute, and (b) does not have such an agreement with the U.S. *See The State Parties to the Rome Statute*, ICC, [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (omitting Pakistan, Yemen, Iraq, Somalia, and Libya); U.S. DEP'T OF STATE, TREATIES IN FORCE 2, 223, 319 (2013), *available at* <http://www.state.gov/documents/organization/218912.pdf> (listing Article 98

*Third*, the terminology of international law can be confusing to the non-specialist. The Report principally addresses two different legal doctrines with similar names that have some elements with identical names—a framework that can and does often lead to confusion. *Ius ad bellum* concerns the duty of a State to refrain from using force against other States and the right of a State under certain circumstances to use force in self-defense. This doctrine addresses the infringement of the sovereignty of the territorial State. By contrast, *ius in bello* governs the use of force during an “armed conflict”. Its focus is on the legality of a drone strike as a targeted killing of a human being. We have devoted considerable space to differentiating between these doctrines.<sup>6</sup>

*Fourth*, the United States has not released a thorough statement of its position under international law.<sup>7</sup> We therefore have devoted an entire section to

---

treaties with Afghanistan, Pakistan and Yemen). Should the U.S. execute a drone strike in the territory of a State that is a party to the Rome Statute and which has not signed an Article 98 agreement with the U.S., that State could refer the issue to the ICC prosecutor for prosecution.

<sup>6</sup> To add to the confusion, *ius in bello* is also called International Humanitarian Law, which is different from International Human Rights Law, which governs the use of force against individuals during peacetime (and can have continuing applicability in an armed conflict). See Appendix B, *infra* (glossary entries on “*ius in bello*”, “IHL”, “IHRL”, “*ius ad bellum* and *ius in bello* compared”, and “*ius in bello* and IHRL compared”).

<sup>7</sup> As the President of the Association of the Bar of the City of New York noted in October 2011:

“[T]he people of the United States and its allies have received only incomplete or unofficial insights into the Government’s legal position. Over the past year and half, State Department Legal Advisor, Harold Hongju Koh, and Assistant to the President for Homeland Security and Counterterrorism, John Brennan, have delivered speeches presenting the most substantive public explanations of the Administration’s policies on legitimacy in the use of force. More recently, reports based on leaks have appeared in the media. But to date, the Administration has not offered a thorough and transparent legal analysis – the likes of which are critical for the meaningful development of the law at home and around the world.” Letter from Samuel Seymour, President of the New York City Bar Association, to Eric Holder, Attorney General of the United States (Oct. 11, 2011), *available at* [http://www2.nycbar.org/pdf/report/uploads/8\\_200721892011-10-09TaskForceletterreLawofTargettedKillings.pdf](http://www2.nycbar.org/pdf/report/uploads/8_200721892011-10-09TaskForceletterreLawofTargettedKillings.pdf).

Although there have been some additional speeches and leaks since October 2011, see Factual Background, Part II, *infra*, the Administration still has not offered a “thorough and transparent legal analysis”.

deriving the United States' legal justification for the drone strikes.<sup>8</sup> On April 21, 2014, the U.S. Court of Appeals for the Second Circuit ordered the United States to release a memorandum that reportedly details the legal basis for the targeted killings of three U.S. citizens.<sup>9</sup> Subsequently, the United States agreed to release the memorandum in redacted form,<sup>10</sup> and President Obama has made promises of increased transparency.<sup>11</sup> It is unclear whether that memorandum, once released, will provide additional insight into the United States' position on international law.<sup>12</sup>

*Fifth*, although the analysis of the legality of a drone strike is highly fact-specific, the facts surrounding the strikes are unclear. The strikes occur in what may well be armed conflicts in areas that are geographically remote and not easily accessible to

---

<sup>8</sup> See Factual Background, Part II, *infra*.

<sup>9</sup> See *New York Times Co. v. U.S. Dep't of Justice*, Nos. 13-422, 13-445, 2014 WL 1569514 (2d Cir. Apr. 21, 2014).

<sup>10</sup> See Ashley Parker, *Memo Approving Targeted Killing of U.S. Citizen to Be Released*, N.Y. TIMES, May 20, 2014, <http://www.nytimes.com/2014/05/21/us/politics/memo-approving-targeted-killing-of-us-citizen-to-be-released.html>; Karen DeYoung & Sari Horwitz, *U.S. to reveal justification for drone strikes against American citizens*, WASH. POST, May 20, 2014, [http://www.washingtonpost.com/world/national-security/us-to-reveal-justification-for-drone-strikes-against-american-citizens/2014/05/20/f607bb60-e066-11e3-8dcc-d6b7fed081a\\_story.html](http://www.washingtonpost.com/world/national-security/us-to-reveal-justification-for-drone-strikes-against-american-citizens/2014/05/20/f607bb60-e066-11e3-8dcc-d6b7fed081a_story.html).

<sup>11</sup> See President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>) (“I also believe we must be more transparent about both the basis of our counterterrorism actions and the manner in which they are carried out. We have to be able to explain them publicly, whether it is drone strikes or training partners.”).

<sup>12</sup> The court addressed only the issue of disclosure under U.S. law and did not address the legality of the drones program or any strikes, either under international or domestic law. See *New York Times Co. v. U.S. Dep't of Justice*, Nos. 13-422, 13-445, 2014 WL 1569514, at \*1 (2d Cir. Apr. 21, 2014) (“We emphasize at the outset that the Plaintiffs’ lawsuits do not challenge the lawfulness of drone attacks or targeted killings.”). The court’s decision, which was based on a theory of waiver, was premised on the notion that much of the concealed memorandum’s substance already has been made public, both in the DOJ White Paper and in statements of United States officials. See *id.* at \*12 (noting that Attorney General Eric Holder has “acknowledged the close relationship between the DOJ White Paper and [the undisclosed memorandum]”). Those disclosed materials are discussed in this Report. See Factual Background, Part II, *infra*. Moreover, since the memorandum—like the DOJ White Paper—concerns the killing of U.S. citizens, it is likely to address matters of U.S. due process law, which are outside the scope of this Report.

outsiders.<sup>13</sup> Moreover, the United States has not disclosed many facts on drone strikes, including its criteria for targeting and the consequences of the strikes.<sup>14</sup> We have therefore devoted an entire section to deriving even generalized facts on the drones program and the States in which those strikes take place.<sup>15</sup>

*Sixth*, the facts continue to develop, including because of changing attitudes by governments and ongoing violence in the armed conflicts discussed in this Report, and because of the fierce public debate involving these important issues. For example, two UN Special Rapporteurs and two NGOs issued significant reports in 2013. These reports seamlessly interweave policy issues—such as an appeal for greater transparency, the alleged ineffectiveness of the drones program and the need for compensation—with the legal issues that we address. Moreover, their focus is different than ours. Although each report contemplates that some targeted killings are legal under *ius in bello*, each report focuses on specific drone strikes as possibly illegal and calls for

---

<sup>13</sup> Amnesty International has described the difficulty of gathering information in Pakistan in light of “the remote and lawless nature of the region”—“[o]btaining reliable information about drone strikes in North Waziristan is extremely difficult due to ongoing insecurity and barriers on independent monitoring imposed by armed groups”. AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 10, 14 (2013). Similarly, Human Rights Watch has noted the “[l]ack of access to the attack areas [in Yemen], most of which are too dangerous for international media and investigators to visit, [which] makes it extremely difficult to verify casualty figures, conclusively determine how many of those killed were civilians, and learn the full circumstances of a strike.” HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 20 (2013).

<sup>14</sup> We are not alone in this observation. Amnesty International states: “The US Government’s utter lack of transparency about its drones program posed a significant research challenge. The USA refuses to make public even basic information about the program, and does not release legal or factual information about specific strikes.” AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 11 (2013). Similarly, Lubell has noted that

“the lack of transparency regarding the decision making process and the targets, and the scant information from the ground as to the consequences of the strikes, turn any attempt at assessing the legality and seeking accountability into a grueling task.” Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. INT’L CRIM. JUST. 1, 23 (2013).

<sup>15</sup> See Factual Background, Part I, *infra*.

the United States to disclose more facts so that the writer of the report can judge the legality of the strikes.<sup>16</sup> By contrast, this Report focuses on the generalized principles that would provide a framework for the United States Government to describe the rules that govern its conduct and for others to evaluate the program's legality.<sup>17</sup> Thus, this Report provides principles that define the legality (or illegality) of drone strikes generally; it does not proceed from the assumption that we are the judge of possibly illegal strikes or from the erroneous proposition that the United States has a duty under international law to provide us with more information to discharge that responsibility.

The contours of our analysis, and our conclusions, are as follows.

A. *Ius ad Bellum: the Legality of the Use of Force in a Territorial State*<sup>18</sup>

As a threshold matter, the *ius ad bellum* inquiry depends on whether the territorial State has consented to the drone strike. If there is consent, there is no

---

<sup>16</sup> For example, Amnesty International states repeatedly that since the “US Government refuses to provide even basic information on particular strikes, including the reasons for carrying them out, Amnesty International is unable to reach firm conclusions about the context in which the US drone attacks . . . took place, and therefore their status under international law”. AMNESTY INTERNATIONAL, “WILL I BE NEXT?": US DRONE STRIKES IN PAKISTAN 8 (2013). Moreover, it states that “the continuing lack of information makes it very difficult to assess the lawfulness of individual drone strikes with complete certainty” and that “it is impossible to reach any firm assessment without a full disclosure of the facts surrounding individual attacks and their legal basis”. AMNESTY INTERNATIONAL, “WILL I BE NEXT?": US DRONE STRIKES IN PAKISTAN 50, 56 (2013). Similarly, a recent report by a UN Rapporteur selected “sample strikes” for analysis, specifically choosing strikes about which there have been allegations of civilian casualties. See Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism, *Civilian impact of remotely piloted aircraft*, ¶ 34, U.N. Doc. A/HRC/25/59 (Mar. 10, 2014) (by Ben Emmerson) (noting that one of the criteria for strikes included in his list was that “there is an allegation emanating from an apparently reliable source . . . that civilians have been killed, seriously injured or had their lives put at immediate risk”).

<sup>17</sup> There is a long-standing history of the United States providing guidance on war crimes. Thus, President Lincoln's General Order No. 100 in 1863, constituted a manual on war crimes that could be used by officers in the field. See The Lieber Code of 1863, General Order No. 100 (Apr. 24, 1863), available at <http://www.civilwarhome.com/liebercode.htm>; see also Rick Beard, *The Lieber Codes*, N.Y. TIMES, Apr. 24, 2013, <http://opinionator.blogs.nytimes.com/2013/04/24/the-lieber-codes/>; JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

<sup>18</sup> Does the use of force by the United States violate principles of *ius ad bellum* by unlawfully infringing upon the sovereignty of the State into which the drone strikes are launched? See Legal Analysis, Part I, *infra*.

infringement on sovereignty. Although a definitive answer to this factual question is impossible without access to confidential material, the publicly-available information suggests that States (with the apparent exception of Pakistan) have given their consent to U.S. drone strikes.

Given Pakistan's public statements on a lack of consent, we consider whether alternative justifications provide a legal basis for continued U.S. drone strikes in Pakistan.

Absent consent, the inquiry principally involves two provisions of the UN Charter.

The first is Article 2(4), which generally prohibits States from using force against other States, a prohibition that is a bedrock principle of Public International Law.

The second is Article 51, which preserves each State's "inherent right of individual or collective self-defense if an armed attack occurs". The contours of that right of self-defense are the subject of intense debate. We reach the following conclusions concerning the law of self-defense:

*First*, the inherent right to self-defense is available against non-State actors, such as terrorist groups, and not just against States, if there is an actual or threatened "armed attack" by the non-State actor.<sup>19</sup>

*Second*, in the exercise of the right of self-defense against a non-State actor, a State may, in appropriate circumstances, use force against that actor within the territory of another State—even if the territorial State is not responsible for the actions of the non-State actor—so long as the force is directed against the non-State actor and is not

---

<sup>19</sup> See Legal Analysis, Part I.A, *infra*.

directed at the territorial State itself.<sup>20</sup>

*Third*, acts of violence by non-State actors can rise to the level of an “armed attack” within the meaning of Article 51 if they are of sufficient scale and effect. Although not all acts of terrorism justify the use of armed force, as opposed to a law enforcement response, a single act of terrorism may constitute an “armed attack” if it is of sufficient intensity. Moreover, under some circumstances, the accumulation of smaller acts of violence committed by a non-State actor may constitute an “armed attack”.<sup>21</sup>

*Fourth*, the use of force in self-defense is constrained by the principles of necessity and proportionality. Specifically, for forcible measures directed at a non-State actor to be “necessary”, the territorial State must be either unwilling or unable to address the threat through its own efforts (or obtaining the territorial States’ consent is not feasible); and for force to be “proportional”, the scope of the use of force must bear a relationship to the scale of the armed attack or to the gravity and imminence of the continuing threat.<sup>22</sup>

*Fifth*, international law allows some leeway to use force before an armed attack has occurred, in anticipation of such an attack. The touchstone for anticipatory self-defense is whether the use of force is *necessary*, meaning that the victim State has “no choice of means” to protect itself short of the use of force. In evaluating whether there is “no choice of means”, the State may consider the imminence of attack and the nature and gravity of the threat, as well as the feasibility of effectively addressing the

---

<sup>20</sup> See Legal Analysis, Part I.B, *infra*.

<sup>21</sup> See Legal Analysis, Part I.C, *infra*.

<sup>22</sup> See Legal Analysis, Part I.D, *infra*.

threat with measures short of force.<sup>23</sup>

Based on these principles and the facts in the public record, we reach the following conclusions with regard to *ius ad bellum* as applied to the drones program:<sup>24</sup>

*First*, the terrorist attacks of September 11, 2001 constituted an “armed attack” by al-Qaeda on the U.S., giving rise to a right of armed self-defense against al-Qaeda pursuant to Article 51 of the UN Charter.

*Second*, the invasion of Afghanistan was a legitimate exercise of force in self-defense in response to the armed attacks of September 11. It was necessary, among other reasons, because the Taliban rejected U.S. demands to remove the continuing threat to the United States. It was proportional because of the severity of the September 11 attacks and the continuing threat posed by al-Qaeda.

*Third*, the September 11 attacks alone no longer supply a legal basis for additional measures taken in self-defense against al-Qaeda. The United States is no longer defending itself against those attacks. If the continued use of force is to be justified on the basis of self-defense, it must be justified by *current* “armed attacks”.

*Fourth*, we are unable to conclude whether the U.S. currently has a legitimate Article 51 claim with respect to strikes in Pakistan. The U.S. is faced with armed attacks by remnants of al-Qaeda and the Taliban from Pakistan, and it is sufficient under international law that United States armed forces *stationed abroad* (e.g., in Afghanistan) are the objects of armed attacks. We do not have sufficient facts to know, however, whether U.S. drone strikes are in defense of such armed attacks, or whether the other requirements of Article 51—such as necessity and proportionality—are met.

---

<sup>23</sup> See Legal Analysis, Part I.E, *infra*.

<sup>24</sup> See Legal Analysis, Part I.F, *infra*.

*Fifth*, the killing of Osama bin Laden in Pakistan was consistent with *ius ad bellum* principles. In his role as the operational leader of al-Qaeda, bin Laden was continuously planning armed attacks on the U.S. and on U.S. forces abroad, particularly across the border from Pakistan into Afghanistan. Infringement of Pakistani sovereignty was necessary because of the continuing danger and the U.S.’s justifiable skepticism of Pakistan’s willingness or ability to remove the threat.

*Sixth*, the use of force worldwide against organizations that are not al-Qaeda core—including any alleged “affiliates” of al-Qaeda—cannot be justified as an *ius ad bellum* matter by the attacks of September 11 alone. We do not interpret the U.S. to be taking that position, but rather to be claiming the right to use force based either on consent or on *current* threats from al-Qaeda and associated forces.

*Seventh*, if Pakistan currently denies consent to U.S. drone strikes, as it has stated publicly, the U.S. has a duty to report to the Security Council on its invocation of Article 51 with respect to those strikes.<sup>25</sup> Consistent with its prior practice, the U.S. should disclose the armed attack(s) giving rise to the right to act in self-defense and the measures that the U.S. is taking in the exercise of that right.<sup>26</sup> It does not appear that the U.S. has met its disclosure obligations under Article 51 with respect to Pakistan.

B. The Existence of an Armed Conflict<sup>27</sup>

The existence of an armed conflict determines whether *ius in bello* or

---

<sup>25</sup> To the extent that other States have consented to the use of force by the U.S., disclosure to the Security Council is not required. If, however, the U.S. initiates drone strikes in other States’ territory without their consent, the U.S. also should disclose to the Security Council its invocation of the right of self-defense with respect to those strikes.

<sup>26</sup> See Legal Analysis, Part I.G, *infra*.

<sup>27</sup> Are the drone strikes taking place in the context of an armed conflict? See Legal Analysis, Part II, *infra*.

IHRL supplies the rules for determining whether a targeted killing is lawful.

Except in extreme circumstances, a targeted killing outside of an armed conflict is almost certain to be contrary to IHRL, which guarantees to each individual the right to life. Under IHRL, an extrajudicial killing outside the context of an armed conflict is legal only if it is “proportionate”, meaning that the killing is required to protect life; and “necessary”, meaning that there are no means short of lethal force to prevent the threat to life. It is generally accepted that a targeted killing could not meet those requirements except in very rare (and perhaps only theoretical) circumstances in which it is the only means of preventing an imminent threat to life.<sup>28</sup>

Analysis of the legality of a targeted killing must therefore start with the question of whether it was undertaken in the context of an armed conflict.

Whether an armed conflict exists depends on (a) whether the violence is of sufficient “intensity” to be considered an armed conflict rather than an internal disturbance or an isolated act of violence; and (b) whether the belligerents are sufficiently organized to be identified as “parties” to an armed conflict. The evaluation of each of these criteria is a factual question driven by local circumstance.

This analysis is complicated by the rhetoric for and against the existence of a “global” armed conflict with a cohesive “al-Qaeda”. The Bush administration declared a “war on terror”, with a claimed right to strike terrorist organizations anywhere.<sup>29</sup> Although the Obama administration has abandoned the “war on terror”

---

<sup>28</sup> See Legal Analysis, Part II.A, *infra*. We interpret the U.S. position to be that the targeted killings are taking place within armed conflicts, not that they are carried out legitimately outside armed conflicts. See Factual Background, Part II.B, *infra*.

<sup>29</sup> On September 20, 2001, President Bush, in addressing a Joint Session of Congress, described the September 11 attacks as an “act of war” and declared that the United States was “at war with terrorism”:

“Our war on terror begins with al Qaeda, but it does not end there. It will not

terminology, it too claims to be in a global armed conflict against al-Qaeda and “associated forces”. On the other hand, critics claim that al-Qaeda is no longer a cohesive organization, and therefore poses little, if any, threat to the U.S., and that the U.S. in fact is attacking members of diffuse organizations having little or no connection to the organization that plotted and carried out the September 11 attacks.

Resolution of this debate would not be easy. Based on the publicly-available information, there has been an “armed conflict” between the U.S. and al-Qaeda at least from September 11, 2001 (and the ensuing military operations in Afghanistan), but whether this armed conflict involves a global conflict with “al Qaeda and associated forces” does not turn on whether there is now a unified organization—which there does not seem to be despite the use of the al-Qaeda name by several groups—but on whether the groups fighting the United States and its allies should be viewed as a combined group by analogy to the law on co-belligerency.<sup>30</sup>

We do not seek to resolve this debate. Indeed, we believe the debate should shift from whether there is a global armed conflict against a combined group to whether the U.S. is a party to *domestic* armed conflicts in different States, albeit against possibly different parties. Regardless of the existence of some “global” transnational

---

end until every terrorist group of global reach has been found, stopped and defeated.” President George W. Bush, Address to the Joint Session of 107th Congress (Sept. 20, 2001) (transcript available at <http://edition.cnn.com/2004US/091201.gen.bush.transcript>).

The Bush administration did not invoke the “war on terror” to justify its conduct as a matter of international law. Quite the reverse. The Bush Administration used this rhetoric to justify invoking inherent war powers to support its refusal to apply the 1949 Geneva Conventions to Al-Qaeda members.

<sup>30</sup> Co-belligerency is a principle of the law of neutrality, which applies in the context of international armed conflicts, and it is unsettled whether it extends to non-international armed conflicts. Although the law is unsettled, we note that there is some support in the facts and law for the existence of a transnational armed conflict between the United States and forces declaring allegiance to al-Qaeda. *See* Legal Analysis, Part II.C.1(b), *infra*.

conflict, there are now hostilities in Afghanistan (with a spill-over into Pakistan), Iraq, Yemen, Somalia, Mali and Libya—the countries where drone strikes have or may have taken place—between the Government of the State, supported by the U.S., and an organization or organizations dedicated to the overthrow of the Government. The determination of whether the hostilities in those States rise to the level of “armed conflict” must be made on a State-by-State basis, examining whether the violence is of sufficient “intensity” and whether the individual non-State organizations in those countries have the structure required to qualify as “parties” to an armed conflict.<sup>31</sup>

Although the existence of a single transnational conflict is controversial, it is generally accepted that there are and have been discrete armed conflicts in at least some of the States in which drone strikes have been carried out, at least during some periods of time. For example, U.N. Special Rapporteur Ben Emmerson has concluded that the “overwhelming majority of remotely piloted aircraft strikes have been conducted within conventional theatres of armed conflict”.<sup>32</sup> Similarly, Amnesty International and Human Rights Watch have acknowledged the existence of armed conflicts in Pakistan and Yemen.<sup>33</sup>

---

<sup>31</sup> See Legal Analysis, Part II.C.2, *infra*.

<sup>32</sup> Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 59, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

<sup>33</sup> See AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 48 (2013) (concluding that the U.S. has participated “in a number of specific armed conflicts . . . on the territory of several states” and that [t]he conflict in Afghanistan might also extend to some of the drone strikes the USA carries out in parts of Pakistan’s Tribal Areas”); HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 7, 84 (2003) (concluding that there is an armed conflict between the government of Yemen and AQAP).

C. *Ius in Bello: International Humanitarian Law*<sup>34</sup>

Whether the criteria of IHL are met requires a factual assessment concerning each strike, a task that is beyond the scope of this Report. Instead we lay out the general principles flowing from the requirements of distinction, necessity and proportionality that constitute the principles of *ius in bello*.

*First*, in the context of an armed conflict against a non-State actor, we follow the ICRC Guidance that the principle of distinction permits the United States to target and kill a member of the non-State actor’s “armed forces”, *i.e.*, a member of the armed group who performs a “continuous combat function”. We reject the view that non-international armed conflict involves only *civilians* who may be targeted only if and for such time as they “directly participate in hostilities”. Although there is no term “combatant” in the Geneva Conventions on non-international armed conflict, that does not mean that non-State armed groups who disguise themselves among the civilian population until the opportunity arises to launch an attack may achieve greater protection than State armed forces who wear uniforms and otherwise comply with the laws of war.<sup>35</sup> Rather, such persons who perform a “continuous combat function” may be targeted and killed for so long as they perform that function within the armed group.

Accordingly, the principle of *distinction* permits the United States to target and kill either a member of an armed group who is performing a “continuous combat

---

<sup>34</sup> What are the constraints imposed on the use of deadly force within an armed conflict? *See* Legal Analysis, Part III, *infra*.

<sup>35</sup> *See* Legal Analysis, Part III.A., *infra*.

function” or a member of an armed group, even if he does not perform a continuous combat function, if he is directly participating in hostilities.<sup>36</sup> In particular:

- (a) The determination of whether an individual has a continuous combat function within a non-State group or is directly participating in hostilities must be made in good faith based upon the information reasonably available, with a presumption of civilian status in cases of uncertainty. Mistaken killings do not necessarily indicate a violation of international law;
- (b) Although there is a fierce public debate over whether the United States is, in fact, targeting only individuals who have a continuous combat function or are participating directly in hostilities, resolution of that debate involves factual issues beyond the scope of this Report; and
- (c) The public debate over “kill lists” and “signature strikes” largely misses the point. The legality (or illegality) of drone strikes in an armed conflict depends on the principle of distinction described above, not on any blanket prohibition of particular nomenclatures. Thus, in an armed conflict, premeditated killing (whether or not from a kill list) is legal so long as it is directed at a legitimate target and otherwise complies with IHL. Likewise, the lawfulness of “signature strikes” depends upon whether or not the “signature” is adequate to comply with the principles of distinction and precaution. We discuss those principles further below.

*Second*, since the principle of *necessity*, which prohibits unnecessary destruction, does not require armed forces to take additional risk in order to capture rather than kill, it is likely not to have an impact on the analysis of the legality of a particular

---

<sup>36</sup> See Legal Analysis, Parts III.A.2, 3, *infra*.

As described below, the ICRC Guidance does not resolve all the issues definitively. For example, some scholars, asserting that the Guidance does not address the realities of non-international armed conflicts, argue that membership in a non-State armed group should go beyond the ICRC definition of “continuous combat function” and there is also an intense dispute over the so-called “revolving door” of civilian protection.

drone strike.<sup>37</sup>

*Third*, there are insufficient facts to reach a conclusion on the principle of *proportionality*, which balances the projected collateral damage against the perceived military advantage. Given the nearly total lack of facts about the projected collateral damage or the perceived military advantage, it is not surprising that we do not reach a conclusion on this principle. Indeed, we observe that the public debate on the principle has been largely about each individual author's policy preferences rather than international law.<sup>38</sup>

*Fourth*, beyond the disclosures required by Article 51, which concern the invocation of the right of self-defense in the *ius ad bellum* context, the United States is not required to make further disclosures on targeted killings under international law, no matter how desirable such disclosures might be as a matter of policy or ethics.<sup>39</sup> We note that disclosures to the Security Council, which we conclude are required under Article 51, might go some way to satisfying calls for greater transparency.

---

<sup>37</sup> See Legal Analysis, Part III.B., *infra*. In the *ius in bello* section, we address only the IHL principles of necessity and proportionality. Principles with the same names exist in *ius ad bellum* and IHRL, but they are distinct doctrines with their own requirements.

<sup>38</sup> See Legal Analysis, Part III.C, *infra*.

<sup>39</sup> See Legal Analysis, Part III.D, *infra*. On October 11, 2011, the President of the Association of the Bar of the City of New York sent a letter to the Attorney General of the United States requesting “information and clarification on the position of the United States Government on the law governing targeted killings”. See Letter from Samuel Seymour, President of the New York City Bar Association, to Eric Holder, Attorney General of the United States (Oct. 11, 2011), *available at* [http://www2.nycbar.org/pdf/report/uploads/8\\_200721892011-10-09TaskForceLetterreLawofTargettedKillings.pdf](http://www2.nycbar.org/pdf/report/uploads/8_200721892011-10-09TaskForceLetterreLawofTargettedKillings.pdf). Although the primary focus of this letter was the legal reasoning under the U.S. Constitution to justify the “decision to kill an American citizen”, a topic not addressed in this Report, the letter addressed disclosure more broadly as well. We discuss the policy arguments raised by this letter in Appendix D, *infra*.