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Transparency into Darkness: How the United States Use of Double-Tap Drone Strikes Violates IHL Principles of Distinction and Proportionality

John Bonino

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INTRODUCTION

Early morning on July 22, 2019, a civilian market in Idlib Syria was hit by an airstrike. Videos taken by residents shows community members and first responders scurrying through the rubble to aid and rescue anyone they can find.¹ A video taken thirty minutes after the strike shows a group of first responders carrying the lifeless body of a child, and then attempting to run for cover as they notice an aircraft returning above.² That aircraft sent a second airstrike to hit the civilian market again, adding to a cumulative death total of 39 civilians and first responders.³ This second airstrike is purposely conducted as part of a drone strike scheme known as the “double-tap”. The double-tap method involves striking an initial target, then subsequently striking the same area after first responders and rescuers arrive at the scene.⁴ Not only does this method of attack significantly increase death totals among innocent civilians worldwide, but it also deters first responders to assist drone strike victims due to fear of a second strike.⁵ Although the attack on Idlib was eventually traced to the Russian military, the United States has been using “double taps” as part of its drone strike program to target violent terrorist groups in the Middle East since at least 2012.⁶ The tactic has been called “unquestionably a war crime” by United Kingdom’s then foreign secretary in 2016 and now Prime Minister, Boris Johnson.⁷ That general statement made by Boris Johnson is supported by the international law community as a whole, as well as customary

¹ *Idlib ‘double tap’ air strike Russia says never was*, BBC (Aug. 30, 2019), <https://www.bbc.com/news/av/world-middle-east-49528495>.

² *Id.*

³ *Id.*

⁴ Kristina Benson, “Kill ‘Em and Sort It Out Later:” *Signature Drone Strikes and International Humanitarian Law*, 27 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 17, 48 (2014).

⁵ *See Id.* at 49.

⁶ Jerome Taylor, *Outrage at CIA’s deadly ‘double tap’ drone attacks*, INDEPENDENT (Sept. 26, 2012), <https://www.independent.co.uk/news/world/americas/outrage-cia-s-deadly-double-tap-drone-attacks-8174771.html>.

⁷ *Idlib ‘double tap’ air strike Russia says never was*, *supra* note 1.

International Humanitarian Law (“IHL”).⁸ Hence, the United States’ use of double-tap drone strikes violates IHL.

I. PRELIMINARY STATEMENT

IHL regulates the conduct of war, including targeted killings generally and “double tap” airstrikes specifically.⁹ IHL is legitimized and binding via acknowledgment through several codifications. Common Article 3 of the Geneva Conventions and Geneva Protocol II of 1977 apply to all parties in armed conflicts.¹⁰ Additionally, Article 52, section 1 and section 2 of Protocol I of 1977 provides general protection to civilian and civilian objects of armed attacks.¹¹ IHL establishes basic principles that have become customary international law, including the principles of distinction and proportionality.¹² Although some nations, including the United States, are not party to the Additional Protocol, a nation does not have to sign the treaty to be bound by the recognized customary international law of IHL.¹³ Intuitively, the United States and its use of double-tap airstrikes can be scrutinized under the principles of distinction and proportionality because those principles are considered customary international law.

Although the United States has never been punished for committing war crimes due to its drone strike program and use of double-tap drone strikes specifically, there was once a hope amongst humanitarian groups for more accountability when President Obama signed Executive

⁸ See Michael Plachta, *COUNCIL OF EUROPE ADOPTS RESOLUTION AND RECOMMENDATION ON DRONES AND TARGETED KILLINGS IN THE CONTEXT OF HUMAN RIGHTS AND INTERNATIONAL LAW*, 31 NO. 4 INT’L ENFORCEMENT L. REP. 136 (Parliamentary Assembly of the Council of Europe (PACE) calls on States to refrain from using procedures for targeting individuals based on mass surveillance techniques, including “double-tap strikes.”).

⁹ See Benson, *supra* note 4, at 27.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See *Id.*

Order 13732.¹⁴ The Executive Order required more transparency about the United States drone strike program by requiring annual reports on strikes, death totals of innocent civilians, and thorough investigations of reports on civilian casualties.¹⁵ However, President Trump has eradicated transparency by revoking the Executive Order.¹⁶ Although dimming the light on accountability for the United States drone strike program, the United States has still accounted for 2,243 known drone strikes under the Trump administration; 365 more drone strikes conducted than President Obama's entire eight-year presidency.¹⁷

Now with drastically less transparency, the United States seems more likely than ever to get away with targeting innocent civilians as part of its drone strike program. Given the significant uptick in the use of drone strikes by the United States' Armed Forces, it is inferable that double-tap drone strikes also are continually being carried out, leading to more civilian casualties at the hands of the United States than ever before.¹⁸ Ironically, even with less transparency it is more apparent that the double-tap tactic has been molded into the status quo of the nation's foreign policy and has virtually normalized the tragedy of using air strike technology to purposely attack innocent civilians.¹⁹ Despite the normalized use of double-tap drone strikes in United States' foreign policy, the international law community has the capability to cease the use of double-tap drone strikes in the United States' drone strike program.

The argument will be exemplified through showing that double-tap drone strikes violate two major principles of IHL. First, the use of double-tap drone strikes can be shown to violate the

¹⁴ Kelsey D. Atherton, *Trump Inherited the Drone War but Ditched Accountability*, FOREIGN POLICY (May 22, 2020), html. <https://foreignpolicy.com/2020/05/22/obama-drones-trump-killings-count/>.

¹⁵ *Id.*

¹⁶ *Trump revokes Obama rule on reporting drone strike deaths*, BBC (Mar. 7, 2019), <https://www.bbc.com/news/world-us-canada-47480207>.

¹⁷ *Id.*

¹⁸ See Steve Niva, *Trump's Drone Surge*, MERIP (Summer 2017), <https://merip.org/2018/02/trumps-drone-surge/>.

¹⁹ See Atherton, *supra* note 14.

IHL principle of distinction because the tactic of double-tapping intentionally targets non-combatants. Next, the use of double-tap drone strikes violates the IHL principle of proportionality. This will be shown by first analyzing the United States' claims of military necessity for conducting drone strikes generally, and if double-tap drone strikes can ever truly be justified as a military necessity. After establishing potential claims for a United States' military necessity for conducting double-tap drone strikes, the argument that such claims of military necessity do not outweigh the severe risks brought upon civilians will be presented. Consequently, the use of double-tap drone strikes can also be shown to violate the IHL principle of proportionality. Finally, the note will show that the international law community has recently taken stricter stances on targeted killings that put innocent lives in grave risk. This trend in international law focusing on preventing attacks on innocent civilians should also focus on the United States use of double-tap drone strikes, but President Trump pulling Executive Order 13732 has made it too difficult to truly scrutinize the United States drone strike program. If national attention on the issue of transparency could pressure the next President of the United States to reinstall transparency, then the United States use of double-tap drone strikes could potentially be terminated.

II. PRINCIPLE OF DISTINCTION

Common Article 3 provides a rudimentary framework for the minimum standards of the principle of distinction, while Additional Protocol I and Additional Protocol II supplement much of the detail.²⁰ The text of Common Article 3 does not explicitly state that violations incur criminal liability, but the United Nations has stated that those nations that conduct or authorize a targeted

²⁰ I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW XXXV (4th prtg. 2009).

killing in violation of IHL can be prosecuted for war crimes.²¹ The United States itself has codified a version of the principle of distinction in the War Crimes Act of 1996, stating any conduct constituting a grave breach of Common Article 3 is a war crime.²² The applicability of the War Crimes Act of 1996 to the United States use of double-tap drone strikes is beyond the argument made in this note. Nevertheless, the War Crimes Act shows that the United States – at least facially – formally recognizes the importance of following the principle of distinction.

Common Article 3 of the Geneva Conventions of 1949 states that in a non-international armed conflict, violence is prohibited against “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.”²³ Essentially, case law interpreting Common Article 3 has established four elements for finding a violation of the principle of distinction: (1) an armed conflict; (2) a nexus between the conflict and alleged violation; (3) targeting of noncombatants; and (4) appropriate mens rea for the war crime.²⁴

The armed conflict requirement is assumed to be met because the United States government generally has characterized its military presence in middle eastern countries to combat terrorist groups as armed conflicts.²⁵ Further, the United States Supreme Court has recognized that Common Article 3 applied to the Afghan conflict with Al-Qaeda and similar terrorist organizations.²⁶ The nexus element requires that an alleged violation be “closely related” to the

²¹ Samuel Alexander, *Double-Tap Warfare: Should President Obama Be Investigated for War Crimes?*, 69 FLA. L. REV. 261, 293 (2017).

²² War Crimes Act of 1996, 18 U.S.C. § 2441 (2012).

²³ Common Article 3 of the Geneva Conventions of 1949, note 6.

²⁴ Alexander, *supra* note 21, at 282.

²⁵ Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. & POL’Y 101, 107-08 (2010).

²⁶ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794-99 (2006).

hostilities.²⁷ The nexus element can also be assumed satisfied because the allegation of United States' double-taps violating IHL is triggered by their use in relation to combating terrorist groups.

Hence, the main areas of dispute as to whether the United States' use of double-tap airstrikes violates the principle of distinction are if the United States is targeting combatants or non-combatants, and if the appropriate mens rea is satisfied to constitute a violation under IHL. This section first explores how combatants and non-combatants are defined in IHL, and how medical personnel and innocent civilians targeted by double-tap drone strikes are considered non-combatants that are supposed to be protected under the principle of distinction. Next, the section will analyze how the United States' Armed Forces has the requisite mens rea needed to find a violation of the principle of distinction. This analysis together establishes that double-tap drone strikes violate the principle of distinction set forth in Common Article 3 because they fail to distinguish between combatants and noncombatants, and can only be conducted in a manner that necessarily establishes the mens rea requirement to constitute a breach of Common Article 3.²⁸

A. *Distinguishing Combatants and Non-combatants*

To determine if non-combatants are the target of United States' double-tap drone strikes, what constitutes a non-combatant, or a combatant must be established. Rule 3 of Customary IHL states that all members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.²⁹ Additionally, civilians are also not considered persons of an armed force granted they are not joining in the hostilities.³⁰ Therefore, medical assistants and innocent civilians effected by double-tap drone strikes cannot be considered combatants under the IHL principle of

²⁷ Alexander, *supra* note 21, at 282.

²⁸ *Id.* at 264.

²⁹ I Henckaerts, *supra* note 20, at 18.

³⁰ *See Id.* at 17.

distinction because they are not taking part in the hostilities between the United States Armed Forces and the terrorist groups claimed to be targeted.³¹

The United States has recognized this combatant and non-combatant distinction of medical personnel and civilians, by explicitly adopting the principle in its own U.S. Naval Handbook.³² IHL principle of distinction and the United States recognizes that for the United States to carry out a proper drone strike, it must target members of the armed forces and not medical personnel or civilians.³³ Despite an official recognition, the United States' use of double-tap drone strikes fails to distinguish the terrorist groups desired to be attack and medical personnel or civilians in the targeted area.

i. Medical Personnel

Both permanent medical personnel of armed forces and temporary medical personnel assisting an armed force are considered non-combatants for as long their medical assignment lasts.³⁴ Medical personnel are provided even greater protection than the ordinary civilian class because even medical personnel working permanently to assist an armed force are not considered combatants.³⁵ Therefore, permanent medical personnel to an armed force, or temporary medical personnel are not considered combatants because they are not actually taking a part of the hostilities.³⁶

³¹ *Id.* at 13.

³² The Commander's Handbook on the Law of Naval Operations, Dep't of the Navy, Office of the Chief of Naval Operations & Headquarters, U.S. Marine Corps, Department of Transp., and U.S. Coast Guard § 605 (1995).

³³ Hilly Moodrick-Even Khen, *Reaffirming the Distinction Between Combatants and Civilians: The Cases of the Israeli Army's "Hannibal Directive" and the United States' Drone Airstrikes Against Isis*, 33 ARIZ. J. INT'L & COMP. L. 765, 767 (2016).

³⁴ 1 Henckaerts, *supra* note 20, at 13.

³⁵ *See Id.*

³⁶ *See Id.*

By nature of the double-tap tactic, the subsequent drone strike of a double-tap is launched when strike rescuers and medical personnel arrive at the scene to provide aid.³⁷ It is difficult, if not impossible, to claim that the United States is able to distinguish between the protected class of medical personnel and combatants where the timing of the subsequent strike is purposely carried out when the medical personnel arrive to help the injured. Moreover, it is equally difficult for the United States to claim that the medical personnel are assisting the targeted terrorist groups in a way that eradicates their protection as non-combatants because they would be provided protection under IHL even if the medical personnel worked permanently for the terrorist groups targeted. The goal of the United States' drone strikes against terrorist groups may be to deter terroristic activity, but the double-tap deters first responders from assisting victims.³⁸ Consequently, double-tap drone strikes cause reluctance in emergency services and assistance not just for legitimate targets of the strike, but for the protect class of civilians that are necessarily impacted by the drone strike. This horrific consequence stems from the United States failure to distinguish the targeted terrorist groups in a double-tap drone strike from the medical personnel there to assist the injured that stems from the nature of the attack itself. Thus, the United States' use of double-tap drone strike does not properly distinguish between combatants and medical personnel because double-tap drone strikes naturally do not distinguish between the targeted terrorist group and the protected medical personnel that subsequently arrive on scene to provide aid.

³⁷ Benson, *supra* note 4, at 48.

³⁸ *Id.*

ii. *Protecting Civilians*

Generally, Recommendations I and II define civilians under IHL as all persons who are not members of the armed forces and/or do not take direct part in the hostilities.³⁹ Civilian villages are also provided protection from attack, as established in the Fourth Hague Convention Respecting the Laws and Customs of War on Land and Annexed Regulations (1907).⁴⁰ The importance of protecting civilians from attack and ensuring they are not targeted is the main goal of the principle of distinction in the first place.⁴¹ IHL requires that the United States in conducting its drone strike program, including double taps, attempts to distinguish between legitimate targets and civilians.⁴²

Given the amount of available data available as to the United States' drone strike program, it can hardly be argued that civilians are not necessarily harmed by drone strikes.⁴³ Whether the ability to distinguish between legitimate military targets and civilians in double-tap drone strikes is ever possible is a point of contention. Issues arise for the United States to distinguish legitimate military targets and civilians where members of terrorist groups such as the Taliban are regularly integrated with civilian populations.⁴⁴ The ability to distinguish can be even more difficult where it is hard to decipher normal civilian behaviors and suspicious behaviors.⁴⁵

³⁹ 1 Henckaerts, *supra* note 20, at 17; *See also* J. Jeremy Marsh & Scott L. Glabe, *Time for the United States to Directly Participate*, 1 VA. J. INT'L L. 13, 16–17 (2011).

⁴⁰ Moodrick-Even Khen, *supra* note 33, at 767.

⁴¹ Alexander, *supra* note 21, at 264.

⁴² Benson, *supra* note 4, at 35.

⁴³ *E.g.*, Chris Woods & Christina Lamb, *CIA Tactics in Pakistan Include Targeting Rescuers and Funerals*, THE BUREAU OF INVESTIGATIVE JOURNALISM, (Feb. 4, 2012), <https://www.thebureauinvestigates.com/stories/2012-02-04/cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals>.

⁴⁴ Benson, *supra* note 4, at 35.

⁴⁵ *See Id.* at 34 (“Individuals have also been targeted for driving a suspicious vehicle, spending time in or around certain facilities, or operating certain types of communications equipment.”).

The United States' ability to show they are at the least attempting to distinguish terrorist group members and civilians is weakened pertaining to the use of double-tap drone strikes. This burden is in distant reach for justifying the use of a double-tap drone strike because the double-tap tactic is necessarily carried out in a way which civilians are in great danger of being harmed. Although the first strike could adequately distinguish the target and civilians, the second drone strike can hardly ever. If the first drone strike in a double tap was successfully, then there would be no need for the second drone strike because the target would be compromised and the goal of the airstrike would be met. For the second drone strike to be able to distinguish between civilians and targeted terrorist groups, the operator would have to determine that the target was not hit in the first one, and that a second-strike minutes later would not only likely hit the target, but also again distinguish the target from the civilians already compromised by the aftermath of the drone strike.

Since double taps are executed in such a methodical way, where the second drone strike hits twenty-five to thirty minutes after the first, and when first responders and civilians are there to help the injured, it is irrational for the United States to justify that their operators are distinguishing the targeted terrorist group members and civilians both before the initial strike and before the subsequent strike. This argument counteracts the objective of the double-tap drone strike anyways because the double-tap is purposely conducted to methodically launch a subsequent strike at the same target, a few minutes later, no matter the specific circumstance. Therefore, there is little to no room for distinguishing targeted terrorist groups and innocent civilians by the very nature of a double-tap drone strike. Thus, it is almost impossible for the United States to justify its use of double tap airstrikes in its drone strike program to target terrorist groups because it cannot be said the subsequent drone strike adequately distinguishes between the target combatants and

military personnel arriving on scene to help the injured, or the civilians necessarily impacted in the drone strikes.

B. *Overcoming the Mens Rea Requirement*

Even if found that the United States' double tap drone strikes fails to distinguish combatants and non-combatants (civilians and medical personnel), there would not be a violation of the principle of distinction set forth in Common Article 3 if the death, damage, or injury was merely incidental to an otherwise lawful attack.⁴⁶ To find a Common Article 3 violation of an unlawful attack on civilians and civilian objects, it must be established that civilians were intentionally targeted, or it was impossible not to know civilians were being targeted.⁴⁷ Therefore, the necessary mens rea requirement to establish the United States' double tap drone strikes violate the principle of distinction is an intentional targeting of civilians.⁴⁸

The United States has a legitimate argument that it lacks intent to target civilians in carrying out its drone strike program and thus does not generally violate the principle of distinction because the United States has recently taken steps to reduce the likelihood that its support of other countries would be used to intentionally kill noncombatants.⁴⁹ As to the conflict in Yemen, the United States has required that Saudi Arabia takes better precautionary steps to ensure they are avoiding hitting civilian targets and causing disproportionate harm to civilians.⁵⁰ Additionally, Secretary of State Mike Pompeo in 2018 ensured that Saudi Arabia and the United Arab Emirates were in fact taking greater care to avoid disproportionate harm. However, given the complete lack of transparency

⁴⁶ Oona A. Hathaway, Aaron Haviland, Srinath Reddy Kethireddy, Alyssa T. Yamamoto, *Yemen: Is the U.S. Breaking the Law?*, 10 HARV. NAT'L SEC. J. 1, 41 (2019).

⁴⁷ I Henckaerts, *supra* note 20, at 25; *See also* Prosecutor v. Blaskic, Case No. IT-95-14, Judgment, 512 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

⁴⁸ Hathaway, *supra* note 46, at 41.

⁴⁹ *See Id.* at 49-50.

⁵⁰ *Id.*

about the United States' drone strike program, it is challenging to fact check Pompeo's claims.⁵¹ The United States' official stance would support its argument that the United States Armed Forces does not possess the requisite mens rea under the principle of distinction.⁵² Regardless of the United States defense as to the mens rea element of its general drone strike program, it is difficult for it to use the same defense for double-tap drone strikes.

It is difficult for the United States to claim its Armed Forces lack the requisite intent to target civilians by using double-tap drone strike because the subsequent airstrike is meant to be carried out when more civilians and medical personnel are there to assist.⁵³ Additionally, when combating terrorist groups, it is more likely that civilian property and objects are purposely attacked because terrorist groups often integrate with the civilian population they reside within.⁵⁴ At the very least, it is hard for the United States to show that it was impossible for it to know that civilians were targeted in the subsequent attack of double-tap drone strikes because targeting the same effected area where civilians necessarily are is part of the method of carrying out a successful double-tap. The United States would have a difficult time showing double-tap drone strikes are not executed intentionally to either hit the civilians around or in the civilian property, or during the subsequent strike where more non-combatants arrive on scene to assist the injured because the design of the double-tap is meant to attack during those situations. Therefore, double-tap drone strikes are carried out in a way that satisfies the mens rea requirement to show a violation of the IHL principle of distinction because the subsequent strike is intentionally carried out when it is more likely for non-combatants to be in the targeted area, assisting the injured.

⁵¹ *Id.* at 41 (“At present, there have been no public reports of such intentional or knowingly disproportionate strikes on civilians or civilian targets by U.S. forces during their operation against AQAP and ISIS.”).

⁵² *Id.* at 49-50.

⁵³ See Benson, *supra* note 4, at 48.

⁵⁴ See *Id.* at 35.

If there were enough transparency about the United States' using double-taps, it would not be difficult to show the United States Armed Forces is violating because double-taps innately do not satisfactorily distinguish between combatants and non-combatants. Without transparency, the only evidence of how the tactic is carried out by United States Armed Forces is through independent journalist investigations, inferences from other countries use of double-tap and testimonials from civilians impacted by double-taps. Therefore, more transparency would allow investigations to go further into the specific details and orders carried out by the United States Armed Forces to see if civilians in the targeted area are considered upon decisions to order a second strike. Thus, the United States' double-tap drone strike by their very nature violate the IHL principle of distinction because they are carried out in furtherance of an armed conflict against terrorist groups, a nexus between the conflict and the use of double taps is shown, it targets non-combatant civilians and medical personnel, and targets such non-combatants and/or their property intentionally.

III. MILITARY NECESSITY AND THE IHL

The IHL principle of proportionality is only satisfied if a claimed military necessity for an act can be justified despite the humanitarian risks that arise from carrying out that act in an armed conflict.⁵⁵ Generally, the greater significant and importance of the military necessity claimed, the more risk is permitted to be legitimately imposed on innocent civilians.⁵⁶ Before balancing the claimed military necessity of a double-tap drone strike and the humanitarian consequences, it is first required to determine what the United States may claim as a justifying military necessity for double-taps in the first place. This can be done by first determining what can generally justify any

⁵⁵ Michael A. Conforti, *Unharmonious Coexistence: How America's Military Obsession Has Demonstrated the Incompatibility of Weaponized Drones and Sovereignty*, 43 RUTGERS COMPUTER & TECH. L.J. 246, 265 (2017).

⁵⁶ Moodrick-Even Khen, *supra* note 33 at 781.

military necessity under Article 52 of Protocol I of 1977, and how the United States can use potential justifications for double-tap drone strikes. Potential claims of the United States' military necessity for carrying out double-taps is difficult to definitively determine due to the secrecy of the United States drone strike program. Nevertheless, inferences can be made from the fact drone strikes are typically carried out in middle eastern countries against terrorist organizations. This section explores if any potential claim of military necessity can ever justify carrying out a double-tap drone strike.

The United States only potential justification for disputing that its use of double-taps is not unlawful is that the affected civilians are necessary collateral damage that is not excessive in light of furthering its military objectives.⁵⁷ Under Article 52 of Protocol I of 1977, an armed attack is only authorized if it is directed toward a military objective and grants general protections to civilian objects.⁵⁸ Civilian objects are considered all objects that are not part of carrying out the military objective.⁵⁹ An attacker may justify an armed attack by calculating the reasonable risk imposed on civilians and find these risks do not outweigh of achievement of the justified military objective.⁶⁰ This calculation of furthering military objectives and reasonable risks is conducted so that the IHL principle of proportionality is met.⁶¹

In the context of a double-tap drone strike, the killing must be militarily necessary, and the use of force must be proportionate so that any military advantage is considered in light of expected harm to civilians in the vicinity and must carried out in a way that prevents mistakes and minimizes

⁵⁷ See 1 Henckaerts, *supra* note 20, at 29.

⁵⁸ See Benson, *supra* note 4, at 28.

⁵⁹ 1 Henckaerts, *supra* note 20, at 33.

⁶⁰ Moodrick-Even Khen, *supra* note 33, at 781.

⁶¹ Conforti, *supra* note 55, at 265.

harm to civilians.⁶² The requirement of military necessity for a double-tap is difficult to meet, particularly for the second strike, since the death or incapacitation of the initial target that could justify a drone strike is likely to have occurred in the first strike.⁶³

A. U.S. “military necessity”

Under the Obama administration, the United States justified its use of drone strikes in middle eastern counties by declaring it was in an armed conflict with Al-Qaeda, the Taliban, and associated groups.⁶⁴ John Brennan, a counter-terrorism adviser to the Obama administration, justified the administrations use of drone strikes to carry out its goals of defeating these terrorist groups by suggesting international law did not prohibit these tactics against these groups outside active battlefields, particularly where countries involved either consent or do not act against these terrorist groups themselves.⁶⁵ Despite these general justifications for drone strikes, the Obama administration never set forth a distinction between lawful and unlawful drone strikes, particularly where civilians were subject to harm.⁶⁶

The United State courts have not helped guide our foreign policy in drawing that line either. In the *Al-Aulaqi* case, the D.C district court was presented with the issue of whether federal officials can be held personally liable for their roles in drone strikes that target and kill United States citizens.⁶⁷ However, the court punted on the issue, stating the government had a broad authority to determine its own military necessity because the political question doctrine barred courts to make complex policy judgments best left to decision-making authority the political

⁶² See Plachta, *supra* note 8 (discussing targeted killings generally).

⁶³ See Alexander, *supra* note 21, at 290.

⁶⁴ See Benson, *supra* note 4, at 24.

⁶⁵ *Id.*

⁶⁶ See *US: End CIA Drone Attacks*, HUMAN RIGHTS WATCH (Dec. 19, 2011), <https://www.hrw.org/news/2011/12/19/us-end-cia-drone-attacks#>.

⁶⁷ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45 (D.D.C 2010).

branches dealing with military and foreign affairs.⁶⁸ Therefore, if the United States' claimed military necessity for double-taps is to be found as not meeting the standard required to meet the principle of proportionality, it is up to the international law community to uphold the IHL principles.

Whether or not the United States can adequately justify its "military necessity" for double-taps is uncertain since the Obama administration was never clear about how the United States distinguishes between lawful and unlawful drone strikes.⁶⁹ The Obama administration also made it difficult by publicly denying civilian harm due to its drone strikes in the face of a plethora of statistical data showing otherwise.⁷⁰ Now President Trump has perhaps made it more challenging to determine the military necessity justification for double-taps by eradicating reporting requirements per Executive Order 13732.⁷¹ The only way to determine the military necessity of the United States' use of double-taps is to draw inferences from the fact they are used as part of a full drone strike program that generally targets terrorist groups in the Middle East.⁷²

Perhaps an even more expansive rationale for the purpose of double-tap drone strikes can be shown in the subjective intent of President Trump as to combating terrorist groups. In 2015, then presidential candidate Trump stated that "the best way to combat terrorists is to take out their families".⁷³ From this statement, it could be inferred that the administration in carrying out its goals of combating terrorism, seeks to expand deterrent impacts of drone-strikes by also targeting

⁶⁸ *Id.* at 52.

⁶⁹ See *US: End CIA Drone Attacks*, *supra* note 66.

⁷⁰ Benson, *supra* note 4, at 33.

⁷¹ See *Trump revokes Obama rule on reporting drone strike deaths*, *supra* note 16.

⁷² Woods, *supra* note 43.

⁷³ See Murtaza Hussain, *Civilian Deaths in U.S. Wars Are Skyrocketing Under Trump. It May Not Be Impeachable, but It's a Crime.*, THE INTERCEPT (Oct. 2, 2019), <https://theintercept.com/2019/10/02/trump-impeachment-civilian-casualties-war/>.

family members of those affiliated with terrorist groups.⁷⁴ Whether or not this is the official United States' position as to its military necessity is unclear, and the United States may instead consider the official justification under the broad umbrella of combating terrorism. Regardless, any legitimate "military necessity" to combat terrorism in the eyes of IHL cannot rationalize targeting a subjected area a second time within only a few minutes, particularly where civilians not associated with such terrorist groups are such a significant of the attack.

Although the Trump administration has withdrawn the requirement of releasing data about dead and injured civilians due to U.S drone strikes, investigative reporting has still given glimpses into the tragic reality that such outcomes still considerably occur.⁷⁵ In 2017, civilian casualties in Iraq and Syria alone increased by more than 200 percent from 2016, with 6,000 dead civilians due to airstrikes.⁷⁶ Since there is little information about the incidents of drone strikes that occurred other than through investigative reporting, there is also little information as to how many of these civilian deaths were due to double-taps. However, it can logically be deduced that the United States is still engaging in double-tap drone strikes because known drone strikes have significantly increased under the Trump administrations, and civilian deaths have subsequently increased as well, despite less transparency about their use from the United States government.⁷⁷

It would be unreasonable to believe that despite these increases in drone attacks in the face of less transparency, the United States has suddenly pulled back the use of double-tap drone strikes despite the lack of current pressure to do so. Additionally, the United States' backed Saudi Arabian

⁷⁴ *See Id.*

⁷⁵ *See* Margaret Sullivan, *Middle East civilian deaths have soared under Trump. And the media mostly shrug.*, THE WASHINGTON POST. (Mar. 18, 2018), https://www.washingtonpost.com/lifestyle/style/middle-east-civilian-deaths-have-soared-under-trump-and-the-media-mostly-shrug/2018/03/16/fc344968-2932-11e8-874b-d517e912f125_story.html.

⁷⁶ *Id.*

⁷⁷ *Id.*

Forces have recently been severely scrutinized for several blatant uses of double-taps in Yemen.⁷⁸ The question that must necessarily be raised next is, does the United States' military necessity of combating terrorist groups by targeting not only terrorist group members, but others implicated by actual or geographical association as a form of deterrence against terrorist activity, ever justify blatantly putting innocent civilians at a greater risk of harm during a subsequent airstrike? The answer to this issue can only truly be answered by weighing the United States military necessity for conducting double-tap drone strikes against the risk of harm under the principle of proportionality.

IV. IHL PRINCIPLE OF PROPORTIONALITY

This section seeks to explore if the United States' potential claims of military necessity for conducting double-tap drone strikes can pass muster under the IHL principle of proportionality. For a double-tap drone strike to be deemed proportional, it would have to be established that the incidental loss of civilian life cause by a double-tap would be outweighed by the military necessity of subsequent airstrikes after the first.⁷⁹ This section explores both the United States interest in combating terrorism, as well as the known data showing how frequent drone strikes are used by the United States military and how often they are inaccurate in hitting legitimate targets, while putting innocent civilians in significant risk of injury and deaths. Next, this section proves that a double-tap cannot ever be consider proportional given the great risks on innocent civilians because of the great inaccuracy of the United States drone strike program generally. The United States'

⁷⁸ See Billy Van Auken, *US-backed Saudi bombing kills at least 32 civilians in Yemen*, WORLD SOCIALIST WEB SITE (Feb. 18, 2020), <https://www.wsws.org/en/articles/2020/02/18/yeme-f18.html>; and *Yemen Project Release: Attacks Causing Grave Civilian Harm*, BELLINGCAT (Sep. 2, 2019), <https://www.bellingcat.com/news/mena/2019/09/02/attacks-causing-grave-civilian-harm/>.

⁷⁹ Alexander, *supra* note 21, at 288.

interest in combating terrorism in the middle east cannot be considered proportional to the grave risk double-tap drone strikes put innocent civilian lives in.

The principle of proportionality is codified in Article 51(5)(b) of Additional Protocol I, Article 57, Protocol II, and Amended Protocol II to the Convention on Certain Conventional Weapons.⁸⁰ The intended purpose of codifying the principle of proportionality is to preserve the value of civilian lives.⁸¹ Through codification and state practice, proportionality has become a customary rule of IHL that binds all states, including the United States.⁸² Proportionality prohibits a state attack that is expected to cause incidental loss of civilian life, injury, or damage to civilians that is excessive in relation to the concrete and direct military advantage anticipated by an attack.⁸³ Therefore, the United States would only be able to justify a legitimate risk of civilian life in carrying out double-tap drone strikes if it can adequately justify its military necessity to combat terrorism to be of greater importance than the incidental impact on innocent civilians.⁸⁴

The United States' ability to justify risking innocent civilian life so it could use double-tap drone strikes also requires a determination of whether the first strike was successful as to meeting the military necessity.⁸⁵ Requirements of proportionality weigh against a double-tap if the first strike were successful in carrying out a military necessity because it would necessarily mean the second and thirds strikes are less likely to be worth the risks to civilian life.⁸⁶ Additionally, the principle of proportionality also weighs against subsequent strikes where first responders and other

⁸⁰ 1 Henckaerts, *supra* note 20, at 46.

⁸¹ Moodrick-Even Khen, *supra* note 33, at 777.

⁸² Alexander, *supra* note 21, at 273.

⁸³ See 1 Henckaerts, *supra* note 20, at 580; See also Alexander, *supra* note 21 at 295.

⁸⁴ See Moodrick-Even Khen, *supra* note 33, at 781.

⁸⁵ Alexander, *supra* note 21, at 295.

⁸⁶ *Id.*

civilians arrive after the first strike to help the injured.⁸⁷ Given the amount of known data about collateral damage from drone strikes generally and double-taps specifically, the United States' use of double-tap drone strikes cannot be considered proportional to achieving its military necessity of combating terrorism.⁸⁸

A. *U.S Disproportionality*

The United States' military advantage argument on their side of the proportionality equation as to its drone strike program is to manage risks engendered by terrorist groups such as Al-Qaeda and ISIS.⁸⁹ The United States' own Naval Handbook acknowledges the principle of proportionality and states that in considering the military advantage anticipated by its attacks, although incidental injury and collateral damage may occur, it must not be excessive.⁹⁰ Although what is "excessive" can be up for debate, what is known about the successes of the United States drone strike program and the collateral damage produced raises serious concerns as to whether a double-tap drone strike can ever be considered proportional.

When the Bureau of Investigate Journalism released its report on the United States drone strike program under the Obama administration, it showed that around 98% of victims of drone strikes are civilians, children, or "non-militants".⁹¹ Although the data now shows casualty rates are not as high as initially reported, this may be due to both the lack of transparency that came from the Obama administration about casualties prior to Executive Order 13732, and even less transparency

⁸⁷ *See Id.* at 290.

⁸⁸ Moodrick-Even Khen, *supra* note 33, at 801.

⁸⁹ *Id.* at 798.

⁹⁰ Benson, *supra* note 4, at 36-37.

⁹¹ Jack Serle, *Obama Drone Casualty Numbers A Fraction of Those Recorded by the Bureau*, THE BUREAU OF INVESTIGATIVE JOURNALISM (July 1, 2016), <https://www.thebureauinvestigates.com/stories/2016-07-01/obama-drone-casualty-numbers-a-fraction-of-those-recorded-by-the-bureau>.

about the drone strike program under the Trump administration.⁹² Regardless of the reason for casualty rates not being reported as high, United States drone strikes are still being carried out at a rapid pace and with significant subsequent casualties. In Somalia in 2016 and 2017, the United States was responsible for forty-nine drone strikes and 420 subsequent dead civilians.⁹³ In 2018 alone, the United States carried out forty-five additional drone strikes in Somalia.⁹⁴ In 2017 in Yemen, the United States was responsible 127 air strikes, eighty-six more than the second most airstrikes in one year in Yemen.⁹⁵ Although only 136 were reported dead, the proportion of airstrikes to civilian casualties of the 2017 Yemen airstrikes seem to be outliers. When looking at data from other years and other countries, there is typically several more dead per each airstrike.⁹⁶ The proportion anomaly can likely be explained by the now extreme lack of transparency in the United States reporting.⁹⁷ Furthering this logic, Afghanistan, where airstrikes from the United States are found in the thousands, report almost no casualties whatsoever.⁹⁸ As the data shows that generally the United States is ramping up its drone strike program under the Trump administration, it can be logically inferred the United States is not pulling back on the use of double-taps, thus furthering the danger civilians are already in from drone strikes generally.⁹⁹

Additionally, it is difficult to justify double taps as furthering the United States' military necessity given even less reporting to provide information about any success of drone strikes. One

⁹² See generally Jack Serle & Jessica Purkiss, *Drone Wars: The Full Data*, THE BUREAU OF INVESTIGATIVE JOURNALISM (January 1, 2017) (The Bureau of Investigate Journalism compiled all their quantitative data on drone strikes and casualty estimates in Yemen, Somalia, Pakistan, Afghanistan via spreadsheets.), <https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Hussain, *supra* note 73.

⁹⁸ Serle, *supra* note 91.

⁹⁹ See Andrew Buncombe, *Donald Trump administration orders 70 airstrikes on Yemen in a month – twice as many as 2016 total*, THE INDEPENDENT (Apr. 4, 2017), <https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-yemen-airstrikes-monthly-double-2016-obama-a7666676.html>.

out of every four killed from a United States drone strike is labeled ‘other militant’, identified with circumstantial evidence and no direct confirmation as to who the targets truly were.¹⁰⁰ Given virtually no accurate data provided by the United States’ government about successes and failures of the drone-strike program, it is even more difficult to determine if a subsequent airstrike directly attacking area when first responders and civilians arrive to assist is successful in taking out the initial target. Therefore, it is difficult for the United States to argue its military advantage is of such great importance as to require the need for double-tap airstrikes where the advantage gained by such conduct is not concrete and direct. The data provided by investigative reporting showing the inaccuracy of drone strikes in general and the collateral damage that necessary follows does not support the idea that the military advantage of combating terrorism is genuinely being met by the United States drone strike program.

One could make the argument that if the first airstrike is inaccurate, then the second strike may be necessary to ensure more likelihood of the target being hit. At that point of the argument is where the principle of proportionality must take a stand and prevent such a tactic because the effect of carrying out a questionable and inaccurate tactic to impede terrorist groups, effects innocent civilians too greatly. The already quantified collateral damage despite the lack of full access to information regarding effects of double tap airstrikes is already so great. Further, knowingly striking when civilians arrive on the scene to assist the injured is implicitly acknowledging that the collateral damage on civilian life will be directly impacted. A double-tap airstrike employed by the United States knowing it necessarily results in serious collateral damage without genuine confidence in successful results as to intended targets can hardly be considered proportional.¹⁰¹

¹⁰⁰ Moodrick-Even Khen, *supra* note 33, at 798-99.

¹⁰¹ *Id.*

Thus, such a use of double tap airstrikes employed by the United States would be prohibited by Article 51(5)(b) of Additional Protocol I, Article 57, Protocol II, Amended Protocol II to the Convention on Certain Conventional Weapons, and therefore violate the IHL principle of proportionality.¹⁰²

V. CONCLUSION

Whether or not the United States drone strike program and double-tap drone strikes specifically can be reeled in is questionable at best given the hiding of information surrounding the drone strike program under the Trump administration.¹⁰³ Although inferences can be made about the current use of double-tap airstrikes given the expanding drone strike program, little can be done in either domestic law or international law if the executive branch refuses to bring back Executive Order 13732 to ensure more transparency. Public pressure on the Obama administration about questionable drone strike tactics and deceitful statements made about drone strike use led President Obama to issue Executive Order 13732 initially.¹⁰⁴ It is possible that if public pressure can be exerted in the same on the next President of the United States, Executive Order 13732 can potentially be re-instilled so that more information about the United States drone-strike program can be known to the public. If the United States reverted to following the transparency set forth Executive Order 13732, the international law community would now be more prepared to hold the United States' accountable for violating IHL principles by using double-tap drone strikes.

Currently, the international community has taken a stricter stance against both targeted killings and drone strikes specifically. The Israeli Supreme Court was the first court to rule on the use of

¹⁰² *See Id.*

¹⁰³ *See Trump revokes Obama rule on reporting drone strike deaths, supra* note 16.

¹⁰⁴ *See Atherton, supra* note 14; *See also Woods, supra* note 43.

targeted killings by its military force in response to the leaks regarding its targeted killing program.¹⁰⁵ The Israeli Court held in addition to satisfying the principles of distinction and proportionality, the Israeli government is required to show it met strict conditions to verify the target, perform a post-killing independent investigation, and demonstrate the killing was carried out to prevent civilian harm.¹⁰⁶ More transparency as to the United States' drone strike program could lead to a similar result of the United States government being required to conduct similar thorough investigations and conduct targeted killings under the strictest of conditions only. If these conditions were forced upon the United States, it is unlikely double-tap drone strikes could ever be conducted because of their naturally inability to overcome the IHL principles of distinction and proportionality.

In response to the Russian forces executing a double-tap drone strike on *Idlib*, the United Nations Commission recommended that Russian forces cease its attack on civilians and civilian objects in accordance with their obligations under IHL, especially against medical facilities and personnel.¹⁰⁷ It also required compliance with the IHL obligation to minimize harm to the civilian population, and further cease using weapons wide wide-area effects, including those used typically in Russia's double-tap drone strikes.¹⁰⁸ Therefore, if the United States had more transparency and more information available about its own uses of double-tap drone strikes, it is likely the United Nations Commission would similarly recommend the United States forces to comply with IHL principles. Now that the international law has taken further steps to deter the use of double-tap drone strikes since they violate several of the IHL principles by their very nature, the need for the

¹⁰⁵ Jeanne Mirer, *U.S. Policy of Targeted Killing with Drones: Illegal at Any Speed*, in *DRONES AND TARGETED KILLING* 136, 137 (Marjorie Cohn ed., 2015).

¹⁰⁶ *Id.*

¹⁰⁷ Bruce Zagaris, *UN Commission of Inquiry on Syria Condemns and Calls for Halt of Atrocities Against Civilians*, 36 NO. 3 INT'L ENFORCEMENT L. REP. 89, 90 (Mar. 31, 2020).

¹⁰⁸ *Id.*

United States to be more transparent about its drone strike program is more necessary than ever to ensure the United States adheres to IHL principles. Executive Order 13732 was originally enacted due to public pressure when investigations and data showed the atrocious aftermath of drone strikes carried out by the United States.¹⁰⁹ Now that the United States' drone strike program is accomplished with even less transparency and at a more aggressive rate, it has become more embedded in the United States foreign affairs. The most efficient way to begin reeling in the United States' drone strike program, is to first shut down the use of the double-tap drone strike because it is the most difficult form of targeting killing to justify since it innately violates the IHL principles of distinction and proportionality.

¹⁰⁹ See Atherton, *supra*, note 14.