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Michael A. Newton

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## FLYING INTO THE FUTURE: DRONE WARFARE AND THE CHANGING FACE OF HUMANITARIAN LAW

### KEYNOTE ADDRESS TO THE 2010 SUTTON COLLOQUIUM

MICHAEL A. NEWTON\*

It is a delight to be here today, particularly in the presence of Professor Ved Nanda. I do hope that you realize how privileged you are to be here under his tutelage, and I salute him as one whose influence has affected both the content of the law and the character of those who have learned from him in this great law school. The discussion regarding the scope and propriety of drone warfare cannot be undertaken in isolation. Drones and the parameters of their appropriate use are very much at the forefront of the modern consciousness, and thus I think it wholly appropriate to carefully consider the best way ahead for both the legal profession and the profession of arms.

Before we consider the specifics of drone warfare, we must remember two predicate points. Firstly, the discipline of international criminal law has never been healthier as the era of accountability is irreversibly underway. While the challenges of administering justice in the midst of profound political and personal passions remain, there is no current shortage of young and inspired advocates who wish to contribute. Furthermore, they do so against the backdrop of a developed discipline. It cannot be forgotten that the discrete discipline that we term international criminal law, and that many of us teach in our law schools, has taken form and root only over the past fifteen years. Thus, any discussion of drone warfare must be cognizant of the backdrop of criminality and prosecutorial prerogatives that did not exist until relatively recently. The long list of leaders and policymakers that have been held accountable bears witness to the authority of the criminal law regime. This pool includes a rogue's gallery of political leaders and powerful personalities. Moreover, individuals at the leadership level will be those that authorize drone warfare in the future. No one is truly above the law in this modern era.<sup>1</sup>

Secondly, in my opinion, the debates over drone warfare should not be seen through an isolated lens. Drone warfare takes place against the broader backdrop of many issues. To a certain extent, the interaction of these issues clarifies where

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\* Professor of the Practice of Law, Vanderbilt University Law School, <http://law.vanderbilt.edu/newton>. While these remarks substantially follow the talk Professor Newton presented at the University of Denver's 39th annual Sutton Colloquium, the author and the editors have made some necessary changes for the print version.

1. See generally MICHAEL A. NEWTON & MICHAEL P. SCHARF, *ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN* (2008).

we are and where we are heading, but at the same time the interaction creates complexity. For example, the changing face of conflict has spawned a revision of counterinsurgency doctrine that has changed the way we define the very nature of armed conflict.

What does the very scope of the phrase “armed conflict” now mean in light of our modern experience? How does *jus in bello* interface with the established law of peace in a new era of seemingly perpetual conflict? What does it mean to achieve victory in an era of transnational conflict against established non-state terrorist organizations? What are the key operational dynamics and how do civilized nations best remain within the legal regime while still attacking the relevant terrorist organizational centers of gravity? The United States’ position on these doctrinal areas has evolved significantly. Moreover, this evolution has not taken place in isolation, as the United States has evolved in conjunction with its allies.

The earlier panel alluded to the complexities introduced by the intersection of differing international law regimes. Two of these colliding regimes are the tectonic plates of international human rights law and international humanitarian law (“IHL”). As drone warfare becomes not only necessary, but a new normality, the clash between these great, huge, moving icebergs of law becomes ever more pointed. From my perspective, it is an oxymoron to argue that humanitarian law is a mere subset of human rights law. No, IHL has a much richer, longer, and diverse history. The Martens clause<sup>2</sup> and other aspirational phraseology in the corpus of humanitarian law do little to change the relationship between these two international regimes. Additionally, it cannot be forgotten that all of the Geneva principles derived from a strongly stated consensus to improve humanitarian protections.<sup>3</sup>

The principle of command and control is central to IHL. The idea that a commander’s orders operate with the force of law to limit the application of violence arose independently in widely disparate cultures and historical periods.<sup>4</sup> This suggests that command and control is more than just a legal technicality, but rather is fundamental to the nature of warfare itself. Hence, the body of IHL sprang from the realities of military practice and the demands of military duty. Despite the fact that states in the modern era have obligations arising from human

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2. Convention with Respect to the Laws and Customs of War on Land (Hague II) July 29, 1899, 32 Stat. 1803, T.S. no. 403, available at [http://avalon.law.yale.edu/19th\\_century/hague02.asp](http://avalon.law.yale.edu/19th_century/hague02.asp). See also Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky*, EUR. J. INT'L L. 187 (2000).

3. *The Geneva Conventions of 1949: Origins and Current Significance, Ceremony to Celebrate the 60th Anniversary of the Geneva Conventions, Address by Philip Spoerri, Director of International Law, ICRC, INTERNATIONAL COMMITTEE OF THE RED CROSS* (Dec. 8, 2009), <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm>.

4. Michael A. Newton & Casey Kuhlman, *Why Criminal Culpability Should Follow the Critical Path: Reframing the Theory of 'Effective Control'* 4 (Vanderbilt University Law School Public Law and Legal Theory, Working Paper No. 10-17, 2010), available at [http://law.case.edu/lectures/files/2010-2011/20110211\\_Newton-EffectiveControl-SSRN.pdf](http://law.case.edu/lectures/files/2010-2011/20110211_Newton-EffectiveControl-SSRN.pdf).

rights awareness, this normative development did not simply eviscerate the preexisting body of law. Human rights law has obviously evolved in a specialized and, in some sense, universalized context. However, international human rights law should not be perceived as the Pac-Man that ate IHL.

The key point to understand in the context of drone warfare is that this clash of the tectonic plates of law is immensely important and directly relevant to the way we view rapidly evolving technology. To be more precise, these international law regimes are wholly determinative of the best practices and professional norms by which we appropriately apply the evolving technology of drones, or remotely piloted vehicles (“RPVs”).

The other notable legal development in the post 9/11 era is of course our changing perceptions regarding the rights and duties attached to non-state actors or, to be more precise, non-state participants in armed conflict. Where should the line be drawn concerning humanitarian human rights protections and humanitarian obligations or conversely humanitarian rights begin? That is the core of the question; and it is derived from both of those bodies of law. As the earlier panelists noted, any attempt to address drone warfare that ignores the changing legal terrain is doomed to be incomplete despite the reality that the questions are inherently complex. Not to state a tautology too bluntly, but inadequate framing of the key issues will result in incomplete answers that ignore the broader doctrinal and legal debates.

The law of state responsibility has also been changing dramatically. Remember, in the context of human rights law, the state itself is primarily responsible for protecting the human rights of those persons within their jurisdiction.<sup>5</sup> Well, we all know that. By the way, that should be on your Bar exam. Currently, it is not, but it should be for you law students. I am advocating for the day when we will have core international human rights questions on the Bar exam. Human rights are a fundamental, foundational knowledge necessary for good lawyering. Practicing lawyers cannot become successful in the world today without understanding these basic principles. I really believe that, so keep studying your human rights law. But I digress.

Of course, the entire debate regarding drones takes place in the context of a sea change in our understanding of the authoritative actors in an armed conflict. The keen international sense of vulnerability in the aftermath of the al Qaeda attacks in New York and Washington D.C spawned an extremely rare fever of international unity. President Bush declared a state of national emergency,<sup>6</sup> and the U.N. Security Council swiftly passed Resolution 1368 unanimously.<sup>7</sup>

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5. UN Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2006, HR/PUB/06/12, available at <http://www.unhcr.org/refworld/docid/46ceaf92.html>.

6. Proclamation No. 7463 Declaration of National Emergency by Reason of Certain Terrorist Attacks, 50 U.S.C. § 1621 (2006).

7. Press Release, Security Council, Security Council Condemns, ‘In Strongest Terms’, Terrorist

Resolution 1368 categorized the attacks as a “threat to international peace and security,”<sup>8</sup> affirming the “inherent right of individual or collective [self-defense]”<sup>9</sup> expressed in Article 51 of the U.N. Charter, and specifically directing “all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks.”<sup>10</sup> For the first time in its storied existence, the North Atlantic Treaty Organization (“NATO”) invoked the principle of Article 5 of the Washington Treaty, thereby recognizing that the attacks constituted an “armed attack” consistent with the treaty’s provisions that trigger NATO obligations to assist another member so attacked.<sup>11</sup> NATO aircraft helped to fly combat air patrols over U.S. airspace in the immediate wake of the attacks.<sup>12</sup>

Despite the modern consensus that the sovereign right of self-defense did not originate in Article 51 of the United Nations Charter and is not restricted to responses enumerated therein, there remains a great deal of debate over the appropriate principle that ought to apply to non-state actors that conduct conflicts that transcend national borders. Does the responsibility for protecting human rights jump from border to border as the combatant engages in transnational conflicts? States, as a matter of state responsibility, remain responsible for combatant activities conducted from their territories. Conversely, states are, of course, responsible for protecting and defending the human rights of those people and those persons in their territories.

Lastly, an ostensibly obvious point, which cannot be overlooked is that the nature of the conflict is changing. Until 9/11, there was a huge debate on the proper relationship between state actors and non-state actors. Before the al Qaeda attacks many scholars debated whether it was even possible to enter an armed conflict with a non-state actor. As I just noted, that seems so passé after 9/11; so quaint. Today it is widely accepted that the very essence of civilization, central to governmental authority, is the government’s obligation to defend its territory and its citizens from attack, even if that attack comes from non-state actors. General acceptance of the truism that we can indeed be in an armed conflict against non-state actors that is fully subject to *jus in bello* does not, however, answer essential

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Attacks on United States; Unanimously Adopting Resolution 1368 (2001), Council Calls on All States to Bring Perpetrators to Justice, U.N. Press Release SC/7143 (Sept. 12, 2001).

8. S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

9. *Id.* pmbl.

10. *Id.* ¶ 3 (“[T]hose responsible for aiding, supporting or [harboring] the perpetrators, organizers and sponsors of these acts will be held accountable . . .”).

11. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; *Invocation of Article 5 Confirmed*, N. ATLANTIC TREATY ORG. [NATO] (Oct. 2, 2001), <http://www.nato.int/docu/update/2001/1001/e1002a.htm>; *What is Article 5?*, NATO, <http://www.nato.int/terrorism/five.htm> (last updated Feb. 18, 2005).

12. NATO, *Anti-terrorism Operations*, ALLIED COMMAND OPERATIONS, <http://www.aco.nato.int/page142123533.aspx> (last visited Apr. 22, 2011); *NATO and the Fight Against Terrorism*, NATO, [http://www.nato.int/cps/en/natolive/topics\\_48801.htm](http://www.nato.int/cps/en/natolive/topics_48801.htm) (follow “Historical background” hyperlink) (last updated Mar. 9, 2011, 3:54 PM) (describing Operation Eagle Assist which lasted from October 2001 to May 2002 and was intended to free up U.S. air assets for strikes against Afghanistan, from which the September 11 attacks were planned and launched).

questions that confront practitioners. The real questions are: what is the scope of that conflict? Who are the participants in that conflict? How does IHL bind asymmetric actors? Remember, humanitarian law was designed to apply on a reciprocal basis to people who act in conformity with the language of the Geneva Conventions on behalf of a state; in other words, those who belong to a state party.

Drone strikes that transcend international boundaries and that are conducted against an amorphous transnational organization raise vital legal questions. Some of these are offensive questions, such as targeting issues, while some are defensive questions (at least in the sense of good lawyering on behalf of your client), such as the rights, duties, and obligations of the striking party. As an extension, what are the effects on the application of the law when that non-state actor acts in ways that undermine—and I would argue ignore—the larger body of humanitarian law? Does that obviate the need for IHL? Does another legal regime apply? Does it mean that non-state actors can be targeted without the constraints otherwise imposed by IHL? These are all complex questions that cannot be answered without recourse to the backdrop of larger legal developments.

Before I make the legal observations at the heart of my comments, I want to pause and highlight my deep conviction that words have meaning. This was alluded to in conversations this morning, but I want to emphasize that words do have meaning, particularly when they are charged with legal significance in the context of legal documents because of the implications of language. To be specific, the danger of loose or misused language is heightened in today's globalized society where there really are no secrets. Now we have a common homogenized body of norms, criminal norms that have begun to be implemented in the domestic systems of countries all around the world. Those norms are directly relevant to both the precepts of command responsibility, the precepts of corporate responsibility, and the precise contours of the line between state responsibility and individual responsibility. The paradox is that even as we have made tremendous strides over the last 20 years to eliminate impunity, to create accountability structures with clearly established legal norms that do, in fact, export criminal liability, we have also created a perverse incentive for those same norms to be discussed in a cavalier and cutting manner. If you do not think this is a serious concern, then read the foreign press following any NATO drone strike in Afghanistan, or Pakistan, or Yemen.<sup>13</sup> Words have meaning and it is important for us to use words precisely if for no other reason than to refrain from giving aid and comfort to our enemies.

A very strong strain of thought argues that drones are really nothing special; certainly nothing that needs an entirely separate legal framework.<sup>14</sup> In other

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13. See, e.g., Declan Walsh, *Leading UN Official Criticises CIA's Role in Drone Strikes*, THE GUARDIAN (London), June 3, 2010, available at <http://www.guardian.co.uk/world/2010/jun/03/us-pakistan-drone-strikes?INTCMP=SRCH>.

14. See, e.g., Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 106-08 (2010) (stating that the U.S. government considers itself in an armed conflict in Afghanistan and Iraq, and with the Taliban).

words, the body of developed humanitarian law is sufficient to handle drones as a mere technological innovation. From this perspective, drones are simply another delivery mechanism to be analyzed against the framework of established principles of humanitarian law, such as reciprocity, humanity, necessity, distinction, proportionality. In other words, while drones (RPVs in the current lingo) present a wholly new technological stand-off capability, they merely represent a new incarnation of a method of conflict that must be assessed in light of the preexisting Hague and Geneva principles that are today intertwined in what we conveniently lump together under the rubric of “international humanitarian law.” To be more precise, we could correctly speak of the corpus of the “laws and customs of war.” These principles nevertheless do not stand alone on the battlefield. They are implemented by the force of will of the commander.

Every drone strike is undertaken at the express command of a commander. “To command” is an active verb. Commanders are critical to a fighting organization, and are keenly aware of the linkages between law and operations, because “their organizations will be most effective—militarily—where they field their organization with the proper control mechanisms.”<sup>15</sup> According to the International Committee of the Red Cross (ICRC), “[t]he first duty of a military commander, whatever his rank, is to exercise command.”<sup>16</sup> The commander or superior is the decisive actor because inattention to the basic legal duties inherent in a hierarchy of authority undermines the “very essence of the problem of enforcement of treaty rules in the field.”<sup>17</sup> Mao Tse-Tung put it simply, “[u]norganized guerrilla warfare cannot contribute to victory.”<sup>18</sup> In the modern era, therefore, successful military operations require that commanders at all levels are educated and empowered to make important and accurate decisions, because their actions often have strategic consequences that are intertwined with the legality and legitimacy of the decisions made and actions taken. The modern media has been known to transform appropriate and tactical decision-making into another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant media accomplices. Legal lacunae can be deliberately magnified and exploited by an adversary to degrade combat effectiveness. Mistakes are often amplified, and law is misused, not to facilitate effective operations that minimize civilian casualties and preserve human dignity, but to create greater military parity between mismatched forces. U.S. counterinsurgency doctrine captures this truism:

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15. Michael A. Newton & Casey Kuhlman, *Why Criminal Culpability Should Follow the Critical Path: Reframing the Theory of Effective Control*, 40 NETH. Y.B. OF INT'L L. 3, 52 (2009).

16. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 art. 87, ¶ 3549 (Yvez Sandoz et al. eds., 1987), available at <http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/36fc92eb9e83fbec12563cd00437bfb!OpenDocument> [hereinafter ICRC COMMENTARY ON PROTOCOL I].

17. *Id.* ¶ 3550.

18. MAO TSE-TUNG ON GUERRILLA WARFARE 45 (Samuel B. Griffith trans., 2000).

Senior leaders set the proper direction and climate with thorough training and clear guidance; then they trust their subordinates to do the right thing. Preparation for tactical-level leaders requires more than just mastering Service doctrine; they must also be trained and educated to adapt to their local situations, understand the legal and ethical implications of their actions, and exercise initiative and sound judgment in accordance with their senior commanders' intent.<sup>19</sup>

Accordingly, commanders need both a clear understanding of the law regulating drone strikes and the courage to act decisively to limit civilian casualties and comply with the law, while remaining faithful to the overriding imperative of mission accomplishment. Thus, it should not be surprising that there is a long-standing rule of engagement promulgated under the authority of commanders that says you may not send unobserved artillery fire into an urban area. In other words, sending artillery fire into those areas must only be done under the express authority of a commander absent overriding imperatives. Despite the fact that subordinates have legal authority derived under the principle of *jus in bello*, in order for a particular strike aimed at a military target - with indirect artillery fire located in a civilian area - to adhere to distinction and proportionality, it must comply with a more stringent set of constraints imposed by command prerogatives.

When assessing the normative state of practice regarding drone warfare, we therefore need to be very precise in our analysis of the line between pragmatics and legal obligation. What is the distinction between the law as it is and the law as we might want it to evolve? What is the difference between *lex lata* and *lex ferenda*? Where do we want the law to develop, where should it develop? How are states and non-state actors bound by divergent norms? Or is the law to be conceived of as a homogenous mass that must be objectively determined and neutrally applied?

In light of the precursor thoughts I've just outlined, let me quickly develop what I see as four discrete areas where we should look to the future, building on what's happened in the past and focusing on the future developments, which is by coincidence the assigned topic of this panel. As you might have inferred from my earlier reflections on the nature of command, the application of command responsibility [or its extension to the realm of superior responsibility drawn from Article 25 of the Rome Statute] has particular ramifications for the future of drone warfare. The law is exceedingly clear in this regard as commanders must "do everything feasible" to minimize or eliminate collateral damage and "take all feasible precautions" to ensure that the choice of means or methods of attacking any military objective minimizes "incidental loss of civilian life, injury to civilians, [and] damage to civilian objects."<sup>20</sup> Thus, the complexities of debate from this morning regarding the scope of direct participation in hostilities and the boundaries

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19. DEP'T OF ARMY, FIELD MANUAL 3-24: COUNTERINSURGENCY 157 (2006) [hereinafter COUNTERINSURGENCY MANUAL].

20. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 57, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], *available at* <http://www.unhcr.org/refworld/docid/3ae6b36b4.html>.



of acceptable conduct on the part of non-state actors cannot be obviated. The commander's most solemn duty is to conduct operations with strict adherence to the laws and customs of warfare. This principle is especially applicable in the context of drone warfare because of the pejorative caricature that I have increasingly encountered, that commanders can afford to be cavalier because the lives of THEIR personnel are not endangered through the conduct of drone warfare.

By extension, there is a very real and important debate regarding the standards for assessing feasibility during drone operations. Where is the line among what is advisable, what is feasible, what is appropriate, and what is criminal in this context? That line today is ill-defined except with resort to the broader definitions of distinction and the proportionality in the broader bodies of law that we know today. The precise feasibility criteria are ill-defined at best. Though I fully realize that what I am about to hypothesize is controversial, and indeed anathema to many, it may well be time to consider an additional protocol designed to address the residual questions revolving around drone warfare. The foregoing is intended to make clear that "drone warfare" represents a distinctive synthesis of heterogeneous activities, technologies, strategies, and actors. The distinctive dimensions of drone warfare merit movement towards a holistic international consensus on the appropriate scope, rationale, and legal metrics applicable to this new method for defeating our enemies. Furthermore, if we undertake to negotiate an additional protocol precisely on the issue of unmanned area vehicles, Drone warfare, and micro-Drones, one of the key issues has to be with particular application - what does feasibility mean in this context? We need to define it with our allies so that, in fact, the law is clear and we know what the law is. More to the point, commanders can command.

Another vital issue to be addressed in any future discussions related to drone warfare is the concept of effective warning. Humanitarian law, unlike human rights law, builds in a broad base of appropriate command discretion and appropriate combatant discretion. Thus, the language is often: "where circumstances permit," "when feasible," "when possible," etc., which of course is not reflected in human rights law. Though it derives from wholly different sources and operate with entirely different structures, the latitude that is properly afforded to commanders in the midst of armed conflict is somewhat analogous to the margin of appreciation and deference given to domestic authorities under modern human rights jurisprudence.

Article 57(2)(c) of the 1949 Geneva Convention's Protocol I expressly mandates that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."<sup>21</sup> This

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21. Additional Protocol I, *supra* note 20, art. 57(2)(c). See also INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS, art. 57, ¶ 2190 (Yvez Sanoz et al. eds., 1987), <http://www.icrc.org/ihl.nsf/COM/470-750073?OpenDocument> [hereinafter ICRC COMMENTARY ON PROTOCOL I] (emphasizing that precautions precedent to attacks on civilians will be of "greatest importance in urban areas because such areas are most densely

provision is an express obligation that is really just a *lex specialis* application of the larger obligations to “take constant care” to protect civilian lives and objects<sup>22</sup> and to “do everything feasible” to protect civilians both in the choice of targets and in the means selected to attack targets.<sup>23</sup> But, one might well ask, what does effective warning mean? Is the concept of effective warning dependent on the modality of the offensive technology used by the commander? Wouldn’t any abstract principles created to regulate the concept of effective warning carry counterintuitive consequences? During Operation Cast Lead, IDF warnings in the urban areas of Gaza consisted of: 165,000 telephone calls, 300,000 warning notes on December 28, 2008 alone, 2,500,000 leaflets overall, radio broadcasts, and another newly developed tactic involving non-explosive detonations known as “roofknocking.”<sup>24</sup>

The Goldstone Report sets forth several criteria in determining whether a warning is effective:

[I]t must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon.<sup>25</sup>

After detailing the content of the leaflet and radio broadcast warnings, the

Report concluded that the warnings did not comply with the obligations of Protocol I because Israeli forces were presumed to have had the capability to issue more effective warnings, civilians in Gaza were uncertain about whether and where to go for safety, and some places of shelter were struck after the warnings were issued.<sup>26</sup> Thus, despite giving more extensive warnings to the civilian population than in any other conflict in the long history of war, the efforts of the Israeli attackers were equated with attacks intentionally directed against the civilian population. This approach eviscerates the appropriate margin of appreciation that commanders who respect the law and endeavor to enforce its constraints should be entitled to rely upon—and which the law itself provides. There is simply no legal precedent for taking the position that the civilians actually respond to such warnings, particularly in circumstances such as Gaza where the civilian population is intimidated and often abused by an enemy that seeks to

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populated”).

22. Additional Protocol I, *supra* note 20, art. 57(1).

23. Additional Protocol I, *supra* note 20, arts. 57(2)(a)(i)–(ii).

24. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, ¶¶ 498–99, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) [hereinafter *Goldstone Report*] available at [http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC\\_Report.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf).

25. *Id.* ¶ 528.

26. *Id.* ¶¶ 499–542.

protect itself by deliberately intermingling with the innocent civilian population. The newly minted Goldstone standard for warning the civilian population would displace operational initiative from the commander in the attack to the defender who it must be remembered commits a war crime by intentionally commingling military objectives with protected civilians. This aspect of the report would itself serve to amend the entire fabric of the textual rules that currently regulate offensive uses of force in the midst of armed conflict. Logically, if this standard were applied to drone warfare with intellectual rigidity, there would be no lawful margin for drone strikes. This simply cannot be accepted as an appropriate extension of the law in this area.

The logical corollary to this example derives from the application of the proportionality principle in the context of drone strikes. Article 8(2)(b)(4) of the Rome Statute sets out the modern scope of the proportionality principle.<sup>27</sup> Of course, it cannot be forgotten that proportionality in the context of *jus in bello* (or the conduct of armed conflicts) has a very different meaning from that found in the *jus ad bellum* regime or gleaned from the human rights jurisprudence. Though the Rome Statute expressly sets out the consolidated articulation of the modern concept of proportionality, its relevance to drone warfare is more subtle. The crime is committed only through the *intentional* launching of an attack predictably anticipated to result in disproportionate and hence unlawful damage. For example, no responsible commander intentionally targets civilian populations, and the law on this matter is clear and fundamental.<sup>28</sup> Nor would a responsible military commander ever launch an attack intentionally against civilians or civilian objects or against a target with reasonably anticipated disproportionate results. In the age of twenty-four hour news cycles, such a commander would foolishly imperil the overarching operational objectives but would also betray the core obligations of the military profession.

So let me pause while we reflect on these truths. If a media outlet or antagonist throws out numbers and press releases to report that a drone strike killed "X" number of people or damaged particular civilian property, the presumption cannot be automatically that those were disproportionate drone strikes. The war crime, the crime that defines the boundaries of professional practice, begins with the word *intentionally*. The key focus is not on the damage inflicted but on the information available at the time of the attack and the precautions taken by the commander. As an aside, I am proud that the Rome Statute language includes damage to the environment within the purview of the crime of intentionally launching an attack that can be anticipated to result in disproportionate damage. This extension of the law is entirely warranted and to me represents a concrete advancement in our legal understanding of the protections afforded by the applicable *jus in bello*.

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27. Rome Statute of the International Criminal Court, art. 8, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3, 37 I.L.M. 1002.

28. Additional Protocol I, *supra* note 20, art. 48.

This brings me directly to the third area that should be clarified in customary practice as drone strikes become a more common dimension of state practice. The legal balancing drawn from Article 8(2)(b)(4) of the Rome Statute is predicated on a comparison between the damage to otherwise protected places and people as assessed against the concrete and direct overall military advantage anticipated. The concrete and direct language flows directly from the text of Protocol I. There is, however, a vital distinction in light of modern law and the practice of modern drone strikes. The geographic shackles that might have been imposed by our concept of sovereign conflicts have been definitively removed. The Elements of Crimes for Article 8(2)(b)(4) adopted by international consensus (which included the United States delegation) contain an express footnote to clarify that the assessment of concrete and direct overall military advantage cannot be constrained by geographic or temporal limitations.<sup>29</sup>

Now, let me be clear of what I am not arguing. The debates over the freedom enjoyed by a sovereign state to direct its drones anywhere around the world to kill anyone that sovereign directs will continue unabated for good reason. Just because the definition of proportionality is a much more open and permissive definition than is often postulated does not remove any residual geographic dimension from the *jus ad bellum* analysis. And then of course, there is that last word “anticipated.” The critical perspective is that of the commander, and the key data lies in the mental calculus drawn from the pressures of command and the conflicting mandates of the mission that must be accomplished in the midst of uncertainties aplenty and unknown collateral consequences. In passing, I should note my own strong (though highly controversial) belief that the United States and our NATO allies should do a much, much better job of being more transparent about these decisions. Where we’re right, I don’t think we should be afraid to go to the world and say “we’re right about that and here’s why.” Our silence and perceived hubris leaves a tabula rasa for a hostile press and cunning adversary to sway the popular perception that the modern conflict is the center of gravity on the road to either victory or defeat. We should not permit the enemy to proclaim and to propagate unchecked negative inferences. We should demonstrate our professionalism and precision at every opportunity. In my opinion, the IDF and other westernized militaries do more than any other participants in conflict to minimize or eliminate accidental deaths and damage to civilian property and to punish it when investigations reveal wrongdoing. The world should rationally have some mechanism available for freely and candidly offering the proof of professionalism.

The final scope of my hypothetical Protocol on drone warfare stems directly from the geographic scope of the proportionality rule that I just raised with you. The classic law of neutrality is closely related to the obligation of states to prevent their territory from being used for combatant purposes. In the context of non-state

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29. Rep. of the Preparatory Comm’n for the Int’l Criminal Court, *Finalized Draft Text of the Elements of Crimes*, 24 n.36, U.N. Doc PCNICC/2000/1/Add.2 (Nov. 2, 2000).

actors whose activities transcend boundaries, sometimes all over the world instantaneously from the defense perspective, you would argue that there may be no such thing anymore as a neutral state, because geographic boundaries don't mean as much as they used to, precisely because those decisions about war making are not being made by state actors.

Al Qaeda, Al Shabaab, and other transnational organizations simply don't care about borders. In fact, borders affirmatively help them. They serve to interfere with the application of force. They serve to give them sanctuary. Resolution 1373 emphasizes the fact that in the conduct of hostilities in this armed conflict not of an international character, a neutral state cannot exist. The language of Resolution 1373, the definitive resolution on the subject from September 2001,<sup>30</sup> specifically asserts that "all states shall . . . [p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens; [e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice."<sup>31</sup> The words "facilitate" and "participates in . . . preparation" suggest that, although there may not have been a consensus among the UN Security Council over the exact extent of the definition of "terrorist acts," its members plainly intended to apply individual criminal liability to those complicit in terrorist acts. On this basis, a court in a UN member state could prosecute terrorist facilitators through a broad application of complicity liability that would include such actions as are understood as Material Support for Terrorism under U.S. law. Indeed, regional conventions include the widest possible scope of liability for terrorist acts in prohibiting any state or individual from "aiding, abetting or counseling the commission of [terrorist acts] or participating as an accomplice in [such offenses]."<sup>32</sup>

Thus, all states shall refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups, eliminating the supply of weapons to terrorists, and to take necessary steps to prevent the commission of acts—the commission of terrorist acts. Resolution 1373 was a unanimous Chapter VII act that eliminates the ability of any state sponsor of terrorism to hide behind an abstract geographic border.<sup>33</sup> Does it logically follow that the inherent and obligatory right of sovereign self-defense has now superseded the previously binding right of states to control their airspace on a unilateral basis? Furthermore, in light of the "all necessary means" mandate of Resolution 1373, couldn't some states argue in an adjudicatory forum that a transnational drone strike was an *a priori* authorized method for addressing the persistent threat of transnational

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30. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

31. *Id.* ¶ 2.

32. SAARC Reg'l Convention on Suppression of Terrorism, U.N. Doc A/51/136, GAOR, 44th Sess., (1989), available at <http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf>.

33. See S.C. Res. 1373, *supra* note 30.

terrorism? All of these issues could be usefully addressed during negotiations over a new Drone Protocol.

Let me close by observing that in one sense, the struggle to define the contours of the legal regime and to correctly communicate those expectations to the broader audience of civilians caught in the conflict is a recurring problem unrelated to the current evolution of warfare. Shaping the expectations and perceptions of the political elites who control the contours of the conflict is perhaps equally vital. The paradox is that as the legal regime applicable to the conduct of hostilities has matured over the last century, the legal dimension of conflict has at times overshadowed the armed struggle between adversaries. As a result, the overall military mission is intertwined with complex political, legal, and strategic imperatives that require disciplined focus on compliance with the applicable legal norms as well as the most transparent demonstration of that commitment to sustain the moral imperatives that lead to victory. In his seminal 1963 monograph describing the counterinsurgency in Algeria, counterinsurgency scholar David Galula observed that if “there was a field in which we were definitely and infinitely more stupid than our opponents, it was propaganda.”<sup>34</sup> The events at Abu Ghraib are perhaps the most enduring example of what General Petraeus has described as “non-biodegradable events.”<sup>35</sup> The very nature of drone warfare is inextricably linked to the accomplishment of the mission and a larger plethora perception and misperception. Indeed, the United States doctrine for counterinsurgency operations makes a point that is equally applicable to drone warfare in its opening section:

Insurgency and counterinsurgency (COIN) are complex subsets of warfare. Globalization, technological advancement, urbanization, and extremists who conduct suicide attacks for their cause have certainly influenced contemporary conflict; however, warfare in the 21<sup>st</sup> century retains many of the characteristics it has exhibited since ancient times. Warfare remains a violent clash of interests between organized groups characterized by the use of force. Achieving victory still depends on a group’s ability to mobilize support for its political interests (often religiously or ethnically based) and to generate enough violence to achieve political consequences. Means to achieve these goals are not limited to conventional force employed by nation-states.<sup>36</sup>

There are many other examples of events during conflict that strengthen the enemy even as they remind military professionals of the visceral linkage between their actions and the achievement of the mission. I fear that drone strikes have

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34. DAVID GALULA, *PACIFICATION IN ALGERIA 1956–1958*, at 143 (new ed. 2006) (1963).

35. General David H. Petraeus, *A Conversation with General Petraeus at Vanderbilt University* (Mar. 1, 2010) (video available at <http://sitemason.vanderbilt.edu/myvu/news/2010/03/01/modern-warfare-complex-but-winnable-petraeus-tells-vanderbilt.108544>); See also Uthman Al-Mukhtar, *Local Sunnis Haunted by the Ghosts of Abu Ghraib*, SUNDAY HERALD, Dec. 26, 2010, at 51; Joseph Berger, *U.S. Commander Describes Marja Battle as First Salvo in Campaign*, N.Y. TIMES, Feb. 22, 2010, at A7.

36. COUNTERINSURGENCY MANUAL, *supra* note 19, at 1.

taken on such a symbolism that reasoned dialogue with our adversaries and allies is often precluded. In the context of a globalized and interconnected international legal regime, drone warfare is a reality that cuts across the complexities of competing legal theories to inflict very real damage on both enemies and all too often the innocents among whom they hide. We must confront these issues directly if we expect to resolve the underlying tensions and by extension to permit military professionals to risk their lives and honor with no shadow of second guessing.

I want to thank the organizers of this excellent conference. My task in this keynote address was to highlight the trends and to generate the confusion, which the panel will now dispel. Commenting on the impractical aspects of Additional Protocol I, the eminent Dutch jurist Bert Röling—who served on the bench of the Tokyo International Military Tribunal—observed that treaty provisions ought not “prohibit what will foreseeably occur” because the “laws of war are not intended to alter power relations, and if they do, they will not be observed[.]”<sup>37</sup> The disconnects between aspirational legal rules and human experience are borne out in operational experience by states that act decisively to protect the lives and property of their citizens, which feeds an undercurrent of suspicion and politicization that could erode the very foundations of humanitarian law. Unless we move towards clarity in the conduct of drone warfare, we may well find ourselves paralyzed by legal imprecision that erodes our ability to effectively apply available technologies even in the exercise of the fundamental rights of individual or collective self-defense. This imprecision could lead to a cycle of cynicism and second-guessing that could weaken the commitment of some policy makers or military forces to actually follow the law.

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37. GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 391 (1994) (quoting Bert Röling, *Criminal Responsibility for Violations of the Laws of War*, 12 *REVUE BELGE DE DROIT INT'L* 8, 25–26 (1976)).