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Keywords

Drones, Military, War and Peace, Terrorism, Human Rights Law, Politics

DRONE WARFARE AND THE LAW OF ARMED CONFLICT

RYAN J. VOGEL*

“[I]n all of our operations involving the use of force, including those in the armed conflict with al Qaeda, the Taliban, and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law.... [I]t is the considered view of this Administration... that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”

*Harold Koh, U.S. State Department Legal Adviser*¹

“My concern is that these drones, these Predators, are being operated in a framework which may well violate international humanitarian law and international human rights law.”

– *Philip Alston, United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*²

The United States has increasingly relied upon unmanned aerial vehicles (UAVs), or “drones,” to target and kill enemies in its current armed conflicts. Drone strikes have proven to be spectacularly successful—both in terms of finding and killing targeted enemies and in avoiding most of the challenges and controversies that accompany using traditional forces. However, critics have begun to challenge on a number of grounds the legality and morality of using drones to kill belligerents in the non-traditional conflicts in which the United States continues to fight. As drones become a growing fixture in the application of modern military force, it bears examining whether their use for lethal targeting

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1. Harold Koh, Legal Advisor, U.S. Dep’t of State, Keynote Address at the American Society for International Law Annual Meeting: The Obama Administration and International Law (March 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

2. *US Warned on Deadly Drone Attacks*, BBC NEWS (Oct. 28, 2009), <http://news.bbc.co.uk/2/hi/8329412.stm>.

operations violates the letter or spirit of the law of armed conflict. In this article I identify the legal framework and sources of law applicable to the current conflicts in which drones are employed; examine whether, and if so in what circumstances, using drones for targeting operations violates the jus in bello principles of proportionality, military necessity, distinction, and humanity; and determine what legal boundaries or limitations apply to the seemingly limitless capabilities of drone warfare. I then evaluate whether the law of armed conflict is adequate for dealing with the use of drones to target belligerents and terrorists in this non-traditional armed conflict and ascertain whether new rules or laws are needed to govern their use. I conclude by proposing legal and policy guidelines for the lawful use of drones in armed conflict.

In an effort to reach remote territory and targets, save American blood and treasure, achieve optimal accuracy and efficiency in targeting operations, and perhaps to avoid the controversies³ surrounding the insertion of ground forces, the United States has increasingly relied upon unmanned aerial vehicles (UAVs), or “drones,”⁴ to target and kill enemies in its current armed conflicts.⁵ The United States has utilized drones to support combat and counterterrorism efforts across its theaters of armed conflict.⁶ Drone targeting has proven to be spectacularly successful—both in terms of finding and killing targeted enemies and in avoiding most of the challenges and controversies that accompany using traditional forces. However, critics have begun to challenge on a number of grounds the legality and morality of using drones to kill belligerents in the non-traditional conflicts in

3. In particular, relying on drones to remotely attack targets avoids the thorniest byproduct of inserting ground forces in America’s current conflicts: detention of enemy belligerents and security threats.

4. In this paper I use the terms “drone” and “UAV” interchangeably. Recently, some have begun to use the term “remotely-piloted aircraft,” or “RPA,” to describe UAVs, likely in an effort to emphasize the human element of control with UAVs. However, while the RPA may be a more accurate term, I use the terms UAV and drone in this paper for purposes of consistency and audience familiarity.

5. As explained by U.S. State Department Legal Adviser, Harold Koh, and mirroring the posture taken by the U.S. Government in the Guantanamo habeas litigation and in its first universal periodic review submission to the Human Rights Council, the Obama Administration considers the United States to be “engaged in several armed conflicts”: one in Iraq, one in Afghanistan, and importantly to this discussion, another against al Qaeda, the Taliban, and associated forces both “in Afghanistan and elsewhere.” While the Obama Administration publicly purged the term “global war on terror” from its official lexicon, and wisely so, since the U.S. Government likely never intended to fight *any* form of terrorism *anywhere* in the world, Harold Koh’s expression of the Administration’s position amounts to a *global war against specific terrorists* – namely, al Qaeda, Taliban, and associated forces, including those who substantially support or harbor them. This is no mere insignificant rhetorical modification: the Obama Administration has expressly taken the previous administration’s posture of fighting the parties contemplated by the AUMF in a wartime framework anywhere in the world and applying the law of armed conflict to any individuals they encounter in that fight, subject of course to “considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.” See Koh, *supra* note 1. See also Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

6. See, e.g., Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, ¶¶ 7, 18-22, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Phillip Alston).

which the United States continues to fight.⁷ After much anticipation and speculation in the international law community, and after promptings by the UN and other organizations for the United States to deliver a legal justification for its drone strikes, U.S. State Department Legal Adviser Harold Koh addressed the American Society for International Law's (ASIL) 2010 Annual Meeting and used the occasion to present the "considered view" of the Obama Administration in regards to U.S. targeting operations, particularly those conducted with drones.⁸ Koh explained that "great care is taken to adhere to [the principles of distinction and proportionality]... in both planning and execution" of lethal targeting operations, and asserted that such operations "comply with all applicable law, including the laws of war."⁹ As drones become a growing fixture in the application of modern military force, it bears examining whether their use for lethal targeting operations violates the letter or spirit of the law of armed conflict.¹⁰

In this article, I identify the legal framework and sources of law applicable to the current conflicts in which drones are employed;¹¹ examine whether, and in what circumstances, using drones for targeting operations violates the *jus in bello* principles of proportionality, military necessity, distinction, and humanity; and determine what legal boundaries or limitations apply to the seemingly limitless capabilities of drone warfare. I then evaluate whether the law of armed conflict is adequate for dealing with the use of drones to target belligerents and terrorists in this non-traditional armed conflict and ascertain whether new rules or laws are needed to govern their use. I conclude that the law of armed conflict adequately governs drone warfare and provides guiding principles for conducting drone strikes within the letter and spirit of the law.

I. INTRODUCTION

A. Background

The use of unmanned drones to target belligerents presents complex legal issues for modern warfare. However, the appearance of new and advanced weapons in warfare is hardly a new challenge in the history of armed conflict. Technological progress has produced increasingly sophisticated means for fighting, while laws to moderate or police their use have typically lagged far behind. At different times in history, developments such as the crossbow, gunpowder, machine guns, tanks, airplanes, noxious gasses, nuclear bombs, and a number of other deadly inventions, irreversibly changed the landscape of warfare and required groups and states to reassess the laws governing armed conflict. The United Nations' call, then, for the United States to justify the legality of its drone

7. *Id.* at ¶¶ 18-22.

8. Koh, *supra* note 1.

9. Koh, *supra* note 1.

10. While experts have recognized substantive distinctions in the names used to describe the rules governing armed conflicts, I prefer the term "law of armed conflict" and use it interchangeably with the "law of war" and "international humanitarian law" in this article.

11. While I draw on U.S. law to help characterize the conflict, this article aims to examine the issue of drone warfare through the lens of the *international* law of armed conflict. U.S. domestic law applicable to the issue at hand is not the focus of this article.

strike program¹² should not come as a surprise. Public officials, experts, practitioners, operators, and lawyers are just now coming to grapple with the rules and legal framework for the emerging use of drones in order to determine guidelines for the use of this new technology.¹³

Some of this concern is understandable, as drones seem to have moved overnight to the front line of America's current armed conflicts. In reality, UAVs languished for years in development and obscurity¹⁴ before becoming, as CIA Director Leon Panetta famously put it, "the only game in town."¹⁵ Even in the early years of the current wars in Afghanistan and Iraq, the U.S. military rarely utilized the emerging technology. In 2001, the Predator UAV fleet numbered only ten and was typically relegated to reconnaissance missions, when used at all.¹⁶ By 2007, Predators numbered more than 180, with plans to nearly double that number over the next few years.¹⁷ In addition to the Predator drone (about 27 feet long and capable of flying for 24 hours at up to 26,000 feet), the best known of the American UAV fleet, the United States has increasingly employed a number of other drones in the current conflicts, including the Global Hawk (the largest of the fleet at 40 feet long and capable of flying for 35 hours and up to 65,000 feet), the Shadow (only 12 feet long and capable of flying for 5 hours or 70 miles), the Hunter (around 24 feet long and capable of flying twice as long as the Shadow), the Raven (just 38 inches long and only 4 pounds, capable of flying for 90 minutes at about 400 feet), and the Wasp (even smaller than the Raven).¹⁸ The smaller drones of the UAV fleet are used primarily for reconnaissance and target acquisition, while the larger drones are armed with Hellfire missiles and used to conduct strikes, in addition to higher altitude reconnaissance.¹⁹ A number of other UAVs are expected to be operated in the near future to update and expand capabilities, including the Reaper, the Peregrine, and the Vulture.²⁰ The Pentagon

12. *US Warned on Deadly Drone Attacks*, *supra* note 2.

13. A recent story in the Harvard National Security Journal poignantly illustrated the need for such guidelines. Brett H. McGurk writes:

There is yet another reason to define clear standards for the drone program: *'In warfare, what comes around – goes around.'* Tas Oelstrom emphasized that simple maxim during the symposium, a point driven home by MIT's Mary Cummings, who showed with alarming detail how easily drone technology is patterned and even piloted with an iPhone. 'Yes,' she said, 'there is an app for that.'

Brett H. McGurk, *Lawyers: A Predator Drone's Achilles Heel?*, HARVARD NAT'L SEC. J. (Mar. 11, 2010), <http://www.harvardnsj.com/2010/03/lawyers-a-predator-drone's-achilles-heel/>.

14. For a detailed history of the development and deployment of UAVs, see generally P.W. Singer, *WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* (2009).

15. *U.S. Air Strikes in Pakistan Called 'Very Effective,'* CNN.COM (May 18, 2009, 6:48 PM), <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/>.

16. P.W. Singer, *Military Robots and the Laws of War*, 23 THE NEW ATLANTIS 25, 37 (2009), available at <http://www.thenewatlantis.com/publications/military-robots-and-the-laws-of-war>.

17. *Id.*

18. *Id.* at 37-39.

19. *Id.* at 39.

20. *Id.*

has made producing and evolving all aspects of its drone fleet a top budgetary and strategic priority for the coming years.²¹

B. Framing the Issues

It seems clear that the United States intends to advance and expand its UAV program, including for lethal strike operations.²² Reportedly, more drone strikes were carried out in President Barack Obama's first year in office than in the previous eight years combined under George W. Bush, and 2010 has almost doubled the pace of 2009.²³ Indeed, over the past two years, a number of senior Obama Administration officials have come out in defense of drone warfare.²⁴ However, while the U.S. Government has been clear about its intent to use drones for targeting operations, and while it has broadly defended its policy of conducting strikes against parties contemplated by the Authorization for the Use of Military Force (AUMF),²⁵ the government's public proponents have rarely delved into some of the weightier issues presented by drone warfare. A few hypotheticals may help illustrate the preeminent issues:

Hypothetical 1: A military operator in Afghanistan identifies a Taliban target within Afghanistan, determines through intelligence sources that the target is reachable at his home and that the operation would meet the proportionality, necessity, and humanity requirements under the law of armed conflict, and employs a drone to conduct the kill operation.

Hypothetical 2: A military operator on a ship off the Horn of Africa identifies a high-level al Qaeda target within Yemen, determines through intelligence sources that the target is reachable while at a funeral and that the operation would

21. See, e.g., U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW viii, 10-12, 18, 22, 101, 104, available at <http://www.defense.gov/qdr/> (last visited Oct. 11, 2010); U.S. DEP'T OF DEF., QUADRENNIAL ROLES AND MISSIONS 24-29 (Jan. 2009), available at http://www.defense.gov/news/Jan2009/QRMFinalReport_v26Jan.pdf; see generally U.S. DEP'T OF DEF., FY 2009-2034 UNMANNED SYSTEMS INTEGRATED ROADMAP 1, available at <http://www.jointrobotics.com/documents/library/UMS%20Integrated%20Roadmap%202009.pdf>.

22. *Id.*

23. *Pakistan denies U.S. request to expand drone access, official says*, CNN.COM (Nov. 22, 2010, 11:04 AM), <http://www.cnn.com/2010/WORLD/asiapcf/11/22/pakistan.us.drones/index.html>.

24. See, e.g., Koh, *supra* note 1; *U.S. Airstrikes in Pakistan Called 'Very Effective,' supra* note 15 (recounting CIA Director Leon Panetta's defense of drone strikes); *Future of Military Aviation Lies with Drones: US Admiral*, SPACE WAR (May 14, 2009), http://www.spacewar.com/reports/Future_of_military_aviation_lies_with_drones_US_admiral_999.html (quoting Chairman of the Joint Chiefs, Admiral Mullen, and Secretary of Defense, Robert Gates, on the future use of UAVs in the military).

25. In this article, I will use the term "AUMF" as an adjective to reference the parties with which the United States is at war under the 2001 Authorization for the Use of Military Force (Taliban, al Qaeda, and associated forces) and the conflict in which the United States is engaged (e.g., AUMF foes, AUMF enemies, AUMF parties, and AUMF conflict). Because both the Bush and the Obama administrations rely on the AUMF for authority to conduct hostilities against al Qaeda, the Taliban, and associated forces in Afghanistan and elsewhere, and because the label "global war on terrorism" has been (wisely) abandoned, the tag "AUMF" most succinctly and accurately describes the conflict and parties involved. See RICHARD F. GRIMMETT, CONGRESSIONAL RESEARCH SERV., RS 22357, AUTHORIZATION FOR THE USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS 3-4 (2007) [hereinafter AUMF].

meet the proportionality, necessity, and humanity requirements under the law of armed conflict, and employs a drone to conduct the kill operation.

Hypothetical 3: A CIA operator in Kabul identifies a group of Jaish-e-Muhammad fighters (known al Qaeda affiliates) in a Waziristan “safe house,” determines through intelligence sources that the target is reachable and that the operation would meet the proportionality, necessity, and humanity requirements under the law of armed conflict, and employs a drone to conduct the kill operation.

Hypothetical 4: A CIA operator in Djibouti identifies al-Shabaab leaders (loosely aligned with al Qaeda) in Somalia, determines through intelligence sources that the targets are reachable at a meeting of associates and that the operation would meet the proportionality, necessity, and humanity requirements under the law of armed conflict, and employs a drone to conduct the kill operation.

A number of recurrent issues present themselves in these examples: (1) *Consent of the government where the strike occurs.* Does it matter if the host government consents to the strike, expressly opposes the strike, or is silent on the matter? (2) *Rank or importance of the targeted individual.* Does a target need to have sufficient rank or importance to be targeted? Do certain targets, because of their seniority or importance, justify more latitude in regards to determining what constitutes “acceptable” collateral damage? (3) *Foreseeability of civilian losses.* Does it matter if the strike causes unforeseeable but disproportionate civilian losses? In a conflict where the enemy intentionally fails to distinguish himself, and indeed intentionally seeks to mask his combatant status as a matter of course, is there a requirement to subject intelligence assessments to heightened levels of scrutiny before targeting civilians who have lost their protected status by participating in the hostilities? (4) *Humanitarian objective.* Does the United States have an affirmative obligation to seek the less harmful option if a target might just as easily, or within a reasonable range of practicability, be captured and detained? (5) *Location of the strike.* Does the answer of legality differ if the strike takes place within the recognized battlefield of Afghanistan, the border region of Pakistan, the ungoverned spaces of Somalia, or the terrorist havens of Yemen? Will the answer change if the strike occurs on the high seas or in a “neutral” country or zone? (6) *Location of the operator.* Does it matter if the operator is located within the same zone of hostilities or somewhere outside it? What if the operator is located on a ship or in Nevada or Virginia? (7) *Status of the operator.* Does it matter if the operator conducting the strike is a civilian or combatant uniformed member of the armed forces? Where do CIA personnel fit into this status characterization? In the proceeding sections, I will address each of these questions and issues within the context of both current law governing armed conflict and the realities of a new kind of war.

II. LEGAL FRAMEWORK AND SOURCES OF LAW

A. *Wartime or Criminal Legal Framework?*

At the outset, it is important to identify the proper legal framework on which to base our analysis. It should be noted, however, that the application of one legal framework need not be exclusive to the application of another. In the war against al Qaeda and its terrorist associates, if the government reasonably concludes that it

is involved in an “armed conflict,” the government may properly utilize law of war methods as well as criminal law enforcement methods for enforcement, detention, and prosecution of terrorists, depending on the circumstances. In fact, the U.S. Government has frequently used law enforcement personnel and resources, the criminal code, and civilian courts to thwart, identify, apprehend, and try terrorists before and since 9/11,²⁶ and the Justice Department has signaled its intent to continue to do so, including by trying some of the Guantanamo detainees in federal court.²⁷

That said, the U.S. Government has made clear that it considers itself at war in Afghanistan, Iraq, and with the parties contemplated by the AUMF.²⁸ From Koh’s formal explanation in his 2010 ASIL speech, to language in presidential and executive orders, court filings, human rights reports, and statements by senior officials in both the Bush and Obama Administrations, the Executive Branch has consistently characterized the current conflicts to be armed conflicts, governed primarily by the *lex specialis* of the laws of war.²⁹ Congress has also consistently, and without exception, confirmed the Executive’s characterization of the current conflicts as armed conflicts.³⁰ In addition, as the courts have reviewed issues of detention and treatment of detainees, they have also dependably upheld the political branches’ characterization of the current conflicts as armed conflicts, to which unique rules apply, from the Supreme Court’s decisions in *Hamdi* and *Boumediene*, to the most recent habeas decisions in the D.C. Circuit and the D.C. District Court.³¹ Thus, all three branches of government,³² in both Republican and

26. See, e.g., JAMES J. BENJAMIN, JR. & RICHARD B. ZABEL, HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, 2009 UPDATE AND RECENT DEVELOPMENTS 6 (2009) available at <http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf>.

27. See, e.g., Attorney General Announces Forum Decisions for Guantanamo Detainees, U.S. DEP’T OF JUSTICE (Nov. 13, 2009) available at <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>; DOJ Says Some Terror Suspects to be Tried in Federal Court, AM. CONSTITUTION SOC’Y BLOG (Nov. 13, 2009, 12:48 PM), available at <http://www.acslaw.org/node/14808>. While there has been controversy about trying terrorists in federal courts, in particular the 9/11 co-conspirators, the Attorney General has consistently supported using federal courts for trying detainees at Guantanamo and future captures.

28. See, e.g., Koh, *supra* note 1; Exec. Order No. 13234, 66 Fed. Reg. 221 (Nov. 9, 2001); Exec. Order No. 13239, 66 Fed. Reg. 241 (Dec. 12, 2001); Military Order, 66 Fed. Reg. 222 (Nov. 13, 2001); Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litigation, No. 08-442, 3 (D.C. March 13, 2009); President Barack Obama, Remarks by the President on National Security, National Archives (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09; Human Rights Council, U.S., *Nat’l Report Submitted in Accordance with Para. 15 (a) of the Annex to Human Rights Council Res. 5/1*, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/155/69/PDF/G1015569.pdf?OpenElement>.

29. *Id.*

30. See, e.g., AUMF, *supra* note 25, at 3-4; Detainee Treatment Act of 2005, 28 U.S.C. § 2241(e)(2); Military Commissions Act of 2006, 10 U.S.C. § 948(2)(a); see generally, National Defense Authorization Act of 2009, Pub. L. 111-84 (2009).

31. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2004); see also, *Gherebi v. Obama*, 609 F.

Democrat Administrations and Congresses, have consistently characterized the situations in Afghanistan, Iraq, and with Taliban, al Qaeda, and associated forces as that of an armed conflict governed by the laws of war.

As evidenced by Koh's ASIL speech, the United States couches its foundational legal authority to target AUMF belligerents within the self-defense terms of Article 51 from the UN Charter.³³ The U.S. Government takes the position that the events of September 11, 2001 constituted an "armed attack" by a transnational terrorist organization, thereby triggering application of the laws of armed conflict.³⁴ Congress emphasized this fact when, in response to the 9/11 attacks, it authorized the President to exercise the country's "rights to self-defense" and to "use all necessary and appropriate force" in order to prevent future acts of terrorism against the United States.³⁵ The Obama Administration, like its predecessor, continues to rely on that statutory authority to use military force against the parties described in the AUMF.

However, while the AUMF clearly provides the authority for the use of military force, it offers a great deal of ambiguity for its application. For example, the AUMF grants the president sweeping power to determine who falls within the enemy forces.³⁶ In a war against a shadowy and purposefully indistinct adversary, this power to define the enemy is significant, even if operationally necessary. Additionally, the AUMF does not impose geographical limitations of any kind.³⁷ While the law does not seem to contemplate a "global war on *terror*," it certainly provides for a global war against *specific terrorists* – namely, al Qaeda, Taliban, and associated forces, including those that substantially support or harbor them.³⁸

Supp. 2d 43, 55 (DDC 2009).

32. The fact that all three branches agree on the characterization of the conflict places it squarely within Justice Jackson's category of maximum executive authority in his *Youngstown* concurrence. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-39 (1952) (Jackson, J. concurring).

33. See Koh, *supra* note 1; U.N. Charter art. 51.

34. AUMF, *supra* note 25, at 5 (referencing article 5 of the Washington Treaty). The UN and NATO also recognized that a state of armed conflict existed between the United States and the perpetrators of the 9/11 attacks in New York, Washington, D.C., and Pennsylvania. See, e.g., Press Release, Security Council, Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution, U.N. Press Release SC/7158 (Sep. 28, 2001), available at <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>; G.A. Res. 56/1, ¶¶ 3-4, U.N. Doc. A/RES/56/1 (Sep. 12, 2001), available at <http://www.un.org/documents/ga/docs/56/agresolution.htm>; Press Release, Security Council, Security Council Condemns in Strongest Terms Terrorist Attacks on United States, U.N. Press Release SC/7143 (Sep. 12, 2001), available at <http://www.un.org/News/Press/docs/2001/SC7143.doc.htm>; Lord Robertson, NATO Secretary General, Statement by NATO Secretary General (Oct. 2, 2001), available at <http://www.nato.int/docu/speech/2001/s011002a.htm>.

35. AUMF, *supra* note 25, at 6.

36. *Id.* at 4.

37. Instead, the AUMF provided the President authority to use force against specific targets – those "nations, organizations, or persons" the President determined "planned, authorized, committed, or aided" the terrorist attacks on 9/11 as well as those who "harbored such organizations or persons." *Id.* at 6. See also Bradley & Goldsmith, *supra* note 5.

38. AUMF, *supra* note 25, at 3.

This geographical expansiveness, and the line of logic that flows from it,³⁹ has been a lightning rod for criticism both within the United States and abroad. In fact, some have argued that targeting operations conducted outside the geographical battlefield do not fall under the law of armed conflict at all, but under the criminal law, and therefore such operations constitute unlawful killings.⁴⁰ Those who take this position typically oppose the idea of a “global battlefield,” preferring the more traditional territorially-contained battlefield – in this case, the territory of Afghanistan.⁴¹ Of course, in practice, the United States will almost certainly not embrace the broadest application of a “global battlefield” with regard to targeting operations. If there is a government willing and able to either capture or kill a sought-after belligerent within its territory, the United States is not likely to undermine that state’s sovereignty and risk the certain diplomatic blowback by targeting the individual anyway. However, in countries such as Pakistan, Somalia, and Yemen, where the respective governments maintain only partial control over their territory and have proven incapable of eliminating, or unwilling to eliminate, terrorist actors and activities, the United States has resorted to territorial incursions through drone strikes.⁴² Koh notes that the decision of “whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.”⁴³ According to the United States, it may conduct such strikes as long as the individuals (e.g., AUMF parties) are

39. Pressed on whether a “little old lady in Switzerland” could be considered an enemy combatant if she donated money to al Qaeda, the United States Government responded in the affirmative. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). The Obama Administration may have come up with a different response, but it seems apparent that the underlying policy continues of taking the fight to al Qaeda and their supporters wherever the United States finds them.

40. See, e.g., Rise of Drones II: Unmanned Systems and the Future of Warfare: Hearing before the U.S. House Subcommittee on National Security and Foreign Affairs, 111th Cong. 2 (Apr. 28, 2010) (written testimony of Mary Ellen O’Connell, Professor, University of Notre Dame Law School), available at http://oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/4.28.10_Drones_II/OConnell_Statement.pdf [hereinafter Rise of Drones II]; Anthony D. Romero, Open Letter to President Obama, COMM. ON OVERSIGHT & GOV’T REFORM (Apr. 28, 2010), http://oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/4.28.10_Drones_II/2010_04_28_ACLU_ADR_Letter_to_President_Obama.pdf, Reply Memorandum in Support of Plaintiff’s Motion for a Preliminary Injunction and in Opposition to Defendant’s Motion to Dismiss at 16-20, *Al-Aulaqi v. Obama*, No. 10-cv-01469 (D.D.C. Oct. 8, 2010), available at http://www.aclu.org/files/assets/Reply_Brief_FINAL_100810.pdf.

41. See, e.g., Bridget Johnson, *Kucinich: Policy of Drone Strikes Helping Stoke ‘Fanaticism,’ ‘Radicalism,’* The Hill: Blog, (Apr. 24, 2010, 12:20 AM), <http://thehill.com/blogs/blog-briefing-room/news/94127-kucinich-obama-policy-of-drone-strikes-helping-inspire-fanaticism-and-radicalism> (Representative Dennis Kucinich claims that the United States is violating international law by attacking a country—Pakistan—we are not at war with and who has not attacked us).

42. See, e.g., Scott Shane, Mark Mazzetti & Robert F. Worth, *A Secret Assault on Terror Widens on Two Continents*, N.Y. TIMES, Aug. 15, 2010, available at <http://www.nytimes.com/2010/08/15/world/15shadowwar.html>.

43. Koh, *supra* note 1.

lawfully targetable as belligerents or civilians who have forfeited their protected status.⁴⁴

B. Characterization of the Conflict

While the three branches of the government agree that a state of armed conflict exists and primarily rely upon the law of armed conflict to govern the fight with the groups listed in the AUMF, particularly with regard to lethal targeting operations, the inquiry to identify the proper legal framework does not end there – the law of armed conflict has different rules for the different types of conflict. “International armed conflicts” are traditional armed conflicts between states and are governed by the 1907 Hague Conventions,⁴⁵ the four Geneva Conventions of 1949,⁴⁶ custom, and, to those that are party, the first Additional Protocol to the Geneva Conventions (AP I).⁴⁷ “Conflicts not of an international character” (or “non-international armed conflicts”) are armed conflicts between states and non-state actors, including but not limited to internal armed conflicts, and are governed by Common Article 3 of the Geneva Conventions,⁴⁸ custom, domestic law, and,⁴⁹

44. See *infra* section III(B)(1) for a fuller explanation on the implications of civilians losing their protected status.

45. Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV].

46. See The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6.3 U.S.T. 3114, 3116, T.I.A.S. No.3362, at 3, 75 U.N.T.S. 31, 32 [GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6.3 U.S.T. 3217, 3220, T.I.A.S. No.3363, at 4, 75 U.N.T.S. 85, 86 [GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6.3 U.S.T. 3316, 3318, T.I.A.S. No. 3364., at 3, 75 U.N.T.S. 135, 136 [GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6.3 U.S.T. 3516, 3518, T.I.A.S. No.3365, at 3, 75 U.N.T.S. 287, 288 [GC IV] [all four hereinafter Geneva Conventions].

47. The United States signed AP I but never submitted it to the Senate for advice and consent. See Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 110 (1985). The U.S. Government has been consistently critical of some of its terms throughout the years, particularly with regard to rules concerning unlawful participants in hostilities and the combatant's privilege. See, e.g., George H. Aldrich, *Prospects for the United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 3-4 (1991). However, many in the international community, including the United States, have argued that large parts of Protocol I reflect custom. See, e.g., Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912, 914 (1987). The U.S. government has taken the position in the past that the provisions of Article 75 represent “an articulation of safeguards to which all persons in the hands of an enemy are entitled.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 663 (2006) (quoting William H. Taft IV, *Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003)). Nevertheless, the scope of customary international law (CIL) is controversial within the United States Government. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter AP I].

48. Common Article 3 is the only article in the four Geneva Conventions of 1949 to provide rules for “armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties.” GC I-IV, *supra* note 46, art. 3.

49. Some experts have argued that the lack of substantive law for non-international armed conflicts, or internal armed conflicts, reflects the intent for either domestic law or human rights law to fill in the gaps. See, e.g., Gabor Rona, *Obama Administration Must Define “Enemy Combatant”*

to those that are party, the second Additional Protocol to the Geneva Conventions (AP II).⁵⁰ Some have pointed to the existence of a third category—*internationalized* non-international armed conflicts, or conflicts between states and non-state actors that feature additional states on one or both sides—and have argued that, because these conflicts are not expressly contemplated by the traditional laws of war, rules from both types of conflict should govern where appropriate.⁵¹

With these categories in mind, the AUMF conflict presents challenges for proper characterization. The United States was not and has never been in an international armed conflict with al Qaeda, since al Qaeda is not a state and has no government and is therefore incapable of fighting as a party to an inter-state conflict.⁵² It is arguable, however, that the United States was at least initially engaged in an international armed conflict with the Taliban as the functional government of Afghanistan, and with al Qaeda forces supporting the Taliban as a

Consistent With Traditional Laws of War, HUMAN RIGHTS FIRST (February 17, 2009), <http://www.humanrightsfirst.org/pdf/091020-LS-rona-obama-admin-define-combatant.pdf>. The U.S. Government has asserted that only Common Article 3 applies directly as applicable treaty law to the AUMF conflict, but has preferred to draw analogies from the law of international armed conflict to fill gaps rather than apply human rights law or domestic law. See, e.g., *Hamdan*, 548 U.S. at 630-31.

50. The United States signed AP II and submitted it to the Senate for advice and consent in 1987 where it remains before Senate subcommittees. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, reprinted in 16 I.L.M. 1442 (1977) [hereinafter AP II]; see also Gasser, *supra* note 47, at 912; Roberts, *supra* note 47, at 110. Much like with Protocol I, many have asserted that certain provisions in Protocol II have achieved the status of custom. See, e.g., Gasser, *supra* note 47, at 912.

51. See, e.g., ROBERT K. GOLDMAN & BRIAN TITTEMORE, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 24 n. 82 (2002), available at <http://www.asil.org/taskforce/goldman.pdf> In the report he notes that such conflicts are:

Hybrid conflicts in that they are not governed entirely by either international or internal armed conflict rules. Because the Geneva Conventions contain no provisions applicable to these kinds of conflicts, the solution followed by most international lawyers has been to break down the armed conflict into its international and domestic components and, based on this differentiation, to identify the humanitarian law rules governing relations between the various warring parties.

See also Dietrich Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, 22 INT'L REV. RED CROSS 255, 258-61 (1982).

52. *But see* Brief for Respondents at 48, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 460875 (arguing that “[a]s the President determined, because the conflict between the United States and al Qaeda has taken place and is ongoing in several countries, the conflict is ‘of an international character’”). However, the *Hamdan* Court disagreed with the government’s position, finding:

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to *Hamdan* because the conflict with al Qaeda, being ‘international in scope,’ does not qualify as a ‘conflict not of an international character.’ . . . That reasoning is erroneous. . . . In context, then, the phrase ‘not of an international character’ bears its literal meaning.

Hamdan, 548 U.S. at 630-31.

kind of militia.⁵³ The Taliban maintained some form of governance over Afghanistan, occupied the capital, conducted foreign relations, and proved to be the most powerful military force in the country with its defeat of rival tribal alliances.⁵⁴ However, because the Taliban was only recognized by a handful of states as the rightful government of Afghanistan,⁵⁵ did not occupy Afghanistan's seat at the UN, and maintained only erratic control over large portions of its own territory, the Taliban may not have met the basic requirements for recognition as Afghanistan's government.⁵⁶ Additionally, while most of the conflict with Taliban forces occurred within the borders of Afghanistan, fighting and targeting, including through drone strikes, of non-Taliban belligerents and terrorists took place throughout the region.⁵⁷ In any event, after Afghanistan ratified a new constitution and elected a democratic government in January and October of 2004, respectively, followed by the new government fighting alongside U.S. Forces and International Security Assistance Forces (ISAF), the conflict would no longer qualify as "international."

However, characterization of the conflict as non-international is also difficult. Although there are no states fighting against states in the current conflict, the drafters of the Geneva Conventions seemed to be thinking more of internal armed conflicts when they provided the sparse terms for "armed conflicts not of an international character" in Common Article 3 and not of global struggles with transnational non-state actors.⁵⁸ It seems at least debatable, then, that the AUMF

53. Even if al Qaeda forces acted as a Taliban militia, fought alongside them in defense of Afghan territory, and considered themselves a part of the opposition force, it is doubtful that al Qaeda fighters would have qualified for the protected status outlined in GC III, art. 4(A)(1) and (2). Al Qaeda fighters were not a regular militia or volunteer corps forming "part of" Afghanistan's armed forces as contemplated by art. 4(A)(1); similarly, al Qaeda did not satisfy three of the four listed criteria in art. 4(A)(2) required of "other militias" to earn protected combatant status: they did not wear a fixed sign, they did not carry arms openly, and they did not conduct their activities in compliance with the law of war.

54. See Greg Bruno, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELATIONS: BACKGROUNDER (August 3, 2009), http://www.cfr.org/publication/10551/taliban_in_afghanistan.html; see also Saeed Shah, *Taliban Rivals Unite to Fight US Troop Surge*, THE GUARDIAN (March 3, 2009), <http://www.guardian.co.uk/world/2009/mar/03/taliban-pakistan-afghanistan-us-surge>.

55. On September 11, 2001, only Pakistan, Saudi Arabia, and the United Arab Emirates recognized the Taliban as the government of Afghanistan. Tony Karon, *Time.com Primer: The Taliban and Afghanistan*, TIME.COM (Sept. 18, 2001), <http://www.time.com/time/nation/article/0,8599,175372,00.html>.

56. At a basic level, state practice suggests that a political entity must fulfill four criteria to achieve international recognition as a country's government: (1) assume a permanent character, (2) prove itself to be substantially in control of the country, (3) demonstrate the support of the majority of the country, and (4) show the ability to abide by international agreements. See Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. Some have argued that the Taliban met the first three of these criteria, but its abhorrent human rights record and failure to comply with international agreements led all but three countries to refuse recognition of the Taliban as the government of Afghanistan. See Karon, *supra* note 55.

57. See, e.g., Ismail Khan & Salman Masood, *Drone Strikes Reported in Pakistan*, N.Y. TIMES, Jan. 6, 2010, available at <http://www.nytimes.com/2010/01/07/world/asia/07drones.html>.

58. See, e.g., Memorandum from John Yoo, Deputy Assistant Attorney General, Memorandum for Alberto R. Gonzales Counsel to the President, Treaties and Laws Applicable to the Conflict in

conflict may transcend the characterization of “non-international” and more closely resemble an “international armed conflict,” since the United States not only fights in a number of countries but fights alongside both Afghan forces and a coalition of UN-sanctioned ISAF forces. At least for purposes of filling gaps in the law, analogizing the AUMF conflict to international armed conflicts might provide a fuller and more comprehensive set of rules than by looking to the customary rules supporting non-international armed conflicts or to some other less relevant body of law. The Bush Administration consistently asserted that the conflict with AUMF parties was international – particularly with regard to the global fight against al Qaeda.⁵⁹ However, taking its position from the Supreme Court’s decision in *Hamdan v. Rumsfeld*,⁶⁰ the Obama Administration now takes the position that the conflict is non-international in nature.⁶¹ For purposes of determining the proper legal framework for targeting operations in the AUMF conflict, the Court’s determination that the fight with al Qaeda and associates is a non-international armed conflict and the current Administration’s adoption of that characterization sufficiently answers this preliminary question.

C. Sources of Law

It follows, then, that the primary legal framework applicable to drone attacks conducted in the current conflict is the *lex specialis* of armed conflict, and that the status of this conflict is non-international. As a result, as noted above, Common Article 3 and customary international law, including provisions from Additional Protocols I and II, expressly apply as sources of law for this conflict. In addition,

Afghanistan and to the Treatment of Persons Captured by U.S. Armed Forces In that Conflict (Nov. 30, 2001), <http://www.justice.gov/olc/docs/aclu-ii-113001.pdf> (Yoo argues that while the rules of international armed conflict do not apply to al Qaeda, Common Article 3 also does not cover the conflict between a state Party and a non-state actor:

There is substantial reason to think that this language [common Article 3] refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its territory. . . . Analysis of the background to the adoption of the Geneva Conventions in 1949 confirms our understanding of common Article 3. It appears that the drafters of the Conventions had in mind only the two forms of armed conflict that were regarded as matters of general *international* concern at the time: armed conflict *between* Nation States (subject to Article 2), and large-scale civil war *within* a Nation State (subject to Article 3). . . . [C]ommon Article 3 should not be read to include all forms of non-international armed conflict.)

59. See, e.g., Memorandum from George W. Bush, Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

60. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630, 633 (2006). The Court did not take a position on whether the conflict had always been non-international or whether that mattered, but it did expressly reject the Executive’s argument that the conflict was international. In finding that the conflict with the Taliban and al Qaeda is non-international in character, the *Hamdan* Court correctly determined that Common Article 3 governs. *Id.* at 630. Interestingly, though, the Court looked to Article 75 of Protocol I to flesh out the terms of Common Article 3 instead of Articles 4-6 of Protocol II. *Id.* at 633. Protocol I expressly supplements the rules for *international* armed conflicts, while Protocol II supplements the rules for *non-international* armed conflicts. See AP I, *supra* note 47; AP II, *supra* note 50.

61. See, e.g., Koh, *supra* note 1.

the UN Charter provides basic *jus ad bellum* rules for the application and use of force.⁶² So, too, do other treaties generally applicable to armed conflict apply to targeting operations in a non-international armed conflict, including the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW), and the customary provisions within the 1998 Rome Statute of the International Criminal Court.⁶³ In order to supplement the relatively sparse terms of the law of non-international armed conflicts, the United States has also chosen to use international armed conflict principles from the Hague and Geneva Conventions by analogy.⁶⁴ And, of course, whatever domestic rules Congress, the President, or the Department of Defense prescribe for the current conflicts apply as sources of law, subject to an expanding role for the courts in reviewing aspects of the rules adopted by the Executive or Legislative branches (e.g., in *Hamdan* and *Boumediene*).

The President may still choose to treat belligerents as criminals within a law enforcement framework, including by apprehending suspects and prosecuting them in federal courts for violations of federal criminal law, including the War Crimes Act. But he is under no obligation to do so, and he may continue to use the law of war framework for targeting operations for as long as hostilities endure between the United States and the Taliban and al Qaeda, respectively.⁶⁵

III. DRONE STRIKES UNDER THE LAW OF ARMED CONFLICT'S FUNDAMENTAL PRINCIPLES

The Obama Administration has been quick to note that targeting operations against the AUMF foes not only meets the requirements of black letter law and relevant custom, but is "conducted consistently with law of war principles," with "great care... taken to adhere to these principles in both planning and execution."⁶⁶ Traditionally, the fundamental principles of the *jus in bello* are composed of (a) military necessity, (b) distinction, and (c) proportionality, with many now adding to the list (d) the principle of humanity.

62. See, e.g., U.N. Charter art. 2, para. 4; U.N. Charter art. 51, para. 1; see also Karma Nabulsi, *Jus ad Bellum/Jus in Bello* in CRIMES OF WAR A-Z GUIDE (2nd ed. 2007), available at <http://www.crimesofwar.org/thebook/jus-ad-bellum.html>.

63. See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1523, available at http://lawofwar.org/cxconventional_weapons_convention.htm [hereinafter CCW]; Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 3, 37 I.L.M. 1002 [hereinafter ICC].

64. See, e.g., *Hamdan*, 548 U.S. at 603-04.

65. As recognized by GC III, art. 118, parties to a conflict may hold captured belligerents until the cessation of hostilities. In addition, because the belligerents in the AUMF conflict are unprivileged, they are susceptible to criminal punishment even if detained under the law of armed conflict (LOAC). See Goldman & Tittmore, *supra* note 51, at 1, 4.

66. Koh, *supra* note 1.

A. *The Principle of Military Necessity*

Because it is military necessity that drives targeting operations, I begin the analysis with this principle. Generally considered to reflect international custom,⁶⁷ Article 52 of Geneva Protocol I requires that armed attacks in wartime be “limited strictly to military objectives” and offer “a definite military advantage.”⁶⁸ The U.S. Army adds in its field manual on the law of war that military necessity is “[t]hat principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”⁶⁹ Also of note, Article 23 of Hague IV forbids “destroy[ing] or seiz[ing] the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war,”⁷⁰ and Article 8 of the Rome Statute defines as a war crime attacks against civilian objects and “[d]estroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war.”⁷¹

For purposes of this analysis, then, the general question of whether drone strikes meet a military necessity is a relatively easy one. As noted above, a number of U.S. Government officials have over the past few years confirmed that drones are an invaluable tool against al Qaeda, Taliban, and associated terrorist forces.⁷² In some areas, they are, as the CIA director put it, “the only game in town” because of their ability to find and identify targeted persons and reach into territory that ground forces cannot enter, either for military or political reasons. In one reported case, the United States targeted a senior Taliban official in the impenetrable border region of Pakistan, while he was resting on the roof of a house with his wife and hooked up to a drip for kidney problems.⁷³ He was wanted for his involvement in a number of suicide bombings and the assassination of Pakistani Prime Minister Benazir Bhutto. The United States would surely assert that in such a situation and others like them, the drone strike offers a “definite military advantage,” particularly in a war that is transnational in scope and with enemies intent on hiding among civilians and within failed or semi-failed states and territories. Likewise, the United States would likely argue that such attacks

67. See, e.g., U.S. DEP’T OF ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 14 (2005) [hereinafter FM 27-10]; see also Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 420 (1987).

68. AP I, *supra* note 47, art. 52(2).

69. F.M. 27-10, *supra* note 67, at 164.

70. Hague IV, *supra* note 45, art. 23(g).

71. ICC, *supra* note 63, art. 8. The ICC creates a distinction between international and non-international armed conflicts, with more rules for the former.

72. See *U.S. Airstrikes in Pakistan Called ‘Very Effective,’* *supra* note 15. CIA Director Leon Panetta famously stated in May 2009 that drones were “the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership,” asserting that they have been “very precise” and “very limited in terms of collateral damage.” *Id.*

73. Peter Finn & Joby Warrick, *Under Panetta, A More Aggressive CIA*, WASH. POST, Mar. 21, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/20/AR2010032003343.html>. See also Radio Interview by Michael Smerconish with President Obama (Aug. 20, 2009), available at <http://www.whitehouse.gov/the-press-office/radio-interview-president-michael-smerconish>.

against belligerents when and where they present themselves is “indispensable for securing the complete submission of the enemy as soon as possible.”⁷⁴ All reports indicate that drone attacks have become a central part of the U.S. arsenal in the current conflicts and officials have consistently commented on the significant military advantage they offer.⁷⁵

However, evaluating whether conducting a lethal drone strike operation is a military necessity, like evaluating the use of any weapon or weapon platform, requires a case-by-case analysis. In each application, the commander or operator must affirmatively answer that the particular attack in question offers a distinct military advantage for the accomplishment of a military goal. Drone strikes are no different than any other tool or application of force in this respect.

B. *The Principle of Distinction*

Of course, military necessity is weighed against the other three constraining principles, including the principle of distinction. Considered to reflect a customary definition of distinction, Article 48 of AP I requires that parties to a conflict “at all times distinguish between the civilian population and combatants, and between civilian objects and military objectives.”⁷⁶ Article 52 then defines those military objectives as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁷⁷ Focusing on the non-combatants in close proximity to the conflict, Article 51 of AP I requires parties to ensure that “[t]he civilian population and individual civilians...enjoy general protection against dangers arising from military operations,” and “not be the object of attack.”⁷⁸ Article 51 also prohibits and defines “indiscriminate attacks.”⁷⁹ Ambiguously, and therefore more

74. F.M. 27-10, *supra* note 67, at 164.

75. See, e.g., *U.S. Airstrikes in Pakistan Called ‘Very Effective,’ supra* note 15.

76. AP I, *supra* note 47, art. 48.

77. *Id.* art. 52(2). Notably, where there is doubt as to whether a civilian object is being used to “make an effective contribution to military action,” article 52(3) stipulates that: it shall be presumed not to be so used.” *Id.* art. 52(2), (3). The U.S. Army Field Manual adds more detail at para. 40(c):

Military objectives include, for example, factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places that are for the accommodation of troops or the support of military operations. Pursuant to the provisions of [Hague IV, art. 25], however, cities, towns, villages, dwellings, or buildings which may be classified as military objectives, but which are undefended (para. 39 b), are not permissible objects of attack.

F.M. 27-10, *supra* note 67, para. 40(c).

78. AP I, *supra* note 47, arts. 51(1), (2). The provisions from Article 51 are considered to reflect custom. F.M. 27-10, *supra* note 67, para. 25.

79. AP I, *supra* note 47, art. 51(4). According to Article 51(4):

Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this

controversially, Article 51(3) forbids the targeting of civilians “unless and for such time as they take a direct part in hostilities.”⁸⁰ Significantly for this analysis, Article 13 of AP II, governing non-international armed conflicts, provides a version of these provisions from AP I, albeit in pared-down form.⁸¹ Also of note, the Rome Statute includes as war crimes a number of offenses against civilians and civilian objects stemming from failures to adequately distinguish.⁸²

More specific to air strikes, Article 25 of the 1907 Hague IV Convention prohibits aerial bombardment “by whatever means” of undefended towns, villages, or dwellings.⁸³ And, Article 26 requires a commander to do “all in his power” to

Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.” *Id.* In addition, Article 51(5) lists “the following types of attacks” as examples of those that are indiscriminate: “(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Id. art. 51(5).

80. AP I, *supra* note 47, art. 51(3). Notably, AP II, article 13(3) contains the same provision. AP II, *supra* note 50, art. 13(3). Sections III(B)(1) and IV(C) of this article address the controversy surrounding this language in detail.

81. Art. 13 provides:

1) The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. 2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3) Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

AP II, *supra* note 50, art. 13.

82. In Article 8(2)(b) the following represent “serious violations of the laws and customs applicable in international armed conflict,” and constitute war crimes under the statute for international armed conflicts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives.

ICC, *supra* note 63, arts. 8(2)(b), (e). Note that only (i) is repeated in Article 8(2)(e) as a war crime for non-international armed conflicts. *Id.* art. 8(2)(e).

83. Hague IV, *supra* note 45, art. 25.

warn “authorities” before an aerial bombardment, “except in cases of assault.”⁸⁴ In addition, while never formally entered into force, the 1923 Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare provides a number of specific rules that may reflect custom for aerial warfare that apply to all air targeting operations, including those conducted with drones.⁸⁵ Article 22 forbids “[a]ny air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants.”⁸⁶ Article 24(1) then provides that “[a]n air bombardment is legitimate only when it is directed against a military objective, i.e. an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent.”⁸⁷ Moreover, Article 24(3) forbids aircraft from conducting “undiscriminating bombardment.”⁸⁸

Thus, it seems clear from convention and customary law that in order for a drone strike to comply with the principle of distinction, the operator may target only combatants or military objectives, and not civilians or civilian objects, unless the civilian or object has forfeited his protected status by participating in the hostilities. The difficulty with the AUMF conflict is that the line between combatant and civilian, and military objective and civilian object, is often blurry and undefined. Therefore, in order to determine whether U.S. drone strikes meet the requirements of distinction we must establish (i) whether the strikes sufficiently distinguish between civilian and military targets, taking into account the loss of civilian protected status by direct participants, and (ii) whether the attacks are conducted indiscriminately, or without regard to the effects on the civilian population.

1. Do Drone Strikes Distinguish Between Civilian and Military Targets?

The difficulty with the AUMF conflict is that the enemy intentionally fails to distinguish himself—indeed purposefully obfuscating his belligerent status by posing as a civilian—and in many cases targets civilians and conducts operations in civilian settings. Al Qaeda and its associates also routinely use protected persons and objects as shields.⁸⁹ The United States is thus often forced to fight AUMF parties in a civilian context. This situation requires the United States to do all it can to ensure that it is targeting the right kind of individuals (belligerents), and, if civilians are targeted, to ensure that such individuals have forfeited their protected status by directly participating in hostilities.

84. *Id.* art 26.

85. Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923.

86. *Id.* art. 22.

87. *Id.* art. 24(1).

88. *Id.* art. 24(3).

89. See, e.g., Ron Synovitz, *U.S. Says Al-Qaeda Used Afghan Children as Human Shields*, RADIO FREE EUROPE RADIO LIBERTY (June 18, 2007), <http://www.rferl.org/content/article/1077179.html>; *Afghanistan Midyear Report on Protection of Civilians in Armed Conflict 2010*, UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN, (Aug. 2010), http://unama.unmissions.org/Portals/UNAMA/Publication/August102010_MID-YEAR%20REPORT%202010_Protection%20of%20Civilians%20in%20Armed%20Conflict.pdf.

As noted above, only combatants (or civilians who directly participate in hostilities)⁹⁰ may be lawfully targeted in an armed conflict.⁹¹ Lawful combatants are those individuals who fight for a state's armed forces or militia, or belong to one of the groups described in GC III, Article 4 and report to a responsible chain of command, distinguish themselves, carry their arms openly, and conduct their actions in compliance with the laws and customs of war.⁹² If an individual does not meet these criteria, he is not a lawful combatant and is engaging in the conflict without privilege; therefore, he is either an unlawful combatant (or unprivileged belligerent) or a civilian who has forfeited his protected status.⁹³ Members of al Qaeda, the Taliban, and their associates do not meet the requirements of lawful combatancy,⁹⁴ and therefore are unlawful combatants or unprotected civilians.

The question of when, or under what circumstances, a civilian loses his protected status has long been debated and is of great import to the issue at hand. In an attempt to flesh out the meaning of the phrase, "unless and for such time as they take a direct part in hostilities,"⁹⁵ the International Committee of the Red Cross (ICRC) conducted a five-year study and consultation with experts, resulting in its issuing guidance for determining the proper interpretation.⁹⁶ According to the ICRC report, a person must perform a "continuous combat function" in order to be targetable as a combatant.⁹⁷ The ICRC distinguishes the case of civilians

90. The concept of civilian participation in hostilities is addressed in the immediate paragraphs below.

91. In a non-international armed conflict, some argue that the law of war does not recognize a combatant status for any but the state actor's armed forces. Thus, it becomes even more important to determine when civilians lose their protected status and become targetable.

92. GC III, *supra* note 46, art. 4. For a comprehensive and authoritative analysis on privileged/unprivileged belligerency, see Richard R. Baxter, *So Called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 323-46 (1951); see also GOLDMAN & TITTEMORE, *supra* note 51, at 2-4 (identifying the characteristics of lawful combatants/privileged belligerents, and unlawful combatants/unprivileged belligerents).

93. *But see* Marco Sassoli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 LAW & INEQ. 195, 209 (2004); Goldman & Tittmore, *supra* note 51, at 32 n.108. Some in the international community have refuted the notion that there is a third category in the law of war, separate from combatants and civilians. However, such critics note that even characterizing terrorists as civilians does not lead to perverse results – so long as such individuals "take a direct part in hostilities" and directly aid the efforts of the enemy, they forfeit their protected civilian status and become as targetable as combatants.

94. Members of al Qaeda, the Taliban, and their associates do not meet any of the requirements from GC III, art. 4, i.e., they do not belong to a state party, do not constitute an accompanying militia, and do not meet the four criteria (distinctive sign or uniform, carry arms openly, chain of command, and compliance with the laws of war) to grant them the combatant's privilege. *But see POWs or Unlawful Combatants?* CRIMES OF WAR PROJECT, (Jan. 2002), <http://www.crimesofwar.org/expert/pow-intro.html> (taking the position that the Taliban and possibly al Qaeda met the requirements for POW status as of 2002).

95. AP I, *supra* note 47, art. 51(3); AP II, *supra* note 50, art. 13(3).

96. INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 33-35 (2009), available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/\\$File/ICRC_002_0990.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.PDF) [hereinafter ICRC DPH Guidance].

97. *Id.* at 34. The ICRC continues:

engaged in a “continuous combat function,” who make up the “organized fighting forces” of a non-state actor, from “civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.”⁹⁸ Civilians who engage in such temporary or non-combat conduct, the ICRC argues, may only be targeted for the time they are engaged in hostile conduct.⁹⁹

Of course, many disagree with the ICRC’s position on the meaning of direct participation in hostilities.¹⁰⁰ The Obama Administration, for example, suggests that individuals who are merely “part of... an armed group are belligerents and, therefore, lawful targets under international law.”¹⁰¹ “Indeed,” Koh asserts,

Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.

Id.

98. *Id.* at 33-34. More specifically, the ICRC continues, those designated as engaged in “continuous combat function” must be distinguished from:

Persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and reintegrate into civilian life. Such ‘reservists’ are civilians until and for such time as they are called back to active duty. Individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL. Instead, they remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces. Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities. The same applies to individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature. Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group. As civilians, they benefit from protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities or location may increase their exposure to incidental death or injury.

Id. at 34-35.

99. *Id.* at 70 (conceding that civilians may be targeted if they are on their way or returning from hostilities, but insisting that the “‘revolving door’ of civilian protection is an integral part, not a malfunction, of IHL”).

100. See, e.g., W. Hays Parks, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance: Part IX of the ICRC “Direct Participation In Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769 (2010).

101. Koh, *supra* note 1.

“targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.”¹⁰² Yoram Dinstein similarly argues:

[A] person is not allowed to wear simultaneously two caps: the hat of a civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status.¹⁰³

The ICRC’s position that participants who only “sporadically” involve themselves in hostilities or who are not engaged in combat-type functions (and therefore not part of an organized fighting force) may not be targeted seems to misunderstand grossly the nature of the AUMF conflict. As a transnational non-state terrorist organization, al Qaeda’s sole purpose is to achieve ideological objectives through violent means. Presumably, every member of al Qaeda and its affiliates supports that unlawful mission – from the propagandists to the financiers, and from the religious leaders to the front-line fighters. In fact, al Qaeda members are often ordered to remove themselves from the fight for a time in order to re-group, train, switch theaters, join “sleepers cells,” and a variety of other reasons.¹⁰⁴ In each scenario, the member is still very much engaged in hostilities (or performing a “continuous combat function”) against the United States by actively following orders and participating according to his assigned duties. But under the ICRC’s definition, such individuals would likely not be covered under the designation. Thus, to allow a state to target a terrorist only for such time as he is engaged in an actual hostile act is to give the terrorist the best of both worlds – the protections of a civilian and the rights of a combatant. Presumably, it is for this reason that the U.S. government takes a broader view of which individuals fall under the category of belligerents or unprotected civilians who are targetable under the law of war.

So, too, is there debate on when, or under what circumstances, a civilian *object* gives up its protected status. The argument turns upon the “nature, location, purpose, or use” of the object.¹⁰⁵ If a civilian object is employed in such a way that its nature, location, purpose, or use meets the criteria for a military objective as defined in Article 52 of AP I, that object loses its protected status and may be targeted.¹⁰⁶ Of course, military objectives must also make an “effective

102. *Id.*

103. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 29 (2004).

104. Eric Schmitt & Jane Perlez, *Strikes Worsen Qaeda Threat, Pakistan Says*, N.Y. TIMES, Feb. 25, 2010, at A1, available at <http://www.nytimes.com/2009/02/25/world/asia/25drones.html>.

105. AP I, *supra* note 47, art 52(2).

106. Dinstein, *supra* note 103, at 88. Dinstein offers a definition for each of these terms: Nature denotes the intrinsic character of the military objective. . . . [T]he ‘purpose’ of a military objective is determined either by its (inherent) nature or

contribution to military action” and “offer[] a definite military advantage.”¹⁰⁷ In the AUMF conflict, this analysis comes up frequently; drones often strike civilian houses, businesses, and vehicles, which by their nature, location, purpose, or use have become militarized. Consider the examples described in the hypothetical scenarios above, where AUMF foes gather in civilian settings, such as homes and boarding houses. There is no doubt that a person’s residence is civilian in status, but when the home is used to house belligerents, store weapons, plan or conduct attacks, regroup for future hostilities, train, or any number of other activities that make an effective contribution to the war effort, that home’s nature, location, purpose, or use arguably changes in such a way that it forfeits its protected civilian status and becomes a military objective. Again, there is still much debate on this point, and some may apply similar rules for civilian objects as the ICRC applies to civilians directly participating in hostilities.

Therefore, the answer to the question of whether U.S. drone strikes properly distinguish between civilian and combatant, and between civilian object and military objective depends upon the interpretation of when a civilian or civilian object loses its protected status and becomes lawfully targetable. While a good number of U.S. operations in the AUMF conflict occur in traditional skirmishes with enemy forces, the United States typically uses drones to target individuals outside the traditional battlefield, in civilian areas where they may or may not be engaged in hostile activities at the time they are struck. As described in open press, drones have targeted individuals in a number of civilian settings, including homes and urban centers.¹⁰⁸ It seems that if the ICRC’s interpretation of direct participation in hostilities is used, then many of the United States’ drone strikes may not properly distinguish between combatant and civilian—particularly those attacks against “civilians” (*e.g.*, members of al Qaeda, Taliban, and associated forces who perform only political, religious, or other “non-combat” functions for the group) located in their homes. However, if one concludes that membership in an inherently violent non-state armed group within a recognized armed conflict severs an individual’s civilian protected status, then drone strikes that target such individuals likely meet the requirement to distinguish.

2. Are Drone Strikes Conducted Indiscriminately?

Even if drone strikes properly distinguish between combatant and civilian, the United States must still ensure that it conducts strike operations discriminately to meet the requirements of distinction. An indiscriminate attack can be described as “one in which the attacker does not take measures to avoid hitting non-military objectives, that is, civilians and civilian objects,” including by “using means and methods that... cannot be directed at specific military objectives or whose effects

by its (*de facto*) use. . . . Actual ‘use’ of an objective does not depend necessarily on its original nature or on any (later) intended purpose.

Id. at 88-90.

107. AP I, *supra* note 47, art 52(2).

108. Joby Warrick & Peter Finn, *Amid Outrage Over Civilian Deaths in Pakistan, CIA Turns to Smaller Missiles*, WASH. POST, April 26, 2010, at A8, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/25/AR2010042503114.html>.

cannot be limited.”¹⁰⁹ In other words, indiscriminate attacks are those that by their nature are so imprecise or ill-defined that collateral effects are assured. Customary law, reflected in Article 57(1) and (4) of AP I,¹¹⁰ requires parties to an armed conflict to exercise “constant care” and to “take all reasonable precautions” to spare the civilian population and avoid damage to civilian objects.¹¹¹ Article 57(3) further requires that when given the option, parties select the military objective most likely to “cause the least danger to civilian lives and to civilian objects.”¹¹²

With their ability to surveil for hours or days at a time, and to perform surgical strikes with pinpoint accuracy, drones typically offer a cleaner alternative to other forms of aerial bombardment or missile strikes.¹¹³ P.W. Singer writes that “[u]nmaned systems seem to offer several ways of reducing the mistakes and unintended costs of war,” including by using “far better sensors and processing power...allow[ing] decisions to be made in a more deliberate manner,” and “remov[ing] the anger and emotion from the humans behind them.”¹¹⁴ “Such exactness,” Singer argues, “can lessen the number of mistakes made, as well as the number of civilians inadvertently killed.”¹¹⁵ Senior U.S. officials have consistently stated that “procedures and practices for identifying lawful targets” in the AUMF conflict “are extremely robust, and advanced technologies have helped to make our targeting even more precise.”¹¹⁶ Indeed, U.S. officials would certainly argue that

109. ROY GUTMAN & DAOD KUTTAB, *Indiscriminate Attacks*, in *CRIMES OF WAR 2.0*, 239, 239-40 (2007).

110. *See* AP I, *supra* note 47, art. 57(1), (4).

111. *Id.* More specifically, Article 57(2) provides:

With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

Id. at art. 57(2).

112. *Id.* at art. 57(3).

113. *See* Singer, *supra* note 14, at 397-98.

114. *Military Robots and the Laws of War*, *supra* note 16.

115. *Id.*

116. Koh, *supra* note 1. Koh continues: “In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented

an advantage of using drones for targeting operations is that it actually promotes the humanitarian objective of sparing civilians by conducting more precise attacks on belligerents.¹¹⁷ Still, because of the location of the strikes—typically in civilian settings—there are almost always civilian casualties.¹¹⁸ Although one could argue that drones offer a more discriminating alternative to aerial bombing or traditional ground applications of force (tanks, long-range guns and missiles, etc.), it is incumbent upon a drone operator and commander to exercise judgment in determining when to conduct an attack where there are co-located civilians or where the targets themselves are difficult to identify.

Thus, insofar as drone strikes target military objectives, combatants, or unprivileged civilians (i.e., those who are directly participating in hostilities at the time of the attack), and as long as such attacks are conducted with constant care, reasonable precaution, and proper consideration of the likely collateral effects, drones offer a more precise and adaptable means for bombardment than traditional weapons and meet the requirement of discrimination. There may still be concern that because of this precision and effectiveness, the decision to use force becomes easier and more frequent. And there may also be concern with drone strikes' dependency on reliable intelligence for acquisition of targets. However, neither concern is unique to the employment of drones in warfare, and both are the kinds of questions that merit consideration before any application of force, including with drones.

C. *The Principle of Proportionality*

Much like the discussion on indiscriminate attacks, the principle of proportionality considers the effects of an attack on civilian objects and civilians in relation to the achievement of a military goal. Reflecting this principle, Article 51(5) of AP I prohibits “attack[s] which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive* in relation to the concrete and direct military advantage anticipated.”¹¹⁹ Similarly, Article 57 requires military planners and decision-makers to “[r]efrain from deciding to launch any attack which may be expected to cause incidental... [but] *excessive* [losses]... in relation to the concrete and direct military advantage anticipated.”¹²⁰ The U.S. Army Field Manual on counterinsurgency, which is not a restatement of law of war requirements but does reflect law of war-influenced U.S. counterinsurgency (COIN) policy, adds to this definition two positive commitments for combatants: (1) to “[p]reserve noncombatant lives by limiting the damage they do,” and (2) to “[a]ssume additional risk to minimize potential harm.”¹²¹

rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.”

Id.

117. *Id.*

118. *See, e.g.*, Finn, *supra* note 73.

119. AP I, *supra* note 47, art. 51(5)(b) (emphasis added).

120. *Id.* art. 57(2)(a)(iii) (emphasis added).

121. U.S. DEP'T OF ARMY, FIELD MANUAL 3-24: COUNTERINSURGENCY ¶¶ 7-30 (2006)

Notably, the Rome Statute includes proportionality-related war crimes within the ICC's jurisdiction – in Article 8(2)(a)(iv) for “[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,”¹²² and in Article 8(2)(b)(iv) for “[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects... which would be *clearly excessive* in relation to the concrete and direct overall military advantage anticipated.”¹²³ In other words, attacks that result in civilian casualties do not by themselves constitute war crimes; but reckless attacks that result in civilian deaths or destruction, or attacks that knowingly take civilian lives clearly in excess of what is necessary for accomplishing the military objective could violate the principle of proportionality and constitute war crimes.

Importantly for the AUMF and Afghanistan conflicts, although not necessarily reflecting a legal requirement, the Field Manual on counterinsurgency adds:

In conventional operations, proportionality is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and military advantage gained. But in COIN operations, advantage is best calculated not in terms of how many insurgents are killed or detained, but rather *which* enemies are killed or detained. If certain key insurgent leaders are essential to the insurgents' ability to conduct operations, then military leaders need to consider their relative importance when determining how best to pursue them. In COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape. If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement.¹²⁴

In its current conflicts, the U.S. military has often determined that proportionality concerns with co-located civilians prevented it from striking certain military objectives.¹²⁵ However, in the recently reported targeting of Hussein al-Yemeni,¹²⁶ like the reported strike on Pakistani Taliban leader Baitullah Mehsud,¹²⁷ and in addition to many other similar attacks against senior terrorist

[hereinafter FM 3-24].

122. ICC, *supra* note 63, art. 8(2)(a)(iv) (emphasis added).

123. *Id.* art. 8(2)(b)(iv) (emphasis added).

124. FM 3-24, *supra* note 121 (emphasis added).

125. See, e.g., Koh, *supra* note 1; *Secrecy of U.S. Drone Strikes in Pakistan Criticized*, DAWN.COM (Jan. 30, 2010, 11:08 AM), <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/04-drone-secrecy-criticised-qs-02>.

126. David E. Sanger, *Drone Strike Said to Kill a Leader of Al Qaeda*, N.Y. TIMES, Mar. 18, 2010, at A10, available at <http://www.nytimes.com/2010/03/18/world/asia/18terror.html>. Al-Yemeni was reportedly a senior al Qaeda leader located in Waziristan and wanted for his involvement in the killings of several CIA operatives in December 2009.

127. Pir Zubair Shah, Sabrina Tavernise & Mark Mazzetti, *Taliban Leader in Pakistan Is Reportedly Killed*, N.Y. TIMES, Aug. 8, 2009, at A1, available at <http://www.nytimes.com/>

leaders in Afghanistan, Pakistan, and elsewhere,¹²⁸ the United States has also demonstrated at times a determination that the risks to co-located civilians were justifiable since the targets were of sufficiently high rank and capable of substantial future harm. Indeed, as U.S. officials have noted, targeting particular individuals with advanced technologies often serves the purpose of avoiding broader harm to civilians and civilian objects.¹²⁹

However, there is great disagreement on this point. Critics of drone targeting allege that the number and frequency of civilian deaths are immensely disproportionate to the military advantage they provide.¹³⁰ Using public news reports as sources, some estimates put civilian losses at approximately one out of every three fatalities caused by drone attack.¹³¹ A recent survey of Pakistanis revealed that they thought almost all the casualties from drone strikes were civilian.¹³² Still others, including the *Long War Journal*¹³³ and intelligence officials,¹³⁴ place the number much lower. Some also assert that the military advantage of many of the drone attacks is minimal to nil, because either the importance of the target is often overstated or, more importantly, because the civilian losses generate increased hostility among the civilian population, thereby fueling and prolonging the hostilities.¹³⁵

2009/08/08/world/asia/08pstan.html.

128. The *Long War Journal* reports that 1,438 al Qaeda, Taliban, and affiliate leaders and operatives have been killed by drones since 2006. Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004 – 2010*, THE LONG WAR JOURNAL (Sept. 21, 2010, 8:22 PM), <http://www.longwarjournal.org/pakistan-strikes.php>.

129. Koh, *supra* note 1.

130. *Secrecy of U.S. Drone Strikes in Pakistan Criticized*, *supra* note 125; *Rise of Drones II*, *supra* note 40, at 5-6.

131. *NSJ Analysis: Turning Off Autopilot: Towards a Sustainable Drone Policy*, HARVARD NATIONAL SECURITY JOURNAL (Mar. 6, 2010), <http://www.harvardnsj.com/2010/03/nsj-analysis-turning-off-autopilot-towards-a-sustainable-drone-policy/> (citing an analysis of the U.S. policy of UAV drones strikes against al-Qaeda and Taliban operatives in Pakistan by Peter Bergen and Katherine Tiedemann).

132. *Secrecy of U.S. Drone Strikes in Pakistan Criticized*, *supra* note 125.

133. Roggio & Mayer, *supra* note 128 (referencing data that indicates 6.7% of airstrike fatalities since 2006 have been civilian).

134. Finn & Warrick, *supra* note 73.

135. See, e.g., *Rise of Drones II*, *supra* note 40, at 5-6. O'Connell concluded her testimony by arguing that:

The use of military force in counter-terrorism operations has been counter-productive. Military force is a blunt instrument. Inevitably unintended victims are the result of almost any military action. Drone attacks in Pakistan have resulted in large numbers of deaths and are generally seen as fueling terrorism, not abating it. In Congressional testimony in March 2009, counter-terrorism expert, David Kilcullen, said drones in Pakistan are giving 'rise to a feeling of anger that coalesces the population around the extremists and leads to spikes of extremism well outside the parts of the country where we are mounting those attacks.' Another expert told the *New York Times*, 'The more the drone campaign works, the more it fails—as increased attacks only make the Pakistanis angrier at the collateral damage and sustained violation of their sovereignty.'

Id. at 6.

Determining whether drone strikes meet the requirements of proportionality will always be a case-by-case analysis. Higher numbers of civilian casualties may meet the proportionality test, for example, if the target is a very senior leader of the enemy whose elimination may more likely lead to a quicker cessation of hostilities and fewer military and non-military deaths. On the other hand, striking low-level fighters or supporters in public places, where collateral damage is virtually assured, may not meet the test. Thus, the number of civilians killed, or of terrorists killed, is only the first part of the analysis—whether the target was of sufficient value and whether the strike offered a real military advantage and was conducted with all due caution and concern for civilians establishes the operation's proportionality. Again, this test is not unique to drone attacks, but because drones are used primarily and frequently in civilian contexts, the proportionality analysis merits greater examination.

It bears noting, before moving on, that the fact that drones represent a vastly superior tool for the application of force when compared to the enemy's technological capabilities does not make the use of drones inherently disproportionate. For one, the enemy's "inferior" weapons (e.g., small arms and improvised explosive devices) have proven to be abundantly lethal. But more importantly, the law of war does not require parties to fight with equal strength or ability—only with equal respect for and compliance with the rules. Just as one army's superior discipline and training does not constitute a disproportionate advantage over an opponent's poorly-trained and undisciplined forces, use of superior technology does not by itself violate the principles of the law of war. Thus, remotely firing Hellfire missiles from thousands of feet in the air on belligerents engaged in lethal operations using rudimentary explosives does not by itself violate the principle of proportionality.

D. The Principle of Humanity

The final principle in this analysis is that of humanity. Article 22 of Hague IV reflects the purpose of the humanity principle, affirming that "[t]he right of belligerents to adopt means of injuring the enemy is *not unlimited*."¹³⁶ Likewise, Article 23 prohibits parties from "employ[ing] arms, projectiles, or material calculated to cause *unnecessary suffering*."¹³⁷ These same provisions are repeated in Article 35 of AP I,¹³⁸ in paragraphs 33 and 34 of the U.S. Army Field Manual on the law of war,¹³⁹ and in the preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW).¹⁴⁰ The principle of humanity may be understood as the capstone of the other constraining principles, requiring parties to a conflict to exercise restraint when an act would

136. Hague IV, *supra* note 45, art. 22 (emphasis added).

137. *Id.* art. 23 (emphasis added).

138. AP I, *supra* note 47, art. 35.

139. FM 27-10, *supra* note 67, at 33-34.

140. CCW, *supra* note 63.

cause superfluous injury or unnecessary suffering, even if it meets the requirements of necessity, distinction, and proportionality.

To be sure, not many would assert that the application of drones as a military tool inherently violates the principle of humanity. There is no evidence that drone strikes themselves cause any more injury or suffering than traditional forms of bombardment. But because of the setting in which drones are most often employed, and because of the difficulty in ensuring that the right individuals are being targeted, drone warfare invites more scrutiny than other forms of force. A growing chorus of critics is claiming (perhaps a little ironically, due to their criticism of the United States' detention policy and practices) that drone strikes are taking the place of the more humanitarian option with regard to engaging belligerents – capture and detention.¹⁴¹ Of course, no official policy exists that instructs operators to kill rather than detain, but critics have pointed to the fact that since the Obama Administration came into office in 2009, hundreds of drone strikes have been launched against high-level terrorists with no high-level captures and detentions.¹⁴²

Compounding this challenge is the inability of, or extreme difficulty for, drones to accept surrender or call back strikes at late stages of deployment.¹⁴³ Consider, for example, a hypothetical operation where, as a drone heads for its position, but before its missile hits its mark, the target looks to the skies and unambiguously demonstrates his intent to surrender, thus rendering himself *hors de combat*. On the one hand, one might argue that when conducting an aerial bombing on a lawful target from a traditional manned aircraft, the target does not have a right to surrender once the bombs are dropped. However, the technological ability of drones to survey the ground before and during a strike, and abort a strike at the latest of stages, may complicate the hypothetical. It is possible that the law of armed conflict may require a drone to accept surrender until it is no longer capable of doing so. The implications of such an interpretation, of course, are considerable. After all, how is a drone flying deep into hostile territory, and without nearby ground support (presumably the reason for the drone's use in the first place), to accept surrender and remove the person or persons from the battlefield? And even if this were possible, how is a drone to inform the now *hors de combat* target that he is to stay in place until picked up and detained by

141. See, e.g., Asim Qureshi, *The 'Obama doctrine': kill, don't detain*, THE GUARDIAN (Apr. 11, 2010), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/apr/11/obama-national-security-drone-guantanamo>; Karen DeYoung & Joby Warrick, *Under Obama, More Targeted Killings Than Captures in Counterterrorism Efforts*, WASH. POST, Feb. 14, 2010, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/13/AR2010021303748.html?nav=emailpage>.

142. See, e.g., DeYoung & Warrick, *supra* note 141; Richard Murphy & John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 406-14 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349357.

143. The scenario of surrendering to a drone has occurred at least once. P.W. Singer writes: "In one case, a group of Iraqi soldiers saw a Pioneer flying overhead and, rather than wait to be blown up, waved white bed sheets and undershirts at the drone – the first time in history that human soldiers surrendered to an unmanned system." *Military Robots and the Laws of War*, *supra* note 16.

opposing forces? The prospect of surrendering to a drone is fraught with such practical challenges.

However, in the vast majority of cases, strikes are conducted by surprise and without forewarning. This fact begs another question: is the United States required to warn civilian populations about intended drone strikes in advance of the attack? And if so, what does that warning need to look like? Article 26 of Hague IV requires a commander to do “all in his power” to warn “authorities” before a bombardment, “except in cases of assault.”¹⁴⁴ It is not clear under this definition who is required to receive that notification, although it is widely believed that the United States receives some level of consent or permission from Afghan, Iraqi, Pakistani, and Yemeni “authorities” when it conducts strikes in their respective territories. Recently, a collection of experts gathered at Harvard University to develop rules for aerial and missile warfare.¹⁴⁵ Of note, Rule 37 from the group’s manual states:

When the attack of a lawful target by air or missile combat operations may result in death or injury to civilians, effective advance warnings must be issued to the civilian population, unless circumstances do not permit. This may be done, for instance, through dropping leaflets or broadcasting the warnings. Such warnings ought to be as specific as circumstances permit.¹⁴⁶

It is clear that the law of war contemplates some kind of warning before attacks on civilian locations. However, it is also clear that there are exceptions to the requirement to forewarn under certain situations. In the AUMF conflict, where individuals stage attacks and conduct hostile operations from homes and public places, the United States often depends upon the ability to strike targets when they find them—and to do so quickly and by surprise. Presumably, an attack against a lawful target that depends on the element of surprise for its achievement of the military objective, if conducted as precisely as possible and with proper consideration of the potential collateral effects, would be such an exception and fit within the principle of humanity.

IV. LEGAL BOUNDARIES AND LIMITATIONS FOR DRONE WARFARE

By examining the law of armed conflict’s fundamental principles in relation to drone strikes, it is evident that there is plenty of law governing drone warfare—from the Hague and Geneva Conventions and their protocols, to specialized treaties on specific weapons, to custom and usage, and to domestic laws, rules, and regulations. Thus far, most of the analysis in this article has been dedicated to the targets and victims of drone strikes. This section therefore identifies and analyzes

144. Hague IV, *supra* note 45, art. 26.

145. PROGRAM ON HUMANITARIAN POLICE AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, *Foreword to MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE* (2009), available at <http://ihlresearch.org/amw/HPCR Manual.pdf> [hereinafter HPCR].

146. *Id.* at 18. The Manual adds at Rule 39, “the obligation to take feasible precautions in attack applies equally to UAV/UCAV operations.” *Id.*

some of the most prominent actor-focused issues, assessing what, if any, legal boundaries exist and some of the implications of those limitations.

A. Location of the Strike

From the hypothetical scenarios outlined in the introduction, it is clear that location matters when it comes to military operations. When a drone strike occurs within a recognized and accepted theater of active armed conflict, such as Afghanistan or Iraq, there is virtually no question that the attack is covered by the *lex specialis* of the law of armed conflict by virtue of geography. However, when such an attack occurs in areas outside the traditional, geographically limited “hot” battlefield, reasonable people disagree on whether the operation is or should be covered by the law of armed conflict.

The most obvious current issue in this respect is the question of whether or not the border areas of sovereign, independent Pakistan should be considered part of the “Afghanistan theater” of conflict. This issue prompts a few questions: First, is Pakistan part of either the Afghan conflict or the broader AUMF conflict, such that its territory is part of a “theater of conflict”? Second, is consent from Pakistani authorities required to conduct strikes within Pakistani territory? And third, even without consent, does Pakistan’s inability or unwillingness to take on terrorists within their territory justify the United States from acting itself regardless of consent? On the first question, some argue that Pakistan is not part of the Afghan theater of war, and consequently, any drone strikes conducted in Pakistan violate the law of armed conflict.¹⁴⁷ However, while there is wide disagreement on whether Pakistan is *de jure* part of the Afghan theater, there is no question that at least its border regions are *de facto* part of the same conflict. Actors regularly stage attacks from the Federally Administered Tribal Area (FATA) of Pakistan, conduct operations into Afghanistan, only to retreat back into the FATA.¹⁴⁸ The non-state participants to the conflict, therefore, do not recognize a territorially-limited war. Moreover, there is no question that Pakistan’s territory falls within the greater AUMF theater of conflict.¹⁴⁹ U.S. officials have argued that the fight with AUMF enemies is global, not confined to the territory of one country.¹⁵⁰ In fact, most of the leadership and many of the fighters for the AUMF parties are located outside of Afghanistan and within Pakistan’s borders.¹⁵¹ Thus, while the United States may not assert an unconditional right to attack targets throughout Pakistan at will, if Pakistan’s territory is being used to continue the war against the

147. See, e.g., Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144.

148. *The Truth about Talibanistan*, TIME.COM (Mar. 22, 2007), <http://www.time.com/time/magazine/article/0,9171,1601850,00.html>.

149. U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1 (2006), available at www.fas.org/irp/nsa/doj011906.pdf [hereinafter NSA Report].

150. See, e.g., *id.* at 5.

151. Joby Warrick, *U.S. Cites Big Gains Against Al-Qaeda*, WASH. POST, May 30, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/05/29/AR2008052904116_2.html?sid=ST2008053100213.

United States and its allies, and if Pakistan is unwilling or unable to contain the threat, then strikes on targets in Pakistan do not violate Pakistan's right to territorial inviolability. The argument that a conflict with a non-state actor must be confined to a geographical boundary may seem appealing to some, but it is not supported by law or custom and it becomes dangerously illogical when applied to conflicts that by their nature cross borders and by definition are not between or among territorially limited states.

That being said, and as noted above, deciding "whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to... the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses."¹⁵² Thus, in response to the remaining two questions, obtaining a state's consent to use force within its territory may be required under the UN Charter,¹⁵³ but if a state is unable or unwilling to suppress a threat against the security of a second or third state (in this case, Afghanistan or the United States), that second or third state may exercise its Charter right to self defense.¹⁵⁴ According to public reports, U.S. officials have regularly consulted Pakistani authorities when drones have been employed for strike operations in Pakistan.¹⁵⁵ However, as Pakistan maintains only limited control over large swaths of its territory – and terrorists have used that ungoverned space to their advantage – both candidate¹⁵⁶ and President Obama¹⁵⁷ has made clear that the United States will act if and when Pakistan cannot.

152. Koh, *supra* note 1.

153. U.N. Charter art. 2, para. 4, available at <http://www.un.org/en/documents/charter/chapter1.shtml> [hereinafter UN Charter]. Article 2(4) of the Charter of the United Nations provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.*; see also, Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. 1, Oct. 18, 1907, 36 Stat. 2310, 205 Consol. T.S. 299 [hereinafter Hague V].

154. See UN Charter, *supra* note 153, art. 51. See also Koh, *supra* note 1; U.S. Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, 7.3 (2007)

A neutral nation has the duty to prevent the use of its territory as a place of sanctuary or a base of operations by belligerent forces of any side. If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may take such acts as are necessary in the neutral territory to counter the activities of enemy forces, including warships and military aircraft, making unlawful use of that territory.

155. See, e.g., Amanda Hodge, *Pakistan Allowing CIA to Use Airbase For Drone Strikes*, THE AUSTRALIAN, Feb. 19, 2009, available at <http://www.theaustralian.com.au/news/pakistan-permits-cia-base-for-strikes/story-e6frg6t6-111118893683>.

156. See e.g., Steve Holland, *Tough Talk on Pakistan from Obama*, REUTERS, Aug. 1, 2007, available at <http://www.reuters.com/article/idUSN0132206420070801>.

157. See, e.g., R. Jeffrey Smith, Candace Rondeaux & Joby Warrick, *2 U.S. Airstrikes Offer a Concrete Sign of Obama's Pakistan Policy*, WASH. POST, Jan. 24, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/23/AR2009012304189.html>; James Joyner, *Obama Orders Pakistan Drone Strikes*, NEW ATLANTICIST, Jan. 24, 2009, available at http://www.acus.org/new_atlanticist/obama-orders-pakistan-drone-attacks.

While the AUMF conflict is fought primarily in Afghanistan with the consent of the Afghan government, and in Pakistan in consultation with the Pakistani government, the AUMF contemplates a transnational, borderless war with al Qaeda and associated forces. As al Qaeda maintains a strong presence in a number of countries, most notably Yemen and Somalia, and uses such states to train for, plan, and stage attacks against the United States and its allies, the United States has reportedly conducted limited kinetic operations in such countries.¹⁵⁸ Somalia and Yemen present an even more compelling case of “unwilling or unable” than Pakistan, as both states show little semblance of governance or law and order.¹⁵⁹ Accordingly, the United States would likely assert the right of self-defense as the legal rationale for drone strikes against al Qaeda and their associates in these and potentially other failed or failing states. More challenging is whether the United States would opt for attacking high-level targets in neutral states that *do* have the capacity and/or willingness to act, such as Kenya, the Philippines, or Saudi Arabia. Given the likely diplomatic repercussions, it is doubtful that U.S. officials would opt for a drone strike in such countries without consent at the highest levels of their governments. And if consent were given and U.S. personnel pulled the trigger on a targeting operation against AUMF foes, the strike would arguably be covered under AUMF authority and fall within the law of armed conflict. It bears noting that to the extent that belligerents are present in the “global commons,” such as international waters, they are targetable there.¹⁶⁰ However, strike operations conducted in or from neutral waters or airspace fall under the same rules for strike operations in or from neutral territory.¹⁶¹

Thus, location matters, but it is not overly prohibitive. The United States has consistently made the case that the war with al Qaeda and its terrorist associates is of global reach.¹⁶² The epicenter is in Afghanistan (and to a lesser extent Iraq), but al Qaeda, as a transnational non-state actor, operates in and wages war from states across the world. Particularly hot are the conflicts in Pakistan, Somalia, and Yemen, although al Qaeda’s presence in other countries, including in Europe, has

158. See *Rise of Drones II*, *supra* note 40 (O’Connell describes a situation in November, 2002, where the U.S. used a drone outside a combat area “to fire laser-guided Hellfire missiles at a passenger vehicle traveling in a thinly populated region of Yemen.” The drone was operated by CIA agents based in Djibouti).

159. See, e.g., U.N. S.C. Rep. of the Secretary-General 8, U.N. Doc. S/2010/394 (July 26, 2010); Jeffrey D. Feltman, Assistant Secretary, Bureau of Near Eastern Affairs, House Committee on Foreign Affairs, *Yemen on the Brink: Implications for U.S. Policy* (Feb. 3, 2010), available at <http://www.state.gov/p/nea/rls/rm/136499.htm>.

160. United Nations Convention on the Law of the Sea arts. 19, 301, Dec. 10, 1982, 1833 U.N.T.S. 397. Neutral zones, including the high seas and the air above the high seas, are reserved for “peaceful purposes,” precluding their use to conduct lethal strike operations. *Id.* art. 88. However, in times of war, the law of armed conflict allows for the sea to be used for self-defense or other UN Charter-authorized uses of force. See George K. Walker, *Self-Defense, the Law of Armed Conflict and Port Security*, 5 S.C.J. INT’L L. & BUS. 347 (2009).

161. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA §1 (Louise Doswald-Beck ed., 1995), available at <http://www.icrc.org/ihl.nsf/WebART/560-06?OpenDocument>.

162. NSA Report, *supra* note 149.

led to a number of deadly attacks.¹⁶³ While the United States has not and will not respond to every terrorist threat posed by AUMF parties with military force, it has asserted the right to do so – with the consent or cooperation of the home government, or, if the home government is unwilling or unable to respond, without it.¹⁶⁴

B. Location of the Operator

One of the most common critiques of drone warfare relates to the location of the operator. When it became apparent that most of the Predator strikes on al Qaeda targets were controlled far from the battlefield, in Nevada or at Langley or any other number of locations outside the traditional battlefield and out of harm's way, concerns with operators becoming detached and indifferent to the human costs began to emerge. While drones eliminate many of the issues associated with human emotion and frailty, leading to increased effectiveness and precision, some fear that advanced technologies may “make some soldiers too calm, too unaffected by killing.”¹⁶⁵ Army chaplain D. Keith Shurtleff comments that “as wars become safer and easier, as soldiers are removed from the horrors of war and see the enemy not as humans but as blips on a screen, there is a very real danger of losing the deterrent that such horrors provide.”¹⁶⁶ A number of operators and commentators have compared the drone operating experience to playing a video game,¹⁶⁷ with some commenting that a person playing a video game is usually “not a benevolent God.”¹⁶⁸ While many of these issues are not unique to drones, drone warfare seems to present a number of particularly challenging ethical and moral questions.¹⁶⁹

However, while further ethical or moral exploration may be required with regard to remotely conducted attacks performed far from the battlefield, the law of armed conflict does not present any additional limitations or prohibitions in this respect. There is no difference under the law of war if a ship at sea fires a rocket at a military objective hundreds or thousands of miles away ashore, or if a plane flying thousands of feet in the air bombs a military target it never sees, or if a domestic missile installation fires an intercontinental ballistic missile at a lawful target half way across the globe, so long as the attacks are carried out within the

163. See Alston, *supra* note 6, at 7-8; Robert S. Leiken & Steven Brooke, *Al Qaeda's Second Front: Europe*, N.Y. Times, July 15, 2005, available at <http://www.nytimes.com/2005/07/14/opinion/14iht-edleiken.html>.

164. Memorandum from John Yoo, Deputy Assistant Attorney General, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sep. 25, 2001).

165. Singer, *supra* note 14, at 395.

166. *Id.* at 396.

167. See, e.g., Eric Hagerman, *Point. Click. Kill: Inside The Air Force's Frantic Unmanned Reinvention*, POPULAR SCIENCE MAGAZINE, Aug. 18, 2009, available at <http://www.popsci.com/drones>.

168. Singer, *supra* note 14, at 395.

169. See, e.g., Mat Trachok, *Predator Strikes Raise Novel Moral, Legal Issues*, HARVARD NATIONAL SECURITY JOURNAL, Dec. 2, 2009 available at <http://www.harvardnsj.com/2009/12/predator-strikes-raise-novel-moral-legal-issues/>.

rules of armed conflict.¹⁷⁰ Similarly, the law of armed conflict does not forbid a military operator from remotely conducting a drone strike from an air force base in Nevada or some other location far from the target, if the strike is carried out within the same recognized conventional and customary legal framework that any other attack in the same armed conflict would be performed. In sum, the location of the operator in the context of an armed conflict does not make a legal difference as long as that operator is working under the same rules as any other individual engaged in the conflict.

C. Status of the Operator

Probably the most controversial aspect of the drone strike program is the status of the operator. Even some of those who are fully on board with nearly every other aspect of drone warfare find themselves uneasy with civilian personnel performing a combat function.¹⁷¹ In the broader AUMF conflict, it is reportedly the CIA that almost exclusively operates drones for lethal strike operations.¹⁷² The United States has relied heavily on the CIA to perform combat-type functions in its current conflicts.¹⁷³ Proponents would likely argue that this is because the current conflicts are unlike any others the United States has found itself in – with a greater need for quick, actionable intelligence, targeting identification and acquisition, secrecy, and swift decision-making.¹⁷⁴ To be sure, not many would argue that the CIA may not perform a prominent intelligence role in the current armed conflicts, even by using drones for reconnaissance and espionage missions. But CIA operation of drones for lethal combat-type operations prompts a number of legal questions.

As discussed at length in section III(B)(1) above, only lawful combatants (or privileged belligerents) are permitted to participate in hostilities.¹⁷⁵ The CIA is a civilian agency and not a branch of the U.S. Armed Forces. Even under a liberal reading of Article 4 from GC III, the CIA would not meet the requirements of lawful belligerency as a militia or volunteer corps because, while they do report to a responsible chain of command (albeit not always a military chain of command), as a group they do not wear uniforms or otherwise distinguish themselves, nor do they carry their arms openly. CIA personnel are therefore unprivileged

170. It should be noted here that the same rules regarding neutral zones described in the “location of the strike” section above apply equally here to the location of the operator. See *supra* Section IV(A).

171. See, e.g., Kenneth Anderson, *Predators Over Pakistan*, 15 WEEKLY STANDARD 24, Mar. 8, 2010, available at <http://www.weeklystandard.com/articles/predators-over-pakistan>; David Glazier, *Testimony Before the House Subcommittee on National Security and Foreign Affairs*, U.S. House of Representatives Committee on Oversight and Government Reform, Apr. 28, 2010, available at http://oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/4.28.10_Drones_II/Glazier_Statement.pdf.

172. See Jane Mayer, *The Predator War: What are the risks of the C.I.A.'s covert drone program*, NEW YORKER, Oct. 26, 2009, available at http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

173. *Id.*

174. *Id.*

175. See Baxter, *supra* note 92; GOLDMAN & TITTEMORE, *supra* note 51, at 2-4.

belligerents¹⁷⁶ in this conflict.¹⁷⁷ This may not prohibit the United States from using CIA or other civilian personnel to conduct drone strikes, but the participating civilians join the fight without the combatant's privilege and lose their protected civilian status.¹⁷⁸ While engaged CIA personnel become targetable as combatants, it is unclear whether CIA personnel would also be prosecutable as unlawful belligerents for their participation in the hostilities.¹⁷⁹ Some have questioned whether requiring a uniformed service-member to "pull the trigger" in a "right seat-left seat" situation with the CIA might solve this issue. After all, reconnaissance, target identification, and remote piloting do not by themselves constitute acts of belligerency. However, applying the direct participation analysis, CIA personnel involved in preparing for, assisting, and setting up hostile acts perform a combat function, have likely already given up their civilian protected status, and do not need to actually pull the trigger in order to cross the line into a combatant role.

There is some speculation that the CIA only conducts drone attacks outside "traditional battlefields," leaving Afghan and Iraqi operations to the military. Jane Mayer writes: "The U.S. government runs two drone programs. The military's

176. *But see* ICRC DPH Guidance, *supra* note 96, at 39 (stating even the ICRC allows some civilians, if incorporated into the forces, may take on a combatant status in certain situations:

As long as they are not incorporated into the armed forces, private contractors and civilian employees do not cease to be civilians simply because they accompany the armed forces and or assume functions other than the conduct of hostilities that would traditionally have been performed by military personnel. . . . A different conclusion must be reached for contractors and employees who, to all intents and purposes, have been incorporated into the armed forces of a party to the conflict, whether through a formal procedure under national law or *de facto* by being given a continuous combat function. Under IHL, such personnel would become members of an organized armed force, group, or unit under a command responsible to a party to the conflict and, for the purposes of the principle of distinction, would no longer qualify as civilians.

177. Gary Solis argues exactly this point in a recent Washington Post editorial. *See* Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html>.

178. *Id.* (asserting that CIA personnel, as unlawful combatants, might be targetable as a class anywhere by current enemies—even driving to work at Langley).

179. It can be argued that the United States takes the position that unprivileged belligerency is a violation of the law of war. As an example, the Military Commissions Act of 2009 criminalizes activities committed by unprivileged belligerents (*i.e.*, conspiracy, material support, and murder in violation of the law of war) that would not be war crimes if committed by lawful combatants committed during the course of an international armed conflict. However, this is controversial. The ICRC DPH Guidance asserts that:

The absence in IHL of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by IHL nor criminalized under the statutes of any prior or current international criminal tribunal or court.

The ICRC notes, though, that such civilians may "not enjoy immunity from domestic prosecution for lawful acts of war, that is, for having directly participated in hostilities while respecting IHL." ICRC DPH Guidance, *supra* note 96, at 83-84.

version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based."¹⁸⁰ This may reflect a political or diplomatic decision not to introduce military elements into countries where the United States does not maintain an active military presence. However, some suggest that the CIA's role in the recognized war zones might be greater than Mayer's assessment.¹⁸¹ Either way, because the United States treats the AUMF conflict as an armed conflict that extends beyond Afghanistan and Iraq, the CIA participates within the framework of that armed conflict whenever they target AUMF enemies.

A number of critics also point to the lack of accountability for CIA drone strikes as reason for concern. O'Connell, for example, claims that CIA personnel are not trained in the laws of war and do not take into account the constraints imposed by that legal framework when conducting strike operations.¹⁸² The military, in contrast, is trained in the laws of war and expected to comply with them, perform all operations under a strict command structure, and are held accountable for their actions under the Uniform Code for Military Justice. In addition, the military is subject to its own internal rules and regulations as well as the guidance from its commanders that further restrain its personnel.¹⁸³ Of course, this is not to say that the CIA does not require its personnel to abide by many of the same rules with equal rigor and accountability—they certainly may. But the public does not know what rules apply and neither does the enemy, in contrast to the military's requirement for transparency in promulgating its rules and regulations.

Finally, in addition to the civilian-military status issue, there is an obscure but emerging computer-human status issue in this area. Verging on the stuff of science fiction, "autonomous UAVs" may become a reality in the near future. Singer writes,

As military robots gain more and more autonomy... [a]utonomous robots could, in theory, follow the rules of engagement; they could be programmed with a list of criteria for determining appropriate targets and when shooting is permissible. The robot might be programmed to require human input if any civilians were detected. An example of such a list at work might go as follows: "Is the target a Soviet-made T-80 tank? Identification confirmed. Is the target located in an authorized

180. Mayer, *supra* note 172.

181. See e.g., *Rise in Drones II*, *supra* note 40, at 6 (recounting an interview with a former drone commander from Nellis Air Force Base in Nevada, where the commander admitted that all Air Force drone operations were conducted jointly – or with CIA participation).

182. *Id.* at 8.

183. See FM 3-24, *supra* note 121; FM 27-10, *supra* note 67; also consider General Stanley McChrystal's "zero-tolerance" policy on civilian deaths in Afghanistan. See *McChrystal Apologizes as Airstrike Kills Dozens in Afghanistan*, CNN.COM, Feb. 23, 2010, available at <http://www.cnn.com/2010/WORLD/asiapcf/02/22/afghanistan.civilian.strike/index.html>.

free-fire zone? Location confirmed. Are there any friendly units within a 200-meter radius? No friendlies detected. Are there any civilians within a 200-meter radius? No civilians detected. Weapons release authorized. No human command authority required.”¹⁸⁴

Such a prospect presents serious challenges to the law of war framework. For one, having a human responsible for his or her actions serves as a deterrent to violations of the law.¹⁸⁵ Allowing a computer to “make” life or death decisions severs this chain of responsibility. Second, robots do not meet the definition of lawful combatants and may not participate independently in combat operations.¹⁸⁶ And third, while humans may commit errors due to emotion, fatigue, or other factors, human judgment is often critical in exercising restraint in armed conflict. Taking Singer’s scenario as an example, it is hard to imagine how a drone might be programmed to account for distinction when the enemy’s status is inherently unclear, or for proportionality when the situation calls for a difficult decision on calculating the worth of human life, or for humanity when the strike might not be worth the human costs. Humans are required by the law of armed conflict to exercise judgment and restraint, and programming into a drone the standard rules of engagement is a start, but human judgment ultimately requires human operators.

V. CONCLUSION: DOES THE LAW OF ARMED CONFLICT PROVIDE ADEQUATE RULES TO GOVERN DRONE WARFARE?

As this analysis has demonstrated, there are more than enough rules for governing drone warfare – from the laws governing aerial and missile warfare to the fundamental principles of the law of armed conflict, to specialized weapons treaties and the Hague and Geneva conventions, and from customary law to the UN Charter. The issue is whether these rules are fairly and consistently followed. Correctly, the Obama Administration has stated that “the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart bombs—so long as they are employed in conformity with applicable laws of war.”¹⁸⁷ Drones may present interesting new challenges because of their sophistication and the technological advantage they convey to their operators, but the law of armed conflict is more than adequate to govern their wartime deployment. The United States has stated that it is committed to ensuring that targeting practices are lawful.¹⁸⁸ To this end, the Administration has “carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles,” concluding that “targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”¹⁸⁹ In sum, properly

184. *Military Robots and the Laws of War*, *supra* note 16.

185. *Id.*

186. *Id.*

187. Koh, *supra* note 1.

188. *Id.*

189. *Id.*

conducted drone attacks, which take into account all the constraining principles from the law of war, target lawful objectives, and are performed by privileged belligerents, do not violate the law of armed conflict.

Drawn from the above analysis, then, I close by offering ten guiding principles for conducting drone strikes within the letter and spirit of the law of war:

One: Any drone strike *must* be necessary for the accomplishment of an actual military objective.

Two: A drone strike *must* be directed only at lawful targets—i.e., combatants, civilians who have forfeited their protections by directly participating in hostilities, and military objectives.

Three: Commanders and operators *must* not authorize a drone strike when they know or reasonably should know that the strike will cause excessive collateral effects to civilians or civilian property.

Four: Commanders and operators *must* strike a proportional balance between the risk to civilians or civilian objects and the military advantage expected when using drones to conduct attacks.

Five: Commanders and operators *must* exercise constant care and reasonable precaution to spare the civilian population from death and destruction.

Six: Commanders and operators *must* not conduct drone strikes where there is a high likelihood that the strike will cause unnecessary suffering or superfluous injury.

Seven: A drone strike *must* be conducted within the framework of an actual armed conflict.

Eight: A drone strike *should* be conducted only by lawful combatants.

Nine: Commanders and operators *should* receive prior consent (even if blanket approval) from the state in whose territory the strike will occur, unless that state is unwilling or unable to control the threatening activities within its own territory.

Ten: Although not required by law, commanders and operators may benefit in certain circumstances from pursuing a non-lethal course of action if a target might just as easily be captured and detained, within reason and subject to force protection concerns.