

ARTICLES

DRONES AND DISTINCTION: HOW IHL ENCOURAGED THE RISE OF DRONES

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ABSTRACT

The principle of distinction, which requires participants in an armed conflict to differentiate themselves from civilians and which demands that attackers distinguish between lawful targets and civilians, stands at the core of international humanitarian law (IHL). The use of armed drones presents challenges for this principle, particularly with regard to who operates them. While this topic has been discussed frequently, little has been said about the role that the principle of distinction played in encouraging the development of armed drones.

A combination of the rise in the strategic effectiveness of asymmetric warfare and the manner in which the principle of distinction was applied to asymmetric armed conflicts contributed to the rise of the armed drone. The practice of irregular armed groups blending with the civilian population challenged IHL and put pressure on the principle of distinction. On one hand IHL recognized that utilizing the civilian population to shield military objects was unlawful, but on the other it did not want this behavior to absolve attacking forces (in most cases regular state military forces) from continuing to take precautions to avoid civilian casualties. This conundrum was resolved by finding shielding to be illegal but legally effective, in that attacks upon shielded targets were judged to be illegal by several U.N. commissions of inquiry and by guidance offered by the ICRC.

State militaries reacted to these restrictions in one of two ways. Some ignored these restrictions and carried on campaigns against shielded targets that caused massive civilian casualties. Others, seeking to comply with IHL, sought smaller, more accurate weapons and more reliable sources of real-time intelligence. This is where drones entered the picture. Some have argued that drones were developed

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for their operational advantages rather than for their ability to comply with IHL. But the operational benefits of using drones instead of manned aircraft in places like Afghanistan, Yemen, and Pakistan are very slight. Coalition pilots are at very little if any risk in those environments. It is the improved real-time intelligence and the superior command control over weapons employment decisions (factors critical to IHL compliance) that are the most important benefits provided by drones.

Who controls the drones is also a critical issue for IHL. Are CIA drone operators civilians directly participating in hostilities (DPH)? Does that make them legitimate targets? Is there any way that they might acquire combatant status? The answer to all three of these questions is yes. They are legitimate targets whether as civilians DPH or as combatants. From the information available they appear to be civilians, but they could acquire combatant status if they are subject to a command structure that enforces the laws of war. The existence of such a command structure is a factual question that there is insufficient public information available to assess.

Lastly, many commentators have criticized the legal basis for the U.S. use of drones as being based on an “ever-expanding entitlement” to use force, and they have warned that the proliferation of drones will result in terrorist drone attacks against the United States. After briefly reviewing the practical impediments to terrorist drone attacks, this Article closes by examining the legal framework that the United States appears to be relying upon in conducting drone strikes against al Qaeda targets outside Afghanistan.

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DRONES AND DISTINCTION

I. INTRODUCTION

Unmanned aerial vehicles (UAVs)—otherwise known as drones—have emerged as a major source of debate in international humanitarian law (IHL). Discussions have centered on the legality of their usage,¹ ranging from disputes over the disparate reporting of death tolls attributable to drone strikes,² the legality of the targeting criteria behind drone strikes,³ *jus ad bellum* concerns regarding the use of drones in states such as Yemen and Somalia,⁴ and concerns relating to the conduct of drone strikes by non-military government agencies, such as the U.S. Central Intelligence Agency (CIA).⁵ However, an unexamined area regarding the rise of drones as a weapon of war has been the degree to which both the principle of distinction, one of IHL's core concepts, and the changing nature of warfare have combined to galvanize the development and use of drones. This Article examines that phenomenon and explores how adherence to the principle of distinction, when applied in the increasingly complex context of twenty-first century asymmetric armed conflict, has encouraged the development of weaponry that offers the potential for more precise attacks.

The principle of distinction is one of the most important concepts of the law of armed conflict. It provides that parties to a conflict must distinguish between combatants and civilians. Legally, combatants are

1. E.g., Mary Ellen O'Connell, *Unlawful Killing With Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263 (Simon Bronitt et al. eds., 2012); Jeremy Waldron, *Justifying Targeted Killing with a Neutral Principle?*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 112 (Claire Finkelstein et al. eds., 2012); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145 (2010); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009).

2. Gregory S. McNeal, *Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence*, in TARGETED KILLINGS, *supra* note 1. See also reports by the Bureau of Investigative Journalism on drone casualties, available at <http://www.thebureauinvestigates.com/category/projects/drones/> and the "Living Under Drones" project undertaken by Stanford University and New York University, available at <http://livingunderdrones.org/>.

3. E.g., Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3 (2010).

4. E.g., Chris Jenks, *Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649 (2009); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005).

5. E.g., Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201 (2011).

the only people who are allowed to take part in an armed conflict.⁶ Combatants are defined as members of an organization that possesses an internal disciplinary system that enforces the laws of war.⁷ Civilians are negatively defined as all non-combatants.⁸ Civilians are immune from targeting, but they can forfeit that immunity by taking direct part in hostilities.⁹ Respect for the principle of distinction also requires parties to the conflict to distinguish themselves from the civilian population and to distinguish between civilian and military objects and installations when targeting. These provisions require that military installations and objects be located away from civilian populations and prohibit locating such installations and objects in civilian-dense areas in an attempt to “immunize” them from attack.¹⁰

Historically, the question of how one distinguished between a combatant and a civilian was, until the early twentieth century, a relatively unproblematic concept. As a general rule, inter-state wars were decided by soldiers in recognizable uniforms, often on battlefields far removed

6. Knut Ipsen, *Combatants and Non-Combatants*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* ¶ 301 (Dieter Fleck ed., 2d ed. 2008).

7. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]. Although the United States has not ratified Protocol I, it recognizes much of Protocol I as descriptive of customary international law. For example, a statement issued by the Obama White House in 2011 announced the intention of the Administration to accept the applicability of Article 75 of Protocol I:

Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, is similarly important to the international legal framework. Although the Administration continues to have significant concerns with Additional Protocol I, Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported. Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.

Press Release, White House Office of the Press Secretary, Fact Sheet: New Actions on Guantanamo and Detainee Policy (Mar. 7, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

8. *See* API, *supra* note 7, art. 51. Neither the Geneva Conventions nor their Additional Protocols specifically define the term civilian, but it is generally accepted that civilians are defined as all people that are not combatants. *See generally infra* notes 39-40.

9. *Id.*

10. *Id.* art. 58.

from civilian populations.¹¹ Technological practicalities demanded such behavior. The weapons of the day required a degree of physical proximity between adversaries; truly remote or long-distance attacks—attacks launched against an adversary from locations physically remote from kinetic hostilities—were simply impossible. The distinction between the military and civilians in such cases was essentially clear. Prior to launching attacks, soldiers could generally rely on clear visual indicia—uniforms, insignia, livery, and so on—as a means to identify the enemy, and thus distinguish between military and civilian objects. Although a number of pre-twentieth-century conflicts¹² contained examples of asymmetric warfare and guerrilla tactics that blurred the lines between military and civilian objects, the ultimate outcomes of those conflicts were determined by pitched battles between regular forces on battlefields relatively free of civilians. This remained the case until World War II.

The humanitarian disaster that was World War II killed tens of millions of civilians worldwide. Sometimes civilians were exterminated or intentionally targeted. Often they were killed collaterally by the tens of thousands due to their proximity to munitions factories, military barracks, road and rail networks, or raw material storage facilities.¹³ And sometimes they were killed accidentally as massive armies fought over cities like Stalingrad, Shanghai, Berlin, Singapore, and Leningrad. Throughout this conflict, most of the existing laws designed to protect civilians and civilian objects¹⁴ were ignored or reinterpreted into oblivion by all parties to the conflict.¹⁵ In the aftermath of this disaster,

11. HELEN M. KINSELLA, *THE IMAGE BEFORE THE WEAPON: A CRITICAL HISTORY OF THE DISTINCTION BETWEEN COMBATANT AND CIVILIAN* 115 (2011) (“Recall that the development of the distinction between combatant and civilian in the late nineteenth century assumed the existence of professionalized standing armies engaged in set-piece battles with one another . . . identifiable through their military regalia or presence in specific formations of war.”).

12. Colonial guerillas in the American Revolution and *franc-tireurs* in the Franco-Prussian War of 1870 are two examples of fighters that blurred the principle of distinction in pre-twentieth-century conflicts. While guerilla warfare played an important role in these conflicts, their outcome was determined by decisive battles (e.g., Saratoga, Yorktown, Spicheren, and Sedan) between regular troops on battlefields relatively free of civilians.

13. See A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 131-133 (3d ed. 2012); see also MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 335 (1959) (on the practice of both the Allies and Axis powers during the War, where military objectives in highly populated civilian areas were targeted, often resulting in considerable civilian casualties).

14. See, e.g., Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

15. See also Charles S. Maier, *Targeting the City: Debates and Silences About the Aerial Bombing of World War II*, 87 INT’L REV. RED CROSS 429 (2005), in which Maier canvases the different legal

the international community created treaties, the 1949 Geneva Conventions and the 1977 Additional Protocols, that were designed to curtail or prevent this level of violence against civilians by more clearly and precisely defining the principle of distinction.¹⁶ The past decade has seen further efforts to more fully describe the distinction requirements of IHL.¹⁷ It has also seen the U.N. and other international organizations accept the legally binding nature of these requirements in their assessment of wartime conduct.¹⁸

During the Cold War, the nature of armed conflict continued to change. Although there were still conflicts fought by more traditional militaries on the Korean peninsula and between Iran and Iraq, there were also an increasing number of asymmetric conflicts involving guerrilla forces and other armed groups. Some of these armed groups aided more traditional armies (the Vietcong actions supported, and were in some cases coordinated with, the North Vietnamese Army¹⁹), while in other cases these groups fought alone against government

analyses regarding the city bombing campaigns against towns and cities such as Coventry, Dresden, Hiroshima, and London, and examines how politicians and military personnel at the time alternatively condemned such bombing as wanton destruction or praised the attacks as legitimate military actions. Such approaches were often entirely dependent on strategic allegiances and whether the attack was committed by one's own military or by the adversary.

16. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV, the Civilians Convention, or GCIV]; API, *supra* note 7.

17. See, e.g., INT'L COMM. OF THE RED CROSS [ICRC], 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY IHL]; Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009*, 90 INT'L REV. RED CROSS 991 (2009) [hereinafter *Interpretive Guidance*].

18. See, e.g., Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, Sept. 25, 2009, U.N. Doc. A/HRC/12/48, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> [hereinafter Goldstone Report]; see also Rep. of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, Mar. 31, 2001, available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf [hereinafter Sri Lanka Report].

19. For a description of how the North Vietnamese Army and the Vietcong coordinated attacks on a variety of occasions, particularly in the Tet Offensive, see generally *Battlefield: Vietnam—Timeline*, PBS, <http://www.pbs.org/battlefieldvietnam/timeline/index.html> (last visited Apr. 30, 2013). Even when the United States was on the defensive during individual battles, such as at Khe Sanh or after the 1972 Easter Offensive, the United States' advantages in artillery and airpower meant that militarily the United States prevailed, forcing the North Vietnamese Army and Vietcong forces to retreat. *Id.*

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forces (e.g., the FARC in Colombia,²⁰ the Afghan *mujahedeen* against the Soviets,²¹ and the Tamil Tigers in Sri Lanka²²). More importantly, in some cases these irregular armed groups won their conflicts without ever winning major battles.²³ This elevation of guerrilla warfare from tactical annoyance to strategic threat has changed the way militaries think about armed conflict.²⁴

Along with developments in military law and tactics, military technologies have also evolved. In the early twentieth century, the maximum range of a Browning machine gun, a weapon used by the U.S. military during World War I, was around one-and-a-half miles.²⁵ Today, cruise missiles and UAVs, such as the Predator drone, can strike targets hundreds of miles from their launch point and are often controlled by operators located thousands of miles from the “battlefield.”²⁶ Thus, it is no longer necessary for combatants to share the same geo-physical space in order to wage war. However, despite all of the technological advances, attacks taking place across great geographical distances still principally rely upon visual identification of the target. When a target appears to be military in nature, and intelligence information supports such a contention, attacks are likely to be undertaken. This confluence of the growing strategic relevance of irregular armed groups, the

20. See Jeff Franks, *Colombia's Marxist FARC Rebels End Ceasefire*, NBC NEWS (Jan. 20, 2013), http://worldnews.nbcnews.com/_news/2013/01/20/16610564-colombias-marxist-farc-rebels-end-ceasefire?lite (describing FARC's ongoing forty-eight-year conflict with the Colombian government).

21. See *Timeline: Soviet War in Afghanistan*, BBC NEWS (Feb. 17, 2009), http://news.bbc.co.uk/2/hi/south_asia/7883532.stm (explaining how Soviet military forces were forced to withdraw from Afghanistan in 1988 and that the *mujahedeen* eventually toppled the Soviet-backed Afghan government in 1992). Although the *mujahedeen* did receive significant monetary support from Saudi Arabia and the United States, unlike the Vietcong whose cause was aided by direct military action from the North Vietnamese Army, the *mujahedeen* did not receive direct support from any state military. *Id.*

22. See Steven R. Ratner, *Accountability and the Sri Lankan Civil War*, 106 AM. J. INT'L. L. 795, 795-802 (2012) (although the Sri Lankan government clearly defeated the Tamil Tigers in 2009, this article describes the results of a U.N. investigation that found numerous credible allegations of IHL violations by the Sri Lankan military in the final stages of the conflict which led to the military defeat of the Tamil Tigers).

23. *Battlefield: Vietnam—Timeline*, *supra* note 19.

24. See, e.g., U.S. ARMY, COUNTERINSURGENCY MANUAL (2006) [hereinafter U.S. COIN MANUAL]; see also BRITISH ARMY, BRITISH ARMY FIELD MANUAL VOLUME 1 PART 10: COUNTERING INSURGENCY (2009).

25. WALTER C. SHORT, COURSE IN MACHINE GUNS: THE GENERAL SERVICE SCHOOLS—THE ARMY SCHOOL OF THE LINE & THE ARMY STAFF SCHOOL, 1919-1920, at 36 (1919).

26. *MQ-1B Predator: Fact Sheet*, U.S. AIR FORCE (Jan. 5, 2012), <http://www.af.mil/information/factsheets/factsheet.asp?fsID=122>.

development of remote weapon systems and the increasing specificity and scrutiny of the principle of distinction has resulted in legal complexities unanticipated by the drafters of the Geneva Conventions. Adding to this complexity is the increasing use of civilians by traditional military forces to carry out combat support functions that threatens to further blur the distinction between civilian and military targets.

The United States has publicly stated that it observes all relevant rules, such as the principle of distinction, when making its targeting assessments in its conduct of remote warfare.²⁷ However, there are those who question this assertion with regard not only to who is attacked, but also as to who launches those attacks.²⁸ Thus, remote warfare raises two separate distinction concerns. First, whether the remote warrior is doing all that is required of him to distinguish between civilian and military targets. Second, what effect the use of civilians as remote warriors has upon the laws of war. Is such a civilian taking a direct part in hostilities and, if so, for how long will they be considered to be doing so? A civilian UAV pilot is certainly taking direct part in hostilities when piloting the drone, but what about when he leaves his workstation for the day and returns home? Does he regain his immunity for that time? May such so-called “cubicle warriors”²⁹ call upon the protections of the laws of armed conflict? Is this globalization of the battlefield an illegal expansion of the law of armed conflict or are discussions about the “geography of war” simply sophistry?

The majority of academic and public scrutiny of remote attacks has focused on the question of the legality of the strikes *qua* strikes: whether the parties conducting the attacks are bound by IHL regarding who, where, and by what means they target.³⁰ These approaches often ignore or minimize other important aspects of the distinction paradigm. Who conducts the attacks and from where? What responsibility does the law place on those who are targeted to differentiate them-

27. Harold Hongju Koh, Legal Adviser, U.S. State Dept., Keynote Address: The Obama Administration and International Law, Address at the 104th Annual Meeting of the American Society of International Law (Mar. 25, 2010), *in* 104 AM. SOC'Y INT'L L. PROC. 207, 218-19 (2010).

28. See generally Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 134-35 (2011); Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, A17.

29. See Lambèr Royakkers & Rinie van Est, *The Cubicle Warrior: The Marionette of Digitalized Warfare*, 12 J. ETHICS & INFO. TECH. 289 (2010).

30. See generally Blum & Heymann, *supra* note 1; Jenks, *supra* note 4; Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT'L L. & POL'Y 661 (2011).

selves from the civilian population and how is that responsibility interpreted in practice?³¹ Therefore, this Article will examine the problems raised by increasing civilian participation in the conduct of armed conflicts, specifically in the context of remote warfare. It will also describe how the current legal trend minimizing the duty of irregular forces to distinguish themselves from the civilian population has encouraged the expansion of remote warfare and particularly the ascendancy of drones. Part I of this Article looks at the relevant international law regarding the protection of civilians in armed conflict and the circumstance in which civilians lose their protection—when they take direct part in hostilities. Part II of this Article illustrates how the attenuation of the duty of distinction for irregular forces has incentivized the expansion of remote warfare and particularly the reliance on drones.³² Part III of the Article discusses current examples of civilian participation in remote hostilities and examines what potential problems this raises under the law of armed conflict. Part III also briefly examines some legal critiques of remote warfare and describes the norms that appear to be developing around its present usage.

II. THE PRINCIPLE OF DISTINCTION: ITS ORIGINS AND PHILOSOPHICAL FOUNDATIONS

Distinction is arguably the most fundamental of the philosophies that underpin the modern law of armed conflict.³³ At the heart of the principle is the idea that civilians should be immune from targeting. Although explicit provisions for civilian immunity were not introduced until Additional Protocol I in 1977, the principle of distinction is based on a certain basic belief outlined in one of the earliest contemporary laws regulating armed conflict, the 1868 St. Petersburg Declaration. The St. Petersburg Declaration states “[t]hat the progress of civilization should have the effect of alleviating as much as possible the calamities

31. See Kenneth Anderson et al., *A Public Call for International Attention to Legal Obligations of Defending Forces As Well As Attacking Forces to Protect Civilians in Armed Conflict*, CRIMESOFWAR.ORG (Mar. 19, 2003), <http://www.crimesofwar.org/special/Iraq/news-iraq3.html>; see also Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for Proportionate Proportionality*, 22 STAN. L. & POL'Y REV. 93 (2011) (arguing that the responsibilities of defending forces toward civilian populations are largely overlooked).

32. See Peter Margulies, *The Fog of War Reform: Change and Structure in the Law of Armed Conflict After September 11*, 95 MARQ. L. REV. 1417 (2011-12). For the most cogent critique of API, see Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT'L L.J. 323, 344-47 (2009).

33. KARMA NABULSI, TRADITIONS OF WAR: OCCUPATION, RESISTANCE AND THE LAW 1 (2005).

of war; [t]hat the only legitimate object which States should endeavor to accomplish during war is to weaken the *military forces* of the enemy.”³⁴ The idea that civilians were not legitimate objects of attack under the law of armed conflict—unless they took part in the hostilities—developed from the writings of some of the earliest publicists of international law. Grotius argued that “[b]y the law of war armed men and those who offer resistance are killed . . . [It] is right that in war those who have taken up arms should pay the penalty, but that the guiltless should not be injured.”³⁵

Civilians were not the enemies of the state against which their own state fought; they were to thus be spared, as far as possible, from the deleterious effects of the conflict.³⁶ Article 22 of the Lieber Code—the first attempt to codify the laws of war—affirms this principle:

[A]s civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.³⁷

International law publicists writing contemporaneously to the first codified laws of armed conflict reaffirmed the need to distinguish between civilians and those who take direct part in hostilities.³⁸ How-

34. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight [St. Petersburg Declaration], (1868), *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 91, 92 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) (emphasis added).

35. Hugo Grotius, *The Law of War and Peace*, Bk. III, Ch. XI, Sec. X (1625), *reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 16, 88-89 (Leon Friedman ed., 1972).

36. LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 19 (2002); *see also* R.R. Baxter, *The First Modern Codification of the Law of War: Francis Lieber and General Order No. 100*, in 25 INT’L REV. RED CROSS 171 (1963); Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC’Y INT’L L. PROC. 112, 114 (2001).

37. Francis Lieber, Instructions for the Government of Armies of the United States in the Field [Lieber Code], art. 22 (Apr. 24, 1863), *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3, 6 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

38. Risley wrote in 1897 that non-belligerent subjects of a party to the conflict

[A]re not liable to be killed or taken as prisoners of war as long as they do not actively engage in hostilities Combatants must be open enemies, known and knowable, and

ever, this consistent theme—that civilians were to be spared the ravages of war—ran through the works of many of the early theorists on the law of armed conflict, but it wasn't enunciated until the adoption of the Geneva Conventions in 1949,³⁹ and it wasn't explicitly outlined until the Additional Protocols of 1977.⁴⁰

III. THE PRINCIPLE OF DISTINCTION AS CODIFIED IN MODERN INTERNATIONAL HUMANITARIAN LAW

Additional Protocol I of 1977 states that “[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”⁴¹ This definition of the principle of distinction is considered to be customary international law, despite the fact that a number of states have not ratified Additional

non-combatants must be harmless. As soon as an individual ceases to be harmless, he ceases to be a non-combatant, and must be reckoned a combatant; and unless he bears the distinguishing marks of an open combatant, he puts himself outside the laws of war.

JOHN SHUCKBURGH RISLEY, *THE LAW OF WAR* 107-08 (1897). This sentiment was echoed in Wheaton's *Elements of International Law* forty years later:

[N]o use of force against an enemy is lawful, unless it is necessary to accomplish the purposes of war. The custom of civilized nations, founded upon this principle, has therefore exempted . . . [all] public or private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity.

HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 362, § 345 (Richard Dana ed., 1936).

39. The Geneva Conventions, as they are collectively known, are the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I or GCI]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II or GCII]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III, the POW Convention, or GCIII]; and Geneva Convention IV, *supra* note 16.

40. See API, *supra* note 7; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. The two protocols are generally known as Protocol I and Protocol II (or the Additional Protocols, collectively) and will be referred to as such in this Article.

41. API, *supra* note 7, art. 48.

Protocol I.⁴²

Observing the principle of distinction is a two-fold obligation. First, parties to the armed conflict must at all times distinguish between civilians and combatants. Combatants are liable to be targeted due to their status as combatants while civilians must not be made the object of attack. Likewise, attacks must only be directed against military objects and objectives; civilian objects must not be targeted. The corollary to this injunction is the obligation on parties not to “blur” the lines between military and civilian. Thus, combatants must distinguish themselves from the civilian population through use of uniforms and other visible insignia that mark them as military in nature.

Military installations must also be so marked, and must not be located in civilian-dense areas as a means to immunize them from attack. This requirement is contained in Article 58(b) of Protocol I, which provides that parties to the conflict “shall, to the maximum extent feasible . . . (b) [a]void locating military objectives within or near densely populated areas.”⁴³ This builds on Article 51(7) of the Protocol, which provides that:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.⁴⁴

The customary status of Article 58 has been affirmed by the Inter-

42. The U.S., as well as India, Indonesia, Iran, Israel, Malaysia, Myanmar, Nepal, Pakistan, and Sri Lanka, among others, are not party to Protocol I. See API, *supra* note 7. However, Article 58(b) has been deemed, under the ICRC Study on Customary International Humanitarian Law, to be of customary status. See CUSTOMARY IHL, *supra* note 17, at 74-76 (Rule 24). The Study notes that Article 58(b) was adopted by eight votes in favor, with none against, and eight abstentions. See also Geoffrey Best, *The Restraint of War in Historical and Philosophical Perspective*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 3, 17 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (stating that the principle of distinction was “no doubt firm customary law before it received positive formulation in the 1860s”).

43. API, *supra* note 7, art. 58(b).

44. *Id.* art. 57.

national Criminal Tribunal for the Former Yugoslavia (ICTY) in a number of cases including *Kupreškić*,⁴⁵ *Galić*,⁴⁶ and *Dragomir Milošević*,⁴⁷ affirming the obligation on the parties to a conflict to remove civilians, to the maximum extent feasible, from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas.

While these requirements to separate military objectives from the civilian population clearly apply to states, the plain language of Protocol I—which explicitly only applies to international armed conflicts (IACs)—calls into question whether these requirements also apply to non-state armed groups. While excluding such groups from these requirements would fundamentally undermine the core purpose of the Conventions, the state-centric nature of Protocol I does complicate its applicability to irregular armed groups in non-international armed conflicts (NIACs). This is demonstrated by the Commentary to Protocol I,⁴⁸ which indicates that the defending state has a responsibility to “its own population” to ensure that military objectives are not placed in close proximity to the civilian population.⁴⁹ While it is certainly possible to find that a duty exists for irregular armed groups to distinguish themselves from the civilian population, the legal basis for doing so would have to be rooted in general principles of humanity rather than a sovereign’s duty to its own population.

45. Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment, ¶ 524 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

46. Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 61 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

47. Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-T, Judgment, ¶ 949 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007).

48. See ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 692, ¶ 2239 (Yves Sandoz et al. eds., 1987) [hereinafter AP Commentary].

49. *Id.* at 692, ¶¶ 2239-2240, states

This article is a corollary to the numerous articles contained in the Protocol for the benefit of the population of enemy countries. It is not concerned with laying down rules for the conduct to be observed in attacks on territory under the control of the adversary, but with measures which every Power must take in its own territory in favour of its nationals, or in territory under its control. Belligerents may expect their adversaries to conduct themselves fully in accordance with their treaty obligations and to respect the civilian population, but they themselves must also cooperate by taking all possible precautions for the benefit of their own population as is in any case in their own interest.

A. *Blurring the Principle of Distinction: Civilians Taking Direct Part in Hostilities*

However, the prohibition on targeting civilians—a key part of the principle of distinction—is not absolute. The law of armed conflict provides that only certain persons are legally entitled to take part in hostilities and enjoy the rights and privileges that attach to such status. Those that are permitted to participate in hostilities are known as combatants, and the rules governing combatant status are found in the Geneva Conventions of 1949 and Additional Protocol I.⁵⁰ Article 4A of Geneva Convention III describes in detail all those individuals that are entitled to prisoner of war status if captured during an armed conflict,⁵¹ while Article 43 and 44 of Additional Protocol I define the terms

50. See GCI, *supra* note 39, arts. 13(1)-(2); GCII, *supra* note 39, arts. 13(1)-(2); GCIII, *supra* note 39, arts. 4A(1)-(2); API, *supra* note 7, arts. 43-44.

51. Specifically, Article 4A lists:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

“armed forces” and “combatants.”⁵²

Persons designated as combatants are permitted to participate in armed hostilities and are immune from criminal prosecution for their conduct if it is in keeping with the laws of armed conflict.⁵³ This immunity is also termed the “combatants’ privilege.”⁵⁴ In addition to combatant immunity, combatants are also entitled, upon capture by enemy forces, to treatment as prisoners of war (POWs).⁵⁵ However, there is a downside to combatant status. Although combatants are entitled to combatant immunity, they are also targetable by the adverse party at any time based upon their status as combatants.⁵⁶ This status-based targeting means that, regardless of their dangerousness, they remain targetable unless they are rendered *hors de combat* by wounds or they surrender.

However, for *civilians* who unlawfully take a direct part in hostilities, the situation is different. No combatant immunity or POW status attaches to their conduct. The only consequence of their participation in “specific acts carried out . . . as part of the conduct of hostilities between parties to an armed conflict”⁵⁷ is that they will be deemed to have taken a “direct part in hostilities”⁵⁸ and thereby forfeited their

GCIII, *supra* note 39, art. 4A.

52. API, *supra* note 7, art. 43 defines armed forces as:

- (1) The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
- (2) Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
- (3) Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44 confirms that combatants are members of the armed forces defined in Article 43.

53. See Ipsen, *supra* note 6, ¶¶ 301-302.

54. Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. ¶ 68 (2002) (“The combatant’s privilege . . . is in essence a license to kill or wound enemy combatants and destroy other enemy military objectives.”).

55. See GCIII, *supra* note 51, art. 4.

56. See GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 187-88 (2010).

57. *Interpretive Guidance*, *supra* note 17, at 995 (2008).

58. API, *supra* note 7, art. 51(3).

civilian immunity.⁵⁹ By participating in hostilities they render themselves targetable for the duration of their participation.

The rule on direct participation thus acts as an exception to the rule of civilian immunity. On one hand, as noted above, the twin notions that civilians should be spared the ravages of war and that they should not take an active part in armed conflict can be traced through the very earliest discussions of the laws of war. On the other hand, however, explicit provisions for civilian immunity and the prohibition against the direct participation in hostilities by civilians did not exist before the adoption of the Additional Protocols in 1977.

In Protocol I, the concept is outlined in Article 51(3), which states that “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”⁶⁰ The “protection afforded by this Section” refers to the prohibition contained in Articles 51(1), (2), and (4) through (8), which provide that civilians are not to be made the object of attack,⁶¹ and that civilians are to be protected from the dangers arising from military operations, imposing prohibitions on parties to the conflict on conducting indiscriminate attacks, and from using civilians to immunize military installations or sites.⁶² Article 51(3) has, to date, had no reservations attached to its applicability.⁶³

Additionally, Protocols I and II make it clear that the prohibition of direct participation in hostilities applies only to civilians. This is because combatants, by their very nature, are allowed to participate in hostilities. Their status as combatants subjects them to the benefit of combatant immunity and detriment of continuous targetability. The International Committee of the Red Cross’s Interpretive Guidance on Direct Participation in Hostilities defines direct participation in both international and NIACs as being,

59. *Id.*

60. *Id.* art. 51(3).

61. *See*, CUSTOMARY IHL, *supra* note 17, at 3-11 (Rules 1-2), 17-36 (Rules 5-10).

62. “Direct part in hostilities” is outlined in Article 13(3) of Protocol II, and is worded exactly as Article 51(3) of Protocol I. *See* API, *supra* note 7, art. 51(3); Protocol II, *supra* note 40, art. 13(3).

63. API, *supra* note 7, art. 51(3) was adopted by seventy-seven votes in favor, one against, and sixteen abstentions. During the Diplomatic Conferences, the importance of the provision was affirmed by a number of states, including the United Kingdom, which declared that the exception to the civilian immunity from attack contained in Article 51(3) was a “valuable reaffirmation” of an existing rule of customary international law. *See* 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS: GENEVA (1974-1977) at 164-204, CDDH/SR. 41 (1978).

DRONES AND DISTINCTION

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities.⁶⁴

While it is clear that these provisions only apply to civilians, what constitutes “direct participation in hostilities” is less clear. When debating Article 51 of Protocol I, the Diplomatic Conferences did not agree on a precise definition of the term.⁶⁵ Likewise, the ICRC Study on the Customary Status of International Humanitarian Law stated that “[a] precise definition of the term ‘direct participation in hostilities’ does not exist.”⁶⁶

A number of attempts have been made to give the term “direct participation in hostilities” clearer scope. In 2003, the ICRC undertook a detailed study of the concept of “direct participation in hostilities,” which is discussed in more detail below.⁶⁷ Around this same time, domestic and international courts were also looking at what constituted direct participation in hostilities. The ICTY looked at direct participation in the case of *Strugar*, where the court defined direct participation

64. *Interpretive Guidance*, *supra* note 17, at 995.

65. See 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS: GENEVA (1974-1977) at 330, CDDH/III/224 (1978); see also AP Commentary, *supra* note 48, at 618-19, ¶¶ 1942-45; MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 301-04, ¶¶ 2.4-2.4.2.2 (1982).

66. CUSTOMARY IHL, *supra* note 17, at 22.

67. However, this process, and the final document, was controversial; the process failed to achieve consensus, a number of experts requested their names to be removed from the final document, and the ICRC ended up releasing the document as its ‘own work,’ rather than as a result of the expert meetings.

as “acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party.”⁶⁸ The ICTY elaborated on possible examples of direct participation as including:

[B]earing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces.⁶⁹

However, a more systematic interrogation of the concept of “direct participation in hostilities” can be found in the Israeli Supreme Court case of *Public Committee Against Torture in Israel v. Government of Israel*, known colloquially as the *Targeted Killings* case.⁷⁰ After taking the important first step of affirming the customary status of the principle behind Article 51 (3) (which was necessary because Israel is not party to Additional Protocol I),⁷¹ the Court proceeded to analyze the concept of direct participation in hostilities for the purposes of determining when a civilian forfeited his or her immunity from targeting.⁷² Indicating that it was mindful of the hazards of both overly restrictive and overly broad interpretations of the concept, the Court noted the ICRC’s Commentary on the Additional Protocols, which counseled that determining the scope of direct participation is a difficult task:

68. Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment, ¶ 178 (Int’l Crim. Trib. for the Former Yugoslavia Jul. 17, 2008). The Chamber drew on numerous sources in support of its statement, including military manuals from numerous countries, international tribunal judgments, U.S. Military Commission decisions, State practice and reports and decisions of human rights bodies, such as the Inter-American Commission on Human Rights. See Third Report on the Human Rights Situation in Columbia, Inter-Am. Comm’n H.R., OEA/Ser.L/V/IL102, doc. 9 rev. 1 ¶ 53 (1999) (“It is generally understood in humanitarian law that the phrase ‘direct participation in hostilities’ means acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and material.”).

69. *Strugar* ¶ 177.

70. HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [2006] (Isr.), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf [hereinafter *Targeted Killings* Case].

71. *Id.* ¶¶ 23, 29-30.

72. *Id.* ¶¶ 29-40.

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[U]ndoubtedly there is room here for some margin of judgment: to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly.⁷³

Taking a functional approach,⁷⁴ the Court identified categories of persons who could be considered as taking direct part in hostilities. These could include persons collecting intelligence on the armed forces; persons transporting unlawful combatants to or from the place where hostilities are occurring; and persons who operate weapons that unlawful combatants use, or supervise their operation, or provide service to them.⁷⁵ The Court also considered civilians involved in transporting ammunition to places for use in hostilities, as well as persons acting as voluntary human shields as taking direct part in hostilities.⁷⁶ The Court explained:

[T]he “direct” character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take “a direct part”. The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities.⁷⁷

The Court went on, however, to exclude certain persons and acts from the scope of direct participation, including the selling of food and medicine to unlawful combatants; providing general strategic analysis, logistical and other general support, including monetary aid; and the distribution of propaganda.⁷⁸

The Court also looked at the question of duration of direct participation: when civilian immunity could be lost, when (and if) it was regained upon cessation of direct participation. The Court stated that there was no accepted or agreed interpretation of the concept, but conceded that a person who has ceased to take a direct part in

73. AP Commentary, *supra* note 48, at 516, ¶ 1679.

74. *Targeted Killings Case*, *supra* note 70, ¶ 31.

75. *Id.* ¶ 35.

76. *Id.* ¶¶ 35-36.

77. *Id.* ¶ 37.

78. *Id.* ¶ 35.

hostilities regains his or her protection from targeting.⁷⁹ The Court noted that it was necessary to distinguish between a person who took a sporadic part (perhaps even a single instance) in hostilities, and those persons who actively joined a “terrorist organization” and, while within that organization, committed a chain of hostile acts, even if there are short “rest” periods between such acts.⁸⁰ The Court opined that for such organizational members, such rest intervals did not constitute a cessation of active participation, and therefore concluded that they did not reacquire their civilian immunity during these intervals. Instead, it regarded these breaks as brief interludes preparatory to the commission and/or participation in the next act of hostility.⁸¹

The Court determined that decisions regarding whether a civilian could be targeted for taking direct part in hostilities needed to be undertaken on a case-by-case basis.⁸² As a result the Court did not attempt to provide great detail on what might constitute indicia of membership in a terrorist group that would result in an individual becoming targetable. Such a detailed examination had to await the ICRC’s study.

The Interpretive Guidance issued by the ICRC focused on three questions: (1) Who is a civilian for the purposes of the principle of distinction? (2) What conduct amounts to direct participation in hostilities? And (3) What modalities govern the loss of protection against direct attack?⁸³ The Guidance defines civilians as “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.”⁸⁴ Such persons are “entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”⁸⁵ This definition is essentially straightforward in relation to civilians in IACs.

Defining a civilian in an NIAC is more difficult. The instruments that deal with NIACs—Common Article 3⁸⁶ and Protocol II⁸⁷—acknowledge but do not authorize participation in armed conflict. Thus, there is no clear combatant/civilian divide amongst non-state

79. *Id.* ¶ 39.

80. *Id.* ¶¶ 39-40.

81. *Id.*

82. *Id.* ¶¶ 34, 39.

83. *Interpretive Guidance*, *supra* note 17, at 994.

84. *Id.* at 995.

85. *Id.* at 997.

86. GCI, *supra* note 39, art. 3. Article 3, which is common to all four Geneva Conventions, is often referred to as Common Article 3.

87. Protocol II, *supra* note 40.

persons engaged in NIACs. The Interpretive Guidance on participation in NIACs is accordingly more complex than that for IACs:

[A]ll persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities (“continuous combat function”).⁸⁸

Thus, another term requiring definition emerges: “continuous combat function.” This was adopted for two reasons. It reaffirms the Israeli Supreme Court’s notion that organizational members do not reacquire their civilian immunity during “rest intervals” if their organizational role involves combat functions.⁸⁹ It is also designed to prevent support personnel from forfeiting their immunity for performing tasks that are not viewed as constituting combat functions.⁹⁰ So the question becomes what constitutes a combat function or a direct participation in hostilities. The Interpretive Guidance states that, in order to qualify as direct participation,

[A] specific act must meet the following cumulative criteria: (1) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).⁹¹

88. *Interpretive Guidance*, *supra* note 17, at 1002.

89. *See id.* at 1007-08.

90. *Id.* at 1008.

91. *Id.* at 1016.

These elements are designed to ensure that persons who might supply subsidiary or peripheral support are excluded from being targeted, reserving targeting for the more serious levels of involvement. What is less clear, or to be more accurate, less clearly accepted as stating the contours of existing law on the subject, is which activities are considered to be sufficiently related to a combat function to result in the forfeiture of immunity.⁹² Difficult questions arise around individuals like bomb makers. The Interpretive Guidance opines that bomb makers are not continuous combat functionaries, analogizing them to civilian munitions workers.⁹³ However, the experts involved in the process of producing the Interpretive Guidance were divided on this issue with some taking the position, currently shared by a number of states, that some bomb makers may be targetable as continuous combat functionaries if they are providing a military capacity otherwise unavailable to their armed group.⁹⁴

The last part of the overall test is “modalities governing loss of protection.” The Guidance states that civilians directly participating will lose their protected status for the duration of each act of direct participation.⁹⁵ However, higher-level members of organized groups do not have this “revolving door” of protection/loss of protection. As long as such persons are deemed to be assuming a continuous combat function, they will remain targets.⁹⁶ This loss of protection for individual acts includes a temporal element: “Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution,

92. See, e.g., W. Hays Parks, *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). It should be noted that the ICRC document does not have the force of law and can only become customary international law if its parameters are accepted by a number of states. Because military reaction to the *Interpretive Guidance* has contended that the definitions offered are too narrow (i.e., that the ICRC considers that fewer people and fewer actions constitute direct participation in hostilities than the military might), the Interpretive Guidance should be viewed as a baseline description of behavior that inarguably constitutes direct participation in hostilities while the actual state of the law remains less clear. See *Interpretive Guidance*, *supra* note 17.

93. *Interpretive Guidance*, *supra* note 17, at 1020-22.

94. ICRC, *Summary Rep. of the Fourth Expert Meeting on the Notion of Direct Participation in Hostilities* 48-60, (Nov. 27-28, 2006) (discussing the qualitative difference between using generally available skills to assemble a munition and using specialized knowledge to build a munition that has exceptional qualities, e.g., liquid explosives that are undetectable or shaped-charge warheads for improvised explosive devices that improve their armor penetrating capabilities).

95. *Interpretive Guidance*, *supra* note 17, at 1034.

96. *Id.* at 1034-35.

constitute an integral part of that act.”⁹⁷ Travel to and from an act of direct participation is included in the window for loss of protection.

IV. DISTINCTION FOR IRREGULAR ARMED GROUPS: HOW THE INTERPRETATION OF SHIELDING AND BLENDING WITH THE CIVILIAN POPULATION HAS ENCOURAGED RELIANCE ON DRONES

Given the legal framework regarding distinction, civilian immunity, and direct participation, this Article now turns to the issue of how distinction has been interpreted in NIACs and how that interpretation has encouraged an increasing reliance on remote warfare and particularly the use of drones in such conflicts.

In today’s world, most NIACs take the form of asymmetric warfare—conflicts in which there is a vast disparity between the quantity and/or quality of the military manpower or equipment available to the two sides. Asymmetric armed conflicts and the irregular armed forces and guerrilla tactics that most frequently characterize them have existed for millennia.⁹⁸ But with the rise of the nation state and the use of standing armies that followed the Thirty Years’ War, the effectiveness of irregular warfare diminished.⁹⁹ From the Treaty of Westphalia in 1648 until the 1950s, the actions of irregular armed groups were rarely outcome-determinative.¹⁰⁰ Since then a number of irregular armed groups have succeeded, at least temporarily, in winning asymmetric armed conflicts against much larger, better-equipped militaries.¹⁰¹ This suc-

97. *Id.* at 1031.

98. See Max Boot, *The Evolution of Irregular War: Insurgents and Guerrillas from Akkadia to Afghanistan*, 92 FOREIGN AFF. 100 (2013).

99. See *id.*

100. Although the toll that the irregular Cossacks took on Napoleon’s *Grande Armée* is perhaps the closest that irregular armed groups had come to determining the outcome of a conflict before the 1950s, it was inflicted during the retreat from Moscow after typhus and the Russian winter had already defeated the French. See Robert K.D. Peterson, *Insects, Disease, and Military History: The Napoleonic Campaigns and Historical Perception*, § 5, http://entomology.montana.edu/historybug/napoleon/typhus_russia.htm (last visited Apr. 30, 2013); see also *Captaine Coignet’s Escape*, NAPOLEONIC GUIDE, http://www.napoleonguide.com/campaign_russ_coignet.htm (last visited Apr. 30, 2013). Successful irregular campaigns, like the Greeks in the 1820s and the Cubans in the 1890s, owed their ultimate success to the intervention of outside forces. See Boot, *supra* note 98.

101. The Vietcong (along with the North Vietnamese Army) defeated the United States and the Army of the Republic of Vietnam in the 1970s. See *Battlefield: Vietnam—Timeline*, *supra* note 19. The *mujahedeens* defeated the Soviet Union in the 1980s. See *Timeline: Soviet War in Afghanistan*, *supra* note 21. The Chechen rebels won a temporary victory against the Russians in the mid-1990s which was later reversed in a second conflict at the end of that decade. See *Timeline: Chechnya*, BBC NEWS

cess has caused the world's regular militaries to reexamine how to best counter the threat posed by such irregular armed groups.¹⁰²

Invariably, irregular armed groups seek to preserve their assets (manpower and munitions) by hiding them amongst the civilian population. The regular militaries confronting them have reacted in a variety of ways to the challenge posed by these actions, but they have become increasingly mindful of the fact that post-action explanations that “in order to save the village we were forced to destroy it”¹⁰³ are unlikely to effectively advance their cause. This is because ultimate success in such conflicts increasingly depends upon gaining the support of the general population. This may be achieved through physical or economic coercion, political compromise, or a combination of these tools.¹⁰⁴ But to the extent that the asymmetric conflict remains a violent one, both sides increasingly look to the law to legitimize their actions.¹⁰⁵

(Jan. 19, 2011, 1:59 PM), http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/2357267.stm. For the peace treaty ending the first Chechen war, see Alessandra Stanley, *Yeltsin Signs Peace Treaty With Chechnya*, N.Y. TIMES (May 13, 1997), <http://www.nytimes.com/1997/05/13/world/yeltsin-signs-peace-treaty-with-chechnya.html>. For a discussion of FARC's success against the Colombian military, see Franks, *supra* note 20.

102. See, e.g., U.S. COIN MANUAL, *supra* note 24.

103. This line has been attributed to an unnamed U.S. Army officer, who reputedly made the comment to journalist Peter Arnett at Bentre during the Vietnam War, *Major Describes Move*, N.Y. TIMES, Feb. 8, 1968, although similar comments can be found in other asymmetric conflicts.

104. E.g., this can take the form of military or police powers used either punitively or protectively, the imposition of economic penalties or the provision of economic incentives to the broader population, or the political destruction or accommodation of an opposing group.

105. There are numerous examples of non-state armed groups that have publicly declared their intention to observe the laws of armed conflict in their armed conflicts with other states or armed groups, as a means to justify and legitimize their acts. During the internal armed conflict in Yemen in the early 1960s, both the Royalists and the opposing Republicans declared their intention to “respect the principles” of the Geneva Conventions. See ICRC, *Annual Report 1963*, 16-17 (1963). In making these declarations, both sides to the Yemeni internal armed conflicts “appear to go beyond acceptance of the provision of article 3 and to support a more far-reaching interpretation of the obligations of the parties with respect to the laws of war than might otherwise be the case in an internal war.” Kathryn Boals, *The Internal War in Yemen*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 303, 315 (Richard A. Falk ed., 1971). More recently, the Libyan opposition group—the National Transitional Council (NTC)—took steps to ensure that their conduct during the civil war in Libya complied fully with international law and the laws of armed conflict. The NTC collaborated with the NGO Lawyers for Justice in Libya to instruct Libyan opposition fighters on conduct in armed conflict, including rules on treatment of detainees and targeting rules. Christine Seisun, *Operationalizing the Laws of Armed Conflict for Libyan Opposition Forces*, YALE J. INT'L AFF. (Aug. 17, 2011), <http://yalejournal.org/2011/08/operationalizing-the-laws-of-armed-conflict-for-libyan-opposition-forces/>.

On paper, IHL imposes obligations on both sides of an NIAC to avoid civilian casualties. Irregular armed groups are required to distinguish themselves from the civilian population¹⁰⁶ and are prohibited from using the civilian population to shield them from attack.¹⁰⁷ State militaries are prohibited from conducting attacks that are expected to cause disproportionate damage to civilians and civilian infrastructure in light of the military advantage gained,¹⁰⁸ and they are also required to take all feasible precautions to prevent or minimize civilian casualties and to provide warnings to the civilian population of imminent attacks.¹⁰⁹

In practice, however, the obligations of irregular armed forces have not been interpreted nearly as rigorously as those that apply to state militaries. Determinations of whether irregular armed groups improperly intermingled themselves with the civilian population have turned not on their proximity to the civilian population when they initiated offensive operations, but rather on whether the irregular armed groups subjectively had an “intention” for the civilian population to act as a shield.¹¹⁰ Absent evidence that the fighters forced civilians to remain in proximity to the fighting, no violation was found.¹¹¹ Although the ICRC is clear that the use of civilians as human shields is illegal,¹¹² its analysis of human shielding situations insists that the “us[e of] civilians as human shields does not release the attacker from his obligations with respect to the civilian population.”¹¹³ In other words, the use of human shields, particularly passive human shields, by irregular armed groups may be illegal, but it is also considered to be legally effective. Any attack on a shielded target would be considered an IHL violation by an attacker if the attacker were aware of the shielding and it produced

106. API, *supra* note 7, art. 48.

107. *Id.* art. 51(7).

108. *Id.* art. 51(5)(b).

109. *Id.* art. 57.

110. See Goldstone Report, *supra* note 18, at 123, ¶ 493; see also Sri Lanka Report, *supra* note 18, at 65.

111. See Goldstone Report, *supra* note 18, at 123, ¶ 494; see also Sri Lanka Report, *supra* note 18, at 65.

112. See CUSTOMARY IHL, *supra* note 17, at 337-40 (Rule 97); see also *Interpretive Guidance*, *supra* note 17, at 1024-26; Sri Lanka Report, *supra* note 18, at 65; Special Rapporteur of Extrajudicial, Summary or Arbitrary Executions, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 9, Human Rights Council, U.N. Doc. A/HRC/11/2/Add.4 (May 6, 2009) (by Philip Alston).

113. *Interpretive Guidance*, *supra* note 17, at 1025 n.142; see also Sri Lanka Report, *supra* note 18, at 65.

disproportionate civilian casualties. While it is unclear whether these interpretations of IHL are effective in reducing civilian casualties during an asymmetric armed conflict,¹¹⁴ it is clear that state armed forces intent upon honoring these interpretations will have to alter their behavior to do so. It is important to emphasize that state armed forces do not have to accept this legal interpretation of the principle of distinction to be influenced by it. Because irregular armed forces benefit from the state armed forces they oppose being accused of IHL violations, even states that disagree with this interpretation of distinction will have a strong incentive to alter their behavior to avoid the reputational damage associated with such allegations. This is particularly true when the interpretation of distinction is supported by credible institutions like the ICRC and the United Nations.

Because observing these restrictions when fighting an enemy that conducts its operations in close proximity to the civilian population effectively negates much of the firepower advantage enjoyed by state armed forces, regular militaries involved in asymmetric conflicts have reacted to the restrictions in one of two ways. They have either ignored the restrictions imposed by IHL or they have attempted to comply with them by changing their weaponry and tactics to better account for the modern interpretation of distinction. These two different responses and their resulting outcomes help to illustrate why legal concerns are a major factor in the development of remote warfare and the use of drones.

In several instances, states have virtually ignored the IHL restrictions: employing artillery, rocket launchers, and bombers in assaults on irregular forces in densely populated areas resulting in tens of thousands of civilian casualties.¹¹⁵ Yet both the Russian and Sri Lankan militaries were ultimately successful in their asymmetric conflicts with

114. Because irregular armed groups stand to benefit from civilian casualties caused by strikes conducted by the state armed forces they oppose, it is less than clear whether this interpretation of IHL is an effective or appropriate way to reduce civilian casualties. For criticisms of IHL interpretations that ignore or minimize the duties of defending forces to the civilian population, see Rubinstein & Rozani, *supra* note 31, at 107-11.

115. See Sri Lanka Report, *supra* note 18, at iii, 55-60 (the Sri Lankan military used a great deal of heavy artillery in its final offensive against the Tamil Tigers in 2009 and killed tens of thousands of civilians in doing so); see also John Sweeney, *Revealed: Russia's Worst War Crime in Chechnya*, GUARDIAN (Mar. 5, 2000), <http://www.guardian.co.uk/world/2000/mar/05/russia.chechnya>; *Russian Tanks Pounding Grozny from 3 Directions*, N.Y. TIMES (Dec. 18, 1999), <http://www.nytimes.com/1999/12/18/world/russian-tanks-pounding-grozny-from-3-directions.html?n=Top/Reference/Times%20Topics/Subjects/I/Immigration%20and%20Refugees> (the Russian military used tanks, artillery, and bombers extensively in their assaults on the Chechen capital of Grozny during both

Chechen and Tamil rebels respectively.¹¹⁶ While this success certainly raises moral as well as legal concerns, it does indicate that nature of modern asymmetric warfare itself does not require states to minimize civilian casualties in order to win asymmetric conflicts.

The alternative response by state armed forces has been attempted compliance with IHL's restrictions. States choosing this response have turned to their technological advantage to find solutions to the problem posed by asymmetric warfare and the laws that govern it. State militaries wishing to assert compliance with a legal regime that regards human shielding and intermingling with the civilian population as legally effective had to ensure that their attacks became increasingly more discriminating and that their intelligence became more accurate. Also, in order to minimize collateral damage the weapons they employed had to become much smaller than the ones designed to defeat a more traditional military opponent.¹¹⁷ This is where drones have entered the picture.

Because the United States has consistently asserted that it complies with IHL in its conflict with al Qaeda, examining U.S. responses to al Qaeda's blending with the civilian population in Iraq, Afghanistan, Pakistan, and Yemen serves as a good illustration of how state militaries seeking to comply with IHL's distinction requirements attempt to do so. The United States' need for more robust intelligence greatly increased the demand for drones whose first role in the conflict with al Qaeda was gathering real-time intelligence. Drones' exceptional endurance of approximately between twenty and thirty hours allowed for long loiter times over the target, which helped to accurately identify

the First [1994-95] and Second [1999-2000] Chechen Wars resulting in tens of thousands of civilian casualties).

116. See Ratner, *supra* note 22. Similarly, the Chechen wars were eventually won by the Russian military at a great cost to the civilian population. See *supra* notes 101 and 115.

117. Compare *MK-82 General Purpose Bomb Specifications*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/systems/munitions/mk82-specs.htm> (last visited Apr. 29, 2013) (the Mark-82 bomb's (the smallest of the munitions typically employed by U.S. manned aircraft in the late 1990s and early 2000s) total weight of approximately 500 lbs and warhead weight of 192 lbs) with *AGM-114 Hellfire Specifications*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/systems/munitions/agm-114-specs.htm> (last visited Apr. 29, 2013) (the Hellfire missile is the most frequently used drone launched munition whose total weight is approximately 100 lbs. and carries a warhead that weighs approximately thirty-five pounds); compare also the 2,000 lb Paveway with a 945 lb warhead (the most common laser guided bomb dropped by manned aircraft in the late 1990s and early 2000s), with *Small Diameter Bomb / Small Smart Bomb*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/systems/munitions/sdb.htm> (last visited Apr. 29, 2013) (the smaller GBU-39, introduced around 2006, has a total weight of 250 pounds, delivering a fifty-pound warhead).

individual targets as well as to establish their patterns of movement.¹¹⁸ With the exception of one strike in late 2002,¹¹⁹ drones were used almost exclusively in this intelligence-gathering role through the mid-2000s. Over the four years from the beginning of 2004 to the end of 2007, armed drones only conducted nine strikes in Pakistan.¹²⁰

However, continuing criticisms of excessive civilian casualties caused by conventional airstrikes¹²¹ and night raids by special forces¹²² in both Afghanistan and Pakistan put pressure on the United States to seek alternatives. Armed drones offered the advantage of smaller weapons and greater command control over firing decisions. Drones employed Hellfire missiles (which were originally designed for use on helicopters) that weigh one hundred pounds with a warhead of approximately thirty-five pounds.¹²³ That is one-twentieth the size of a standard laser guided bomb or cruise missile and less than half the size of the smallest precision ordnance dropped from conventional aircraft.¹²⁴

In addition to delivering smaller weapons, drones also provided commanders and their legal advisers with a much greater ability to assess the status of the target using a “pattern of life analysis” before conducting any attacks.¹²⁵ It also allowed for a real-time legal assessment of firing decisions that special forces and conventional aircraft

118. See *Predator B UAS*, GEN. ATOMICS AERONAUTICAL SYS., http://www.ga-asi.com/products/aircraft/predator_b.php (last visited Apr. 29, 201) (maximum endurance of twenty-seven hours); *Predator C Avenger UAS*, GEN. ATOMICS AERONAUTICAL SYS., http://www.ga-asi.com/products/aircraft/predator_c.php (last visited Apr. 29, 2013) (maximum endurance of eighteen hours).

119. See *Drone Warfare: Are Strikes by Unmanned Aircraft Ethical?*, 20 CQ RESEARCHER 653, 663 (Aug. 6, 2010), available at http://www.asil.org/files/CQ_DroneWarfare.pdf.

120. *Id.* at 656.

121. See HUMAN RIGHTS WATCH, “TROOPS IN CONTACT”: AIRSTRIKES AND CIVILIAN DEATHS IN AFGHANISTAN, No. 1-56432-362-5 (Sept. 2008), available at http://www.hrw.org/sites/default/files/reports/afghanistan0908web_0.pdf.

122. See Alissa J. Rubin, *U.S. Transfers Control of Night Raids to Afghanistan*, N.Y. TIMES (Apr. 8, 2012), <http://www.nytimes.com/2012/04/09/world/asia/deal-reached-on-controversial-afghan-night-raids.html?pagewanted=all> (night raids were also politically unpopular in Afghanistan because they violated the privacy of women and children); see also *Civil Liberties and National Security: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 6-7 (2010) (statement of Jeremy Scahill, National Security Correspondent, The Nation), available at <http://judiciary.house.gov/hearings/pdf/Scahill101209.pdf>.

123. See *infra* note 135.

124. See *infra* note 135.

125. Laurie R. Blank, *After “Top Gun”: How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT’L L. 675, 692-96 (2012); see also Michael N. Schmitt, *Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the “Fog of Law,”* 13 Y.B. INT’L HUMANITARIAN L. 311, 311-26 (2010) (rules of engagement in Afghanistan required a 48-hour pattern of life assessment before any target could be approved).

could not offer.¹²⁶ But for many critics these advantages were outweighed by negative aspects of drones.

One criticism leveled at drones is that they cause excessive civilian casualties.¹²⁷ Such a criticism is not unique to drone warfare—any weapon, indiscriminately employed, can cause unacceptable levels of collateral damage. But perhaps because drones are a different kind of weapon this criticism has resonated more strongly.¹²⁸ The widely varying estimates of civilian casualties caused by drones have made assessing these criticisms all the more difficult.¹²⁹ There is evidence to suggest that the criticism of civilian casualties caused by drones has been based, in part, upon exaggerated casualty reports generated by

126. See Blank, *supra* note 125, at 692-96; Schmitt, *supra* note 125, at 311-26.

127. See David Luban, *What Would Augustine Do? The President, Drones and Just War Theory*, BOSTON REVIEW (June 6, 2012), http://www.bostonreview.net/BR37.3/david_luban_obama_drones_just_war_theory.php; see also *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on Nat'l Sec. & Foreign Affairs of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (2010) (statement of Mary Ellen O'Connell, Professor, Univ. of Notre Dame), available at <http://oversight.house.gov/images/stories/Hearings/pdfs/20100428OConnell.pdf>; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings*, ¶ 84, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter Alston, *Study on Targeted Killings*]; Peter Finn, *A Future for Drones: Automated Killing*, WASH. POST (Sept. 19, 2011), http://www.washingtonpost.com/national/national-security/a-future-for-drones-automated-killing/2011/09/15/gIQAVy9mgK_story.html; Editorial, *A Closer Look at Drones*, L.A. TIMES (Sept. 25, 2011), <http://articles.latimes.com/2011/sep/25/opinion/la-ed-drones-20110925>; Sudarsan Raghavan, *In Yemen, U.S. Airstrikes Breed Anger, and Sympathy for al-Qaeda*, WASH. POST (May 29, 2012), http://www.washingtonpost.com/world/middle_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmKI0U_story.html; *US Drone Strikes "Raise Questions"—UN's Navi Pillay*, BBC NEWS (June 8, 2012), <http://www.bbc.co.uk/news/world-asia-18363003>.

128. See *UN Team to Investigate Civilian Drone Deaths*, BUREAU OF INVESTIGATIVE JOURNALISM (Oct. 25, 2012), <http://www.thebureauinvestigates.com/2012/10/25/united-nations-team-to-investigate-civilian-drone-deaths/>. This investigation is proceeding in spite of the fact that, according to estimates compiled by the Bureau of Investigative Journalism (the highest estimates amongst the various groups attempting to track civilian casualties from drones in Pakistan), drones have killed a total of 281 people in fifty-eight strikes over the past thirteen to fourteen months in Pakistan. Of those 281 killed, only seven were civilians according to the Bureau of Investigative Journalism. See *infra* note 152.

129. Compare Daniel L. Byman, *Do Targeted Killings Work?*, FOREIGN POL'Y (July 14, 2009), <http://www.brookings.edu/research/opinions/2009/07/14-targeted-killings-byman> (placing civilian casualty rates at ten percent), with Tony Capaccio & Jeff Bliss, *U.S. Said to Reduce Civilian Deaths After Increasing CIA Pakistan Strikes*, BLOOMBERG (Jan. 31, 2011), <http://www.bloomberg.com/news/2011-01-31/u-s-said-to-reduce-civilian-deaths-after-increasing-cia-pakistan-strikes.html> (CIA reporting that its drone program killed thirty civilians since 2008).

the Taliban and al Qaeda for political purposes.¹³⁰ While this Article does not take a position on the relative credibility of the various sources that have aggregated civilian drone casualties, what is inarguable is that civilian casualties from drone strikes have declined sharply in the past few years.¹³¹ While the debate on this issue certainly continues, this decline has led some commentators to conclude that civilian casualties from drone strikes are relatively low, particularly compared with other methods of warfare.¹³² Others have gone so far as to suggest that because of their superior discrimination and fire control capabilities drones should be legally *required* in certain circumstances.¹³³

Because a primary purpose of this Article is to account for the ways in which operational and legal considerations have helped to create an environment in which drones have become a prominent weapon of war rather than to weigh in on the civilian casualty debate, further discussion of that issue will be left to others. While it is impossible to know for certain the degree to which the use of drones was driven by legal rather than operational concerns, when the competing values are assessed there is a strong case to be made that it was legal rather than operational concerns that drove the increasing reliance upon drones. Operationally, drones eliminated the risk taken by U.S. forces for certain

130. See C. Christine Fair, *Drones Over Pakistan: Menace or Best Viable Option?*, HUFFINGTON POST (Aug. 2, 2010), http://www.huffingtonpost.com/c-christine-fair/drones-over-pakistan-m_b_666721.html (arguing that reports by U.S. and Pakistani media exaggerate civilian casualties caused by drones); Farhat Taj, *Drone Attacks: Challenging Some Fabrications*, DAILY TIMES (Jan. 2, 2010), http://www.dailytimes.com.pk/default.asp?page=2010%5C01%5C02%5Cstory_2-1-2010_pg3_5 (indicating that the U.S. and Pakistani media do not accurately report civilian casualties caused by drone strikes); see also Kenneth Anderson, *Am I Arguing a Strawman About Drones and Civilian Casualties?*, VOLOKH CONSPIRACY (Apr. 27, 2011), <http://volokh.com/2011/04/27/am-i-arguing-a-strawman-about-drones-and-civilian-casualties> (arguing that the recent acknowledgement by many human rights advocates of the superior target discrimination of drones does not alter the fact that many of the early criticisms of drones were related to excessive civilian casualties).

131. *Pakistan Drone Statistics Visualized*, BUREAU OF INVESTIGATIVE JOURNALISM (July 2, 2012), <http://www.thebureauinvestigates.com/2012/07/02/resources-and-graphs/> (showing seven civilian casualties in the past thirteen months from fifty-eight drone strikes in Pakistan). It should be noted that the Bureau of Investigative Journalism's estimates of civilian casualties for Pakistan have consistently been the highest of the three major civilian casualty aggregators and their figures clearly indicate a sharp decline in civilian casualties.

132. Peter Bergen, *Civilian Casualties Plummet in Drone Strikes*, CNN (July 14, 2012), <http://www.cnn.com/2012/07/13/opinion/bergen-civilian-casualties/index.html>; see also New America Foundation, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2013*, available at <http://counterterrorism.newamerica.net/drones> (last visited Apr. 29, 2013).

133. Scott Shane, *The Moral Case for Drones*, N.Y. TIMES (July 14, 2012), <http://www.nytimes.com/2012/07/15/sunday-review/the-moral-case-for-drones.html>.

types of missions and some commentators have pointed to this as a major reason for their expanding use.¹³⁴ But in the context of Afghanistan, Pakistan, and Yemen, this explanation for drone use makes little sense because the operational risk reduction had practically no value. Because the al Qaeda and Taliban forces had no air force and very little in the way of air defenses, the risk to pilots executing strikes in these areas was practically nil.¹³⁵ On the other hand, the unique real-time intelligence gathering capability that drones provided became valuable because of the increasing legal emphasis on avoiding civilian casualties. Likewise, the use of armed drones that allowed for more extensive legal analysis before weapons were employed and provided greater senior officer control over weapons employment decisions was part of a strategy that was driven by the need to reduce civilian casualties.¹³⁶

The Russians and the Sri Lankans have proven that legal compliance is not necessary for operational success in a modern asymmetric armed conflict.¹³⁷ Therefore, the remaining operational reason for using drones is the protection of U.S. aircrew. Because U.S. aircrew faced negligible risks in operating over Afghanistan, Pakistan, and Yemen, it seems that moral and legal concerns were the major drivers of increasing drone use in these regions.

V. DISTINCTION, DRONES, AND “CUBICLE WARRIORS”: IS THIS A GENUINE ISSUE FOR STATES UNDER IHL?

If the reaction to the evolving interpretation of distinction begat increasing reliance upon drones, what of the other side of the coin? Is the civilian involvement in drone use potentially a violation of the principle of distinction, and if so can anything be done to permit civilian involvement in the use of drones?

134. See Mary Ellen O’Connell, *Seductive Drones: Learning from a Decade of Lethal Operations*, J.L. INFO & SCI. (2011) (arguing that the elimination of risk to pilots allowed for the use of force in situations where the U.S. would have been otherwise unlikely to undertake military action).

135. Although we do not have specific statistics on this, we are not aware of any combat casualties suffered by Coalition aircrew over Afghanistan, Pakistan, or Yemen.

136. See Dexter Filkins, *U.S. Tightens Airstrike Policy in Afghanistan*, N.Y. TIMES (June 22, 2009), http://www.nytimes.com/2009/06/22/world/asia/22airstrikes.html?_r=0.

137. See *supra* note 115. The Sri Lankan success against the Tamils and the ultimate Russian success against the Chechens came without any serious attempt by their militaries to comply with IHL’s requirements of proportionality and military necessity.

A. *Drone Operators and Distinction*

That the CIA is following, or at least professing to follow, the laws of armed conflict is not in doubt. Even if they are not, that issue has been addressed comprehensively in other papers.¹³⁸ Other concerns regarding CIA involvement in drone warfare have been noted, as stated by U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions, Philip Alston:

[I]ntelligence personnel do not have immunity from prosecution under domestic law for their conduct. They are thus unlike State armed forces which would generally be immune from prosecution for the same conduct Thus, CIA personnel could be prosecuted for murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law.¹³⁹

Without more information from the CIA on the details of its drone program, Alston's assessment of the legal status of CIA drone operators is correct. However, even if the CIA does not suddenly become more transparent about its drone program it may still be possible to surmise the legal position that the United States takes regarding CIA drone operators.

The controversial prosecution before military commissions of the offense of "murder in violation of the law of war" effectively narrows the legal options regarding CIA drone operators.¹⁴⁰ By prosecuting murder—which, as Alston's assessment indicates, is widely regarded as a purely domestic law violation—as an IHL violation, the United States is taking the position that crimes committed by unprivileged belligerents rise to the level of war crimes. If that is the case, then it is arguable that the Geneva Conventions *require* the United States to prosecute CIA drone operators that have used lethal force if those operators are civilians engaged in direct participation in hostilities.¹⁴¹ Although from a practical standpoint such a prosecution would be unlikely, the

138. See *infra* notes 148-50.

139. Alston, *Study on Targeted Killings*, *supra* note 127, at ¶ 71.

140. See *Charging Documents in the Case of Omar Ahmed Khadr*, Apr. 24, 2007, available at <http://www.defense.gov/news/Apr2007/Khadrrreferral.pdf>. Australian David Hicks, the first person sentenced by the revised military commissions, was initially charged with "attempted murder in violation of the laws of war." See *Charging Documents in the Case of David Matthew Hicks*, Mar. 1, 2007, available at <http://www.defense.gov/news/d20070301hicks.pdf>.

141. See GCIII, *supra* note 39, arts. 129-31; GCIV, *supra* note 16, arts. 146-48.

United States would need to provide some legal justification for failing to prosecute individuals that it regards as having committed grave breaches of the laws of war. Indeed, it is possible to observe this in recent attempts by the Obama Administration to assert the legality of the drone program. Over the last two years, leaks of classified information from the White House and CIA,¹⁴² along with public statements by Administration officials,¹⁴³ seem to indicate a complex and multi-layered sanctioning procedure for the placing of persons on “kill lists,”¹⁴⁴ suggesting heightened Administration awareness of the need to comply with international law in their conduct of drone strikes. It is possible to see such behavior as an attempt to preempt or circumvent possible calls for domestic prosecution of CIA drone operators as unprivileged belligerents.¹⁴⁵

However, even if U.S. domestic courts do not prosecute drone operators, this does not preclude the possibility that CIA drone operators could be indicted in foreign courts; indeed, courts in both Italy¹⁴⁶ and Spain¹⁴⁷ have attempted just this. Though the United States would undoubtedly refuse to cooperate in such endeavors, a successful indictment could effectively render such states—and any other states sharing extradition agreements with an indicting state—“no-go” zones for individuals taking part in drone operations. Along with the inconvenience of potential geographical limitations for drone operators, a successful indictment would also likely cause considerable reputational damage to the drone operators themselves and more significantly to the U.S. drone program as a whole. Were the United States to start finding itself on the receiving end of war crimes indictments against its personnel, the legality of the drone program could find itself under

142. See Jack L. Goldsmith, *A Just Act of War*, N.Y. TIMES (Oct. 1, 2011), www.nytimes.com/2011/10/01/opinion/a-just-act-of-war.html; Eli Lake, “Permission” Needed to Kill American Terrorists, WASH. TIMES, Feb. 4, 2010, at A9; Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1.

143. Koh, *supra* note 27.

144. See David Ignatius, *Risks of Drone Addiction*, WASH. POST, Sept. 22, 2011, at A21.

145. For an excellent overview of how public pressure is creating a form of indirect transparency in the Administration with regards to the drone program, see Lesley Wexler, *Litigating the Long War on Terror: The Role of Al-Aulaqi v. Obama*, 9 LOY. U. CHI. INT’L L. REV. 159 (2011).

146. *Italian Bid to Indict U.S. Soldier*, CNN (June 19, 2006), http://articles.cnn.com/2006-06-19/world/iraq.italy_1_italian-intelligence-agent-nicola-calipari-soldier?_s=PM:WORLD.

147. Michael Sung, *Spain Prosecutors Appeal Indictment of US Soldiers in Iraq Death of Journalist*, JURIST (May 19, 2007), <http://jurist.org/paperchase/2007/05/spain-prosecutors-appeal-indictment-of.php>.

even greater international scrutiny.

But before discussing any legal justification for CIA drone operators, there is an additional area of concern for CIA drone pilots. If “they are ‘directly participating in hostilities’ by conducting targeted killings, intelligence personnel may themselves be targeted and killed” in keeping with IHL.¹⁴⁸ Alston is not alone in this assessment of the status of CIA drone pilots. As noted by Vogel:

[T]he 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 belligerents in this conflict.¹⁴⁹

Gary Solis agrees with this assessment and has opined at some length on the status of CIA drone operators as unprivileged belligerents:

[T]hose CIA agents are, unlike their military counterparts but like the fighters they target, unlawful combatants. No less than their insurgent targets, they are fighters without uniforms or insignia, directly participating in hostilities, employing armed force contrary to the laws and customs of war. Even if they are sitting in Langley, the CIA pilots are civilians violating the requirement of distinction, a core concept of armed conflict, as they directly participate in hostilities It makes no difference that CIA civilians are employed by, or in the service of, the U.S. government or its armed forces. They are civilians; they wear no distinguishing uniform or sign, and if they input target data or pilot armed drones in the combat zone, they directly participate in hostilities—which means they may be lawfully targeted Moreover, CIA civilian personnel who repeatedly and directly participate in hostilities may have what recent guidance from the International Committee of the Red Cross terms “a continuous combat function.” That status, the ICRC

148. Alston, *Study on Targeted Killings*, *supra* note 127, at ¶ 71.

149. Vogel, *supra* note 28, at 134-35.

DRONES AND DISTINCTION

guidance says, makes them legitimate targets whenever and wherever they may be found, including Langley.¹⁵⁰

Before evaluating these assessments of the CIA drone operators' status, it is worth pointing out that their focus on the failure to wear uniforms is misguided. The legal purpose for wearing uniforms is not to assist in the status-based targeting of a combatant outside of active hostilities. The principle of distinction does not require combatants to constantly wear their uniforms.¹⁵¹ In fact, most combatants wear civilian clothes most of the time when they are not on duty and when interacting with the civilian population. Although they remain targetable at all times, combatants do not violate the principle of distinction by donning civilian clothes outside an area of active hostilities.

The legal purpose for wearing uniforms is to ensure that during active hostilities (the time during which combatants are most likely to draw fire), the combatant is readily distinguishable from the civilian population.¹⁵² The principle of distinction requires that military aircraft and drones bear markings that indicate their military nature to prevent misidentification and reduce the likelihood that fire is directed at civilian aircraft.¹⁵³ Disguising a drone as a civilian aircraft would certainly violate the principle of distinction. But because the drone operator is thousands of miles from the place that the drone is conducting its attack, the clothing that the drone operator wears at the time of the attack would be irrelevant to the principle of distinction. As discussed below, the status of drone operators hinges on much more substantive considerations than the clothes they wear.

B. *The Status of Drone Operators*

Are CIA drone operators unprivileged belligerents as suggested by the commentators above? To answer that question in the negative it must be shown that drone operators are members of a paramilitary group or "armed law enforcement agency" that have been "incorporate[d] . . . into its armed forces" as provided for by Article 43 of Additional Protocol I.¹⁵⁴ Such incorporation does not turn solely on

150. Solis, *supra* note 28.

151. See API, *supra* note 7, art. 44 (only requiring combatants to distinguish themselves from the civilian population when they are engaged in an attack or actions preparatory to an attack).

152. A.P.V. ROGERS, LAW ON THE BATTLEFIELD 38-41 (2d ed., 2004).

153. *Id.*

154. API, *supra* note 7, art. 43(3).

the wearing of uniforms or the carrying of arms openly, but rather on whether the drone operators are part of a chain of command that requires the operators to be trained in the laws of war and whether that chain of command enforces the laws of war. There is evidence that CIA drone operators have complied with the first prong of this test as they began receiving law of war training within the few months following the terrorist attacks of September 11, 2001.¹⁵⁵

However, there is less clarity as to how the CIA's chain of command enforces the laws of war. If the CIA's chain of command does enforce the laws of war, then the CIA drone operators are combatants, entitled to the combatants' privilege but also liable to be targeted at all times. If the CIA's chain of command does not enforce the laws of war then the CIA drone operators are unprivileged belligerents. They could potentially face domestic criminal prosecution in places like Yemen or Pakistan, and they would remain targetable at all times as continuous combat functionaries rather than as combatants.

C. *U.S. Conduct of Drone Strikes: Setting a Bad Precedent or Developing Law for a New Kind of Conflict?*

Many commentators have bolstered their arguments that the United States' use of drones is illegal by "cautioning" that the rules for drone use which the United States is establishing could come back to haunt it when drones proliferate.¹⁵⁶ After mentioning that over forty states possess drone technology, Philip Alston warns that "the rules being set today are going to govern the conduct of many States tomorrow. I'm particularly concerned that the United States seems oblivious to this fact when it asserts an ever-expanding entitlement for itself to target individuals across the globe."¹⁵⁷ Elsewhere he raises the specter that "[t]here are strong reasons to believe that a permissive policy on drone-fired targeted killings will come back to haunt the United States in a wide range of potential situations in the not too

155. Ambassador Henry Crumpton, Former Deputy Chief of Operations, CIA Counterterrorism Center, Keynote Address at the Texas International Law Journal Symposium: The Air and Missile Warfare Manual: A Critical Analysis (Feb. 10, 2011).

156. Press Release, Office of the High Commissioner for Human Rights [OHCHR], UN Expert Criticizes "Illegal" Targeted Killing Policies and Calls on the US to Halt CIA Drone Killings (June 2, 2010), *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10094&LangID=E>.

157. *Id.*

distant future.”¹⁵⁸

Before discussing the legal merits of the norms that the United States is shaping through its present conduct of drone warfare, it is first necessary to dispel a pervasive misconception about drones that Alston and many other commentators have promulgated. That misconception is that the current manner in which the United States is using drones broadly justifies any use of drones by other countries against the United States and that drones represent a serious threat to the United States.¹⁵⁹ This misconception has spread so easily because the reciprocity theme is intuitively appealing and, to a point, legally correct. It is true that whatever legal basis the United States offers for utilizing drones in Yemen, Pakistan, or Somalia must also be available to any other nation wishing to use drones as well. However, that does not mean that drones will be appearing over New York City anytime soon, in large part because drones are very vulnerable to air defense systems and signal interruption and because they are particularly unsuited to use by terror groups.¹⁶⁰ Even the most advanced drones that the United States possesses are relatively slow and vulnerable to fighters or surface-to-air missiles, meaning that, as conventional weapons, drones would have limited utility in a traditional state-on-state armed conflict.¹⁶¹ Perhaps more importantly, the physical realities associated with using drones makes them of limited usefulness to terrorists. Drones that are capable of carrying any significant payload need hard surfaced runways and significant maintenance support. Any drone returning to such facilities would be closely followed by U.S. forces, meaning that any drone used by terrorists would be a single strike proposition, and quite an expensive one at that. Therefore, from a practical standpoint, car bombs, suicide bombs, and attacks on airliners remain by far the most credible threat to the United States, regardless of how it pursues its drone policy.

But the misconceptions concerning drones are not limited to the

158. Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV NAT'L SEC. J. 283, 441 (2011); see also P.W. Singer, *Defending Against Drones: How Our New Favorite Weapon in the War on Terror Could Soon Be Turned Against Us*, NEWSWEEK (Feb. 25, 2010), <http://www.thedailybeast.com/newsweek/2010/02/25/defending-against-drones.html>.

159. See Alston, *supra* note 158, at 441-45; Singer, *supra* note 158.

160. See Michael W. Lewis, *Unfounded Drone Fears*, L.A. TIMES, Oct. 17, 2011, at A15. The U.S. lost a drone in Iraq to a 1970s-era Soviet fighter. It is unlikely that any drone launched by an enemy nation would be capable of defeating or evading modern U.S. fighters.

161. See *id.*; Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT'L. L. J. 293, 298-99 (2012) (describing drones extensive vulnerabilities to signal interruption and air defense systems).

practical effects of U.S. drone policy. Legally, the United States' position is not one of "ever-expanding entitlement for itself to target individuals across the globe."¹⁶² The "entitlement" to use drones, just like the entitlement to engage in any other action on the sovereign territory of another state, is largely based upon the consent of the nation in which drones are being used. It is clear that Yemen consented to the strikes undertaken on its territory.¹⁶³ This is supported by the WikiLeaks release of cables indicating Yemeni government consent for the actions taken there.¹⁶⁴ Likewise, there is evidence that the Pakistani government has privately consented to most of the strikes that the United States had conducted on its territory.¹⁶⁵ To the extent that the norm being shaped by U.S. behavior is limited to cases of consent, it is hard to see how the United States will one day be disadvantaged by that norm.

Outside of situations in which the host state consents to the strike, the United States has only asserted an "entitlement" to target al Qaeda in situations where the host state has proven itself to be unable or unwilling to incapacitate or expel al Qaeda from its territory.¹⁶⁶ It has

162. See OHCHR, *supra* note 156.

163. See Nick Allen, *WikiLeaks: Yemen Covered Up US Drone Strikes*, TELEGRAPH (Nov. 28, 2010), <http://www.telegraph.co.uk/news/worldnews/middleeast/yemen/8166610/WikiLeaks-Yemen-covered-up-US-drone-strikes.html>; *Wikileaks Files Reveal Secret US-Yemen Bomb Deal*, BBC NEWS (Dec. 4, 2010), <http://www.bbc.co.uk/news/world-middle-east-11918037>.

164. See Allen, *supra* note 163; *Wikileaks Files Reveal Secret US-Yemen Bomb Deal*, *supra* note 163.

165. That a state may consent to the use of force by another state in its territory is not problematic under international law. See G.A. Res. 56/83, art. 20, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) (Article 20 of the International Law Commission's Draft Articles on State Responsibility states that "[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent"). However, must such consent be publicly communicated in order to be effective or valid? Conflicting reports from Pakistan suggest that while publicly the Pakistani government is critical of U.S. drone strikes in its territory, privately the government actively endorses and participates in U.S.-led drone strikes. See Mark Mazzetti & Jane Perlez, *C.I.A. Bolsters Pakistan Spies With Wary Eye*, N.Y. TIMES, Feb. 25, 2010, at A1. Does this mean that the consent is not valid? While it seems difficult to get an accurate appraisal of the extent of Pakistani or Yemeni consent, none of the literature seems to support a contention that the consent must be publicly announced in order to be valid. See Jenks, *supra* note 4; Sean D. Murphy, *The International Legality of U.S. Military Cross-Border Operations from Afghanistan into Pakistan*, 85 NAV. WAR. COLL. INT'L L. STUD. 109, 118-20 (2009); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 249-58 (2010).

166. See Attorney General Eric Holder, Remarks at Northwestern University Law School (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

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long been established that states not involved in armed conflicts have a responsibility not to aid either belligerent.¹⁶⁷ The United States' position that the law of armed conflict allows it to conduct proportional strikes against al Qaeda targets within states that have proven themselves to be unable or unwilling to incapacitate or expel those targets cannot be fairly characterized as creating an "ever-expanding entitlement for itself to target individuals across the globe."¹⁶⁸

VI. CONCLUSION

Although IHL is often critiqued for its inability to alter behavior, the application of the principle of distinction to asymmetric armed conflicts has strongly influenced the development of twenty-first-century remote warfare. While it may have done so in ways not anticipated by its advocates, there can be little question that the increasing use of drones has been a technological reaction of state militaries to the legal (and moral) requirements imposed by IHL. By taking the position that human shielding is illegal but legally effective, IHL imposed requirements for increasing intelligence accuracy and increasing control of weapons employment decisions upon state militaries wishing to comply with IHL and minimize civilian casualties. In response, state militaries have turned to technology to create smaller and more accurate weapons and to provide greater real-time intelligence and greater control over weapons employment decisions. That technology has come in the form of the armed drone.

While drones may have developed as a solution to one problem created by the principle of distinction, their control by non-military personnel has created another distinction problem. Given the United States' own interpretation of the laws of armed conflict, CIA drone operators may be violating IHL. Their potential violation is not related to the fact that they do not wear uniforms while flying a drone 8,000 miles from Afghanistan or Pakistan, but rather is related to the organization to which they belong. By flying drones they are directly participating in hostilities, which the United States has interpreted to be a war crime if they are considered to be civilians. The only way for these operators to comply with the laws of war is for them to be considered combatants, and combatant status can only be conferred by the organi-

167. See Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, arts. 1-5, Oct. 18, 1907, 36 Stat. 2310 (establishing the inviolable nature of neutral territory for belligerents).

168. See OHCHR, *supra* note 156.

zation for which one fights. An organization that educates its members in the laws of war and then enforces those laws can confer combatant status on its members. While it is clear that the CIA drone operators have been educated in the laws of war, the enforcement mechanisms for noncompliance with these laws is not. Until it becomes clear that drone operators are subject to internal discipline for violating the laws of war, their legal status will remain questionable.

Lastly, the legal justification advanced by the United States for its drone use does not seek an “ever-expanding entitlement” to use drones around the world, nor is it likely to result in the use of drones against the United States. While states must always be wary of conducting themselves in a manner that serves their short-term security interests while creating a damaging long-term precedent, it does not appear that the United States’ legal justification does that. Because the justification is largely based upon the consent of the state in which force is employed, there are minimal sovereignty concerns related to drone use. Those concerns do arise when a state is unable or unwilling to prevent non-state actors within its borders from engaging in an armed conflict with another state. These concerns should be addressed by showing proper deference to the targeted state in arriving at an “unable or unwilling” determination. As long as proper deference is shown to the target state, an emerging legal norm allowing for self-defense targeting of non-state actors on the territory of a third state if that “host” state is either unable or unwilling to detain or expel the non-state actors does not threaten the stability and cohesion of the international order, nor is it likely to “haunt” the United States in the future.¹⁶⁹

169. See Ashley S. Deeks, “Unwilling or Unable”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L. L. 483 (2011).