

AIR WAR COLLEGE

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UNLAWFUL COMBATANTS AT THE CONTROLS:

THE CIA, ARMED RPAS AND LOAC

by

Scott T. Ecton, Lt Col, USAF

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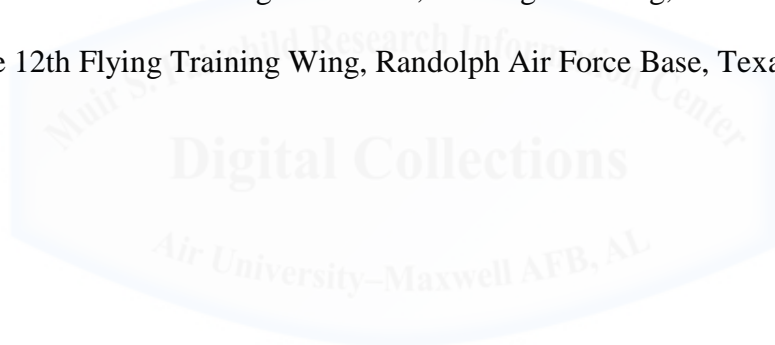


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Biography

Lieutenant Colonel Scott T. Ecton, United States Air Force, received his Bachelor's degree in Business Administration from the University of Kentucky in 1986 and his Juris Doctor from the University of Kentucky College of Law in 1991. That same year he was admitted to the Bar of the Supreme Court of the Commonwealth of Kentucky. Lt Col Ecton is a career judge advocate, beginning military service with the Judge Advocate General's Corps, United States Navy. After a brief stint in private practice, he was commissioned in the Air Force in 1997. Lt Col Ecton completed his Master's degree in Military Operational Art and Science from Air Command and Staff College in 2004. Prior to his selection for Air War College, Lt Col Ecton served consecutive tours as Staff Judge Advocate, 51st Fighter Wing, Osan Air Base, Republic of Korea, and the 12th Flying Training Wing, Randolph Air Force Base, Texas.



I. Introduction

“The principle of distinction between combatant and civilian is at the root of the Law of War.”¹ Historically, the law of war in international armed conflict is based almost exclusively on the idea of warfare between the armed forces of nation states. Yet increasingly since September 11, 2001, as we engage a new kind of enemy in Al Qaeda and other terrorist organizations, this model has been altered and many players, including the United States, have deviated from accepted international legal norms.² The US government has increasingly engaged in asymmetrical means of warfare, disregarding the legal framework in which combatants and non-combatants participate in international armed conflict, blurring the foundational law of war principle of distinction between combatants and non-combatants.³ One such example is the use of personnel – civilians – from the Central Intelligence Agency (CIA) to conduct airstrikes with remotely piloted aircraft (RPA), or drones, in Afghanistan and Pakistan against Al Qaeda and the Taliban.⁴

There has been a considerable amount of debate concerning the use of drones by the CIA, particularly as to conducting strikes in Pakistan. Much of that debate, however, has been over the actual killing of the targets and who is being killed – referred to as “targeted killing” or “extrajudicial killing” – and the use of drones as the method by which the target is engaged.⁵ Much less attention and debate has centered on who is carrying out the strikes – civilian personnel at the CIA. In international armed conflict, CIA personnel do not have the legal authority under international humanitarian law (IHL), or the law of armed conflict (LOAC), to engage in hostilities on behalf of the United States. In light of this, the US has several options. First, it may continue with the status quo, disregarding international and domestic legal concerns. Second, it may seek some form of combatant status for the CIA personnel and other civilians

who directly participate in hostilities. Finally, the US could turn over execution of the drone missions to the US military.

A. Assumptions

This paper does not address the scope of the armed conflict in which the US asserts it is engaged – whether the operations in Afghanistan along with Pakistan qualify as international armed conflict. From their safe havens in Pakistan, including inside the Federally Administered Tribal Areas, Al Qaeda and the Taliban continue to organize, direct and commit attacks on US military personnel and other targets inside Afghanistan.⁶ Whether or not the Pakistani government is willing to address the threat – subject to the law concerning neutrals or other parties – the strikes against Al Qaeda and Taliban targets located in Pakistan are part and parcel to the international armed conflict taking place in Afghanistan by lawful combatants.

Department of State Legal Advisor Harold Koh is on record as stating, “As a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as with the Taliban and associated forces.”⁷ While Koh’s statement does not settle the issue, it is assumed that the law of war in international armed conflict will apply in the *next* conflict and the status of civilians as unlawful combatants will be a concern if this practice is continued. Regardless, DoD policy is that US personnel will “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”⁸

B. Background

CIA-run Predators have been at the forefront from the beginning of the war in Afghanistan. Early in the war, CIA-operated Predators provided intelligence that resulted in several days of strikes against Al Qaeda leadership.⁹ As early as November 2002, US officials

indicated that a strike on suspected Al-Qaeda members in Yemen by a missile from an unmanned Predator aircraft was carried out by the CIA and not by US armed forces.¹⁰ In Pakistan between 2004 and 2010, there have been more than 200 strikes against Al Qaeda leaders, their external operations network, and Taliban leaders and fighters in the country.¹¹ More than half of the Pakistani strikes have come in the last year as the Obama administration continued expanding authority approved in 2008 by the Bush administration.¹² The New York Times reported the CIA launched 20 attacks in September 2010 alone, the most in any single month to date.¹³

The program run by the CIA is one of two drone programs run by the US government. “The military’s version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there.”¹⁴ On the contrary, the CIA’s program “is aimed at terror suspects around the world, including in countries where U.S. troops are not based...The program is classified as covert, and the intelligence agency declines to provide any information to the public about where it operates, how it selects targets, who is in charge, or how many people have been killed.”¹⁵ CIA officials do not comment on the program as a matter of policy, but anonymous sources state that procedures ensure that “militants” are being targeted.¹⁶ While the military’s fleet of drones has supposedly grown to nearly 200 since 2001, the CIA has not disclosed how many it operates.¹⁷ Furthermore, it is unclear whether the CIA owns its own drones or whether it uses drones “owned” by the US Air Force.¹⁸

Unlike the military program which is operated by uniformed members of the armed forces, CIA drones are operated by civilians, including both intelligence officers and private contractors. “According to a former counterterrorism official, the contractors are ‘seasoned

professionals – often retired military and intelligence officials.”¹⁹ The program is also alleged to employ private contractors to perform various aspects of the missions, including flying the aircraft and maintaining and loading the Hellfire missiles on the aircraft. The latter function is done by employees of Xe Services, formerly known as Blackwater, the private security firm that has been at the forefront of other allegations concerning civilians directly participating in hostilities.²⁰

The CIA manages the missions using teams of operators. One set of operators work in the theater of operations at hidden airfields in Afghanistan and Pakistan to handle takeoffs and landings. Once the drones are airborne, operational control is passed to “reachback operators” at CIA headquarters in Langley, Virginia. From Langley, these operators control all aspects of the mission, including the targeting and subsequent strikes against approved targets.²¹ The White House has allegedly delegated trigger authority to CIA officials, including the head of the Counter-Terrorist Center.²²

II. Law of Armed Conflict

Who qualifies to be a “combatant” and the attendant privilege accompanying that status is determined in accordance with the law of armed conflict.

A. Combatants

In one of the first codifications of the principle of distinction, the Lieber Code, Article 155, classified enemies of regular war “into two general classes – that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government.”²³ Combatant, however, was not defined.²⁴ The Hague Convention of 1907 (hereafter Hague IV) was the first time “combatant” or its equivalent was defined. To be qualified as a “belligerent” and therefore

subject to the “laws, rights, and duties” of war, a person had to be led by a responsible commander, wear a distinguishing insignia or emblem, carry his arms openly, and obey the laws and customs of war.²⁵ The Geneva Conventions of 1949 mirrored this requirement for the armed forces, as well as the militia and volunteer corps.²⁶

Protocol Additional (Protocol I) to the Geneva Conventions significantly expanded combatant status to qualifying armed groups provided they meet certain requirements. It further states that the members of the armed forces are “combatants” and as such, “they have the right to participate directly in hostilities.”²⁷ Article 44(3) of Protocol I, however, significantly relaxed the requirements for “combatant” status.²⁸

B. Combatant’s Privilege

The status of “combatant” carries with it the combatant’s privilege. The combatant’s privilege includes: the right to attack enemy personnel and objects; the claim of immunity for killing or injuring personnel and damage or destruction of objects lawfully subject to attack; and, the right to prisoner of war status upon capture. Combatants may also be the object of lawful attack by enemy personnel and may be tried and punished for breaches of the law of war.²⁹ Assuming a breach of the law of war does not occur, the privilege is inherent to all lawful combatants.³⁰

C. Civilians

It was not until Protocol I that “civilian” was classified, albeit by exclusion. Article 50 of Protocol I defines a “civilian” as any person not a member of the armed forces as defined in Geneva III or a civilian not part of a *levee en masse*.³¹ Under Geneva III, this would include “persons who accompany the armed forces without actually being members thereof.”³²

Furthermore, Article 50 states “in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”³³

Article 48 of Protocol I puts the onus on the attacking Party, which “shall at all times distinguish between the civilian population and combatants...”³⁴ Article 51 provides that “the civilian population as such, as well as individual civilians, shall not be the object of attack.” The protection of the civilian population and individual civilians, however, is not absolute. “Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.”³⁵

D. Direct Participation in Hostilities

A lawful combatant who forfeits his status as such because he fails to wear a uniform or other distinguishing insignia is simple to discern. What constitutes “direct participation in hostilities” by a civilian under Article 51(3) of Protocol I, however, has been the subject of considerable discussion. The Commentary to Protocol I states that direct participation means “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”³⁶ Clearly, the actions of personnel involved in providing direct target support, arming, or flying drones that engage targets would be considered to be directly participating in hostilities.

In 2009, the ICRC released more inclusive guidance as to the meaning of direct participation in hostilities.³⁷ Rather than provide a more expansive definition, however, the guidance was considerably more restrictive as to when a civilian would be considered as directly participating in hostilities.³⁸ One exception is the continuing participation status of those who perform a “continuous combat function.”³⁹ Discussing those CIA personnel who “repeatedly and directly participate in hostilities,” Professor Solis notes they may fall under the ICRC’s

guidance as engaged in “a continuous combat function” which “makes them legitimate targets whenever and wherever they may be found, including Langley.”⁴⁰

E. Unlawful combatants

“Unlawful combatant” does not appear in any instrument of international law – the Geneva Conventions, Additional Protocols, or any other writing. While many terms have been used to describe the subject actor, it is the term “unlawful combatant” that has reached the category of “de facto individual status” and is commonly used today in the lexicon of the law of armed conflict.⁴¹ An “unlawful combatant” has been described as “all persons taking a direct part in hostilities without being entitled to do so and therefore cannot be classified as prisoners of war on falling into the power of the enemy”⁴² and as “a shorthand expression useful for describing those civilians who take up arms without being authorized to do so by international law.”⁴³

An “unlawful combatant” has lost the status and therefore, the protection afforded to civilians under the law. Loss of that status is significant. “Two consequences attach to the loss of this status. First, those captured do not qualify as prisoners of war. Second, because only combatants have the right to “directly participate” in hostilities, others enjoy no combatant immunity for their actions during the hostilities. While it is not a war crime to attack the enemy, doing so may amount to a criminal offense (e.g., murder) under the national law of capturing forces. Lacking immunity, they may be prosecuted.”⁴⁴

Several authors have agreed that the status of persons who fly the drones and engage in targeting while not members of the armed forces of a party to the conflict are unlawful combatants.⁴⁵ One writer referred to them as “unprivileged fighters” who, like those we are targeting, are not entitled to combatant status or the combatant immunity “for what otherwise

would be lawful targetings during war and they can be prosecuted under relevant U.S. or Pakistani domestic law for murder...”⁴⁶ However unlikely as that is so far as it concerns US domestic law, it is not unrealistic that charges could be brought before a foreign court. A Pakistani man is pursuing just such an action.

In late December 2010, the CIA pulled its station chief in Islamabad, Pakistan, after his name was allegedly leaked to the public. The unconfirmed name was leaked in relation to a Pakistani man who has threatened to sue the CIA over the deaths of his son and brother in a 2009 drone missile strike. The man has filed a complaint with the police, asking them to investigate the CIA station chief in the deaths. The same newspaper article identified the station chief as “a virtual military commander in the U.S. war against al-Qaida and other militant groups” and credited him with running the drone program in Pakistan.⁴⁷

III. Options

The US has several options it may consider to address the unlawful combatant status of CIA personnel involved in RPA strikes. First, it may continue with the status quo, disregarding international and domestic legal concerns. Second, it may seek some form of combatant status for the CIA personnel – a type of “quasi-combatant” status. Finally, the US could turn over execution of the drone missions to the US military.

A. Status Quo

Several factors indicate that the US will not change the way the drone program is conducted. First, in March 2010, Harold Koh, Department of State Legal Advisor, reaffirmed the Obama Administration’s continuation (and now escalation) of the drone program, stating “U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial

vehicles, comply with all applicable law, including the laws of war.”⁴⁸ In his speech, Koh addressed who is targeted, what weapon is used, the concept of extrajudicial killing, and the domestic ban on assassination, but he did not address who is doing the killing. Additionally, CIA director, Leon Panetta, has stated “Very frankly, it’s the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership.”⁴⁹

Second, increased reliance on technology along with decreasing military funding will only further draw a broader array of “civilians” into the reality of modern armed conflict. The participation by such civilians, particularly those that are remote from the battlefield, is not likely to be deemed direct participation in hostilities any time soon by the international legal community, as evidenced by the recently issued Interpretive Guidance. In broadening the definition of “armed forces” while restricting the definition of “direct participation in hostilities,” Protocol I and the Interpretive Guidance have arguably been counter to US interests and any attempt by the US to change the law would unlikely be resolved in favor of the US.

Finally, many believe that the law is “fundamentally defective” for the current conflict and enemy and our actions are justified to level the playing field. Democracies must recognize “that adherence to the law of war is not based upon strict reciprocity.”⁵⁰ “It affords parties to international armed conflicts strategic and tactical advantages from the combination of their own noncompliance with the law of war and their adversaries’ observance of the law. Nations should not be placed at a strategic or tactical disadvantage for following international humanitarian law or for their enemies’ failure to do so.”⁵¹

Maintaining the status quo, however, runs contrary to our stated ideals and interests. During his acceptance speech for the Nobel Peace Prize, President Obama “reaffirmed America’s commitment to abide by the Geneva Conventions.”⁵² The President went on to state,

“[E]ven as we confront a vicious adversary that abides by no rules...the United States of America must remain a standard bearer in the conduct of war.”⁵³ Unfortunately, deviating from the laws of war has been justified by the present conflict. In the same speech previously noted, legal advisor Koh stated that “construing what is ‘necessary and appropriate’ under the AUMF requires some ‘translation,’ or analogizing principles from the laws of war governing traditional international conflicts.”⁵⁴ Construing what is “necessary and appropriate” should not include a translation that deviates from one of LOAC’s most basic tenets, that of distinction.

Second, maintaining the status quo does not level the playing field, rather it moves closer to putting our enemy on equal footing as to their status under the law of war. The permissive use of civilians to conduct attacks, knowing they do not meet the status of a combatant, while at the same time identifying our enemies as criminals because they do not abide by the law of war, is “tantamount to declaring these adversaries to be civilians.”⁵⁵ Taken to the extreme, compared against the legal basis the US has used in prosecuting Guantanamo detainees, the “CIA officers as well as any higher level government officials who have authorized or directed their attacks are committing war crimes.”⁵⁶

Lastly, the report from Philip Alston, the UN’s special reporter on extrajudicial killings, suggests that international chaos that could occur if other countries conducted similar operations.⁵⁷ The public justifications for continuing the program steadfastly promote the nature of the conflict and the “diffuse, difficult to identify” enemy.⁵⁸ More concern should be given to the precedent that is being set for a potential future conflict against a near-peer competitor that may develop a similar capability. Just as the targeting of protected persons and objects becomes doctrine for a disadvantaged force, there is the danger that using unlawful combatants, such as

civilian armed RPA pilots, in situations where armed forces are not capable or available might also become doctrine.⁵⁹

B. Quasi-combatants

The US may seek to change the normative boundaries of armed conflict, such as advocating for a new class of combatants – “quasi-combatants.”⁶⁰ Consistent with the intent of providing as much protection as possible to those civilians who are genuinely non-participants in the hostilities and not weaken that intent, “It would appear to be more prudent to move unprivileged belligerents out of the category of civilians and provide them their own status or make them a sub-category of combatants.”⁶¹ By creating a sub-category of combatant and legalizing their conduct, the idea is that further breaches of the law of war are discouraged. Individuals that may already be punished as unlawful combatants have less incentive for complying with the law of war.⁶²

Creating a sub-category of combatant for those who willingly participate in hostilities and therefore establishing the legal basis making themselves the object of lawful attack is a natural extension of their participation in hostilities. After all, one author argues, “War is not about killing people who are morally liable to be killed; it is about killing people who may otherwise kill you.”⁶³ Another writer argues that “there seems no reason why people who are not members of the armed forces cannot be subjected to violent attack when they are part of the chain of agency of aggression . . . that constitutes the just cause for violent measures in response.”⁶⁴ Forming a sub-category for those civilians whose job exists to participate in hostilities removes the direct participation “revolving door,” treating the category of those who harm as only those who are at present attacking.⁶⁵

Another argument is that “quasi-combatant” status would not place true civilians in any more harm’s way than they are currently. Those civilians directly participating in hostilities are already subject to lawful attack as unlawful combatants “for such time as” they are directly participating in hostilities. CIA employees have been under increasing attack, including seven CIA officers and contractors killed by a suicide bomber in December 2009 on an attack at a CIA base in Khost, Afghanistan, that oversees the agency’s covert drone program.⁶⁶ Referring to that attack on the CIA, Solis points out, “If [they] were directly involved in supplying targeting data, arming or flying the drones in the combat zone, they were lawful targets of the enemy, although the enemy himself was not a lawful combatant.”⁶⁷ Any casualties of other civilians would be governed by the principle of proportionality and collateral damage.

Finally, “quasi-combatant” status would afford those individuals with combatant’s privileges – including prisoner of war status and immunity from prosecution for any acts committed in violation of host-nation laws. For those quasi-combatants located on the battlefield, attaining combatant status would be an important step. On the other hand, when at war with non-state actors such as Al Qaeda, prisoner of war status is a hollow shell. For quasi-combatants removed from the battlespace, such as RPA pilots located in the US, capture and attendant status is less concerning. Where we fight today, however, may not be where the fight is tomorrow.

Although the arguments for a new sub-category of combatant have some merit, such a classification would not be consistent with the intent of international law of providing protection to the civilian population to the maximum extent possible. While civilians are not immune from the hardships and suffering of armed conflict, attempts to create a new class of combatant will likely lead to more unnecessary suffering for the civilian population. “The idea that civilians

should have a quasi-combatant status depending on the job they do seems to take little account of the confusion it would cause. If there is to be any hope that the law will be complied with, the rules must be as simple and straightforward as possible.”⁶⁸ As noted above, it is unlikely any change in the law of armed conflict would broaden the category of “combatants.”

A civilian with a quasi-combatant status who does not otherwise distinguish himself as a combatant will put others unnecessarily at risk by so doing. “When the distinction requirement is disregarded, opposing combatants cannot discern fighters from civilians, opposing shooters from friendly shooters, good guys from bad guys, eroding the lawful combatant’s presumption that civilians he encounters are noncombatants who present no danger.”⁶⁹ While this may seem illogical or unlikely when discussing remotely-located RPA pilots, the argument for quasi-combatant status must be equally applicable to any civilian who directly participates in hostilities, particularly those performing a “continuous combat function.” Performing functions indistinguishable from military units is alone an inadequate basis to advocate combatant-type status for an entity that has noticeably civilian characteristics.⁷⁰

C. Military Control

The most compelling argument suggests that combat operations be returned to the sole control of the armed forces. One scholar notes “It is quite obvious that during an international armed conflict the better approach for the United States would be to require that only military personnel use drones for the targeting of persons.”⁷¹ Another writer concurs that “there is no question that uniformed military personnel...are lawful combatants entitled to ‘fly’ drone strikes in a recognized armed conflict.”⁷²

While the number of drone strikes has risen dramatically in the last year, the CIA is not the government agency normally associated with killing people and breaking things. That

mission has been, up until now, exclusively vested with the Department of Defense. Whereas the military operates under a well-defined and established legal code with an associated judicial establishment, the CIA does not. Although the CIA employs retired military and intelligence officers who no doubt have combat experience, there is no evidence that they operate under any form of guidance similar to that provided military forces during armed conflict. For example, military air forces engaging a target would be subject to a wide range of rules and guidance – Standing Rules of Engagement, theater/operation specific rules of engagement, Special Instructions (SPINS), and a Collateral Damage Methodology – to name a few.

Rules of engagement (ROE), particularly those developed for a specific operation, will contain both legal and policy considerations for that operation. This will include the requirement to obtain positive identification, or PID, of a target before engagement. The ROE or SPINS may further delineate what standard is required for PID (e.g., two independent, verifiable human sources, etc.). At the very least, the ROE will spell out who the approval authority is for a target based on the nature or level of the target itself or depending on the anticipated collateral damage estimate (CDE) as determined according to an approved Collateral Damage Methodology (CDM). For example, if striking a target is estimated to cause a certain number of civilian casualties or damage to a protected facility, such as a school or mosque, higher-level permission may be required to strike that target. In determining CDEs, Air Force intelligence targeting personnel have access to computer programs to assist in calculating the specific impact area of any given weapon to ensure the best available information is provided to the decision authority.

Whether or not the CIA possesses or operates under similar guidance or has available the same kind of information prior to approving weapons employment is unknown as details of the program are not publicly available. In all likelihood, they operate with much of the same

sophisticated intelligence and within a structured framework similar to their military counterparts. However, the CIA's program, with its corresponding secrecy, inflates the difficulties of defending the program. For example, claims that it is to hide abuses and high civilian casualties have been levied about the secrecy of the CIA's drone strikes in Pakistan.⁷³ As one scholar stated, "People are being killed, and we generally require some public justification when we go about killing people."⁷⁴

In addition to operating under very specific ROE and other guidance, the armed forces fall under a well-recognized judicial establishment. The Uniform Code of Military Justice (UCMJ) provides an in-place system of accountability when US military personnel fail to abide by standards set for the conduct of the armed forces. For matters that fail to rise to the level of judicial accountability, military members remain accountable to their chain of command. CIA personnel, on the other hand, are not subject to the UCMJ and their actions are often beyond the reach of any court of competent jurisdiction.

Finally, all military personnel receive training in the law of armed conflict.⁷⁵ "Unlike a State's armed forces, [the CIA's] intelligence agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL, rendering violations more likely and causing a higher risk of prosecution both for war crimes and for violations of the laws of the State in which any killing occurs."⁷⁶ Alston does not specifically state it in his report, but certainly implies that the killings should be undertaken by the "State armed forces and agents."⁷⁷

"The difference between a strike launched by the CIA and the military may seem insignificant, when the person responsible was in any case hundreds of miles from the target, watching a live video feed and pushing a button on a control panel."⁷⁸ However insignificant the

difference may seem, the primary concern is the apparent disjunction between the existing legal framework and evolving state practice.⁷⁹ Following the rule of law would place responsibility back with the military where operations are conducted with the oversight of the public.

IV. Conclusion

The argument that using CIA-operated drones are the “only game in town” – that necessity justifies ignoring normative boundaries and the consequences of doing so in a conflict against a non-state actor like Al Qaeda – is illusory and disregards the precedence that is set for future conflict, especially a conflict against a near-peer competitor. “As a matter of law, there can be no wars in which one side has all the rights and the other has none.”⁸⁰ Whether referring to a nation state or a transnational terrorist group, all participants in the armed conflict would be entitled to equality of rights and obligations under IHL with the States fighting them. Disregard for the rule of law is “an invitation to legal, moral, and political disaster.”⁸¹ Just as military necessity should not be used to justify deviating from normative boundaries, neither should “victor’s justice” be used to validate the actions, less you find yourself on the wrong end between victor and vanquished in the next conflict.

While the Pakistani government may have plausible deniability as to the actions of the US government – or rather may tenuously deny operations by the US military – the Pakistani people, along with the rest of the world, are certainly under no illusion as to who is dropping the bombs. It makes no difference to them – nor to anyone on the receiving end, whether Al Qaeda or the Taliban – that it was the CIA versus the US military that pulled the trigger. The continued CIA role, however, only serves to undermine the legality of the action.

No convincing argument has been made that justifies the use of force in the present case by any entity other than the military's armed forces. Maintaining the status quo during the next conflict will not only further erode the principle of distinction among combatants and non-combatants, it will further diminish US standing in the international community. While the actions will continue to be condemned by some regardless, the exclusive use of military personnel to conduct hostilities adds legitimacy to the lawfulness of our actions. Furthermore, abiding by the rule of law will only fortify US power. "When other countries see the United States using its power to strengthen existing rules and institutions, that power is rendered more legitimate – and U.S. authority is strengthened."⁸²



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End Notes

- ¹ Ingrid Detter, *The Law of War*, 2nd Ed. (Cambridge, U.K.: Cambridge University Press, 2000), 141.
- ² See, e.g., the use of private military firms in security and combat functions or the wear of non-standard uniforms by members of the Armed Forces. W. Hays Parks, "Special Forces' Wear of non-Standard Uniforms," 4 *Chi. J. Int'l L.* 493 (Fall 2003) and Michael N. Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees," 5 *Chi. J. Int'l L.* 511 (Winter 2005).
- ³ Although certain members of the armed forces are considered "non-combatants" under the Geneva Conventions, the term as used throughout this paper is considering "non-combatant" to equate to "civilian."
- ⁴ CIA paramilitary personnel have also been alleged to have directly participated in hostilities. See, e.g., Dana Priest, "Private Guards Repel Attack on U.S. Headquarters," *The Washington Post*, 6 April 2004 and Peter W. Singer, "Warriors for Hire in Iraq," *Salon.com*, 16 April 2004, available at http://www.brookings.edu/articles/2004/0416defenseindustry_singer.aspx?p=1.
- ⁵ See, e.g., Philip Alston, "Study on Targeted Killings," Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, U.N. General Assembly Doc. A/HRC/14/24/Add.6, 28 May 2010 and Mary Ellen O'Connell, "Unlawful Killing with Combat Drones," Notre Dame Law School, Legal Research Studies Paper No. 09-43, November 2009, <http://ssrn.com/abstract=1501144>.
- ⁶ It is their direct participation in hostilities that makes them subject to lawful attack.
- ⁷ Harold H. Koh, "The Obama Administration and International Law" (address, Annual Meeting of the American Society of International Law, 25 March 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>. See also, David W. Glazier, "Rise of the Drones II: Examining the Legality of Unmanned Targeting," Hearing before Subcommittee on National Security and Foreign Affairs, 28 April 2010. "I do not see any credible basis to dispute the idea that the United States is lawfully engaged in an armed conflict against al Qaeda and the resurgent Taliban in which it has the right to draw legal authority from the law of war." (Ibid.)
- ⁸ Department of Defense Directive (DODD) 2311.01E, *DoD Law of War Program*, 9 May 2006. The exact nature of the conflict – be it international armed conflict or non-international armed conflict as each of those is defined – is ultimately dispositive as what body of law is applicable during hostilities. However, in accordance with DoD policy, the characterization of the conflict is irrelevant and the presumption is that the law of war applies to each proposition.
- ⁹ Bob Woodward, "Secret CIA Units Playing a Central Combat Role," *The Washington Post*, 18 November 2001.
- ¹⁰ Anthony Dworkin, "The Yemen Strike: The War on Terrorism Goes Global," *Crimes of War Project*, 14 November 2002, <http://crimesofwar.org/print/onnews/yemen-print.html>.
- ¹¹ Bill Roggio and Alexander Mayer, "Charting the Data for US Airstrikes in Pakistan, 2004-2010," *The Long War Journal*, <http://www.longwarjournal.org/pakistan-strikes.php> (accessed on 5 December 2010).
- ¹² David S. Cloud, "CIA Drones Have Broader List of Targets," *Los Angeles Times*, 5 May 2010, <http://articles.latimes.com/2010/May/05/world/la-fg-drone-targets-20100506>.
- ¹³ Mark Mazzetti and Eric Schmitt, "C.I.A. Steps Up Drone Attacks on Taliban in Pakistan," *The New York Times*, 27 September 2010.
- ¹⁴ Jane Mayer, "The Predator War," *The New Yorker*, 26 October 2009.
- ¹⁵ Ibid.
- ¹⁶ Cloud, "CIA Drones Have Broader List of Targets," 5 May 2010.
- ¹⁷ Mayer, "Predator War," 26 October 2009.
- ¹⁸ Hillel Ofek, "The Tortured Logic of Obama's Drone War," *The New Atlantis* 35 (Spring 2010), 36.
- ¹⁹ Mayer, "Predator War," 26 October 2009.
- ²⁰ Ibid.
- ²¹ According to another source, the military supplies the aircraft and monitors the flights in and out of Pakistan. Flights originate out of bases in Afghanistan or Pakistan, but may be controlled by CIA personnel actually located in Afghanistan or Pakistan, while some are operated out of CIA headquarters in Langley, Virginia. Noah Schactman, "U.S. Military Joins CIA's Drone War in Pakistan," *wired.com*, 10 December 2009, <http://www.wired.com/dangerroom/2009/12/us-military-joins-cia-drone-war-in-pakistan>.
- ²² Mayer, "Predator War," 26 October 2009.
- ²³ General Order No. 100, U.S. Dep't of Army, Instructions for the Government of Armies of the United States in the Field (Lieber Code), Art 155, 24 April 1863, available at <http://www.icrc.org/ihl.nsf/WebPrint/110-FULL?OpenDocument>.

²⁴ “Non-combatant” however, has a distinct meaning under the law of war. Hague IV notes that “armed forces” consist of combatants and non-combatants. 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, Ch 1, Art 3, 18 October 1907, 36 Stat. 2277, 205 Consol. T.S. 277, (hereafter Hague IV). Although it has a distinct meaning, “non-combatant” is often used interchangeably with “civilian.”

²⁵ Hague IV, Ch 1, Art 1.

²⁶ Geneva Convention Relative to the Treatment of Prisoners of War, Art 4, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, (hereafter Geneva III). Geneva III codified the definition of those entitled to the legal status as a prisoner of war (POW) to include 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 – which includes those commanded by a person responsible, having a fixed distinctive sign recognizable at a distance, carrying arms openly, and conducting their operations in accordance with the laws and customs of war. (Ibid.)

²⁷ Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, Art 43, 12 December 1977, 1125 U.N.T.S. 3, (hereafter Protocol I). Article 43 defines the “armed forces of a Party” as “all organized armed forces, groups or units which are under a command responsible to that Party for the conduct of its subordinates.” (Ibid.)

²⁸ Protocol I, Art 44.3. If “owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.” (Ibid.)

²⁹ 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). See also, Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York, N.Y.: Cambridge University Press, 2010), 187. “The defining distinction of the lawful combatant’s status is that upon capture he or she is entitled to the protections of a POW, ‘one of the most valuable rights of combatants under the Law of War.’” (Ibid.)

³⁰ Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York, N.Y.: Cambridge University Press, 2010), 42.

³¹ Protocol I, Art 50.

³² Geneva III, Art 4.

³³ Protocol I, Art 50. Defining “civilian” in the negative, however, promotes blurring of the lines of distinction. See Detter, *Law of War, supra* note 1, 287. “If ‘civilian’ means someone who is not a combatant, this also means that problems connected with the identification of ‘combatants’ are carried over to the field of protection of ‘civilians.’”

³⁴ Protocol I, Art 48.

³⁵ Protocol I, Art 51.3.

³⁶ Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman, eds, *Commentary on the Additional Protocols*, ¶ 1679 (Geneva: ICRC/Martinus Nijhoff, 1987), 516.

³⁷ International Committee of the Red Cross, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,” *International Review of the Red Cross* 90 (December 2008), 995, (hereafter Interpretive Guidance). According to the Interpretive Guidance, to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, be likely to inflict death, injury or destruction of persons or objects protected against direct attack; there must be a direct causal link between the act and the harm likely to result from that act; and, 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.

³⁸ For a complete analysis of the IG, see, Kenneth Watkin, “Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance,” 42 *N.Y.U. J. Int’l L. & Pol.* 641 (2010); Michael N. Schmitt, “Deconstructing Direct Participation in Hostilities: The Constitutive Elements,” 42 *N.Y.U. J. Int’l L. & Pol.* 697 (2010); Bill Boothby, “And for Such Time As: The Time Dimension to Direct Participation in Hostilities,” 42 *N.Y.U. J. Int’l L. & Pol.* 741 (2010); and, 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).

³⁹ Interpretive Guidance, 1007- 1008.

⁴⁰ Gary Solis, “CIA Drone Attacks Produce America’s Own Unlawful Combatants,” *The Washington Post*, 12 March 2010.

⁴¹ Solis, *Law of Armed Conflict*, 207-208. In the current war against Al Qaeda, the US has issued its own definition of “unlawful enemy combatant” or, as referred to in the Military Commissions Act (MCA), “unprivileged enemy belligerent.” DOD Directive 2310.01E, The Department of Defense Detainee Program, E2.1.1.2, 5 September 2006,

defines the former as “persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict.” The Military Commissions Act defines the latter to include an individual (other than a privileged belligerent) who “has engaged in hostilities against the United States or its coalition partners” or “has purposefully and materially supported hostilities against” the same. Military Commissions Act, § 948a(7).

⁴² Knut Dörmann, “The Legal Situation of “Unlawful/Unprivileged Combatants,” *International Review of the Red Cross* 85 (March 2003), 46.

⁴³ Solis, *Law of Armed Conflict*, 208. “Unlawful combatant” has also been used to describe combatants who violate the “bedrock concept of distinction” when they engage in combat without wearing a uniform or other distinguishing insignia. (Ibid, 209)

⁴⁴ Michael N. Schmitt, “War, Technology and the Law of Armed Conflict.” *The Law of War in the 21st Century: Weaponry and the Use of Force* (Naval War College, 2006), 151-152. See also, Detter, *Law of War*, 141-142. “If a person fulfils the requirements for combatant status he is entitled to the ‘rights’ of a soldier, notably to enjoy prisoner of war status if captured; if he does not fulfil these requirements, he is an ‘unlawful combatant’ and may be shot” and “the requirement of a distinctive military sign is still applicable; to wear some rudimentary form of uniform has, by tradition, been a hallmark and a condition of combatant status and for prisoner of war status.”

⁴⁵ Solis, “CIA Drone Attacks,” 12 March 2010. “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.” (Ibid.)

⁴⁶ 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 (Spring, 2010), 277.

⁴⁷ Adam Goldman and Chris Brummitt, “CIA Chief Pulled from Pakistan; Drones Kill 54,” *Bloomberg*, 17 December 2010, <http://www.bloomberg.com/news/print/2010-12-17/pakistani-officials-us-missiles-kill-15-in-nw.html>.

⁴⁸ Koh, “Obama Administration and International Law,” 25 March 2010.

⁴⁹ Ofek, “Tortured Logic of Obama’s Drone War,” 37.

⁵⁰ Richard D. Rosen, “Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity,” 42 *Vand. J. Transnat’l L.* 683 (May 2009), 691.

⁵¹ Ibid.

⁵² Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize, 10 December 2009, available at <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

⁵³ Ibid.

⁵⁴ Koh, “Obama Administration and International Law,” 25 March 2010.

⁵⁵ Glazier, “Rise of the Drones II: Examining the Legality of Unmanned Targeting,” 28 April 2010.

⁵⁶ Ibid. Some legal scholars believe that the difference between the CIA civilian and a terrorist, at least in the current conflict, is that the CIA agent is acting on behalf of a state. See, Sig Christenson, “Issue of Just Who Can Legally Kill is Clouded,” *San Antonio Express-News*, 27 November 2010,

<http://www.mysanantonio.com/news/military/article/Issue-of-just-who-can-legally-kill-is-clouded-836542>.

Christenson, SA Express-News, 27 Nov 10.

⁵⁷ Alston, “Study of Targeted Killings,” *supra* note 5, 9.

⁵⁸ Koh, “Obama Administration and International Law,” 25 March 2010.

⁵⁹ Michael N. Schmitt, “Asymmetrical Warfare and International Humanitarian Law,” 62 *A.F. L. Rev.* 1 (2008), 32.

⁶⁰ See, e.g., W. Hays Parks, “Air War and the Law of War,” 32 *A.F.L. Rev.* 1 (1990), at footnote 402, discussing the legality of attack on certain quasi-civilians (or quasi-military personnel) who are providing direct support to a nation’s military effort.

⁶¹ Kenneth Watkin, “Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict,” in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, eds. David Wippman and Matthew Angelista (Ardsley, N.Y.: Transnational Publishers, 2005), 162.

⁶² Schmitt, “Asymmetrical Warfare,” 39.

⁶³ David Rodin and Henry Shue, *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford; New York: Oxford University Press, 2008), 100.

⁶⁴ C.A.J. Coady, “The Status of Combatants,” in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, eds. David Rodin and Henry Shue (Oxford; New York: Oxford University Press, 2008), 154.

⁶⁵ Ibid., 156.

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- ⁶⁶ Joby Warrick, Joby and Pamela Constable, "CIA Base Attacked in Afghanistan Supported Airstrikes Against al-Qaeda, Taliban," *The Washington Post*, 1 January 2010.
- ⁶⁷ Solis, "CIA Drone Attacks," 12 March 2010.
- ⁶⁸ A.P. V. Rogers, *Law on the Battlefield*, 2nd Ed. (Manchester; New York: Manchester University Press, 2004), 9. See also, Detter, *Law of War*, 135. Detter reinforces the importance to have a clear distinction between the civilian population and combatants, noting "any confusion of the division between the two groups will inevitably endanger protection granted under the Law of War." (Ibid.)
- ⁶⁹ Solis, *Law of Armed Conflict*, 210.
- ⁷⁰ Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees," *supra* note 2, 525.
- ⁷¹ Paust, "Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan," 278.
- ⁷² Glazier, "Rise of the Drones II: Examining the Legality of Unmanned Targeting," 28 April 2010.
- ⁷³ Gareth Porter, "The CIA's Drone Wars." *Counterpunch*, 12 June 2009, <http://www.counterpunch.org/porter06122009.html>.
- ⁷⁴ Michael Walzer, as quoted by Mayer, in "Predator War," 26 October 2009.
- ⁷⁵ But see O'Connell, "Unlawful Killing with Combat Drones," *supra* note 5, where she says this may not be true. O'Connell claims the US may no longer train its members in the law of war as it once did, citing unattributed sources.
- ⁷⁶ Alston, "Study of Targeted Killings," *supra* note 5, 22.
- ⁷⁷ Ibid., 28.
- ⁷⁸ Dworkin, "Yemen Strike", 14 November 2002.
- ⁷⁹ Ibid.
- ⁸⁰ International Committee of the Red Cross, report on *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2003.
- ⁸¹ Solis, *Law of Armed Conflict*, 11.
- ⁸² John G. Ikenberry, "The Rise of China and the Future of the West: Can the Liberal System Survive?" *Foreign Affairs*, Vol. 87, No. 1, January/February 2008.