

Not Whether Machines Think, But Whether Men Do

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ABSTRACT

Drones “allow for the most discriminating uses of force in the history of military technology,” and can thus be a profound humanitarian advancement in warfare. State actors alone, however, can actualize this potential. Although the United States complies with international humanitarian law from strike authorization through strike execution within the Afghanistan theatre of war, its methods for evaluating and reporting collateral damage caused by drone strikes—including presuming every deceased “military-aged male[] in a strike zone” to have been a “combatant[]”—do not comply with international law. The United States must amend its policies to uphold its obligations of forming customary international law that mandates a humane use of drones in theatres of war, and protecting its ground troops from distrust and violence predicated on inaccurate reporting of collateral damage.

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TABLE OF CONTENTS

INTRODUCTION.....	762
I. THE IMPORTANCE OF AFGHANISTAN.....	767
II. LAWS GOVERNING DRONES AND THE LIMITS OF EXISTING SCHOLARSHIP.....	769
A. Necessity.....	770
B. Distinction.....	771
C. Proportionality.....	775
1. Ex Ante Analysis: Strike Authorization and Execution.....	775
2. Ex Post Analysis: Collateral Damage in Light of Counterinsurgency.....	776
III. EX ANTE ANALYSIS OF THE LOGAR STRIKE.....	778
A. Facts.....	778
B. Analysis Proving Ex Ante Compliance with IHL.....	780
1. Consent of the Government.....	781
2. Rank or Importance of the Target.....	781
3. Foreseeability of Civilian Losses.....	782
4. Humanitarian Objective.....	783
5. Location of the Strike.....	783
6. Location of the Operator.....	783
7. Status of the Operator.....	784
IV. EX POST ANALYSIS OF THE LOGAR STRIKE AND RECOMMENDATIONS.....	784
A. Problematic Conduct.....	785
B. Recommendations for Compliant Conduct.....	787
C. Recommendation for a Compliant Definition of Combatant.....	787
1. Presumption of Civilian Status.....	788
2. Unlawful Combatants.....	788
3. Proposed Definition of Combatant.....	791
CONCLUSION.....	792

INTRODUCTION

There are two sides to every story.

At 1:00 a.m. on June 6, 2012, International Security Assistance Force (ISAF)¹ and Afghan coalition forces² approached a building in Afghanistan's Logar Province.³ Classified intelligence had revealed the presence therein of a Taliban leader known as Qari Sadari.⁴ Coalition forces, intending to capture and detain Sadari and other Taliban using the least amount of force possible, issued verbal requests that all insurgents within show themselves.⁵

The coalition forces were met with weapons fire and a grenade.⁶ They therefore returned fire in self-defense.⁷ Eventually perceiving themselves to

1. The International Security Assistance Force (ISAF) was established by U.N. Security Council Resolution 1386. S.C. Res. 1386, para. 1, U.N. Doc. S/RES/1386 (Dec. 20, 2001). The NATO-led, multinational force was established to coordinate resistance to the Taliban in Afghanistan, “reduce the capability and will of the insurgency, support the growth in capacity and capability of the Afghan National Security Forces (ANSF), and facilitate improvements in governance and socio-economic development in order to provide a secure environment . . . that is observable to the [Afghan] population.” *About ISAF*, AFG. INT’L SEC. ASSISTANCE FORCE, NATO, <http://www.isaf.nato.int/mission.html> (last visited Aug. 20, 2014).
2. At this stage in the War in Afghanistan, U.S. troops are primarily deployed in an advisory capacity, training counterparts in the Afghan National Security Forces in order to “guarantee . . . sustain[ed] resistance to the Taliban insurgents] once [United States and NATO] forces leave.” Mel Johnson, *Coalition Forces Celebrate Eid With Afghan Forces*, MARINES: THE OFFICIAL WEBSITE OF THE UNITED STATES MARINE CORPS (Aug. 13, 2012), <http://www.hqmc.marines.mil/News/NewsArticleDisplay/tabid/3488/Article/147908/coalition-forces-celebrate-eid-with-afghan-forces.aspx>; see also Frances Johnson, *Afghan National Police Advisors Complete Mission*, MILITARY.COM (July 10, 2014), <http://www.military.com/daily-news/2014/07/10/afghan-national-police-advisor-team-completes-mission.html> (describing that the Afghan police force is “now capable of taking on the insurgents face-to-face” as a result of U.S. Marine oversight and training).
3. See *NATO in Deadly Afghan Air Strike in Logar Province*, BBC NEWS (June 6, 2012, 3:16 PM), <http://www.bbc.co.uk/news/world-asia-18340140> [hereinafter BBC 6/6]; *ISAF Joint Command Morning Operational Update - June 6, 2012*, AFG. INT’L SEC. ASSISTANCE FORCE (June 6, 2012), <http://www.isaf.nato.int/article/isaf-releases/isaf-joint-command-morning-operational-update-june-6-2012.html> [hereinafter *ISAF Initial Statement*]; Sahaafi Mujahid, *17 Civilians Dead in NATO Airstrike*, LIVELEAK (June 9, 2012), http://www.liveleak.com/view?i=245_1339254728 [hereinafter LIVELEAK 6/9].
4. The name of the Taliban leader was not given in ISAF reports, but rather reported by Afghan news source “Pajhwok Afghan News.” Abdul Maqsd Azizi, *17 Civilians Dead in NATO Airstrike*, PAJHWOK AFGHAN NEWS (June 6, 2012), <http://www.pajhwok.com/en/2012/06/06/17-civilians-dead-nato-airstrike>; LIVELEAK 6/9, *supra* note 3.
5. See BBC 6/6, *supra* note 3.
6. *ISAF Initial Statement*, *supra* note 3.
7. See *id.*; BBC 6/6, *supra* note 3.

be outmatched and in grave danger, they ordered a precision drone strike on the structure⁸ (an incident to which this Comment will refer as the Logar Strike).

Are the above facts sufficient to conclude that the Logar Strike was legal? Existing scholarship answers unequivocally, yes.⁹ Coalition forces sought to capture and detain insurgents using the least amount of force possible. Occupants of the house were, beyond a reasonable doubt, armed combatants. The strike was ordered in self-defense, and in a theatre of war. This scenario—according to media, politicians, global scholars, and most American citizens—is the paradigm of legal drone use.¹⁰

But it's not the whole story.

The facts recounted above establish the *ex ante* legality of the Logar Strike, from strike authorization and target-selection through strike commission. The Logar Strike's impact, however, did not end after drones cleared the air and dust settled to reveal a demolished civilian house and several dead men, women, and children. ISAF's conduct during the critical hours and days that followed would determine whether the Logar Strike was ultimately legal. The second, *ex post*, side to the story of a drone strike is written in the strike's aftermath, by ISAF's assessment and public communication of the strike's collateral damage.

The *ex post* side of the Logar story follows.

The site of the strike was found to be a civilian home.¹¹ Information surfaced following the strike that a wedding party had assembled there.¹² Taliban commanders were also found in the building, killed along with members of the wedding party.¹³

These subsequently discovered facts, however tragic, did not change the *ex ante* legality of the Logar Strike.¹⁴ Lawful combatants are empowered to act in self-defense to subdue enemy combatants in a war zone.¹⁵ The method

8. See BBC 6/6, *supra* note 3.

9. See discussion *infra* Part II.

10. See discussion *infra* Part II.

11. *Afghanistan: Officials Claim NATO Air Strike Kills Women, Kids at Wedding Party*, CBS NEWS (June 6, 2012, 11:54 AM), http://www.cbsnews.com/2102-202_162-57448041.html?tag=contentMain;contentBody [hereinafter CBS 6/6].

12. *Id.*

13. See *id.*; *ISAF Initial Statement*, *supra* note 3.

14. See *infra* Part III.

15. See, e.g., Rome Statute of the International Criminal Court art. 31(1)(c), July 12, 1998, 2187 U.N.T.S. 90 (“[A] person shall not be criminally responsible if, at the time of that person’s conduct The person acts reasonably to defend himself or herself or another person[.]”); Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 106 (2006) (International humanitarian law

by which ISAF investigated and communicated the above facts to the public, however, transformed an occasion on which drones were legally employed to serve a vital battlefield function into an event that violated international law and engendered hatred and distrust of U.S. troops.

ISAF issued a press release on the morning of the Logar Strike that claimed no civilian casualties, but it was unintentionally published alongside Agence France Presse (AFP) pictures depicting women and children killed in the strike.¹⁶ This accidental juxtaposition impressed upon the public—falsely—that either the United States did not care to discriminate between Afghan civilians and combatants, or falsified its reports of collateral damage. Inaccurate reporting of collateral damage generated anti-American sentiment with ramifications far transcending the hours immediately following the Logar Strike, during which villagers drove their dead to the provincial capital chanting “death to America.”¹⁷

ISAF’s on-the-ground damage assessment, however, is not wholly to blame for the inaccuracy. Collateral damage data is distorted far from the battlefield by the Obama administration’s designation of “all military-aged males [killed] in a strike zone” as “combatants,” absent “explicit evidence posthumously proving them innocent.”¹⁸ This definition of “combatant,” operating on a presumption of combatant status for all deceased men in strike zones, conflicts on its face with Customary International Law.¹⁹ By this definition, every man killed at Logar was presumed a combatant without further investigation. Perhaps this explains why ISAF has failed to release a

(IHL) “reflect[s] an ancient respect for the plight of individuals facing life-threatening situations.”).

16. See *Collateral Damage or Crimes of War? Women, Children Among 18 Afghans Dead in NATO Wedding Strike*, GLOBAL RESEARCH (June 6, 2012), <http://www.globalresearch.ca/collateral-damage-or-crimes-of-war-women-children-among-18-afghans-dead-in-nato-wedding-strike> [hereinafter GLOBAL RESEARCH 6/6]; CBS 6/6, *supra* note 11 (corroborating Agence France Presse (AFP) pictures by noting that an Associated Press photographer “saw the bodies of five women, seven children, and six men piled in the back of vans that drove to the capital or Logar province to protest the protest the overnight strike”).
17. See LiveLeak 6/9, *supra* note 3; GLOBAL RESEARCH 6/6, *supra* note 16.
18. Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, at A1, available at http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=1.
19. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol Additional] (“In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”).

final number of civilians killed in the strike,²⁰ rendering a final determination of collateral damage impossible.

Both ISAF's inaccurate reporting and this flawed definition of combatant have caused endemic miscommunication of collateral damage caused by U.S. drone strikes.²¹ For example, in August 2011, White House Chief Counterterrorism Advisor John Brennan stated that "for more than a year . . . the U.S. government has not found credible evidence of collateral deaths resulting from U.S. counterterrorism operations," prompting an investigation by the Bureau of Investigative Journalism, which found over twenty-three strikes during the stated time for which the "media had credibly reported civilian deaths."²² Misreporting has created so much confusion that the United Nations formed a council in Geneva in 2013 with the sole purpose of investigating U.S. drone strikes.²³ U.N. Special Rapporteur Ben Emmerson published a report on March 10, 2014, intended to "increase pressure on the US to bring their covert [drone] programme out of the shadows."²⁴ Emmerson recorded a "dramatic reduction in drone strikes in 2013 in Pakistan but increases in Afghanistan," and noted "a threefold increase in recorded civilian casualties from drone strikes in Afghanistan in

20. See *infra* notes 105–08, 140–40 and accompanying text.

21. There have been extreme discrepancies between civilian casualties reported by government officials and those reported by The Long War Journal and the British Bureau of Investigative Journalism. See Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 11, 2011, at A1, available at <http://www.nytimes.com/2011/08/12/world/asia/12drones.html>.

22. See CTR. FOR CIVILIANS IN CONFLICT AND COLUMBIA LAW SCH. HUMAN RIGHTS CLINIC, THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS 30 (2012) [hereinafter THE CIVILIAN IMPACT OF DRONES] ("Media had credibility reported civilian deaths in more than one in five of the 116 reported drone strikes during the year in question." (internal quotation marks omitted)).

23. See Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. TIMES, Nov. 25, 2012, at A1, available at <http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all>; News Release, U.N. Human Rights, Office of the High Commissioner, Statement by Ben Emmerson, U.N. Special Rapporteur on Counter-Terrorism and Human Rights, Concerning the Launch of an Inquiry Into the Civilian Impact, and Human Rights Implications of the Use Drones [sic] and other Forms of Targeted Killing for the Purpose of Counter-Terrorism and Counter-Insurgency, available at http://www.foreignpolicy.com/files/fp_uploaded_documents/130124_SRCTBenEmmersonQCStatement.pdf.

24. Ewen MacAskill & Owen Bowcott, *UN Report Calls for Independent Investigations of Drone Attacks*, THE GUARDIAN (Mar. 10, 2014, 11:16 AM), <http://www.theguardian.com/world/2014/mar/10/un-report-independent-investigations-drone-attacks>.

2013.”²⁵ Despite international skepticism, the Obama administration presently seeks to codify its existing drone policies.²⁶

This Comment argues that without amending present ex post methods for assessing and reporting collateral damage following a drone strike, the United States’ drone program will remain inconsistent with two fundamental principles of international law: the principle of proportionality,²⁷ and the presumption of civilian status for all individuals.²⁸

The United States must ensure that its wartime drone program complies with international law in order to restrict drone use in future wars to the confines of international humanitarian law (IHL).²⁹ According to the United Nations, “the United States is setting a legal and ethical precedent for other countries developing armed drones.”³⁰ Furthermore, the United States must do more to protect its ground troops from dangerous local backlash predicated on unnecessary miscommunication.³¹

25. *Id.*; see Ben Emmerson, *Third Rep. on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. HUMAN RIGHTS COUNCIL (Mar. 11, 2014), available at <http://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx>.

26. Shane, *supra* note 23.

27. See *infra* Part II.C.2 applying Protocol Additional art. 51(5)(b) (Stating attacks are prohibited “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”).

28. See Protocol Additional, *supra* note 19, art. 50(1).

29. See David P. Forsythe, *The United States and International Humanitarian Law*, 7 J. OF HUM. RTS. 25, 25 (2008) (“[T]he United States, with its size, power, and relatively [sic] transparency, has great impact on world affairs. Some data indicate that because of US tough policies after the terrorist attacks of September 11, 2001, many states, taking their cue from Washington, increased repression—and thus in general violations of many human rights.”).

30. Shane, *supra* note 23.

31. 2012 was one of the bloodiest years in recent memory for ISAF troops in Afghanistan—not because of a surge in Taliban activity, but rather because of a dramatic rise in “green-on-blue attacks” perpetrated by Afghan National Security Forces against their ISAF counterparts. According to a *Newsweek* article published just two months after the Logar Strike:

The [death] toll [of ISAF forces operating in Afghanistan] keeps rising [due to green-on-blue violence] [M]embers and civilian employees of Afghanistan’s security forces ha[ve] killed no fewer than 40 coalition troops this year—at least 10 of the dead, all of them Americans, in the first three weeks of August alone.

Sami Yousafzai, *Afghanistan: ‘Green on Blue’ Killings Explained*, NEWSWEEK (Oct. 1, 2012, 12:15 PM), <http://www.newsweek.com/afghanistan-green-blue-killings-explained-64561>.

I. THE IMPORTANCE OF AFGHANISTAN

Afghanistan is both the longest and the least talked-about war in American history.³² Its absence from the 2012 presidential election was so palpable that Joshua Foust of *The Atlantic* published an article aptly titled “The Afghanistan-Shaped Hole in the Presidential Campaigns,” in which he explained why “[n]either presidential campaign ha[d] seemed interested . . . in taking a bold stand on Afghanistan or in pushing a different strategy,” namely because Americans were no longer paying attention; thus, there was “little political gain” involved in doing so.³³

Ignoring Afghanistan, however, the first war in which the United States has deployed drones on a large scale in combat,³⁴ exacts a high price. As one veteran wrote poignantly: “American men and women are still dying in Afghanistan.”³⁵ This will continue to be a risk well beyond 2014.³⁶ In February 2014, the Obama administration commissioned a report by the Center for Naval Analyses’ Strategic Studies division that concluded: “The Taliban is likely to gain strength after 2014, posing a threat to the [Afghan] government from 2015 to 2018, although significantly less so if American and NATO forces stay.”³⁷ Currently, there are 32,000 troops in Afghanistan, and President Obama has approved a Bilateral Security Agreement to authorize a continued U.S. presence in the country in response to numerous reports suggesting that withdrawal will result in a civil war in Afghanistan.³⁸

32. See Arianna Huffington, *Afghanistan: Our Longest and Least Talked About War*, HUFFINGTON POST (Oct. 11, 2012, 2:39 PM), http://www.huffingtonpost.com/arianna-huffington/afghanistan-our-longest-a_b_1958282.html.

33. Joshua Foust, *The Afghanistan-Shaped Hole in the Presidential Campaigns*, THE ATLANTIC (Sept. 7, 2012, 11:02 AM), <http://www.theatlantic.com/international/archive/2012/09/the-afghanistan-shaped-hole-in-the-presidential-campaigns/262059>. See generally *Nation Horrified to Learn About War in Afghanistan While Reading Up On Petraeus Sex Scandal*, THE ONION (Nov. 13, 2012), <http://www.theonion.com/articles/nation-horrified-to-learn-about-war-in-afghanistan,30367/> (dramatizing American popular perception about the war in Afghanistan).

34. See Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/counterterrorism/targeted-killings/p9627> (last updated May 23, 2013).

35. Brian Mockenhaupt, *Failure of Leadership: An Iraq War Vet on Petraeus*, DAILY BEAST (Nov. 21, 2012, 6:05 PM), <http://www.thedailybeast.com/articles/2012/11/21/david-petraeus-betrayed-us-writes-an-iraq-war-vet.html>.

36. See *Ex-NATO Chief: 15,000 Troops Should Stay in Afghanistan After 2014*, BUSINESS INSIDER (Aug. 14, 2013, 7:07 PM), <http://www.businessinsider.com/nato-chief-troop-levels-afghanistan-2014-2013-8> (noting how American troops will remain in Afghanistan after 2014).

37. Editorial, *Frustration With Afghanistan*, N.Y. TIMES, Mar. 4, 2014, at A22, available at <http://www.nytimes.com/2014/03/04/opinion/frustration-with-afghanistan.html?ref=afghanistanwar>.

38. See Mark Landler, *U.S. Troops to Leave Afghanistan by End of 2016*, N.Y. TIMES, May 28, 2014, at A1, available at <http://www.nytimes.com/2014/05/28/world/asia/us-to>

Furthermore, as noted by the U.N. Special Rapporteur on counterterrorism in March 2014, the number of civilian casualties caused by drone strikes in Afghanistan is increasing exponentially rather than decreasing.³⁹ This is caused in part by the United States' increasing reliance on drone warfare as it draws down the number of troops on the ground.⁴⁰ As long as the United States has boots on the ground (and drones in the sky) in Afghanistan, it will continue to set precedent for states' future drone use in theatres of war, and will continue to ask its troops to make incredible sacrifices on its behalf.

On May 29, 2012, the *New York Times* revealed the Obama administration's definition of combatant for assessing drone-strike collateral damage.⁴¹ The definition has not been adequately confronted as a stumbling block to IHL compliance for the U.S. drone program in Afghanistan.⁴²

complete-afghan-pullout-by-end-of-2016-obama-to-say.html; Nate Rawlings, *Why the U.S. Needs to Keep Troops in Afghanistan*, TIME (Feb. 26, 2014), <http://world.time.com/2014/02/26/why-the-u-s-needs-to-keep-troops-in-afghanistan>.

39. See *supra* notes 23 and 25.

40. See Liat Clark, *Report: US Drone Attacks Rapidly Increasing in Afghanistan*, WIRED (Feb. 20, 2013), <http://www.wired.co.uk/news/archive/2013-02/20/un-afghanistan-drone-deaths>.

41. Becker & Shane, *supra* note 18. This prompted some scholars to begin evaluating the definition's implications for drone use outside theatres of war. See, e.g., THE CIVILIAN IMPACT OF DRONES, *supra* note 22; INT'L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCH. AND GLOBAL JUSTICE CLINIC AT NYU SCH. OF LAW, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN 43–54 (2012).

42. See, e.g., THE CIVILIAN IMPACT OF DRONES, *supra* note 22 at 19, 46 (expressing concern about the “true civilian toll of drone operations *outside the Afghanistan combat theater*,” and applauding the United States' policy of “immediately investigating any potential incident of civilian harm” resulting from strikes in Afghanistan (emphasis added)); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 29 (Brookings Inst., Georgetown Univ. Law Ctr., & Hoover Inst., Working Paper, 2009), available at <http://ssrn.com/abstract=1415070> (concluding that drones—also known as “predators”—should be permitted “unashamedly” against terrorist leaders within theatres of war); Shane, *supra* note 23 (reporting that “[e]xperts say the [United States' drone] strikes are deeply unpopular both in Pakistan and Yemen, in part because of allegations of large numbers of civilian casualties, which American officials say are exaggerated” while ignoring controversy surrounding the calculation of civilian casualties caused by strikes in Afghanistan).

Drone legality within and outside of theatres of war are two separate matters, because outside theatres of war, a different and more demanding regime of international law known as international human rights law (IHRL) applies. ADVISORY SERVICE ON INT'L HUMANITARIAN LAW, INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW (2003), available at http://www.icrc.org/eng/assets/files/other/ihl_and_ihrl.pdf. While IHL acknowledges that death, even of civilians, is inevitable in times of armed conflict, IHRL is based on the principle that “[e]very human being has the inherent right to life” outside theatres of war. International Covenant on Civil and Political Rights art. 6, Dec. 19, 1966, 999 U.N.T.S. 171. This Comment goes one step beyond

Although the attention of scholars and politicians alike has turned away from drone governance in theatres of war, the people of Afghanistan, and the seventy countries that currently have drone technology—including Russia, India, China, and Libya⁴³—continue to pay close attention.

II. LAWS GOVERNING DRONES AND THE LIMITS OF EXISTING SCHOLARSHIP

Scholarship scrutinizing whether the United States' drone use in Afghanistan is consistent with IHL has focused exclusively on ex ante strike authorization and strike execution.⁴⁴ There is now near-consensus that drone use in Afghanistan is consistent with IHL.⁴⁵ Drone warfare implicates three

existing scholarship to argue that U.S. methods for calculating collateral damage fail to comply even with IHL.

43. *21st Century Battlefield: Race of Drones*, YNETNEWS (Oct. 3, 2012, 12:40 AM), <http://www.ynetnews.com/articles/0,7340,L-4287728,00.html>; Peter Bergen & Jennifer Rowland, *A Dangerous New World of Drones*, CNN (Oct. 8, 2012, 5:13 AM), <http://www.cnn.com/2012/10/01/opinion/bergen-world-of-drones/index.html>.
44. See, e.g., THE CIVILIAN IMPACT OF DRONES, *supra* note 22, at 73–76. Here, the authors correctly note that IHL requires an individual be presumed a civilian for ex ante purposes of targeting and strike authorization, but conflate the United States' ex ante procedures for strike authorization with its ex post procedures for assessment of collateral damage. The authors therefore terminate their inquiry into strike legality before fully addressing the need for an ex post presumption of civilian status to lawfully determine collateral damage. Specifically, authors assert that “while the U.S. government states that it does not conduct strikes against a particular individual unless it has a high degree of certainty that the high-value target is present and that civilians are not, it appears the U.S. often presumes that persons in geographic proximity to targeted individuals can also be directly and intentionally targeted.” In fact, a presumption of combatant status does not arise until the ex post assessment stage following a strike. The authors base their assertion on the May 2012 *New York Times* article divulging President Obama’s “disputed method for *counting civilian casualties*” following a drone strike—which is distinct from the administration’s painstaking method for selecting drone targets and approving strikes ex ante. See Becker & Shane, *supra* note 18 (emphasis added).
45. See, e.g., *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 & Gov’t Reform*, 111th Cong. 20 (2010) (statement of Mary Ellen O’Connell, Robert and Marion Short Chair in Law, Univ. of Notre Dame) (“Restricting drones to the battlefield is the single most important rule governing their use.”); Joseph Singh, *Are the Strategic Costs of Obama’s Drone Policy Greater Than the Short-Term Gains?*, FOREIGN POLICY (June 27, 2012, 6:52 AM), http://ricks.foreignpolicy.com/posts/2012/06/27/are_the_strategic_costs_of_obama_s_drone_policy_greater_than_the_short_term_gains_0 (“Panelists noted that in Afghanistan, ISAF has been very effective at using drones as part of the larger military campaign. Strict rules govern the use of drones under ISAF command. Under no conditions, for example, are drones used to attack buildings, given the possibility that unidentified civilians may be inside. Such rigidity results not solely from a belief in abiding by the rules of war, but from a conviction that any civilian deaths threaten greater instability. In the

fundamental principles of IHL, taken from the Protocol Additional to the Geneva Conventions⁴⁶: necessity,⁴⁷ distinction,⁴⁸ and proportionality.⁴⁹

A. Necessity

The first principle, necessity, has provoked little debate. Necessity requires that military strikes accomplish objectives that confer a “definite military advantage” on troops.⁵⁰ Drones are, without a doubt, an “invaluable tool against al-Qaeda, Taliban, and associated terrorist forces.”⁵¹ According to John Brennan, drones are “essential” in Afghanistan because of their “laser-like” ability to “eliminate the cancerous tumor called an al-Qaida terrorist, while limiting damage to the tissue around it.”⁵²

Brennan’s statement implies that drones not only satisfy the principle of necessity, but also satisfy the distinction and proportionality principles. He states specifically that drones can distinguish between “tumors” (al-Qaeda

hinterlands of Pakistan, Somalia, and Yemen, where ground troops are unable to help vet potential targets or engage with local populations to redress errors, drones have struck more fear and resentment in local populations than confidence.” (quoting a panel discussion hosted by the German Marshall Fund, in which panelists unconditionally condone ISAF’s use of drones in Afghanistan)).

46. Although the United States is not party to the Protocol Additional, according to a majority of states and international organizations, including most importantly the International Committee of the Red Cross (ICRC), the treaty reflects binding customary international law. *Treaties and Customary Law: Overview*, INT’L COMM. OF THE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/treaties-customary-law/overview-treaties-and-customary-law.htm>.
47. Protocol Additional, *supra* note 19, art. 52(2) (“Attacks shall be limited strictly to military objectives. [M]ilitary objectives are limited to those objects . . . whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, *offers a definite military advantage*.” (emphasis added)).
48. *Id.* art. 48 (“In 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.”).
49. *Id.* art. 51(4–5) (“Indiscriminate attacks are prohibited . . . [including] attack[s] which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”).
50. *See supra* note 47.
51. Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. & POL’Y 101, 115–16 (2010) (explaining that drones offer a significant military advantage “in a war that is transnational in scope and with enemies intent on hiding among civilians and within failed or semi-failed states and territories”).
52. *John Brennan Delivers Speech On Drone Ethics* (NPR radio broadcast May 1, 2012) [hereinafter Brennan Radio Speech], *available at* <http://www.npr.org/2012/05/01/151778804/john-brennan-delivers-speech-on-drone-ethics>.

combatants) and “tissue” (Afghan civilians), and implies that their “laser-like” ability to do so automatically limits collateral damage to the greatest extent possible. His statement thus implies that these undisputed capabilities alone ensure drone compliance with IHL. In doing so, however, Brennan oversimplifies the issues surrounding drone use. While drone satisfaction of necessity within theatres of war has always been greeted with near consensus, the inception and enlargement of the United States’ drone program in Afghanistan initially sparked serious debate concerning adherence to the distinction and proportionality principles.

B. Distinction

The second IHL principle, distinction, has one factual requirement— “[p]arties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives”—and one legal requirement—“and accordingly shall direct their operations only against military objectives.”⁵³

The factual component requires that a weapons technology have the capacity to distinguish between military and civilian targets. The legal component requires those endowed with the power to authorize the use of such technology, namely policy makers and military officials, to take every feasible measure to minimize harm to civilians.⁵⁴ Drones satisfy the factual requirement better than any other weapon currently employed in Afghanistan,⁵⁵ and better than ground troops acting alone for several reasons,

53. See *supra* note 48; see also Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, 44 *POLITY* 260, 284 (2012) (cautioning scholars and policymakers against focusing solely on the factual demand of the principle of distinction, arguing that “the mere use of particular technologies in military strikes cannot bestow on them legal and ethical legitimacy; it is individuals—rather than the technologies on their own—who make these assessments”).

54. See sources cited *supra* notes 47, 53 and accompanying text.

55. See CIA Director Leon E. Panetta’s Remarks at the Pacific Council on International Policy, CENTRAL INTELLIGENCE AGENCY (May 18, 2009), <https://www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html> (referring to drones as “the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership”); see also Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 *TEX. INT’L L.J.* 293, 297–98 (2012) (praising the “longer loiter time of drones [that] allows for a much higher level of confidence that the target has been properly identified.”); Vogel, *supra* note 51, at 122–23 (stating that drones have the capability to observe and strike their targets precisely, and that drone compliance with the principle of distinction hinges on policymakers’ ability to satisfy the legal demand alone); see also Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility* 53–54 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research

including that drones are never impaired by “mortal fear.”⁵⁶ Drones have the luxury of being “deliberate instead of reactionary”⁵⁷ in their attacks, and are capable of responding to threats with the appropriate amount of force, only after gaining information verifying the status of their targets, rather than responding out of fear with “massive uses of force directed at only vaguely identified targets.”⁵⁸ Consequently, drones generate fewer civilian casualties than ground troops,⁵⁹ whose information is limited and judgment frequently impaired by the “fog of war.”⁶⁰

The cause for concern regarding drone capacity to satisfy the distinction principle, therefore, has nothing to do with any inherent feature of the weapons technology itself, but rather with the manner in which drones are employed, and whether policy decisions will inevitably handicap drones’ ability to satisfy the legal requirement of distinction. Many worry that drones diminish the United States’ willingness to abide by IHL by encouraging overly broad definitions of what constitutes a legitimate, *ex ante* strike target.⁶¹ The primary argument advanced to this end is that drones’ significant reduction of the cost of war to the United States in terms of both “blood and treasure” will seduce policymakers into expanding the limits on what constitutes a “legitimate target,” and engaging in more, longer, and less legitimate wars.⁶² This argument, however, is misguided insofar as it opposes drones as a weapons technology. All that can reasonably be required of a weapons technology is that it satisfies the “fact” component of distinction: that it be

Paper Series, Working Paper No. 12–40, 2012) (“[D]rones . . . should be seen as a substantial humanitarian advance in warfare Drones, as against other uses of military force, better realize [humanitarian] principles than any other technology currently available. Indeed, they allow for *the most discriminating uses of force in the history of military technology and warfare*, in contexts in which the use of force is otherwise justified.”).

56. Lewis, *supra* note 55, at 298.

57. MATT J. MARTIN & CHARLES W. SASSER, PREDATOR: THE REMOTE-CONTROL AIR WAR OVER IRAQ AND AFGHANISTAN 104 (2010).

58. Issacharoff & Pildes, *supra* note 55, at 56.

59. *Id.* at 54 (stating that “[i]f the alternative [to drones] is sending US ground forces . . . the result will be far greater loss of civilian life, and far greater loss of combatant [life]”).

60. U.S. MARINE CORPS, DEPT. OF THE NAVY, WARFIGHTING 7 (1997) (“Uncertainty pervades battle in the form of unknowns about the enemy, about the environment, and even about the friendly situation.”).

61. Kreps & Kaag, *supra* note 53, at 261–62 (calling attention to a difference between “increasingly sophisticated technology” and “increasingly sophisticated judgment,” and arguing that drones, “by shielding U.S. soldiers from injury in the field—both insulate the U.S. domestic population from the effects of an on-going war and allow strategists to avoid the logical and ethical pitfalls associated with advances in technology”).

62. *Id.* at 281–82.

endowed with the capacity to distinguish between combatants and civilians, and the accuracy to execute strikes against the former only. This, drones can clearly do. Drone technology effectively gives policymakers the tools to comply with distinction. Whether or not policymakers employ drones appropriately and make the best use of this technology (in order to satisfy the legal component of distinction) does not bear on the question of whether drones in general comply with international law.

In fact, scholars have come to agree that, at least in theatres of war, drones present no novel legal issue.⁶³ Where IHL governs, there is no legal prohibition of asymmetrical warfare, or on the use of weapons technologies that attempt to remove soldiers as far as possible from the battlefield; the truth is that “advances in military technology have always been about the ability to project force from a distance.”⁶⁴ For centuries, scholars have argued that humanitarian developments in the way of war (like modern drones) will “perversely” increase countries’ willingness to go to war.⁶⁵ For example, pacifists in nineteenth century objected to the formation of the International Committee of the Red Cross, arguing that “[s]uch a society would relieve governments of responsibilities which really belong to them which they only can properly discharge . . . and being relieved of which would make war more easy.”⁶⁶ Drones simply continue this debate in the twenty-first century.⁶⁷

Contrary to some scholars’ argument that drones remove humans one step too far from the battlefield⁶⁸ and thus tranquilize a sense of personal accountability for strikes, drone operators feel an undeniable sense of personal responsibility for the strikes they commence. Indeed, they often experience the typical, human aversion to causing the death of another person⁶⁹ more than

63. See Issacharoff & Pildes, *supra* note 55, at 53–54.

64. *Id.* at 54 (recalling how even “[a]ncient advances, such as catapults and longbows, involved the delivery of force from a distance, instead of hand-to-hand personalized combat”).

65. See *id.* at 54–55.

66. See *id.* at 55, n.176 (quoting Kenneth Anderson, *Efficiency in Bello and ad Bellum: Making the Use of Force Too Easy?*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 389 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012)).

67. The debate is, in essence, a fundamental criticism of the very existence of war, rather than a practical criticism of compliance with the laws of war, which, tragically, concede war is all but inevitable in a fallen world. 4 ST. AUGUSTINE, Book XIV.4, in THE CITY OF GOD (G. P. Goold, ed., Philip Levine, trans., 1988); 2 ST. THOMAS AQUINAS, *Question XL of War*, in SUMMA THEOLOGICA (Fathers of the English Dominican Province trans., 1916).

68. Kreps & Kaag, *supra* note 53.

69. DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 36–37, 74 (rev. ed. 2009).

traditional bombardiers and soldiers.⁷⁰ Physical proximity and a sense of personal accountability are not always correlated. Drone operators are required to monitor potential targets for a twenty-four hour “cycle of life surveillance,” during which they regularly observe the man below interacting with his wife and children.⁷¹ Reality—that an operator is about to cause the death of another human being—is brought to bear while watching the target take his last meal, hug his wife for a final time, and bid his children farewell. Harold Koh, Legal Advisor to the State Department, once asked a former bomber pilot and current drone operator about the mythical “PlayStation Mentality” supposed to remove a sense of personal accountability from drone operators. The operator explained:

I [used to] drop[] bombs, hit my target load, but had no idea who I hit. Here I can look at their faces. I watch them for hours, see these guys playing with their kids and wives. . . . After the strike, I see the bodies being carried out of the house. I see the women weeping and in positions of mourning. That's not PlayStation; that's real. My job is to watch after the strike too. I count the bodies and watch the funerals.⁷²

Reality is nauseatingly poignant. Indeed, personal accountability pervades drone warfare more than it did wars of the past, in which the enemy was considered “faceless.”⁷³ Drones therefore satisfy the distinction principle better than any other weapons technology.

70. See Gregory S. McNeal, *Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 336–38 (Claire Finkelstein et al. eds., 2012), available at <http://ssrn.com/abstract=1954795>; see also Issacharoff & Pildes, *supra* note 55, at 55–56 n.178 (quoting DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 217 (2012)).

71. See sources cited *supra* note 70.

72. Issacharoff & Pildes, *supra* note 55, at 55–56 n.178 (quoting DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 217 (2012)).

73. *Id.* at 55. According to a recent study conducted by the Armed Forces Health Surveillance Center, drone pilots have at least comparable—and possibly higher—rates of stress disorders than soldiers in combat do. James Dao, *Drone Pilots Are Found to Get Stress Disorders Much as Those in Combat Do*, N.Y. TIMES, Feb. 22, 2013, at A22, available at <http://www.nytimes.com/2013/02/23/us/drone-pilots-found-to-get-stress-disorders-much-as-those-in-combat-do.html> (“After analyzing diagnosis and treatment records, the researchers initially found that the drone pilots had higher incidence rates for 12 conditions, including anxiety disorder, depressive disorder, post-traumatic stress disorder, substance abuse and suicidal ideation.”).

C. Proportionality

1. Ex Ante Analysis: Strike Authorization and Execution

The final IHL principle, proportionality, requires that the military objective advanced by a strike outweigh the collateral damage caused.⁷⁴

Preplanned strikes are only authorized against “high-level” combatants⁷⁵—Taliban and al-Qaeda leaders whose biographies are reviewed by the president before they are placed on the president’s so-called “kill list.”⁷⁶ A strike against any member of the kill list, whose records of terrorism are verified by the president and his advisors, advances a significant military objective—literally, as Brennan fantasized, the precise removal of the most dangerous terrorists like “cancerous tumor[s].”⁷⁷

The Logar Strike was not a preplanned operation targeting a particular insurgent, however. Rather, it was an operation in which drones were used in self-defense to aid lawful combatants under enemy fire, and thus advanced a significant military objective. As such, the Logar Strike avoids the question of the legitimacy of kill lists altogether, alleviating practically all controversy surrounding the ex ante legality of the Strike.

Thus, the only remaining question about drone strike compliance with proportionality is that of collateral damage. To address this question, scholars such as Gregory S. McNeal have pointed to exhaustive ex ante mechanisms currently in place to ensure the accuracy of strikes, to mitigate (and in 99 percent of cases eliminate) collateral damage, and to consequently ensure ex ante strike compliance with proportionality.⁷⁸ According to McNeal, the

74. See *supra* note 49.

75. Issacharoff & Pildes, *supra* note 55, at 53.

76. Becker & Shane, *supra* note 18. The existence of the “kill list” itself has generated much controversy. See, e.g., Hannah Furness, *Kill List’ Legal Challenge Brought by Man Who Lost Five Relatives in Missile Strike*, THE TELEGRAPH (Aug. 10, 2012, 8:34 AM), <http://www.telegraph.co.uk/news/uknews/defence/9465942/Kill-list-legal-challenge-brought-by-man-who-lost-five-relatives-in-missile-strike.html>; Lesley Wexler, *Litigating the Long War on Terror: The Role of Al-Aulaqi v. Obama*, 9 LOYOLA UNIV. CHICAGO INT’L L. REV. 159, 169–70, 171–72 (2011); Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, WASH. POST (Oct. 23, 2012), http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408f6e6a4b_story.html; Katrina Vanden Heuvel, *Obama’s ‘Kill List’ is Unchecked Presidential Power*, WASH. POST OPINIONS, (June 12, 2012), http://www.washingtonpost.com/opinions/obamas-kill-list-is-unchecked-presidential-power/2012/06/11/gJQAHw05WV_story.html.

77. Brennan, *supra* note 52.

78. McNeal, *supra* note 70, at 328–32.

military employs a multistep process known as the Collateral Damage Methodology (CDM) to assist commanders in weighing risks to collateral objects based on empirical data and physics-based computerized models.⁷⁹ If there is any possibility that a preplanned strike will result in collateral damage, commanders are bound to undergo a mitigation process, designed by the secretary of defense and the president, that has reduced the likelihood that collateral damage will result from a preplanned drone strike to 1 percent.⁸⁰ This extensive mitigation process happens before the legal question of whether a particular strike adheres to the principle of proportionality is even asked.⁸¹ Finally, in Afghanistan, any preplanned strike that might result in a single civilian casualty must be approved by President Obama himself.⁸² From this *ex ante* perspective, drones appear to make easy work of compliance with proportionality.

The scholarship ends here, giving the impression that drones in Afghanistan adhere to necessity, distinction, proportionality, and thus comply with IHL. But the inquiry cannot stop here. To conclude that the drone program in Afghanistan satisfies proportionality, one must look beyond the *ex ante* strike authorization process and technological precision of strike execution to the United States' method for *ex post* determination of civilian casualties following a strike.

2. Ex Post Analysis: Collateral Damage in Light of Counterinsurgency

The Obama administration's overly broad definition of "combatant" and consequent method for counting and publicly reporting civilian casualties to the global community is not only inconsistent with international law as codified in the Protocol Additional⁸³ and interpreted by the International Committee of the Red Cross (ICRC),⁸⁴ but may also generate enough anti-American sentiment to thwart, rather than advance, ISAF's primary military objective: affecting counterinsurgency (COIN).

Dr. David Kilcullen, a Lieutenant Colonel in the Australian Army, authored the foundational article used to educate company-level commanders

79. *Id.*

80. *Id.* at 328.

81. Issacharoff & Pildes, *supra* note 55, at 66.

82. Becker & Shane, *supra* note 18.

83. *See supra* note 19.

84. *Infra* Part IV.C.1.

in the U.S. military about the fundamental goals of COIN.⁸⁵ Kilcullen writes that COIN, in a “nutshell,” is “competition with the insurgent for the right and ability to win the hearts, minds and acquiescence of the population.”⁸⁶ In other words, ISAF must compete with the Taliban for legitimacy in the eyes of the Afghan people, legitimacy won only after the people have come to “respect” ISAF, “accept that [its] actions benefit them, and trust [its] integrity and ability to deliver on promises, particularly regarding their security.”⁸⁷

The legitimacy of coalition forces was significantly damaged in the aftermath of the Logar Strike. How could a Logar villager, whose family member or friend was a civilian killed in the strike, “accept that [ISAF’s] actions benefit [him], trust [ISAF’s] integrity,” or conclude that ISAF prioritized his security, when civilian deaths might not have even been acknowledged by ISAF absent photographs depicting dead civilians?

Kilcullen continues: “In this battlefield[,] popular perceptions and rumor are more influential than the facts and more powerful than a hundred tanks.”⁸⁸ A perception that ISAF lacks integrity “fuels and perpetuates the insurgency.”⁸⁹ Thus, perception matters more to the accomplishment of COIN than reality. The Logar Strike caused significant collateral damage. Misreporting of that collateral damage then caused the Afghan people to perceive ISAF as untrustworthy, holding grave consequences for the United States’ ability to affect COIN and thereby diminishing the “military advantage” advanced by the Strike. Such results weight both sides of the proportionality equation—collateral damage caused and military objective advanced—against a strike’s satisfaction of proportionality.⁹⁰

85. DAVID KILCULLEN, IO SPHERE JOINT INFO. OPERATIONS CTR., TWENTY-EIGHT ARTICLES: FUNDAMENTALS OF COMPANY-LEVEL COUNTERINSURGENCY 29–35 (2006), available at http://www.au.af.mil/info-ops/iosphere/iosphere_summer06_kilcullen.pdf.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. It is little wonder that “questioning whether killing unidentified fighters is legally justified or worth the local backlash” has “prompted the greatest conflict inside the Obama administration.” Shane, *supra* note 23 (emphasis added). Unfortunately, conflict has thus far failed to catalyze change.

III. EX ANTE ANALYSIS OF THE LOGAR STRIKE

A. Facts

On June 6, 2012, when ISAF and Afghan coalition forces approached a house in the remote Logar Province in eastern Afghanistan, they hoped to capture and detain a combatant known to “command[] multiple insurgents and acquire[] weapons for use in insurgent attacks against Afghan and coalition troops.”⁹¹ According to the head of the village’s local council, Mohammad Wali, a wedding party had gathered in the house on the eve of a wedding. In contrast, according to Provincial Police Chief General, Ghulam Sakhi Roogh Lawanay, the gathering was a meeting of “senior [Taliban] commanders.”⁹² Occupants of the house were likely present for both reasons. No evidence suggests that coalition forces suspected a large number of civilians to be present in the house at the time or that a wedding party had assembled there.

Coalition forces surrounded the house on foot and warned all insurgents within to surrender.⁹³ The forces immediately came under small weapons and grenade fire, returned fire, and eventually called for a precision airstrike, which devastated the house and concluded the operation.⁹⁴

Immediately following the operation, ISAF issued a press release which stated that “as a result of the operation, multiple insurgents were killed and the Afghan and coalition security force seized several weapons and a quantity of explosives,” and quantified collateral damage as “two women who had sustained non-life-threatening injuries.”⁹⁵

Testimony and photographs by sources on site immediately revealed collateral damage beyond that acknowledged by ISAF, however. Deputy Provincial Police Chief Raeis Khan Abdul Rahimzai reported that “seven key local Taliban officials were killed in the strike,” but that eighteen civilians, including women and children, had also been killed.⁹⁶ Rahimzai’s testimony was bolstered by photographs, taken by an onsite Associated Press

91. *ISAF Initial Statement*, *supra* note 3.

92. CBS 6/6, *supra* note 11.

93. BBC 6/6, *supra* note 3.

94. *ISAF Initial Statement*, *supra* note 3; *NATO Airstrike Kills ‘at Least 15 Afghan Civilians,’* AGENCE FRANCE-PRESSE (June 6, 2012, 7:28 PM), <http://www.rawstory.com/rs/2012/06/06/nato-airstrike-kills-at-least-15-afghan-civilians> [hereinafter AFP 6/6].

95. *ISAF Initial Statement*, *supra* note 3.

96. AFP 6/6, *supra* note 94; CBS 6/6, *supra* note 11.

photographer, of villagers transporting their dead, including several women and children, to the provincial capital in vans.⁹⁷

The death toll eventually amounted to five women, seven children, and six men.⁹⁸ There is still disagreement, however, as to how many of the dead were combatants. The BBC, citing “Afghan officials,” reported that all of the men killed were civilians.⁹⁹ *USA Today* cited “Afghan officials” who claimed that “some or all of the dead men were militants.”¹⁰⁰ The deceased males’ statuses have yet to be publicly resolved by ISAF.

The BBC reported that “[v]illagers took their dead to the provincial capital to show that they had been wrongly targeted.”¹⁰¹ Once villagers reached the capital, they held demonstrations to “condemn the killings.”¹⁰² They “chanted anti-U.S. and anti-Afghan government slogans, saying ‘death to America, death to the Afghan government, death to Hamid Karzai and death to Barak [sic] Obama.’”¹⁰³

Unsurprisingly considering the discord, Afghanistan President Hamid Karzai stated that all eighteen people killed were civilians, adding: “This is unacceptable, it cannot be tolerated.”¹⁰⁴ Karzai then “criticized NATO for not being able to provide an explanation for the vans piled with women’s and children’s bodies that villagers displayed to reporters.”¹⁰⁵

ISAF immediately issued a second statement that civilian casualties resulting from the strike would be investigated further.¹⁰⁶ Major Martyn Crighton, spokesperson for NATO, stated that an assessment team was being assembled to investigate “allegations” of civilian casualties “because there is

97. AFP 6/6, *supra* note 94; CBS 6/6, *supra* note 11; Global Research 6/6, *supra* note 16; *Afghan Leader: NATO Airstrike Killed 18 Civilians*, USA TODAY (June 7, 2012), <http://usatoday30.usatoday.com/news/world/story/2012-06-07/afghanistan-civilian-deaths/55444706/1> [hereinafter USA Today 6/7].

98. USA Today 6/7, *supra* note 97.

99. BBC 6/6, *supra* note 3.

100. USA Today 6/7, *supra* note 97.

101. BBC 6/6, *supra* note 3.

102. LiveLeak 6/9, *supra* note 3.

103. *Id.*

104. USA Today 6/7, *supra* note 97; Heidi Vogt, *NATO Airstrike Killed 18 Civilians in Eastern Afghanistan, Hamid Karzai Says*, HUFFINGTON POST (Sept. 7, 2012, 6:44 AM), http://www.huffingtonpost.com/2012/06/07/nato-airstrike-afghanistan-civilian-casualties_n_1576615.html?view=print&comm_ref=false (quoting President Hamid Karzai).

105. Vogt, *supra* note 104.

106. *Joint Team Assesses Civilian Casualties in Eastern Afghanistan*, AFG. INT’L SEC. ASSISTANCE FORCE (June 6, 2012), <http://www.isaf.nato.int/article/isaf-releases/joint-team-assesses-civilian-casualties-in-eastern-afghanistan.html> [hereinafter ISAF Second Statement].

such a discrepancy between what our operational reporting indicates and what Afghan officials on the ground are saying happened”¹⁰⁷

Two days after the strike, ISAF issued a statement that its “initial assessment” of the incident was concluded, and that it assumed responsibility for the “unintended, but nonetheless tragic death of Afghan civilians.”¹⁰⁸ This statement failed to state a total number of civilians or combatants killed,¹⁰⁹ and is, to date, NATO’s final word on the matter. ISAF then-Commander General John Allen personally apologized, “as a father,” to the family members of those killed and affirmed his commitment to doing “the right thing” in terms of compensating the families for their loss and “minimiz[ing] the likelihood of similar occurrences in the future.”¹¹⁰

B. Analysis Proving Ex Ante Compliance with IHL

Ryan J. Vogel, Foreign Affairs Specialist in the Office of the Secretary of Defense, operationalized the principles of necessity, distinction, and proportionality to evaluate the legality of drone strikes by examining several different scenarios in which drones are used and identifying common factors between them that determine whether they comply with IHL.¹¹¹ Vogel proposed a list of “weightier issues” material to each strike’s compliance with IHL to serve as “guidelines” for drone use, thereby addressing the most contentious and frequently discussed issues surrounding drone use.¹¹² Vogel identifies seven “recurrent issues” that determine drone strikes’ compliance with IHL: (1) consent of the government where the strike occurs, (2) rank or importance of the target, (3) foreseeability of civilian losses, (4) humanitarian objective, (5) location of the strike, (6) location of the drone operator, and (7) status of the operator.¹¹³ The Vogel framework for analysis indicates how, ex ante, the Logar Strike adhered to IHL.

107. Vogt, *supra* note 104.

108. *ISAF Commander Expresses Condolences*, AFG. INT’L SEC. ASSISTANCE FORCE (June 8, 2012), http://www.isaf.nato.int/index2.php?option=com_content&task=view&id=12859&pop=1&page=0&Itemid=83&lang= [hereinafter *ISAF Final Statement*].

109. *Id.*

110. *Id.*

111. Vogel, *supra* note 51, at 104–06.

112. *Id.*

113. *Id.* at 106.

1. Consent of the Government

Vogel asserts that “[c]ommanders and operators *should* receive prior consent (even if blanket approval) from the state in whose territory the strike will occur”¹¹⁴ Since December 22, 2001, when Hamid Karzai was sworn in as president of Afghanistan, he has been endowed with the capacity to consent, and has consented, to the United States’ military intervention in a noninternational conflict against the Taliban within the borders of Afghanistan.¹¹⁵ This level of consent to intervention in Afghanistan is all that is required in the context of a noninternational conflict to permit the use of drones in accordance with IHL.¹¹⁶

Therefore, this factor weighs in favor of the Logar Strike’s ex ante compliance with IHL.

2. Rank or Importance of the Target

Vogel explains that “whether the target was of sufficient value and whether the strike offered a real military advantage” weighs in favor of compliance with the proportionality principle.¹¹⁷ The Taliban commander that coalition forces set out to detain was known through intelligence to “command[] multiple insurgents and acquire[] weapons for use in insurgent attacks against Afghan and coalition troops.”¹¹⁸ This target’s active facilitation of terrorism in the village merited his removal from the village. There is no information regarding the target’s rank, but no further information is needed for this factor to weigh in favor of the Strike’s ex ante legality, because the initial objective of the operation was to remove the target by way of detention, not death.¹¹⁹

Therefore, this factor weighs strongly in favor of the Strike’s ex ante legality.

114. *Id.* at 138.

115. *See, e.g.*, ERIC BLEHM, THE ONLY THING WORTH DYING FOR (2010); Tim Lister, *Drones: A Sign of the Times*, CNN SECURITY CLEARANCE BLOG (Dec. 4, 2012, 8:24 AM), http://security.blogs.cnn.com/2012/12/04/drones-a-sign-of-the-times/?hpt=hp_t3 (“U.S. drones operate over Yemen and Afghanistan with the host government’s agreement.”).

116. *See, e.g.*, Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT’L L. 189, 210 (1985).

117. Vogel, *supra* note 51, at 127.

118. *ISAF Initial Statement*, *supra* note 3.

119. *See* Masters, *supra* note 34.

3. Foreseeability of Civilian Losses

According to Vogel, “[c]ommanders and operators *must* not authorize a drone strike when they know or reasonably should know that the strike will cause excessive collateral effects to civilians or civilian property.”¹²⁰ There is no evidence to suggest that coalition troops could reasonably have foreseen civilian casualties resulting from the Strike: According to one report, “[o]nly later did [troops] discover that in addition to insurgents,” they had killed civilians who allegedly “had gathered there for a wedding party.”¹²¹

One might argue that coalition forces should have reasonably foreseen civilian losses because they requested the strike on a civilian house. The troops’ verbal warnings to occupants as they approached the house on foot, however, were met with small arms fire and grenades from within.¹²² The troops therefore reasonably believed the structure was not a civilian home, but a military location containing enemy combatants.¹²³

Vogel further suggests that when evaluating the foreseeability of civilian losses, consideration should be given to whether the enemy “intentionally fails to distinguish” itself.¹²⁴ Thus, this factor must be evaluated in the context of the modern battlefield, which has been transformed by features of modern terrorism, including combatants’ failure to wear uniforms or otherwise distinguish themselves from civilians, and combatants’ willingness to hide themselves among civilians.¹²⁵ In the context of the modern battlefield, enemy combatants are identified not by clear “membership in an opposing army,” but rather by the “specific acts” they perpetrate.¹²⁶ This clearly impedes coalition forces’ ability to conclusively determine, before any operation, whether a structure is filled with civilians, combatants, or a combination thereof. Therefore, combatants’ failure to distinguish themselves “should factor into the analysis of [drone] targeting decisions and the inevitable post-strike discussion on the strike’s legality.”¹²⁷ Especially considering the unique challenges faced combating modern terrorism, it was reasonable that coalition

120. Vogel, *supra* note 51, at 138.

121. Heidi Vogt & Rahim Faiez, *Afghanistan War: Karzai Slams U.S. for Failing to Consult on Airstrike*, HUFFINGTON POST (June 9, 2012, 2:03 PM), http://www.huffingtonpost.com/2012/06/09/afghanistan-war-us-airstrike_n_1583398.html?view=print&comm_ref=false.

122. *ISAF Initial Statement*, *supra* note 3.

123. *See id.*

124. Vogel, *supra* note 51, at 106.

125. Isaacharoff & Pildes, *supra* note 55, at 2; Chris Jenks, *Law From Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649, 669 (2009).

126. Isaacharoff & Pildes, *supra* note 55, at 4–5.

127. Jenks, *supra* note 125, at 669.

forces in Logar judged a structure from which small weapons and grenade fire was emitting to be a military compound, rather than a civilian house.

Therefore, this factor weighs in favor of the Strike's ex ante legality.

4. Humanitarian Objective

A strike's objective is considered "humanitarian" when forces seek the "less harmful option if [the] target might . . . be captured."¹²⁸ This is precisely what coalition forces set out to do in Logar, by first sending troops in on foot with the objective of capturing and detaining their target, and only after having come under fire, requesting a precision airstrike on a structure reasonably believed to be a military compound.¹²⁹ There is no evidence suggesting an alternative means of support was possible under the circumstances.

Therefore, this factor weighs in favor of the Strike's ex ante legality.

5. Location of the Strike

According to Vogel, a strike's location is the key point of analysis for strikes within a theatre of combat.¹³⁰ Vogel firmly asserts that "[w]hen a drone strike occurs within a recognized and accepted theater of active armed conflict, such as Afghanistan . . . there is virtually no question that the attack is covered by the *lex specialis* of the law of armed conflict by virtue of geography."¹³¹

Therefore, this factor weighs heavily—if not decisively—in favor of the Logar Strike's ex ante legality.

6. Location of the Operator

The drone operators at issue in Logar were almost certainly located in Afghanistan.¹³² Regardless, Vogel addresses this factor only in order to

128. See Vogel, *supra* note 51, at 106.

129. ISAF Initial Statement, *supra* note 3; CBS 6/6, *supra* note 11.

130. See Vogel, *supra* note 51, at 130.

131. *Id.*

132. Micah Zenko & Emma Welch, *Where the Drones Are: Mapping the Launch Pads for Obama's Secret Wars*, FOREIGN POLICY (May 29, 2012), http://www.foreignpolicy.com/articles/2012/05/29/where_the_drones_are.

properly dismiss it, asserting that the location of the operator is a nonissue for compliance with IHL.¹³³ Vogel writes:

[T]he law of armed conflict does not present any additional limitations or prohibitions in this respect. There is no difference under the law of war if a ship at sea fires a rocket at a military objective hundreds or thousands of miles away ashore . . . or if a domestic missile installation fires an intercontinental ballistic missile at a lawful target half way across the globe.¹³⁴

Therefore, this factor weighs in favor of the Logar Strike's ex ante legality, to the extent it weighs at all.

7. Status of the Operator

Vogel argues that the operator of a drone must be a combatant in order to comply with IHL. Only lawful combatants operate in Afghanistan.¹³⁵ Therefore, this factor weighs in favor of the Logar Strike's ex ante legality.

Considering the totality of the factors, the Logar Strike was conclusively legal from the point of its ex ante authorization through its execution, despite resulting in a tragic number of civilian deaths. The Strike conferred a definite military advantage on coalition forces, as air support was necessary to ensure the troops' safety. Before and during the Strike, coalition forces distinguished between civilians and combatants to the extent possible under the circumstances. They surrounded the house based on intelligence that Taliban insurgents were within, and concluded its occupants were combatants based on their engagement with small weapons fire and grenades. Finally, collateral damage was limited to the greatest extent possible before and during the Strike, as coalition forces issued verbal requests for surrender before using force, and resorted to force only in self-defense. Therefore, the Logar Strike, ex ante, complied with all three fundamental principles of IHL: necessity, distinction, and proportionality.

IV. EX POST ANALYSIS OF THE LOGAR STRIKE AND RECOMMENDATIONS

An analysis of ISAF's ex post assessment and communication of collateral damage sheds a different light on the Logar Strike's consistency

133. *Id.* at 133–34.

134. *Id.* at 133.

135. *See id.* at 135–36.

with IHL. Scholars have come to agree that drones provide the United States' military and policymakers with the tools necessary to comply with IHL. Whether or not the U.S. drone program in Afghanistan complies with IHL, however, depends on how the technology is used. ISAF failed to utilize the unique capabilities of drones to comply *ex post* with IHL following the Logar Strike. Consequently, ISAF compromised the legitimacy of the U.S. drone program in Afghanistan, engendering so much anti-American sentiment that the Strike ultimately thwarted, rather than advanced, the cornerstone objective of counterinsurgency: winning the hearts and minds of the Afghan people.

A. Problematic Conduct

Drones can be equipped with advanced cameras capable of monitoring targets for twenty-four hours before preplanned attacks, and likewise capable of lingering after a strike to assess collateral damage.¹³⁶ One type of drone used by the U.S. military, for instance, is the RQ-1.¹³⁷ The RQ-1 “uses some of the most sophisticated monitoring equipment available today,” including a “[f]ull-color nose camera that the pilot uses primarily to navigate the craft[;] [v]ariable aperture camera (similar to a traditional TV camera) that functions as the Predator's main set of ‘eyes’[;] [v]ariable aperture infrared camera for low-light and night viewing[; and] [s]ynthetic aperture radar (SAR) for seeing through haze, clouds or smoke.”¹³⁸ Thus, “[e]very camera in the plane’s forward bank can produce full-motion video and still-frame radar images. The RQ-1 can give real-time imagery of the enemy position to a command post.”¹³⁹ Additionally, drones have the capability to hover in the air, while carrying a full payload, for twenty-four hours.¹⁴⁰ With this level of monitoring technology available, capable of seeing (and tracking) combatants during the day, night, and even through clouds of smoke, there is no excuse for a drone not to loiter for a reasonable time following a strike to collect accurate information regarding collateral damage.

Had the drone used in Logar been properly equipped and hovered for even just a few hours longer than it did in order to collect collateral damage

136. McNeal, *supra* note 70, at 338.

137. Robert Valdes, *How the Predator UAV Works*, HOW STUFF WORKS, <http://science.howstuffworks.com/predator.htm>.

138. *Id.*

139. *Id.*

140. *Id.*

data, ISAF's initial statement would have been better informed. It would have been clear—just several hours following the Strike, when the first onsite reports began to surface depicting twelve dead women and children—that at least some civilian casualties had been sustained. It is no secret that the United States possesses this advanced monitoring capability, so when ISAF's initial statement mentioned no civilian casualties, one could reasonably assume, and many did, that the report was intentionally falsified.

A second and related misstep by ISAF following the Logar Strike was the issuance of an initial press release before conducting a full assessment of collateral damage. ISAF's initial statement was issued the morning of the Strike.¹⁴¹ ISAF should have prioritized accuracy, rather than expediency, and withheld an initial statement until it could quantify, or at least acknowledge the possibility of, civilian casualties.¹⁴²

Finally, ISAF never publicly confirmed the number of civilians killed in the Logar Strike.¹⁴³ This is likely because, under the Obama administration's definition of combatant for ex post assessment of collateral damage, all men killed in the strike were presumed to be combatants. The United States presently defines "combatant" as all military-aged males in a strike zone.¹⁴⁴ It is impossible to determine whether ISAF ever sought or reviewed evidence absolving the deceased males of combatant status, but judging by the timing of ISAF's third and final press release on the matter (issued just two days following the Strike¹⁴⁵), it is unlikely that a sufficient effort to determine the males' statuses beyond this presumption was made. If made, it was certainly not communicated to the public. Absent an accurate determination of the

141. *ISAF Initial Statement*, *supra* note 3.

142. It is admittedly important to respond to perceived missteps by U.S. troops and ISAF quickly, even if doing so means responding with incomplete information. According to the U.S. Army/Marine Corps Counterinsurgency Field Manual, troops are to "[h]ighlight successes of . . . counterinsurgents promptly . . . [and] not delay announcements while waiting for all results. Initiate communications immediately to let people know what counterinsurgents are doing and why." THE U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL 162 tbl.5-1 (2007). While it is important and even essential that ISAF publish information regarding the purpose and outcome of violent incidents such as the Logar Strike before the Taliban does, a balance between accuracy and expediency must be struck. Ultimately, in the case of the Logar Strike, ISAF would have better affected damage control had it immediately issued an explanation for the Strike on a civilian house, and a statement that while it was unaware of civilian deaths, it was diligently investigating the situation. Furthermore, ISAF should eventually have released a final number of civilians and combatants killed.

143. See *ISAF Final Statement*, *supra* note 108.

144. Becker & Shane, *supra* note 18.

145. *ISAF Final Statement*, *supra* note 108.

statuses of the deceased, it is impossible for either ISAF or the global community to assess whether proportionality was achieved in the Logar Strike. Proportionality evidence is essential to judge whether the Strike was ultimately legal, and to ensure future drone strike authorizations achieve proportionality.¹⁴⁶ Furthermore, failing to publicly acknowledge the status of each person killed gives the impression that the United States does not care whether the dead were civilians or combatants, which in turn fosters doubt as to whether the United States makes ex ante efforts to distinguish between civilians and combatants before strikes.

B. Recommendations for Compliant Conduct

ISAF must amend its ex post conduct following strikes if the United States is to accomplish COIN, establish customary international law that binds future warring states to use drone technology as humanely as possible, and protect its troops from violent and unnecessary backlash.

The initial recommendations for compliant conduct are obvious: First, ISAF must equip every attack drone with the means to assess collateral damage following a strike. Second, ISAF should require drones to remain in a strike zone following an operation for long enough to collect accurate collateral damage data. Third, ISAF should never issue a press release purportedly disclosing collateral damage, or lack thereof, until all data has been aggregated, and if possible confirmed by onsite witnesses. Fourth, in the event that ISAF is mistaken in a report on collateral damage caused by a strike, in addition to offering compensation and condolences to those civilians harmed and their families, ISAF must publicly and accurately disclose the number of civilians and combatants killed. Importantly, accuracy depends on a definition of combatant that complies with international law.

C. Recommendation for a Compliant Definition of Combatant

All of the above recommendations are insufficient to ensure the legality of the United States' drone program in Afghanistan absent a definition of combatant for the ex post assessment of collateral damage that is consistent with international law, including a presumption of civilian status and a liberal interpretation of IHL's unlawful combatant definition.

146. Protocol Additional, *supra* note 19, art. 51(5).

1. Presumption of Civilian Status

The Obama administration's definition of combatant for ex post assessment of civilian casualties creates a rebuttable presumption that a deceased adult male was a combatant. IHL, however, requires a presumption that any given individual is a civilian. Article 50(1) of the Protocol Additional,¹⁴⁷ in which "civilian" is defined, captures this requirement, reading: "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."¹⁴⁸ If there was any doubt as to what Article 50(1) requires, the ICRC reemphasized in 2009 that an individual's status "remains subject to all feasible precautions and to the presumption of protection in case of doubt."¹⁴⁹ Additionally, the Israeli High Court of Justice held in 2005 that "the burden of proof on the attacking army [to prove that an individual is a combatant] is heavy."¹⁵⁰ Therefore, customary international law creates a presumption of civilian status absent evidence to the contrary—for every person—under IHL.¹⁵¹

2. Unlawful Combatants

The foremost difficulty in implementing this presumption of protected status on the modern battlefield is that modern warfare is characterized by the participation of "unlawful combatants," whose status is determined by their actions rather than their readily identifiable membership in a hostile organization.¹⁵² Unlawful combatants by definition fail to identify themselves as combatants by wearing uniforms or separating themselves from civilians.¹⁵³ Although their participation in combat violates IHL, unlawful combatants are nevertheless protected by an extension of the presumption of civilian status, under Article 51(3) of the Protocol Additional, which states

147. *Id.* art. 50(1).

148. *Id.*

149. INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 35 (2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

150. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. P.D. (2006), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

151. Several different types of documents can evidence custom, including treaties, decisions by national courts, and decisions by preeminent international organizations like the ICRC. JEFFREY L. DUNOFF, ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS 77–78 (3d ed. 2010).

152. *See, e.g.*, Issacharoff & Pildes, *supra* note 55, at 20.

153. *Id.*

“[c]ivilians shall enjoy . . . protection . . . unless and *for such time as they take a direct part in hostilities*.”¹⁵⁴ This increases the difficulty faced by coalition troops in complying with IHL, particularly in distinguishing between civilians and combatants. Nevertheless, the Taliban’s failure to uphold its “reciprocal responsibility” of abiding by IHL does not excuse the United States from its own obligation to abide by IHL, and to continue to distinguish to the greatest extent possible between civilians and combatants,¹⁵⁵ both before and after drone strikes.

This increased difficulty has caused handwringing in states currently engaged in war against unlawful combatants, such as Israel, over how to define “for such time as they take a direct part in hostilities” in a way that complies with IHL, while affording adequate protection to its civilians and lawful combatants. Defining “for such time as they take a direct part in hostilities” is key, because this is the time during which unlawful combatants, otherwise protected under IHL, may lawfully be interpreted and targeted as combatants. In the context of the modern battlefield, “unlawful combatant” must be interpreted in order to fashion a definition of combatant that comports with IHL.

The Israeli High Court of Justice interpreted “for such time as they take a direct part in hostilities” seven years ago, as Israel was involved in a perpetual state of armed conflict against terrorists (operating as unlawful combatants) since 2000.¹⁵⁶ Operating on a presumption of civilian status for individuals in cases of doubt, the Court settled on a liberal definition of “direct participation in hostilities.”¹⁵⁷ The Court, citing the work of Michael N. Schmitt, Director and Professor in the International Law Department at the U.S. Naval War College,¹⁵⁸ wrote:

In our opinion, the “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. Their contribution is direct (and active).¹⁵⁹

154. Protocol Additional, *supra* note 19, art 51(3) (emphasis added).

155. Jenks, *supra* note 125, at 669.

156. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. PD (2006), *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

157. *Id.*

158. See Faculty Profile of Michael N. Schmitt, U.S. NAVAL WAR COLLEGE, <http://www.usnwc.edu/MichaelSchmitt> (last visited October 12, 2014).

159. *Id.* (citation omitted); Michael N. Schmitt, “Direct Participation in Hostilities” and 21st Century Armed Conflict, in CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FÜR DIETER FLECK 529 (Horst Fischerr et al. eds., 2004).

A liberal definition of “direct participation in hostilities” allows for a presumption of civilian status for all individuals in accordance with IHL, but broadens the universe of acceptable evidence with which to rebut this presumption and prove an individual is a combatant, for the dual purposes of targeting him in an operation, and counting him as a combatant casualty following an operation. This affords lawful combatants the greatest amount of flexibility possible under IHL for determining whether to engage a potentially dangerous individual in combat, and consequently provides the greatest amount of protection possible to lawful combatants against the hazards of unlawful combatants.

In addition to affording greater protection to lawful combatants, Schmitt argues that liberally interpreting “for such time as they take a direct part in hostilities” also increases civilian protection, and thus “best preserves the underlying values resident in humanitarian law.”¹⁶⁰ Schmitt proposes the following interpretation of “for such time as they take a direct part in hostilities”: “Once an individual has opted into the hostilities, he or she remains a valid military objective until unambiguously opting out. This may occur through extended non-participation or an affirmative act of withdrawal.”¹⁶¹

Schmitt argues that this interpretation will increase civilian protection, because if civilians are permitted to opt in and out of combat without consequences, the lawful combatants they victimize will lose respect for the laws of war and thus expose the civilian population as a whole to greater danger. Furthermore, the unrestrained tactical advantage of unlawful combatants will incentivize armies to employ more civilians in combat.¹⁶² Unlawful combatants, he argues, should be forced to assume the risk, having participated unlawfully in hostilities, of opposing forces not realizing their withdrawal from combat.¹⁶³ For all of these reasons, Schmitt concludes that when attempting to decide whether or not an individual is participating directly in hostilities:

[G]ray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities.¹⁶⁴

160. Schmitt, *supra* note 159, at 529.

161. *Id.* at 510.

162. *Id.*

163. *Id.*

164. *Id.* at 509.

The Israeli High Court of Justice has adopted Schmitt's suggestion for interpretation of "unlawful combatant," and the United States should follow suit. Doing so will best protect civilians and lawful combatants alike, and engender greater respect for IHL.

3. Proposed Definition of Combatant

Ex post evaluation of civilian casualties must operate on a presumption of civilian status, as clearly proscribed by customary international law. In other words, a casualty following a drone strike must count as a civilian death absent evidence suggesting the deceased was either a lawful combatant, or a civilian who forfeited his protected status by "direct participation in hostilities." "Direct participation in hostilities," however, should be interpreted liberally, in order to: (1) adequately protect the United States' lawful combatants, and (2) enhance civilian protection, thereby complying in good faith with the purposes of IHL. "Direct participation in hostilities" should be defined as Schmitt suggests: "Once an individual has opted into the hostilities, he or she remains a valid military objective until unambiguously opting out. This may occur through extended non-participation, or an affirmative act of withdrawal."¹⁶⁵ This definition will broaden the universe of acceptable evidence with which to rebut a presumption of innocence.

A presumption of innocence, coupled with a liberal interpretation of "direct participation in hostilities," achieves the highest level of fidelity to international law and engenders the greatest respect for IHL. A new definition that reflects these principles should therefore replace the Obama administration's current definition of combatant as "any military-aged male in a strike zone." A proposed new definition is as follows:

Combatant: Any person for whom there is affirmative evidence suggesting that he or she is either a lawful combatant, or has opted into hostilities without unambiguously opting out.

As Schmitt writes: "One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants."¹⁶⁶ This proposed definition of combatant would enable the United States and its troops, in most cases, to get the distinction right. Those individuals who threaten the United States' lawful combatants should and will be vulnerable to attack, and

165. *Id.* at 510.

166. *Id.* at 509.

those who do not will be safe from either being targeted, or counted among deceased combatants unjustifiably.

CONCLUSION

Henry Dunant, father of the Red Cross, published *Un Souvenir de Solferino* over a century and a half ago in 1862, though his words are timeless: “[I]n an age when we hear so much of progress and civilization, is it not a matter of urgency, since unhappily we cannot always avoid wars, to press forward in a human and truly civilized spirit the attempt to prevent, or at least to alleviate, the horrors of war?”¹⁶⁷ Dunant captured the horror of one of the bloodiest battles of the nineteenth century in a work widely recognized as the origin of IHL.¹⁶⁸ *Un Souvenir de Solferino* inspired the first Geneva Convention,¹⁶⁹ which was signed by twelve nations, including the United States, two years later.¹⁷⁰ As Dunant observes:

Since new and terrible methods of destruction are invented daily . . .
And since finally the state of mind in Europe combines with many other
symptoms to indicate the prospect of future wars, the avoidance of
which, sooner or later, seems hardly possible . . . why could not
advantage be taken of a time of relative calm and quiet to investigate and
try to solve a question of such immense and worldwide importance, both
from the humane and Christian stand-point?¹⁷¹

As the most powerful player in the international system, the United States has a serious responsibility to fortify IHL by contributing to the

167. HENRY DUNANT, A MEMORY OF SOLFERINO 2, 30 (1862), available at <http://www.salvamento.org/wp-content/uploads/2011/06/Henri-Dunantmemoryofsolferino.pdf>.

168. *The History of International Humanitarian Law*, INFORMATION PLATFORM HUMAN-RIGHTS, <http://www.humanrights.ch/en/Standards/International-Humanitarian-Law/History/index.html>.

169. *Id.* Modern IHL was formed in response to the mass atrocities of World War II, based on the notion that the barbarism of war should have humanitarian limits, and codified in the Geneva and Hague Conventions. See, e.g., Joan Policastrì & Sergio D. Stone, *International Humanitarian Law*, AMERICAN SOCIETY OF INTERNATIONAL LAW, http://www.asil.org/sites/default/files/ERG_International%20Humanitarian%20Law%20%28test%29.pdf (last visited March 22, 2014); *International Humanitarian Law*, AMERICAN RED CROSS, <http://www.redcross.org/what-we-do/international-services/educating-future-humanitarians/international-humanitarian-law> (last visited March 22, 2014). The United States was instrumental in IHL's formation. Forsythe, *supra* note 29, at 26 (“The United States . . . ratified the various Hague and Geneva conventions It played a leading role in the negotiation of the 1949 treaties, with those four interlocking instruments constituting the main legal firewall against barbarism in war after that time, designed to ensure that belligerents did not become barbarians.”).

170. *The History of International Humanitarian Law*, *supra* note 168.

171. DUNANT, *supra* note 167, at 27.

formation of custom that binds all states to use new weapons technologies mindful of humanitarian principles. Furthermore, the United States is obligated to engender trust and goodwill toward the men and women of its armed forces—to whom it is indebted for its relative position of influence—rather than distrust, which directly compromises both their mission of counterinsurgency and their safety. The United States has thus far failed to set satisfactory standards for ex post assessment of collateral damage following drone strikes. The United States must amend, rather than codify, its current policies for ex post conduct following drone strikes. Most importantly, it must amend its definition of combatant, and thereby comply in good faith with international law.