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DRONES AND TRANSNATIONAL ARMED CONFLICTS

*Michael W. Lewis**

Drones are certainly one of the most discussed features of the ongoing conflict between the United States and al Qaeda, and in many ways they are one of the most misunderstood. To some they represent a step towards a dystopian future in which Terminator-like machines relentlessly hunt down human beings.¹ Others have criticized drones for causing civilian casualties,² for violating the sovereignty of nations not directly involved in the conflict,³ for increasing the support for al Qaeda amongst the civilian population,⁴ and for bringing a “video-game” mentality to warfare.⁵ Drone strikes are viewed

* Professor of Law at Ohio Northern University Pettit College of Law. I would like to thank the members of the St. John’s Journal of International and Comparative Law for creating an excellent Symposium to discuss the legality and policy considerations underlying the use of armed drones. I would also like to thank the participants at the symposium for their comments and suggestions concerning this essay. In discussing the capabilities, limitations and near term uses of drones I draw upon my experience flying F-14’s for the U.S. Navy during the 1991 Persian Gulf War.

¹ See Peter Finn, *A Future for Drones: Automated Killing*, WASHINGTON POST (Sep. 10, 2011), http://www.washingtonpost.com/national/national-security/a-future-for-drones-automated-killing/2011/09/15/gIQAVy9mgK_story.html?wpisrc=emailtoafriend; see also David Luban, *What Would Augustine Do? The President, Drones and Just War Theory*, BOSTON REVIEW (June 6, 2012), http://www.bostonreview.net/BR37.3/david_luban_obama_drones_just_war_theory.php.

² See *US Drone Strikes ‘Raise Questions’ – UN’s Navi Pillay*, BBC NEWS ASIA (June 8, 2012), <http://www.bbc.co.uk/news/world-asia-18363003>.

³ *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov’t Reform*, 111th Cong. (Apr. 28, 2010) (statement of Mary Ellen O’Connell, Professor, University of Notre Dame)[hereinafter O’Connell testimony]; see also LA Times Editorial Board, *A Closer Look at Drones*, LA TIMES (Sep. 25, 2011), <http://articles.latimes.com/2011/sep/25/opinion/la-ed-drones-20110925>.

⁴ See Sudarsan Raghavan, *In Yemen, US Airstrikes Breed Anger, and Sympathy for al Qaeda*, WASHINGTON POST (May 29, 2011), http://www.washingtonpost.com/world/middle_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmKI0U_story.html.

⁵ See Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶84, UN Doc. HRC/14/24/Add. 6, (May 28, 2010),

negatively by the general populations of most nations surveyed in a recent poll by Pew Research,⁶ and some jurists have gone so far as to suggest that their use should be banned entirely, comparing them to cluster munitions and landmines.⁷ Yet in spite of all these supposed faults drones have been used with increasing frequency in the conflict with al Qaeda as well as in other low-intensity conflicts in Libya and Somalia.⁸ Most of these critics attribute this use to the political advantage associated with a “no risk” war fought by invulnerable drone operators who sit thousands of miles from the battlefield.⁹ This invulnerability creates a sense that such a conflict in which one side does not risk its soldiers is “unfair,” contributing to the widespread negative perception of drones. Given all of these negatives, why is drone use becoming more, rather than less prevalent?

Why Are Drones Used?

Ironically the extensive use of drones has a great deal to do with a different form of perceived “unfairness”, that posed by asymmetric warfare to many of the world’s militaries during the past few decades. Asymmetric warfare is not new. Conflicts involving two parties between which there is a large disparity in the quantity and/or quality of military manpower

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

⁶ Pew Global Attitudes Project, *Global Opinion of Obama Slips, International Policies Faulted: Drone Strikes Widely Opposed*, PEW RESEARCH CENTER (June 13, 2012), available at <http://www.pewglobal.org/2012/06/13/global-opinion-of-obama-slips-international-policies-faulted/> [hereinafter Pew Survey].

⁷ Murray Wardrop, *Unmanned Drones Could be Banned, Says Senior Judge*, THE TELEGRAPH (July 6, 2009), <http://www.telegraph.co.uk/news/uknews/defence/5755446/Unmanned-drones-could-be-banned-says-senior-judge.html> (quoting Lord Bingham, a retired senior law lord).

⁸ See Michael Georgy, *U.S. Sends Drones to Libya, Battle Rages for Misrata*, REUTERS (Apr. 21, 2011), <http://www.reuters.com/article/2011/04/21/us-libya-idUSTRE7270JP20110421>; see also Alex Spilius, *Britain ‘Flew Drones Over Libya’*, THE TELEGRAPH (Jul. 26, 2012).

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9430380/Britain-flew-drones-over-Libya.html> (indicating that the RAF used American-made Predator drones over Libya).

⁹ See Notes 1–7 *supra*.

and equipment have existed for centuries or even millennia. In most cases the weaker irregular forces were either resisting an army of occupation (e.g. the partisans that fought the Germans in Yugoslavia during World War II or the Arab uprising against the Turks lead by the British officer T.E. Lawrence during World War I) or were internal insurgencies against the government (e.g. the Vietcong in South Vietnam, the Tamil Tigers in Sri Lanka or the FARC in Colombia). During the past half century these asymmetric wars have resulted in one of four outcomes; 1) military victory for the irregular forces after the collapse of the government or the withdraw of government troops from the contested region;¹⁰ 2) military defeat for the irregular forces;¹¹ 3) political accommodation between the two sides;¹² or 4) continuing conflict.¹³

The nature of transnational armed conflict, that is a conflict between a state and an external non-state actor such as the US versus al-Qaeda, makes many of these outcomes virtually impossible.¹⁴ Unless it redefines its goals, al Qaeda cannot achieve a military victory because its current goals go beyond merely expelling US forces from Iraq, Afghanistan or Yemen and it has no way of threatening to topple the US government. Similarly without changes in al Qaeda's goals, political accommodation is seemingly impossible because any form of agreement between local al Qaeda organizations and their "host" state will not end the conflict with the US. On the other hand, the nature of al Qaeda and the larger context of the

¹⁰ E.g. The Vietcong and North Vietnam were victorious when the South Vietnamese government fell; Mao's Communist Chinese rebellion succeeded when it pushed Chiang Kai-Shek's government off the mainland to Taiwan; the Chechens were victorious in the First Chechen War when Russia withdrew its troops from the region.

¹¹ E.g. The Tamil Tigers were crushed by the Sri Lankan military in 2009; Russia reasserted its military control over Chechnya after the Second Chechen War.

¹² The IRA agreed to decommission its military arm and peacefully participate in the political process.

¹³ The continuing conflict between the Colombian government and the FARC has gone on for over 45 years.

¹⁴ See Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 *ISR. L. REV.* 46, 50 (2009) (setting out the need for the law of armed conflict to evolve to address the "emerging category" of "transnational armed conflict").

conflict between Islamic states and Israel means that any US military victory depends heavily on the ability to disrupt and destroy the capabilities of al Qaeda and its offshoots without alienating the broader populations of nations where al Qaeda is found.

Although asymmetric warfare is not new, the role that law has played in asymmetric conflicts of the past thirty years is. Human rights organizations and the UN now routinely address the legality of actions undertaken by parties to such conflicts. These legal assessments can be as informal as a single press release¹⁵ or as formal as the reports of United Nations official fact-finding missions from conflicts like the ones in Gaza and Sri Lanka.¹⁶ In addition two publications by the International Committee of the Red Cross (ICRC), Customary International Humanitarian Law,¹⁷ and Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law have directly addressed some of the more difficult legal questions associated with asymmetric warfare.¹⁸ As a result, the conduct of all armed

¹⁵ See e.g. Clive Baldwin, *Syria is Bound by the Laws of War*, HUMAN RIGHTS WATCH (Aug. 9, 2012), <http://www.hrw.org/news/2012/08/09/syria-bound-laws-war>; see also Stephanie Nebehay, *Red Cross Ruling Raises Question of Syrian War Crimes*, REUTERS (July 14, 2012), <http://www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86D09H20120714>.

¹⁶ See e.g. Rep. of the Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, Sep. 25, 2009, U.N. Doc. A/HRC/12/48; GAOR 12th Sess., <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> [hereinafter Goldstone Report]; see also Rep. of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, March 31, 2001, http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf [hereinafter Sri Lanka Report].

¹⁷ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES 355 (Jean-Marie Henckaerts and Louise Doswald-Beck, eds. 2005) [hereinafter Customary IHL].

¹⁸ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991, 997 (2009), <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf>, [hereinafter Interpretive Guidance] (while neither the Interpretive Guidance nor Customary International Humanitarian Law have the force of law because they cannot become customary international law without *opinio juris* to support them, they both strive to provide definitive answers to the questions of who may be targeted and when.

conflicts, including asymmetric ones, is subjected to a great deal more legal scrutiny than it was thirty years ago, particularly with regard to limiting or avoiding civilian casualties. The way that these legal assessments deal with the thorniest questions raised by asymmetric warfare has been a factor in the increasing reliance on armed drones.

Both sides in an asymmetric armed conflict have legal responsibilities for avoiding harm to civilians.¹⁹ On the one hand, irregular armed groups are required to distinguish themselves from the civilian population²⁰ and are prohibited from using the civilian population to shield them from attack.²¹ On the other hand, state militaries are prohibited from conducting attacks that are expected to cause disproportionate damage to civilians and civilian infrastructure in light of the military advantage gained.²² They are also required to take all feasible precautions to prevent or minimize civilian casualties and to provide warnings to the civilian population of imminent attacks.²³

In practice, however, these have not been interpreted to be reciprocal obligations. Determinations of whether irregular armed groups improperly intermingled themselves with the civilian population have turned not on their proximity to the civilian population when they initiated offensive operations, but rather on whether the armed groups subjectively “intended” for the civilian population to act as a shield.²⁴ Absent evidence that the fighters forced civilians to remain in proximity to the

The Interpretive Guidance also attempts to define the circumstances in which a civilian forfeits their immunity from attack).

¹⁹ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 48, 51-58, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (although Protocol I is technically applicable to only international armed conflicts, many of these provisions concerning the protection of the civilian population are widely viewed as customary law in non-international armed conflicts as well).

²⁰ *Id.* Art. 48.

²¹ *Id.* Art. 51(7).

²² *Id.* Art. 51(5b).

²³ *Id.* Art. 57.

²⁴ See Goldstone Report 123; see also Sri Lanka Report 65.

fighting, no violation was found.²⁵ Although the ICRC is clear that the use of civilians as human shields is illegal,²⁶ its analysis of human shielding situations insists that the “use of civilians as human shields does not release the attacker from his obligations with respect to the civilian population.”²⁷ In other words the use of human shields by irregular armed groups may be illegal, but it is also effective. Any attack on a shielded target would be considered a violation of the laws of war by an attacker if the attacker was aware of the shielding and it produced disproportionate civilian casualties. Likewise any attack that is not preceded an effective warning could also be considered a violation if it resulted in civilian casualties that could have been avoided if a more effective warning had been given.²⁸ While it is unclear whether these interpretations of International Humanitarian Law (IHL, the term used to describe Geneva Convention law) are effective in reducing civilians during an asymmetric armed conflict,²⁹ it is clear that honoring

²⁵ *Id.*

²⁶ See Customary IHL Rule 97; see also Interpretive Guidance 56-58 and Sri Lanka Report 65.

²⁷ Interpretive Guidance 57 fn. 142; see also Sri Lanka Report 65.

²⁸ See Goldstone Report 130-33.

²⁹ The legal concept that an attacker violates IHL if it causes civilian casualties when attacking irregular armed forces that are intermingled with the civilian population has the same intuitive appeal as the tort law doctrine of “last clear chance”. Both are based upon the idea that a party that is capable of avoiding causing harm (be they tortfeasor or attacker) should be legally required to do so. While the “last clear chance doctrine” may have been appropriate for torts (although it has largely been supplanted by comparative fault in most US jurisdictions) its application to IHL is much more problematic because the victims (civilians) and wrongdoers (irregular armed groups) are separate entities whereas in tort law they are one and the same person. Last clear chance allowed a contributorily negligent plaintiff to recover when a tortfeasor had a final chance to avoid causing harm even though the victim contributed to the occurrence which harmed him. Because it is unlikely that the victim benefited from being harmed, allowing for compensation when the tortfeasor could have avoided causing the harm seems appropriate. In IHL irregular armed groups are contributing to the likelihood that civilians will be harmed by conducting operations in close proximity to the civilian population. Because the irregular armed groups stand to benefit from civilian casualties caused by strikes conducted by the state armed forces they oppose, it is less clear that this interpretation of IHL is an effective or appropriate way to reduce civilian casualties. Whether this interpretation of IHL can be viewed as incentivizing (although not directly endorsing) the practice of irregular armed groups conducting operations in close proximity to the civilian population, the appropriateness of this interpretation from either a legal or policy standpoint is beyond the scope of this essay.

these interpretations will alter the behavior of state armed forces.

Because observing these restrictions when fighting an enemy that conducts its operations in close proximity to the civilian population effectively negates much of the firepower advantage enjoyed by state armed forces, regular militaries involved in asymmetric conflicts have reacted to the restrictions in one of two ways. In several instances they have virtually ignored the restrictions entirely employing artillery, rocket launchers and bombers in assaults on irregular forces in densely populated areas resulting in tens of thousands of civilian casualties.³⁰ Alternatively, forces that attempted to comply with these restrictions turned to their technological advantage to find a solution to the problem posed by asymmetric warfare and the laws that govern it.

If human shielding is deemed to be legally effective then attacks had to become more discriminating, intelligence had to be more accurate and the weapons employed had to become much smaller than the ones designed to defeat a more traditional military opponent.³¹ It was in the gathering of real-

³⁰ See Sri Lanka Report *supra* note 6, at 55-60, (the Sri Lankan military used a great deal of heavy artillery in its final offensive against the Tamil Tigers in 2009 and killed tens of thousands of civilians in doing so). See John Sweeney, *Revealed: Russia's Worst War Crime in Chechnya*, THE GUARDIAN (Mar. 5, 2000), <http://www.guardian.co.uk/world/2000/mar/05/russia.chechnya>; see also *Russian Tanks Pounding Grozny from 3 Directions*, NY TIMES (Dec. 18, 1999), <http://www.nytimes.com/1999/12/18/world/russian-tanks-pounding-grozny-from-3-directions.html?n=Top/Reference/Times%20Topics/Subjects/I/Immigration%20and%20Refugees> (the Russian military used tanks, artillery and bombers extensively in their assaults on the Chechen capital of Grozny during both the First (1994-95) and Second (1999-2000) Chechen Wars resulting in tens of thousands of civilian casualties).

³¹ Compare. *MK-82 General Purpose Bomb Specifications*, GLOBAL SECURITY.ORG, <http://www.globalsecurity.org/military/systems/munitions/mk82-specs.htm> (stating that the Mark-82 bomb (the **smallest** of the munitions typically employed by manned aircraft) with a total weight of ~500 lbs and a warhead weight of 192 lbs), with *AGM-114 Hellfire Specifications*, GLOBAL SECURITY.ORG, <http://www.globalsecurity.org/military/systems/munitions/agm-114-specs.htm> (noting that the Hellfire missile that is the most frequently used drone launched munition with a total weight of approximately 100 lbs and a warhead weight of ~35 pounds), and *AGM-114 Hellfire Specifications*, GLOBAL SECURITY.ORG, <http://www.globalsecurity.org/military/systems/munitions/sdb.htm> (stating that the

time intelligence that drones first made an appearance in the conflict with al Qaeda. Their exceptional endurance of between 20 and 30 hours allowed for long loiter times over the target which helped to accurately identify individual targets as well as establishing their patterns of movement.³² With the exception of one strike in late 2002,³³ drones were used almost exclusively in this role through the mid-2000's. Over the four years from the beginning of 2004 to the end of 2007 armed drones only conducted 9 strikes in Pakistan.³⁴

Weapons also got smaller and more precise. The standard laser guided bomb employed in the 1990's and early 2000's was the GBU-24, a 2,000 pound bomb with a 945 pound warhead. In large part out of concern for reducing collateral damage the mid-2000's saw the introduction of a much smaller smart bomb, the GBU-39 weighing only 250 lbs. with a warhead of 50 lbs.³⁵

However, continuing criticisms of civilian casualties caused by conventional airstrikes³⁶ and night raids by Special Forces³⁷ in both Afghanistan and Pakistan continued to put

most common laser guided bomb dropped by manned aircraft is the 2,000 lb Paveway with a 945 lb warhead, although the smaller GBU-39 was introduced in ~2006 with a total weight of 250 lbs with a 50 lb warhead).

³² See *Predator B UAS*, GENERAL ATOMICS AERONAUTICAL SYSTEMS INC., http://www.ga-asi.com/products/aircraft/predator_b.php (last visited Jan. 31, 2012); see also *Predator C Avenger UAS*, GENERAL ATOMICS AERONAUTICAL SYSTEMS INC., http://www.ga-asi.com/products/aircraft/predator_c.php (last visited Jan. 31, 2012).

³³ See *Drone Warfare: Are Strikes by Unmanned Aircraft Ethical?*, CQ RESEARCHER, Aug. 6, 2010 at 663, available at http://www.asil.org/files/CQ_DroneWarfare.pdf.

³⁴ *Id.* at 656.

³⁵ See *Id.*

³⁶ See generally *Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan*, HUMAN RIGHTS WATCH (Sept. 2008), available at http://www.hrw.org/sites/default/files/reports/afghanistan0908web_0.pdf.

³⁷ See *Civil Liberties and National Security: Before the Subcommittee On The Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary House of Representatives*, 111th Cong. 77-78 (2010) (Prepared Testimony of Jeremy Scahill, Correspondent, The Nation); see also Alissa Rubin, *US Transfers Control of Night Raids to Afghanistan*, NY TIMES, Apr. 8, 2012, at A1 (claiming that night raids were also politically unpopular in Afghanistan because they violated the privacy of women and children)..

pressure on the United States to seek alternatives. Armed drones offered the advantage of smaller weapons (Hellfire missiles designed for use on helicopters) that weigh 100 lbs. with a warhead of approximately 35 lbs. and real-time control over firing decisions that special forces and conventional aircraft could not offer. Although drones were also initially criticized for causing civilian casualties³⁸ there was evidence from the beginning that these were often based upon exaggerated reports generated by the Taliban for political purposes.³⁹ As time has gone on more careful studies on the question of civilian casualties from drone strikes have been conducted. These more objective assessments, along with refinements in drone targeting such as targeting vehicles instead of compounds to reduce the likelihood that family members would be harmed, have made it widely accepted that civilian casualties from drone strikes are very low.⁴⁰ So low in fact, that there are serious questions now about whether drones should be *required* to be used in many circumstances.⁴¹

Like the early claims about civilian casualties, the commonly heard criticism that armed drones bring a video game mentality to warfare that makes drone operators less likely to obey the laws of war or to understand the

³⁸ See notes 1–7 *supra*.

³⁹ See Kenneth Anderson, *Am I Arguing a Strawman About Drones and Civilian Casualties?*, VOLOKH CONSPIRACY (Apr. 27, 2011, 9:51 AM), <http://volokh.com/2011/04/27/am-i-arguing-a-strawman-about-drones-and-civilian-casualties> (arguing that the recent acknowledgement by many human rights advocates of the superior target discrimination of drones does not alter the fact that many of the early criticisms of drones were related to excessive civilian casualties; *see also* C. Christine Fair, *Drones Over Pakistan—Menace or Best Viable Option?*, HUFFINGTON POST (Aug. 2, 2010), http://www.huffingtonpost.com/c-christine-fair/drones-over-pakistan---m_b_666721.html (arguing that reports by U.S. and Pakistani media exaggerate civilian casualties caused by drones). *See* Farhat Taj, *Drone Attacks: Challenging Some Fabrications*, DAILY TIMES (Jan. 2, 2010), http://www.dailytimes.com.pk/default.asp?page=2010%5C01%5C02%5Cstory_2-1-2010_pg3_5 (indicating that the U.S. and Pakistani media do not accurately report civilian casualties caused by drone strikes).

⁴⁰ Peter Bergen, *Civilian Casualties Plummet in Drone Strikes*, CNN.COM (July 14, 2012), <http://www.cnn.com/2012/07/13/opinion/bergen-civilian-casualties/index.html>.

⁴¹ Scott Shane, *The Moral Case for Drones*, NY TIMES, July 14, 2012., at SR4.2

consequences of their actions has not stood up to serious examination. The fact that drone operators are at risk for PTSD and that in some cases they display *greater* levels of combat stress than some units in Afghanistan is a strong indication that this theoretical criticism is not a valid concern in reality.⁴²

The one remaining common criticism of armed drone use in transnational armed conflicts is that their use outside of “hot battlefields” infringes upon the sovereignty of the nation in which the strike takes place. The remainder of this essay addresses that concern.

Where May Drones be Used?

The use of armed drones clarifies larger legal issues concerning the boundaries of the battlefield in transnational armed conflicts such as the one between the US and al Qaeda. The reason why drones, rather than the other tools employed in the conflict with al Qaeda, such as special forces, regular army, FBI, or CIA, focus us in this way is because drones are exclusively tools of armed conflict.

Armed drones may only legally be used in an armed conflict (as opposed to law enforcement), and the reason for this is that the dividing line between law enforcement and armed conflict is based upon when and how lethal force can be employed.

Lethal force during a time of armed conflict can be applied against any positively identified enemy. The positively identified enemy can be targeted whether they are dangerous or not, whether they are armed or not, and whether they are awake or not. The only restrictions against targeting a positively

⁴² See Elisabeth Bumiller, *Air Force Drone Operators Report High Levels of Stress*, NY TIMES, Dec. 18, 2011, at A8; see also *Interview with P.W. Singer: The Soldiers Call it War Porn*, SPIEGEL ONLINE (Mar. 12, 2010), <http://www.spiegel.de/international/world/interview-with-defense-expert-p-w-singer-the-soldiers-call-it-war-porn-a-682852.html> (indicating that drone operators suffer from *higher* levels of combat stress and PTSD than do some units in the field).

identified enemy are if they are incapacitated or have surrendered.⁴³

In law enforcement, the *only* time lethal force can be employed is if the target is an imminent threat to law enforcement or others and an opportunity to surrender has been offered. Because drones cannot offer an opportunity to surrender before employing lethal force they may not be used in a law enforcement environment and are may only be employed in times of armed conflict. This means that when there are drone strikes in Yemen or in Pakistan, the legal basis for them being used must be a belief that the laws of armed conflict apply rather than laws governing law enforcement.

The argument that law enforcement rules, rather than the laws of armed conflict should apply outside of “hot battlefields” has been advanced by those who oppose strikes in places like Yemen and Pakistan. These opponents contend that there is no war going on in Yemen, or at least that there was no war going on in Yemen a year and a half ago when the United States first began targeting Anwar Al-Awlaki in that nation.⁴⁴ Likewise they argue that there is no war going on in the FATA areas of Pakistan, and because of that the laws of armed conflict do not apply there, drone strikes are illegal in that area as well.

This geographically minimalist argument that seeks to strictly limit the boundaries of the battlefield in conflicts like the one between the U.S. and al Qaeda, is based on the

⁴³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 2, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁴⁴ Note that al-Awlaki’s name is also transliterated al-Aulaqi, Complaint, Al-Aulaqi v. Obama, 727 F.Supp.2d 1 (D.D.C 2010) (No. 10-01469) (the complaint filed in 2010 contended on 17 separate occasions in 11 pages that the targeting of al-Aulaqi was occurring “outside of armed conflict”); *see also* O’Connell testimony, note 3 *supra* (O’Connell maintains that there is no armed conflict in the border regions of Pakistan either).

description of the boundaries in the battlefield in non-international armed conflicts. There are two kinds of armed conflict, international armed conflicts (IAC's) and non-international conflicts (NIAC's).⁴⁵ International armed conflicts are easy to identify because they involve two countries, for example France versus Germany. However, determining the boundaries of the battlefield in non-international armed conflicts is more difficult because of the nature of the conflict and the fact that one of the participants is a non-state actor. The *Tadic* opinion⁴⁶ from the International Criminal Tribunal for Yugoslavia (ICTY) dealt with that issue, when it determined the geography in which the laws of armed conflict applied within the former Yugoslavia. This opinion demonstrated an understandable hesitancy in applying the laws of armed conflict throughout an entire nation that is undergoing an internal conflict for the entire length of that conflict. Because the laws of armed conflict allow actions whose application should be limited, such as targeting based upon positive identification rather than dangerousness and indefinite detention without charge there is an obvious desire to limit the geography in which such rules apply. Therefore the ICTY sought to curb the geographical and temporal scope of the laws of armed conflict in *Tadic*.

The *Tadic* court applied the law of armed conflict only in the geographic areas where there existed a threshold level of

⁴⁵ See Geneva I and Geneva 3, art. 3 (all four Geneva Conventions contain identical article 3's, often termed "common article 3". Common article 3 describes the application of the Geneva Conventions to the two types of armed conflicts. The difference between these two types of conflicts is more fully described by the 1977 Additional Protocols to the Geneva Conventions. Compare Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (addressing international armed conflicts), with Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (1987) [hereinafter Additional Protocol II] (addressing non-international armed conflicts).

⁴⁶ Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 561–62 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) ("[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.").

violence and a level of cohesion in the actors fighting each other. If this approach was applied to countries such as Yemen where (until recently) there was no armed conflict because the level of violence threshold was not met, then one would conclude that the tools of armed conflict could not be used there.

The sensibilities that underlie this idea are not new and can be traced all the way back to our own civil war, which occurred long before any of these concepts were debated on an international level. In *ex Parte Milligan*,⁴⁷ a Southern sympathizer was captured in Indiana by Union forces. He was tried by a military commission and sentenced to death. He appealed on the grounds that he should have been afforded trial before an article 3 court rather than a military commission and the United States Supreme Court agreed. The Supreme Court reasoned that one may not try a Southern sympathizer before a military commission in Indiana if the civilian courts were open and available at the time. In places where the institutions of civil society were still functioning, even though there was unquestionably a rebellion going on, those institutions of civil society must be used. The result may have been quite different in Tennessee where the Union was acting as an occupying army and as such *it* was temporarily providing the institutions of civil society. But in Indiana, the courts were open and so the laws of armed conflict should not be applied in that area because they need not be applied there.

For internal NIAC's this reasoning that underlay *Milligan* and *Tadic* makes perfect sense. However, applying this reasoning to transnational armed conflicts is far more problematic. The problem with using the *Tadic* factors to define the boundaries of the battlefield in such conflicts is that doing so essentially turns the Geneva Conventions on their head.

⁴⁷ *Ex parte Milligan*, 71 U.S. 2, 4 (1866) (requiring that even during time of rebellion civilian courts be utilized instead of military commissions in geographical areas where the courts were functioning).

In order to understand why this happens, one has to have a basic understanding of the primary purpose of the Geneva Convention and how the Conventions look at the world. Geneva divides the world into two groups, combatants and civilians.⁴⁸ Combatants are not just people that pick up guns, but rather people that belong to an organization that enforces the laws of war. It is through the definition of combatancy that the laws of war encourage people to follow the laws of war. U.S. soldiers are combatants because they go to jail if they violate the laws of armed conflict in Iraq or Afghanistan. Because the United States enforces the laws of war, its soldiers are combatants.

The advantage of being a combatant is that they are entitled to the combatant's privilege, which means that combatants are not legally liable for the harm and destruction they cause as long as they complied with the laws of war. For example, if a combatant blows up a building and hurts the people in the building, he cannot be charged with assault, arson, murder, etc. if the attack was conducted in keeping with the laws of war. The disadvantage of being a combatant is that they are targetable 24/7 because of their status as an identified enemy.

Everyone that is not a combatant is a civilian.⁴⁹ The advantage of being a civilian is that they are never targetable under any circumstances. The disadvantage is that civilians are not allowed to participate in armed conflict and if they do so they forfeit the immunity that

⁴⁸ It should be noted that the ICRC document does not have the force of law and can only become customary international law if its parameters are accepted by a number of states. Because military reaction to the Interpretive Guidance has contended that the definitions offered are too narrow (i.e., that the ICRC considers that fewer people and fewer actions constitute direct participation in hostilities than the military might), the Interpretive Guidance should be viewed as a baseline description of behavior that inarguably constitutes direct participation in hostilities while the actual state of the law remains less clear. See, e.g., W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. INT'L L. & POL. 769 (2010) (criticizing the ICRC's approach to direct participation in hostilities in Part IX of the Interpretive Guidance).

⁴⁹ INTERPRETIVE GUIDANCE at 997.

comes with being a civilian. When a civilian picks up a gun and starts firing, they lose their immunity. They can regain their immunity by putting their gun down and ceasing to participate in hostilities. Some civilians that continue in the revolving door between fighter by night and farmer by day, or actively perform leadership roles are termed continuous combat functionaries and they become targetable 24/7 just as though they were a combatant. This permanent loss of civilian immunity is based upon the function that the civilian performs within an armed group.

In this way IHL provides that if someone is functioning like a combatant, then they may be targeted like a combatant.⁵⁰ However, even if they may be targeted like a combatant they are not entitled to the combatant's privilege, because they are still considered to be civilians directly participating in hostilities. They do not belong to an organization that enforces the laws of war, therefore they cannot be combatants. This is how IHL deals with groups such as al Qaeda. It denies them the combatant's privilege, but it permits the continuous targeting of active members of such groups that perform combatant functions. The only way someone in a group like al Qaeda can regain their civilian immunity is to get away from al Qaeda and definitively disassociate themselves from the group.

The problem with using the *Tadic* factors to determine the geographical scope of a transnational armed conflict is that it gives al Qaeda and other terrorist organizations another way to effectively regain their civilian immunity. By simply crossing the border into Pakistan, or going to Yemen, or to Somalia, or Sudan, places where law enforcement is not effective, and where the threshold of violence required by *Tadic* is not present an al Qaeda member could effectively regain their civilian immunity. This is because the geographical minimalist view that applies the *Tadic* factors would consider the lack of local violence to mean that the laws

⁵⁰ INTERPRETIVE GUIDANCE at 993-96, 1031-33.

of armed conflict would not apply in those areas and the tools of law enforcement would be the exclusive method by which these terrorists could be pursued. The idea that IHL should be interpreted in this manner, resulting in one of IHL's least favored groups (terrorists that target civilians and hide amongst the civilian population) being afforded this kind of sanctuary seems contrary to the core principles of IHL.

The alternative to applying *Tadic* to transnational armed conflicts is to apply the neutrality law principles that have determined the boundaries of the battlefield in IAC's for centuries, and it appears that this is what the US is doing. While the US position is far from definitive about its legal rationale for employing drones, it is possible to cobble together the speeches of various administration officials from the past couple of years (Koh at ASIL a couple of years ago, Brennan at Harvard last September and Holder at Northwestern in April)⁵¹ and get a feel for how the administration views this issue. What they appear to be doing and the norm I believe they are effectively creating is that the boundaries of the battlefield in transnational armed conflicts will be determined by a modified version of centuries-old neutrality law.

The law of neutrality has been used to determine the boundaries of the battlefield and the rights and obligations of nations involved in IAC's for over a century.⁵² During a conflict between state A and state B where some of A's forces take refuge in or use a neutral state as a base of operations that neutral state has an obligation to remove A's forces from its territory. When state B demands that this removal take place, the neutral state has three choices in response. It can become an ally of B and allow B's forces onto its territory to go after A's forces, it can become an enemy of B by preventing B's forces from entering its territory and harboring A's forces, or it can remain neutral by denying B's forces the right to enter while expelling A's forces from its territory.

⁵¹ Speeches on file with law review.

⁵² See Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land arts. 1–5, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague V] (establishing the inviolate nature of neutral territory for belligerents).

The conflict between the U.S. and al Qaeda has displayed all three of these choices in its application of neutrality law principles to a transnational armed conflict. The first example occurred when the United States approached Afghanistan in the aftermath of 9/11 and demanded the expulsion of Osama bin Laden, Mullah Omar and others. Afghanistan acted as an enemy of the U.S. by refusing to discharge its neutral obligations and harboring bin Laden and other al Qaeda members within its borders. As a result, when the U.S. invaded Afghanistan to pursue al Qaeda it also attacked the Taliban because they effectively became the enemy by harboring al Qaeda. The second example is that of Yemen when the U.S. approached it over al Qaeda's presence within its borders. Yemen chose to act as an ally of the United States, and (as WikiLeaks has made clear) granted permission for the U.S. to use armed force on its territory. With this permission the U.S. has conducted numerous drone strikes on Yemeni territory since 2002, including the one that killed Anwar al-Awlaki last September. The third example is when states retain their neutral status by denying the U.S. permission to employ armed force on their territory while discharging their neutral obligations by expelling or arresting al Qaeda members within their borders. Numerous European states have taken this approach by either detaining suspected al Qaeda members themselves or allowing U.S. law enforcement to apprehend al Qaeda members on their territory.

The most widely analyzed event in the conflict with al Qaeda of the past few years (the killing of Osama bin Laden by U.S. Special Forces in Pakistan) also fits within this framework. Pakistan had clearly acted as an ally of the U.S. on a number of occasions by giving the U.S. permission to use force on its territory, either in the form of drone strikes or special forces missions. However, there were also ways that Pakistan had acted as an enemy toward the U.S. by failing to make any effort to detain or expel al Qaeda members from its territory. The fact that bin Laden had lived undisturbed within a few miles of Pakistan's military academy was viewed as evidence that Pakistan was either unable or unwilling to

apprehend or expel bin Laden. The U.S. viewed this failure by Pakistan to discharge its neutral obligations as the basis for using armed force on Pakistani territory without Pakistani permission.

In conclusion, the state practice of the United States in the conflict with al Qaeda appears to rely on the application of neutrality law principles in determining the boundaries of the battlefield. This is borne out by the way in which the U.S. has employed armed drones, which are exclusively tools of armed conflict, in areas outside of “hot battlefields”. When compared with the competing vision of the boundaries of the battlefield offered by the “geographic minimalists” that applies the *Tadic* factors to transnational armed conflicts, it becomes clear that relying upon neutrality law principles for determining the scope of transnational armed conflicts is more in keeping with the core principles of IHL.