

Targeting Operations with Drone Technology: Humanitarian Law Implications

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INTRODUCTION

The U.S. government's dramatically increasing use of drone technology has provoked a maelstrom of questions about the law. None of the controversies dwell on the possibility that drones, as a weapons platform, are inherently unlawful. To the contrary, most observers recognize the potential benefits of drone technology to minimize unintended casualties or damage to property.

While they disagree on important legal issues, critics and proponents alike share at least one significant concern: drones may be the future of warfare, and the U.S. may soon find itself "on the other end of the drone," as other governments and armed non-state groups develop drone technology. Yet discussions of the legal constraints lag behind the rapid advances in technological capability and deployment. Even those who believe that the U.S. government's use of drone technology is carefully calibrated to adhere to applicable law worry that other governments or non-state groups will cite the U.S. government's silence on key legal questions as justification to shirk from transparency about their practice or even openly flout the law.

In this paper, we describe three questions arising from the U.S. government's use of drone technology, focusing on ambiguities in the government's position which scholars have debated: the scope of the armed conflict; who may be targeted; and the legal and policy implications of who conducts the targeting. These questions stem not so much from drone technology itself, but from the kind of warfare for which the U.S. is currently using drones. Scholars and experts have sharply disagreed about the answers to these questions, but it is telling that a core set of issues has emerged as the shared focus for individuals from across the ideological spectrum.

Ambiguity on these core issues exists despite the Administration's efforts to establish the legality of targeting practices—most notably, State Department Legal Adviser Harold Koh's address at the 2010 annual meeting of the American Society of International Law. Some scholars laud Koh's speech as divorcing the Administration from an approach that invokes the privileges of the law of war while dismissing the relevance of its duties and restraints. Observers have recognized that Koh's address reflects the Administration's desire to legitimize its policy through forthrightness about the constraints imposed by law. However, scholars disagree about the functional difference between the paradigm of the "global war against terrorism" and the Administration's articulation, in a variety of fora, of an armed conflict against al Qaeda, the Taliban and associated forces. Some observers have argued that without further explanation, the Administration's position confirms the relevancy of humanitarian law but leaves unanswered questions fundamental to assessing the legality of U.S. practice. We agree that where significant ambiguity exists, it leaves the U.S. government vulnerable to challenges about the sincerity of its commitment to the rule of law. In the near future, ambiguity may also weaken the government's ability to argue for constraints on the practice of less law-abiding states.

Clarity about U.S. legal standards and policy, as we describe in this paper, would not require disclosure of classified information about who is targeted, or intelligence sources and methods. We recognize that rules of engagement are classified and vary based on the theater of combat. Instead, we encourage clarification of the existence or character of legal justifications

and standards, and generic procedural safeguards, about which scholars and experts have debated.

To be sure, not all the scholars and observers whose views we present believe that the government needs to disclose more information about its legal standards and procedures. Some have objected to court scrutiny of the government's standards or justifications. Many observers are concerned that further government clarification would require divulging sensitive information, or at least information that the government has not historically made public. They point to the extent to which the questions we raise involve not just legal standards, but policy determinations. These observers' concerns, and countervailing concerns about the expansive or unbounded scope of the armed conflict referenced by the Administration, require further discussion—one we attempt to set the foundation for, by identifying particular areas of ambiguity and debate.

For some issues, scholars disagree with each others' characterization of the government's position. For other issues, they agree that the government's position is unknown. On still other issues, the question of the government's position is relegated to the background in favor of a highly contested debate among scholars and practitioners about the relevance of the law or the practicability of a legal standard. Yet in each case, disagreement among scholars underscores the need for clarity about the U.S. government's position. U.S. legal standards and policies are a necessary starting point for discussions among scholars, yet they are such a "moving target"—or simply a target in the fog—that discussions can be expected to devolve to speculation. Disagreement among scholars, to some degree, reflects a necessarily myopic understanding of government policy. At least to that extent, the government non-disclosure may undermine the robustness of debate among scholars and practitioners about humanitarian law standards, and effectively halt sound legal analysis of U.S. practice.

Limiting scholarly debate would be detrimental to the development of clear legal standards that aid, rather than undermine, U.S. armed forces charged with conducting targeting operations. Insofar as government non-disclosure prevents public or legal accountability, it also undermines the U.S. government's message to the international community, so evident in Koh's ASIL speech, of commitment to the rule of law.

In this paper, we limit our discussion to perspectives related to humanitarian law. However, many of the questions we raise cannot exclusively be resolved by reference to humanitarian law, nor should they be—other bodies of law place significant limits on targeting operations, including human rights law, domestic law, the U.N. Charter, the law of neutrality and principles of non-intervention. The Administration's statements about targeting operations with drones, including Koh's speech, have also stirred debates on international law on the use of force, or *jus ad bellum*, including theories related to self-defense. Recognizing the importance of these debates, we nonetheless confine our analysis to perspectives about the role of humanitarian law in answering questions related to the conduct of hostilities.

In Part I, we explore the nature and scope of the armed conflict referenced by the Administration in recent statements, describing debates among scholars about the government's possible theories. In Part II, we discuss scholarly debates about who may be targeted, focusing on standards related to the principle of distinction, and identify basic questions about the government's approach. In Part III, we briefly describe reports of targeting conducted by the CIA

and consider implications arising from humanitarian law standards. We conclude by briefly evaluating whether and how drone technology affects calls for government clarity.

PART I. WHAT IS THE NATURE AND SCOPE OF THE ARMED CONFLICT?

Many scholars and experts agree that the Administration’s recent discussions of its targeting operations against al Qaeda, the Taliban, and associated forces are ambiguous regarding the nature and scope of the armed conflict—although they disagree about the extent and significance of that ambiguity. In this section, we describe the government’s statements and the ways they have impacted debate among scholars and experts.

We begin by describing the government’s statements about the scope of targeting operations. Acknowledging the government’s discussions of a “non-international armed conflict,” we describe scholars’ queries of whether: (1) all U.S. targeting practices against al Qaeda, the Taliban, and associated forces are part of the armed conflict in Afghanistan; or (2) whether the threshold criteria of non-international armed conflict are otherwise met—either in a single armed conflict encompassing all practices outside Afghanistan against al Qaeda, the Taliban, and associated forces, or in multiple, distinct armed conflicts in each of the locations in which the U.S. is engaged in targeting practices against al Qaeda, the Taliban, and associated forces. Finally, we identify concerns of some observers that without further clarification, the U.S. appears to posit a “global battlefield,” despite the Administration’s efforts to distance itself from that approach.

A. U.S. Government’s Statements Concerning the Conflict

The Obama administration has indicated that it is engaged in an armed conflict with al Qaeda, the Taliban and associated forces. In March 2010, State Department Legal Advisor Harold Koh, described the conflict in an address at the American Society of International Law (ASIL):

As I have explained, as a matter of international law, the U.S. is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.”¹

He continued: “In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda).”² The National Security Strategy document issued by the White House in May 2010 echoes this characterization of the conflict, describing the war in Afghanistan as part of a

¹ Koh, H, Legal Adviser, U.S. Department of State, Speech at the Annual Meeting of the American Society of International Law, p.7, Mar. 25, 2010, *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm> [hereinafter Koh, ASIL Speech].

² *Id.*

“broader campaign to disrupt, dismantle, and defeat al-Qa’ida and its violent extremist affiliates.”³

In litigation, the government under the Obama administration has described the existence of a non-international armed conflict. In *Al-Aulaqi v. Obama*, a challenge to the government’s authority to carry out a targeted killing of a U.S. citizen in Yemen alleged to have a leadership role in al Qaeda in the Arabian Peninsula (AQAP), the government successfully argued against judicial review of the nature and scope of the armed conflict, citing, *inter alia*, the political question doctrine. In filings, however, it described a “non-international armed conflict between the United States and al-Qaeda,” arguing that AQAP was “part of al-Qaeda—or at a minimum is an organized, associated force or co-belligerent of al-Qaeda.”⁴ However, in *Al-Aulaqi*, the government may have been referring only to a non-international armed conflict with Al Qaeda; it is unclear whether some in the government view the conflict in Afghanistan against the Taliban as international in nature.

The Obama administration’s description of the conflict as against al Qaeda, the Taliban and associated forces represents a significant departure from the Bush administration’s early articulation of a “global war on terror,” and its later characterization of a “global battlefield.” In contrast to the Bush administration’s description of a war against “terror,” the Obama administration’s formulation limits the scope of the conflict to a war against particular entities—although, as described below, there is significant ambiguity about where this armed conflict exists and what armed groups are considered parties to it.

Moreover, the Obama and Bush administration differ over the applicability of humanitarian law as a general matter. Most notably, under the Bush administration, the government argued in *Hamdan v. Rumsfeld* that humanitarian law did not regulate its conduct in the “global war on terror” because the conflict fell into a gap between humanitarian law’s categories of international armed conflict and non-international armed conflict.⁵ In contrast, as noted, in litigation the government under the Obama administration has described engagement as a “non-international armed conflict,” which follows the Supreme Court’s decision in *Hamdan v. Rumsfeld*, as described below.⁶

Scholars have debated questions they characterize as having been left open by the Obama administration’s description of a non-international armed conflict against al Qaeda, the Taliban and associated forces. Focusing on the threshold issue of the applicability of humanitarian law, we explore two of the central questions: First, what is the nature of the armed conflict in which the U.S. is engaged against al Qaeda, the Taliban and associated forces? Second, what is the scope of the armed conflict or conflicts? In other words, are all targeting operations executed by the U.S. against al-Qaeda, the Taliban and associated forces part of the non-international armed

³ National Security Strategy (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

⁴ Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum In Support of Defendant’s Motion to Dismiss at 32-34, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10 Civ. 1469).

⁵ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (“The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being ‘international in scope,’ does not qualify as a ‘conflict not of an international character’”).

⁶ Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum In Support of Defendant’s Motion to Dismiss at 32-34, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10 Civ. 1469).

conflict in Afghanistan? If not, have the threshold criteria for a non-international armed conflict otherwise been met, either in a single armed conflict or in multiple armed conflicts? Recognizing the complexity of these questions and the multiplicity of perspectives, we briefly set out the positions of a few scholars to illustrate the range of possible theories.

B. Theories of the Nature and Scope of the Armed Conflict Between the U.S. and al Qaeda, the Taliban, and Associated Forces

1. Is the armed conflict between the U.S. and al Qaeda, the Taliban, and associated forces of an international or non-international?

Although some scholars have debated the nature of the conflict in which the U.S. is engaged, the government in *Al-Aulaqi v. Obama* referred to a non-international armed conflict. This characterization is supported by the terms of humanitarian law, but the government's failure to elaborate stymies identification of the conflict's scope.

Humanitarian law identifies two kinds of armed conflict: international armed conflict and non-international armed conflict. Common Article 2 of the Geneva Conventions defines an international armed conflict as, "any . . . armed conflict which may arise between two or more of the High Contracting Parties."⁷ Since the U.S. is at war with al Qaeda, the Taliban, and associated forces, all non-state actors, the current conflict in Afghanistan cannot be characterized as an international armed conflict.⁸ Some scholars have discussed the possibility of characterizing the conflict as an international armed conflict. However, as Noam Lubell, lecturer at the Irish Centre for Human Rights at the National University of Ireland, notes, "state practice does not lend support to there being any agreement on widening the concept of international armed conflict beyond that recognized in treaties, and which is based upon conflict between states."⁹

The category of non-international armed conflict is reflected in Common Article 3, which describes "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."¹⁰ Scholars with diverse perspectives have contended that the U.S. is

⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, 75 U.N.T.S. 31, entered into force Oct. 21, 1950 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, art. 2, entered into force Oct. 21, 1950 [hereinafter Second Geneva Convention]; Geneva Convention relative to the Treatment of Prisoners of War, art. 2, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 [hereinafter Third Geneva Convention]; Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 2, 75 U.N.T.S. 287, entered into force Oct. 21, 1950 [hereinafter Fourth Geneva Convention] [hereinafter Common Article 2, Geneva Conventions] [hereinafter Common Article 3, Geneva Conventions]. The International Committee of the Red Cross (ICRC) has interpreted Article 2 to refer to "[a]ny difference arising between two States and leading to the intervention of armed forces."⁷ ICRC, Commentary on the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field 32 (Jean S. Pictet ed., 1952).

⁸ See, e.g., Robert Chesney, *Who May Be Killed? Anwar Al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, Yearbook of International Humanitarian Law (forthcoming 2011); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) [hereinafter Alston, *Study on Targeted Killings*], ¶51.

⁹ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* 96 (2010).

¹⁰ Common Article 3, Geneva Conventions, *supra* note 7. Additional Protocol II, to which the U.S. is not a party, includes additional requirements, including that the conflict be between the armed forces of the state and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part

currently engaged in a non-international armed conflict in Afghanistan, and that if an armed conflict or multiple conflicts against al Qaeda, the Taliban and associated forces exist, they are also non-international, rather than international armed conflicts.¹ For example, the International Bar Association report on terrorism and the law proposes that “the US is engaged in a non-international armed conflict with armed groups in Afghanistan and Iraq...elsewhere, the US is not engaged in an armed conflict at all.”¹¹ While other observers argue that the U.S. may be engaged in an armed conflict outside of Afghanistan, for instance, in the Federally Administered Tribal Area (FATA) of Pakistan or in Yemen, they confine their analysis to the scope of the non-international armed conflict, as opposed to international armed conflict.¹² Kelisiana Thynne, a legal adviser at the International Committee of the Red Cross (ICRC), argues that “the armed conflict is occurring within and as a result of the war in Afghanistan, al-Qaeda and the US are parties to that armed conflict, with the conflict being a non-international armed conflict.”¹³

The government’s characterization of the conflict as non-international follows the U.S. Supreme Court’s decision in *Hamdan v. Rumsfeld*.¹⁴ In *Hamdan*, the Court rejected the lower court’s finding that Article 3 was inapplicable because the conflict with al Qaeda was international in scope.¹⁵ It emphasized that the term “international,” as used in the phrase “not of an international nature” in Article 3, distinguishes conflicts referenced in Article 2, “between two or more of the High Contracting Parties.”¹⁶ Thus, “not of an international nature” refers to a conflict that is not between two or more nations.¹⁷ While it did not specifically determine the nature of the armed conflict, the Court determined that at a minimum, the protections of Common Article 3 apply to the conflict. *Hamdan* has been interpreted by at least one lower court and a variety of scholars as characterizing the conflict as non-international, rather than international.¹⁸

of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1, 1125 U.N.T.S. 609, entered into force Dec. 7, 1978 [hereinafter Additional Protocol II].

¹¹ Elizabeth Stubbins Bates, *Terrorism and International Law, Report of the IBA Task Force on Terrorism* (2011).

¹² See, e.g., Chris Jenks, *Law From Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 North Dakota L. Rev. 649, 656 (2010) (declining to consider “the concept of an [international armed conflict] between the United States and Pakistan because recent Pakistani attacks on the Taliban undermine any agency or proxy argument”); Chesney, *supra* note 8, at 29 (analyzing whether U.S. targeting in Yemen is part of a “stand-alone non-international armed conflict” or “a larger, long-running non-international armed conflict”).

¹³ Kelisiana Thynne, Targeting the ‘Terrorist Enemy’: The Boundaries of and Armed Conflict against Transnational Terrorists, 16 Austl. Int’L.J. 161, 171 (2009) (citations omitted). Thynne’s views do not necessarily represent those of the ICRC.

¹⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁵ *Hamdan*, 548 U.S. at 563.

¹⁶ *Id.*; Common Article 2, Geneva Conventions, *supra* note 7.

¹⁷ *Hamdan*, 548 U.S. at 563.

¹⁸ *Id.* at 562-63. In *Al-Aulaqi v. Obama*, a D.C. district court, in *dicta*, interpreted *Hamdan* as holding that the conflict was a non-international armed conflict. See *Al-Aulaqi v. Obama*, 727 F.Supp.2d at 17 (asserting that Common Article 3, applied by the Supreme Court in *Hamdan*, would prohibit the government from using lethal force against al-Aulaqi were he to turn himself in).

While the Administration’s references to a “non-international armed conflict” provide some clarity, they do not include any further articulation of its character—indeed, in *Al-Aulaqi*, the government posited that it had no obligation to describe “the scope of the particular conflict, geographic or otherwise,” although some scholars have disagreed.¹⁹ In public addresses since his 2010 ASIL speech, Legal Adviser Koh has not provided further explanation or signaled that, as a matter of policy, it would be appropriate to do so. The difficulty with the government’s limited articulations is that they tend to obscure, rather than address, fundamental questions about the scope of the conflict. Left open are basic questions about whether the U.S. is engaged in a single or multiple non-international armed conflicts, and whether the Administration considers the conflict or conflicts geographically circumscribed. Below, we explore a few of the basic theories about the government’s possible position, and identify the particular areas of ambiguity.

2. Are all targeting operations executed by the U.S. part of the same non-international armed conflict that is taking place in Afghanistan? Or, alternatively, is the US engaged in either an independent armed conflict outside of Afghanistan or multiple armed conflicts in various locations?

Scholars and experts have emphasized that the Administration’s statements are ambiguous regarding whether targeting operations outside of Afghanistan are part of the same armed conflict that is taking place inside of Afghanistan, or constitute separate armed conflicts—either one armed conflict encompassing all targeting operations outside of Afghanistan, or multiple independent armed conflicts.

In his ASIL address, Koh refers to “an” ongoing armed conflict with al Qaeda, the Taliban and associated forces.²⁰ Likewise, in *Al-Aulaqi v. Obama*, the government in its filings declares that al Qaeda of the Arabian Peninsula is “an organized armed group that is either part of al-Qaeda, or is an associated force, or cobelligerent, of al-Qaeda that has directed attacks against the United States in *the* noninternational armed conflict between the United States and al-Qaeda that the Supreme Court recognized in *Hamdan*” (emphasis added). Referencing the criteria for a non-international armed conflict, described below, the government argues that “[e]ven assuming that these criteria were to govern the question, the fact that the United States’ armed conflict with al-Qaeda exists in one particular location does not mean that it cannot exist outside this geographic area.”²¹ Additionally, in its White House National Security Strategy statement, the Administration refers to the conflict in Afghanistan and Pakistan as a singular war.²²

From these articulations, it is not clear whether the Administration would characterize *all* hostilities beyond Afghanistan as part of a singular war. Even if it did, it is unclear whether the Administrations uses “war” synonymously with the term “armed conflict”; thus, the U.S. may

¹⁹ Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum In Support of Defendant’s Motion to Dismiss at 33-34, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10 Civ. 1469). For a discussion of the Supreme Court’s review of executive war measures, see John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, Temp. L. Rev. (forthcoming 2011).

²⁰ Koh, ASIL Speech, *supra* note 1.

²¹ Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum In Support of Defendant’s Motion to Dismiss at 1, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10 Civ. 1469).

²² Office of the President of the United States, National Security Strategy (May 2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

refer to a single “war,” as a rhetorical matter, but regard itself as engaging in multiple armed conflicts. (It may also regard certain operations against Al Qaeda and associated forces as not part of an armed conflict, but legitimated based on self-defense, a theory we do not explore in this paper in light of the breadth of issues it raises.)

Scholars have interpreted the government’s statements in varying ways, and articulated diverse theories of the conflict/s. Among the large and complex set of controversies, we set out two central discussions, which have spawned multiple and diverse theories: (1) whether and how the U.S. might be engaged in a singular armed conflict; (2) alternatively, whether and how the U.S. might be engaged in a single or multiple armed conflicts in its operations outside of Afghanistan against al Qaeda and associated forces.

a) Are all targeting operations executed by the US part of the same non-international armed conflict that is taking place in Afghanistan?

The Administration’s statements leave open the possibility that all targeting of al Qaeda, the Taliban and associated forces within and outside of Iraq and Afghanistan is conducted as part of a single armed conflict. There are multiple perspectives about the importance of geographic limitations to such an armed conflict, which we describe below.

Common Article 3 describes a non-international armed conflict as one “occurring in the territory of one of the High Contracting Parties.”²³ This definition, and related case law, does not definitively speak to the role of geographic limitations in a non-international armed conflict.²⁴ For example, Robert Chesney, professor at the University of Texas, notes that case law regarding the scope of non-international armed conflict “simply did not confront the question of whether [humanitarian law] should...apply when parties to an armed conflict use lethal force against one another in new locations beyond their respective borders.”²⁵ Principally, it is unclear whether, and according to what standard, humanitarian law would apply if the U.S. targeted al-Qaeda, the Taliban and/or associated forces beyond Afghanistan and surrounding areas.

One of the theories presented by Thynne is that “actions outside of the territory in which the armed conflict is ongoing... occur as a direct part of the armed conflict.”²⁶ Thynne suggests that “each act...[is] linked to the next and connected to a particular territory where the armed conflict occurs.”²⁷ Thynne ultimately concludes, however, that because recent terrorist attacks in other countries had “no direct impact on the conduct of hostilities in Afghanistan, they are not

²³ Common Article 3, Geneva Conventions, *supra* note 7.

²⁴ In *Tadic*, the International Criminal Tribunal for the former Yugoslavia provided some guidance on role of geographic limitations, stating that the “geographical and temporal scope of a conflict is not limited to the area in a territory where hostilities are taking place, but applies to the whole of the territory.” *Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, ICTY (Oct. 2, 1995), ¶69. It also noted that “if actions occur as part of an armed conflict directly, which are not in the particular vicinity of the armed conflict, [humanitarian law] will still apply.” *Id.* at ¶68.

²⁵ Chesney, *supra* note 8, at 36.

²⁶ Thynne, *supra* note 13, at 174.

²⁷ *Id.*

linked to the armed conflict.”²⁸ Thus, according to Thynne, those attacks did not trigger the application of international humanitarian law.

Lubell likewise emphasizes that “[a]rmed conflicts can, and do spill over borders.” But Lubell’s focus is on the kind of activities a party to the conflict takes after relocating. Lubell recognizes that just as Taliban forces could relocate and operate from Pakistan, and remain part of the same armed conflict, members of the opposing party could also relocate to Yemen. “[T]his does not lead to a *carte blanche* to strike any individual in any country,” Lubell argues. According to Lubell:

[I]t is a question of whether the conflict activities themselves have also relocated. In other words, only if the individual or group are continuing to engage in the armed conflict from their new location, then operations taken against them could be considered to be part of the armed conflict. This could be the case for Taliban fighters engaged in the Afghan conflict but operating from Pakistan....[But] [i]f the US attacks are being launched against persons not involved in the Afghan conflict to which the US is party then they could not be considered legitimate targets.²⁹

A contrasting view, articulated by Chesney, is that the existence of an armed conflict in any location worldwide is enough to establish that attacks executed by one party to the armed conflict and carried out against another party are subject to humanitarian law, irrespective of geographic location.³⁰ For Chesney, the central limit to such a conflict would be that the interaction be between parties to the non-international armed conflict. Thus, under this view, in order for humanitarian law to apply to interactions between the U.S. and al Qaeda in the Arabian Peninsula (AQAP) in Yemen, as part of the ongoing, singular non-international armed conflict between the U.S. and al Qaeda in Afghanistan, it would only need to be shown is that AQAP is part of al Qaeda.³¹ According to Chesney, if one accepts that the U.S. is in an armed conflict with al Qaeda in Afghanistan and that AQAP is part of al Qaeda, humanitarian law would apply to any and all attacks that the U.S. made on AQAP in Yemen.³²

West Point Professor John C. Dehn makes the related point that “[t]he key to the applicability of [humanitarian law] is not the location of the attack, but the status of the attacker and target.” According to Dehn, humanitarian law applies where both the attacker and target are “members of parties to, or sufficiently associated with the ongoing hostilities of, an armed conflict.”³³ Dehn’s focus is the degree of association between Al-Qaeda and the affiliated group, an issue explored below.

²⁸ *Id.*

²⁹ Lubell, *supra* note 9, at 255.

³⁰ Chesney, *supra* note 8, at 37.

³¹ *Id.*

³² *Id.*

³³ John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. Pa. L. Rev. Pennumbra 175, 190-91 (2011).

The significant differences in the theories we have described exemplify the wide range of possible interpretations of the Administration's statements regarding the scope of the armed conflict.

b) Have the threshold criteria of a non-international armed conflict otherwise been met cumulatively or in the various locations in which the U.S. is engaged in targeting practices against al-Qaeda and associated forces?

The Administration's statements also leave open the possibility that it conducts targeting outside of Iraq and Afghanistan in the context of an independent or several separate armed conflicts. Various scholars and experts agree that this theory is plausible, as a hypothetical matter, but that the Administration would be required to demonstrate that the cumulative or various separate armed conflict(s) meet the criteria for a non-international armed conflict.

The threshold criteria for a non-international armed conflict are not as categorical as those for an international armed conflict.³⁴ Among the most well-known formulations of these criteria is the International Criminal Tribunal for the former Yugoslavia's in *Tadic*. Interpreting Common Article 3, *Tadic* describes an armed conflict as existing whenever there is "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."³⁵ While scholars and other tribunals have formulated these criteria in varying terms and described several factors, as described below, *Tadic*, other recent cases and developing scholarship at least reflect that: (1) violence must meet a threshold level; and (2) non-state armed groups must be identifiable as parties.³⁶

i. Threshold of Violence

Factors for the threshold of violence include intensity and duration.³⁷ Although there is some disagreement about the necessary level of intensity and duration, it is illustrative that Additional Protocol II to the 1949 Geneva Conventions, of which the Obama administration recently advocated Senate ratification,³⁸ distinguishes armed conflict from "situations of internal disturbances and tensions, such as riots, isolated or sporadic acts of violence and other acts of a similar nature."³⁹ The International Criminal Tribunal for the former Yugoslavia has suggested that "protracted armed conflict" could "refer[] more to the intensity of the armed violence than

³⁴ Alston, *Study on Targeted Killings*, *supra* note 9, ¶52.

³⁵ *Prosecutor v. Tadic*, Opinion and Judgment (Trial Chamber), IT-94-1-T, ICTY (May 7, 1997), ¶562.

³⁶ For a comprehensive discussion of the criteria for armed conflict, including legal developments and evidence of how past conflicts were classified, see International Law Association, Final Report on the Meaning of Armed Conflict in International Law (2010), available at <http://www.ila-hq.org>.

³⁷ See *id.*; *Prosecutor v. Tadic*, Appeal on Jurisdiction, IT-94-I-AR72, ICTY (Oct. 2, 1995); *Prosecutor v. Akayesu*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR) (Sept. 2, 1998), ¶¶619-620.

³⁸ In a fact-sheet published with the announcement of a new executive order on continuing detention and military commission charges related to Guantanamo detainees, the Administration "urge[d] the Senate to act as soon as practicable on this Protocol," noting that "United States military practice is already consistent with the Protocol's provisions." Press Release, White House Office of the Press Secretary, Fact Sheet: New Actions on Guantanamo and Detainee Policy (March 7, 2011).

³⁹ Additional Protocol II, *supra* note 10, art. 1(2).

its duration,” where intensity is indicated by several possible factors.⁴⁰ Moreover, as Professor Andreas Paulus and Dr. Mindia Vashakmadze have noted, “there are situations where a much lower level of violence that is not protracted is seen as armed conflict.”⁴¹

Intensity and duration, notwithstanding some disagreement about their parameters, are significant factors for determining whether U.S. targeting practices outside of Afghanistan occur in the context of a separate non-international armed conflict. As Lubell notes, a threshold requirement of prolonged military hostilities, while met for battleground fighting in Afghanistan, may not be met by short-term or one-time operations outside of Afghanistan.⁴²

Scholars have debated whether isolated terrorist attacks, and military responses to them, meet the requisite threshold of intensity. Thynne emphasizes that, in the current situation outside of Afghanistan, the threshold of intensity is not met insofar as the acts of violence are sporadic and short-lived, but notes that terrorist attacks “over a period of time that may themselves be relatively minor, if carried out in a systematic way, can result in their being determined part of an armed conflict or establishing an armed conflict.”⁴³ Professor Mary Ellen O’Connell, however, emphasizes that “the isolated terrorist attack, regardless of how serious the consequences, is not an armed conflict.”⁴⁴ In his report to the U.N. Human Rights Council, then-Special Rapporteur Philip Alston concludes, “even when there have been terrorist attacks by al-Qaeda or other groups claiming affiliation with it, the duration and intensity of such attacks has not risen to the level of an armed conflict.”⁴⁵

Some scholars reject the notion that terrorist attacks are sufficiently intense to constitute a global non-international armed conflict, but countenance the existence of “localized” conflicts. For example, professor Kevin Heller of Melbourne Law School emphasizes, “I know of no non-American [humanitarian law] scholar and no state other than the United States that believes the sporadic acts of terrorism committed around the world by groups that call themselves ‘Al Qaeda’ are sufficiently protracted and intense to qualify as a global [non-international armed conflict].” But Heller adds, “[this] does not mean that there are no localized [non-international armed conflicts] between the United States and specific al-Qaeda groups.”⁴⁶

At the other end of the spectrum, Chesney, examining U.S. targeting of Al Qaeda in the Arabian Peninsula (AQAP) in Yemen, argues that the threshold of violence is met due to the “nature of the weaponry employed by the governments involved (especially the U.S. military’s

⁴⁰ See *Prosecutor v. Hardinaj and ors*, Judgment (Trial Chamber), IT-04-84-T, ICTY (April 3, 2008), ¶49; *Prosecutor v. Limaj*, Judgment (Trial Chamber), IT-03-66-T, ICTY (Nov. 30, 2005), ¶90.

⁴¹ Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization*, International Review of the Red Cross, vol. 91 no. 873, 102 (March 2009).

⁴² Lubell, *supra* note 9, at 105.

⁴³ Moreover, “if terrorist attacks were to be continuous and they were responded to with force by an opposing side, they could be termed protracted and be a sustained military effort that amounts to an armed conflict. It will depend, however, on the circumstances of each attack and host states deal with it.” Thynne, *supra* note 13, at 168.

⁴⁴ *Lawful Use of Combat Drones: Hearing Before the Subcomm. On National Security and Foreign Affairs*, 111th Congress, 4 (April 28, 2010) (statement of Mary Ellen O’Connell, Robert and Marion Short Chair in Law, University of Notre Dame).

⁴⁵ Alston, Study on Targeted Killings, *supra* note 9, ¶ 54.

⁴⁶ Dehn & Heller, *supra* note 33, at 197-98.

use of air power),” the “extended period during which this violence has occurred,” “the frequency with which AQAP has engaged in attacks,” and “the volume of deaths and injuries as a result of attacks by all parties.”⁴⁷

ii. *Identification of Parties*

Non-international armed conflicts involve two or more parties. Where non-state actors are involved, they must possess the necessary characteristics to be considered a party to the conflict. The ICRC emphasizes that “non-governmental groups involved in the conflict must be considered as ‘parties to the conflict,’ meaning that they possess armed forces...[and] that these forces have to be under a certain command structure and have the capacity to sustain military operations.”⁴⁸ *Tadic* reflects these requirements, and subsequent cases describes multiple indicative factors.⁴⁹

Scholars disagree about whether al Qaeda and associated forces outside of Afghanistan are identifiable as parties. For example, Thynne argues that the groupings of al Qaeda outside of Afghanistan “do not negotiate, they have no central command structure, they do not have a unified military strategy and they do not engage in military acts [that are comparable to the military actions of al Qaeda in Afghanistan].”⁵⁰ Noam Lubell notes that characterization of al Qaeda as a party to the conflict is complicated by “the fact that its description ranges from being a distinct group, to a network of groups, or even a network of networks, and in some cases an ideology rather than an entity.”⁵¹ Lubell continues:

Accumulating all acts described as terrorism, and its supporters, into a single armed conflict on the basis of shared ideology is akin to claiming that not only could the Korean war, the Vietnam war and the Cuban Missile Crisis in the 1950s-1970s all be considered part of a single armed conflict (as indeed they might be according to the rhetoric of the Cold War) but that anyone, or any group, suspected of holding Communist opinions, anywhere around the globe, would also be seen as party to the conflict.⁵²

Identification of “associated forces” as a party or parties also raises several questions. Alston contends that “al-Qaeda and other ‘alleged associated’ groups are often loosely linked if

⁴⁷ Chesney, *supra* note 8, at 31. Chesney argues that other factors, such as the frequency of attacks, do not definitively weigh on either side of the argument and, accordingly, do not weigh against finding sufficient intensity.

⁴⁸ See ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?” Opinion Paper (March 2008), 3.

⁴⁹ See *Tadic* (Trial Chamber), IT-94-1-T at ¶¶ 562-563. In *Hardinaj*, the International Criminal Tribunal for the former Yugoslavia (ICTY) described indicative factors including: “the existence of a command structure...; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons,...recruits and military training; its ability to plan coordinate and carry out military operations, including...logistics; its ability to defined a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and concludes agreements such as cease-fire...accords.” *Hardinaj* (Judgment), IT-04-84-T at ¶60. In *Boskoski*, the ICTY elaborated on indicators of these factors. See *Boskoski v. Tarculovski*, Judgment (Trial Chamber), IT-04-82-T (July 10, 2008) ¶¶ 199-203.

⁵⁰ Thynne, *supra* note 13, at 171.

⁵¹ Lubell, *supra* note 9, at 118.

⁵² *Id.* at 120.

at all.”⁵³ Administration officials in policy settings have described al Qaeda affiliates as “self-sustaining independent movements and organizations,”⁵⁴ but the Administration has not identified how such independence affects its legal rationales.⁵⁵

In particular, the Administration has not defined the parameters of “associated forces,” a lack of clarity harkening to problems related to the Bush Administration’s characterization of a war on “terror.” As Gabor Rona noted in 2003, “[a] terrorist group can conceivably be a party to an armed conflict and a subject of humanitarian law, but the lack of commonly accepted definitions is a hurdle.”⁵⁶ Some observers argue that the term “associated forces” suffers from the same definitional ambiguity as “terrorist group,” with the degree and manner of association that subjects an individual or group of individuals to targeting unclear. Dehn has argued that the focus should not be on “ideological alignment” with al Qaeda, but “coordinated activity.”⁵⁷

Other scholars contend that the criteria of identification of parties has been met, at least in some cases. Examining U.S. targeting practices against AQAP in Yemen, Chesney describes AQAP’s leadership structure as “formal.”⁵⁸ He concedes, however that this factor is particularly difficult to assess given the clandestine nature of the party.⁵⁹

The divergent views on whether the threshold criteria for non-international armed conflict are met underscore the need for clarity about the Administration’s standards.

C. Questions left unanswered and implication of the debate on the scope and nature of the armed conflict

As scholars with diverse perspectives have recognized, the Administration’s recent articulations of the nature and scope of the armed conflict do not indicate whether there are geographic boundaries to the armed conflict or conflicts against al Qaeda, the Taliban and associated forces. There are several possible implications. For example, if the Administration contends that all of its targeting operations against al Qaeda and associated forces, including those outside of Afghanistan, are part of a single non-international armed conflict, what might be the effect of an end to U.S. combat operations in Afghanistan, or an end to Al Qaeda’s presence there? If the Administration does not assert that all of its targeting operations against al Qaeda and associated forces are component hostilities in an armed conflict, does the Administration

⁵³ Alston, *Study on Targeted Killings*, *supra* note 9, ¶55.

⁵⁴ Michael E. Leiter, Director of the National Counterterrorism Center (NCTC), *The Changing Terrorist Threat and NCTC’s Response*, Center for Strategic & International Studies (Dec. 1, 2010), video *available at* <http://csis.org/multimedia/video-changing-terrorist-threat-and-nctcs-response>.

⁵⁵ Professor Jack Goldsmith notes this ambiguity, and argues that the existence of increasingly independent Al Qaeda affiliates may counsel in favor of congressional action to “update the government’s authorities to deal with these evolving threats.” See Lawfareblog.com, “More on the Growing Problem of Extra-AUMF Threats,” <http://www.lawfareblog.com/2010/12/more-on-the-growing-problem-of-extra-aumf-threats/> (Dec. 1, 2010). Debates about the sufficiency of existing domestic law to authorize targeting operations are beyond the scope of this paper.

⁵⁶ Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the War on Terror*, 27:2 *Fletcher Forum of World Affairs* 55, 60 (2003).

⁵⁷ Dehn & Heller, *supra* note 33, at 191.

⁵⁸ *Id.*

⁵⁹ Chesney, *supra* note 8, at 31.

envision that the conduct of some drone strikes, rather than being regulated by humanitarian law, would need to meet law enforcement and human rights standards?

Further specificity by the Administration is critical to clarifying whether it posits the existence of a “global battlefield”—a notion from which the Administration has sought to distance itself, and which some observers have argued would undercut the rule of law by eviscerating the system of limited rights and duties envisioned by humanitarian law.⁶⁰ Insofar as the government has not previously articulated the geographic boundaries of past armed conflicts, clarity may be warranted by the unprecedented nature of a campaign against a foe that, according to the government and many observers, operates globally and clandestinely. In other words, the potentially unbounded nature of the campaign against al Qaeda and associated groups is precisely what warrants greater definition of the scope and nature of the armed conflict.

PART II. WHO MAY BE TARGETED?

A. U.S. Government’s Statements Concerning Who May Be Targeted

Scholars have articulated a second central area of ambiguity in the U.S. government’s statements: the scope of who may be targeted. In his ASIL speech, Legal Advisor Koh emphasized that U.S. targeting practices “must conform [...] to all applicable law.”⁶¹ He confirmed, in broad terms, the application of the principle of distinction of the laws of war, “which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack.”⁶² In addition, Koh pointed out that “in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.”⁶³ Koh also referenced the Authorization for the Use of Military Force (AUMF), which provides that force can be used “against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁶⁴

In litigation, the government under the Obama administration has referenced the AUMF in describing its targeting practices, arguing:

Congress authorized the President to use necessary and appropriate military force against al-Qaeda, the Taliban and associated forces, AUMF, 115 Stat. 224, and

⁶⁰ See, e.g., Letter from Ken Roth, Human Rights Watch, to President Obama (Dec. 7, 2010).

⁶¹ Koh, ASIL speech, *supra* note 1.

⁶² *Id.* The U.S. response to the U.N. Human Rights Council’s report during the Universal Periodic Review echoes Koh’s remarks, expressing that “[i]n U.S. military operations, great care is taken to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.” See U.S. Response to UN Human Rights Council Working Group Report, March 10, 2011, <http://www.state.gov/g/drl/upr/157986.htm>.

⁶³ *Id.*

⁶⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

the Executive Branch has determined that [Al-Qaeda in the Arabian Peninsula] is an organization within the scope of this authorization.⁶⁵

While these statements, including Koh’s reaffirmation of the principle of distinction’s applicability to U.S. targeting practices related to al Qaeda, are welcome, scholarly disagreement about the scope of who may be targeted underscores that much about the Administration’s position remains unclear. Scholars disagree not just on what the current U.S. standards on key issues are, but from what sources of international law they derive. They have arrived at starkly contrasting conclusions as to what constitute legitimate targets.

B. Who May Be Targeted: Basic Areas of Debate

Legal Advisor Koh affirmed that U.S. drone strikes are limited to “military objectives”⁶⁶ and that “civilians shall not be the object of the attack.”⁶⁷ These words reflect the key international humanitarian law principle of distinction. Under international humanitarian law governing international armed conflict, the principle of distinction requires parties to the conflict to distinguish in attack between combatants, as defined in Article 4 of the Third Geneva Convention,⁶⁸ and civilians.⁶⁹ Civilians are protected from attack “unless and for such time as they take a direct part in hostilities.”⁷⁰

In non-international armed conflict, a customary rule of distinction applies, which is formulated in similar terms.⁷¹ However, conventional humanitarian law governing non-international armed conflict does not use the term “combatant,” and states have never agreed to recognize the privileges and obligations of combatant status for rebels in internal situations. Nevertheless, the principle of distinction operates in non-international armed conflict based on

⁶⁵ Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum In Support of Defendant’s Motion to Dismiss at 24, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10 Civ. 1469).

⁶⁶ Koh, ASIL Speech, *supra* note 1.

⁶⁷ *Id.*

⁶⁸ Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

⁶⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art. 50-51, June 8, 1977, 1125 U.N.T.S. 3, 23 [hereinafter Additional Protocol I]; Rules 1 and 3, ICRC, Customary International Humanitarian Law Database, <http://www.icrc.org/customary-ihl/eng/docs/home> [hereinafter ICRC, Customary Law Database]. The U.S. is not party to Additional Protocol I, but regards some of its provisions as customary law. In this section, we refer to customary law as recognized by the ICRC’s study on customary law, although its views do not always reflect the U.S. governments.

⁷⁰ Additional Protocol I, *supra* note 69, art. 51(3). The ICRC regards this provision as a customary law. *See* ICRC Customary Law Database, *supra* note 69, Rule 6.

⁷¹ *See* ICRC Customary Law Database, *supra* note 69, Rule 1.

the same criteria which define the “combatant” category in international armed conflict; persons who are not civilians are “members of the armed forces,” at least with regard to state military.⁷²

There is nonetheless substantial debate about how to categorize individuals who may be targeted by drone strikes, as members of non-state armed groups or civilians directly participating in hostilities. In this section we set out some basic aspects of the debate, but do not discuss it comprehensively. Our focus is the extent to which the Administration’s statements reflect the debate, and whether or how the debate impacts the question of whether further government clarification about its legal standards is warranted. Koh’s ASIL speech refers to “military objectives” and “high-level targets,” but there is little guidance on the government’s analysis of the link between the latter term and particular standards related to the principle of distinction.

Among the areas of debate on the principle of distinction, two of the most highly contested issues are: (1) who may be targeted as “directly participating in hostilities” and for how long; and (2) who may be targeted as fulfilling a “continuous combatant function,” a status by which members of organized armed groups cease to be civilians and lose protection against direct attack. A significant reference point in the debate on these issues is the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities, published in 2009 as a non-binding interpretation.⁷³ As set out below, neither Koh’s ASIL speech, nor other government statements, delineate the government’s perspective on these particular issues.

1. Are targets of drone strikes civilians “directly participating in hostilities”?

The principle that civilians lose protection from targeting while directly participating in hostilities is universally accepted among scholars and practitioners.⁷⁴ However, there is a wide spectrum of views on what it means for civilians to directly participate in hostilities, and thereby

⁷² See *id.*, Rule 3 (“For purposes of the principle distinction...members of State armed forces may be considered combatants in both international and non-international armed conflicts. Combatant status, on the other hand, exists only in international armed conflicts ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law 993-995 (Nils Melzer ed., 2009); Nils Melzer, *Targeted Killings in International Law* 313 (2008) (“While conventional IHL applicable in non-international armed conflict does not use the term ‘combatant,’ it operates the principle of distinction based on the same criteria which define that category in international armed conflict”).

⁷³ ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (Nils Melzer ed., 2009) [hereinafter ICRC Interpretive Guidance].

⁷⁴ See Michael Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. Int’l L. & Pol. 697, 699 (2010).

lose protection against direct attack. The government’s position on what conduct falls within the category of direct participation, and when individuals regain protection as civilians, is unclear.⁷⁵

Much of the scholarly debate about the scope and targeting implications of direct participation in hostilities references the ICRC’s Interpretive Guidance. The Interpretive Guidance is the result of a five-year study and consultation with nearly 50 experts. Prior to its publication, there was broad agreement among experts that there is a distinction between “direct” and “indirect” participation, but the defining of the contours of that distinction was largely left to those conducting and planning the attacks.⁷⁶ Indeed, a recent U.S. military manual emphasizes that “[d]irect participation in hostilities must be judged on a case-by-case basis.”⁷⁷ This approach is also reflected in the International Criminal Tribunal for the Former Yugoslavia’s discussion in the *Tadic* case, which counsels “examin[ing] the relevant facts of each victim and...ascertain[ing] whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time.”⁷⁸ However, according to Nils Melzer, author of the Interpretive Guidance, “confusion and uncertainty as to the distinction” has been generated by “the rise of loosely organized and clandestinely operating armed groups, the widespread outsourcing of traditional military functions to private contractors and civilian intelligence personnel, [and] a more general trend towards increased civilian involvement in military operations.”⁷⁹

The Interpretive Guidance sought to clarify the concept, including what kinds of acts could constitute direct participation.⁸⁰ The Interpretive Guidance is considered by many observers to be a controversial document; a number of the consulted experts disagreed with the Guidance’s final propositions.⁸¹ The U.S. government has not expressed an official position.

a. The ICRC’s Definition of Direct Participation in Hostilities

⁷⁵ However, Bill Boothby, a member of the British Air Force, has described correspondence between himself and W. Hays Parks, former Department of Defense official, on these issues. See Bill Boothby, “*And For Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. Int’l L. & Pol. 741, 758 (2010).

⁷⁶ ICRC Interpretive Guidance, *supra* note 73, at 25 (“[Defining “direct participation”] has generally been treated as a matter of judgment on the part of those planning, approving, and executing attacks.”).

⁷⁷ See U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, Doc. NWP 1-14M/MCWP 5-12.1/COMDTPUB P5600.7A, *The Commanders Handbook on the Law of Naval Operations*, ch. 8.2.2 (July 2007) (cited in Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, *supra* note 74, at 706).

⁷⁸ *Prosecutor v. Tadic*, Opinion and Judgment, IT-94-1-T, ICTY (May 7, 1997), ¶616.

⁷⁹ Nils Melzer, “Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques on the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities,” N.Y.U. J. Int’l L. & Pol. 831, 833 (2010). Melzer’s views in the article do not necessarily reflect those of the ICRC.

⁸⁰ The Interpretive Guidance does not claim to be new law, but to “reflect the ICRC’s institutional position as to how existing [humanitarian law] should be interpreted.” ICRC Interpretive Guidance, *supra* note 73, at 9.

⁸¹ See Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 Harvard National Security Journal 5-44, 6 (2010).

As reflected in the Interpretive Guidance, the ICRC's position is that for an act to constitute direct participation in hostilities, it must satisfy the following criteria: "(1) the harm likely to result from the act must reach a certain threshold (threshold of harm); (2) there must be a direct causal link between the act and the expected harm (direct causation); and (3) the act must be specifically designed to support a belligerent party to the detriment of another (belligerent nexus)."⁸² As set out below, this definition has elicited debate on how to categorize various actions.

Another source of debate is the ICRC's interpretation of the duration for which direct participation in hostilities results in loss of protection. Under conventional humanitarian law, a civilian loses protections for so long as he directly participates.⁸³ According to the Interpretive Guidance, participation includes both the immediate execution phase of the specific act, its preparation and the deployment to and return from the location of its execution.⁸⁴

b. Concerns that the ICRC's Definition of Direct Participation in Hostilities Is Too Narrow

Some scholars have criticized the ICRC's Interpretive Guidance as defining direct participation in hostilities too narrowly. One concern is that the ICRC's definition of direct participation does not take into account the pragmatic and tactical realities of military operations, and that military actors should be afforded broad discretion to make targeting decisions on the battlefield.⁸⁵

Another criticism is that the Interpretive Guidance's definition of direct participation results in a "revolving door" of protection, giving individuals the ability to participate in attacks and then quickly regain protection from counter-attack.⁸⁶ The paradigmatic example, given by critics, is of the farmer who toils by day, and is a rebel fighter by night. According to critics, the farmer would regain protection from attack every time he returns home.⁸⁷ (However, Nils Melzer, author of the Interpretive Guidance, has argued in response that such an individual would likely

⁸² Melzer, *Keeping the Balance Between Military Necessity and Humanity*, *supra* note 79, at 856; *see* ICRC, Interpretive Guidance, *supra* note 73, at 1016.

⁸³ *See* Additional Protocol I, *supra* note 69, art. 51(3); Additional Protocol II, *supra* note 10, art. 13(3). These provisions are regarded by the ICRC and various courts as customary international law. *See* ICRC, Customary Law Database, Rule 6.

⁸⁴ ICRC Interpretive Guidance, *supra* note 73, at 1031.

⁸⁵ Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: an Introduction to the Forum*, 42 N.Y.U. J. Int'l L. & Pol. 637, 640 (2010).

⁸⁶ *See* Lubell, *supra* note 9, at 142 (citing various scholars).

⁸⁷ Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 Harvard Nat'l Security J. 5, 37 (2010).

be categorized not as a civilian but as member of an organized group with a continuous combatant function—a category discussed below.⁸⁸)

To avoid the “revolving door,” some scholars espouse a broader definition of direct participation. For example, Brigadier General Kenneth Watkin, a military law expert, argues that a civilian who is repeatedly involved in hostilities is continuously participating, and must affirmatively disengage to regain protection. Watkin also argues that direct participation should include preparation for an attack, not just the immediate execution phase of a specific act.⁸⁹

c. Concerns that the ICRC’s Definition of Direct Participation In Hostilities Is Too Broad

At the other end of the spectrum, some commentators have expressed concern that the Interpretive Guidance defines direct participation in hostilities too broadly, thereby diminishing civilian protection during armed conflict.⁹⁰ One concern long pre-dating the Interpretive Guidance is that direct participation in hostilities should be squarely limited to military operations. Writing in 1980, then-Lieutenant Colonel Robert Gehring argued: “[Additional Protocol I] indicates the ‘hostilities’ from whose effects civilians are to be protected are military operations aimed at specific objectives. It follows that only through direct participation in *military operations* should a civilian forfeit his protection.”⁹¹ Some experts have expressed concern that the Interpretive Guidance would allow targeting of civilians who do not pose an immediate threat to the enemy.⁹²

However, it is noteworthy that then-Special Rapporteur Philip Alston, in his report on targeted killings, characterizes the ICRC’s approach as “exclud[ing] conduct that is protected by other human rights standards, including political support for a belligerent party or an organized armed group.”⁹³ Alston’s position underscores that the criticism of the ICRC’s definition as over-inclusive is limited.

d. Concerns Regarding “Direct” versus Indirect Participation in Hostilities

⁸⁸ See Melzer, *Keeping the Balance Between Military Necessity and Humanity*, *supra* note 79, at 890-91.

⁸⁹ Kenneth Watkin, *Opportunity lost: organized armed groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. Int’l L. & Pol. 640, 692 (2010) (“Carrying out an attack or preparing to do so would constitute taking a direct part in hostilities”).

⁹⁰ See Goodman & Jinks, *supra* note 85, at 639 (briefly discussing perspectives about the Interpretive Guidance’s role in authorizing “extrajudicial killing of civilians” as “a *de jure* or *de facto* matter”).

⁹¹ See Robert Gehring, *Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I*, Military Law and Law of War Review, Vol. XIX-1-2 (1980), 19 (cited in Melzer, *Targeted Killings in International Law*, at 336 n.150).

⁹² See Melzer, *Keeping the Balance Between Military Necessity and Humanity*, *supra* note 79, at 835 (describing views of some experts expressed during proceedings of the Interpretive Guidance expert process).

⁹³ Alston, *Study on Targeted Killings*, *supra* note 9, ¶64.

Among the several debates about the Interpretive Guidance, one central controversy focuses on the scope of “direct” participation. The Interpretive Guidance requires the harm caused by an act of “direct participation” to be “brought about in one causal step.”⁹⁴ Some scholars view this as unduly limiting; for example, assistance, although it takes place over more than one single step, may have substantial and direct casual effect.⁹⁵ The Israeli Supreme Court’s analysis in *The Public Committee Against Torture in Israel v The Government of Israel (PCATI)* reflects this concern. The Court argued that direct participation can constitute (a) “preparing [one]self for the hostilities; (b) planning a hostile act or sending others to commit one; or (c) engaging in a ‘chain of hostilities’ as an active member of a terrorist organization.”⁹⁶ However, other scholars argue that a wide formulation effectively eliminates the “directness” requirement. Lubell contends that a broader interpretation of activities which constitute direct participation may “make it possible for states to fit almost any desirable target into them, for example by claiming the individual was involved in planning.”⁹⁷

2. Are targets of drone strikes “individuals with a Continuous Combatant Function”?

If targets of drone strikes are not civilians directly participating in hostilities, they may nonetheless be directly attacked as members of organized armed groups, which are parties to the conflict, who have a “continuous combatant function”; however, this theory is contested.

(a) The ICRC’s Definition of Continuous Combat Function

The rule of distinction governing non-international armed conflict permits direct attacks against members of the armed forces. However, the question of whether armed forces includes organized armed non-state groups is not resolved by conventional humanitarian law, state practice or international jurisprudence.⁹⁸ The implications are great: excluding organized armed groups from the definition of armed forces would permit their members to have the status of civilians, and with it, protection against direct attack unless they are directly participating in hostilities.

⁹⁴ ICRC Interpretive Guidance, *supra* note 73, at 1021.

⁹⁵ *See, e.g.*, Schmitt, *supra* note 81, at 29-30.

⁹⁶ H CJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr., [Dec. 11, 2005] slip op. para. 33-39, *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf [hereinafter *PCATI*]. Arguably, the Interpretive Guidance would encompass the same activity discussed by the Israeli Supreme Court: the ICRC’s definition of direct participation includes preparation and planning for a specific act, and the “continuous combatant function” standard, described below, envisions the “chain of hostilities” described by the Court. *See* Melzer, *Keeping the Balance Between Military Necessity and Humanity*, *supra* note 79, at 886-892.

⁹⁷ Lubell, *supra* note 9, at 150.

⁹⁸ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I, 19 (2005).

To address this potential asymmetry, the ICRC’s Interpretive Guidance describes the category of individuals with a “Continuous Combatant Function,”⁹⁹ including members of a non-state party’s armed forces to a non-international armed conflict into the definition of armed forces. The continuous combatant function requires lasting integration into an organized armed group which is acting as the armed forces of a non-State party to an armed conflict.¹⁰⁰ Individuals with a continuous combatant function cease to be civilians for as long as they remain members of the organized armed group. They thereby lose protection against direct attack for the duration of their membership, that is, “for as long as they assume their continuous combat function.”¹⁰¹ Accordingly, such individuals may be attacked even between episodes of participation, unless they unambiguously opt out of hostilities.

The ICRC’s standard includes only those individuals who carry out continuous combatant function; it would likely exclude some individuals who may currently be targeted in U.S. drone strikes, such as those who only function as “political and religious leaders” or “financial contributors, informants, collaborators and other service providers.”¹⁰²

(b) Concerns that the Continuous Combat Function Impermissibly Expands the Scope of Who May Be Targeted

Some scholars and practitioners have criticized the theory of continuous combatant function as expanding the category of who may be targeted without placing sufficient temporal or geographic limits. For example, in his report as then-U.N. Special Rapporteur, Philip Alston argues that “the ICRC’s Guidance raises concern from a human rights perspective because of the ‘continuous combat function’ (CCF) category of armed group members who may be targeted anywhere, at any time.” Alston also emphasizes that “[c]reation of the CCF category also raises the risk of erroneous targeting of someone who, for example, may have disengaged from their function.”¹⁰³ Lubell argues that the continuous combatant function approach “is, in effect, a form of having the cake and eating it—the state can attack group members whenever it sees fit just as if they were combatants under the laws of international armed conflict, but is under no obligation to give them prisoner of war status upon capture.”¹⁰⁴

(c) Concerns that the Continuous Combat Function Applies too Narrowly

Other scholars argue, to the contrary, that the ICRC’s definition of the continuous combat function is too narrow. They criticize the definition as limited to individuals who are members of organized armed groups—excluding financial contributors, religious and political leaders, for

⁹⁹ ICRC Interpretive Guidance, *supra* note 73, at 1002.

¹⁰⁰ *Id.* at 1007.

¹⁰¹ *Id.* at 1036.

¹⁰² Melzer, *Targeted Killings in International Law*, *supra* note 72, at 320-21.

¹⁰³ Alston, *Study on Targeted Killings*, *supra* note 9, ¶¶65-66.

¹⁰⁴ Lubell, *supra* note 9, at 150.

instance, who would still only be targetable for as long as they were directly participating in hostilities.¹⁰⁵ Practitioners like Brigadier General Kenneth Watkin argue that the definition of the continuous combat function should include those who perform support functions such as intelligence gathering, maintaining communications or conducting logistics.¹⁰⁶

Bill Boothby, another practitioner, argues that rather than strict durational limits on loss of protection from direct participation, there should be a distinction between “isolated and sporadic acts by civilians, and . . . repeated or persistent acts of [direct participation in hostilities].” For Boothby, a civilian involved in isolated or sporadic acts would regain status after each act, but a civilian involved in repeated or persistent acts would lose protection “while such persistent or repeated involvement” and regain protection only once he affirmatively disengages from the conflict.¹⁰⁷

(d) Concerns Regarding the Practicability of the Continuous Combat Function Approach

Several scholars have expressed concern about the practical utility of the continuous combatant function standard. They argue that, in practice, it will be difficult to distinguish between civilians directly participating in hostilities and members of an organized armed group with a continuous combatant function.¹⁰⁸ Professor Michael Schmitt, for example, queries how an attacker can possibly know whether an individual—identified as having engaged in hostilities in the past—is engaging merely “periodically” or frequently enough to meet the continuous combatant standard.¹⁰⁹ Schmitt suggests the categorization is unwieldy because in practice, most attacks will be launched against groups of people—rather than individuals—or in time-sensitive circumstances where identification of an individual’s function will be highly difficult.¹¹⁰

C. Questions left unanswered and implications of the debate on who may be targeted

The range of positions we have described, related to the continuous combatant function standard and direct participation in hostilities, demonstrate the need for clarity regarding the government’s legal standards for who may be targeted. While questions about the applicability of the principle of distinction are certainly not unique to drone strikes, the questions arise with greater urgency because of the targeting operations for which drones are commonly used. As Ryan Vogel, Foreign Affairs Specialist at the U.S. Department of Defense, has observed:

¹⁰⁵ See, e.g., Bill Boothby, “*And For Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. Int’l L. & Pol. 741, 753 (2010).

¹⁰⁶ Watkin, *supra* note 89, at 691.

¹⁰⁷ Boothby, *supra* note 105, at 758-59.

¹⁰⁸ Schmitt, *supra* note 81, at 22-24.

¹⁰⁹ *Id.* at 23.

¹¹⁰ *Id.* at 24.

While a good number of U.S. operations in the AUMF conflict occur in traditional skirmishes with enemy forces, the United States typically uses drones to target individuals outside the traditional battlefield, in civilian areas where they may or may not be engaged in hostile activities at the time they are struck.¹¹¹

Moreover, “drones have targeted individuals in a number of civilian settings, including homes and urban centers.”¹¹²

Indeed, while Legal Adviser Koh described in his ASIL speech U.S. targeting of “high-level al-Qaeda leaders who are planning attacks,” especially vexing issues arise from targeting of lower-level individuals who may not have a readily identifiable role or known history. The need to recognize the realities of combat with highly organized armed groups is critical, yet many scholars and practitioners question how the government approaches the rule of distinction where—in parts of Pakistan, for instance—civilians may be caught in conflict areas. In such circumstances, ambiguity about what constitutes “direct participation” is not a theoretical debate; it puts individuals in a precarious situation of being unable to predict what conduct will make them targetable. As Christopher Rogers of the Campaign for Innocent Victims in Conflict (CIVIC) has noted in regard to Pakistan:

Residents of areas in which drones operate do not know what kind of conduct or relationships could put them at risk. Offering indirect support to militants such as food or quarter or political or ideological support would not formally qualify under international norms as “direct participation in hostilities.” However, it is entirely possible that the US considers many people to be combatants, owing to their relationships to known militants, when they are legally civilians.”¹¹³

By the same token, ambiguity about U.S. legal standards or a failure to air discussion about the perspectives described above is unfair to those conducting targeting operations, who should be armed with clear instructions when operating in a complex and rapidly changing environment, even while they are left a defined margin of discretion in applying them.

A number of questions about U.S. legal standards may warrant further discussion. Recent reports about U.S. drone strikes suggest that mid- and low-level individuals are increasingly targeted, although there are no official reports.¹¹⁴ Are these individuals targeted as direct participants in hostilities, or individuals with a continuous combatant function? Does the U.S.

¹¹¹ Ryan Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *Denver J. Int'l L. & Pol'y* 101, 122 (2010).

¹¹² *Id.*

¹¹³ See, e.g., Christopher Rogers, *Civilians in Armed Conflict: Civilian Harm and Conflict in Northwest Pakistan*, Campaign for Innocent Victims in Conflict (CIVIC) 20-22 (2010).

¹¹⁴ See Greg Miller, *Increased U.S. Drone Strikes in Pakistan Killing Few High-Value Militants*, *Wash. Post* (Feb. 21, 2011).

government assess their involvement or participation on an individual or group basis? Do the standards of non-military personnel differ from those of the military, and if so, why?

Koh described in his ASIL speech “high-level al-Qaeda leaders who are planning attacks”—are these individuals who may be targeted at any time, until they affirmatively disengage, because of their continuous combat function? If so, do these leaders include individuals who do not participate in armed activity, but promote or finance armed activity? Does the U.S. government’s proportionality assessment for targeting such individuals vary when so-called “voluntary human shields” are present, notwithstanding that family members and other such “shields” may not have directly participated in hostilities? If the government uses a standard akin to the continuous combatant function, how does it assess whether an individual has affirmatively disengaged from combat or otherwise regained civilian status? If the government does not subscribe to a theory akin to the continuous combatant function, what is its view of the “revolving door” debate related to interpretations of direct participation in hostilities?

Ambiguity on these and related questions undermines the project of assessing U.S. compliance with the principle of distinction, and developing scholarship and guidance which may assist those who conduct targeting operations.

PART III. WHO CONDUCTS TARGETING?

As part of its commitment to the rule of law, the Administration has repeatedly affirmed the importance of accountability in adhering to international law standards.¹¹⁵ As many scholars and observers have noted, the U.S. armed forces have established frameworks for promoting accountability, including institutionalized procedures for applying humanitarian law standards and investigating possible violations. Some of these procedures and standards are described in publicly released military manuals, although some rules are classified.

However, a variety of non-military personnel—including the CIA, private contractors and special operations personnel—may not be subject to the same rules and procedures as the U.S. military. Reports about drone strikes conducted by or with the participation of these actors raise questions about the suitability, as a legal and policy matter, of actors outside the regular forces of the U.S. military to conduct targeting operations somewhat regularly, and on a large scale. While such questions may arise from the involvement of all of these actors, scholars and observers have focused especially on the CIA due to the reported escalation of its drone strikes in Pakistan.¹¹⁶ We limit our discussion to issues raised by the CIA’s reported role, since research and analysis about the involvement of special operations personnel and private contractors is not as

¹¹⁵ See, e.g., Koh, ASIL Speech, *supra* note 1.

¹¹⁶ See, e.g., Salman Masood, *Pakistani General, in Twist, Credits U.S. Drone Strikes*, N.Y. Times, Mar. 9, 2011; Scott Shane, *C.I.A. to Expand Use of Drones in Pakistan*, N.Y. Times, Dec. 3, 2009; Christopher Drew, *Drones are Playing a Growing Role in Afghanistan*, N.Y. Times, Feb. 19, 2010.

developed.¹¹⁷ However, many of the legal and policy questions we identify about the CIA's reported role may also apply to that of other actors.

We begin by describing the U.S. government's statements, which do not officially acknowledge CIA-directed strikes, but provide some guidance for our discussion. Second, we describe questions scholars have raised about the status of CIA personnel under international humanitarian law. Third, we query standards applied by the CIA in its targeting practices and the CIA's adoption of procedures and arrangements envisioned by humanitarian law, such as command and oversight structures, and training and legal advisory processes. We conclude by briefly identifying the implications of CIA targeting, including the lack of clarity about the CIA's standards and generic procedures.

A. U.S. Government's Statements Relating to Targeting by the CIA

While the U.S. government has not officially confirmed or denied the involvement of the CIA in conducting targeting practices using drones, the role of CIA personnel has been widely reported.¹¹⁸ Observers suggest that the CIA almost exclusively controls targeting operations in northwest Pakistan, Yemen and Somalia—as well as playing a role in Iraq and Afghanistan.¹¹⁹ Some commentators understand the CIA to be participating “within the framework of [an] armed conflict whenever they target AUMF enemies,” i.e., individuals whose targeting is purported to

¹¹⁷ For a discussion of these issues, see Alston, *Study on Targeted Killings*, *supra* note 9, ¶18; Mary Ellen O'Connell, *Drones II – Mary Ellen O'Connell Testimony Submitted to U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs, Second Hearing on Drone Warfare*, April 28, 2010 [hereinafter O'Connell Testimony] at 6; Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 *Harv. Nat'l Security J.* 5, 7 (2010); ICRC Interpretive Guidance, at 993; Individual Contractors and Civilian Employees, Expert Meeting on the Notion of “Direct Participation in Hostilities under IHL” (Geneva, 23 to 25 October 2005). The U.S. recently stated, in a report to the U.N. Human Rights Council, that “contractors are not authorized to engage in direct hostilities or offensive operations or to commit assassinations.” See U.S. Response to UN Human Rights Council Working Group Report, March 10, 2011, <http://www.state.gov/g/drl/upr/157986.htm>.

¹¹⁸ See e.g., Jane Mayer, *The Predator War: What Are the Risks of the CIA's Covert Drone Program?* *New Yorker*, Oct. 26, 2009; Christopher Drew, *Drones are Weapons of Choice for Fighting Qaeda*, *N.Y. Times*, Mar. 16, 2009.

¹¹⁹ See e.g., Richard W. Murphy & Afsheen John Radsan, *Measure Twice, Shoot Once: Higher Care for CIA Targeting*, William Mitchell Legal Studies Research Paper No. 2010-14, Texas Tech Law School Research Paper No. 2010-25, 2 (June 16, 2010); Peter Baker, *Obama's War Over Terror*, *N.Y. Times*, Jan. 10, 2010 (reporting authorization of increased drone use in the Pakistan border as well as in Yemen and Somalia); Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *Denv. J. Int'l. L. & Pol'y.* 101, 109 (stating that “in countries such as Pakistan, Somalia, and Yemen...the United States has resorted to territorial incursions through drone strikes”).

be authorized by the Authorization for the Use of Military Force, discussed in Part I.¹²⁰ The CIA's role has been the subject of congressional hearings.¹²¹

Legal Adviser Koh's ASIL speech did not explicitly address the involvement of the CIA in conducting targeting practices. However, some observers have interpreted his comments as seeking to provide assurance about the CIA's level of care in conducting targeting operations.¹²²

While the Administration's silence about the CIA's operations is unsurprising given their covert nature, some observers have expressed concern about the government's failure to address the CIA's understanding, integration and application of humanitarian law principles, as we set out below.

B. Concerns Related to Humanitarian Law Raised by CIA Targeting

Many scholars and experts agree that international humanitarian law does not prohibit the CIA, as a per se matter, from conducting targeting operations. However, they have varying perspectives about the legal and policy implications of non-military personnel conducting targeting practices in an armed conflict. Areas of debate include: (1) the legal status of CIA personnel conducting targeting practices in an armed conflict; (2) the CIA's standards for conducting targeting practices under humanitarian law; and (3) the command and oversight structures and training programs adopted by the CIA. Government clarification on these issues would foster informed and necessary debate on the legal and policy implications of the CIA's role in drone strikes.

1. What concerns arise from the CIA's status under international humanitarian law, as non-military personnel conducting targeting practices in armed conflict?

¹²⁰ Vogel, *supra* note 111, at 136 (stating that "the U.S. government has made clear that it considers itself at war in Afghanistan, Iraq and with the parties contemplated by the [Authorization for the Use of Military Force]").

¹²¹ See e.g., David Glazier, *Drones II* – David Glazier Testimony Submitted to U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs, Second Hearing on Drone Warfare, April 28, 2010 [hereinafter Glazier Testimony]; Michael Lewis, *Drones II* – Michael Lewis Testimony Submitted to U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs, Second Hearing on Drone Warfare, April 28, 2010 [hereinafter Lewis Testimony]; O'Connell Testimony, *supra* note 117; Afsheen John Radsan, *Loftier Standards for the CIA's Remote-Control Killing*, Statement for the House Subcommittee on National & Security Affairs, Washington D.C., April 28, 2010 [hereinafter Radsan Testimony]; Hina Shamsi, *Drones II* – Hina Shamsi Testimony Submitted to U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs, Second Hearing on Drone Warfare, April 28, 2010 [hereinafter Shamsi Testimony].

¹²² See, e.g., Afsheen John Radsan, *Loftier Standards for the CIA's Remote-Control Killing*, Statement for the House Subcommittee on National & Security Affairs, Washington D.C., 5 (May 2010) (stating that Legal Adviser Koh's comments were "obviously intended to reassure an uncertain audience about CIA activities.").

International humanitarian law's bedrock distinction is between combatants and civilians. However, "combatant" status exists only in international armed conflict (see Part II). Accordingly, in a non-international armed conflict the relevant distinction is between members of the armed forces and civilians.¹²³ Whether the government regards the CIA as members of the armed forces or civilians directly participating in hostilities is unknown.

Humanitarian law defines the armed forces of a party to a conflict as consisting of "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party."¹²⁴ Some experts have contended that CIA personnel, as employees of a civilian agency, cannot be considered members of the armed forces.¹²⁵ The ICRC Interpretive Guidance suggests that, for purposes of the principle of distinction, whether CIA personnel are armed forces is a matter of domestic law.¹²⁶

Hypothetically, the U.S. government could incorporate the CIA into its armed forces, but there is no indication that it has done so. To the contrary, as Lieutenant Colonel Mark Maxwell notes, "paramilitary operatives are not members of the Armed Forces and cannot be incorporated into the force by some procedural fiat" since "[u]nder congressional dicta, an individual must meet specific criteria to be a member of the U.S. Armed Forces and bind[] himself, via contract to certain obligations."¹²⁷ The U.S. government has also not publicly discussed whether CIA personnel should be considered *de facto* members of the armed forces, in light of their authorization to conduct targeting operations.¹²⁸

Another consideration is that Additional Protocol I, which governs international armed conflict, requires a party to "notify" other parties to the conflict if it "incorporates a paramilitary

¹²³ See *supra* Part II; ICRC Customary Law Database, *supra* note 69, Rule 3 ("Definition of Combatants" and Rule 5 ("Definition of Civilians"; Additional Protocol I, *supra* note 69, arts. 43, 50.

¹²⁴ Additional Protocol I, *supra* note 69, art. 43 (1); Rule 4 of the ICRC Study on customary international humanitarian law notes that "[f]or purposes of the principle of distinction" this definition "may also apply to State armed forces in non-international armed conflicts." ICRC Customary Law Database, *supra* note 69, Rule 4.

¹²⁵ See Part II; Alston, *Study on Targeted Killings*, *supra* note 9, ¶70; Glazier Testimony, *supra* note 121; Shamsi Testimony, *supra* note 121, A.F. Radsan & R. Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing*, 1, Texas Tech Law School Research Paper No. 2010-25; Thynne, *supra* note 13, at 164 n.28.

¹²⁶ See ICRC Interpretive Guidance, *supra* note 73, at 1011 ("for contractors and employees who, to all intents and purposes, have been incorporated into the armed forces of a party to the conflict, whether through a formal procedure under national law or de facto by being given a continuous combatant function").

¹²⁷ Mark David "Max" Maxwell, *The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections*, Military Review 20-21 (Sept.-Oct. 2004).

¹²⁸ See ICRC Interpretive Guidance, *supra* note 73, at 1011 n.71 (noting that "[t]he prevailing view expressed during the expert meetings was that, for the purposes of the conduct of hostilities, private contractors and employees authorized by a State to directly participate in hostilities on its behalf would cease to be civilians and become members of its armed forces under [humanitarian law], regardless of incorporation").

or armed law enforcement agency into its armed forces.”¹²⁹ However, this provision is not regarded as customary law, which would apply to non-international armed conflict. Moreover, notification is a legal obligation, not a constitutive element of incorporation into armed forces. Nonetheless, it is notable that state practice supports formal, open incorporation of paramilitary or armed law enforcement agencies, rather than secret incorporation.¹³⁰ Thus, as Schmitt has emphasized, “non-incorporated paramilitary and law enforcement agencies are civilian in nature for the purposes of humanitarian law.”¹³¹

If they are not members of the armed forces, CIA personnel could be considered civilians directly participating in hostilities. Indeed, a wide spectrum of commentators regard them as such, although their analyses vary.¹³² Many legal consequences would follow, which the U.S. government might be loath to recognize.¹³³ As civilians directly participating in hostilities, CIA personnel would not be immune from prosecution under domestic law for their conduct, in the U.S. or any other country.¹³⁴ CIA personnel, like members of the armed forces, can be prosecuted for war crimes if they fail to abide by the laws of war, including those applicable to international armed conflicts.¹³⁵ Individuals liable for war crimes include “the author, as well as those who authorized [the act].”¹³⁶

¹²⁹ Additional Protocol I, *supra* note 69, art. 43(4).

¹³⁰ See ICRC Customary Law Database, *supra* note 69, Rule 4.

¹³¹ Michael Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 379 Chi. J. Int'l L. 511 (2005).

¹³² See, e.g., Vogel, *supra* note 111, at 134 (concluding that “[e]ven under a liberal reading of Article 4 from GC III, the CIA would not meet the requirements of lawful belligerency as a militia or volunteer corps”); Gary Solis, *CIA Drone Attacks Produce America’s Own Unlawful Combatants*, Wash. Post, Mar. 12, 2010 (“[I]t makes no difference that the CIA civilians are employed by, or in the service of the U.S. government or its armed forces. They are civilians”); Mary Ellen O’Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 Case W. Res. J. Int'l. L. 325, 328 (2003) (concluding that CIA members are not members of the armed forces because they do not carry weapons openly).

¹³³ Some observers have argued that CIA personnel conducting targeting practices are in violation of the laws of war because they are “unlawful combatants,” a status category adopted under the previous administration’s interpretation of the law of war, but rejected by most humanitarian law experts. See Military Commissions Act of 2006, Pub. L. 109-336, 120 Stat. 2600 (amended by the Military Commission Act of 2009, 10 USCA §948a) (defining “unlawful combatant” and establishing procedures for the trial of such individuals in military commissions); Solis, *supra* note 132; Vogel, *supra* note 111, 134. For a discussion of scholarship rejecting this term, see Lubell, *supra* note 9, at 143-46.

¹³⁴ See Alston, *Study on Targeted Killings*, *supra* note 9, ¶71; ICRC Interpretive Guidance, *supra* note 73, at 1045. *But see id.* at 1011 n.71 (nothing that as a historical matter, “direct participation in hostilities with the authority of a State has always been regarded as legitimate and, as such, exempt from domestic prosecution”).

¹³⁵ See Melzer, *Targeted Killings in International Law*, *supra* note 72, at 329 n.124.

¹³⁶ Alston, *Study on Targeted Killings*, *supra* note 9, ¶72; see First Geneva Convention, art. 49 (requiring parties to enact legislation providing penal sanctions “for persons committing, or ordering to be committed, any of the grave breaches”); Second Geneva Convention, art. 50 (same); Third Geneva Convention, art. 129 (same); Fourth Geneva

2. Do CIA rules and standards reflect humanitarian law principles governing the conduct of hostilities?

In addition to the principle of distinction, discussed in Part II, the conduct of targeting practices must respect all the rules applicable in armed conflict, including those relating to proportionality, military necessity, humanity and precautionary measures. The practice of U.S. armed forces is reflected in U.S. military manuals describing these standards, but whether the CIA has adopted these standards, together with procedures for complying with them, is unclear.

(a) Humanitarian Law Standards & the U.S. Military

Two important limitations on permissible force in armed conflict are the principles of military necessity and proportionality. The ICRC has described the customary law principle of proportionality as prohibiting “[l]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹³⁷ The principle of military necessity, defined in the Lieber Code (1863) and subsequent military manuals, requires that force in armed conflict be lawful according to the modern law and usages of war, and necessary for the achievement of the ends of the war.¹³⁸

The principles of necessity and proportionality are “subject to the elementary considerations of humanity.”¹³⁹ This principle is reflected in Article 22 of the Hague Convention IV, which affirms that the “right of belligerents to adopt means of injuring the enemy is not unlimited.”¹⁴⁰ Finally, to give effect to these principles, humanitarian law requires that those planning, deciding and conducting attacks take precautionary measures to minimize incidental harm to civilians.¹⁴¹

These standards of humanitarian law are reflected in the manuals of the U.S. armed forces,

Convention, art. 146 (same); *see also* ICRC Customary Law Database, *supra* note 69, Rule 152 (describing state practice supporting application of these provisions to international and non-international armed conflicts).

¹³⁷ ICRC Customary Law Database, *supra* note 69, Rule 14; *see also* Additional Protocol I, *supra* note 69, arts. 51(5)(b), 57, 58; *Prosecutor v. Kupreškić*, Judgment (Trial Chamber), IT-95-16-T, ICTY (Jan. 14, 2000), ¶524 (describing the “principle of proportionality, whereby an incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained” as “now part of customary law” where it “does not appear to be contested by any State, including those which have not ratified the Protocol”).

¹³⁸ *See* Instruction for the Government of Armies of the United States in the Field (Lieber Code), prepared by Francis Lieber, 24 April 1863, art. 14 [hereinafter Lieber Code]; Annex to Hague Convention IV - Laws and Customs of War on Land: 18 October 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461, entered into force Jan. 26, 1910, art. 23 [hereinafter Annex to the 1907 Hague Convention IV].

¹³⁹ *See Kupreškić*, Judgment (Trial Chamber), IT-95-16-T, at ¶524.

¹⁴⁰ Annex to the 1907 Hague Convention IV, *supra* note 138, art. 22.

¹⁴¹ *See* Additional Protocol I, *supra* note 69, art. 57. For a discussion of the principle of precaution as customary law, *see* ICRC Customary Law Database, *supra* note 69, Rule 15; *Kupreškić*, Judgment (Trial Chamber), IT-95-16-T, at ¶524.

directives and reports on military operations.¹⁴² The Department of Defense directive providing for a “Law of War Program” requires members of Department of Defense components to “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”¹⁴³ Manuals specifically reference and discuss humanitarian law standards. Although it is not official U.S. policy, the Operational Law Handbook for judge advocates of the U.S. armed forces includes detailed discussions of humanitarian law principles. For example, in discussing the principle of proportionality, it provides specific guidance on assessing “knock-on effects from an operation,” e.g. the impact of shutting down an electrical grid on the sanitary water supply and consequent health of civilians.¹⁴⁴ The U.S. Army Field Manual on counterinsurgency (COIN) states that “[p]roportionality and discrimination require combatants not only to minimize the harm to non-combatants but also to make positive commitments to: [p]reserve noncombatant lives by limiting the damage they do” and to “[a]ssume additional risk to minimize potential harm.”¹⁴⁵ Standards for taking precautionary measures are also reflected in U.S. military manuals and government reports.¹⁴⁶

(b) Humanitarian Law Standards & the CIA

Observers have noted that, in contrast, whether the CIA has directives, manuals and procedures reflecting humanitarian law principles is unknown.¹⁴⁷ While the president may not authorize covert actions that violate domestic law, there is no parallel statutory requirement related to international law.¹⁴⁸ Thus, some commentators appear to regard the CIA as free from

¹⁴² See generally ICRC Customary Law Database, *supra* note 69; U.S. Practice, http://www.icrc.org/customary-ihl/eng/docs/v2_cou_us.

¹⁴³ See Dep’t of Defense, Directive 2311.01E, “DoD Law of War Program,” §4 (May 9, 2006; certified current as of Feb. 22, 2011), §4, available at www.dtic.mil/whs/directives/corres/pdf/231101e.pdf; see also Chairman of the Joint Chiefs of Staff Instruction, Implementation of the DoD Law of War Program, CJCSI 5810.01D (April 30, 2010), available at www.dtic.mil/cjcs_directives/cdata/unlimit/5810_01.pdf.

¹⁴⁴ See U.S. Army Judge Advocate General’s Legal Center & School, Operational Law Handbook 147-48 (2010), available at www.jagcnet.army.mil.

¹⁴⁵ U.S. Dep’t of Army, Field Manual, Counterinsurgency (COIN), FM 3-24, MCWP 3-33.5, PP 7-30, PP D-11, ¶7-30.

¹⁴⁶ See, e.g., United States, Commanders Handbook on the Law of Naval Operations, NWP 1-14m/MCWP 5-2.1/COMDTPUB P5800.7 issued by Dep’t of Navy et al, § 8.1.2.1 (1995) (requiring naval commanders to “take all reasonable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force” and specifying that “[t]he commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and other damage”) (cited in ICRC Customary Law Database, *supra* note 69, U.S. Practice Relating to Rule 15).

¹⁴⁷ See e.g., Alston, *Study on Targeted Killings*, *supra* note 9, ¶93; O’Connell Testimony, *supra* note 117; Radsan Testimony, *supra* note 121.

¹⁴⁸ See War and National Defense, National Security: Presidential Approval and Reporting of

constraints imposed by the laws of armed conflict. One practitioner notes that while the Department of Defense “is legally bound to execute its military operations in accordance with the laws of armed conflict...the CIA, however, is under no similar requirement regarding international law,” a legal void which “provides the U.S. with tremendous flexibility when it implements foreign policy.”¹⁴⁹

Although some practitioners suggest that it is reasonable to presume that the CIA applies the same standards as the military,¹⁵⁰ the context of CIA strikes may make clarification of its legal standards especially appropriate. In particular, a major source of controversy regarding CIA strikes in northwest Pakistan is the reporting of more than a thousand deaths from about 200 drone strikes since 2004. The veracity of these reports, particularly the number of “civilian” deaths, is subject to debate; indeed, no large-scale study of drone strikes in northwest Pakistan has relied on on-the-ground reporting, as opposed to sourcing through multiple, corroborative accounts, making well-documented, accurate and legally specific assessments of who is killed a rarity.¹⁵¹ Putting aside these debates, what is significant is that the reports of large-scale deaths, whether of “civilians” or “militants,” contrast with descriptions of the precise nature of strikes, and more broadly, the narrative of drone strikes, i.e., strikes against a carefully selected, limited number of “high-value” targets.

The CIA’s legal standards could provide some explanation for the gulf between the depiction of larger-scale deaths and depiction of a limited number of precise strikes against high-value targets. For example, if several hundreds of individuals have been killed, but the CIA views most of the individuals as lawfully targeted under the principle of distinction, then its interpretation of who directly participates in hostilities may be expansive, or it may rely on a different theory of targetability, akin to the continuous combatant function (see Part II). On the other hand, if the reported deaths include a large number of individuals whom the CIA would likely categorize as civilians not directly participating in hostilities, then its legal standard for proportionality and its

Covert Actions, 50 U.S.C. §§ 413b(a) and (a)(1) (prohibiting the president from issuing a finding to authorize covert action, if that action “would violate the Constitution or any statute of the United States”).

¹⁴⁹ Kathryn Stone, Col. U.S. Army, ‘*All Necessary Means*’ – *Employing CIA Operatives in a Warfighting Roles Alongside Special Operations Forces*, U.S. Army War College Strategic Research Project 16 (2003), available at www.fas.org/irp/eprint/stone.pdf.

¹⁵⁰ See Jenks, *supra* note 12, at 670; Raul “Pete” Pedrozo, International Law Department, Naval War College, Remarks at Panel III The Changing Character of Weapons Systems: Unmanned Systems/Unmanned Vehicles, International Law Conference 2010, Naval War College (June 22-24, 2010) (video available at <http://www.usnwc.edu/Events/International-Law-Conference-2010.aspx>).

¹⁵¹ The most well-reputed large-scale study of drone strikes is a frequently updated report by the New America Foundation, a Washington D.C.-based think tank, based on an analysis of news accounts, rather than its own field research. As of March 2011, the New America Foundation reported between 1,408 and 2,242 individuals killed, “of whom around 1,130 to 1,804 were described as militants in reliable press accounts.” See New America Foundation, *The Year of the Drone*, <http://counterterrorism.newamerica.net/drones> (last updated March 14, 2011); see also *The Long War Journal* (Sept. 21, 2010), <http://www.longwarjournal.org/pakistan-strikes.php>.

precautionary measures may provide some explanation.

3. What concerns arise from the CIA’s structural limitations as a covert civilian agency?

Scholars and observers have also raised concerns about whether the CIA has the structures, processes and oversight mechanisms required to effectively verify compliance with international humanitarian law standards. One central concern is that humanitarian law requires a degree of transparency and institutionalized legal standards that are anathema to the CIA, due to its covert nature. As noted by human rights advocate Hina Shamsi, “[u]nlike the military, the laws of war are not part of the ‘DNA’ of the CIA, and it is this fact that raises legal concerns.”¹⁵²

(a) Required command and control structure under humanitarian law

Under international humanitarian law, the armed forces are required to establish internal structures which ensure that personnel who undertake targeting practices are in full compliance with the law. Additional Protocol I requires that members of the armed forces are “subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.”¹⁵³ The U.S. military recognizes this requirement in its manuals.¹⁵⁴ Department of Defense directives establish procedures for the prompt investigation of possible violations of the laws of war, including preservation of evidence and reporting of incidents to established “command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities.”¹⁵⁵

In contrast, experts have expressed concerns about whether the CIA, as a covert agency, can effectively establish a command and control structure with the necessary requirements of oversight, accountability and transparency for the regulation of combat functions in armed conflict.¹⁵⁶ Afsheen John Radsan, former Assistant General Counsel at the CIA, has emphasized the effects of the covert nature of the agency, noting that, “since the CIA is given leeway to operate in the shadows, a countervailing check is needed. Even if the Obama administration is carrying out targeted killing accurately...the potential for abuse stays with us.”¹⁵⁷

¹⁵² Shamsi Testimony, *supra* note 121.

¹⁵³ Additional Protocol I, *supra* note 69, art. 43(1).

¹⁵⁴ See, e.g., Commander’s Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7 §5.3 (1995) (cited in ICRC Customary Law Database, *supra* note 69, U.S. Practice Relating to Rule 4) (defining combatants as “all members of the regularly organized armed forces of a party to the conflict...as well as irregular forces who are under responsible command subject to internal military discipline, carry their arms openly, and otherwise distinguish themselves clearly from the civilian population”).

¹⁵⁵ Dep’t of Defense, Directive 2311.01E, “DoD Law of War Program” (May 9, 2006, certified current as of Feb. 22, 2011), §4, available at www.dtic.mil/whs/directives/corres/pdf/231101e.pdf.

¹⁵⁶ See Alston, *Study on Targeted Killings*, *supra* note 9, ¶73; Radsan Testimony, *supra* note 121; Shamsi Testimony, *supra* note 121.

¹⁵⁷ Radsan Testimony, *supra* note 121.

Some commentators have proposed significant policy reform measures, focused on oversight and accountability. Radsan suggests requiring “that the CIA be certain beyond reasonable doubt that a targeted person is a legitimate object of direct attack before carrying out a drone strike” and that “the CIA’s Inspector General . . . review every CIA drone strike, including the agency’s compliance with a checklist of standards and procedures” with the “results of these reviews . . . made as public as consonant with national security.”¹⁵⁸ Kenneth Anderson argues that the Administration should “establish a formal category of unacknowledged but also obviously not covert operations by the CIA, with their own mechanisms of Congressional oversight and accountability.”¹⁵⁹

Some experts question whether measures that fall short of structural change would be sufficient. Michael Lewis, a former U.S. air force officer and current professor at Ohio Northern University, testified before the House Sub-Committee on National Security and Foreign Affairs that reforms short of transformational measures, such as formal incorporation of the CIA into the armed forces or “other measures clearly establishing the CIA’s accountability for law of armed conflict violations,” will not mitigate concerns.¹⁶⁰

More generally, human rights advocates have cautioned that the CIA does not operate within a framework that places sufficient emphasis on ensuring compliance with humanitarian law, making violations more likely.¹⁶¹

(b) Required Training and Legal Advisers under Humanitarian Law

Another concern about the CIA’s role stems from ambiguity about the legal training of personnel and the sufficiency of legal advising.

Humanitarian law requires training and legal advisers to be made available to the armed forces. Additional Protocol I requires that parties include the study of the Conventions and Protocols “in their programmes of military instruction.”¹⁶² Legal advisers are required to “ensure that legal advisers are available, when necessary, to advise military commanders at the

¹⁵⁸ Radsan & Murphy, *supra* note 125, at 1.

¹⁵⁹ Kenneth Anderson, *Drones II* –Testimony Submitted to U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs, Second Hearing on Drone Warfare, April 28, 2010, ¶23 [hereinafter Anderson Testimony].

¹⁶⁰ Lewis Testimony, *supra* note 121.

¹⁶¹ See, e.g., Alston, *Study on Targeted Killings*, *supra* note 9, ¶73.

¹⁶² Additional Protocol I, *supra* note 69, art. 83(1). Article 83(2) further requires that “[a]ny military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.” *Id.*, art. 83(2). The ICRC regards these provisions as customary law, governing both international and non-international armed conflict. See ICRC Customary Law Database, *supra* note 69, Rule 142.

appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.”¹⁶³

The U.S. military has a strong tradition of training its personnel on the laws of war, and maintains a highly experienced and sophisticated cohort of military lawyers who are trained to respond quickly but expertly to targeting situations. This tradition of training and robust legal advising is reflected in directives and military manuals. For example, the Department of Defense requires military departments to “implement effective programs to prevent violations of the law of war, including law of war training and dissemination.”¹⁶⁴ It also requires that commanders of combatant commands ensure that “all plans, policies, directives, and rules of engagement used by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with [the] Directive and the law of war obligations of the United States.”¹⁶⁵ The U.S. Naval Handbook requires that “[n]avy and Marine Corps judge advocates responsible for advising operational commanders are especially trained to provide officers in command with advice and assistance in the law of armed conflict on an independent and expeditious basis.”¹⁶⁶

Military commanders who decide how to apply humanitarian law standards, particularly in complex and uncertain situations where time is of the essence, rely on their experience and specific training, as well as the sophisticated analysis provided by seasoned military lawyers. It is not known whether CIA personnel making these determinations are trained in the law of armed conflict with the same rigor, or able to access appropriately qualified legal advisers.

C. Questions Left Unanswered and Implications of the Debate on Who Conducts Targeting

The government has not directly responded to concerns about the CIA’s involvement in drone strikes; this is unsurprising, but many observers agree that the silence is worrisome in light of the reportedly increasing number of CIA drone strikes. CIA spokespersons have indicated that they cannot confirm or deny the agency’s involvement in drone strikes or other covert killings programs, but simultaneously contended that any such programs have led to no more than 40 or 50 civilian casualties and that they are governed by robust domestic accountability procedures.¹⁶⁷

¹⁶³ Additional Protocol I, *supra* note 69, art. 82. The ICRC regards this provision as customary law, governing both international and non-international armed conflict. *See* ICRC Customary Law Database, *supra* note 69, Rule 141.

¹⁶⁴ Dep’t of Defense, Directive 2311.01E, “DoD Law of War Program” (May 9, 2006, certified current as of Feb. 22, 2011), §5, *available at* www.dtic.mil/whs/directives/corres/pdf/231101e.pdf.

¹⁶⁵ *Id.* at §5.11.8.

¹⁶⁶ United States, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard, October 1995 (formerly NWP 9 (Rev. A)/FMFM 1-10, October 1989), § 6.1.2 (cited in ICRC Customary Law Database, *supra* note 69, U.S. Practice Relating to Rule 141)

¹⁶⁷ *See* Interim report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. No.

However, particularly where the CIA reportedly operates in northwest Pakistan, it is impossible to independently verify reports of civilian casualties, since human rights monitors and foreign press do not have access to affected areas.¹⁶⁸

The long-term consequences of CIA personnel undertaking so significant a role in targeting operations are unknown, if only because the situation is somewhat unprecedented.¹⁶⁹ Few have queried, at least publicly, whether the CIA is suited for large-scale and frequent activity that, in other circumstances, would likely be in the U.S. armed forces' purview. Nor has there been much public discussion about whether the CIA's increasing role compromises the work of the U.S. armed forces, in terms of their reputation, self-perception or long-term development. Instead, many observers have emphasized that whatever the negative consequences of the CIA's reported operations in northwest Pakistan, the practical alternative of ground attacks by the Pakistani army would be worse for civilians in the area. CIA Director Leon Panetta's assertion that drones are the "only game in town," in discussions among observers, gives way to a sense that the CIA is the only game in town.

These debates obscure rather than inform discussions about the implications of CIA targeting related to humanitarian law. Whatever the policy imperatives of CIA involvement, the Administration's failure to disclose the CIA's status and structures undercuts its message of transparency and adherence to the rule of law. Even if it chose to maintain deniability about the CIA's role in northwest Pakistan, the government could describe its position on some of the issues we have described. Among the questions it could answer without describing intelligence sources or methods are: Does the US government consider CIA personnel who are conducting targeting practices in an armed conflict to be civilians directly participating in hostilities? If not, how does the US government define their status? Does the CIA have the command and control structures, and training programs, envisioned by humanitarian law?

There are reasons for intelligence personnel to welcome such disclosure, rather than object to it. As Anderson has emphasized, "[t]he officers of the CIA who carry out these operations, whether planning or execution, merit the public acknowledgement that what they do is legal."¹⁷⁰ But it is impossible to assess the Administration's arguments for the legality of CIA activities, without knowing what its legal standards and rationales are.

Disclosure could also address or facilitate debate on general concerns about the CIA's fitness for targeting operations. As we have noted, while the U.S. military's manuals and procedures

A/65/321 (Aug. 23, 2010), ¶14 (citing Peter Finn, *U.N. Official Urges U.S. to Stop CIA Drone Attacks on al-Qaeda and Taliban*, Wash. Post, June 3, 2010; David Cloud, *U.N. Report Faults Prolific Use of Drone Strikes by U.S.*, L.A. Times, June 3, 2010; Jonathan Adams, *US Defends Unmanned Drone Attacks After Harsh UN Report*, Christian Science Monitor, June 3, 2010).

¹⁶⁸ *Id.*

¹⁶⁹ However, CIA paramilitary operatives have long operated with U.S. military forces in Korea, Vietnam, and the Gulf War. See Stone, *supra* note 149, at 10 (2003).

¹⁷⁰ Anderson Testimony, *supra* note 159, ¶22.

reflect humanitarian law concerns, the CIA's adoption or integration of humanitarian law standards is unknown. Would the structures envisioned by humanitarian law appropriately map onto to the CIA? Does the CIA have the institutional capability to routinely take appropriate precautionary measures, and to adjudge standards such as proportionality? Generalized assurances of the legality of U.S. operations do not address whether the CIA, as a covert organization, is capable of the accountability measures envisioned by humanitarian law. Putting aside the requirements of humanitarian law, it is also unclear whether mechanisms and structures exist which enable external oversight that may be appropriate as a policy matter, either by Congress or the public, although scholars like Radsan are beginning to shed light on the issue.

CONCLUSION: DRONE TECHNOLOGY & CALLS FOR CLARITY

Increasing use of drone technology is not the only, or even the dominant source of debate about U.S. standards related to the scope of the armed conflict, who may be targeted and who conducts targeting. Indeed, it is fair to question the focus on drone technology as emblematic of the host of issues we have discussed; many of the scholarly debates we have identified are more fundamental, and have wider implications. Still, it is hard to dispute that drone technology has been an impetus for debate on the U.S. government's legal rationales and standards. Perhaps this is because drone technology challenges our conception of the range of possibilities for which various legal regimes must answer. As Radsan notes:

Killer drones are the future of warfare. Viewed from one angle, this development has few legal implications insofar as drones merely provide another tool for the longstanding military practice of killing enemies from the air. But the drone's extraordinary capabilities have greatly expanded the government's range for finding, tracking, and killing human targets.¹⁷¹

The last aspect of drone technology—the capacity to kill—has prompted the most debate, especially on the need for government clarity. Many scholars and advocates with divergent views on the substantive debates we have discussed nevertheless agree that clarity is warranted. For example, Ken Andersen, who has taken provocative positions on U.S. use of force based on self-defense, has emphasized that “Congress and the administration need to offer standards to regulate the practice of targeted killing.”¹⁷² Chesney has argued that “[t]he U.S. government would do well to maximize their transparency, as so many have urged, if only by providing better information to the public about the abstract nature of and standards associated with its use of lethal force outside of conventional combat contexts.”¹⁷³ These scholars make for odd bedfellows with human rights groups like Human Rights Watch,

¹⁷¹ Murphy & Radsan, *supra* note 119, at 4.

¹⁷² Kenneth Anderson, *Targeted Killing in US Counterterrorism Strategy and Law*, Series on Counterterrorism and American Statutory Law, at 34 (May 2009).

¹⁷³ Chesney, *supra* note 8, at 57.

which has likewise argued that the Administration has failed to “clearly explain[] where it draws the line between lawful and unlawful targeted killing,” although “it is both its obligation and in its self-interest to do so.”¹⁷⁴

Commentators who agree on the need for clarity have varying policy motivations. For example, many observers appear to agree that greater clarity about U.S. standards is warranted by recent reports of drone strikes against mid- or low-level militants, rather than high-level leader with known histories. While some observers are concerned that this trend heightens the need for oversight and accountability, others focus on the need to provide practical guidance to those conducting targeting operations. Some commentators focus on whether the government owes greater clarity on U.S. legal standards to the personnel it asks to conduct targeting operations, as a matter of fairness and to protect them from legal claims or criminal investigations. As we have noted, many commentators share the concern that the U.S. use of drone technology sets a global precedent, and that a failure to articulate specific legal constraints could, in the near-future, be cited by less law-abiding governments or groups as justification for evading accountability.

Still, the call for clarity extends beyond the use of drone technology. Its axis is the appearance of an unbounded conflict, or at least a conflict where the ambit is not readily identifiable. As we have noted, the geographical and temporal boundaries of the conflict, or whether such boundaries exist, are unknown. The identity of whom the U.S. is attacking, i.e. who qualifies as a part of al-Qaeda, the Taliban and associated forces, appears nebulous. The involvement of actors beyond the regular U.S. armed forces, who operate covertly and with little public accountability, further obscures the nature and extent of operations. Whatever drone technology means for humanitarian law generally, in this context it may counsel in favor of greater discussion—among scholars, practitioners and the government—of fundamental questions regarding humanitarian law which will persist beyond even the next, hardly fathomable generation of technologies.

¹⁷⁴ See, e.g., Human Rights Watch, *Letter to Obama on Targeted Killings and Drones* (December 7, 2010), available at: <http://www.hrw.org/en/news/2010/12/07/letter-obama-targeted-killings>.