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Jens D. Ohlin
Cornell Law School, jdo43@cornell.edu

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IS JUS IN BELLO IN CRISIS?

Jens David Ohlin[*]

ABSTRACT

It is a truism that new technologies are remaking the tactical and legal landscape of armed conflict. While such statements are undoubtedly true, it is important to separate genuine trends from scholarly exaggeration. The following Essay, an introduction to the Drone Wars Symposium for the Journal of International Criminal Justice*, catalogues today's most pressing disputes regarding International Humanitarian Law (IHL) and their consequences for criminal responsibility. These include: (i) the triggering and classification of armed conflicts with non-state actors; (ii) the relative scope of IHL and international human rights law (IHRL) in asymmetrical conflicts; (iii) the targeting of suspected terrorists under conduct- or status-based classifications that render them subject to lawful attack; (iv) the legal fate of CIA drone operators who participate in armed conflict without the orthodox privilege of combatancy conferred on members of the armed forces; and (v) the principle of proportionality as it applies to drone strikes that produce collateral damage. What emerges from this survey is a portrait of drones as a technological development that has radically escalated pre-existing tensions in IHL that first emerged with manned aerial attacks and artillery. As conflicts with non-state actors proliferate and intensify, these pre-existing tensions will continue to transform, via state practice, the reciprocity usually associated with orthodox IHL.*

INTRODUCTION

Reports abound that jus in bello is in crisis and that the putative armed conflict between the United States and al-Qaeda is itself the casus belli of the legal crisis.[1] The protestations are loud, vociferous and panicky: targeted killings against suspected terrorists have eroded respect for the principle of distinction; drone strikes violate the principle of proportionality; targeting is now based on status rather than conduct, violating deeply held principles of justice, or the reverse, violating other principles of justice. While some of these complaints may be based in reality, others are sometimes layered with exaggerations, either regarding the nature of the trans-

[*] Associate Professor of Law, Cornell Law School; member, Editorial Committee. [jdo43@cornell.edu]

[1] See M.E. O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009', in S. Bronitt, M. Gani, and S. Hufnagel (eds), *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force* (Oxford: Hart Publishing, 2012).

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gression or the clarity and universality of the original norm. If the use of drone technology against non-state actors has made anything clear, it is this: there is far less agreement regarding the application of core principles of international humanitarian law (IHL) and international criminal law (ICL) than previously thought, especially between nations that rely on aerial bombing and those that are subject to its deadly technology. In fact, the disagreements regarding the content and scope of core IHL principles predates the use of drones, and has long preoccupied international tribunals.[2] However, the drone program has thrown into stark relief a set of controversies that can now be catalogued, addressed, and possibly resolved (or at the very least rendered explicit). The task of this introduction is to catalog and explain these core areas of disagreement, liberating the individual authors of this symposium from doing so and freeing them to engage with more specific issues in greater depth.

Most of the legal issues raised by the American drone campaign are, predictably, alleged jus in bello violations, though a few issues sound in jus ad bellum. For example, human rights critics and other commentators occasionally complain that the asymmetrical nature of the lethal force of drones makes the resort to force too easy.[3] Since drones are remotely piloted, attacking forces can neutralize their intended target and risk no loss of life when their drones are deployed. The question becomes whether the asymmetrical nature of the risk offends, on a conceptual level, the basic paradigm of co-equal belligerents who meet each other on the battlefield and run the reciprocal risk of killing and dying – a paradigm encapsulated by the chivalric conception of warfare, a conception already placed under pressure by the development, in World War II, of aerial bombardment, but whose pressure has been inflated into pure displacement now that pilots are remotely housed out of harm's way. The issue of aerial risk received widespread notice when NATO required its pilots to fly above 15,000 feet when bombing Serbian targets during the conflict over Kosovo – a decision that allegedly prioritized force protection over civilian collateral damage. Indeed, not a single pilot died during the conflict, and critics complained that NATO's obsession with zero casualties impermissibly prioritized the lives of soldiers over the lives of civilians. That being said, there would be something odd about a putative rule of international law that prevented an attacking force from lowering the

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[2] See, e.g., Judgement, *Prosecutor v. Galic*, ICTY Trial Chamber, Case No. IT-98-29-T, paras. 41-61, 5 Dec. 2003 (analyzing distinction and proportionality); Judgement, *Prosecutor v. D. Milosevic*, ICTY Trial Chamber, Case No. IT-98-29/1-T, paras. 877-82 (spreading terror through targeting civilians), 12 Dec. 2007.

[3] The complaint is critically examined in K. Anderson, 'Efficiency in Bello and ad Bellum: Making the Use of Force too Easy?', in C. Finkelstein, J.D. Ohlin, and A. Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012) 374-99.

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risk to its own personnel, as it does with drones, when lowering the risk to one's own personnel does not increase the risk of collateral damage to enemy civilians as it might have in Serbia.[4]

On a more practical level, the question is whether the asymmetrical use of force, and the low risk of civilian casualties, will erode one of the automatic enforcement mechanisms of the Article 2 prohibition on the use of force in the UN Charter. In the past, the aggressive use of force in contravention of the Charter was only possible when a country risked its own personnel, thus providing a self-interested reason to comply with the legal prohibition on the use of force, in addition to more principled reasons for compliance. If aggressive force can be deployed without risk, will more nations ignore the Charter (and customary law) prohibition on the use of force? In this vein, it is perhaps sufficient to note that the problem is not new and that nuclear weapons may also be used without risk. The solution to the nuclear dilemma was the deterrent rationale expressed in the Mutually Assured Destruction Doctrine, which became a reality once nuclear weapons proliferated. The coming proliferation of drone technology may well solve the same issue again and provide an internal check on over-deployment of drone technology.

Turning now to jus in bello problems raised by targeted killings, the issues can be classified into five discrete categories: (1) the existence of a putative armed conflict with al-Qaeda; (2) the contentious relationship between IHL and IHRL; (3) whether targeted terrorists are civilians or combatants; (4) whether drone operators enjoy the privilege of combatancy; and (5) the nature of proportionality calculations when civilians are collateral victims. Each category will be addressed in order to express the full landscape of legal dispute and evaluate whether jus in bello is truly in crisis. The resulting portrait will reveal that most of these fissures pre-date the development of drone technology and are simply emblematic of a pre-existing disunity that consistently threatens the underlying reciprocity of IHL.

I. Triggering An Armed Conflict

The United States drone campaign is targeted almost exclusively at non-state actors (NSAs) such as al-Qaeda or their regional affiliates, including Al-Qaeda in the Arabian Peninsula (AQAP), al-Shabaab, and possibly in the future Al-Qaeda in the Islamic Maghreb (AQIM). According to the official

[4] Indeed, it appears plausible that the drones decrease the risk of enemy civilian casualties, though the entire issue is the subject of intense factual dispute. See G.S. McNeal, 'Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence', in C. Finkelstein, J.D. Ohlin, and A. Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012) 326-46.

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position as expressed by government officials, the US is waging an armed conflict against al-Qaeda itself – a proposition that assumes that armed conflict against an NSA is possible under international law and that such a conflict triggers the operation of IHL.[5] This is a contested proposition, with at least some scholars and foreign governments more comfortable with the view that an armed conflict may exist in (or might have existed in) Afghanistan or Iraq, by virtue of the armed conflict between the United States and the Taliban, or between the US and Saddam Hussein's government. Under this view, either international law does not countenance the possibility of armed conflict with an NSA, or if it does, al-Qaeda is not the type of organization that could be a party to a conflict. A natural extension of this view is that the US is only engaged in armed conflict in particular, geographically constrained areas, as opposed to a global armed conflict with al-Qaeda itself.[6] So under this view, the conflict with al-Qaeda is more like a non-international civil war confined to a particular country, rather than an international armed conflict that follows the belligerents.

The textual source of this debate is Common Article 3 of the Geneva Conventions, which states that protections enumerated in the provision apply to conflicts 'not of an international character' but which occur 'in the territory of a High Contracting Party'.[7] The structure of this language is not self-explanatory, but one view holds that the Geneva Conventions codify the rule that non-international conflicts are *defined* in such a way as to be geographically contained to the territory of one nation – anything that extends beyond the territory of one nation becomes an international armed conflict, so long as it is a conflict between two states. Conflicts that extend beyond the territory of one state but whose parties are not state actors fall in the hinterland between these two categories, thus prompting numerous attempts at creating a

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[5] H.H. Koh, 'The Obama Administration and International Law', Speech before the American Association of International Law, Washington D.C., 25 March 2010. Compare with J.J. Paust, 'Propriety of Self-Defense Targetings of Members of al Qaeda and Applicable Principles of Distinction and Proportionality', 18 *ILSA Journal of International & Comparative Law* (2012) 565.

[6] See C. Savage, 'At White House, Weighing Limits of Terror Fight', *New York Times*, 15 Sept. 2011 (detailing dispute between state and defense department legal advisors).

[7] See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

new taxonomy of armed conflicts, including transnational armed conflicts or internationalized armed conflicts.[8] These efforts naturally lead to a second set of questions, namely whether to import the rules of IAC or NIAC to these conflicts falling into these hybrid categories.[9]

However, there is a second potential reading of Common Article 3 and its reference to the territory of High Contracting Parties. Perhaps signatories included the language in Common Article 3 not to codify a *definition* of non-international conflicts, but rather in furtherance of their desire to use Common Article 3 to regulate non-international conflicts that occurred on their territory, while remaining silent as to the rules that would apply outside their territorial jurisdiction. This is not to suggest that no IHL principles would apply to such extra-territorial conflicts,[10] but rather to deny that the language in Common Article 3 can be taken as evidence that the drafters of the Geneva Convention meant to deny the very existence of a legal category of armed conflicts against non-state actors when that violence crosses international borders.[11]

With this in mind, what is the underlying principle behind the argument that the US cannot be engaged in an armed conflict with an NSA like al-Qaeda? It cannot be the simple claim that only nation-states are capable of being a party to an armed conflict. The very existence of non-international armed conflicts, as a legal category, indicates that armed conflicts are possi-

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[8] For a discussion, see D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012).

[9] See J.G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict', 850 *International Review of the Red Cross* (2003) 313-350.

[10] This was, regrettably, the view taken by the Bush Administration, which lead the Supreme Court in *Hamdan* to rule that Common Article 3 applied to the armed conflict against al-Qaeda because Common Article 3 was a gap-filling mechanism meant to regulate all conflicts that did not fall within the definition of international armed conflicts between states. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) ('Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning.').

[11] See *Hamdan*, supra, at 630 (citing ICRC Commentary for the proposition that 'the scope of application of the Article must be as wide as possible').

ble against non-state entities.[12] Rather, the skepticism must stem from the conclusion that al-Qaeda is not the right type of organization to be a party to an armed conflict. Is al-Qaeda sufficiently organized and hierarchical? Does it have a command structure? Is it capable of following the laws of war, as APII requires?[13] Although these are factual disputes well beyond the purview of this symposium, several observations are possible.

First, a distinction ought to be made between organizations with a command hierarchy and organizations with a *linear* hierarchy. Although IHL arguably requires the former, there is nothing in codified IHL that requires the latter.[14] Command structures can take many different geometric forms and nothing in Geneva, API, or APII requires the existence of a linear command structure analogous to the linear command structure of a traditional state army. Second, what matters is the existence of a *functional* command structure embodied in article 1 of APII; a hierarchy of individuals who give and take orders, and carry out violent operations in accordance with that command structure. Why would it matter whether that structure *looks* like the same structure of the US or German Army or the NATO High Command? Third, what matters is whether the organization is sufficiently organized that it could follow the Laws of War if it was so inclined. As it happens, there is some evidence that al-Qaeda is capable of following the Laws of War but has emphatically decided against it, in accordance with matters of strategy and its *Weltanschaaung* of a global jihad against supposed Western imperialism and unchecked secularism.

II. The War Between International Humanitarian Law and International Human Rights Law

Just as the existence of an armed conflict – the subject of the previous section – structures the entire legal analysis, so too does the deeply contentious relationship between IHL and IHRL. Adding venom to the dispute is the fact that each body of law has its own legal institutions and its own dedi-

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[12] See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadic, ICTY Appeals Chamber, 2 Oct. 1995, para. 70; Prosecutor v. Akayesu, Judgment, ICTR Trial Chamber, 2 Sept. 1998, para. 620. For a discussion, see A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press, 2010), at 123.

[13] See art. 1, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (APII), 8 June 1977.

[14] For a contrary view, see K. Ambos and J. Alkatout, 'Has "Justice Been Done"? The Legality of Bin Laden's Killing under International Law', 45 *Israel Law Review* (2012) 341, at 347.

cated personnel – human rights lawyers versus military lawyers – each with their own doctrinal allegiances. Human rights lawyers are trained to believe in the universality of human rights law, while most military lawyers are conditioned to protect the centrality and exclusivity of IHL – to, in the words of Yoram Dinstein, keep poachers off the grass.[15]

Again, American drone strikes have brought to the foreground two different paradigms that each express a different and competing relationship between IHL and IHRL. Under the first view, IHL is *lex specialis* to the more general human rights law; the specific license and regulations of IHL (i.e. the privilege of combatant immunity and the demands of the principle of distinction) are triggered during armed conflict, thus displacing the more stringent protections of human rights law, including the right to life.[16] This is not to suggest that human rights are no longer universal. Rather, it is to suggest that the *lex specialis* of IHL provides the specific codification of what human rights law demands in times of armed conflict, as the International Court of Justice has expressed the point.[17] The more general codification of human rights is simply inappropriate in times of armed conflict, requiring a different balancing of the appropriate protections in order to achieve the maximum humanization of conflict as possible. In this sense, it might be more appropriate to refer to IHL as 'Human Rights Law in Armed Conflict'.

However, a recent view has gained currency that suggests that drone strikes are governed directly by IHRL even if the protections of IHL apply, that the two bodies of law can be 'co-applied' *at the same time*, thus denying that IHL's status as *lex specialis* means that it knocks out the general law from operation.[18] Indeed, at least some scholars have suggested that *lex specialis* is 'latinized nonsense' that stands in as a promissory note for an argument that is never redeemed.[19] At the very least, it is certainly true that the

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[15] Y. Dinstein, 'Concluding Remarks: LOAC and the Attempts to Abuse or Subvert It', 87 *Int'l Studies* (2011) 483, at 488. For a discussion of this view, see D. Luban, 'Military Lawyers and the Two Cultures Problem', *Leiden Journal of International Law* (2012).

[16] On the difficulty of combining the regimes, see W. Schabas, 'Lex Specialis? Belts and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum', 40 *Israel Law Review* (2007) 592.

[17] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Reports, p. 226, § 25.

[18] See M. Milanovic, 'Norm Conflicts, International Humanitarian Law and Human Rights Law', in O. Ben-Naftali (ed), *Human Rights and International Humanitarian Law* (Oxford: Oxford University Press, 2010).

[19] See J.J. Paust, 'Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan', 19 *Journal of Transnational Law & Policy* (2009) 237, at 247 n.94.

term is deeply engrained in the Continental literature but historically absent from the American lexicon. Evaluating the co-application thesis requires a consideration of the underlying aims of each body of law and their compatibility with each other, rather than recourse to conclusory terminology whether Latin or not.

The real risk of the co-application thesis is that it involves, from the perspective of the human rights lawyer, a deal with the devil. In order to render IHRL applicable during times of armed conflict, the relevant provisions must be interpreted (or re-interpreted) to square them with the undeniable realties of IHL, especially the privilege of unfettered combatancy and the right to detain enemy combatants as POWs without trial or conviction. Simply put, IHL permits the taking of human life – often in large numbers -- in the course of securing a military objective. Neither of these principles is consistent with peacetime human rights; perhaps reinterpreting IHRL to take into account these realties is to succumb far too much to the blood and guts that military lawyers have come to expect from lawful armed conflict.[20]

The co-application thesis is especially relevant when considering the summary killing performed by a Predator drone. Are such attacks only permissible when capture and trial are impossible, as the Israeli *Targeted Killings* decision suggested?[21] Or is lethal force permissible whenever the target is lawfully selected, regardless of whether capture is feasible? On one level of the analysis, the alleged duty to capture is rendered more plausible if IHRL is co-applied with IHL; the duty to capture might stem from the importation of IHRL principles of necessity. However, the dilemma clearly predates the importation of IHRL norms into the debate of targeted killings.[22] Even within the field of IHL, there is substantial debate over the summary nature of the privilege of combatancy, and whether the principle of military necessity allows for summary killing of combatants or only allows such killing when capture is implausible.[23] This debate arguably predates the Israeli *Targeted Killings* decision and certainly predates the development of the Predator Drone by several years.

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[20] This anxiety is addressed by Milanovic, supra.

[21] HCJ 769/02 *Pub. Comm. Against Torture in Isr. v. Gov't of Isr.* 53(4) PD 459 [2005] [hereafter cited as *Targeted Killings Decision*].

[22] For a full discussion of this issue, see J.D. Ohlin, 'The Duty to Capture', 97 *Minnesota Law Review* (forthcoming), available at http://ssrn.com/abstract=2131720.

[23] For the historical view that IHL permits killing enemy combatants only if capture is not feasible, see J. Pictet, *Development and Principles of International Humanitarian Law* (1985), at 75, cited in ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, at 82 n.221.

Turning now to the application of IHRL to these attacks, the United States has long been skeptical of the extraterritorial application of human rights obligations, preferring instead to view IHRL obligations as limited to the sovereign territory of the signatory. This view is buttressed by the opening language of the ICCPR, which states in article 2 that each state party 'undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant…'.[24] If one were to take this statement literally, it would mean that nothing in the ICCPR would apply to targeted killings committed in areas outside of the sovereign territory of the United States. Although one might appeal to areas of 'de facto' control or sovereignty, such as Guantanamo Bay, there is no serious argument that the United States has either control or sovereignty of areas in Yemen or the tribal regions of Pakistan were drone strikes are launched.[25] Applying IHRL in such areas thus necessitates an argument that IHRL applies extraterritorially.

The United States has softened its stance slightly regarding co-application, but only slightly. In its most recent filing before the Human Rights Committee, the United States conceded that '[w]ith respect to the application of the Covenant and the international law of armed conflict (also referred to as international humanitarian law or "IHL"), the United States has not taken the position that the Covenant does not apply "in time of war."'[26] At first glance, this statement sounds as if it supports the co-application view. However, that conclusion might be too hasty, since the U.S. position statement continued: 'Indeed, a time of war does not suspend the operation of the Covenant to matters *within its scope of application*' (emphasis added). The question is what matters are within the scope of the Covenant's application, as opposed to within the scope of IHL. The U.S. position statement continued with this illustrative example: 'To cite but two obvious examples from among many, a State Party's participation in a war would in no way excuse it from respecting and ensuring rights to have or adopt a religion or belief of one's choice or the right and opportunity of every citizen to vote and to be elected at genuine periodic elections.'[27] Obviously, neither of

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[24] International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, Art. 6(5), S. EXEC. DOC. 36 E, 95-2, at 23 (1978), 999 UNTS 171, 175.

[25] The notion of 'de facto control' provided the basis for the U.S. Supreme Court to exercise constitutional review over detention in Guantanamo Bay in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), at 2240. See A.J. Colangelo, '"De Facto Sovereignty": Boumediene and Beyond', 77 *George Washington Law Review* (2009) 623.

[26] U.S. Department of State, Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, 30 Dec. 2011, § 506.

[27] Ibid.

these protections have much to do with the core principles of IHL regarding detention or targeting.

This suggests a final view regarding co-application that is highly relevant for its application to drone strikes. Some argue that IHL's status as a *lex specialis* means that it applies when it offers a direct rule on point, but otherwise IHRL, whether from the Covenant or another source, represents a gap-filler that plugs the holes left by IHL's porous nature.[28] In application, such debates will always hinge on a critical evaluation of whether there is – or is not – a hole in IHL that needs to be filled. In that regard, it might be helpful to distinguish between a strong and weak form of the gap-filling thesis. Under the strong form, IHRL fills any gaps left over when no *codified* rule of IHL is on point. Under the weaker form, IHRL only fills any gaps remaining when no *customary* rule of IHL governs. The weaker form therefore depends on deeply contested arguments regarding the exact scope of customary norms of IHL, though recent ICRC projects have increased the level of systematization and reporting of customary norms in this area.[29] As applied to targeted killings, this gap-filling version of the co-application thesis is particularly relevant with regard to the rules applicable in NIACs which are codified only in Common Article 3 and APII, arguably leaving substantial gaps in which IHRL might be applied. However, if one argues that IAC norms apply by virtue of *custom* in NIAC, then the available space for IHRL to 'fill the gap' is substantially reduced.

It should also be noted that international prosecutors, on the one side, and human rights lawyers, on the other, might have opposite and competing interests in this legal battle. Ever since the *Tadic* decision at the ICTY, prosecutors and judges have been arguing that legal norms have already been expanded from IAC to NIAC, thereby establishing the necessary predicate violation of IHL to trigger a war crimes conviction.[30] From the perspective of international criminal lawyers, if there is no violation of IHL, then by definition there can be no war crime, thus creating a built-in institutional bias in favor of IHL expansion. On the other hand, human rights lawyers often have the opposite interest. They seek to cabin IHL to its lowest possible ebb, thus increasing the space available for IHRL to fill the gap. That's because human rights lawyers are less concerned with prosecuting individuals

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[28] See, e.g., Y. Shany and O. Ben-Naftali, 'Living in Denial: The Application of Human Rights in the Occupied Territories', 37 *Israel Law Review* (2003-2004) 17-118, at 88.

[29] See J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules* (Cambridge: Cambridge University Press, 2005).

[30] See Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic,* Case No. IT-94-1, ICTY Appeals Chamber, §§ 128-137 (2 Oct. 1995). See also C. Greenwood, 'International Humanitarian Law and the Tadić Case', 7 *European Journal of International Law* (1996) 265, at 280.

for past conduct and more concerned with chastening future conduct such as American prosecution of the armed conflict with al-Qaeda.

As a final point, it is impossible to determine the application of IHL and IHRL without first taking a position on the legal geography of armed conflict, i.e. whether IHL follows the parties to the conflict, applies only in the state where the conflict occurs, or perhaps only on the so-called hot battlefield – the area of most intense fighting. Writing in this volume, Noam Lubell and Nathan Derejko reject both the widest and narrowest application of IHL to either the entire state in which the hostilities occur or the overly narrow battlefield where the hostilities are presently occurring.[31] The key provisions for Lubell and Derejko are the requirements that the terrorist be directly participating in hostilities. Moreover, the authors conclude that although a drone strike may not necessarily trigger the application of IHL, at some point a sufficiently large number of drone strikes may itself trigger the application of IHL in the area where the drones are deployed. Although this type of self-triggering of IHL may be disturbing to some, the authors persuasively conclude that drone strikes are equally bound by the requirements of jus ad bellum, which may very well impose constraints upon, or even outright prohibit, the particular territorial incursion.[32]

III. Targeting Civilians

Assuming arguendo that the law of war applies to such attacks, there is an open question of who can be targeted under IHL?. Are members of al-Qaeda or so-called 'affiliated forces' protected civilians or bona fide combatants subject to the reciprocal risk of killing? (Or perhaps terrorists are subject to an asymmetrical risk of killing, whereby their status as unprivileged combatants allows them to be killed but their status does not confer on them privileged belligerency). The warrant for denying them combatant immunity, as historically asserted by the Bush Administration, is that governments involved in NIAC have historically maintained the right under international law to treat members of a rebellion as enemies of the state subject to criminal prosecution.[33] Although Lincoln conferred belligerent status on Confederate soldiers during the Civil War, this was allegedly an optional declaration not required by international law.[34] The question, though, is whether a govern-

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[31] See N. Lubell and N. Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict', in this volume.

[32] Ibid.

[33] In this respect, see R.R. Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs', 28 *British Yearbook of International Law* (1951) 323.

[34] S.C. Neff, *Justice in Blue and Gray: A Legal History of the Civil War* (2010).

ment can have it both ways: recognize the existence of an armed conflict with an NSA, yet also deny its members the privilege of combatancy. Does this asymmetry conflate two separate paradigms: law enforcement and armed conflict? Either the enemy is an enemy of the state or it is at the very least capable of the privilege of combatancy if it complies with the basic requirements of the laws of war.[35]

As to the status of alleged terrorists, they are clearly targetable under black-letter IHL so long as they are directly participating in hostilities. International lawyers have long been perplexed with how to apply this mercurial standard, and the ICRC waded into the water when it published its controversial *Interpretive Guidance on Direct Participation in Hostilities*, a document whose drafting was so contentious that it prompted vicious dissents from all sides.[36] Of particular note was its suggestion that civilians could be targeted at any time if they exercised a 'continuous combat function' in the military organization of a non-state actor. The rationale for this new category – arguably *lex ferenda* – was to resolve what many considered an intolerable asymmetry in the law of war.[37] While regular combatants of a state army could be targetable at any time by virtue of their status, civilian fighters of a non-state military force could only be targeted at the moment when they were directly participating in hostilities. To some, this asymmetry tipped the rules of IHL towards non-state actors and against traditional state militaries.[38] Once the continuous combat function standard is applied, though, non-state fighters and traditional army soldiers are placed on a level playing field.

Applying the continuous combat function is anything but simple. The U.S. government believes that all members of al-Qaeda and associated forces are *ipso facto* exercising a continuous combat function, which makes them targetable any moment by virtue of their status. This claim depends for its veracity on the nature of the terrorist organization in question. If the organi-

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[35] Critically, see G.D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), at 207.

[36] For a polemical description of that process, see W.H. Park, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect', 42 *N.Y.U. Journal of International Law & Politics* (2010) 769, at 805.

[37] See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, at 33.

[38] See, e.g., K. Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance', 42 *NYU Journal of International Law and Politics* (2010) 641, at 689 ('Combined with a narrow concept of membership in an organized armed group and a correspondingly broad notion of who is a civilian, the protection normally associated with uninvolved civilians begins to look like a form of immunity for insurgents. It is a protection which is consciously not provided to State security forces.').

zation is purely military in nature then there is at least a colorable argument that all members exercise a continuous combat function, in the same sense that all members of a regular army, even if working as a cook, exercise a continuous combat function because they received basic training and are capable of firing a rifle (and indeed expected to) if the situation demands it.[39] Under this approach, membership alone in the military organization (whether a state or non-state group) would form the basis for targeting. That being the case, criteria for membership must change depending on the nature of the organization. Membership in the regular armed forces can be determined by formal criteria alone, such as the wearing of a military uniform and employment by the armed forces. In contrast, membership in a non-state military group (if it is to be a workable standard) must be determined by functional criteria such as the giving and taking of orders and one's participation in a hierarchical chain of command.[40]

The question is whether al-Qaeda, or any of its regional affiliates, are indeed exclusively military organizations in this fashion, or whether they are mixed civilian/military organizations that engage in civilian functions such as local governance, providing social services to local populations, such as health care and schooling. While it may be the case that al-Qaeda core was an exclusively military organization, what is one to make of Al-Shabaab in Somalia, a local Islamic insurgency with control over specific territory and a stated goal of expanding its territory? Whether this rises to the level of a mixed civilian-military organization is a question of fact and may even change over time.

Several scholars have suggested that IHL, in both academic theory and state practice, is moving from primarily status-based targeting towards an increased reliance on (and demand for) conduct-based targeting.[41] The increased importance of the 'directly participating in hostilities' standard is just one piece of evidence that conduct has become more important than status in targeting decisions. The US now engages in so-called signature strikes,

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[39] See *Hamlily v. Obama*, 616 F.Supp.2d 63, 73-74 (D.D.C. 2009), *citing* Additional Protocol II, art. 13. See also Judgment, *Prosecutor v. Galic*, ICTY Trial Chamber, Case No. IT-98-29-T, § 47, 5 Dec. 2003, and Judgment, *Prosecutor v. Blaskic*, ICTY Trial Chamber, Case No. IT-95-14-T, § 180, 3 March 2000.

[40] As an example, see *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), at 872-73. See also N. Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), at 350-52; J.D. Ohlin, 'Targeting Co-Belligerents', in C. Finkelstein, J.D. Ohlin, and A. Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012) 60-89, at 86-87.

[41] See S. Issacharoff and R.H. Pildes, 'Targeted Warfare: Individuating Enemy Responsibility' (forthcoming), available at http://ssrn.com/abstract=2129860.

which are analyzed by Kevin Heller in this volume.[42] According to Heller, while some of the signatures used by the US result in attacks that are legally valid under IHL, others are per se illegal under international law because the signature may be over-inclusive and pick out targets that are neither directly participating in hostilities nor exercising a continuous combat function.

According to Larry May, the shift to conduct-based targeting is reason enough to trigger a due process analysis that requires some judicial consideration, unless there is absolute exigency, of the factual basis for the conduct-based targeting decision.[43] These intuitions are widely shared, though there is something disconcerting about the result that due process concerns are only triggered when the state engages in a careful surgical strike, but that due process concerns evaporate when the state selects the more cavalier method of aerial bombardment of an entire military installation, potentially killing many more individuals. There is something ironic about requiring greater legal scrutiny of targeting when the state kills a single individual than when the state kills a larger number of individuals. While it is true that the killing of a larger number of individuals looks like war, and the killing of a single individual looks like an extra-judicial execution, perhaps this realization sets up a perverse incentive to kill more, rather than fewer, individuals. Nonetheless, May is absolutely correct that the naming of a single-individual prima facie suggests, even if it does not conclusively demonstrate, the triggering of a law-enforcement model.

As for the future, the development of the 'continuous combat function' standard could suggest a return to the primacy of status-based targeting. For some human rights lawyers this is a disconcerting development. However, the relative merits of status-based and conduct-based targeting are difficult to evaluate. The law of armed conflict is built around status-based determinations and does not have the institutional structures to carefully oversee decisions regarding conduct-based targeting. The whole point of IHL is that the participants themselves must enforce the prohibitions in the here and now; the sanctions imposed by international criminal tribunals for violations of targeting protocol are ex post and are only designed to end impunity. It is unrealistic to expect that criminal courts applying conduct-based criteria will oversee and achieve real-time compliance with substantive provisions of the law they are applying. It is precisely for this reason that IHL has always favored legal prohibitions that place transparency and publicity at their core.

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[42] See K. Heller, '"One Hell of a Killing Machine": Signature Strikes and International Law', in this volume.

[43] See L. May, 'Targeted Killings and Proportionality in Law and War', in this volume.

IV. CIVILIAN EMPLOYEES AS BELLIGERENTS

This naturally leads to one of the most specific problems with the drone campaign from the perspective of ICL. Although many of the drone pilots are uniformed members of the military operating under the Joint Special Operations Command (JSOC), many others are reportedly non-uniformed CIA personnel. Although both CIA and military personnel are both operating drones from a great distance, neither of which can be seen by the targets, the formal criteria for the privilege of belligerency plays out differently for them. A military member operating under JSOC is wearing a fixed emblem recognizable at a distance, is part of the regular armed forces, and is therefore unquestionably entitled to combatant immunity. On the other hand, CIA personnel are not members of the regular military and do not meet the Geneva Convention criteria for the privilege. Does this fact make their actions criminal? Have they committed a war crime? What implication, if any, does this have for the superiors to oversee their conduct? If the drone operators have violated criminal law and have no combatant immunity conferred by international law, then the individuals who ordered the attacks are also guilty as accomplices or even indirect perpetrators. Under this strain of thought, is President Barack Obama a serial murderer, responsible for dozens of drone killings, as journalist Ben Wittes once asked (rhetorically and facetiously)?[44] To some, this might constitute a *reductio ad absurdum* of the argument, suggesting that at least one of the premises in the argument must be false. But which one?

Answering this question requires a sensitive analysis of the privilege of combatancy and what implications flow from its violation. In the past, the United States government has prosecuted members of al-Qaeda and the Taliban for the crime of 'murder in violation of the laws of war'.[45] Critics have rightly suggested that these crimes amount to nothing more than criminalizing unprivileged combatancy, because the sole source of the alleged violation is the actor's lack of privileged combatancy. The question is whether unprivileged combatancy is a *criminal* violation of the laws of war.[46] It clearly offends the scheme of combatant immunity, but what conclusion can one draw

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[44] The incident is recounted in K. Delanian, 'In legal battle against drone strikes, she's on the front lines', *Los Angeles Times*, 9 Oct. 2012 (describing debate between Mary Ellen O'Connell and Ben Wittes).

[45] See J.C. Dehn, 'The *Hamdan* Case and the Application of a Municipal Offence: The Common Law Origins of 'Murder in Violation of the Law of War', 7 *Journal of International Criminal Justice* (2009) 63 (evaluating prospects of justifying prosecution of unprivileged belligerency as a domestic crime historically prosecuted by military commission).

[46] See Baxter, *supra*, at 333-38 (concluding that unprivileged guerrillas violate domestic law because no rule of international law confers immunity on their actions).

from the lack of any available immunity to a combatant? There is nothing in the Rome Statute, or any other international criminal statute, that refers to the war crime of 'murder in violation of the laws of war'.

Although murder is not a war crime per se, it certainly is a domestic crime in every jurisdiction. Without the immunity conferred by the international law of war, the domestic criminal law applies with full force, and combatants are therefore subject to the full force of its sanctions. The U.S. government initially resisted this argument because U.S. military commissions had jurisdictions over violations of the international law of war; a domestic criminal law violation arguably fell outside the scope of the commission process and required a civilian prosecution in a regular Article III criminal court.

In applying this standard to CIA personnel operating drones, it suggests that they have not committed an international war crime by virtue of their unprivileged acts of killing, though they might be guilty of violating the domestic criminal law of Yemen, Pakistan, or Somalia. Apparently the prospect of criminal prosecution and extradition to such countries is so extremely remote as to not chasten the government's conduct, though the *in absentia* conviction of CIA agents in Italy for an extraordinary rendition ought to provide a cautionary lesson regarding overconfidence in this regard.[47]

Recently, the US government has asserted a middle ground position regarding the nature of the criminal prohibition in question. In proceedings before the U.S. Court of Appeals for the D.C. Circuit, the government argued that military commissions have jurisdiction to try violations of the U.S. common law of war, such as providing material support to terrorism.[48] According to the government, the U.S. common law of war is distinct from the international law of war, and represents unwritten precedent stemming from military commissions past, notably those convened during the Civil War.[49] If American military commissions have historically prosecuted certain offences, these offences are part of a domestic common law of war, even if the offences are not criminalized by the international law of war. Presumably, this theory could apply to murder in violation of the law of nations as well, thus making unprivileged combatancy a crime under the American law of war (but not IHL).

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[47] For a discussion of the case, see F. Messineo, '"Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in the Light of the *Abu Omar* Case in Italy', 7 *Journal of International Criminal Justice* (2009) 1023. See an edited English version of the trial judgment in Cassese et al (eds), International Criminal Law: Cases and Commentary, at 564.

[48] Brief for the United States, *Hamdan v. United States*, USCA Case 11-1257, Doc. 1353008, 17 Jan. 2012.

[49] Ibid.

This argument was rejected by the U.S. Court of Appeals for the D.C. Circuit, which overturned Salim Hamdan's conviction for material support even though he had been released from custody six years prior.[50] Citing the U.S. government's own brief to the Supreme Court in *Ex Parte Quirin*, the D.C. Circuit concluded that the relevant body of law for prosecuting law of war violations is the *international* law of war.[51] Indeed, there is something odd about each state developing its own municipal law of war and prosecuting enemy fighters on this basis. This argument, if taken to its logical conclusion, would see CIA personnel standing trial before military courts in enemy countries for violating the municipal laws of war as developed by those countries. The whole point of the law of war is that it represents a common body of law that binds both sides of an armed conflict.

Essentially, CIA personnel are irregular members of the US armed forces. Since they neither display distinctive signs recognizable at a distance nor carry their arms openly, they are not entitled to IHL's privilege of combatancy and 'post-capture' POW status.[52] Although one could argue that the drones themselves constitute 'arms carried openly', the more serious problem is that the use of force carried out by the CIA is legally covert and unacknowledged and therefore not, in the collective sense, an open display of force. Although the involvement of CIA officers in targeted killings might be justified by human rights law or domestic criminal law, perhaps as an extraterritorial application of U.S. domestic law enforcement power, this avenue would trigger additional doctrinal requirements. Human rights law generally requires exigency and necessity – requirements that might require a duty to attempt capture or a determination that capture is not feasible.[53]

If CIA personnel operating remotely piloted drones are unprivileged combatants who violate domestic criminal law in the country within which they operate, are they also subject to attack themselves by virtue of their direct participation in hostilities? It would appear so, insofar as they meet the Additional Protocol standard for direct participation. The more pressing

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[50] *Hamdan v. United States*, 2012 WL 4874564 (D.C. Circuit), 16 Oct. 2012.

[51] Ibid at *10, citing Brief for the United States at 29, *Ex Parte Quirin,* 317 U.S. 1 (1942).

[52] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, at 22.

[53] See J.D. Ohlin, 'The Duty to Capture', *Minnesota Law Review* (forthcoming), available at http://ssrn.com/abstract=2131720 (noting the different requirements of military necessity under IHL and necessity under IHRL). See also *Tennessee v. Garner*, 471 U.S. 1 (1985); Eric Holder, Speech at Northwestern University School of Law, 5 March 2012 (stating that US government only uses lethal force against US citizens abroad if capture is not feasible).

question is whether CIA personnel are *permanently* targetable by virtue of their status, potentially under a reverse 'continuous combat function' argument. If a CIA operative is exercising this function for the U.S. government, can he or she be killed at any moment in time, similar to an al-Qaeda operative? The underlying theory might suggest yes, although the CCF standard only applies to non-state military forces. Furthermore, even if CIA personnel are targetable, they are only targetable by *bona fide* enemy combatants who themselves enjoy the privilege of combatancy -- not al-Qaeda operatives who do not enjoy combatant immunity by virtue of their failure to comply with the laws and customs of war.

V. PROPORTIONALITY

One of the most common complaints about American drone strikes is that they cause significant civilian casualties.[54] To the extent that the causalities are excessive, they would violate IHL and perhaps even article 8(2)(b) of the Rome Statute if they are 'clearly' excessive. But how is this calculation to be made? How many civilians must be killed before we determine that the strike violated international law? Like all standards (as opposed to more precise rules), the student of the law makes that determination by reading the applicable decisions by courts that have applied the standard. This research inevitably leads to an analysis that courts have declared strikes illegal under x and y circumstances, and to the extent that a hypothetical strike is analogous to x and y, it too would be deemed illegal. However, such precedents are nonexistent because the ad hoc tribunals and the ICC rarely convicted anyone for violating the principle of proportionality. Since there are no decisions, the exact scope of the legal rule remains frustratingly indeterminate.

Why is this the case? Proportionality in targeting is notoriously difficult to apply in reality. First, the standard requires judging the scenario from the perspective of the commander and the information available at her disposal.[55] Second, the standard requires balancing the number of anticipated civilian deaths with the value of the military objective. But how is the value of the military objective to be translated into a precise number? Although philosophers and just war theorists have debated this question, there is almost no case law on the question. Also, some theorists question whether one can judge the value of the individual military target independent of the

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[54] See O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009', supra.

[55] See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257 (2000), § 50 (discussing 'reasonable military commander' standard).

value of the overall war effort, potentially collapsing the distinction between jus in bello and jus ad bellum.[56] Third, and most importantly, international courts have largely escaped the demands of proportionality analysis by hanging all of their efforts on the concept of distinction. Situations that are normally understood by common law lawyers to involve reckless collateral damage to civilians would be redefined in the jurisprudence of the ICTY to involve intentional or indiscriminate attacking of civilians. How is this feat accomplished? Simply because continental lawyers view *dolus eventualis*, the civil law analogue that most closely resembles recklessness, as a sub-category of intent and therefore a mental state capable of triggering the categorical prohibition against directly attacking civilian targets. In practice, lawyers trained in the civil law tradition would assess whether somebody targeting a military objective had accepted the risk that, in the ordinary course of events, hitting the military target would have resulted, for instance, in a high number of civilian casualties. A judge reaching this conclusion would be warranted to conclude that the attack was illegal, for example because the attacker had intentionally targeted civilians (if no military target was actually present)[57] or had fired indiscriminately (if the amount of civilian casualties vastly exceeded the expected military advantage or an indiscriminate weapon has been used).[58]

As applied to drone strikes, these issues are highly relevant. Debates surrounding drone strikes that cause civilian casualties often degenerate into pointless competitions of untestable 'intuitions' that the reported civilian deaths are proportionate, disproportionate, or clearly excessive. The balancing tests implicit in these arguments very rarely change anyone's mind, since there is no case law to appeal to as a neutral arbiter in these debates. This radical legal indeterminacy does not indicate a moral indeterminacy, of course, but it does limit the capacity for progress in the legal discourse, frustrating the ability of the field to move forward. Moreover, the subject matter is beset with cross talking. Both common law trained lawyers and military lawyers are inclined to adopt a very restrictive understanding of the notion of intentionally attacking civilians, while civil law trained lawyers are more inclined to take such a broad reading of the prohibition against directly attacking civilians that some of the reported drone strikes might violate the per se prohibition against attacking civilians. In a sense, both views might be correct relative to their paradigm's understanding of the concept of intent.

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[56] See T. Jurka, 'Proportionality in the Morality of War', 33 *Philosophy & Public Affairs* (2005) 34, at 44.

[57] See, e.g., Judgement, Prosecutor v. Galic, ICTY Trial Chamber, Case No. IT-98-29-T, 5 Dec. 2003, para. 438-496 (Markale market incident).

[58] See, e.g., Galic Trial Judgment, paras. 372-387; Judgement, Prosecutor v. Martic, ICTY Appeals Chamber, Case No. IT-95-11-A, 8 Dec. 2008, paras. 247-252.

CONCLUSION

The preceding summary suggests that although the U.S. deployment of drone strikes raises deep and potentially intractable dilemmas for IHL, these are by no means new issues for the field to address. The field has long struggled with how to regard NSAs and how to categorize armed conflicts between them and traditional states. The scholarly dialogue regarding the interplay between IHL and IHRL has undergone substantial evolution in the last decade, though whether this movement was sparked by the drone campaign is doubtful; rather, it is more likely the inevitable collision of competing paradigms or what David Luban has referred to as the 'Two Cultures Problem'.[59]

The drone campaign has added urgency to the legal status of targeted terrorists, though the standard of civilians 'directly participating in hostilities' long pre-dates the armed conflict against al-Qaeda. Critics of the 'continuous combat function' legal standard developed by the ICRC have suggested that it is an unfortunate and misguided attempt to legitimate how the United States and its allies target terrorists. However, regardless of the motivation, the question is whether the definition is legally defensible, not wether it was inspired by a specific factual scenario. As for the status of civilian employees in warfare, and whether they violate the laws of war when they operate remotely piloted drones, this is merely the flipside of the status question for terrorists. Once IHL is liberated from the jus ad bellum, legal standards for civilian/combatant status must be determined by virtue of a neutral principle for both sides of the conflict.[60] If al-Qaeda operatives do not enjoy combatant immunity for failure to carry arms openly and display a fixed emblem recognizable at a distance, neither do U.S. personnel operating covertly. One thing is certain: legal analysis regarding proportionality remains hamstrung by the lack of impartial factual reporting of civilian casualties – a lacuna that has plagued prior armed conflicts as well. This is one area where the ex post fact-finding machinery of international criminal justice may have some role to play.

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[59] See Luban, 'Military Lawyers and the Two Cultures Problem', supra.

[60] Cf. J. Waldron, 'Justifying Targeted Killing With a Neutral Principle?', in C. Finkelstein, J.D. Ohlin, and A. Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012) 112.