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Responses to the Ten Questions

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3. IS PRESIDENT OBAMA'S USE OF PREDATOR STRIKES IN AFGHANISTAN AND PAKISTAN CONSISTENT WITH INTERNATIONAL LAW AND INTERNATIONAL STANDARDS?

The short answer to this question is yes (Afghanistan) and probably (Pakistan). But short answers belie the legal complexities involved in reaching those conclusions. The ultimate answer is only valid if numerous other questions concerning who is being targeted, where they are being targeted, and by whom these drones are operated are also satisfactorily answered.

There is one aspect of this question that is not legally complex, however, and that is the general legality of drones. In spite of the *Terminator*-like creepiness that many have associated with machines making war on men,[1] there is a broad agreement among those who have seriously addressed this question that there is nothing inherently illegal about using drones as weapons of war.[2] Nor is

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1. *See, e.g.*, Michael W. Lewis & Benjamin Wizner, *Predator Drones & Targeted Killings – Podcast*, THE FEDERALIST SOCIETY (Jan. 27, 2011), http://www.fed-soc.org/publications/pubid.2083/pub_detail.asp.

2. *See, e.g.*, *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (Apr. 28, 2010) [hereinafter *Drones II*] (statements of David W. Glazier, Professor, Loyola Law Sch.; L.A, Michael W. Lewis, Professor, Ohio Northern Univ., Pettit Coll. of Law; Mary Ellen O'Connell, Professor, Univ. of Notre Dame), *see also Rise of the Drones: Unmanned Systems and the*

there anything legally unique about the use of unmanned drones as a weapons-delivery platform that requires the creation of new or different laws to govern their use. As with any other attack launched against enemy forces during an armed conflict, the use of drones is governed by International Humanitarian Law (IHL).[3] Compliance with IHL governing aerial bombardment, which requires that all attacks demonstrate military necessity and comply with the principle of proportionality, is sufficient to ensure the legality of drone strikes. In circumstances where a strike by a helicopter, an F-15, or a B-2 would be legal, the use of a drone would be equally legitimate. However, this legal parity does not answer three fundamental questions. Who may be targeted? Where may they be targeted? And finally, who is allowed to pilot the drones and determine which targets are legally appropriate?

I. WHO MAY BE TARGETED?

To answer the question "who may be targeted?" it is necessary to understand how IHL classifies individuals. As a starting point, IHL considers all people to be civilians unless or until they take affirmative steps to change that status. Civilians are immune from attack and may not be targeted unless they take actions to change their status and forfeit that immunity.[4]

From a legal standpoint, the most advantageous way for a civilian to change his or her status is to become a combatant. This cannot be done by merely picking up a weapon, however. In order to become a combatant an individual must be a member of the

Future of War: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform, 111th Cong. (Mar. 18, 2010) [hereinafter *Drones*] (statement of Kenneth Anderson, Professor, Wash. Coll. of Law), *available at* http://ssrn.com/abstract=1579411.

3. International Humanitarian Law is the term given to the body of law that governs armed conflicts. It is also referred to as the Law of Armed Conflict (LOAC) and encompasses the Geneva and Hague Conventions, the Additional Protocols to the Geneva Conventions, and the customary law that has developed around these treaties.

4. Protocol Additional to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]. Although the United States has not ratified Protocol I, it recognizes much of Protocol I as descriptive of customary international law. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006).

"armed forces of a Party to a conflict."[5] This definition is found in Article 43 of Additional Protocol I to the Geneva Conventions which goes on to define the term "armed forces" as:

> [A]ll 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. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.[6]

The status of combatant is legally advantageous because combatants "have the right to participate directly in hostilities."[7] This combatants' privilege allows combatants to participate in an armed conflict without becoming subject to prosecution for violating domestic laws prohibiting murder, assault, and the destruction of property, etc. The combatant's conduct is therefore regulated by IHL rather than domestic law, and the combatant may only be criminally charged with conduct that violates the laws of war.

Attaining combatant status is something of a double-edged sword, however. While it bestows the combatant privilege on the individual, it also subjects that individual to attack at any time by other parties to the conflict. Because targeting of combatants is based upon their status as combatants and not upon their dangerousness, a combatant may be lawfully targeted whether or not they pose a current threat to their opponents, whether or not they are armed, or even awake. The only occasion on which IHL prohibits attacking a combatant is when that combatant has surrendered or been rendered hors de combat.[8] While there is some disagreement about whether combatant status exists in non-international armed conflicts,[9] that dispute is irrelevant when it

5. API, *supra* note 4, art. 43(2).

6. *Id.* art. 43(1) (emphasis added).

7. *Id.* art. 43(2).

8. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 135 [hereinafter Geneva I]; Geneva Convention Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

9. Protocol I only applies to international armed conflicts and there are no provisions in Protocol II (which supplements Common Article III of the Geneva

comes to questions of targeting members of al Qaeda or other terrorist organizations. Because combatant status is based upon membership in a group that organizationally enforces compliance with the rules of international law applicable in armed conflict, groups such as al Qaeda, whose means and methods of warfare include deliberately targeting civilians, cannot claim combatant status for its members. It should be emphasized that the behavior of an individual al Qaeda member cannot confer combatant status. No matter how strictly individual members follow IHL or how scrupulously they distinguish between civilian and military targets, they are never entitled to the combatants' privilege and may therefore be criminally liable for attacks on members of an opposing armed force.[10] Al Qaeda does not, as some have suggested, have a "basic right to engage in combat against us" in response to our attacks.[11]

If al Qaeda members are not combatants, then what are they? Like all people, IHL treats them as being presumptively civilians who, as a general rule, are immune from targeting[12] unless they take affirmative steps to forfeit that immunity. There are two affirmative steps that can result in the loss of immunity. One step results in a temporary loss of immunity while the other in a more permanent forfeiture. A civilian temporarily forfeits their immunity for such time as they directly participate in hostilities.[13] While the exact definition of what constitutes direct participation in hostilities (DPH) has been much debated, clear examples of direct participation include engaging in attacks and planting

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Conventions and is applicable to all armed conflicts which are not covered by API) for combatant status. However, much of API has been recognized as customary law and may apply even to APII conflicts. *See e.g. Hamdan*, 548 U.S. at 630–32.

10. There is debate about whether the source of criminal liability for such an attack is the law of armed conflict or domestic criminal law. Because military commissions deal with IHL violations, the U.S. position has been that unprivileged belligerency is a war crime. *See e.g.*, Robert Chesney, *U.S. v. Khadr (Mil. Com. Oct. 25, 2010) (Plea Agreement)*, J. NAT'L SECURITY L. & POL'Y (Oct. 25, 2010), http://chesney.jnslp.com/2010/10/25/nationalsecuritylaw-united-states-v-khadr-mil-com-oct-25-2010-plea-agreement (describing a war crimes plea agreement in a potential criminal case). Alternatively, Khadr could have been tried for murder under the domestic laws and procedures of either the United States or Afghanistan.

11. *See Drones II*, *supra* note 2 (statement of David W. Glazier, Professor, Loyola Law Sch., L.A.).

12. API art. 51(2), *supra* note 4.

13. *Id.* art. 51(3).

bombs. The most comprehensive attempt to clearly define the contours of DPH is the six-year study recently completed by the International Committee of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.*[14] While this document does not have the force of law, it is certainly viewed as an influential description of what many scholars and human rights lawyers believe the state of the law to be. By itself such a document cannot be considered customary international law, but it may become so if states alter their behavior to conform to its definitions out of a sense of legal obligation.[15] Because military reaction to the interpretive guidance has contended that the definitions offered are too narrow[16] (i.e., that the ICRC considers that fewer people and fewer actions constitute direct participation in hostilities than the military might), the interpretive guidance should be viewed as a baseline description of behavior that inarguably constitutes direct participation in hostilities while the actual state of the law remains less clear.

The more permanent forfeiture of civilian immunity occurs when a civilian takes on a continuous combat function within an organized armed group of a non-state actor. The ICRC describes those civilians that forfeit their immunity on a continuous basis as those "individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities."[17] This

14. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991 (2008) *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf.

15. The creation of customary international law requires *opinio juris*, that is that states alter their practice to conform to a norm out of a sense of a legal obligation that they do so. *See generally* Ross E. Schreiber, Note, *Ascertaining* Opinio Juris *of States Concerning Norms Involving the Prevention of International Terrorism: A Focus on the U.N. Process*, 16 B.U. INT'L L.J. 309 (1998).

16. See W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 802–06 (2010).

17. INT'L COMM. OF THE RED CROSS, *supra* note 14, at 1007. It should be noted that the level of involvement with an organized armed group necessary to trigger continuous combat function (CCF) status is much greater than that required to trigger domestic criminal liability for material support of terrorism. Hence the use of military force against those that have forfeited their immunity by fulfilling a continuous combat function would not significantly diminish the

classification is designed to deal with the farmer-by-day, fighter-by-night tactic that a number of organized, armed terrorist groups have employed to retain their civilian immunity from attack for as long as possible. The Israeli Supreme Court confronted this tactic in its 2006 opinion on targeted killings.[18] While the Court reaffirmed the "for such time as" language related to direct participation in hostilities, recognizing that forfeiture of immunity was not generally intended to be continuous, it did indicate that those who organize, plan, and direct operations were legitimately targetable on a continuous basis because of the continuous nature of their participation.[19] Continuous combat functionaries can only reacquire their civilian immunity by disavowing membership in the organized armed group and ceasing any operations with that group.

So the answer to the question "who may be targeted?" is: any member of al Qaeda or the Taliban that continuously performs a combat function or any other individuals that are directly participating in hostilities against U.S. or allied forces for such time as they are doing so. This would certainly include individuals that directly or indirectly (e.g., planting IEDs) attack coalition forces as well as any leaders[20] within these organizations. It should be emphasized that the fact that these individuals may be directly targeted does not elevate them to combatant status. These individuals are civilians who have forfeited their civilian immunity by directly participating in hostilities or performing a continuous combat function. They are not, and cannot become, combatants unless they join an organization that enforces compliance with the laws of armed conflict, but they nevertheless remain legitimate targets until they clearly disassociate themselves from al Qaeda or the Taliban.

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extensive role that law enforcement continues to play in the conflict with terrorist organizations like al Qaeda.

18. HCJ 769/02 Public Committee against Torture in Israel v. Israel, [2006] (Isr.), *available at* elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf [hereinafter PCATI].

19. *Id.* para. 34–40.

20. If these groups established a political arm (similar to Sinn Fein in Northern Ireland) whose members solely participated in the political process, those leaders could not be targeted. The groups in Afghanistan have shown little inclination to engage in the political process.

II. WHERE ARE DRONE STRIKES PERMISSIBLE?

Some commentators have taken the position that the law of armed conflict only governs the conflict with al Qaeda within certain defined geographic areas.[21] Reasoning that the whole world cannot be a battlefield, they would limit the application of the law of armed conflict to states in which the frequency of armed attacks crosses a minimum threshold of violence.[22] Some of those taking this position claim that international law limits drone strikes to within the geographical boundaries of Afghanistan alone.[23] They consider any operations conducted against al Qaeda outside of this defined geography as being solely the province of law enforcement and therefore subject to all of the provisions of international human rights law. In the law enforcement context lethal force may only be used if the target refuses to surrender after being given an opportunity to do so or if the target imminently threatens to harm others. Because drones cannot provide an opportunity to surrender, and because demonstration of imminent harm is practically impossible to establish for terrorists and particularly for terrorist leadership (the primary target of drone strikes), those advocating this geographic conception of the boundaries of the battlefield conclude that drone strikes outside of this geographic zone of conflict are prohibited by international law.

This geographic approach to defining IHL's scope differs from

21. *E.g.*, Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 860–64 (2009); Mary Ellen O'Connell, *Unlawful Killing With Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming 2010) (Notre Dame Legal Studies Research Paper No. 09-43, Nov. 2009); John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. 175, 198–201 (2011).

22. The factors that the International Criminal Tribunal for the Former Yugoslavia used in the *Tadic* opinion are generally the ones cited for establishing this threshold of violence and it is argued that the current situation in Pakistan does not meet these criteria. O'Connell, *supra* note 21, at 858. *But cf.* Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNATIONAL LAW AND POLICY 237 (2010); Laurie R. Blank & Benjamin R. Farley, *Characterizing US Operations in Pakistan: Is the United States Engaged in an Armed Conflict?*, 34 FORDHAM INT'L L. J. 151, 162–76 (2011) (concluding that the conflict between the Pakistani government and the Pakistani Taliban satisfies the *Tadic* criteria for establishing the existence of an armed conflict in Pakistan).

23. See Drones II, *supra* note 2 (statement of Mary Ellen O'Connell, Professor, Univ. of Notre Dame).

the more traditional view, consistently held and practiced by states, that the law of armed conflict goes where the participants in the armed conflict go, no matter how far they are from the zone of conflict or which side of a geographic line they are on. During World War II at the strategic level the Allies struck German forces in Algeria, Tunisia, Sicily, Italy, France, Holland, and Belgium before striking German forces in Germany. The boundaries of the battlefield were determined by the location of the enemy. Likewise, at the tactical level commando raids and airstrikes against leadership and infrastructure targets far behind any front line where combat was taking place, and the shoot down of Admiral Yamamoto's plane that was on an inspection tour of the rear areas are a couple of examples of conduct permitted by IHL at some distance from the zone of conflict.[24]

Even as the paradigmatic armed conflict has shifted from one contested by standing armies of nation states against each other to one that is fought between non-state actors employing guerilla tactics and nation states, state practice on this issue has remained consistent.[25] When non-state actors that are involved in a conflict have attempted to find sanctuary by crossing a geopolitical line, the state party to the conflict has consistently asserted (and exercised) the right to cross that line to strike the enemy. Whether it is the United States pursuing the Viet Cong into Cambodia, Colombia striking the FARC in Ecuador, or Israel striking Hezbollah in Lebanon, states have consistently asserted the right to carry the fight to their enemies in an armed conflict, regardless of whether their enemies have attempted to use international boundaries as a sanctuary. While the International Court of Justice has, at times,

24. Prof. O'Connell claims that the Yamamoto shoot down today would be "in conflict with the basic treaties that form the law on the use of force". Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POL'Y 343, 361 (2010). This claim, that in the context of an international armed conflict the shooting down of a uniformed enemy officer in a military aircraft flown by military pilots by unrefueled, land-based aircraft would be viewed as illegal by IHL today because it was too far removed from the zone of conflict reveals the extremity and indefensibility of O'Connell's position in this matter.

25. Because there is not a treaty determining how the boundaries of the battlefield are determined, any legal norm must be the product of customary international law. While court opinions and commentators may influence customary law, it may only be established if it is supported by state practice taken out of a sense of legal obligation (opinio juris). There is a distinct lack of opinio juris supporting the proposition that an enemy may find sanctuary by crossing a geopolitical line.

disagreed with such assertions, this disagreement is only binding upon the parties before the court and does not constitute opinio juris supporting the development of a customary norm prohibiting such a practice.

More important than the lack of state practice supporting the proposed strict geographical restriction on IHL's scope is the incongruence of such a reading of IHL. One of the principal goals of IHL is to protect the civilian population from harm during an armed conflict. To further this goal, IHL prohibits direct attacks on civilians and requires that parties to the conflict distinguish themselves from the civilian population. It would seem anomalous, therefore, to read IHL in such a way as to reward a party that regularly targets civilians. Yet that is what is being proposed.[26] As discussed above, a member of al Qaeda who is performing a continuous combat function forfeits his civilian immunity and may be legitimately targeted with lethal force without warning. But the proposed geographic limitations on IHL's application offer this individual a renewed opportunity for immunity from attack. Rather than being required to disavow al Qaeda in order to reacquire his immunity, IHL's preferred result, the proposed geographic restrictions allow the individual to obtain the same effective immunity by crossing an international border to an area in which it is known that law enforcement is ineffective. If he can get to Yemen or Somalia or Sudan or the Waziristan region of Pakistan, the al Qaeda continuous combat functionary could remain active in the organization that targets civilians while enjoying effective immunity from attack. IHL has manifested its clear disapproval of terrorist organizations by denying them the combatants' privilege and forfeiting their civilian immunity. A reading of IHL that would grant these same individuals effective immunity based upon their geographic location is not defensible.

Although the strict geographic limitation does not undermine the legality of U.S. drone strikes in Pakistan, there are other issues that might. Unlike the ongoing operations in Afghanistan, in which the United States clearly has permission from the Afghan government to continue providing military aid in its conflict with al Qaeda and the Taliban, the Pakistani situation is more complicated. It is clear that the Pakistani leadership would pay a

26. *See* O'Connell, *supra* note 21; Dehn & Heller, *supra* note 21.

steep political price for openly embracing U.S. military operations on Pakistani soil. As a result, any permission that Pakistan has granted the United States to conduct strikes on its territory has been given privately. While it is impossible to know the extent of private permission that has been offered, the fact that Harold Koh, the State Department's Legal Adviser, specifically mentioned the importance of respecting the "sovereignty of the other states involved"[27] in his discussion of drone strikes, is evidence that the Obama administration takes this requirement seriously and is presumably receiving the necessary permission from the appropriate sources. This uncertainty as to the permission being given by Pakistan is the reason for the "probably" answer to the question on the legality of drone strikes in that country.[28]

III. WHO MAY DO THE TARGETING?

In order for an attacker to be free from any legal liability associated with a drone strike, the strike must comply with IHL's requirements (most notably proportionality, necessity, and distinction) and the attacker must possess the combatants' privilege. As discussed above, the only way to acquire the combatants' privilege is to be a member of an organized armed force that has an internal disciplinary system that enforces the laws of war. Air Force pilots that conduct drone strikes clearly meet these criteria, but CIA drone operators may not, and it has been suggested that they are committing war crimes by engaging in such conduct.[29]

There are actually two distinct forms of legal jeopardy to which CIA drone operators may be subject.[30] They can be viewed as

27. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law, The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

28. It should be noted that there is a self-defense argument that could be raised by the United States if Pakistan did not give permission for the strikes. This argument was hinted at by Koh in his speech to ASIL. *Id.* It was also developed more fully by Ken Anderson in his testimony. Ken Anderson *supra* note 1, and Jordan Paust *supra* note 22.

29. *See* Drones II, *supra* note 2 (statement of David W. Glazier, Professor, Loyola Law Sch., L.A.).

30. It is important to clarify that this applies to drone operators conducting surveillance as well as direct strikes with drones. Conducting surveillance in support of the armed forces would place operators in the role of a continuous

violating the domestic laws (prohibiting such things as assault, murder, arson, etc.) of the state in which the strike takes place, or they can be viewed as violating the law of war by engaging in unprivileged belligerency. I believe that the majority of international lawyers would favor the former view, that the operators are potentially liable for domestic criminal law violations. If that were the case then CIA drone operators could be subject to trial in Pakistan or Afghanistan for harm caused by drone strikes. However, the United States has complicated this analysis by essentially endorsing the latter choice.[31] By charging Omar Khadr, a Canadian citizen fighting with al Qaeda in Afghanistan who killed an American soldier during a firefight, with murder in violation of the law of war and officially sentencing him to forty years in prison pursuant to a plea agreement,[32] the United States has made it clear that it views unprivileged belligerency as a war crime.

The clearest solution to this problem is for CIA drone operators to acquire combatant status if they have not already done so. It is clear that CIA drone operators have received IHL instruction from military lawyers since the beginning of the armed drone program.[33] However IHL instruction, by itself, is insufficient to confer combatant status. They must also be subject to an internal disciplinary system that enforces the laws of war. Whether such a disciplinary system currently exists is uncertain, but one way of ensuring that CIA operators would qualify as combatants under IHL would be to incorporate them into the armed forces. Article 43(3) of Protocol I allows a party to "incorporate a paramilitary or armed law enforcement agency into its armed forces" after notifying other parties to the conflict.[34] For such an incorporation

combat functionary.

31. *See supra* note 10.

32. *See* Press Release, U.S. Dept. Def., DOD Announces Sentence for Detainee Khadr (Oct. 31, 2010) http://www.defense.gov/releases/release.aspx ?releaseid=14023. Pursuant to the plea agreement Khadr will in reality serve only eight years.

33. Ambassador Henry Crumpton, who was in charge of CIA operations in Afghanistan in 2001–02, made it clear in his keynote address to the "Air and Missile Warfare Manual" Symposium at the University of Texas-Austin School of Law that the CIA armed drone operators had received IHL training and that the program had some form of military legal oversight from early October 2001 onward. Henry Crumpton, Ambassador, Address at the Air and Missile Warfare Manual Symposium at the University of Texas-Austin School of Law (Feb. 10, 2011).

34. API art. 43(3), *supra* note 4.

to be effective a clear chain of command would have to be established (if it does not already exist) that enforces compliance with the laws of armed conflict. Without this incorporation or some other measure clearly establishing the CIA drone operator's accountability for law of armed conflict violations, the continued use of CIA drone pilots and strike planners will be legally problematic.

IV. CONCLUSION

Drones are legitimate weapons platforms whose use is effectively governed by current IHL applicable to aerial bombardment. Like other forms of aircraft they may be lawfully used to target enemy forces, whether specifically identifiable individuals or armed formations, if they comply with IHL's requirements of proportionality, necessity, and distinction.

IHL permits the targeting of both combatants and civilians that have forfeited their civilian immunity by directly participating in hostilities or assuming a continuous combat function. Because of the means and methods of warfare that they employ, al Qaeda and Taliban forces are not combatants and are not entitled to the combatants' privilege. They are instead civilians that have forfeited their immunity because of their participation in hostilities. Members of al Qaeda and the Taliban that perform continuous combat functions may be targeted at any time, subject to the standard requirements of distinction and proportionality.

International law should not be read as placing blanket geographical restrictions on the use of drone strikes. Such restrictions are not supported by state practice and more importantly, reading such geographic limitations into IHL's scope effectively turns IHL on its head by allowing the least-privileged individuals, terrorists that routinely target civilians, a means of acquiring effective immunity from attack without ceasing to plan and participate in terrorist attacks. Rather, the more traditional understanding of IHL's scope, that it applies wherever participants to an armed conflict can be found, should continue to govern the conduct of drone strikes. The geographical limitations on drone strikes imposed by sovereignty requirements, along with the ubiquitous requirements of distinction and proportionality are sufficient to prevent these strikes from violating international law.

Lastly, CIA personnel participating in drone strikes must take

the necessary steps to be classified as combatants if they have not done so already. Until they attain that status they are not entitled to assert the combatants' privilege against any domestic law claims made against them for damage done by drone strikes. Even more problematically, given the United States' current position that unprivileged belligerency constitutes a violation of the laws of war, CIA drone operators that are not subject to a disciplinary system that enforces the laws of war could be viewed as committing war crimes.