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Not Whether Machines Think, But Whether Men Do

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I pledge that the following monograph is an original work and mine alone.

NOT WHETHER MACHINES THINK, BUT WHETHER MEN DO
Legal & Moral Drone Use in a Theatre of War

ABSTRACT

Drones “allow for the most discriminating uses of force in the history of military technology,”¹ and can thus be a profound humanitarian advancement in warfare. State actors alone, however, can actualize this potential. Although the United States complies with International Humanitarian Law (“IHL”)² from strike authorization through strike execution within the Afghanistan theatre of war, its methods for evaluation and reporting of collateral damage caused by drone strikes—including presuming every deceased “military-aged male in a strike zone” to have been a “combatant”³—do not comply with international law. The United States must amend its policies to uphold its dual moral obligations of forming Customary International Law⁴ mandating a humane use of drones in theatres of war; and protecting its ground troops from distrust and violence predicated on inaccurate reporting of collateral damage.

¹ Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility* (N.Y. Univ. Sch. of Law, Working Paper No. 12-40 at 54, 2012).

² “IHL is a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. It protects persons and property that are, or may be, affected by an armed conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice.” INT’L COMM. OF THE RED CROSS, *International Humanitarian Law and International Human Rights Law*, Advisory Service on Int’l Humanitarian Law (Jan. 2003), available at http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf.

³ Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), available at http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=1.

⁴ Customary International Law (“custom”) results from a “general and consistent practice of states followed by them from a sense of legal obligation” and is binding. Restatement (Third) of Foreign Relations Law § 120(c)(2).

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INTRODUCTION

There are two sides to every story.

At 1:00 AM on June 6, 2012, ISAF⁵ and Afghan coalition forces⁶ approached a building in Afghanistan's Logar Province.⁷ Intelligence had revealed with certainty the presence therein of a Taliban leader known as Qari Sadari.⁸ Coalition forces, intending to capture and detain

⁵ The International Security Assistance Force ("ISAF") was established by U.N. Security Council Resolution 1386 as a NATO-led, multi-national force to coordinate resistance to the Taliban in Afghanistan, "reduce the capability and will of the insurgency, support the growth in capacity and capability of the Afghan National Security Forces (ANSF), and facilitate improvements in governance and socio-economic development in order to provide a secure environment...that is observable to the [Afghan] population." AFGHANISTAN INTERNATIONAL SECURITY ASSISTANCE FORCE, NATO, *About ISAF*, <http://www.isaf.nato.int/mission.html> (last visited Aug. 26, 2013); UN SECURITY COUNCIL, *Security Council Resolution 1386 (2001) on the situation in Afghanistan*, S/RES/1386 (Dec. 20, 2001), available at <http://www.unhcr.org/refworld/docid/3c4e94571c.html>.

⁶ At this stage in the War in Afghanistan, United States troops are primarily deployed in an advisory capacity, training counterparts in the Afghan National Security Forces in order to "guarantee...sustain[ed] resistance to the Taliban] once [United States and NATO] forces leave." Lance Cpl. Mel Johnson, *Coalition Forces Celebrate Eid With Afghan Forces*, MARINES: THE OFFICIAL WEBSITE OF THE UNITED STATES MARINE CORPS (Aug. 13, 2012), <http://www.hqmc.marines.mil/News/NewsArticleDisplay/tabid/3488/Article/147908/coalition-forces-celebrate-eid-with-afghan-forces.aspx>.

⁷ ISAF Joint Command Morning Operational Update, NATO, 2012-06-S-010 (June 6, 2012), <http://www.isaf.nato.int/article/isaf-releases/isaf-joint-command-morning-operational-update-june-6-2012.html> [hereinafter ISAF Initial Statement]; Sahaafi Mujahid, *17 Civilians Dead in NATO Airstrike*, LIVELEAK.COM (June 9, 2012), http://www.liveleak.com/view?i=245_1339254728 [hereinafter LiveLeak 6/9].

⁸ *Id.* The name of the Taliban leader was not given in ISAF reports, but rather reported by Afghan news source "Pajhwok Afghan News." Abdul Maqsud Azizi, *17 Civilians Dead in NATO Airstrike*, PAJHWOK AFGHAN NEWS (June 6, 2012), <http://www.pajhwok.com/en/2012/06/06/17-civilians-dead-nato-airstrike>.

Sadari and other Taliban using the least amount of force possible, issued verbal requests that all insurgents within show themselves.⁹

Coalition forces were met with weapons fire and grenades.¹⁰ They therefore returned fire in self-defense.¹¹ Eventually perceiving themselves to be outmatched and in grave danger, they ordered a precision drone strike on the structure¹² (an incident to which this Monograph will refer as the “Logar Strike”).

Are the above facts sufficient to conclude that the Logar Strike was legal? Existing scholarship answers, unequivocally, yes.¹³ Coalition forces sought to capture and detain insurgents using the least amount of force possible. Occupants of the house were, beyond a reasonable doubt, armed combatants. The strike was ordered in self-defense, and in a theatre of war. This scenario- according to media, politicians, global scholars, and most American citizens- is the paradigm of legal drone use.¹⁴

But it’s not the whole story.

The fact-set recounted above establishes the ex-ante legality of the Logar Strike, from strike authorization and target-selection through strike commission. The Logar Strike’s impact, however, did not end after drones cleared the air and dust settled to reveal a demolished civilian house and several dead men, women and children. ISAF’s conduct during the following, critical

⁹ *Nato in Deadly Afghan Air Strike in Logar Province*, BBC NEWS (June 6, 2012, 3:16 PM),

<http://www.bbc.co.uk/news/world-asia-18340140> [hereinafter BBC 6/6].

¹⁰ ISAF Initial Statement.

¹¹ *Id.*; BBC 6/6.

¹² *See id.*

¹³ *Infra* Section II.

¹⁴ *Id.*

hours and days would determine whether the Logar Strike was ultimately legal. The second, or ex-post, side to the story of a drone strike is written in the strike's aftermath, by ISAF's assessment and communication to the public of collateral damage caused by the strike.

The ex-post side of the Logar story follows.

The site of the strike was found to be a civilian home.¹⁵ Information surfaced following the strike that a wedding party had assembled there in preparation for religious festivities later that day.¹⁶ The Logar Strike killed a bride the night before her wedding, along with her family, many of whom were women and children.¹⁷ Taliban commanders were found in the building, killed along with members of the wedding party.¹⁸

These subsequently discovered facts, however tragic, did not change the ex-ante legality of the Logar Strike.¹⁹ Lawful combatants are empowered to act in self-defense to subdue enemy combatants in a war zone.²⁰ However, the method by which ISAF investigated and communicated the above facts to the public transformed an occasion on which drones were

¹⁵ *Afghanistan: Officials Claim NATO Air Strike Kills Women, Kids at Wedding Party*, CBS NEWS (June 6, 2012, 8:18 AM), http://www.cbsnews.com/2102-202_162-57448041.html?tag=contentMain;contentBody [hereinafter CBS 6/6].

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *Id.*; ISAF Initial Report.

¹⁹ *Infra* Section III.

²⁰ *See, e.g.*, Rome Statute of the International Criminal Court, art. 31(1)(c): “[A] person shall not be criminally responsible if, at the time of that person’s conduct....The person acts reasonably to defend himself or herself or another person.” IHL “reflect[s] an ancient respect for the plight of individuals facing life-threatening situations.” Eyal Benvenisti, *Human Dignity in Combat: the Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 106 (2006).

legally employed to serve a vital, battlefield function, into an event that violated international law and engendered hatred and distrust of United States troops.

ISAF issued a press release on the morning of the Logar Strike that claimed no civilian casualties, but was unintentionally published alongside AP pictures depicting women and children that had been killed in the strike.²¹ This accidental juxtaposition impressed upon the public—however falsely—that either the United States did not care to discriminate between Afghan civilians and combatants, or alternatively, falsified its reports of collateral damage. Inaccurate reporting of collateral damage generated anti-American sentiment with ramifications far transcending the hours immediately following the Logar Strike, during which villagers drove their dead to the provincial capital chanting “death to America.”²²

ISAF’s on-the-ground assessment of damage, however, is not wholly to blame for the inaccuracy. Collateral damage data is in fact distorted far from the battlefield, by the Obama administration’s assessment of “all military-aged males [killed] in a strike zone” as “combatants,” absent “explicit evidence posthumously proving them innocent.”²³ This definition of “combatant,” operating on a presumption of combatant status for all deceased men in strike zones, conflicts on its face with Customary International Law.²⁴ By this definition, every man

²¹ *Collateral Damage or Crimes of War? Women, Children among 18 Afghans Dead in NATO Wedding Strike*, GLOBAL RESEARCH (June 6, 2012), <http://www.globalresearch.ca/collateral-damage-or-crimes-of-war-women-children-among-18-afghans-dead-in-nato-wedding-strike/> [hereinafter Global Research 6/6]; CBS 6/6.

²² LiveLeak 6/9.

²³ Becker & Shane, *supra* note 3.

²⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 [hereinafter “Protocol Additional”], art 50(1) (“In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”).

killed at Logar was presumed to have been a combatant without further investigation. Perhaps this explains why ISAF has failed to release a final number of civilians killed in the strike,²⁵ rendering a final determination of collateral damage impossible.

Both ISAF's inaccurate reporting and this flawed definition of "combatant" have caused endemic miscommunication of collateral damage caused by United States drone strikes.²⁶ For example, in August of 2011, White House Chief Counterterrorism Advisor John Brennan stated that "for more than a year...the US government has not found credible evidence of collateral deaths resulting from US counterterrorism operations," prompting an investigation by the Bureau of Investigative Journalism, which found over 23 strikes during the stated time for which the "media had credibly reported civilian deaths."²⁷ Misreporting has created so much confusion that the United Nations is opening an office in Geneva this year with the sole purpose of investigating United States drone strikes.²⁸ Notwithstanding international skepticism, the Obama administration presently seeks to codify its existing policies.²⁹

This Monograph argues that without amending present ex-post methods for assessing and reporting collateral damage following a strike, the United States' drone program will remain

²⁵ *Infra* notes 107-08, 138-40 and accompanying text.

²⁶ There have been extreme discrepancies between civilian casualties reported by government officials, and those reported by the Long War Journal, the New America Foundation, and the Bureau of Investigative Journalism. *Infra* note 42.

²⁷ See *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions*, CTR. FOR CIVILIANS IN CONFLICT AND COLUMBIA LAW SCH. HUMAN RIGHTS CLINIC 30 (2012).

²⁸ Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. TIMES (Nov. 24, 2012), <http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all>.

²⁹ *Id.*

inconsistent with two fundamental principles of international law: the principle of proportionality,³⁰ and a presumption of civilian status for all individuals.³¹

This Monograph further argues that the United States is morally responsible for ensuring that its wartime drone program complies with international law in order to restrict drone use in future wars to the confines of IHL.³² According to the United Nations, “the United States is setting a legal and ethical precedent for other countries developing armed drones.”³³ Additionally, the United States is morally obligated to protect its ground troops from dangerous local backlash predicated on unnecessary miscommunication.³⁴

³⁰ *Infra* Section II.C.2 *applying* Protocol Additional art. 51(5) (Attacks are prohibited “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”).

³¹ *Supra* note 24.

³² David P. Forsythe, *The United States and International Humanitarian Law*, 7 J. OF HUM. RTS. 25, 25 (2008) (“[T]he United States, with its size, power, and relative[sic] transparency, has great impact on world affairs. Some data indicate that because of US tough policies after the terrorist attacks of September 11, 2001, many states, taking their cue from Washington, increased repression—and thus in general violations of many human rights.”).

³³ Shane, *supra* note 28.

³⁴ 2012 was one of the bloodiest years in recent memory for ISAF troops in Afghanistan—not because of a surge in Taliban activity, but rather because of a dramatic rise in “green-on-blue attacks” perpetrated by Afghan National Security Forces against their ISAF counterparts. According to a Newsweek article published just two months after the Logar Strike:

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

I. THE IMPORTANCE OF AFGHANISTAN

Afghanistan is both the longest and least talked about war in American history.³⁵ Its absence from the presidential election was so palpable that Joshua Foust of *The Atlantic* published an article aptly titled “The Afghanistan-Shaped Hole in the Presidential Campaigns,” in which he explained why “[n]either presidential campaign ha[d] seemed interested...in taking a bold stand on Afghanistan or in pushing a different strategy,” writing that with most Americans favoring immediate withdrawal of troops, there was “little political gain” involved in doing so.³⁶ Spoof newspaper *The Onion* encapsulated growing ignorance of the War in a piece titled: “Nation Horrified to Learn About War in Afghanistan While Reading up on Petraeus Sex Scandal.”³⁷ An Iraq War veteran exposed the painfully true underpinnings of this spoof, writing: “While we’ve been captivated with the unfolding mess, and the steady drip, drip, drip of tawdry details, American men and women are still dying in Afghanistan.”³⁸

Sami Yousafzai & Ron Moreau, *Afghanistan: ‘Green on Blue’ Killings Explained*, THE DAILY BEAST (Aug. 27, 2012, 1:00 AM), <http://www.thedailybeast.com/newsweek/2012/08/26/afghanistan-green-on-blue-killings-explained.html>.

³⁵ Arianna Huffington, *Afghanistan: Our Longest and Least Talked About War*, HUFFINGTON POST (Oct. 11, 2012, 2:39 PM), http://www.huffingtonpost.com/arianna-huffington/afghanistan-our-longest-a_b_1958282.html.

³⁶ Joshua Foust, *The Afghanistan-Shaped Hole in the Presidential Campaigns*, THE ATLANTIC (Sept. 7, 2012, 11:02 AM), <http://www.theatlantic.com/international/archive/2012/09/the-afghanistan-shaped-hole-in-the-presidential-campaigns/262059/>.

³⁷ THE ONION (Nov. 13, 2012), *available at* <http://www.theonion.com/articles/nation-horrified-to-learn-about-war-in-afghanistan,30367/?ref=auto>.

³⁸ Brian Mockenhaupt, *Failure of Leadership: An Iraq War Vet on Petraeus*, DAILY BEAST (Nov. 21, 2012, 6:05 PM), <http://www.thedailybeast.com/articles/2012/11/21/david-petraeus-betrayed-us-writes-an-iraq-war-vet.html>.

Forgetting about Afghanistan, the first war in which the United States has deployed drones on a large scale in combat,³⁹ however, exacts a high price. The United States will not exit Afghanistan before 2014.⁴⁰ In fact, thousands of United States troops will almost certainly remain in Afghanistan beyond 2014.⁴¹ As long as the United States has boots on the ground (and drones in the sky), it will continue to set precedent in Afghanistan for states' future use of drones in theatres of war, and will continue to ask its troops to make incredible sacrifices on its behalf.

The New York Times revealed for the first time on May 29, 2012 the Obama administration's definition of "combatant" for the purpose of assessing collateral damage.⁴² The definition has not been adequately confronted as a stumbling block to compliance with IHL of the United States' drone program in Afghanistan.⁴³ Although the attention of scholars and

³⁹ See Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN RELATIONS (updated May 23, 2013), <http://www.cfr.org/counterterrorism/targeted-killings/p9627>.

⁴⁰ Citing Secretary of Defense Leon Panetta:

Mr. Panetta said no decisions had been made about the number of American troops to be withdrawn in 2013. In early 2012, the United States had some 90,000 troops in Afghanistan, with 22,000 of them due home by the fall. There has been no schedule set for the pace of the withdrawal of the 68,000 American troops who will remain, only that all are to be out by the end of 2014.

Afghanistan, N.Y. TIMES (updated Aug. 23, 2013),

<http://topics.nytimes.com/top/news/international/countriesandterritories/afghanistan/index.html>.

⁴¹ Agence France Presse, *Ex-NATO Chief: 15,000 Troops Should Stay in Afghanistan After 2014*, BUSINESS INSIDER (Aug. 14, 2013, 7:07 PM), <http://www.businessinsider.com/nato-chief-troop-levels-afghanistan-2014-2013-8>.

⁴² This prompted some scholars to begin evaluating the definition's implications for drone use *outside* theatres of war. See, e.g., *The Civilian Impact of Drones*, *supra* note 27; *Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan*, INT'L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC, STANFORD LAW SCH. AND GLOBAL JUSTICE CLINIC, NYU SCH. OF LAW 43-54 (2012).

⁴³ See, e.g., *The Civilian Impact of Drones*, *supra* note 27 at 19, 46 (expressing concern about the "true civilian toll of drone operations *outside the Afghanistan combat theater*," applauding the United States' policy of "immediately

politicians alike has turned away from governance of drones in theatres of war, the people of Afghanistan, and the seventy countries that currently have drone technology- including Russia, India, China, and Libya⁴⁴- continue to pay close attention.

investigating any incident of civilian harm” resulting from strikes in Afghanistan) (emphasis added); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* (Brookings Inst., Georgetown Univ. Law Ctr., & Hoover Inst., Working Paper at 29, 2009) (concluding that drones should be permitted “unashamedly” against terrorists within theatres of war); Shane, *supra* note 28 (reporting that “[e]xperts say the [United States’ drone] strikes are deeply unpopular both in Pakistan and Yemen, in part because of allegations of large numbers of civilian casualties, which American officials say are exaggerated” while ignoring controversy surrounding the calculation of civilian casualties caused by strikes in Afghanistan).

Drone legality within and outside of theatres of war are two separate and distinct considerations, because outside theatres of war, a different and more demanding regime of international law known as International Human Rights Law (“IHRL”) applies. *International Humanitarian Law and International Human Rights Law*, *supra* note 2. While IHL acknowledges that death, even of civilians, is inevitable in times of armed conflict, IHRL is based on the principle that “Every human being has the inherent right to life” outside theatres of war. International Covenant on Civil and Political Rights, art. 6, *opened for signature* Dec. 16, 1966, U.N. GENERAL ASSEMBLY Resolution 2200A (XXI), *entry into force* (1976). This Monograph goes one step beyond existing scholarship to argue that United States methods for calculation of collateral damage fails even to comply with IHL.

⁴⁴ *21st Century Battlefield: Race of Drones*, YNETNEWS (Oct. 30, 2012, 12:40 AM), <http://www.ynetnews.com/articles/0,7340,L-4287728,00.html>; Peter Bergen & Jennifer Rowland, *A Dangerous New World of Drones*, CNN.COM (Oct. 8, 2012, 5:13 AM), <http://www.cnn.com/2012/10/01/opinion/bergen-world-of-drones/index.html>.

II. LAWS GOVERNING DRONES AND THE LIMITS OF EXISTING SCHOLARSHIP

Scholarship scrutinizing whether the United States' use of drones in Afghanistan is consistent with IHL has focused exclusively on ex-ante strike authorization and strike execution.⁴⁵ There is now near consensus that the use of drones in Afghanistan is consistent with IHL.⁴⁶ Drone warfare implicates three fundamental principles of IHL, taken from the Protocol Additional to the Geneva Conventions:⁴⁷ necessity,⁴⁸ distinction,⁴⁹ and proportionality.⁵⁰

⁴⁵ See, e.g., *The Civilian Impact of Drones*, *supra* note 27 at 73-76 (in which authors correctly note that IHL requires an individual be presumed a civilian for *ex-ante* purposes of targeting and strike authorization, but conflate the United States' ex-ante procedures for strike authorization with its ex-post procedures for assessment of collateral damage. Authors therefore terminate their inquiry into strike legality before fully addressing the need for an ex-post presumption of civilian status *to lawfully determine collateral damage*. Specifically, authors assert that "while the US government states that it does not conduct strikes against a particular individual unless it has a high degree of certainty that the high-value target is present and that civilians are not, it appears the US often presumes that persons in geographic proximity to targeted individuals can also be directly and intentionally targeted." In fact, a presumption of combatant status does not arise until the ex-post assessment stage following a strike. Authors base their assertion on the May 2012 New York Times article divulging President Obama's "disputed method for *counting civilian casualties*" (emphasis added) following a drone strike -- which is distinct from the administration's painstaking method for selecting drone targets and approving strikes ex-ante. See Becker & Shane, *supra* note 3.

⁴⁶ See, e.g., *Lawful Use of Combat Drones*, Hearing titled: Rise of the Drones II: Examining the Legality of Unmanned Targeting Before the Subcomm. on Nat'l Sec. & Foreign Affairs, 111th Cong. 1-2 (2010) (statement of Mary Ellen O'Connell, Robert and Marion Short Chair in Law, Univ. of Notre Dame) ("[r]estricting drones to the battlefield is the single most important rule governing their use."); Thomas E. Ricks, *Are the Strategic Costs of Obama's Drone Policy Greater than the Short-term Gains?*, FOREIGN POLICY (June 27, 2012, 10:52 AM), http://ricks.foreignpolicy.com/posts/2012/06/27/are_the_strategic_costs_of_obama_s_drone_policy_greater_than_the_short_term_gains_0, quoting a panel discussion hosted by the German Marshall Fund, in which panelists unconditionally condone ISAF's use of drones in Afghanistan:

A. Necessity

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

Panelists noted that in Afghanistan, ISAF has been very effective at using drones as part of the larger military campaign. Strict rules govern the use of drones under ISAF command. Under no conditions, for example, are drones used to attack buildings, given the possibility that unidentified civilians may be inside. Such rigidity results not solely from a belief in abiding by the rules of war, but from a conviction that any civilian deaths threaten greater instability. In the hinterlands of Pakistan, Somalia, and Yemen, where ground troops are unable to help vet potential targets or engage with local populations to redress errors, drones have struck more fear and resentment in local populations than confidence.

⁴⁷ Although the United States is not party to the Protocol Additional, according to a majority of states and

international organizations, including most importantly the ICRC, the treaty reflects binding Customary

International Law. ICRC, *Treaties and Customary Law: Overview*, Oct. 29, 2010, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/overview-treaties-and-customary-law.htm>.

⁴⁸ Protocol Additional art. 52(2) (“Attacks shall be limited strictly to military objectives...to those objects...whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, *offers a definite military advantage*”) (emphasis added).

⁴⁹ Protocol Additional art. 48 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

⁵⁰ Protocol Additional art. 51(5) (“Indiscriminate attacks are prohibited...[including] attack[s] which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”).

⁵¹ *Supra* note 48.

⁵² Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. & POL’Y 101, 115-16 (2010) (explaining that drones offer a significant military advantage “in a war that is transnational in scope and with enemies intent on hiding among civilians and within failed or semi-failed states and territories.”).

ability to “eliminate the cancerous tumor called an al-Qaida terrorist, while limiting damage to the tissue around it.”⁵³

Brennan’s statement implies that drones not only satisfy the principle of necessity, but also satisfy the principles of distinction and proportionality. He implies specifically that drones can distinguish between “tumors” (al-Qaeda combatants) and “tissue” (Afghan civilians), and that their “laser-like” ability to do so automatically limits collateral damage to the greatest extent possible. His statement implies that these undisputed capabilities alone ensure drone compliance with IHL. In doing so, Brennan over-simplifies the issues surrounding drone use. While drone satisfaction of necessity within theatres of war has always been greeted with near consensus, the inception and enlargement of the United States’ drone program in Afghanistan initially sparked serious debate as to drone adherence to distinction and proportionality.

B. Distinction

The second IHL principle, distinction, has one factual requirement: (“Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives”); and one legal requirement: (“and accordingly shall direct their operations only against military objectives”).⁵⁴ The factual component requires

⁵³ John Brennan, White House Counterterrorism Adviser, Speech at the Woodrow Wilson Center: Drone Ethics (May 1, 2012) (transcript *available at* <http://www.npr.org/2012/05/01/151778804/john-brennan-delivers-speech-on-drone-ethics>).

⁵⁴ *Supra* note 49; *see also* Sarah Kreps & John Kaag, *The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis*, NORTHEASTERN POL. SCI. ASS’N at 25 (2012) (cautioning scholars and policymakers against focusing solely on the factual demand of the principle of distinction, arguing that “the mere use of particular technologies in military strikes cannot bestow on them legal and ethical legitimacy; it is individuals—rather than the technologies on their own—who make these assessments.”).

that a weapons technology have the capacity to distinguish between military and civilian targets. The legal component requires those endowed with the power to authorize the use of such technology, policy makers and military officials, to take every feasible measure to minimize harm to civilians.⁵⁵ Drones satisfy the factual requirement better than any other weapon currently employed in Afghanistan.⁵⁶ Drones unquestionably satisfy the factual requirement better than ground troops acting alone for several reasons, including that drones are never impaired by “mortal fear.”⁵⁷ Drones also have the luxury of being “deliberate instead of reactionary” in their attacks, responding to threat with the appropriate amount of force, and only after having gained information verifying the status of their targets, rather than responding out of fear with “massive uses of force directed at only vaguely identified targets.”⁵⁸ Consequently,

⁵⁵ *Id.*

⁵⁶ Leon Panetta, Secretary of Defense, Speech at the Pacific Council on International Policy (May 18, 2009) (referring to drones as “the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership”); *see also* Issacharoff & Pildes, *supra* note 1 at 53-54 (stating that drones “should be seen as a substantial humanitarian advance in warfare” because “[d]rones, as against other uses of military force, better realize [humanitarian] principles than any other technology currently available. Indeed, they allow for the most discriminating uses of force in the history of military technology and warfare, in contexts in which the use of force is otherwise justified); *see also* Vogel, *supra* note 52 at 122 (stating that drones have the capability to observe and strike their targets precisely, and that drone compliance with the principle of distinction hinges on policymakers’ ability to satisfy the legal demand alone); *see also* Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 *Tex. Int’l L.J.* 293, 297-98 (2012) (praising the “longer loiter time of drones [that] allows for a much higher level of confidence that the target has been properly identified.”).

⁵⁷ Lewis, *supra* note 56.

⁵⁸ Isaacharoff & Pildes, *supra* note 56 at 56.

drones generate fewer civilian casualties than ground troops,⁵⁹ whose information is limited and judgment frequently impaired by the “fog of war.”⁶⁰ The cause for concern regarding drone capacity to satisfy the principle of distinction, therefore, has nothing to do with any inherent feature of the weapons technology itself; but rather, *how* drones are employed, and whether policy decisions will inevitably handicap drones’ ability to satisfy the legal requirement of distinction. Many worry that drones diminish the United States’ willingness to abide by IHL, encouraging overly broad definitions of what constitutes a legitimate, ex-ante strike target.⁶¹ The primary argument advanced to this end is that drones’ significant reduction of the cost of war to the United States in terms of both “blood and treasure” will seduce policymakers to expand the concept of what constitutes a “legitimate target,” and engage in more, longer, and less legitimate wars.⁶² These arguments, however, are misguided insofar as they oppose drones as a weapons technology. All that can reasonably be required of a weapons technology is that it satisfy the “fact” component of distinction: that it be endowed with the capacity to distinguish between combatants and civilians, and the accuracy to execute strikes against the former only. This drones can clearly do. Drone technology effectively gives policymakers the tools to comply with

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

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

⁶¹ Kreps & Kaag, *supra* note 54 at 2-3 (calling attention to a difference between “increasingly sophisticated technology” and “increasingly sophisticated judgment,” and arguing that drones, “by shielding U.S. soldiers from injury in the field—both insulate the U.S. domestic population from the effects of an on-going war and allow strategists to avoid the logical and ethical pitfalls associated with advances in technology.”).

⁶² *Id.* at 23.

distinction. Whether or not policymakers employ drones appropriately and make the best use of this technology (in order to satisfy the “legal” component of distinction) does not bear on the question of whether drones in general comply with international law.

In fact, scholars have come to agree that, at least in theatres of war, drones present no novel legal issue.⁶³ Where IHL governs, there is no legal prohibition whatsoever of asymmetrical warfare, or of weapons technologies that attempt to remove soldiers as far as possible from the battlefield; the truth is that “advances in military technology have always been about the ability to project force from a distance.”⁶⁴ Scholars have, for centuries, argued that humanitarian developments in the way of war, like drones, will “perversely” increase countries’ willingness to go to war.⁶⁵ Pacifists in 19th Century objected, for this reason, to the formation of the International Committee of the Red Cross, arguing that “[s]uch a society would relieve governments of responsibilities which really belong to them which they only can properly discharge . . . and being relieved of which would make war more easy.”⁶⁶ Drones simply continue this debate in the 21st Century.⁶⁷

⁶³ See Isaacharoff & Pildes, *supra* note 56 at 53-54.

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

⁶⁵ *Id.* at 41, 55.

⁶⁶ *Id.*, quoting CLAIRE FINKELSTEIN, TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 389 (eds. Claire Finkelstein, Jens Ohlin & Andrew Altman 2012).

⁶⁷ The debate is, in essence, a fundamental criticism of the very existence of war, rather than a practical criticism of compliance with the Laws of War—which, tragically, concede war is all but inevitable in a fallen world. (ST. AUGUSTINE, THE CITY OF GOD XIV.4; THOMAS AQUINAS, SUMMA THEOLOGIAE, Quaestio XL, de Bello).

Contrary to some scholars who argue that drones remove humans one step too far from the battlefield⁶⁸ and thus tranquilize a sense of personal accountability for strikes, drone operators feel an undeniable sense of personal responsibility for the strikes they commence. Indeed, they often experience the typical, human aversion to causing the death of another person⁶⁹ more than traditional bombardiers and soldiers.⁷⁰ Proximity and personal accountability are not always correlated. Drone operators are required to monitor potential targets for a twenty-four hour “cycle of life surveillance,” during which they regularly observe the man below interacting with his wife and children.⁷¹ Reality- that an operator is about to cause the death of another human being- is brought to bear while watching the “target” take his last meal, hug his wife for a final time, and bid his children farewell. Harold Koh, Legal Advisor to the State Department, once asked a former bomber pilot and current drone operator about the mythical “Playstation Mentality” supposed to remove a sense of personal accountability from of drone operators. The operator explained:

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

⁶⁸ Kreps & Kaag, *supra* note 54.

⁶⁹ LT. COL. DAVE GROSSMAN, ON KILLING (Revised ed. 2009).

⁷⁰ Gregory S. McNeal, *Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence* at 38 (2012), draft available at <http://ssrn.com/abstract=1954795>.

⁷¹ *Id.*

⁷² *Id.*; see also Issacharoff & Pildes, *supra* note 1 at 56 n.178, quoting DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 217 (2012).

Reality is nauseatingly poignant. Indeed, personal accountability pervades drone warfare more than it did wars of the past, in which the enemy was considered “faceless.”⁷³

C. Proportionality

1. Ex-Ante Analysis: Strike Authorization and Execution

The final principle of IHL, proportionality, requires that the military objective advanced by a strike outweigh collateral damage caused.⁷⁴ Pre-planned strikes are only authorized against “high-level” combatants,⁷⁵ in other words, Taliban and al-Qaeda leaders whose biographies are reviewed by the President before they are placed on the President’s so-called “kill list.”⁷⁶ A

⁷³ Issacharoff & Pildes, *supra* note 1 at 55. According to a recent study conducted by the Armed Forces Health Surveillance Center, drone pilots have at least comparable—and possibly higher—rates of stress disorders than soldiers in combat do. James Dao, *Drone Pilots Are Found to Get Stress Disorders Much as Those in Combat Do*, N.Y. TIMES, (Feb. 22, 2013)(“After analyzing diagnosis and treatment records, the researchers initially found that the drone pilots had higher incidence rates for 12 conditions, including anxiety disorder, depressive disorder, post-traumatic stress disorder, substance abuse and suicidal ideation.”).

⁷⁴ *Supra* note 50.

⁷⁵ Issacharoff & Pildes, *supra* note 1 at 53.

⁷⁶ Becker & Shane, *supra* note 3. The existence of the “kill list” itself has generated much controversy. See, e.g., Hannah Furness, *‘Kill list’ Legal Challenge Brought by Man Who Lost Five Relatives in Missile Strike*, THE TELEGRAPH (Aug. 10, 2012), <http://www.telegraph.co.uk/news/uknews/defence/9465942/Kill-list-legal-challenge-brought-by-man-who-lost-five-relatives-in-missile-strike.html>; Lesley Wexler, *Litigating the Long War on Terror: The Role of Al-Aulaqi v. Obama*, 159 Loyola Univ. Chicago Int’l L. Rev. at 12-13 (2012); Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Name to Kill Lists*, WASHINGTON POST (Oct. 23, 2012), http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408f6e6a4b_story.html; Katrina vanden Heuvel, *Obama’s ‘kill list’ is Unchecked Presidential Power*, WASHINGTON POST OPINIONS, (June 12, 2012),

strike against any member of the “kill list,” whose records of terrorism are verified by the President and his advisors, advances a significant military objective- literally, as Brennan fantasized, the precise removal of the most dangerous and terrorists like “cancerous tumor[s].”⁷⁷

Thus, the only remaining question about strike compliance with proportionality is that of collateral damage. To address this question, scholars such as Professor Gregory S. McNeal have pointed to exhaustive *ex-ante* mechanisms in place currently to ensure the accuracy of strikes, to mitigate (and in 99% of cases eliminate) collateral damage, and to consequently ensure ex-ante strike compliance with proportionality.⁷⁸ According to Professor McNeal, the military employs a multi-step process known as the Collateral Damage Methodology (“CDM”) to assist commanders in weighing risks to collateral objects based on empirical data and physics-based computerized models.⁷⁹ If there is any possibility that a pre-planned strike will result in collateral damage, commanders are bound to undergo a mitigation process designed by the Secretary of Defense and the President, a process that has reduced the likelihood that collateral damage will result from a pre-planned drone strike to 1%.⁸⁰ This extensive mitigation process happens before the legal question of whether a particular strike adheres to the principle of proportionality is even asked.⁸¹ Finally, in Afghanistan, any pre-planned strike that *might* result

http://www.washingtonpost.com/opinions/obamas-kill-list-is-unchecked-presidential-power/2012/06/11/gJQAHw05WV_story.html.

⁷⁷ Brennan, *supra* note 53.

⁷⁸ McNeal, *supra* note 70 at 328-32.

⁷⁹ *Id.*

⁸⁰ *Id.* at 328.

⁸¹ Issacharoff & Pildes, *supra* note 1 at 66.

in *a single* civilian casualty must be approved by President Obama himself.⁸² From this ex-ante perspective, drones appear to make easy work of compliance with proportionality.

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

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

The Obama administration's overly-broad definition of "combatant," and consequent method for counting and publicly reporting civilian casualties to the global community, is not only inconsistent with international law as codified in the Protocol Additional and interpreted by the ICRC,⁸³ but may also generate enough anti-American sentiment to thwart, rather than advance, ISAF's primary military objective: affecting counterinsurgency ("COIN").

Dr. David Kilcullen, a Lieutenant Colonel in the Australian Army, authored the foundational article used to educate company-level commanders in the United States military about the fundamental goals of COIN.⁸⁴ Kilcullen writes that COIN, in a "nutshell," is "competition with the insurgent for the right and ability to win the hearts, minds and acquiescence of the population."⁸⁵ In other words, ISAF must compete with the Taliban for

⁸² Becker & Shane, *supra* note 3.

⁸³ *Infra* Section IV.C.1.

⁸⁴ David Kilcullen, *Twenty-Eight Articles: Fundamentals of Company-Level Counterinsurgency*, IO SPHERE JOINT INFORMATION OPERATIONS CENTER (2006).

⁸⁵ *Id.* at 29.

legitimacy in the eyes of the Afghan people, legitimacy won only after the people have come to “respect” ISAF, “accept that [its] actions benefit them, and trust [its] integrity and ability to deliver on promises, particularly regarding their security.”⁸⁶

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

Kilcullen continues, “In this battlefield[,] popular perceptions and rumor are more influential than the facts and more powerful than a hundred tanks.”⁸⁷ A perception that ISAF lacks integrity “fuels and perpetuates the insurgency.”⁸⁸ Perception matters more to the accomplishment of COIN than reality. The Logar Strike caused significant collateral damage. Misreporting of collateral damage then caused the Afghan people to perceive ISAF as untrustworthy, holding grave consequences for the United States’ ability to affect COIN and therefore diminishing the “military advantage” advanced by the Strike. Such results weight both sides of the proportionality equation- collateral damage caused and military objective advanced- against a strike’s satisfaction of proportionality.⁸⁹

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ It is little wonder that “questioning whether killing unidentified fighters is legally justified *or worth the local backlash*” has “prompted the greatest conflict inside the Obama administration.” Shane, *supra* note 28 (emphasis added). Unfortunately, conflict has thus far failed to catalyze change.

III. EX-ANTE ANALYSIS OF THE JUNE 6, 2012 LOGAR STRIKE

A. Facts

On June 6, 2012, when ISAF and Afghan coalition forces approached a house in the remote Logar Province in Eastern Afghanistan, they hoped to capture and detain a combatant known to “command[] multiple insurgents and acquire[] weapons for use in insurgent attacks against Afghan and coalition troops.”⁹⁰ According to the head of the village’s local council, Mohammad Wali, a wedding party had gathered in the house on the eve of a wedding. According to Provincial Police Chief General, Ghulam Sakhi Roogh Lawanay, the gathering was a meeting of “senior [Taliban] commanders.”⁹¹ Occupants of the house were likely present for both reasons. No evidence suggests that coalition forces suspected a large number of civilians to be present in the house at the time or that a wedding party had assembled there.

Coalition forces surrounded the house on foot and warned all insurgents within to surrender.⁹² Forces immediately came under small weapons and grenade fire; returned fire; and eventually called for a precision airstrike, which devastated the house and concluded the operation.⁹³

Immediately following the operation, ISAF issued a press release stating that “as a result of the operation, multiple insurgents were killed and the Afghan and coalition security force

⁹⁰ ISAF Initial Statement.

⁹¹ CBS 6/6.

⁹² BBC 6/6.

⁹³ ISAF Initial Statement; *NATO Airstrike Kills ‘at least 15 Afghan civilians’*, AFP (June 6, 2012), <http://www.afp.com/en/news/topstories/nato-airstrike-kills-least-15-afghan-civilians> [hereinafter AFP 6/6].

seized several weapons and a quantity of explosives,” quantifying collateral damage as “two women who had sustained non-life-threatening injuries.”⁹⁴

Evidence in the form of testimony and photographs by sources on-site immediately revealed collateral damage beyond that acknowledged by ISAF. Deputy Provincial Police Chief Raeis Khan Abdul Rahimzai reported that “seven key local Taliban officials were killed in the strike,” but that eleven civilians, including women and children, had also been killed.⁹⁵ Rahimzai’s testimony was bolstered by photographs taken by an on-site AP photographer- of villagers transporting their dead to the provincial capital in vans- including several women and children.⁹⁶

The death toll eventually amounted to five women, seven children, and six men.⁹⁷ However, there is still disagreement as to how many of the dead were combatants. BBC, citing “Afghan officials,” reported that all of the men killed were civilians.⁹⁸ USA Today cited “Afghan officials” who claimed that “some or all of the dead men were militants.”⁹⁹ The deceased males’ statuses have yet to be publicly resolved by ISAF.

⁹⁴ ISAF Initial Statement.

⁹⁵ CBS 6/6; AFP 6/6.

⁹⁶ *Id.*; Global Research 6/6; *Afghan Leader: NATO Airstrike Killed 18 Civilians*, USA TODAY (June 7, 2012), <http://usatoday30.usatoday.com/news/world/story/2012-06-07/afghanistan-civilian-deaths/55444706/1> [hereinafter USA Today 6/7].

⁹⁷ USA Today 6/7.

⁹⁸ BBC 6/6.

⁹⁹ USA Today 6/7.

BBC reported that “[v]illagers took their dead to the provincial capital to show that they had been wrongly targeted.”¹⁰⁰ Once villagers reached the capital, they held demonstrations to “condemn the killings.”¹⁰¹ They “chanted anti-US and anti-Afghan government slogans, saying ‘death to America, death to the Afghan government, death to Hamid Karzai and death to Barak Obama.’”¹⁰²

Not unsurprisingly considering the discord, Hamid Karzai stated that all 18 people killed were civilians, adding: “This is unacceptable, it cannot be tolerated.”¹⁰³ Karzai then “criticized NATO for not being able to provide an explanation for the vans piled with women’s and children’s bodies that villagers displayed to reporters.”¹⁰⁴

ISAF immediately issued a second statement that civilian casualties resulting from the strike would be investigated further.¹⁰⁵ Major Martyn Crighton, spokesperson for ISAF, stated that a Joint Investigation Assessment team was being assembled to investigate “allegations” of

¹⁰⁰ BBC 6/6.

¹⁰¹ LiveLeak 6/9.

¹⁰² *Id.*

¹⁰³ USA Today 6/7; Heidi Vogt, *NATO Airstrike Killed 18 Civilians in Eastern Afghanistan, Hamid Karzai Says*, HUFFINGTON POST (Sept. 7, 2012, 6:44 AM), http://www.huffingtonpost.com/2012/06/07/nato-airstrike-afghanistan-civilian-casualties_n_1576615.html?view=print&comm_ref=false.

¹⁰⁴ *Id.*

¹⁰⁵ ISAF Joint Team Assesses Civilian Casualties in Eastern Afghanistan, NATO, 2012-06-S-012 (June 6, 2012), <http://www.isaf.nato.int/article/isaf-releases/joint-team-assesses-civilian-casualties-in-eastern-afghanistan.html> [hereinafter ISAF Second Statement].

civilian casualties; needless to say, “because there is such a discrepancy between what our operational reporting indicates and what Afghan officials on the ground are saying happened.”¹⁰⁶

Two days after the strike, ISAF issued a statement that its “initial assessment” of the incident was concluded, and that it assumed responsibility for the “unintended, but nonetheless tragic death of Afghan civilians.”¹⁰⁷ This statement failed to state a total number of civilians or combatants killed,¹⁰⁸ and is, to date, NATO’s final word on the matter. ISAF then-Commander General John Allen personally apologized to the family members of those killed “as a father,” and affirmed his commitment to doing “the right thing” in terms of compensating the families for their loss and “minimiz[ing] the likelihood of similar occurrences in the future.”¹⁰⁹

B. Analysis Proving Ex-ante Compliance with IHL

Ryan J. Vogel, Foreign Affairs Specialist in the Office of the Secretary of Defense, operationalized the principles of necessity, distinction and proportionality to evaluate the legality of drone strikes by examining several different scenarios in which drones are used and identifying common elements between them that determine whether or not they comply with IHL.¹¹⁰ Vogel proposes a list of “weightier issues” material to each strike’s compliance with IHL to serve as “guidelines” for the use of drones, thereby addressing the most contentious and

¹⁰⁶ *Id.*; Vogt, *supra* note 3.

¹⁰⁷ ISAF Commander Expresses Condolences, NATO, 2012-06-CA-003 (June 8, 2012), [http://www.isaf.nato.int/index2.php?option=com_content&task=view&id=12859&pop=1&page=0&Itemid=83&lang= \[hereinafter ISAF Final Statement\].](http://www.isaf.nato.int/index2.php?option=com_content&task=view&id=12859&pop=1&page=0&Itemid=83&lang= [hereinafter ISAF Final Statement].)

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Vogel, *supra* note 52 at 104-06.

frequently discussed issues surrounding drone use.¹¹¹ Vogel identifies seven “recurrent issues” that determine drone strikes’ compliance with IHL: (1) consent of the government where the strike occurs; (2) rank or importance of the target; (3) foreseeability of civilian losses; (4) humanitarian objective; (5) location of the strike; (6) location of the drone operator; and (7) status of the operator.¹¹² The Vogel framework for analysis indicates how, ex-ante, the Logar Strike adhered to IHL:

(1) Consent of the government

Since December 22, 2001, when he was sworn in as president of Afghanistan, Hamid Karzai has been endowed with the capacity to consent, and has in fact consented, to the United States’ military intervention in a non-international conflict against the Taliban within the borders of Afghanistan.¹¹³ This level of consent to intervention in Afghanistan is all that is required in the context of a non-international conflict to permit the use of drones in accordance with IHL.¹¹⁴

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

(2) Rank or importance of the target

The Taliban commander coalition forces set out to detain was known through intelligence to “command[] multiple insurgents and acquire[] weapons for use in insurgent attacks against

¹¹¹ *Id.* at 106.

¹¹² *Id.*

¹¹³ See, e.g., ERIC BLEHM, THE ONLY THING WORTH DYING FOR (2010); *Drones: a Sign of the Times*, CNN SECURITY CLEARANCE BLOG (Dec. 4, 2012, 8:24 AM), http://security.blogs.cnn.com/2012/12/04/drones-a-sign-of-the-times/?hpt=hp_t3 (“U.S. drones operate over Yemen and Afghanistan with the host government’s agreement.”).

¹¹⁴ See, e.g., The Legal Validity of Military Intervention by Invitation of the Government, 56 BRIT. Y.B. INT’L L. 189, 210 (1985).

Afghan and coalition troops.”¹¹⁵ This target’s active facilitation of terrorism in the village merited his removal from the village. There is no information regarding the target’s rank; however, no further information is needed for this element to weigh in favor of the Strike’s ex-ante legality, because the objective of the operation was to remove the target by way of detention, not death.¹¹⁶

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

(3) Foreseeability of civilian losses

There is no evidence to suggest that coalition troops could reasonably have foreseen civilian casualties resulting from the Strike: according to one report, “[o]nly later did [troops] discover that in addition to insurgents” they had killed civilians who allegedly “had gathered there for a wedding party.”¹¹⁷

One might argue that coalition forces should reasonably have foreseen civilian losses because the target on which they requested the strike was a civilian house. However, troops’ verbal warnings to occupants, as they approached the house on foot, were met with small arms fire and grenades from within.¹¹⁸ Troops therefore reasonably believed the structure was not a civilian home, but a military location containing enemy combatants. Weapons and explosives

¹¹⁵ ISAF Initial Statement.

¹¹⁶ See Masters, *supra* note 39.

¹¹⁷ Heidi Vogt & Rahim Faiez, *Afghanistan War: Karzai Slams U.S. for Failing to Consult on Airstrike*, HUFFINGTON POST (Sept. 9, 2012, 4:45 PM), http://www.huffingtonpost.com/2012/06/09/afghanistan-war-us-airstrike_n_1583398.html?view=print&comm_ref=false.

¹¹⁸ ISAF Initial Statement.

discovered within the house following the operation suggest that several Taliban insurgents were in fact present in the compound in a military capacity.¹¹⁹

Vogel further suggests, when evaluating the foreseeability of civilian losses, consideration of whether the enemy “intentionally fails to distinguish” itself.¹²⁰ This element must be evaluated given the context of the modern battlefield, which has been transformed by features of modern terrorism, including combatants’ failure to wear uniforms or otherwise distinguish themselves from civilians, and combatants’ willingness to hide themselves among civilians.¹²¹ In the context of the modern battlefield, enemy combatants are identified not by clear “membership in an opposing army,” but rather by the “specific acts” they perpetrate.¹²² This clearly impedes coalition forces’ ability to conclusively determine, prior to any operation, whether a structure is filled with civilians, combatants, or a combination thereof. Therefore, combatants’ failure to distinguish themselves “should factor into the analysis of [drone] targeting decisions and the inevitable post-strike discussion on the strike’s legality.”¹²³ Especially considering the unique challenges faced combating modern terrorism, it was reasonable that coalition forces in Logar judged a structure from which small weapons and grenade fire was emitting to be a military compound, rather than a civilian house.

Therefore, this element weighs in favor of the Strike’s ex-ante legality.

¹¹⁹ *Id.*

¹²⁰ Vogel, *supra* note 52 at 106.

¹²¹ Isaacharoff & Pildes, *supra* note 56 at 2; Chris Jenks, *Law From Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649, 669 (2009).

¹²² Isaacharoff & Pildes, *supra* note 56 at 4-5.

¹²³ Jenks, *supra* note 121 at 669.

(4) Humanitarian objective

A strike's objective is considered "humanitarian" when forces seek the "less harmful option if [the] target might...be captured."¹²⁴ This is precisely what coalition forces set out to do in Logar: first sending troops in on foot with the objective of capturing and detaining their target, and only after having come under fire requesting a precision airstrike on a structure reasonably believed to be a military compound.¹²⁵ There is no evidence suggesting an alternative means of support was possible under the circumstances.

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

(5) Location of the strike

This, according to Vogel, is the key point of analysis for strikes within a theatre of combat.¹²⁶ Vogel firmly asserts that "[w]hen a drone strike occurs within a recognized and accepted theater of active armed conflict, such as Afghanistan...there is virtually no question that the attack is covered by the *lex specialis* of the law of armed conflict by virtue of geography."¹²⁷

This element, therefore, weighs heavily- if not decisively- in favor of the Logar Strike's ex-ante legality.

¹²⁴ See Vogel, *supra* note 52 at 106.

¹²⁵ ISAF Initial Statement; CBS 6/6.

¹²⁶ Vogel, *supra* note 52 at 130.

¹²⁷ *Id.*

(6) Location of the operator

The operators of the drones at issue in Logar were almost certainly in-country.

Regardless, Vogel addresses this element only in order to properly dismiss it, asserting that the location of the operator is a non-issue for compliance with IHL.¹²⁸ Vogel writes:

[T]he law of armed conflict does not present any additional limitations or prohibitions in this respect. There is no difference under the law of war if a ship at sea fires a rocket at a military objective hundreds or thousands of miles away ashore...or if a domestic missile installation fires an intercontinental ballistic missile at a lawful target half way across the globe.¹²⁹

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

(7) Status of the operator

Vogel argues that the operator of a drone must be a combatant in order to comply with IHL. Only lawful combatants operate in Afghanistan.¹³⁰

Therefore, this element weighs in favor of the Logar Strike's ex-ante legality.

Considering the totality of the elements, the Logar Strike was conclusively legal from the point of its ex-ante authorization through its execution, despite resulting in a tragic number of civilian deaths. The Strike conferred a definite military advantage on coalition forces, air support being necessary to ensure troops' safety. Prior to and during the Strike, coalition forces distinguished between civilians and combatants to the extent possible under the circumstances, surrounding the house based upon intelligence that Taliban insurgents were within, and

¹²⁸ *Id.* at 133-34.

¹²⁹ *Id.*

¹³⁰ *See id.* at 135-36.

concluding occupants were combatants based upon their engagement with small weapons fire and grenades. Finally, collateral damage was limited to the greatest extent possible prior to and during the Strike, coalition forces issuing verbal requests for surrender prior to using force, and resorting to force only in self-defense. The Logar Strike, therefore, ex-ante complied with all three fundamental principles of IHL: necessity, distinction and proportionality.

IV. EX-POST ANALYSIS OF THE LOGAR STRIKE AND RECOMMENDATIONS

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

A. Problematic Conduct

Drones can be equipped with advanced cameras capable of monitoring targets for 24-hours prior to pre-planned attacks, and likewise capable of lingering after a strike to assess collateral damage.¹³¹ One type of drone used by the United States military, for instance, is the RQ-1.¹³² The RQ-1 "uses some of the most sophisticated monitoring equipment available

¹³¹ McNeal, *supra* note 70 at 338.

¹³² Robert Valdes, *How the Predator UAV Works*, HOW STUFF WORKS, <http://science.howstuffworks.com/predator.htm>.

today,” including a “[f]ull-color nose camera that the pilot uses primarily to navigate the craft[;] [v]ariable aperture camera (similar to a traditional TV camera) that functions as the Predator’s main set of ‘eyes’[;] [v]ariable aperture infrared camera for low-light and night viewing[; and] [s]ynthetic aperture radar (SAR) for seeing through haze, clouds or smoke.”¹³³ Thus, “[e]very camera in the plane’s forward bank can produce full-motion video and still-frame radar images. The RQ-1 can give real-time imagery of the enemy position to a command post.”¹³⁴ With this level of monitoring technology available, capable of seeing (and tracking) combatants during the day, during the night, and even through clouds of smoke, there is no excuse for a drone not to loiter for a reasonable time following a strike to collect accurate information regarding collateral damage. Drones have the capability to hover in the air, while carrying a full payload, for 24 hours.¹³⁵ Had the drone used in Logar been properly equipped and hovered for even just a few hours longer than it did in order to collect collateral damage data, ISAF’s initial statement would have been better informed. It would have been clear- just several hours following the Strike, when the first on-site reports began to surface depicting twelve dead women and children- that at least *some* civilian casualties had been sustained. It is no secret that the United States possesses this advanced monitoring capability, so when ISAF’s initial statement mentioned no civilian casualties, one could reasonably assume, and many did, that the report was intentionally falsified.

A second and related misstep by ISAF following the Logar Strike was issuance of an initial press release prior to conducting a full assessment of collateral damage. ISAF’s initial

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

statement was issued the morning of the Strike.¹³⁶ Rather than prioritizing expediency, ISAF should have prioritized accuracy, and withheld an initial statement until it could quantify, or at least acknowledge *the possibility of any*, civilian casualties.¹³⁷

Finally, ISAF never publicly confirmed the number of civilians killed in the Logar Strike.¹³⁸ This is likely because, under the Obama administration's definition of "combatant" for ex-post assessment of collateral damage, all men killed in the strike were presumed to be combatants. It is impossible to determine whether evidence absolving the deceased males of combatant-status was ever sought or reviewed by ISAF, but judging by the timing of ISAF's third and final press release on the matter (issued just two days following the Strike¹³⁹), it is unlikely that a sufficient effort to determine the males' statuses beyond this presumption was made. If made, it was certainly not communicated to the public. Absent an accurate

¹³⁶ ISAF Initial Statement.

¹³⁷ It is, admittedly, important to respond to perceived missteps by United States troops and ISAF quickly, even if doing so means responding with incomplete information. According to the U.S. Army/Marine Corps Counterinsurgency Field Manual, troops are to "[h]ighlight successes of counterinsurgents promptly....[and] not delay announcements while waiting on results. Initiate communications immediately to let people know what counterinsurgents are doing and why." Lt. Col. John A. Nage, U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL, No. 3-24 at 162, table 5-1 (2007). While it is important and even essential that ISAF publish information regarding the purpose and outcome of violent incidents such as the Logar Strike before the Taliban does, a balance between accuracy and expediency must be struck. Ultimately, in the case of the Logar Strike, ISAF would have better affected damage-control had it immediately issued an explanation for the Strike on a civilian house, and a statement that while it was unaware of civilian deaths, it was diligently investigating the situation. Furthermore, ISAF should eventually have released a final number of civilians and combatants killed.

¹³⁸ See ISAF Final Statement.

¹³⁹ *Id.*

determination of the statuses of the deceased, it is impossible for either ISAF or the global community to assess whether proportionality was achieved in the Logar Strike. Evidence as to proportionality is essential to judge whether or not the Strike was ultimately legal, and to inform the authorization of future drone strikes to ensure they achieve proportionality.¹⁴⁰ Furthermore, failing to publicly acknowledge the status of each person killed gives the impression that the United States cares not whether the dead were civilians or combatants, which in turn fosters doubt as to whether or not the United States makes *ex-ante* efforts to distinguish between civilians and combatants prior to strikes.

B. Recommendations for Compliant Conduct

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

The initial recommendations for compliant conduct are obvious: first, ISAF must equip every attack drone with the means to assess collateral damage following a strike. Second, ISAF should allow drones to remain in a strike zone following an operation for long enough to collect accurate data as to collateral damage. Third, ISAF should never issue a press release purportedly disclosing collateral damage, or lack thereof, until all data has been aggregated, and if possible confirmed by on-site witnesses. Fourth, in the event that ISAF is mistaken in a report on collateral damage caused by a strike, in addition to offering compensation and condolences to those civilians harmed and their families, ISAF must publicly (and *accurately*) disclose the

¹⁴⁰ *Supra* note 50.

number of civilians and combatants killed. Importantly, accuracy depends upon a definition of “combatant” that complies with international law.

C. Recommendation for a Compliant Definition of “Combatant”

All of the above recommendations are insufficient to ensure the legality of the United States’ drone program in Afghanistan absent a definition of “combatant” for the ex-post assessment of collateral damage that is consistent with international law.

1. Presumption of Civilian Status

The Obama administration’s definition of “combatant” for ex-post assessment of civilian casualties creates a rebuttable presumption that a deceased adult male was a combatant. IHL, however, requires a presumption that any given individual is a civilian. Article 50(1) of the Protocol Additional, in which “civilian” is defined, captures this requirement, reading: “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”¹⁴¹ If there was any doubt as to what Article 50(1) requires, the ICRC reemphasized in 2009 that an individual’s status “remains subject to all feasible precautions and to the presumption of protection in case of doubt.”¹⁴² Accordingly, the Israeli High Court of Justice held in 2005 that “the burden of proof on the attacking army [to prove that an individual is a combatant] is heavy.”¹⁴³ Therefore, Customary International Law creates a presumption of civilian status absent evidence to the contrary- for every person- under IHL.¹⁴⁴

¹⁴¹ Protocol Additional, art. 50(1).

¹⁴² INT’L COMM. OF THE RED CROSS, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* at 35 (May 2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

¹⁴³ HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. (*PCATI*) [2005] (Isr.) at 606, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

2. Unlawful Combatants

The foremost difficulty in implementing this presumption of protected status on the modern battlefield is that modern warfare is characterized by the participation of “unlawful combatants,” whose status is determined by their actions, rather than their readily identifiable membership in a hostile organization.¹⁴⁵ Unlawful combatants by definition fail to identify themselves as combatants by wearing uniforms and separating themselves from civilians.¹⁴⁶ Although their participation in combat violates IHL, unlawful combatants are nevertheless protected by an extension of the presumption of civilian status, under Article 51(3) of the Protocol Additional, which defines “unlawful combatants” as presumptively “[c]ivilians [who] shall enjoy the protection... unless and *for such time as they take a direct part in hostilities.*”¹⁴⁷ This increases the difficulty faced by coalition troops in complying with IHL, particularly in distinguishing between civilians and combatants. Nevertheless, that the Taliban fails to uphold its “reciprocal responsibility” of abiding by IHL does not excuse the United States from its obligation to abide by IHL, and to continue to distinguish to the greatest extent possible between civilians and combatants,¹⁴⁸ both before and after drone strikes.

This increased difficulty has caused handwringing in states, such as Israel, currently engaged in war against unlawful combatants, over how to define “for such time as they take a

¹⁴⁴ Several different types of documents can evidence custom, including treaties, decisions by national courts, and decisions by preeminent international organizations like the ICRC. INTERNATIONAL LAW NORMS at 77-78, *supra* note 4.

¹⁴⁵ *Supra* notes 121-22 and accompanying text.

¹⁴⁶ *Id.*

¹⁴⁷ Protocol Additional, art 51(3) (emphasis added).

¹⁴⁸ Jenks, *supra* note 121 at 669.

direct part in hostilities” in a way that complies with IHL, while affording adequate protection to its civilians and lawful combatants. Defining “for such time as they take a direct part in hostilities” is key, because this is the time during which unlawful combatants, otherwise protected under IHL, may lawfully be defined and targeted as combatants. In the context of the modern battlefield, “unlawful combatant” must be defined in order to fashion a definition of “combatant” that comports with IHL.

The Israeli High Court of Justice defined “for such time as they take a direct part in hostilities” seven years ago, Israel having been involved in a perpetual state of armed conflict against terrorists (operating as unlawful combatants) since 2000.¹⁴⁹ Operating on a presumption of civilian status for individuals in cases of doubt, the Court settled on a liberal definition of “direct participation in hostilities.”¹⁵⁰ The Court, citing the work of Michael N. Schmitt, Chairman and Professor in the International Law Department at the U.S. Naval War College, wrote:

In our opinion, the ‘direct’ character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take ‘a direct part’. The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active).¹⁵¹

A liberal definition of “direct participation in hostilities” allows for a presumption of civilian status for all individuals in accordance with IHL, while broadening the universe of acceptable evidence with which to rebut this presumption and prove an individual is a combatant, for the

¹⁴⁹ *Supra* note 143 at 49.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 27; Faculty Profile of Michael N. Schmitt, U.S. NAVAL WAR COLLEGE,

<http://www.usnwc.edu/Academics/Faculty/Michael-Schmitt.aspx> (last visited Aug. 27, 2013).

dual purposes of targeting him in an operation, and counting him as a combatant casualty following an operation. This affords lawful combatants the greatest amount of flexibility possible under IHL for determining whether to engage a potentially dangerous individual in combat, and consequently provides the greatest amount of protection possible to lawful combatants against the hazards of unlawful combatants.

In addition to affording greater protection to lawful combatants, Schmitt argues that liberally interpreting “for such time as they take a direct part in hostilities” also *increases* civilian protection, and thus in doing so “best preserves the underlying values resident in humanitarian law.”¹⁵² Schmitt proposes the following interpretation of “for such time as they take a direct part in hostilities”: “[o]nce an individual has opted into the hostilities, he or she remains a valid military objective until unambiguously opting out....through extended non-participation or an affirmative act of withdrawal.”¹⁵³

Schmitt argues that this interpretation will increase civilian protection, because if civilians are permitted to opt in and out of combat without consequences, the lawful combatants they victimize will lose respect for the laws of war and thus expose the civilian population as a whole to greater danger, and the unrestrained tactical advantage of unlawful combatancy will incentivize armies to employ more civilians in combat.¹⁵⁴ Unlawful combatants, he argues, should be forced to assume the risk, having participated unlawfully in hostilities, of opposing

¹⁵² MICHAEL N. SCHMITT, “*Direct Participation in Hostilities*” and *21st Century Armed Conflict*, in *CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: Festschrift for Dieter Fleck* 529 (H. Fischerr ed. 2004).

¹⁵³ *Id.* at 510.

¹⁵⁴ *Id.*

forces not realizing their withdrawal from combat.¹⁵⁵ For all of these reasons, Schmitt concludes that when attempting to decide whether or not an individual is participating directly in hostilities:

[G]ray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities.¹⁵⁶

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

3. Proposed Definition of "Combatant"

Ex-post evaluation of civilian casualties must operate on a presumption of civilian status, as is clearly proscribed by Customary International Law. In other words, a casualty following a drone strike must count as a civilian death absent evidence suggesting the deceased was either a lawful combatant, or a civilian who forfeited his protected status by "direct participation in hostilities." "Direct participation in hostilities," however, should be interpreted liberally, in order to (1) adequately protect the United States' lawful combatants; and (2) enhance civilian protection, thereby complying in good faith with the underlying purposes of IHL. "Direct participation in hostilities" should be defined as Schmitt suggests: "[o]nce an individual has opted into the hostilities, he or she remains a valid military objective until unambiguously opting out through extended non-participation, or an affirmative act of withdrawal."¹⁵⁷ This definition

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 509.

¹⁵⁷ *Id.* at 510.

will broaden the universe of acceptable evidence with which to rebut a presumption of innocence.

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

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

As Schmitt writes, “One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants.”¹⁵⁸ This proposed definition of “combatant” will enable the United States and its troops to, in most cases, get the distinction right. Those individuals who threaten United States’ lawful combatants should and will be vulnerable to attack, and those who do not will be safe from either being targeted, or counted among deceased combatants unjustifiably.

¹⁵⁸ *Id.* at 509

CONCLUSION

IHL is rooted in universal concepts of morality.¹⁵⁹ Henry Dunant, father of the Red Cross, published *Un Souvenir de Solferino* a century and a half ago in 1862, though his words are timeless: “[I]n an age when we hear so much of progress and civilization, is it not a matter of urgency, since unhappily we cannot always avoid wars, to press forward in a human and truly civilized spirit the attempt to prevent, or at least to alleviate, the horrors of war?”¹⁶⁰ Dunant captured the horror of one of the bloodiest battles of the 19th Century in a work widely recognized as the origin of IHL.¹⁶¹ *Un Souvenir de Solferino* inspired the first Geneva

¹⁵⁹ Modern IHL was formed in response to the mass atrocities of World War II, based on the notion that the barbarism of war should have humanitarian limits, and was codified in the Geneva and Hague Conventions. See, e.g., Joan Policastri & Sergio D. Stone, AMERICAN SOCIETY OF INTERNATIONAL LAW, *International Humanitarian Law*, <http://www.asil.org/erg/?page=ihuml#id.3pul3n5yhyg6> (last visited Aug. 27, 2013); AMERICAN RED CROSS, *International Humanitarian Law*, <http://www.redcross.org/what-we-do/international-services/educating-future-humanitarians/international-humanitarian-law> (last visited Aug. 27, 2013). The United States was instrumental in IHL’s formation. Forsythe, *supra* note 32 at 26 (“The United States...ratified the various Hague and Geneva conventions....It played a leading role in the negotiation of the 1949 treaties, with those four interlocking instruments constituting the main legal firewall against barbarism in war after that time, designed to ensure that belligerents did not become barbarians.”).

¹⁶⁰ Henry Dunant, ICRC, A MEMORY OF SOLFERINO (1862) at 2, 30, available at <http://www.redcross.org.ph/pdfs/a-memory-of-solferino.pdf>.

¹⁶¹ INFORMATION PLATFORM HUMANRIGHTS.CH, *The History of International Humanitarian Law*, <http://www.humanrights.ch/en/Standards/International-Humanitarian-Law/History/index.html>.

Convention, which was signed by twelve nations, including the United States, two years later.¹⁶²

As Dunant observes:

Since new and terrible methods of destruction are invented daily...And since finally the state of mind in Europe combines with many other symptoms to indicate the prospect of future wars, the avoidance of which, sooner or later, seems hardly possible...why could not advantage be taken of a time of relative calm and quiet to investigate and try to solve a question of such immense and worldwide importance, both from the humane and Christian stand-point?¹⁶³

As the most powerful player in the international system, the United States has a moral responsibility to fortify IHL by contributing to the formation of custom that binds all states to use new weapons technologies mindful of humanitarian principles. Furthermore, the United States is morally obligated to engender trust and goodwill toward the men and women of its armed forces- to whom it is indebted for its relative position of influence- rather than distrust, which directly compromises both their mission of counterinsurgency and their safety. The United States has thus far failed to set satisfactory standards for ex-post assessment of collateral damage following drone strikes. Before the War in Afghanistan is over, the United States must amend its policies for ex-post conduct following drone strikes, including most importantly its definition of “combatant,” and thereby comply in good faith with international law. The morality of the United States’ drone program hinges on these amendments.

¹⁶² *Id.*

¹⁶³ Dunant, *supra* note 160 at 27.