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Legal Status of Drones Under LOAC and International Law

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**LEGAL STATUS OF DRONES UNDER
LOAC AND INTERNATIONAL LAW**

Vivek Sebramat

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I. INTRODUCTION

In the twenty-first century, the use of drones in military combat operations is one of the most legally controversial issues confronting international humanitarian law (IHL) and the law of armed conflict (LOAC).¹ This article argues that drones should be treated as any other component of the United States' (U.S.)² arsenal. A drone can be considered to be a weapons platform or singular weapon system. This article further argues that drones indeed offer extensive and enhanced opportunities for compliance with LOAC and other relevant laws governing the use of certain weapons. Particularly, drones are well suited to execute theories of self-defense in international affairs. In fact, drones can be used for a wide variety of tasks other than kinetic operations, such as: observation and reconnaissance, intelligence collection, target acquisition, search and rescue, delivery of humanitarian aid, and transportation of equipment.³ The appearance of new and advanced weapons in warfare is hardly a new challenge in the history of armed conflict.⁴ The epic poem Mahabharatha, [200 B.C.-200 A.D.] forbids the use of 'hyper-destructive' weapons: the warrior Arjuna, observing the law of war, refrained from using the *pasupathastra*⁵ because when the fight was restricted to ordinary conventional weapons, the use of

¹ Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT'L L. J. 294 (2011-12).

² Hereinafter, United States referred to as U.S.

³ David Turns, *Droning on: some international humanitarian law aspects of the use of unmanned aerial vehicles in contemporary armed conflicts*, CONTEMPORARY CHALLENGES TO THE LAWS OF WAR, 199 (2014).

⁴ Rayan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y, 103 (2010-2011).

⁵ See generally, Section XL, <http://www.sacred-texts.com/hin/m03/m03040.htm>, *Pasupathastra*: capable of destroying all beings and creation itself, this weapon should not be hurled without adequate cause; for if hurled at any foe of little might it may destroy the whole universe. In the three worlds with all their mobile and immobile creatures, there is none who is incapable of being slain by this weapon. And it may be hurled by the mind, by the eye, by words, and by the bow.

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extraordinary or unconventional weapons was not even moral, let alone in conformity with religion or recognized rules of warfare.⁶

At different times in history, developments such as the crossbow, gunpowder, machine guns, tanks, airplanes, noxious gasses, nuclear bombs, and a number of other deadly inventions irreversibly changed the landscape of warfare and required combatants to reassess the laws governing armed conflict.⁷ Drones have become a central instrument in armed conflict, and an increasing number of states and even non-state actors have deployed them in some way or another – although Western armies clearly have a significant technological advantage in this respect.⁸ Legal scholars have expressed a variety of opinions on the use of drones.⁹ On one hand, scholars argue that drones are lawful weapons under international law in a time of armed conflict, while on the other hand, critics argue that drones are being used in ways that violate international law.¹⁰ The legality of drones has been questioned for a variety of reasons, some more grounded in fact than others, but despite this criticism there is little question that the use of drones in surveillance and combat roles is on the rise.¹¹

The recent proliferation of drones has spawned intellectual debate on whether a country has the right under the LOAC and international law to unilaterally deploy these remotely controlled aircrafts abroad for military purposes. The use of drones in support of combat operations – particularly striking distant terror operatives – has become the most controversial legal topic.¹² Many of the most-frequently expressed criticisms about drones and drone warfare do not hold up well under serious scrutiny or, at any rate, there's nothing

⁶ GRAY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 7 (2010).

⁷ Vogel, *supra* note 4 at 103.

⁸ Ferderic Megret, *The Humanitarian Problem with Drones*, 5 *UT. L. REV.* 1284 (2013).

⁹ Shani Dann, *Drone Strikes and IHL*, (Nov. 6, 2014) <http://humanityinwarblog.com/2014/11/06/drone-strikes-and-ihl/>.

¹⁰ *Id.*

¹¹ Lewis, *supra* note 1, at 294.

¹² Heeyong Daniel Jang, *The Lawfulness of and Case for Combat Drones in the Fight Against Terrorism*, 2:1 *NAT'L L.J.* 2 (2013-2014).

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uniquely different or worse about drones when compared to other military technologies.¹³ Consider the most common anti-drone argument: drones kill a disproportionate number of civilian non-combatants.¹⁴ However, drones kill fewer civilians, as a percentage of total fatalities, than any other military weapon.¹⁵ According to the U.N.'s mission in Afghanistan (UNAMA)¹⁶ 2012 report, the number of Afghan civilian casualties caused by the United States and its allies did not increase in 2012, in fact, they decreased by 46 percent. More specifically, civilian casualties from 'aerial attacks' fell 42 percent.¹⁷ The UNAMA report found that drones released 506 weapons in 2012, compared to 294 from the previous year.¹⁸ Five incidents resulted in casualties with sixteen civilians killed and three wounded, up from just one incident in 2011.¹⁹ Even as drone attacks increased, the U.N. reported an overall decrease in civilian deaths by airstrikes with the U.S.-led coalition implementing stricter measures to prevent innocent people from being killed.²⁰ In another empirical report concerning drone strikes cited by The New York Times, 522 strikes have killed an estimated 3,376 militants and 476 civilians, decimating al-Qaida leadership even as the loss of innocent life intensifies anti-American sentiment in nations where strikes occur.²¹ Further, according to *The Long War Journal*, an estimated 801 militant deaths in

¹³ Rosa Brooks, *The Constitutional and Counterterrorism Implications of Targeted Killing: Hearing Before the S. Judiciary Subcomm. On the Constitution, Civil Rights, and Human Rights*, 113TH CONG., 2 (April 23, 2013) (Statement by Professor Rosa Brooks, Geo. U. L. Center), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1114&context=cong>

¹⁴ *Id.*

¹⁵ William Saletan, *In Defense of Drones*, SLATE, (Feb. 2013) http://www.slate.com/articles/health_and_science/human_nature/2013/02/drones.

¹⁶ Hereinafter, U.N.'s mission in Afghanistan referred to as "UNAMA" or "UNAMA's".

¹⁷ Saletan, *supra* note 15.

¹⁸ Kim Gamel, *UN: Drones killed more Afghan civilians in 2012*, YAHOO NEWS, (Feb. 19, 2013) <https://www.yahoo.com/news/un-drones-killed-more-afghan-civilians-2012-145931602.html?ref=gs>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Steven Simon, *In Defense of Drones*, MSNBC (Apr. 26, 2015), <http://www.msnbc.com/msnbc/defense-drones>.

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Pakistan occurred from U.S. drone strikes in 2010.²² This figure is significantly higher than the 195 drone-caused deaths occurring from 2004 to 2007.²³

In contrast, several claims of civilian casualties caused by conventional aircrafts and weaponry have gone underreported. For example, an interview conducted by *The Economist* with twenty residents of the Pakistani tribal areas confirmed that many residents view individual drone strikes as preferable to the artillery barrages of the Pakistani military.²⁴ The residents insisted that the drones do not kill as many civilians—a view starkly at odds with mainstream Pakistani opinion.²⁵ An elder from North Waziristan stated, “No one dares to tell the real picture. Drone attacks are killing the militants who are killing innocent people.”²⁶ *Jet planes, artillery attacks, and bombings* are the problem, not drones. Critics often assert that U.S. drone strikes are morally wrong because they kill innocent civilians.²⁷ This is undoubtedly both true and tragic, but nonetheless, it does not validate the arguments against drone strikes.²⁸ War kills innocent civilians, period.²⁹ But the best evidence currently available suggests that U.S. drone strikes kill fewer civilians than most other common means of warfare.³⁰ The operational effectiveness of drones is undisputed. Martha McCally, former fighter pilot and drone squadron commander for the U.S. Air Force, stated in her April 23, 2013 testimony to the Senate Judiciary Sub-Committee on the Constitution, Civil Rights, and Human Rights, “once a decision has been made that it is a legal and wise strategy to conduct a target strike, the [drone] platform is usually the hands-down best choice to maximize precision, persistent intelligence, responsiveness, and

²² Jang, *supra* note 12.

²³ *Id.*

²⁴ Kenneth Anderson & Benjamin Wittes, *Three Deep Flaws in Two New Human-Rights Reports on U.S. Drone Strikes*, NEW REPUBLIC, (Oct. 24, 2013) <https://newrepublic.com/article/115329/amnesty-international-human-rights-watch-drone-reports-are-flawed>

²⁵ *Id.*

²⁶ *Id.*

²⁷ Brooks, *supra* note 13.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

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oversight by commanders, intelligence and legal experts. It also has the benefit of minimizing civilian casualties without risk of U.S. casualties and at relatively low cost.”³¹ Additionally, drone pilots located in air-conditioned trailers on secure bases are far less likely to err than fighter pilots, who have to deal with numerous other factors while on missions.³² According to one international legal expert:

There is little reason to treat drones as distinct from other weapons systems with regard to the legal consequences of their employment. Nor is there a sound basis for heightened concern as to their use. On the contrary, the use of drones may actually, in certain cases, enhance the protections to which various persons and objects are entitled under LOAC.³³

The use of drones must therefore be carefully weighed against the fact that it creates enemies, even as it destroys them. Under that logic, the same argument might as well be used against all airstrikes, or for that matter, artillery strikes.³⁴ Both of these alternatives tend to be more indiscriminate in their effects than drones.³⁵

This article argues that drones should be treated as any other component of the U.S. arsenal. A drone can be considered a weapons platform or a single weapon system. In addition, this article argues that drones indeed offer extensive and enhanced opportunities for compliance with LOAC and laws governing the use of certain weapons. Particularly, drones are well-suited to execute theories of self-defense in international affairs.

³¹ Martha McSally, *Should the United States Continue Its Use of Drone Strikes Abroad?*, PROCON.ORG, (last updated Apr. 29, 2015)

<http://drones.procon.org/view.answers.php?questionID=001894>.

³² Simon, *supra* note 21.

³³ MICHAEL SCHMITT, *YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW* 313 (2010).

³⁴ Simon, *supra* note 21.

³⁵ *Id.*

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The first part of the article provided a general overview of drones and their modern day implications. The second section will discuss the definition of drones and the technological capabilities of an armed drone. The third section will discuss the *legality per se* of drones as a weapon system in association with general principles of LOAC (i.e. military necessity, humanity, distinction and proportionality). In addition, the third portion will also explore the application of just war theory and its two components, *jus as bellum* and *jus in bello*. In the fourth section, this article demonstrates how effective drones can be in executing self-defense operations, illustrated by a case study of the U.S. drone strategy during the War on Terror. Generally, this article examines the legality of drone strikes under LOAC based upon the geographical location of a given target. Finally, the article will conclude by exploring military command responsibility for the violations of LOAC during drone operations and the legal status of the drone operator.

II. DRONES

The term “drone” is consistently and materially employed throughout this article, as such, there is a need to stipulate to a working definition because of the term’s importance here.

A. What Exactly is a Drone?

To ensure the same basic understanding of the term from the outset, this preliminary definition should help readers in addressing the legal issues that underlie the use of drones. Categorically, “drone” refers to any unmanned, remotely-piloted, flying craft ranging from something as small as a radio-controlled toy helicopter, to the 32,000-pound, \$104 million Global Hawk military drone.³⁶ In determining what exactly constitutes a drone under this language one considers whether the vehicle or flying craft at issue (1) flies and (2) is

³⁶ Kelsey D. Atherton, *Flying Robots 101: Everything You Need to Know About Drones*, POPULAR SCI. (Mar. 7, 2013), <http://www.popsci.com/technology/article/2013-03/drone-any-other-name>.

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controlled by a pilot on the ground; if the vehicle meets this criteria it falls under the everyday-language definition of drone.³⁷ The U.S. Army officially defines a drone as “a land, sea, or air vehicle that is remotely or automatically controlled.”³⁸ Military drones are also referred to as Unmanned Aerial Vehicles (UAVs), Unmanned Combat Aerial Vehicles (UCAVs), or hunter-killers.³⁹ The history of drones is that of a watchful eye turned weapon.⁴⁰ The drone is not a projectile, but a projectile-carrying machine.⁴¹

B. Technology Used in Armed Drones & their Capabilities

Before learning about the legal aspects governing drones, it is important to discuss the relevant technology used in armed drones for a better understanding of their legality. The key difference between human soldiers on the ground and a drone hovering above is that humans have to distinguish and make targeting decisions instantly. In contrast, drones give commanders “tactical patience” - the ability to see, think, and act in a controlled manner. Drones are controlled by a crew often miles away from the dangers of combat, and are capable of acting as both a combatant and a combat support vehicle in the hairiest of battles.⁴² Drones combine several complimentary technologies on a single platform.⁴³ For example, a single drone can contain highly advanced surveillance systems, live-feed video cameras, infrared cameras, thermal sensors and radar, and various types of other equipment including global positioning systems (GPS), and precision munitions.⁴⁴ The high-tech cameras on

³⁷ *Id.*

³⁸ *Department of defense*, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 109 (Aug. 2011). (Original Gregoire Chamayou, Translated by Janet Lloyd, A THEORY OF THE DRONE 27 (2015).

³⁹ Lewis, *supra* note 1, at 294.

⁴⁰ GREGOIRE CHAMAYOU, A THEORY OF THE DRONE 11 (2015).

⁴¹ *Id.*

⁴² Robert Valdes, *How the Predator UAV Works*, HOW STUFF WORKS, (Apr. 1, 2004) <http://science.howstuffworks.com/predator.htm>.

⁴³ James Igoe Walsh, *The Effectiveness of Drone Strikes in Counterinsurgency and Counter terrorism Campaigns*, STRATEGIC STUDIES INSTITUTE AND U.S. ARMY WAR COLLEGE PRESS, V (Sep. 2013).

⁴⁴ *Surveillance Drones*, ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.ORG/issues/surveillance-drones>.

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drones can scan entire cities, or alternatively, zoom in and read a milk carton from 60,000 feet.⁴⁵ Surveillance data gathered by a drone can be relayed to satellites that then send it down to ground forces to help form attack strategies and identify enemy vulnerabilities.⁴⁶ Armed drones carry highly accurate missiles that have the capacity to target individuals, automobiles, and sections of structures such as rooms in a large house.⁴⁷ These missiles can be guided by the intelligence obtained by the sensors discussed above or through real-time, on-ground intelligence.⁴⁸ Drones' low profile and relative fuel efficiency combine to permit them to spend more time on target than any other manned aircraft.⁴⁹ Some military drones can stay airborne for hours or days at a time.⁵⁰ Drones also carry Wi-Fi crackers and can act as fake cell phone towers to determine a target's location or intercept texts and phone calls.⁵¹ Given the ongoing convergence of drones and emerging technologies, it may even become possible for drones to perform facial recognition, identify behavior patterns, and monitor individuals' conversations.⁵²

A typical drone is made of light composite materials to reduce weight and increase maneuverability.⁵³ Drones can fly at extremely high altitudes to avoid detection⁵⁴ and their navigational systems can be programmed to operate autonomously, from takeoff to landing.⁵⁵ Drones have distinct advantages over manned aircraft vehicles, cruise missiles, and Special Operations attacks.⁵⁶ The use of drones actually permits for far greater precision in targeting than

⁴⁵ *Id.*

⁴⁶ V. Shalem Pravas, *Aerial Assassins: Drones, Read & Digest*, (accessed Sept. 1, 2015), <http://readanddigest.com/what-is-a-drone/>.

⁴⁷ *Id.*

⁴⁸ Walsh, *supra* note 43.

⁴⁹ Robert Valdes, *supra* note 42.

⁵⁰ Surveillance Drones, *supra* note 44.

⁵¹ *Id.*

⁵² Chris Cole & Jim Wright, *What are drones?*, DRONE WARS U.K. (Jan. 20, 2010) wars.net/aboutdrone/ <http://dronewars.net/aboutdrone/>.

⁵³ Pravas, *supra* note 46.

⁵⁴ *Id.*

⁵⁵ KENNETH R. HIMES O.F.M., DRONES AND THE ETHICS OF TARGETED KILLING 12 (2016).

⁵⁶ *Id.*

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most other traditional manned aircrafts.⁵⁷ Further, drones can handle what humans cannot: G-Force speed, tedium, and boredom.⁵⁸ Among the other “intrinsic benefits” of drones: they deprive the enemy of human targets; they don’t get tired, thirsty, or hungry; and are relatively inexpensive.⁵⁹ In a worst-case scenario, if a drone is lost in battle military personal can simply “crack another one out of the box” and have it up in the air shortly without the trauma of casualties or the fear of pilots becoming prisoners; both of which being common concerns when more-traditional aircraft or operation failures occur.⁶⁰ Without a doubt, drones are of great benefit to the counterterrorism effort.⁶¹

III. THE LAW OF ARMED CONFLICT

All warfare is governed by IHL, also known as the Law of Armed Conflict (LOAC).⁶²

A. What is the Law of Armed Conflict?

The LOAC comes from both customary international law and treaties.⁶³ Customary international law, based on a practice that nations have come to accept as legally required, establishes the traditional rules that govern the conduct of military operations in armed conflict.⁶⁴ The Law of Armed Conflict “arises from a desire among civilized nations to prevent unnecessary suffering and

⁵⁷ Brooks, *supra* note 13.

⁵⁸ Alan W. Dowd, *Drone Wars: Risks and Warnings*, U.S. ARMY WAR COLLEGE (2013), http://www.strategicstudiesinstitute.army.mil/pubs/Parameters/Issues/WinterSpring_2013/1_Article_Dowd.pdf.

⁵⁹ *Id.*

⁶⁰ Valdes, *supra* note 42.

⁶¹ Himes, *supra* note 55.

⁶² James Foy, *Autonomous Weapons Systems Taking the Human Out of International Humanitarian Law*, 23 *DAL. J. LEGAL STUD.* 47, 53 (2014).

⁶³ Rod Powers, *Law of Armed Conflict (LOAC)*, THE RULES OF WAR, <http://usmilitary.about.com/cs/wars/a/loac.htm>

⁶⁴ *Id.*

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destruction while not impeding the effective waging of war.”⁶⁵ Indeed, modern LOAC is largely driven by humanitarian concerns.⁶⁶ As a part of public international law the LOAC regulates the conduct of armed hostilities, but only among consenting nations.⁶⁷ It also aims to protect civilians, prisoners of war, the wounded, sick, and shipwrecked.⁶⁸ The LOAC regulates, among other things, the means and methods of warfare – the weapons used and the tactics employed.⁶⁹ At its foundation, the LOAC is based on four key principles: distinction, proportionality, unnecessary suffering, and military necessity. All of which undergird the spirit and purpose of the law and drive determinations in areas such as targeting, detention, and treatment of persons.⁷⁰ The legality of drones can also be justified under the principles of weapon laws and targeting laws. The four fundamental LOAC principles are discussed in detail in the following section.

When determining the overall lawfulness of a weapon system under LOAC, there are two distinct aspects of the law that need to be analyzed: weapons law and lawful use of drones.⁷¹ The former verifies that the weapon itself is lawful.⁷² Weapon laws determine whether the use of the weapon system during hostilities might be prohibited in some manner under the law of armed conflict.⁷³ A weapon must satisfy two legal aspects before it may lawfully be used on a battlefield;⁷⁴ the weapon should (1) prevent unnecessary suffering, and (2) be capable of effectively distinguishing targets. The overarching principle that pertains to weapon systems is the

⁶⁵ *Id.*

⁶⁶ Solis, *supra* note 6, at 7.

⁶⁷ Powers, *supra* note 63.

⁶⁸ *Id.*

⁶⁹ Oren Gross, *The New Way of War: Is There a Duty to Use Drones?*, 7 Fla. L. Rev. 1, 27 (2015).

⁷⁰ Laurie R. Blank, *After “Top Gun”: How Drone strikes impact the law of war?*, U. Pa. J. Int’l L. vol. 33:3, 681 (Feb. 14, 2012).

⁷¹ Jeffrey Thurnher, *The Law That Applies to Autonomous Weapon Systems*, 17 AM. SOC’Y OF INT’L L. 4, (January 18, 2013), <https://www.asil.org/insights/volume/17/issue/4/law-applies-autonomous-weapon-systems>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

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prohibition of superfluous injury or unnecessary suffering.⁷⁵ Weapons that cannot be directed at specific military objectives, or weaponry considered overly dangerous by nature, can violate the principle of distinction and found to be unlawful per se.⁷⁶ Moreover, even if a specific type of weapon is not unlawful per se, or is not specifically prohibited by particular treaties, governments are prohibited from improperly employing a weapon in a manner that would result in unnecessary suffering or in the targeting of civilian populations.⁷⁷ Such use is also unlawful under the relevant rules of the LOAC.⁷⁸ The two rules governing weapon laws are discussed in detail in the following section.

1. *General Principles of the LOAC.*

In this section, the principles of the LOAC will be applied to the use of drones in combat and combat support operations. This analysis falls squarely within LOAC principles. Again, the LOAC revolves around four core principles: distinction, proportionality, preventing unnecessary suffering, and military necessity. Application of any weapon depends upon these four general principles of the LOAC. Additionally, targeting law governs the circumstances of the use of lawful weapons and includes general principles of the LOAC. The following arguments help establish a basis for the conclusion that LOAC rules are sufficient to regulate drones.

(i) *Distinction*

“Distinction” means persons employing force must distinguish between lawful military targets (e.g., opposing combatants, equipment, or facilities), protected persons (e.g., civilians, medical personnel, chaplains, or persons who are hors de

⁷⁵ Gross, *supra* note 69.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

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combat), property, and unlawful targets.⁷⁹ Greater awareness of the distinction principle has coincided with technological developments that enable increasingly precise targeting.⁸⁰ According to Article 48 of Additional Protocol I of the Geneva Convention,

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.⁸¹

Through its language, Additional Protocol I prohibits the use of weapons that are “of a nature to strike military objectives and civilians or civilian objects without distinction.”⁸²

Far from bombing entire industrial valleys or cities, which would inevitably lead to civilians being caught in the crosshairs, new technology has allowed states to be far more discriminate.⁸³ Indeed, the adoption of drones equipped with precision-guided munitions is the most recent improvement.⁸⁴ Drones equipped with modern imaging technologies enable operators located thousands of miles away to view details as fine as individual faces; this allows operators to distinguish between civilians and combatants far more effectively than most other weapons systems.⁸⁵ According to General (Ret.) James E. Cartwright, former Vice Chairman of the Joint Chiefs of Staff, “advances in high band-width satellite communications, sensing

⁷⁹ Christopher P. Toscano, “*Friend of Humans*”: *An Argument for Developing Autonomous Weapons Systems*, 8 J. NAT’L SEC. L. & POL’Y 189 (2010).

⁸⁰ JOHN KAAG & SARAH KREPS, *DRONE WARFARE* 81 (2010).

⁸¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, ICRC (8 June 1977) <https://www.icrc.org/ihl/4e473c7bc8854f2ec12563f60039c738/8a9e7e14c63c7f30c12563cd0051dc5c?OpenDocument>.

⁸² *Rule 71*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule71.

⁸³ Kaag & Kreps, *supra* note 80, at 81.

⁸⁴ *Id.*

⁸⁵ Brooks, *supra* note 13.

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technologies – particularly full motion video – combined with existing aircraft technology has allowed armed drones to emerge as the platform of choice in this counter terror mission space.”⁸⁶ On April 30, 2012, CIA Director John Brennan, said, “with the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows U.S. to distinguish more effectively between an al-Qaida terrorist and innocent civilians...[.]”⁸⁷ Therefore, because drones can effectively distinguish between targets, it can be concluded that drones meet the standard of distinction under the LOAC.

(ii) Proportionality

The LOAC principle of proportionality requires that the expected loss of civilian life and damage to civilian property incidental to attack not be excessive in relation to the concrete and direct military advantage anticipated from striking the target.⁸⁸ Article 35 of Additional Protocol I declares that “in any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited[.]” this basic principle was officially codified by the 1907 Hague Convention, however, studies suggest that similar albeit informal principles were commonly observed by combatants prior to the Hague Convention.⁸⁹ The principle focus of proportionality seeks to minimize incidental casualties during war and operationalizes the LOAC’s fundamental premise that the means and methods of attacking the enemy are not unlimited.⁹⁰ The key here is the word “incidental,” meaning outside of the military target.⁹¹ Importantly, however, the law does not prohibit all civilian deaths—

⁸⁶ John Brennan, *Should the United States Continue Its Use of Drone Strikes Abroad?*, PROCON.ORG (Apr. 29, 2015), <http://drones.procon.org/view.answers.php?questionID=001894>.

⁸⁷ *Id.*

⁸⁸ *Basic Principles of LOAC and their Targeting Implications*, CURTIS E. LEMAY CENTER, <https://doctrine.af.mil/download.jsp?filename=3-60-D33-Target-LOAC.pdf> (last updated Jan. 10, 2014).

⁸⁹ Blank, *supra* note 70, at 681-82.

⁹⁰ *Id.*

⁹¹ *Id.*

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and in fact accepts some incidental civilian casualties.⁹² Armed drones offer the advantage of less destructive weapons and greater command and control over firing decisions. Drones can employ Hellfire missiles that weigh one-hundred pounds with a warhead of approximately thirty five pounds.⁹³ That is one-twentieth the size of a standard laser-guided bomb or cruise missile and less than half the size of the smallest precision ordnance dropped from conventional aircraft.⁹⁴ Proportionality inherently covers the notion to control and limit collateral damage to civilians and civilian property. This is a venerable concept. Grotius writes, “one must take care of, so far as is possible, to prevent the death of innocent persons, even by accident.”⁹⁵ Even when a target is purely militant, the element of proportionality is still considered when prosecuting a target. Proportionality brings with it an obligation to consider all options when making targeting decisions: verification of the target; timing of the attack; the chosen weapon of choice; and warnings and evacuations for civilian populations.⁹⁶ Drones, with their ability to see, think, and act in a controlled manner, provide ample opportunity to consider all options before engaging a target. Drone operators, after duly considering all options and taking all mitigating maneuvers into account, are able to minimize damage to civilian life and property.

(iii) Unnecessary suffering

The principle of humanity, also commonly referred to as the principle of unnecessary suffering, aims to minimize suffering in armed conflict.⁹⁷ The core LOAC concept of unnecessary suffering, a concept created to limit damage to civilians while killing combatants, is codified in Additional Protocol 1, Article 35(2) “it is prohibited to employ weapons, projectiles and materials and methods of warfare of

⁹² *Id.*

⁹³ Michael W. Lewis and Emily Crawford, *Drones and Distinction: How IHL Encouraged the Rise of Drones*, 44 *Geo. J. INT'L L.* 1151(2013).

⁹⁴ *Id.*

⁹⁵ *Id.* at 275.

⁹⁶ *Id.*

⁹⁷ Blank, *supra* note 70, at 682.

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a nature to cause superfluous injury or unnecessary suffering”⁹⁸ Once a military purpose has been achieved, the infliction of further suffering is unnecessary.⁹⁹ A weapon is not banned on the ground of superfluous injury or unnecessary suffering merely because it causes great, or even horrendous suffering or injury.¹⁰⁰ There is nothing unique about the armaments and munitions carried by drones and used by their pilots. Thus, Alston, who served as the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, acknowledged in his Study on Targeted Killings that, “a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles.”¹⁰¹

Compliance with the principle of unnecessary suffering depends upon the kind of weapon used and the kind of suffering that it might cause. Weapons can be specifically chosen to satisfy this principle; however, compliance with the LOAC depends upon the features of the weapon used and the competency of those employing the weapon to carry out a particular mission. Also, it is difficult to determine what constitutes “unnecessary suffering” because there is no globally accepted standard.

(iv) Military Necessity

Finally, “military necessity” means that combatants may only employ force against legitimate military objectives.¹⁰² The principle of military necessity recognizes that a military has the right to use any measures not forbidden by the laws of war that are indispensable for securing the complete submission of the enemy as soon as possible.¹⁰³ Military necessity requires combat-forces to only engage

⁹⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, *supra* note 80.

⁹⁹ Blank, *supra* note 70, at 682.

¹⁰⁰ Solis, *supra* note 6, at 270.

¹⁰¹ Philip Alston (Special Rapporteur on extrajudicial, summary, or arbitrary executions), *Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

¹⁰² Toscano, *supra* note 79.

¹⁰³ Blank, *supra* note 70, at 682.

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in acts necessary to accomplish a legitimate military objective.¹⁰⁴ It further permits the killing of enemy combatants and other persons whose death is unavoidable.¹⁰⁵ The principle of military necessity is a principle of controlled violence.¹⁰⁶ Military necessity permits the destruction of property if that destruction is imperatively demanded by the necessities of war.¹⁰⁷ Destruction of civilian property as an end in-itself is a violation of international law.¹⁰⁸ There must be a reasonable connection between the destruction of property and the overcoming of enemy forces.¹⁰⁹ International humanitarian law also prohibits weapon systems that cannot be directed at a specific military target.¹¹⁰ Over the past few years several U.S. Government officials have confirmed that drones are an invaluable tool against Al-Qaeda, the Islamic State, Taliban, and associated terrorist forces.¹¹¹ In some areas, drones are particularly useful because of their ability to find and identify targeted persons, and then reach into territory that ground forces cannot enter due to either military or political reasons.¹¹² In one reported case, the United States targeted a senior Taliban official in the impenetrable border region of Pakistan while he was resting on the roof of a house with his wife and hooked up to an IV-drip for kidney problems.¹¹³ The Taliban member was wanted for his involvement in a number of suicide bombings and the assassination of former Pakistani Prime Minister Benazir Bhutto.¹¹⁴

¹⁰⁴ ANTHONY FINN & STEVE SCHEDING, DEVELOPMENTS AND CHALLENGES FOR AUTONOMOUS UNMANNED VEHICLES: A COMPENDIUM 172 (2010).

¹⁰⁵ *Id.*

¹⁰⁶ Gross, *supra* note 69, at 28.

¹⁰⁷ Finn & Scheduling, *supra* note 104.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, HARVARD NAT'L SECURITY J., 10 (2013), <http://harvardnsj.org/wp-content/uploads/2013/02/Schmitt-Autonomous-Weapon-Systems-and-IHL-Final.pdf>.

¹¹¹ Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y, 115 (2010-2011).

¹¹² *Id.*

¹¹³ *Id.*; *See also*, Peter Finn & Joby Warrick, *Under Panetta, A More Aggressive CIA*, THE WASH. POST (Mar. 21, 2010), <http://www.washingtonpost.com/wpdyn/content/article/2010/03/20/AR2010032003343.html>.

¹¹⁴ *Id.*

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In such situations, and others like it, drone strikes offer a "definite military advantage."¹¹⁵ Drones, because of advanced technology can be very precise in targeted killing. Commanders and their legal advisors have ample to make informed decision to go after a target. They can easily assess the situation, and are capable of controlling the violence.

B. Drones as Lawful Weapons

This section is intended to determine whether current weapon laws of LOAC are capable of regulating drones. In modern times, LOAC governs the choice of weapons and prohibits or restricts the use of certain weapons. Rule 71 of Customary IHL, which applies to both international and domestic conflicts, establishes the norm that the use of weapons which are indiscriminate by nature is prohibited; this norm of customary international law is applicable in both international and non-international armed conflicts.¹¹⁶ In addition, many of the basic rules and specific prohibitions and restrictions on means and methods of warfare may be found in customary international law.¹¹⁷ These restrictions can be traced back to treaties and customary international law, and are justified on the grounds that weapons which are either: (i) indiscriminate in their effect, or (ii) cause unnecessary suffering should be prohibited.¹¹⁸

The Declaration of Saint Petersburg is the first formal agreement prohibiting the use of certain weapons in war. "The Declaration to that effect adopted in 1868, which has the force of

¹¹⁵ *Id.*

¹¹⁶ Rule 71 (Weapons That Are by Nature Indiscriminate), *Customary International Humanitarian Law*, ICRC, (accessed 7 July 2015) https://www.icrc.org/customaryihl/eng/docs/v1_cha_chapter20_rul_71,

¹¹⁷ Kathleen Lawand, *A Guide to Legal Review of New Weapons, Means and Methods of Warfare, Measure to implement article 36 of Additional Protocol I of 1977* (2006), ICRC, Revised, Geneva, (accessed 22 July 2015) http://www.article36.org/wpcontent/uploads/2011/12/icrc_002_0902.pdf.

¹¹⁸ A.G. Houston, *Executive Series ADDP 06.4 Law of Armed Conflict*, COMMONWEALTH OF AUSTRALIA Ed. 1, 4.4, (2006) <http://www.defence.gov.au/adfwc/documents/doctrinelibrary/addp/addp06.4-lawofarmedconflict.pdf>.

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law, confirms the customary rule according to which the use of arms, projectiles and materials of a nature to cause unnecessary suffering is prohibited.”¹¹⁹ Article 36 of Additional Protocol I of 1977 serves as a further reference found in international treaties for the need to carry out legal reviews of new weapons, means, and methods of warfare. The Protocol provides that:

[I]n the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party (describes a party to any international agreement which has both signed and ratified the treaty) is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party (HCP).¹²⁰

“Means of warfare” are weapons and weapon systems, whereas “method of warfare” refers to the tactics, techniques and procedures by which hostilities are conducted.¹²¹ Also, international law prohibits two categories of weapons in armed conflict: indiscriminate weapons and weapons that cause unnecessary suffering.¹²² The first prohibition appears in Article 51(4) of Additional Protocol I, which defines indiscriminate attacks as: (1) attacks “not directed at a specific military objective;” (2) attacks “which employ a method or means of combat which cannot be directed at a military objective;” or (3) attacks “which employ a method or means of combat the effects of which cannot be limited as required by this Protocol.”¹²³ It is prohibited to “use weapons that are

¹¹⁹ *Treaties and State parties to such Treaties*, DECLARATION RENOUNCING THE USE, IN TIME OF WAR, OF EXPLOSIVE PROJECTILES UNDER 400 GRAMMES WEIGHT. SAINT PETERSBURG, 29 NOVEMBER / 11 DECEMBER 1868, ICRC <https://www.icrc.org/ihl/INTRO/130?OpenDocument>.

¹²⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, TREATIES, ST., PARTIES & COMMENT. (Int’l Comm. of the Red Cross), at Article 35, available at <https://www.icrc.org/ihl/WebART/470-750044?OpenDocument>.

¹²¹ Schmit, *supra* note 110, at 27.

¹²² Blank, *supra* note 70, at 682.

¹²³ *Id.*

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incapable of distinguishing between civilian and military targets.”¹²⁴ Examples of inherently indiscriminate weapons are the rockets that Hamas and Hezbollah have fired into Israel for many years, cluster munitions, and nuclear weapons that destroy all life within the area of the detonation.¹²⁵ Additionally, weapons that cause unnecessary suffering or superfluous injury are prohibited.¹²⁶ Expanding bullets and blinding lasers offer two examples.¹²⁷ Peter Maurer, the president of the International Committee of Red Cross has stated:

[U]nder international humanitarian law the rules of war, i.e. the set of laws governing armed conflict, drones are not expressly prohibited, nor are they considered to be inherently indiscriminate or perfidious. In this respect, they are no different from weapons launched from manned aircraft such as helicopters or other combat aircraft. It is important to emphasize, however, that while drones are not unlawful in themselves, their use is subject to international law.¹²⁸

Therefore, it appears drones comply with the various weapon laws, however, when a drone is acting as a “weapons platform,” the ordinance carried by the drone is still governed by other specific areas of weapons law. For example, if a drone is armed with chemical weapons, the applicable law is the convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and their Destruction.¹²⁹ Alternatively, if armed with ‘conventional’ munitions, then the general law of targeting would apply (be that treaty law, customary international law, or both).¹³⁰

¹²⁴ *See, Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*, at 685.

¹²⁷ *Id.*, at 686.

¹²⁸ Peter Maurer (the president of the ICRC), *The use of armed drones must comply with laws*, ICRC, (May 10, 2013) <https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>.

¹²⁹ M.N. SCHMITT, LOUISE ARIMATSU, & TIM MCCORMACK, YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 137 (Aug. 5, 2011), (Ian Henderson, *chapter: Civilian Intelligence Agencies and the use of Armed Drones*).

¹³⁰ *Id.*

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Usually, drones carry Hellfire missiles, which are not banned by any international treaty or convention and do not have any characteristics that cause unnecessary injury. By both measures of weapon laws — indiscriminate targeting and preventing unnecessary suffering—armed drones pass muster.¹³¹

As discussed above, a drone can have advanced technical features and extensive surveillance capabilities, and when combined with precision-guided Hellfire missile, drones should be considered a discriminate weapon system. The ability to track a target for hours, even days, before launching an attack facilitates accurate targeting and enhances the protection of civilians by allowing drone operators the ability to choose the time and place of attack with an intent of minimizing civilian casualties or damage.¹³² Therefore, because armed drones can easily target pure military objectives, and have effects that can be limited, as much as possible, to military objects, drones thus meet the standards of Article 51(4) of Additional Protocol I.¹³³

C. Lawful Use of Drones Under the LOAC

Drones, like any weapon, can be used for unlawful purposes, especially outside a combat zone. However, because drones are lawful weapons, the next step is to analyze their use according to the principles of the LOAC; or more particularly, the principles of distinction, proportionality, and precaution.

1. *Distinction.*

As discussed above, advanced technology places drones in a better position to distinguish between combatants and non-combatants. Historically, distinction was fairly easy; combatants wore uniforms and non-combatants did not. Now, the ‘global war on terrorism’ has raised new concerns because terrorists do not wear traditional uniforms, and it has become harder to distinguish between

¹³¹ Blank, *supra* note 70, at 686.

¹³² *Id.* at 687.

¹³³ *Id.*

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civilians and terrorists. Terrorists often take advantage of civilian populations and hide themselves among them. The situation has raised new challenges for drone operators in regards to distinction. State militaries wishing to assert compliance with a legal regime that regards human shielding and intermingling with the civilian population as unacceptable were pressured to ensure that their attacks became increasingly more discriminate and that their intelligence became more accurate.¹³⁴ The challenge found in non-state armed conflict is identifying the legitimate target. As discussed above, Article 48 of Additional Protocol I states that:

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.¹³⁵

Distinction is also emphasized in Article 51(4) of Additional Protocol I:

Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) Those which are not directed at a specific military objective;
- (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a

¹³⁴ Lewis & Crawford, *supra* note 93, at 1153.

¹³⁵ Additional Protocol I, available at <https://www.icrc.org/ihl/4e473c7bc8854f2ec12563f60039c738/8a9e7e14c63c7f30c12563cd00>.

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nature to strike military objectives and civilians or civilian objects without distinction.¹³⁶

Furthermore, Article 85 of Protocol I declares that nearly all violations of distinction constitute “grave breaches”(foot note explaining or one brief sentence) of the Protocol, and the Rome Statute of the International Criminal Court similarly criminalizes attacks on civilians and indiscriminate attacks.¹³⁷ However, states have historically virtually ignored the principle of distinction by employing artillery, rocket launchers, and bombers in assaults on irregular forces occupying densely populated areas, resulting in tens of thousands of civilian casualties.¹³⁸ However, in order to minimize collateral damage and comply with the principle of distinction states began to employ more precise weapons than those designed to defeat a more traditional military opponent.¹³⁹ This is where drones enter the picture.¹⁴⁰

The United States has consistently asserted that it complies with the LOAC in its battle against Al-Qaeda.¹⁴¹ Examining how the U.S. responds to Al-Qaedas’ practice of hiding amongst the civilian populations of Iraq, Afghanistan, Pakistan, and Yemen serves as a good illustration of how a state military may seek to comply with the LOAC’s distinction requirements.¹⁴² Persons who are members of an organized armed group, but dress the same as civilians, either for a lack of uniforms or specifically to blend into the civilian population for protection, are legitimate targets at all times.¹⁴³ The United State’s need for more robust intelligence greatly increased the demand for drones, which were first employed in the conflict with Al-Qaeda as real-time intelligence gathering vehicles for distinction purposes.¹⁴⁴

¹³⁶ *Article 51*, Additional Protocol I, [hl/WebART/470-750065](https://www.icrc.org/ihl/WebART/470-750065) https://www.icrc.org/ihl/WebART/470-750065.

¹³⁷ Blank, *supra* note 70, at 691.

¹³⁸ Lewis & Crawrord, *supra* note 93, at 1152.

¹³⁹ *Id.* at 1153.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Blank, *supra* note 70, at 692.

¹⁴⁴ Lewis & Crawrord, *supra* note 93, at 1153.

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Drones are a better option as compared to boots on ground. Drone strikes give militaries more time to analyze the situation; operators and decision makers can use the ‘pattern of life’ method to pursue a target (analysis, using evidence collected by surveillance cameras on the unmanned aircraft and from other sources regarding individuals and locations).¹⁴⁵ Further, ground forces face the challenge of distinguishing between civilians and terrorists more promptly than drones, with less situational awareness. Drones may also reduce the emotional element for the humans behind the “joy sticks” when engaging targets.¹⁴⁶

2. *Proportionality.*

Proportionality is closely linked with the principle of distinction and correctly identifying objects as military and civilian.¹⁴⁷ For an action to be considered proportional, the anticipated military gain must exceed the anticipated damage to civilians and their property.¹⁴⁸ Article 51(b) of Additional Protocol I proscribes that “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” is disproportionate.¹⁴⁹ Thus, a commander must refrain from any attack in which the expected civilian casualties will be excessive in light of the anticipated military advantage gained.¹⁵⁰ Loss of life and damage to property *incidental* to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.¹⁵¹ The key here is the word

¹⁴⁵ Emptywheel, *Pattern of Life drone strikes*, SHADOW PROOF, (May 7, 2010) <https://shadowproof.com/2010/05/06/pattern-of-life-drone-strikes>.

¹⁴⁶ P.W. Singer, *Military Robots and the Laws of War*, NEW ATLANTIS, 25, 40-41 (Winter 2009), available at http://www.thenewatlantis.com/docLib/20090203_TNA23Singer.pdf/.

¹⁴⁷ Kaag & Kreps, *supra* note 80, at 94.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Blank, *supra* note 70, at 682.

¹⁵¹ Four basic principles, LOAC (accessed March 21, 2017) <http://loacblog.com/loac-basics/4-basic-principles/>; *See generally* U.S. Army Field Manual FM27-10: Law of Land Warfare.

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“incidental,” meaning outside of the military targets or more commonly known as “collateral damage.”¹⁵² However, if a target is purely military (i.e. no civilian component) proportionality is not a requirement.¹⁵³ Proportionality is a necessary consideration in attacks on civilians, not on combatants.¹⁵⁴ Proportionality brings with it an obligation to consider all options when making targeting decisions: verifying the target, timing the target, identifying the weapons used, warning and evacuating civilian populations.¹⁵⁵ Grotius writes, “one must take care of, so far as is possible, to prevent the death of innocent persons, even by accident.”¹⁵⁶ According to CIA Director John Brennan:

Compared against other options, a pilot operating this aircraft remotely, with the benefit of technology and with the safety of distance, might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians. It’s this surgical precision, the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qaida terrorist while limiting damage to the tissue around it, that makes this counterterrorism tool so essential.¹⁵⁷

3. *Taking Precautions.*

The principle of precaution is important because it provides constant consideration and implementation of precautionary measures that reinforces moral clarity for the warfighter thrust into terribly complex tactical and operational environments.¹⁵⁸ The principle of precaution can be further understood by reviewing Article 27 of the 1899 Hague Convention:

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Solis, *supra* note 6, at 274.

¹⁵⁵ Blank, *supra* note 70, at 275.

¹⁵⁶ *Id.*

¹⁵⁷ Brennan, *supra* note 86.

¹⁵⁸ Geoffrey Corn, *Precautions to minimize civilian harm are a fundamental principle of the law of war*, JUST SECURITY, (July 8, 2015) <https://www.justsecurity.org/24493/obligation-precautions-fundamental-principle-law-war/>.

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In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.¹⁵⁹

Also, Article 2(3) of the 1907 Hague Convention (IX) further states, “[a] commander shall take all due measures in order that the town may suffer as little harm as possible.”¹⁶⁰ Article 57(2)(c) of Additional Protocol I mandates that those who plan or decide upon an attack “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”¹⁶¹ Additionally, according to article 57 (3) of Additional Protocol I, “when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”¹⁶² The primary variables of Article 57 may be identified as “the time necessary to gather and process the additional information, the extent to which it would clarify any uncertainty, competing demands on the intelligence, surveillance, reconnaissance system in question, and risk to it and its operators”.¹⁶³ Finally, according to article 58 of Additional Protocol I, the Parties to the conflict shall, to the maximum extent feasible:

¹⁵⁹ *Article 27 of the 1899 Hague Convention*, available at http://avalon.law.yale.edu/19th_century/hague02.as#art27.

¹⁶⁰ *Article 2 of the 1907 Hague Convention*, available at <http://avalon.law.yale.edu/20thcentury/hague09.asp>.

¹⁶¹ *Article 57 (2) (ii) of AP I*, available at <https://www.icrc.org/applic/ihl/ihl.nsf/9ac284404d38ed2bc1256311002afd89/50fb5579fb098faac12563cd0051dd7c>.

¹⁶² *Article 57 (3) of AP I*, available at <https://www.icrc.org/applic/ihl/ihl.nsf/9ac284404d38ed2bc1256311002afd89/50fb5579fb098faac12563cd0051dd7c>.

¹⁶³ Frederik Rosén, *Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility*, J CONFLICT SECURITY L. (Oct. 16, 2013), <http://jcs.l.oxfordjournals.org/content/early/2013/10/16/jcs.l.krt02>.

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- (a) without prejudice to Article 49 of the Fourth Convention, endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas;
- (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations. This principle of avoidance (also known as "taking precautions") means that it is not enough not to intend to kill civilians while attacking legitimate targets.¹⁶⁴

Indeed, a deliberate, affirmative effort has to be made not to harm civilians.¹⁶⁵ This may mean, for example, that certain targets ought to be attacked only during certain hours (e.g., at night, when no civilians may be around),¹⁶⁶ that some attacks may need to be conducted from a certain angle, and that advance warnings to the civilian population must be issued by the attacker prior to the strike.¹⁶⁶ In this regard, drone technology removes a number of classic dilemmas related to precaution. Drones leave plenty of time for the consideration and execution of precautionary steps.¹⁶⁷ Drones allow commanders to incorporate precautionary measures in strategy formulation, executing signature strikes, and targeted killings.¹⁶⁸ Hours, days, or weeks of surveillance may lie ahead of a drone attack.¹⁶⁹ It has been argued that there is "strong evidence that drones are better, not worse, at noncombatant discrimination."¹⁷⁰ The

¹⁶⁴ Gross, *supra* note 69, at 30.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Rosén, *supra* note 163.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

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factors mentioned above do not eliminate the risk of civilian casualties, but they certainly represent feasible precautions that can minimize incidental loss of civilian life.¹⁷¹ Conversely, drones may not be used when other means or methods of warfare that would result in less collateral damage with an equivalent prospect of mission success are available.”¹⁷²

The rules that govern targeting *do not turn on the type of weapon system used*, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart bombs—so long as they are employed in conformity with applicable laws of war.¹⁷³ In all three areas of distinction, proportionality, and precautions—drones’ unique and advanced capabilities suggest great potential for adherence to LOAC obligations.¹⁷⁴ Drones are not automatons; they depend on human operators, analysts, and decision makers to comply with the laws of war.

D. Just War Theory

The Just War Theory formalizes the moral justifications for war.¹⁷⁵ It is a lens fixed in the Western philosophical tradition.¹⁷⁶ From the start, Just War theorists have focused on two central

¹⁷¹ Stuart Casey-Maslen, *Drone strikes under jus ad bellum, jus in bello, and international human rights law*, 94 INT’L REV. OF THE RED CROSS, NO. 886 AT 601 (Summer 2012), <https://www.icrc.org/eng/assets/files/review/2012/irrc-886-casey-maslen.pdf>.

¹⁷² Blank, *supra* note 70, at 686

¹⁷³ Galloway Family Foundation, *Lawful Use of Drones by Non-State Actors: Who can Kill*, (Jan. 8, 2014) <http://www.gallowayfoundation.org/lawful-use-of-drones-by-non-state-actors-who-can-kill/>.

¹⁷⁴ Blank, *supra* note 70, at 701.

¹⁷⁵ Ethan A. Wright, *Of Drones and Justice: A Just War Theory Analysis of the United States’ Drone Campaigns*, URSINUS COLLEGE, at 12 (2015) http://digitalcommons.ursinus.edu/cgi/viewcontent.cgi?article=1003&context=ethics_essay.

¹⁷⁶ *Id.*

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questions: (1) when is it appropriate to go to war (*jus ad bellum*), and (2) how should the war be fought (*jus in bello*).¹⁷⁷

1. *Jus Ad Bellum*.

Jus ad bellum means the legality of the use of force by a territorial state. *Jus ad bellum* governs the legality of recourse to military force (including drone strikes) by one state against another, and against armed non-state actors.¹⁷⁸ As a threshold matter, the *jus ad bellum* inquiry depends on whether the territorial state has consented to the drone strike.¹⁷⁹ However, recent history has demonstrated that consent of a state is not necessarily required when conducting drone operations.¹⁸⁰ Article 2(4) is properly interpreted as prohibiting all uses of force above a certain minimal level.¹⁸¹ Minimal uses of force such as firing a single shot across an international boundary might violate the principle of non-intervention, but is probably too minor to come within the purview of Article 2(4).¹⁸² The threshold for the occurrence of an armed attack by another state thus appears to be relatively high, going beyond a mere frontier incident between members of the armed forces of two states (or armed groups operating in one state with limited support from another state).¹⁸³ It might even be argued by some that a very limited and targeted drone strike by one state, against individuals located in another state, would not constitute an armed attack under the UN Charter or customary law.¹⁸⁴ This argument is based on the highly contested concept of anticipatory self-defense (self-defense will be

¹⁷⁷ Erich Freiberger, *Just War Theory and the Ethics of Drone Warfare*, E-INT'L REL., (July 18, 2013), <http://www.e-ir.info/2013/07/18/just-war-theory-and-the-ethics-of-drone-warfare/>.

¹⁷⁸ Maslen, *supra* note 171, at 601.

¹⁷⁹ Laurence Shore et al., *The Legality Under International Law of Targeted Killings by Drones Launched by the United States*, COMMITTEE ON INT'L L., N.Y. CITY B. ASS'N, at 8 (June 8, 2014)

¹⁸⁰ Maslen, *supra* note 171, at 601.

¹⁸¹ Mary Ellen O'Connell, *Unlawful Killing with Combat Drones, A CASE STUDY OF PAKISTAN*, at 13 (2004-2009).

¹⁸² *Id.*

¹⁸³ Maslen, *supra* note 171, at 602.

¹⁸⁴ *Id.*

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discussed separately in a later section).¹⁸⁵ If there is consent, there is no infringement on sovereignty.¹⁸⁶ Although a definitive answer to this factual question is impossible without access to confidential material, the publicly available information suggests that states¹⁸⁷ have given their consent to U.S. drone strikes.¹⁸⁸ Because some state have publicly withheld their consent, the U.S. must consider whether alternative justifications provide a legal basis for continued U.S. drone strikes under Just War theory.¹⁸⁹

(i) Jus in Bello

Jus in bello analysis provides a legal basis for states in determining who is an acceptable target, and who is not. The typical distinction is between “combatants,” who may be the targets of wartime operations, and “non-combatants,” who are exempt from being targets of such attacks.¹⁹⁰ In essence, jus in bello is the foundation for the principles of distinction, proportionality, and necessity discussed above. Most legal scholars agree that drone strikes are legal under jus in bello as long as they occur during armed conflict.¹⁹¹ Nothing is inherently illegal about using drones to kill during warfare, just as other airplanes are not forbidden.¹⁹² Drones by themselves are not really weapons, and the armaments they do carry are generally lawful.¹⁹³

¹⁸⁵ *Id.*

¹⁸⁶ Shore et al., *supra* note 179, at 8-9.

¹⁸⁷ With the apparent exception of Pakistan.

¹⁸⁸ Shore et al., *supra* note 179, at 9.

¹⁸⁹ *Id.*

¹⁹⁰ Freiburger, *supra* note 177.

¹⁹¹ JAMES DESHAW RAE, JOHN CRIST, & PALGRAVE MACMILLAN, ANALYZING THE DRONE DEBATES: TARGETED KILLINGS, REMOTE WARFARE, AND MILITARY TECHNOLOGY 62 (Mar. 12, 2014), available at https://books.google.com/books?id=eFkJAwAAQBAJ&pg=PA62&lpg=PA62&dq=Drones+as+Lawful+Weapons&source=bl&ots=mW3rmZwFPG&sig=-I5mkvpBXyHmv3I0_Niv_jd1l-U&hl=en&sa=X&ved=0CDwQ6AEwBGoVChMIuIHuqZHayAIVi6SICH26wwK-#v=onepage&q=Drones%20as%20Lawfu.

¹⁹² *Id.*

¹⁹³ *Id.*

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IV. SELF-DEFENSE THEORY

This section demonstrates the effectiveness of drones in executing self-defense operations, illustrated by a case study of the U.S. drone strategy during the War on Terror. U.S. national security strategy has encompassed the pre-emptive self-defense doctrine since the domestic attack that took place on September 11, 2001; commonly referred to as “9/11.” This doctrine argues that it is legal for a state to launch a pre-emptive attack when it reasonably believes that another entity is planning an attack on the state.¹⁹⁴ However, the U.S. has long recognized the importance of defending its interests, both domestically and abroad. In 1854, a U.S. diplomat was attacked in the town of San Juan del Norte (Greytown)¹⁹⁵, Nicaragua.¹⁹⁶ At the time of the attack, Greytown had been forcibly seized by forces that were politically unrecognized by the U.S., and engaged in other acts of violence against U.S. nationals.¹⁹⁷ The U.S. Secretary of the Navy ordered the bombardment of the town after the enemy force’s refusal to adhere to the U.S.’s demand for redress.¹⁹⁸ The presidential authorization of the military force used in Greytown was later challenged in U.S. courts, with each ruling being appealed until the case arrived at the Supreme Court.¹⁹⁹ Justice Nelson of the U.S. Supreme Court stated in the opinion that the President had the power to order the responsive use of armed force as part of a power of “protection” of U.S. nationals abroad against “acts of lawless violence” and “an irresponsible and marauding community.”²⁰⁰ At the

¹⁹⁴ Kate McCann & Christopher Hope, *Are UK drone strikes in Syria legal?* THE TELEGRAPH, (Sept. 8, 2015), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/11852228/Are-UK-drone-strikes-in-Syria-legal.html>.

¹⁹⁵ Hereinafter San Juan del Norte is referred as Greytown.

¹⁹⁶ Jordan J. Paust, *Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19.2 J. OF TRANSNATIONAL L. & POL’Y, at 245 (*also see*, *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186). Due to lack of recognition of the putative government, the community can be classified as a non-state actor).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 245.

²⁰⁰ *Id.*

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time of the ruling, the U.S. did not consider the ongoing conflict with Nicaragua, Greytown, or its unrecognized government as “war”.²⁰¹

The customary law of a state’s right to self-defense is enshrined in Article 51 of the UN Charter.²⁰² Article 51 states:

[N]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 51 of the Charter expressly affirms the right of a state to respond defensively “if an armed attack occurs.”²⁰³ “Armed attack” is the operative phrase of the text; a state may use force against both state and non-state aggressors under a theory of self-defense. And further, nothing in the language of Article 51 or any otherwise relevant customary international law requires consent of the state from which a non-state actor attack is emanating, and on whose territory a self-defense action takes place against the non-state actor.²⁰⁴ Article 51 provides that nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.²⁰⁵ The United States has justified its

²⁰¹ *Id.* at 246.

²⁰² Schmitt, *supra* note 33, at 5.

²⁰³ Paust, *supra* note 196, at 241.

²⁰⁴ *Id.* at 249.

²⁰⁵ Schmitt, *supra* note 33, at 5.

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drone operations occurring outside the context of an armed conflict with another state on the basis of this right.²⁰⁶

In fact, with respect to permissible measures of self-defense under Article 51, a form of consent from each member of the United Nations already exists in advance by treaty.²⁰⁷ For example, with respect to the U.S. use of drones in Pakistan to target Al-Qaeda and Taliban forces, it is clear that the U.S. would not need the express consent of Pakistan to carry out self-defense targeting.²⁰⁸ It is also clear that the U.S. has the right to use drones in Pakistan under Article 51 of the Charter in self-defense to protect U.S. interests from continuous Al-Qaeda and Taliban attacks launched from Pakistan.²⁰⁹ There is a growing body of law that generally recognizes the actions taken by the U.S. as legal according to international standards. According to public reports, U.S. officials have regularly consulted with Pakistani authorities when drones have been employed for strike operations in Pakistan.²¹⁰ However, Pakistan maintains only limited control over large swaths of its territory, and thus, as a result, terrorists have used that ungoverned space to their advantage; in response, President Trump and former-President Barack Obama have made clear that the United States will act if and when Pakistan cannot.²¹¹

V. GEOGRAPHICAL LOCATION OF DRONE STRIKES AND LOAC

Under the LOAC, in military operations, the location of a strike matters. The LOAC cannot apply places where armed conflict does not exist, and the determination of whether armed conflict does in-fact exist is based upon the intensity of the violence occurring in that given place, in addition to the level of organization employed by the forces involved, as laid out in the *Tadic* opinion.²¹² The

²⁰⁶ *Id.*

²⁰⁷ Paust, *supra* note 196, at 239.

²⁰⁸ *Id.* at 249.

²⁰⁹ *Id.* at 250.

²¹⁰ Vogel, *supra* note 111, at 131.

²¹¹ *Id.*

²¹² Lewis, *supra* note 1, at 301.

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appearance of drones in the arsenal of armed conflict has stimulated renewed attempts to define the parameters of the modern battlefield.²¹³ The location in which military operations are actually taking place at any given time is known as the ‘area of operations,’ ‘the theatre of war,’ or simply, the ‘battlefield.’²¹⁴ Conventional LOAC contains references to “zones of military operations,” the ‘zone of combat,’ and ‘battlefield areas’ although these terms remain ambiguous.²¹⁵ The ever-increasing use of drones in the pursuit of the “war on terror” has raised concerns over the emergence of a global battlefield whereby the entire planet is subject to the application of the LOAC.²¹⁶

For the past several years, the geographical location of drone attacks has expanded at a rapid rate; Afghanistan, Pakistan, Yemen, Somalia, and Libya have all been subject to drone strikes under the blanket justification of fighting terrorism.²¹⁷ Some of these strikes, such as those in Afghanistan, Pakistan, and Libya, fall within the generally recognized parameters of an armed conflict. Others, such as those in Yemen and Somalia, raise more complicated questions regarding where force is being used and what that means in terms of the application of the LOAC.²¹⁸ These concerns primarily stem from frequent drone strikes occurring outside the ‘active battlefields’ of Afghanistan and into the bordering regions of Pakistan, Yemen, and Somalia.²¹⁹

Drone strikes blur the geographical boundaries of the battlefield. In traditional conflicts, military operations were confined to the territories of the actors and were not supposed to spillover to neutral states.²²⁰ The law of neutrality generally “defines the relationship under international law between states engaged in an

²¹³ Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 1 J. INT’L CRIMINAL JUSTICE, 8 (2013).

²¹⁴ *Id.* at 9.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See Blank, *supra* note 70, at 708.

²¹⁸ *Id.*

²¹⁹ Lubell & Derejko, *supra* note 213, at 11.

²²⁰ Blank, *supra* note 70, at 711.

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armed conflict and those that are not participating in that conflict.”²²¹ Neutrality law thus led to a geographic-based framework in which belligerents can fight on belligerent territory or the commons, but must refrain from any operations on neutral territory.²²² In essence, the battle space in a traditional armed conflict between two or more states is anywhere outside the sovereign territory of any of the neutral states.²²³ However, because the U.S. drone program largely targets non-state actors that freely move across borders, laws of neutrality have become less effective.

The U.S. government operates two drone programs.²²⁴ The military’s version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of the U.S. military stationed there. As such, the program is an extension of conventional warfare.²²⁵ The C.I.A.’s program is aimed at terror suspects around the world, including countries where U.S. troops are not based.²²⁶ The program is classified as covert, and the intelligence agency declines to provide any information to the public about where it operates, how it selects a target, who is in charge, or how many casualties the program has led to.²²⁷ It is contended that drone strikes in places like Yemen and Pakistan violate international law because there is no currently recognized conflict between these states and the US.²²⁸

However, just a few weeks after the attacks of 9/11, President George W. Bush laid the foundation for the notion of the whole world as a battlefield when he pronounced, “our war on terror will be much broader than the battlefields and beachheads of the past. This war will be fought wherever terrorists hide, or run, or plan.”²²⁹ The Obama Administration has not specifically adopted that

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Mary Ellen O’Connell, *Unlawful Killing with Combat Drones, A Case Study of Pakistan*, NOTRE DAME L. SCH. LEGAL STUDIES RES. PAPER NO. 09-43, 4 (2010).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Lewis, *supra* note 1, at 294.

²²⁹ Blank, *supra* note 70, at 712.

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same language calling for a global battlefield, but has actually significantly expanded the use of drone strikes outside of Afghanistan.²³⁰ Al-Qaeda maintains a strong presence in a number of countries, most notably Yemen and Somalia, and uses such states to recruit, train, and plan attacks against the United States and its allies. The United States has reportedly conducted limited drone operations in such countries.²³¹ Somalia and Yemen present an even more compelling case (than say Pakistan) of a neutral status; both states are considered “failed states” and are unable to consent or object to U.S. actions and the U.S. has not formally acknowledged the use of force in these states.²³²

However, according to Authorization for Use of Military Force (AUMF) passed by Congress in the days following 9/11:

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.²³³

If consent was given by a state and U.S. personnel engaged a target authorized by the AUMF, the strike would arguably be covered under AUMF authority and fall within the LOAC.²³⁴ Therefore, the U.S. is not territorially limited when conducting operations against non-state participants.²³⁵ Moreover, there is no question that Pakistan's territory falls within the greater AUMF theater of conflict. U.S. officials have argued that the fight with AUMF enemies is

²³⁰ *Id.*

²³¹ Vogel, *supra* note 111, at 132.

²³² *Id.*

²³³ *107th Congress*, PUBLIC LAW 107-40 (Sept. 18, 2001) <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf>.

²³⁴ Vogel, *supra* note 111, at 132.

²³⁵ *Id.*

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global, not confined to the territory of one country.²³⁶ In fact, most of the leadership and many of the fighters intended to be covered by the AUMF are located outside of Afghanistan and within Pakistan's borders.²³⁷

Thus, location matters, but it is not overly prohibitive.²³⁸ The U.S. has consistently made the case that the war with Al-Qaeda and its terrorist associates is of global reach.²³⁹ The epicenter is in Afghanistan (and to a lesser extent Iraq), but Al-Qaeda and its offshoots, as transnational non-state actors, operate in and wage war from states across the world.²⁴⁰

VI. COMMAND RESPONSIBILITY DURING DRONE OPERATIONS

Under the LOAC and international criminal law, military personnel are criminally responsible for any war crimes they commit during war.²⁴¹ In the case of drones, the most controversial aspect of a drone program is the legal status of the operator.²⁴² Military commanders often consult their staff judge advocates (SJAs), especially in the escalation of conflict.²⁴³ Seeking legal advice is increasing and has become prevalent, even in the battle space.²⁴⁴ “It is also clear from the commanders . . . that legal advice is essential to effective combat operations in the current environment—legal advice is now part of the tooth not the tail.”²⁴⁵

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Vogel, *supra* note 111, at 132.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Nathalie Weizmann, *Autonomous Weapon System under International Law*, ACADEMY BRIEFING NO. 8, at 3 (Nov. 2014).

²⁴² Vogel, *supra* note 111, at 134.

²⁴³ Edward Major, *Law and Ethics in Command Decision Making*, U. OF PENN., 61 (June 2012), *available* at <https://www.law.upenn.edu/institutes/cerl/conferences/cyberwar/papers/reading/Major.pdf>.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

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Even those who support nearly every other aspect of drone warfare find themselves uneasy with civilian personnel performing combat functions.²⁴⁶ According to Peter Maurer, the president of the ICRC:

Although the operators of remote-controlled weapons systems such as drones may be far from the battlefield, they still run the weapon system, identify the target and fire the missiles. They generally operate under responsible command; therefore, under international humanitarian law, drone operators and their chain of command are accountable for what happens. The fact of their being thousands of kilometers away from the battlefield does not absolve drone operators and their chain of command of their responsibilities, which include upholding the principles of distinction and proportionality, and taking all necessary precautions in attack. Drone operators are thus no different than the pilots of manned aircraft such as helicopters or other combat aircraft as far as their obligation to comply with international humanitarian law is concerned, and they are no different as far as being targetable under the rules of international humanitarian law.²⁴⁷

Military drone operators live and work in the US, leading relatively normal civilian lives outside of their occupation.²⁴⁸ Unlike deployed personnel who remain in a combat environment continuously, drone operators maintain more stereotypical employment; they come in to work each day, gather intelligence, execute strikes when required, and return home for dinner.²⁴⁹ All the while, military drone operators and their chain of command are subject to the laws of war.

²⁴⁶ Vogel, *supra* note 111, at 134.

²⁴⁷ Maurer, *supra* note 124.

²⁴⁸ Wright, *supra* note 175, at 12.

²⁴⁹ *Id.*

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However, command responsibility is not as clearly defined when drone operations are conducted by the CIA. The CIA follows, or at least professes to follow, the laws of armed conflict.²⁵⁰ As discussed above, the CIA operates one of the two drone programs for the U.S. The CIA program is not considered a military program, is not operated as one, and is not governed “by the same international protocols on the conduct of war” as the Department of Defense.²⁵¹ The clandestine and largely unaccountable nature of the CIA program creates the most ambiguities for Just War theorists.²⁵² According to Philip Alston U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions:

Intelligence personnel do not have immunity from prosecution under domestic law for their conduct. They are thus unlike State armed forces which would generally be immune from prosecution for the same conduct.... Thus, CIA personnel could be prosecuted for murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable U.S. law.²⁵³

Alston is not alone in this assessment of CIA drone pilots’ status. As noted by Rayan Vogel, a Foreign Affairs Specialist, and member of the Office of the Secretary of Defense and U.S. Department of Defense:

The CIA is a civilian agency and not a branch of the U.S. Armed Forces. Even under a liberal reading of Article 4 from GC III, the CIA would not meet the requirements of lawful belligerency as a militia or volunteer corps because, while they do report to a responsible chain of command (albeit not always a military chain of command), as a group they do not wear uniforms or otherwise distinguish themselves,

²⁵⁰ Lewis & Cawrord, *supra* note 93, at 1158.

²⁵¹ Wright, *supra* note 175, at 7.

²⁵² *Id.*

²⁵³ Lewis & Cawrord, *supra* note 93, at 1158.

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nor do they carry their arms openly. CIA personnel are therefore unprivileged belligerents in this conflict.²⁵⁴

Gary Solis agrees with this assessment and has opined at some length on the status of CIA drone operators as unprivileged belligerents:

Those CIA agents are, unlike their military counterparts but like the fighters they target, unlawful combatants. No less than their insurgent targets, they are fighters without uniforms or insignia, directly participating in hostilities, employing armed force contrary to the laws and customs of war. Even if they are sitting in Langley, the CIA pilots are civilians violating the requirement of distinction, a core concept of armed conflict, as they directly participate in hostilities...it makes no difference that CIA civilians are employed by, or in the service of, the U.S. government or its armed forces. They are civilians; they wear no distinguishing uniform or sign, and if they input target data or pilot armed drones in the combat zone, they directly participate in hostilities--which means they may be lawfully targeted Moreover, CIA civilian personnel who repeatedly and directly participate in hostilities may have what recent guidance from the International Committee of the Red Cross terms "a continuous combat function." That status, the ICRC guidance says, makes them legitimate targets whenever and wherever they may be found, including Langley.²⁵⁵

When the laws of armed conflict were developed, there was no technology such as drones used in the battlefield. Perhaps, new laws should be developed, especially to protect and guide drone operators. Drones are different than traditional forces that must react promptly to various hostile situations and make decisions within their

²⁵⁴ *Id.* at 1159.

²⁵⁵ *Id.* at 1159-60.

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own judgment. In the case of drones, it is conceivable that the President may become involved with the assistance of military and legal advisors before authorizing a drone operator to engage a target. Therefore, the laws delineating command responsibility in both drone programs need to be updated and promulgated to ensure operations conform with the LOAC.

VII. CONCLUSION

This article has demonstrated that current laws are capable of governing drone warfare. The fundamental principles of the law of armed conflict, specialized weapons treaties, The Hague and Geneva conventions, customary law, and the UN Charter all provide a thorough legal backdrop to govern the usage of drones.²⁵⁶ As with all weapons, it is essential to ensure that drone attacks are launched only against legitimate military objectives in accordance with the laws governing the use of force.²⁵⁷ The sole legal issue specific to drone operations under both the *jus ad bellum* and the *jus in bello* is weapon choice.²⁵⁸ As correctly noted by Special Reporter Alston, “a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with LOAC.”²⁵⁹ Drones provide a legally permissible use of force to support self-defense.²⁶⁰ Drone attacks can occur against state or non-state actors located in a foreign country from which the armed attacks emanate even though there is no special consent of the foreign state, no imputation of the non-state actor’s attacks to the foreign state, no armed conflict between the foreign state and the United States, and the foreign state

²⁵⁶ Vogel, *supra* note 111, at 137.

²⁵⁷ Blank, *supra* note 70, at 716-17.

²⁵⁸ Michael Schmitt, *Drone Attacks Under the Jus Ad Bellum and Jus In Bello: Clearing the ‘Fog of Law’*, at 13, available at <http://ssrn.com/abstract=1801179>.

²⁵⁹ *Id.*

²⁶⁰ Jordan Paust, *Operationalizing use of drones against non-state terrorists under the international law of self-defense*, 8 ALB. GOV’T L. REV., 203 (2013), (last accessed in 2015).

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is willing or unable to stop the attacks.²⁶¹ However, the legal status of drone operators remains as a challenging legal question while the field continues to develop.

²⁶¹ *Id.*