

An Analysis of the Legal Status of CIA Officers Involved in Drone Strikes

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I. INTRODUCTION

On September 20, 2011, the United States Central Intelligence Agency (“CIA”) killed an American citizen in Yemen via a targeted drone strike.¹ This is only one example from a long list of drone attacks attributable to the CIA, but is quite possibly the most controversial.² Over the last ten years, the CIA has become increasingly involved in the “war on terror.”³ The drone strikes began in November 2002, when the CIA used a Predator unmanned aerial vehicle to kill suspected al Qaeda leader Qaed Salim Sinan al-Harethi, also in Yemen.⁴ Between 2004 and 2008 there

1. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all>.

2. *Id.* (The administration has faced a legal challenge and public criticism for targeting Aulqi, who was born in New Mexico, because of constitutional protections afforded U.S. citizens.); *see also* Spencer Ackerman, *Was Killing Al-Qaida’s YouTube Preacher Illegal?*, WIRED (Sept. 30, 2011, 12:42 PM), <http://www.wired.com/dangerroom/2011/09/awlaki-illegal-or-legal/> (discussing the legality of targeting an American citizen without due process of law).

3. Greg Miller, *CIA Digs in as Americans Withdraw from Iraq, Afghanistan*, WASH. POST, Feb. 8, 2012, http://www.washingtonpost.com/world/national-security/cia-digs-in-as-americans-withdraw-from-iraq-afghanistan/2012/02/07/gIQAFNJTQ_story.html (“CIA paramilitary operatives were the first US personnel to enter Afghanistan after the Sept. 11 attacks.”).

4. *US Kills al-Qaeda Suspect in Yemen*, USA TODAY, Nov. 5, 2002, http://www.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm.

were an estimated forty-six such drone strikes,⁵ and at least sixty-nine in 2009 alone.⁶ The number of drone strikes in 2010 was nearly double 2009's figure.⁷ Drone strikes in the region have continued, and the U.S. government plans to keep a CIA presence in Afghanistan after the troop withdrawal for the purpose of maintaining airstrip access, which will allow the CIA to further use drones for targeting al Qaeda members in Pakistan.⁸

Since the war on terror began in 2001, there has been much debate surrounding the legality of conducting such a war, and what legal rights and protections, if any, members of al Qaeda and their supporters must receive. But what is the legal status of those individuals who target members of al Qaeda on behalf of the United States? Are there any legal consequences for "pushing the button" on the drone that carried out the targeted killing? At first glance, it appears that members of the American armed forces involved in the drone strikes are combatants, and combatants have the lawful right to target the enemy. However, CIA officers are the individuals carrying out many of the drone strikes, particularly in areas not officially considered to be in the combat zone, such as Yemen, Pakistan, and Somalia.⁹ The CIA is a civilian agency that gathers intelligence for the purpose of advising senior United States policymakers.¹⁰ Civilians cannot participate in an armed conflict as they are not combatants; thus, many questions arise regarding the legal status

5. Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201, 1216 (2011).

6. Christopher Drew, *Drones are Playing a Growing Role in Afghanistan*, N.Y. Times, Feb. 19, 2010, <http://www.nytimes.com/2010/02/20/world/asia/20drones.html>; see also Philip Alston, *The CIA and Targeted Killing Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 286 (2011) ("The CIA's drone-based killing programs have so far killed well in excess of 2,000 persons in Pakistan, and it has been involved in such drone programs in at least four other countries.")

7. Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 105 (2010).

8. Miller, *supra* note 3.

9. Drew, *supra* note 6; Greg Miller, *CIA Seeks New Authority to Expand Yemen Drone Campaign*, WASH. POST, Apr. 19, 2012, http://www.washingtonpost.com/world/national-security/cia-seeks-new-authority-to-expand-yemen-drone-campaign/2012/04/18/gIQAsaumRT_story.html; Declan Walsh, *US Extends Drone Strikes to Somalia*, THE GUARDIAN June 30, 2011, <http://www.guardian.co.uk/world/2011/jun/30/us-drone-strikes-somalia>.

10. *Today's CIA*, CENTRAL INTELLIGENCE AGENCY (Apr. 5, 2007), <https://www.cia.gov/about-cia/todays-cia/index.html>; see also Radsan & Murphy, *supra* note 5, at 1206 ("[T]hey are not part of a military chain of command, do not wear uniforms, and are not trained in the laws of war.")

of the CIA officers due to their participation in the war on terror. Specifically, are CIA officers combatants or civilians who are directly participating in hostilities, and what are the implications of their legal status?

The United States justifies targeted drone strikes with the 2001 Authorization of the Use of Military Force (“Authorization”),¹¹ which gives the U.S. President the power to use force against suspected terrorists.¹² The Authorization is predicated upon the argument that the September 11, 2001 terror attacks were an armed attack on the United States, permitting a response of force toward those responsible.¹³ Thus, this article will examine international humanitarian law to determine whether the CIA officers are operating in a situation of armed conflict and to decide which legal classification applies to the CIA officers. Customary international law and the case law and statutes of the international courts, and the *ad hoc* and hybrid tribunals, including the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the International Criminal Court, and the Special Court for Sierra Leone, will inform these analyses.¹⁴ The case law of the Supreme Court of

11. See Vogel, *supra* note 7, at 107; Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

12. Cheri Kramer, *The Legality of Targeted Drone Attacks as U.S. Policy*, 9 SANTA CLARA J. INT’L L. 375, 378 (2011) (The Authorization gives the President of the United States “the power ‘to use all necessary and appropriate force’ against those responsible for the terrorists [sic] attacks realized in New York, Virginia, and Pennsylvania on September 11, 2001.”).

13. Vogel *supra* note 7, at 108; see also Allen S. Weiner, *Law, Just War, and the International Fight Against Terrorism: Is It War?* in INTERVENTION, TERRORISM, AND TORTURE 137, 141 (Steven P. Lee ed., 2007) (“On September 11, the United States sustained an assault that qualifies, in scale and effect, as an ‘armed attack’ that would justify the use of force in self-defense under Article 51 of the UN Charter.”).

14. See Marco Odello, *Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 15, 35 (Roberta Arnold & Noelle Quenivet, eds. 2008) (Case law of international courts and tribunals “is important for the interpretation and clarification of international rules, the identification of customary international law, all the more as judicial decisions are considered a subsidiary source of international law by Article 38(d) of the Statute of the ICJ.”); see also Stephen Mathias, *The United States and the Security Council*, in THE SECURITY COUNCIL AND THE USE OF FORCE 173, 175 (Niels Blokker & Nico Schrijver eds. 2005) (The United States is a member of the United Nations Security Council; as such, it supported the creation of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone.); see also GARY SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 15 (2010) (The term “case law” in the law of armed conflict “refers to decisions of domestic courts, military tribunals, and international courts that relate to IHL and [the law of armed conflict.]”).

Israel will be referenced, as Israel takes the same position as the United States with regard to the legality of targeting terrorists via drone strike. The specific international treaties signed and/ratified by the United States will be examined to determine any applicable legal obligations. Finally, news articles will be used to identify the CIA's actual role in the targeted killings, as there has been little official acknowledgement of the CIA's involvement.¹⁵

Section II of this article introduces international humanitarian law as the applicable legal standard, and develops the distinction between international and non-international armed conflict. This section will define the key elements used to determine whether a situation of hostilities rises to the level of an armed conflict: the intensity of the conflict and the organization of the parties. Furthermore, this section will analyze the idea of internationalized armed conflict and examine the standard for determining when an attack by an armed group may be attributed to a State. Section III of this article describes the different categories of actors found in situations of armed conflict, including combatants, noncombatants, and civilians. This section also discusses members of organized armed groups, terrorists, and unlawful combatants, and analyzes whether they are recognized classifications under international humanitarian law. The principles of "direct participation in hostilities" ("DPH") and "continuous combat function" ("CCF") are introduced and distinguished here. Section IV of this article discusses the legality of targeted killings. This section also examines the right of self-defense under Article 51 of the UN Charter, and whether it permits States to use force against non-State actors. Finally, Section V of this article examines the facts surrounding drone strikes conducted by the United States. It first considers which legal forum the United States is operating in with regard to the locations of the drone strikes; specifically, whether it is an armed conflict and whether the United States may lawfully assert its right of self-defense against al Qaeda. It concludes with an analysis of the legal status of the CIA officers who are participating in the drone strikes and the potential legal consequences of that status.

15. Alston, *supra* note 6, at 299 ("A great deal of the relevant information [surrounding targeted killings] is classified.").

II. INTERNATIONAL HUMANITARIAN LAW AS THE APPLICABLE LEGAL STANDARD

When analyzing the legal status of a participant in a drone strike targeting members of al Qaeda and their supporters, it is imperative that the proper set of legal rules are applied to that targeted killing.¹⁶ The official position of the United States is that the Authorization permits the waging of war against terrorists, and international humanitarian law (“IHL”) applies.¹⁷ This Article will therefore analyze the legal status of the CIA officers engaged in drone attacks using the principles of IHL.

At its most basic applicability, IHL operates in situations of armed conflict and governs the conduct of hostilities (“jus in bello”);¹⁸ it is considered the *lex specialis* applicable during an armed conflict.¹⁹ IHL is the set of rules that attempts to alleviate the effects of war on individuals,²⁰ and its primary purpose is to govern the relationship between a State and the citizens of its enemy during those times of armed

16. See, e.g., Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on targeted killings*, Human Rights Council, ¶ 28, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter *Targeted Killings Study*] (“Whether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the inter-state use of force.”); Kenneth Watkin, *Humanitarian Law and 21st Century Conflict: Three Block Wars, Terrorism, and Complex Security Situations*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 1, 25 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006) (“Since international law only recognizes two normative structures: international humanitarian law and international human rights law a significant legal challenge results in their application to the tripartite categorization of conflict.”).

17. See, e.g., Vogel, *supra* note 7, at 102 n.5; Ackerman, *supra* note 2; Alston, *supra* note 6, at 321 (Harold Koh, the former the United States Department of State Legal Adviser, stated the legal basis for the targeted killings is that “the United States is in an armed conflict with al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks.”).

18. See, e.g., Christopher Greenwood, *Historical Development and Legal Basis in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 1, 12 (Dieter Fleck ed., 2d ed. 2010) (International humanitarian law “is chiefly concerned with the abnormal conditions of armed conflict.”); Conor McCarthy, *Legal Conclusion or Interpretive Process? Lex Specialis and the Applicability of International Human Rights Standards*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 101, 101 (Robert Arnold & Noelle Quenivet eds., 2008) (“[H]umanitarian law is conceived of specifically to address the kinds of situations which arise in warfare and the dynamics which underpins them[.]”); Judith Gardam, *The Contribution of the International Court of Justice to International Humanitarian Law*, 14 LEIDEN J. INT’L LAW 349, 352 (2001) (“The name IHL is recently coined for what was previously known as the law of war[.]”).

19. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. para. 18 [2005] (Isr.) [hereinafter *Israel Case*].

20. SOLIS, *supra* note 14, at 22.

conflict.²¹ IHL applies to all parties caught in the conflict, and sets the rules governing the conduct of the hostilities.²² IHL also attempts to place limits on the way States use force in armed conflict, particularly by prohibiting certain methods of warfare, or, for example, by requiring that attacks may only be directed toward valid military objectives.²³ The two primary sources of IHL are treaties and custom.²⁴

The United States military specifically recognizes these two sources of IHL;²⁵ thus, any principle identified as “customary” in this article will apply to U.S. action. Furthermore, the United States is a party to all four

21. Greenwood, *supra* note 18.

22. William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. OF INT'L L. 741, 743 (2005).

23. Greenwood, *supra* note 18, at 13.

24. See Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 178 (2005) [hereinafter *ICRC Study*] (“It is widely agreed that the existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law[.]”); see Greenwood, *supra* note 18, at 12 (“[O]nce it is established that a humanitarian law treaty is binding upon states on both sides in a conflict, the application of the treaty is not dependent upon reciprocity. . . it is not necessary today that all the states involved in a conflict must be parties to a particular humanitarian treaty for that treaty to apply in the conflict.”); see also Noelle Quenivet, *The History of the Relationship Between International Humanitarian Law and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 1, 2 (Roberta Arnold & Noelle Quenivet eds., 2008) (“While IHL mainly grew via customary law, its first treaty codification dates back to 1864 when the Geneva Convention of August 22, 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field was drafted.”); see SOLIS, *supra* note 14, at 14 (“[C]ustom remains the basis of much of the law of war.”).

25. See DEPARTMENT OF THE ARMY, ARMY FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE 4 (1956) available at http://www.loc.gov/r/frd/Military_Law/pdf/law_warfare-1956.pdf (last visited Aug. 12, 2013) (“The law of war is derived from two principal sources . . . *Lawmaking Treaties (or Conventions)*, such as the Hague and Geneva Conventions [and] *[c]ustom*. Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law.”); see also DEPARTMENT OF THE ARMY, ARMY FIELD MANUAL NO. 3-24 AND MARINE CORPS WARFIGHTING PUBLICATION NO. 30-33.5, COUNTERINSURGENCY D-3 (2006), available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf> (last visited Aug. 12, 2013) (“U.S. forces obey the law of war. The law of war is a body of international treaties and customs, recognized by the United States as binding. It regulates the conduct of hostilities and protects noncombatants. The main law of war protections come from the Hague and Geneva Conventions.”).

1949 Geneva Conventions (“Geneva Conventions”), which form part of the core principles of IHL,²⁶ and “apply as treaties in almost any international armed conflict.”²⁷ Indeed, almost all of the Geneva Conventions’ provisions are considered to be customary international law.²⁸ The United States has also signed and ratified the United Nations (“UN”) Charter, which contains provisions governing when States may resort to the use of force (“jus ad bellum”).²⁹ The United States has relied heavily on the self-defense provision in the UN Charter to justify the targeting and killing of suspected members of al Qaeda, the Taliban, and their supporters in Yemen, Pakistan, and Somalia, which will be discussed further in section V(A) below.

A. *Legal Status of the Conflict*

The first step in analyzing the legal status of a person conducting a drone strike is to decide whether the strike will occur in an international armed conflict or a non-international armed conflict. This determination is important not only because it dictates the applicable legal standard,³⁰ but also because it establishes the legal status of the actors involved and the possible consequences of their involvement.³¹

26. See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 93 (3d ed., Manchester Univ. Press, 2008) (1993).

27. Greenwood, *supra* note 18, at 28.

28. *ICRC Study*, *supra* note 24, at 187 (“The great majority of the provisions of the Geneva Conventions, including common Article 3, are considered to be part of customary international law.”); see also Odello, *supra* note 14, at 43 (“[T]he norms enumerated in Common Article 3 to the [Geneva Conventions] are declaratory of substantive customary international law, and they constitute a minimum yardstick for all types of armed conflict.”).

29. Greenwood, *supra* note 18, at 2.

30. RENE PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 244 (2002) (“In human rights as well as in humanitarian law, initial characterisation plays a key role, because the classification of a given situation as a state of emergency or an armed conflict may render one or the other legal system nearly or totally inapplicable.”); see also Roberta Arnold, *The New War on Terror: Legal Implications under International Humanitarian Law*, in *TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW* 85, 89 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006) (“IHL requires the existence of an armed conflict in order to apply.”); SOLIS, *supra* note 14, at 149 (“In determining conflict status, one asks what law of war, if any, applies in the armed conflict under consideration[.]”).

31. See, e.g., Watkin, *supra* note 16, at 25 (The protections of the Geneva Conventions “are clearly triggered by the existence of an armed conflict between States.”); Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 853 (2009) (“To know who is a combatant, therefore, requires knowing the meaning of armed conflict.”); Dieter Fleck, *The Law of Non-International Armed Conflicts in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 605, 627 (Dieter Fleck ed. 2008)

1. What is “Armed Conflict?”

The 1949 Geneva Conventions were the first to introduce “armed conflict” as a concept distinct from “war.”³² Unfortunately, the Geneva Conventions do not provide an exact definition of armed conflict.³³ But armed conflict is not limited to the use of force between armed forces; the Geneva Conventions allow for an armed conflict to result from the unauthorized crossing of armed forces into a State’s territory, or from situations that are not met with resistance, such as aerial bombings or invasions.³⁴ Regardless of the context, situations of armed conflict can only arise from the use of force by the organs of a State.³⁵ The International Criminal Tribunal for the Former Yugoslavia (“ICTY”), in the first international war crimes trial since the ones in Nuremberg and Tokyo,³⁶ followed this requirement and defined an armed conflict as “a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”³⁷ Thus, the two elements found in

(“A distinction between international and non-international armed conflict remains part of the law of armed conflict, most especially for purposes of the status of fighters.”).

32. See PROVOST, *supra* note 30, at 248 (“The notion of ‘international armed conflict’ evolved as a separate concept from ‘war’ only recently, through the adoption after the Second World War of the UN Charter and the 1949 Geneva Conventions.”).

33. See, e.g., Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 75 (Dieter Fleck ed., 2d ed. 2010) [hereinafter *Scope of Application*] (“The Geneva Conventions do not define ‘armed conflict,’ an omission which was apparently deliberate, since it was hoped that this term would continue to be purely factual and not become laden with technicalities as did the definition of war.”); SOLIS *supra* note 14, at 149 (“[T]here is no ‘bright line test,’ no formula to determine whether there is an armed conflict in progress[.]”).

34. CRYER, R. ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 279 (2d ed. 2010).

35. Greenwood, *supra* note 18, at 48.

36. See Landmark Cases, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/10314> (last visited Aug. 11, 2013).

37. Prosecutor v. Tadić, Case No. IT-94-I-T, Appeals Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://icty.org/x/cases/Tadić/acdec/en/51002.htm> [hereinafter “Tadić Appeals Decision”]; see also Watkin, *supra* note 16, at 38 (“This decision is significant in a number of respects. First, it provided a definition of ‘armed conflict’ that referred to conflict not only between States, but also with ‘organized armed groups.’ Secondly, that same definition also recognized a territorial aspect of the conflict based on ‘control.’”).

all armed conflicts are: an organized armed group and fighting of some intensity.³⁸ These elements will be discussed further in section II(B)(iii).

2. *International Armed Conflict*

The bright line rule is that an armed conflict is international when two or more States use armed force against each other.³⁹ Therefore, the conflict's intensity, duration, and scale are not relevant to the determination so long as the conflict is between two States.⁴⁰ International armed conflict will also occur where the territory of a State is partially or completely occupied, regardless of whether that occupation is resisted with force.⁴¹

Common Article 2, paragraph 1 of the Geneva Conventions dictates that the Conventions are applicable in all cases of officially declared war, or in situations of armed conflict arising between two or more States, regardless of whether one of the States recognizes a "state of war."⁴² This means IHL will apply to all situations of international armed conflict.⁴³ The rules of IHL apply equally to all parties involved in the armed conflict, regardless of which State was the instigator,⁴⁴ or whether the State

38. O'Connell, *supra* note 31, at 854; *cf.* Agnieszka Jachec-Neale, *End Justifies the Means? Post 9/11 Contempt for Humane Treatment*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 57, 69 (Roberta Arnold & Noelle Quenivet eds., 2008) ("Crucial therefore to the analysis of the legal framework of armed conflict will be the intensity and the level of disruption in the first place . . . and the parties to the conflict.").

39. *See e.g.*, Greenwood, *supra* note 18, at 46 (An armed conflict is international "if one state uses force of arms against another state."); Odello, *supra* note 14, at 23 ("International armed conflicts are situations where two or more states are involved in the use of armed force."); SOLIS, *supra* note 14, at 150 ("In a common Article 2 conflict—an international armed conflict—two or more states are engaged in armed conflict against each other.").

40. *Targeted Killings Study*, *supra* note 16, ¶ 51.

41. Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 209 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> [hereinafter Lubanga Decision on the Confirmation of Charges]; *see also Targeted Killings Study*, *supra* note 16, ¶ 51 ("The IHL of international armed conflict applies also to 'all cases of total or partial occupation of the territory of a High Contracting Party' to the Geneva Conventions.").

42. Greenwood, *supra* note 14, at 46–47; *see* Jennifer Elsea, CONG. RESEARCH SERV., RL31367, TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM 12–13 (2005).

43. Odello, *supra* note 14, at 23; *see* Watkin, *supra* note 16, at 25 ("In respect of international armed conflict the determination of when the rules of humanitarian law apply is well prescribed by the Geneva Conventions and Additional Protocol I.").

44. *Scope of Application*, *supra* note 33, at 51.

parties officially recognize each other as States.⁴⁵ In addition to the four Geneva Conventions, Protocol I Additional to the 1949 Geneva Conventions (“AP I”)⁴⁶ applies to international armed conflict.⁴⁷ It is important to note that a formal declaration of war is not required to trigger the application of IHL to international armed conflicts;⁴⁸ in fact, such formal declarations of war are rare in today’s world.⁴⁹ Thus, analyzing the facts surrounding the hostilities determines whether international armed conflict exists.⁵⁰

3. *Non-International Armed Conflict*

In contrast to an international armed conflict, a non-international armed conflict (“NIAC”), or internal armed conflict, either takes place within a State’s borders and involves hostilities between that State’s government and an armed group, or arises from hostilities between non-State armed groups.⁵¹ A State’s armed forces must follow the rules of IHL in military operations whether an armed conflict is international or non-international.⁵² In addition to IHL, international human rights law also governs NIACs.⁵³

45. *See id.* (“The applicability of the rules of international humanitarian law is not dependent upon whether the parties to a conflict recognize one another.”).

46. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (“This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.”).

47. SOLIS, *supra* note 14, at 150.

48. *Scope of Application, supra* note 33, at 49; *see also* SOLIS, *supra* note 14, at 150 (“A declaration of war is not required for a common Article 2 international armed conflict to exist.”).

49. *Scope of Application, supra* note 33, at 49 (“In fact, declarations of war have become almost unknown since 1945.”).

50. O’Connell, *supra* note 31, at 854 (“Armed conflict is determined today by facts of fighting, not mere declarations as in the period before the adoption of the United Nations Charter.”).

51. Fleck, *supra* note 31, at 605; *see also* SOLIS, *supra* note 14, at 152 (Non-international armed conflicts occur when “there is armed conflict within a state and the government’s opponents are not combatants of another state’s armed force.”).

52. *Scope of Application, supra* note 33, at 55.

53. David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 202 (2005); *see also* Gardam, *supra* note 18, at 14 (Human rights norms “can and do supplement IHL, particularly during times of non-international armed conflict.”); *see also* Cordula Droegge, *Elective Affinities? Human Rights and Humanitarian Law*, 871 INT’L REV. RED CROSS

While human rights law generally applies in peacetime⁵⁴ and restrains a State's freedom of action with regard to respect for an individual's human rights, such as the rights to life and liberty,⁵⁵ a State must still abide by these standards in times of non-international armed conflict.⁵⁶ The International Court of Justice ("ICJ") has recognized this, noting, "international human rights law refers to international humanitarian law as a *lex specialis* which informs the content of human rights norms in areas to which both are applicable."⁵⁷ This means States do not have "carte blanche" to behave however they see fit during a NIAC.⁵⁸

The application of IHL to NIACs is a departure from the traditional stance that NIACs were not subject to the laws of war.⁵⁹ Prior to World War II international law only recognized two types of conflicts: war, which was conducted between two States, and civil war, which was conducted between a State and an internal group.⁶⁰ However, there has been an increase in frequency of NIACs since the conclusion of World War II.⁶¹ The 1949 Geneva Conventions updated the laws of war, redefining traditional war as international armed conflict and civil war as non-international armed conflict.⁶² The 1977 Additional Protocols to the

501 (2008) ("[T]here is today no question that human rights law comes to complement humanitarian law in situations of armed conflict.").

54. Greenwood, *supra* note 18, at 12.

55. See e.g., Abresch, *supra* note 22, at 743; Kretzmer, *supra* note 53, at 202; Emiliano J. Buis, *The Implementation of International Humanitarian Law by Human Rights Courts: The Example of the Inter-American Human Rights System in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW* 269, 273 (Robertta Arnold & Noelle Quenivet eds., 2008) (There is a set of core "fundamental guarantees, . . . [that] cannot be suspended or derogated even if a situation of emergency has been declared. These basic rights, which are inherent to the dignity of all human beings, constitute a common ground which is shared by HRL and IHL.").

56. Kretzmer, *supra* note 53, at 202.

57. *Scope of Application*, *supra* note 33, at 75; see also Heike Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SEC. L. 265, 270 (2006) ("[H]umanitarian law is generally *lex specialis* in relation to human rights law during times of conflict."); see also Quenivet, *supra* note 24, at 8 ("Undoubtedly the ICJ declared that although IHL was the governing body of law applying in times of armed conflict, HRL continued to apply.").

58. Kretzmer, *supra* note 53, at 202.

59. GREEN, *supra* note 26, at 82.

60. EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 16–17 (2010).

61. *Id.* at 14, 23; see also DIANE COYLE & PATRICK MEIER, *NEW TECHNOLOGIES IN EMERGENCIES & CONFLICTS: THE ROLE OF INFORMATION & SOCIAL NETWORKS* 4 (2009) ("[A]lthough the number of conflicts between countries has fallen markedly since the Cold War, there is a rising level of civil conflict.").

62. CRAWFORD, *supra* note 60, at 18–19.

Geneva Conventions further refined the laws of armed conflict by specifically applying Additional Protocol II (“AP II”) to internal armed conflict.⁶³ The jurisprudence of the international courts and *ad hoc* tribunals has solidified the application of IHL to NIACs; for example, the ICJ has held that Common Article 3 of the Geneva Conventions contains rules that should be applied in situations of non-international armed conflict.⁶⁴ The ICTY recognized that IHL applies to both international and non-international armed conflicts,⁶⁵ and the International Criminal Tribunal for Rwanda (“ICTR”) recognized the customary status of the application of IHL to NIACs.⁶⁶ The United States applies IHL to NIACs; its official policy is to apply IHL to all conflicts, whether international or non-international.⁶⁷

Common Article 3 to the Geneva Conventions and AP II both apply specifically to NIACs⁶⁸ but there are differences between the two provisions.⁶⁹ Common Article 3 “is wider in scope but narrower in content,”⁷⁰ and sets out only the minimum standards applicable to the

63. *Id.* at 23–26; see GREEN, *supra* note 26, at 75 (AP II is “[t]he first and only international agreement exclusively regulating the conduct of the parties in a non-international conflict.”).

64. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14, ¶ 218 (June 27) [hereinafter Nicaragua] (The rules found in common Article 3 “constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity.’”).

65. Tadić Appeals Decision, *supra* note 37, ¶ 67 (“International humanitarian law governs the conduct of both internal and international armed conflicts.”); see GREEN, *supra* note 26, at 82 (“The *ad hoc* tribunal for Yugoslavia, however, tends to treat both international and non-international conflicts as virtually subject to the same law.”).

66. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 608 (Sept. 2, 1998), <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (“It is today clear that the norms of Common Article 3 have acquired the status of customary law.”).

67. SOLIS, *supra* note 14, at 167; see also Watkin, *supra* note 16, at 41 (“One approach taken by Canada, the United States and the United Nations has been to apply the ‘spirit and principles’ of humanitarian law.”).

68. See SOLIS, *supra* note 14, at 153 (“In a non-international armed conflict, common Article 3, and, perhaps, Additional Protocol II, apply. No other portion of the Geneva Conventions applies.”); see also *Scope of Application*, *supra* note 33, at 55 (Common Article 3 “applies to any ‘armed conflict not of an international character[.]’”).

69. Kretzmer, *supra* note 53, at 176 n.25.

70. PROVOST, *supra* note 30, at 261.

conflict.⁷¹ It applies to any NIAC that occurs on the territory of a State that has ratified the Geneva Conventions.⁷² On the other hand, AP II is “of more limited applicability but contain[s] detailed rules,”⁷³ and only applies to conflicts between a State’s armed forces and dissident armed forces, or between non-State organized armed groups engaged in protracted military operations.⁷⁴ For AP II to apply, the non-State party involved in the conflict must have some control over the territory.⁷⁵

A minimum threshold of intensity and organization must be met to distinguish armed conflict from internal disturbances and riots.⁷⁶ Common Article 3 does not provide any indication of this required degree of intensity.⁷⁷ However, AP II specifies that it does “not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”⁷⁸ Thus, the AP II threshold for non-international armed conflict is higher than the threshold found in Common Article 3.⁷⁹ As a result, AP II “supplements” Common Article 3 in that it provides criteria to assist in distinguishing between situations of armed conflict and situations not rising to that level;⁸⁰ if AP II applies to a conflict, Common Article 3 will also apply.⁸¹

71. ICRC Study, *supra* note 24, at 178; *see also* Robert J. Delahunty & John C. Yoo, *What is the Role of International Human Rights Law in the War on Terror?*, 59 DEPAUL L. REV. 803, 833 (2010) (“Common Article 3 of the Geneva Conventions is also a conventional [law of armed conflict] that applies to ‘internal’ armed conflicts, but it too has very limited substantive implications.”).

72. *Scope of Application*, *supra* note 33, at 55.

73. PROVOST, *supra* note 30, at 261.

74. *Scope of Application*, *supra* note 33, at 55.

75. Kretzmer, *supra* note 53, at 176 n. 25.

76. CRYER, *supra* note 34, at 279.

77. ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 132 (2010).

78. *Scope of Application*, *supra* note 33, at 55.

79. *See e.g.*, GREEN, *supra* note 26, at 83 (This threshold is so high “that it would exclude most revolutions and rebellions, and would probably not operate in a civil war until the rebels were well established and had set up some form of *de facto* government.”); PROVOST, *supra* note 30, at 261 (“The second paragraph [of AP II, Article 1] marks the lower threshold beneath which the Protocol does not apply.”); Maria-Daniella Marouda, *Application of International Humanitarian Law in contemporary armed conflicts: is it ‘simply’ a question of facts?*, in ARMED CONFLICTS & INTERNATIONAL HUMANITARIAN LAW 201, 210 (Stelios Perrakis & Maria-Daniella Marouda eds., 2009) (“Additional Protocol II requires an even higher degree of organization, since the parties would have to be able to carry out . . . sustained and concerted military operations[.]”).

80. ICRC Study, *supra* note 24, at 178; *see* Delahunty & Yoo, *supra* note 71, at 833 (“Additional Protocol II is the most developed body of treaty law relating to conflicts of this nature, but it covers only a small segment of internal conflicts, and its substantive provisions are few.”); *see also* HECTOR OLASOLO, UNLAWFUL ATTACKS IN COMBAT OPERATIONS 33 (2008) (“AP II elaborates on the rules contained in common art.

To qualify as an armed conflict, the hostilities between organized groups must last for some period of time and involve a certain level of force.⁸² Under the ICTY's *Tadić* standard, armed conflict exists when there is protracted violence between a State and an organized armed group,⁸³ or between armed groups within the territory of a State.⁸⁴ Although this definition is still "broader in scope than that considered by the drafters of the Geneva Conventions, it is arguably now the most authoritative formulation of the threshold associated with common Article 3."⁸⁵ The *Tadić* Trial Chamber noted that analyses of these elements is necessary to distinguish situations of armed conflict from situations which do not trigger the application of IHL, such as situations of banditry, unorganized or short-term skirmishes, or terrorist activities.⁸⁶ Therefore, the determination of whether a situation rises to the level of an armed conflict must be

3 for non-international armed conflicts and provides for a set of criteria to distinguish between situations of armed conflict and situations of internal disturbances and tensions").

81. PROVOST, *supra* note 30, at 261; INT'L COMM. OF THE RED CROSS (ICRC), COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1350 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY] ("[I]n circumstances where the conditions of application of the Protocol are met, the Protocol and common Article 3 will apply simultaneously, as the Protocol's field of application is included in the broader one of common Article 3.")

82. O'Connell, *supra* note 33, at 855–56. Note this is different from common Article 2 international conflicts, where "[a] state of international armed conflict can be said to exist in the absence of hostilities in cases of military occupation." CULLEN, *supra* note 77, at 131.

83. See Kretzmer, *supra* note 53, at 197–98 ("While Common Article 3 of the Geneva Conventions does not state so expressly, it is agreed that in order for a non-international conflict covered by this article to exist, there must also be an organized group.")

84. *Tadić Appeals Decision*, *supra* note 37, ¶ 70.

85. CULLEN, *supra* note 77, at 122.

86. Prosecutor v. *Tadić*, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> [hereinafter *Tadić Trial Judgment*]; see also Prosecutor v. Milošević, Case No. IT-02-54-T, Trial Chamber Decision on Motion for Judgment of Acquittal, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004), http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm ("The main purpose of the *Tadić* test is to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, all of which are not subject to international law."); O'Connell, *supra* note 31, at 856 ("One-way attacks and minor armed exchanges are not armed conflicts.")

decided on a case-by-case basis,⁸⁷ guided by the intensity of the conflict and the organization of the parties to that conflict.⁸⁸

a. Intensity of the Conflict

The intensity of the conflict need not be analyzed if there has been a formal declaration of war.⁸⁹ Recall, however, that formal declarations of war do not presently occur as frequently as they did in the past. When do acts of violence reach the level of intensity required to establish an armed conflict? Principally, the level of intensity must exceed the level found in internal disturbances and tensions.⁹⁰ This is to differentiate armed conflict from isolated incidents or sporadic acts of violence. However, the threshold must allow for the inclusion of “situations of internal conflict where hostilities are not necessarily carried out on a continuous basis.”⁹¹ Thus, the intensity requirement includes a temporal element, which IHL provides from the instant an armed conflict begins.⁹² Because armed conflict requires an actual exchange between the parties,⁹³ it will not begin with the attack, but with the counter-attack or response of force from the attacked party.⁹⁴

87. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Trial Judgment, ¶ 92 (Dec. 6, 1999), <http://www.unict.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf> (“It can thence be seen that the definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an “armed conflict,” meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis.”); *see also* Abella v. Argentina, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L./V/IL98, doc. 6 rev. ¶ 153 (1997) (“When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.”).

88. CULLEN, *supra* note 77, at 122 (“[T]he *Tadić* Trial Chamber interpreted the definition expounded in the Jurisdiction Decision as a ‘test’ for the existence of armed conflict and hence also for applicability of common Article 3. The definition ‘focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.’); *see also* Milošević, *supra* note 86, ¶ 17.

89. CULLEN, *supra* note 77, at 132 (“As a declaration of war in itself is sufficient to bring into force the Geneva Conventions, it is clear that the requirement of intensity need not be relevant to determining the status of an armed conflict initiated in this way.”); *see also* OLASOLO, *supra* note 80, at 51 (“[T]he starting date of the conflict coincides with the initial use of armed violence by one of the parties to the conflict, regardless of the issue of a declaration of war.”).

90. CULLEN, *supra* note 77, at 127.

91. *Id.* at 128.

92. ARNOLD, *supra* note 30, at 93; *see also* *Tadić* Appeals Decision, *supra* note 37, ¶ 67 (“[T]he temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.”).

93. O’Connell, *supra* note 31, at 855–56 (Armed conflict requires hostilities, which “are the actual engagement in fighting.”).

94. *Id.* at 855.

The gamut of this temporal element is important because the Geneva Conventions apply beyond the cessation of hostilities.⁹⁵ IHL's temporal scope extends beyond the conclusion of the armed conflict for the purpose of ensuring POWs and any civilians detained during the hostilities are released and repatriated.⁹⁶ The temporal scope also assists with the analysis of the existence of an armed conflict; the longer the hostilities continue, the more likely the incident has become an armed conflict.⁹⁷

Relevant factors in the analysis of the intensity element include the length of the conflict, the protracted nature of the conflict, the seriousness of armed clashes, the spread of clashes throughout the territory, and the type of arms used by the parties.⁹⁸ Additional factors to consider are the high number of casualties,⁹⁹ and the involvement of the UN Security

95. Tadić Appeals Decision, *supra* note 37, ¶ 67.

96. OLASOLO, *supra* note 80, at 51; *see also* Prosecutor v. Brima, Case No. SCSL-04-16-T, Trial Judgment, ¶ 245 (June 20, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=0LA5W/dbDMQ=&tabid=106> (“International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, until a peaceful settlement is achieved.”) [hereinafter AFRC Case].

97. SOLIS, *supra* note 14, at 152 (“A key indicia [of armed conflict] is whether the incident is protracted. The longer an incident continues, the more difficult it is to describe it as merely an incident.”).

98. CULLEN, *supra* note 77, at 128–29, referencing Milošević, *supra* note 86, ¶¶ 28–31. A comprehensive list of factors can be found in Prosecutor v. Boškoski, Case No. IT-04-82-T, Trial Judgment, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008), http://www.icty.org/x/cases/boskoski_tarculovski/acjug/en/100519_ajudg.pdf (“These include the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed. Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease fire agreements.”).

99. Boškoski, *supra* note 98, ¶ 183 (“The high number of casualties and extent of material destruction have also been important elements in their deciding whether an armed conflict existed.”).

Council and whether it has passed any resolutions regarding the hostilities.¹⁰⁰ The ICTY referenced these criteria in its denial of Slobodan Milošević’s Motion for Judgment of Acquittal,¹⁰¹ where he argued there was no armed conflict in Kosovo.¹⁰² The Trial Chamber noted the purpose of the intensity requirement from the *Tadić* test “is to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, all of which are not subject to international law.”¹⁰³ In concluding there was sufficient evidence of an armed conflict in Kosovo,¹⁰⁴ the Trial Chamber considered the following: the Kosovo Liberation Army (“KLA”)¹⁰⁵ carried out numerous operations against the police and Albanian villages (evidence of the protracted nature of the conflict); the severe conflicts throughout the region (the spread of clashes over the territory); the offensive by Serb policemen, soldiers, and paramilitaries into villages where the KLA was not active (the increase of governmental forces sent to Kosovo); and the KLA’s use of rifles, guns, and mortars (the use of weapons by both parties).¹⁰⁶ Likewise, in *Limaj, et al.*,¹⁰⁷ the ICTY considered the seriousness of the hostilities, the mobilization of the troops by the government, the types of arms utilized by the parties, the destruction of property, the displacement of local population, and the number of casualties.¹⁰⁸

100. Marouda, *supra* note 79, at 221; *see also* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Trial Judgment, ¶ 538 (Mar. 14, 2012) [hereinafter Lubanga Trial Judgment] (“In order to assess the intensity of a potential conflict, the ICTY has indicated a Chamber should take into account . . . whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed.”); Boškoski, *supra* note 98, ¶ 177.

101. The indictment against Milošević, the former president of Serbia, alleged he participated in a joint criminal enterprise to expel the Kosovo Albanian population from Kosovo by shelling towns and villages, and burning Kosovo homes, among other criminal activities.

102. *See* Milošević, *supra* note 86, ¶ 14 (“[I]n order for the Trial Chamber to have jurisdiction over crimes pursuant to Articles 3 and 5 of the Statute, the crimes must have been committed in an armed conflict.”).

103. *Id.* ¶ 26.

104. *Id.* ¶ 40.

105. The KLA was an Albanian paramilitary organization that sought to separate Kosovo from Yugoslavia.

106. *Id.* ¶¶ 26–32.

107. This was a case against three KLA members, alleging their participation in a joint criminal enterprise to intimidate, imprison, and murder Serb civilians and perceived Albanian supporters who refused to cooperate with the KLA.

108. CULLEN, *supra* note 77, at 129 (referencing Prosecutor v. Limaj et al., Case No. IT-03-66-T, Trial Chamber Judgment, ¶¶ 135–43, 150, 166–67 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005), <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>).

The ICTR and the International Criminal Court (“ICC”) also analyze the intensity of the conflict when determining the existence of a non-international armed conflict.¹⁰⁹ The ICTR has noted that international and non-international armed conflicts are distinguishable based upon the intensity of the conflict itself.¹¹⁰ Similarly, in *Lubanga*, the ICC’s first judgment, the Trial Chamber referenced the ICTY’s decision in *Mrkšić*¹¹¹ and noted the following criteria may be indicative of an armed conflict: “the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict.”¹¹²

b. Organization of the Parties

Although the *Tadić* decision did not provide a definition for “organized armed group,”¹¹³ subsequent case law has developed the term. The ICTY has reasoned that an armed conflict requires some degree of organization by the parties.¹¹⁴ The *Milošević* Decision on the Motion for Judgment of Acquittal set out criteria that can be used to find this degree of organization, including whether a party to the conflict had headquarters, specific geographic areas of operation, and the ability to obtain weapons and distribute them to its members.¹¹⁵ The Trial Chamber found the KLA was an organized military group with headquarters, a joint command

109. See *Lubanga Trial Judgment*, *supra* note 100, ¶ 538.

110. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 602 (Sept. 2, 1998), <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (“The distinction pertaining to situations of conflicts of a non-international character emanates from the differing intensity of the conflicts. Such distinction is inherent to the conditions of applicability specified for Common Article 3 or Additional Protocol II respectively.”).

111. See Prosecutor v. Mrkšić, Case No. IT-95-13/1-T, Trial Judgment (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007), <http://www.icty.org/x/cases/mrksic/tjug/en/070927.pdf>.

112. *Lubanga Trial Judgment*, *supra* note 100, ¶ 538 (citing Mrkšić, *supra* note 111, ¶ 407).

113. CULLEN, *supra* note 77, at 124.

114. Limaj et al., *supra* note 108, ¶ 89 (“[S]ome degree of organisation by the parties will suffice to establish the existence of an armed conflict.”).

115. *Id.* ¶ 90 (“With respect to the organisation of the parties to the conflict Chambers of the Tribunal have taken into account factors including the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.”)

structure, and designated zones of operation,¹¹⁶ thus meeting the first element of the *Tadić* test.¹¹⁷

International jurisprudence has followed this analysis. The Inter-American Commission on Human Rights (“IACHR”) has recognized that armed conflict requires the existence of organized armed groups capable of engaging in military activities against one another.¹¹⁸ In the *La Tablada* case, the IACHR considered whether the level of organization of a group of attackers on a Buenos Aires military barracks was enough to constitute an armed conflict.¹¹⁹ The IACHR noted the group was organized enough to successfully plan and execute a military operation against a military objective, and thus, met the requirement for an organized armed group.¹²⁰ Likewise, the Special Court for Sierra Leone (“SCSL”) has noted the degree of organization must be such that the armed group is able to organize and carry out concerted military operations and have the ability to impose a disciplinary system upon the group.¹²¹

Similarly, in its Decision on the Application for a Warrant of Arrest in the *Bemba* case, the ICC Pre-Trial Chamber found reasonable grounds to support the existence of an armed conflict, due to the level of organization of the two groups engaged in conflict.¹²² In that case, it was alleged there was an armed conflict in the Central African Republic (“CAR”) between the Movement for the Liberation of the Congo (“MLC”), a rebel group from the Democratic Republic of the Congo (“DRC”) led by Bemba, and a rebel group composed of former members of the Central African Armed Forces (“FACA”), who were attempting to overthrow the CAR president. The Pre-Trial Chamber considered that both groups had a hierarchical organizational structure, which allowed them to operate under an organized chain-of-command with disciplinary powers.¹²³ Bemba possessed both political leadership and military command over the MLC.¹²⁴ Furthermore, the MLC was organized just like a State’s armed

116. Milošević, *supra* note 86, ¶ 23. *See also* Limaj et al., *supra* note 108, ¶ 172 (“The ability of the KLA to engage in such varied operations is a further indicator of its level of organization.” These operations included simultaneous engagement with armed forces at Kosovo’s northern, eastern, southern, and western borders.)

117. Milošević, *supra* note 86, ¶ 25.

118. Abella, *supra* note 87, ¶ 152.

119. *Id.* ¶ 155-56.

120. *Id.* ¶ 155.

121. *AFRC Case*, *supra* note 96, ¶ 738.

122. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Prosecutor’s Application for a Warrant of Arrest, ¶ 54 (June 10, 2008).

123. *Id.* (“[B]oth groups had a hierarchical structure enabling them to act under responsible command with operational and disciplinary powers and a sufficient level of internal organisation.”)

124. *Id.*

forces, with brigades, battalions, companies, and platoons, and the ability to organize military operations.¹²⁵ Thus, the Pre-Trial Chamber was persuaded that there was an armed conflict between the two organized groups. More recently, the *Lubanga* Trial Chamber noted that the term “organized armed group” means that the parties to a conflict must be sufficiently organized in a way to enable them to carry out protracted armed violence.¹²⁶ According to the ICC, relevant factors to be considered in determining the organization of the parties include: “the force or group’s internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement.”¹²⁷

4. Internationalized Armed Conflict

It is possible to have an international armed conflict and a non-international armed conflict take place simultaneously in a single territory.¹²⁸ It is also possible for situations of armed conflict that began as a non-international armed conflict within the boundaries of a State to become “internationalized.”¹²⁹ An internationalized armed conflict could arise if a State conducts military operations against a transnational group in the territory of a foreign State without the agreement of that State.¹³⁰

125. *Id.* (The other rebel group “was also organised hierarchically and had the ability to plan and execute military operations.”).

126. *Lubanga* Trial Judgment, *supra* note 100, ¶ 536.

127. *Id.* ¶ 537.

128. *Id.* ¶ 541; *see SOLIS, supra* note 14, at 156 (“A mixed category of armed conflict, what might be called a dual status conflict, is one in which both international and internal conflicts are occurring *at the same time within the same state.*”) (emphasis added).

129. *E.g., Marouda, supra* note 79, at 214; Fleck, *supra* note 31, at 606 (“Certain armed conflicts may be considered as internationalised, even if not all parties to the conflict are sovereign states.”); CRAWFORD, *supra* note 60, at 15 (An internationalized armed conflict is an “armed conflict that starts as an internal armed conflict, but, due to any number of contributing factors, becomes transformed into an international armed conflict.”); *Lubanga* Decision on the Confirmation of Charges, *supra* note 41, ¶ 209 (An internal armed conflict can become an international armed conflict “if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).”).

130. Fleck, *supra* note 31, at 607; ANTONIO CASSESE, *INTERNATIONAL LAW* 420 (2d ed. 2005) (“An armed conflict which takes place between an Occupying Power and rebel

Or, internationalization might occur if a third State directly intervenes on behalf of one of the parties to the conflict.¹³¹ Internationalization is also possible through indirect involvement of a third State that “effectively controls” one of the parties involved in the non-international armed conflict.¹³² However, if a State enters into an armed conflict with an armed group that is not acting on behalf of a government, then that conflict will not become internationalized.¹³³

Thus, it is important to analyze when an armed group’s actions are attributable to a State. The ICJ established the “effective control test” in *Nicaragua* to guide this analysis, which states that in order to impute acts of an armed group to a State, the relationship must be one of dependence on one side (the armed group) and control on the other (the State).¹³⁴ The issue before the ICJ in *Nicaragua* was whether American involvement with the contras, a counter-revolutionary group in Nicaragua, made the United States responsible for the contras’ acts. The United States claimed it was intervening on behalf of its allies El Salvador, Honduras, and Costa Rica, who were under attack by the government of Nicaragua.¹³⁵ The United States provided logistical support, information on the location and movements of troops, and radar coverage to the contras; furthermore, the contras’ paramilitary operations were planned in close collaboration with, if not completely by, American advisers.¹³⁶ Despite this level of involvement, the ICJ found that while the United States’ assistance to the contras was crucial to the contras’ activities, the contras’ actions were not attributable to the United States.¹³⁷ The ICJ stated the United States did not have “effective control” over the contras’ military or paramilitary operations.¹³⁸ This finding was surprising in light of how much the United States collaborated with the contras; the ICJ noted the level of involvement needed to be that of *directing or enforcing*

or insurgent groups—whether or not they are terrorist in character—in an occupied territory, amounts to an international armed conflict.”).

131. Marouda, *supra* note 79, at 214.

132. Lubanga Trial Judgment, *supra* note 100, ¶ 541 (“It is widely accepted that when a State enters into conflict with a nongovernmental armed group located in the territory of a neighbouring State and the armed group is acting under the control of its own State, ‘the fighting falls within the definition of an international armed conflict.’”).

133. *Id.* (“[I]f the armed group is not acting on behalf of a government, in the absence of two States opposing each other, there is no international armed conflict.”).

134. See *Nicaragua*, *supra* note 64, ¶ 109.

135. GREGOR WETTBERG, *THE INTERNATIONAL LEGALITY OF SELF-DEFENSE AGAINST NON-STATE ACTORS* 35 (2007); see also *Nicaragua*, *supra* note 64, ¶ 165.

136. *Nicaragua*, *supra* note 64, ¶ 106.

137. *Id.* ¶ 110.

138. *Id.* ¶ 115.

the perpetration of the acts contrary to the law.¹³⁹ Although the United States assisted with the financing, organizing, training, supplying, and equipping of the contras and assisted with the planning of their operations,¹⁴⁰ its participation was not enough.

Almost ten years after the *Nicaragua* decision, the ICTY rejected the effective control test and developed a new test with a lower threshold of control.¹⁴¹ In its *Tadić* decision, the ICTY found that to impute the actions of a non-State group to a State, that group must be under the “overall control” of the State.¹⁴² Financial and military assistance from a State is not enough,¹⁴³ the controlling State must also coordinate the armed group or assist with the general planning of its military activities.¹⁴⁴ Thus, the threshold for the overall control test is when a State plays a part in organizing, coordinating, or planning the military actions of the group in addition to the funding, supplying, and training of that group.¹⁴⁵ However, the ICTY noted that if the controlling State is not the location of the hostilities, “more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.”¹⁴⁶ Furthermore, the test for determining whether acts of individuals or non-military groups may be imputed to a State is whether specific instructions were given for the commission of a particular act, or if there was public approval of the acts after their commission.¹⁴⁷

The consequence of using the overall control test to determine whether an armed group’s actions are attributable to a State could be an increase in situations that cross the threshold into armed conflict. When States intervene on behalf of their allies, like the United States did in

139. *Id.*

140. *Id.*

141. WETTBERG, *supra* note 135, at 37; *Tadić* Trial Judgment, *supra* note 86, ¶ 585 (“The [ICJ] set a particularly high threshold test for determining the requisite degree of control.”).

142. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶ 120 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> [hereinafter *Tadić* Appeals Judgment].

143. *Id.* ¶ 130.

144. *Id.* ¶ 131.

145. *See id.* ¶ 137.

146. *Id.* ¶ 138.

147. *Id.* ¶ 132.

Nicaragua, there is a greater chance that using the overall control test to analyze such intervention will internationalize the conflict. The United States organized, trained, supplied and equipped the contras, and assisted with planning operations; all of these are actions that fulfill the overall control test.¹⁴⁸ Thus, an analysis of the United States' actions in *Nicaragua* following the ICTY's perspective would likely lead to American responsibility for the contras' acts.

In summary, an international armed conflict has occurred if two States are engaged in hostilities with one another, regardless of whether they recognize each other as States. A non-international armed conflict arises when protracted armed violence occurs between a State and an organized group. IHL applies to both situations, but not to hostilities falling below the armed conflict threshold. Thus, the distinction between whether a conflict is international or non-international is essential because the armed conflict label dictates which IHL standards and protections apply. Furthermore, the legal consequences of an individual's involvement in the hostilities also depend upon this classification. The following section will introduce each category of actor in an armed conflict, and the consequences of each label.

III. LEGAL STATUS OF THE ACTORS IN INTERNATIONAL HUMANITARIAN LAW

The legal status of the actors in armed conflict is important for many reasons. First, an individual's legal status determines what actions that individual may lawfully take during the armed conflict, and dictates what treatment he or she is entitled to receive upon falling into enemy hands.¹⁴⁹ Second, it assists in defining the State's duty toward the actors in armed conflict, both during and after the conclusion of hostilities. Finally, an individual's legal status is important as it could mean the difference between being either lawfully targeted by the enemy, or protected from such targeting.

A. *Combatant Status*

International humanitarian law recognizes two categories of actors engaged in international armed conflict: combatants and noncombatants.¹⁵⁰ These two groups compose the armed forces of the parties involved in

148. See *Nicaragua*, *supra* note 64, ¶¶ 106, 115.

149. See SOLIS, *supra* note 14, at 238.

150. See O'Connell, *supra* note 31, at 853 (“[N]o one is a combatant in the absence of armed conflict.”).

armed conflicts.¹⁵¹ The *travaux préparatoires* of the Additional Protocols to the Geneva Conventions clarifies that “armed forces” means “all the armed forces—including those which under some national systems might not be called regular forces, but does not include ‘other governmental agencies the members of which may be armed’ such as law-enforcement bodies and paramilitary agencies.”¹⁵² Generally, domestic law will define membership in the armed forces.¹⁵³ Combatants are legally entitled to take part in the hostilities on behalf of their State or an armed group permitted to engage in hostilities.¹⁵⁴ Thus, the test for whether an individual is a lawful combatant is whether he or she is a member of the armed forces of a State or group involved in an international armed conflict.¹⁵⁵ Because combatants have the legal right to participate in the ongoing hostilities,¹⁵⁶ they give up their right to not be attacked.¹⁵⁷ Put another way, combatants exchange their right to life for the right to kill.¹⁵⁸

151. Knut Ipsen, *Combatants and Non-Combatants in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 79, 80–81 (Dieter Fleck ed., 2d ed. 2008) (“[M]embers of armed forces as a rule are combatants and [] the non-combatant status of members of the armed forces applies in exceptional cases.”); see Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 3., Oct. 18, 1907, 187 Consol. T.S. 227 [hereinafter Hague Convention] (“The armed forces of the belligerent parties may consist of combatants and non-combatants.”).

152. Luisa Vierucci, *Private Military and Security Companies in Non-international Armed Conflicts: Jus ad Bellum and Jus in Bello Issues*, in *WAR BY CONTRACT* 235, 248–49 (Francesco Francioni & Natalino Ronzitti eds., 2011).

153. Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 654 (2010) [hereinafter *Opportunity Lost*].

154. An armed group is usually authorized to participate in the hostilities by a sovereign State. See Eric Talbot Jensen, *Direct Participation in Hostilities: A Concept Broad Enough for Today’s Targeting Decisions*, in *NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE* 88 (2011).

155. See JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR* 51 (2007); see also Israel Case, *supra* note 19, para. 24.

156. Abresch, *supra* note 22, at 757; see Watkin, *supra* note 16, at 35 (“Combatants have a right to take part in hostilities regardless of the ‘justness’ of the cause.”).

157. Abresch, *supra* note 22, at 741; see IAN HENDERSON, *CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY, AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I* 80 (2009) (“As one would expect, it is lawful to target combatants.”).

158. Abresch, *supra* note 22, at 741.

Furthermore, combatants may lawfully shoot and be shot at by the enemy.¹⁵⁹

Lawful combatants are entitled to “combatant immunity,” a term which states that they will not be punished for their lawful participation in the armed conflict.¹⁶⁰ Combatant immunity also means lawful combatants must receive prisoner of war (“POW”) status upon capture by the enemy.¹⁶¹ Combatants are sometimes referred to as “privileged belligerents” as a reflection of this immunity and its resulting privileges.¹⁶² However, combatant immunity will not apply if the combatant violates the laws of war in some way.¹⁶³

Combatants are considered valid military objectives, and thus may be targeted and attacked at any time during the armed conflict, until such time when they surrender.¹⁶⁴ Combatants may be attacked when they are not actually threatening the enemy, such as when they are sleeping or far from the front lines of the combat zone.¹⁶⁵ This reflects the idea that it is the individual’s status, as opposed to his or her actions, that determines whether he or she may lawfully be targeted and killed; a combatant is a legitimate target regardless of whether that individual actually endangered the life of the enemy.¹⁶⁶ Taken to the extreme, this means an enemy could potentially target and kill a combatant who is at home on leave.¹⁶⁷ Thus, “[c]ombatants may be targeted wherever found, armed or unarmed,

159. HENDERSON, *supra* note 157, at 81.

160. See Abresch, *supra* note 22, at 757 (“[T]his means that if he is captured a combatant may not be prosecuted as a murderer for killing enemy combatants; instead, he becomes a prisoner of war, held only until the end of active hostilities.”); see also Arnold, *supra* note 30, at 92 (“[C]ombatants are immune from prosecution for having directly participated in hostilities, since this is their task.”); see also CRAWFORD, *supra* note 60, at 52 (2010) (“[C]ombatants who fulfill the necessary requirements to be so classified are legitimately permitted to participate in armed hostilities.”).

161. Jensen, *supra* note 154, at 88.

162. See, e.g., PAUST, *supra* note 155, at 51 (Referring to combatants as “privileged” or “lawful” belligerents.)

163. See PAUST, *supra* note 155, at 53 (“Violations of the laws of war are war crimes; violators are not entitled to immunity and are thus prosecutable.”); Watkin, *supra* note 16, at 35 (“[L]awful combatants are immune from prosecution.”); CRAWFORD, *supra* note 60, at 53 (“At the cessation of hostilities, a legitimate combatant will not face prosecution for acts committed during the course of the armed conflict, unless such acts were in violation of the laws of armed conflict.”).

164. SOLIS, *supra* note 14, at 188; see Marco Sassoli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts*, 871 INT’L REV. RED CROSS 599, 605–06 (2008).

165. SOLIS, *supra* note 14, at 188; Sassoli & Olson, *supra* note 164, at 606.

166. Kretzmer, *supra* note 53, at 190–91.

167. SOLIS, *supra* note 14, at 188.

on a front line or a mile or a hundred miles behind the lines.”¹⁶⁸ However, they can withdraw from the armed conflict by becoming “hors de combat,” meaning the combatant laid down his or her arms and surrendered to the enemy, or became sick, wounded, or shipwrecked.¹⁶⁹ If a combatant becomes hors de combat and falls into the hands of his or her enemy, that combatant is entitled to POW status and all of its attendant privileges.¹⁷⁰

Article 13 of the First and Second Geneva Conventions, Article 4 of the Third Geneva Convention, and Article 43 of AP I list the criteria used to determine whether a person is a combatant. The elements determinative of this status include, subordination to a responsible commander, the display of a fixed and distinctive emblem, the open carrying of arms, and conducting operations in accordance with *jus in bello*.¹⁷¹ However, if a combatant fails to meet one of these elements, he would not then become an “unlawful combatant;” he would retain his combatant status, but lose his POW protections,¹⁷² and could receive punishment for his unlawful conduct.¹⁷³

In non-international armed conflict, the combatant label is not used;¹⁷⁴ the combatant category is reserved specifically for designated persons participating in international armed conflict.¹⁷⁵ As a result, individuals

168. *Id.* at 190.

169. *Id.* at 188–89.

170. *Id.* at 189. *See also* Eric Christensen, *The Dilemma of Direct Participation in Hostilities*, 19 J. TRANSNAT'L L. & POL'Y 281, 287 (2010).

171. *See* Israel Case, *supra* note 19, para. 24; *see also* Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 11, 25 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).

172. Schmitt, *supra* note 171, at 25.

173. Jensen, *supra* note 154, at 89.

174. Guido den Dekker & Eric PJ Myjer, *The Right to Life and Self-defence of Private Military and Security Contractors in Armed Conflict*, in WAR BY CONTRACT 171, 176 (Francesco Francioni & Natalino Ronzitti eds., 2011) (“The special status of ‘combatant’ is not extended to non-State participants in internal conflicts.”); *see also* SOLIS, *supra* note 14, at 191 (“The traditional view is that . . . in non-international armed conflicts, there are no ‘combatants,’ lawful or otherwise.”); *see also* Abresch, *supra* note 22, at 758 (“In the humanitarian law of internal armed conflicts, the distinction is between ‘civilians’ and persons who are ‘taking a direct part in hostilities.’”).

175. CRAWFORD, *supra* note 60, at 68 (Unlawful combatants “do not fulfill the requirements of combatancy since that category only exists for specific persons in international armed conflict.”); *see also* SOLIS, *supra* note 14, at 191 (“[I]n terms of [the law of internal armed conflict] there are fighters, rebels, insurgents, or guerillas who engage in armed conflict, and there are government forces . . . [t]here are no combatants as that term is used in customary law of war.”).

who directly participate in NIACs are not entitled to combatant immunity or protection as a POW,¹⁷⁶ and may be “subject to the domestic laws of the State in which they are captured and liable for their criminal acts.”¹⁷⁷ During non-international armed conflicts, State parties to the conflict may only legally target and attack civilians who directly participate in hostilities.¹⁷⁸

1. Members of Organized Armed Groups

Organized armed groups conduct hostilities on behalf of a non-State party to an armed conflict.¹⁷⁹ Essentially, they are the armed forces of that non-State party.¹⁸⁰ These organized armed groups may include dissident armed forces or other organized groups that are identifiable through their armed activities.¹⁸¹ Members of these organized armed groups are not combatants, and therefore they do not receive the benefits and privileges conferred upon combatants.¹⁸² But, they are also not civilians and do not receive protection from attack.¹⁸³ Thus, members of armed groups often operate outside the scope of combatant status.¹⁸⁴ Status as a member of an organized armed group is based on “continuous combat function” (“CCF”).¹⁸⁵ This means “individuals whose continuous function involves the preparation, execution, or command of acts or

176. Watkin, *supra* note 16, at 35; *see also* CRAWFORD, *supra* note 60, at 48 (“[A] lawful combatant can expect certain rights and privileges to be respected by his or her captor. However, there is no equivalent status for participants in a non-international armed conflict.”); *cf.* Fleck, *supra* note 31, at 627 (“In non-international armed conflicts fighters cannot claim treatment as prisoners of war upon detention.”).

177. CRAWFORD, *supra* note 60, at 68; Watkin, *supra* note 16, at 36 (“[N]on-State actors have no immunity from prosecution regardless of whether they have complied with humanitarian law.”).

178. *Targeted Killings Study*, *supra* note 16, ¶ 58; Vasuki Sunkavalli, *Targeted Killing as a Counter Terrorism Tactic: Should We Name It or Shame It?*, 18 U. MIAMI INT’L COMP. L. REV. 137, 154 (2011) (“[T]he distinction between combatants and civilians applies in both international armed conflict as well as non-international armed conflict.”).

179. NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 70 (2009); *see also* SOLIS, *supra* note 14, at 205.

180. SOLIS, *supra* note 14, at 205.

181. MELZER, *supra* note 179, at 31; *see also* SOLIS, *supra* note 14, at 205.

182. Kramer, *supra* note 12, at 385; *see also* SOLIS, *supra* note 14, at 205.

183. MELZER, *supra* note 179, at 70; *see also* SOLIS, *supra* note 14, at 205.

184. *See* Marouda, *supra* note 79, at 237 (They “act most of the times outside the protection of the status of combatant [] when they participate actively in hostilities.”); *see also* SOLIS, *supra* note 14, at 208 (“Unlawful combatants sometimes band together to form unlawful combatant organizations; that is, armed opposition groups.”).

185. Kramer, *supra* note 12, at 385; SOLIS, *supra* note 14, at 206.

operations amounting to direct participation in hostilities are assuming a continuous combat function.”¹⁸⁶

CCF is a functional approach that determines how to distinguish members of an organized armed group from civilians, as group members usually do not wear uniforms or fixed insignia.¹⁸⁷ One indication that an individual is a member of an organized armed group is repeated direct participation in hostilities.¹⁸⁸ Recruiters, trainers, and financiers are typically not included in CCF, and thus, persons exclusively carrying out these functions remain civilians.¹⁸⁹ Like armed forces, organized armed groups may be accompanied by or supported by civilians who would not be subject to direct attack unless they were also directly participating in hostilities.¹⁹⁰ Due to the difficulty in distinguishing members of organized armed groups from civilians, civilian status is the “default” classification when in doubt.¹⁹¹

2. Terrorists and “Unlawful Combatants”

Terrorism has undoubtedly had an impact on armed conflict,¹⁹² as State responses to terrorist attacks have frequently triggered international armed conflicts.¹⁹³ Indeed, both the United States and Israel have used the context of armed conflict to justify their actions to combat terrorism.¹⁹⁴ But, “terrorist” is not a category of actor defined in IHL. Generally, terrorists are non-State actors¹⁹⁵ who are often linked to insurgency, and

186. MELZER, *supra* note 179, at 34.

187. Jamie A. Williamson, *Challenges of Twenty-First Century Conflicts: A Look at Direct Participation in Hostilities*, 20 DUKE J. COMP. & INT'L L. 457, 464 (2010).

188. *Id.*

189. *Opportunity Lost*, *supra* note 153, at 656.

190. Williamson, *supra* note 187, at 464; *see also Opportunity Lost*, *supra* note 153, at 656–57 (“Persons assuming this supporting function are equated to private contractors and civilian employees accompanying State armed forces.”).

191. Williamson, *supra* note 187, at 464; *see also Opportunity Lost*, *supra* note 153, at 656–57.

192. CASSESE, *supra* note 130, at 403 (“Attacks on civilians (and even combatants) designed to spread terror have multiplied, particularly in occupied territories.”).

193. *Id.*

194. *Targeted Killings Study*, *supra* note 16, ¶ 47; *see also* Weiner, *supra* note 13, at 137 (President Bush “declared in the aftermath of September 11 that the United States was engaged in a *war on terrorism*.”) (emphasis added).

195. Hans-Joachim Heintze, *Do Non-State Actors Challenge International Humanitarian Law?*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES

usually cannot be distinguished from civilians.¹⁹⁶ Their goal is generally “the deliberate causing of death, or other serious injury, to civilians for political or ideological ends.”¹⁹⁷

Terrorists are not combatants since they usually do not belong to the armed forces of any one State.¹⁹⁸ A terrorist is only a combatant if he or she meets the requirements for combatant status. This means the terrorist would have to be a part of the armed forces of a State party or an organized armed group that is party to an armed conflict, wear a fixed distinctive sign, carry his or her arms openly, and follow the laws and customs of war.¹⁹⁹ However, terror attacks are often carried out against civilians by individuals who do not wish to draw attention to themselves and thus do not wear a fixed, distinctive sign or carry their arms openly.²⁰⁰ Because terrorists do not conform to combatant status, they are “not entitled to the status of prisoners of war; they can be put on trial for their membership in terrorist organizations and for their operations against the army.”²⁰¹ As a result, terrorists are labeled as civilians, and can only be targeted for such time as they directly participate in hostilities.²⁰² Direct participation in hostilities will be discussed in section III(C)(i) below.

As there is no terrorist category in IHL, States have attempted to classify terrorists as “unlawful combatants” or “unlawful enemy combatants”²⁰³ in an effort to justify armed response to terrorism.²⁰⁴ Individuals who unlawfully participate in hostilities—meaning, an individual who participates directly in the hostilities despite the fact that he or she has neither combatant status nor the legal right to participate—

163 (Heintschel von Heinegg & Volker Epping eds., 2007) (“Non-state actors can be defined as any actor other than a sovereign state.”).

196. Marouda, *supra* note 79, at 238.

197. Kretzmer, *supra* note 53, at 175.

198. *Id.* at 191.

199. *Id.*; *see also* Israel Case, *supra* note 19, para. 24 (“[T]he terrorist organizations from the *area*, and their members, do not fulfill the conditions for combatants . . . they have no fixed emblem recognizable at a distance, and they do not conduct their operations in accordance with the laws and customs of war.”).

200. *Cf.* John Yoo, *Assassination or Targeted Killings After 9/11*, 56 N.Y.L. SCH. L. REV. 57, 73 (2011–2012) (“Terrorists deliberately disguise themselves as civilians . . . and they attack by surprise.”).

201. Israel Case, *supra* note 19, para. 25 (Terrorists “do not enjoy the status of prisoners of war. They can be tried for their participation in hostilities, judged, and punished.”).

202. Kretzmer, *supra* note 53, at 191.

203. The term “unlawful combatant” in this article will refer to “unlawful combatant,” “unlawful enemy combatant,” and “unprivileged belligerent.”

204. *See* CASSESE, *supra* note 130, at 403 (“[T]errorism has often constituted the triggering element of international armed conflicts.”).

are known as “unlawful combatants” or “unprivileged belligerents.”²⁰⁵ States are hesitant to recognize insurgents and other non-State actors as combatants because they believe doing so would lend an air of legitimacy to those unlawful combatants, and would require that the State, upon capture of that individual, convey upon him or her privileges reserved specially for combatants.²⁰⁶ However, this does not change the fact that according to existing law, “unlawful combatants” are not combatants, but civilians who are without civilian protections so long as they are directly participating in hostilities.²⁰⁷

The term “unlawful combatant” originated in *Ex Parte Quirin*, a 1942 United States Supreme Court case that arose after the capture of German soldiers who had snuck into the United States during World War II.²⁰⁸ Upon their arrival in the United States, the soldiers intentionally removed and hid their uniforms and explosive devices in an attempt to conceal their identities as enemy combatants.²⁰⁹ The Supreme Court analyzed the differences between members of the armed forces and civilians, and noted that, “[u]nlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”²¹⁰ This appears to be the reasoning that proponents of the unlawful combatant status have seized upon as support for the recognition of a new category. However, further reading of the opinion reveals the Supreme Court was referring to a combatant’s loss of combatant immunity upon commission of a violation of the laws of war, and not a change in status. First, the Court noted that an enemy combatant who removes his uniform and sneaks through the lines for the purpose of waging war has violated the laws of war and is subject to punishment.²¹¹ Second, the Court observed that the United States Government recognized unprivileged belligerent status,

205. Watkin, *supra* note 16, at 35; Ipsen, *supra* note 151, at 83 (“Such fighters cannot be classified as belonging to a state or a party to the conflict recognized as a subject of international law, and are therefore not authorized to undertake armed acts against the adversary.”); *see also* Fleck, *supra* note 31, at 613 (“Those who participate in hostilities without combatant status may be prosecuted under relevant criminal law for their belligerent actions[.]”).

206. Kretzmer, *supra* note 53, at 197.

207. *See* Israel Case, *supra* note 19, para. 26.

208. *Ex parte Quirin*, 317 U.S. 1, 21 (1942).

209. *Id.*

210. *Id.* at 31.

211. *Id.*

members of which are not entitled to combatant immunity, including combatants who do not wear the fixed emblem as required.²¹² Based on the definition of a lawful combatant, and the resulting consequences for not complying with the requirements of that status, it is clear the Supreme Court was not creating another category of “unlawful combatant;” it was merely using new terminology to describe the unlawful acts of enemy combatants.

Since the events on September 11, 2001, there have been frequent attempts to recognize “unlawful combatant” as a new IHL category, in addition to the categories of combatant and civilian.²¹³ Proponents of this classification claim that unlawful combatants should be considered combatants because they actively participate in the armed conflict although they are not members of the armed forces,²¹⁴ yet should be denied combatant immunity as well as civilian and POW protections because of their unlawful participation in the hostilities.²¹⁵ Specifically, the Bush Administration applied this definition to members of al Qaeda to justify the actions the United States took against the group.²¹⁶ However, this argument makes it too easy to justify the targeting of civilians as it goes far beyond the reaches of direct participation in hostilities,²¹⁷ discussed in section III(C)(i) below.

Notably, unlawful combatant status does not appear in any international law convention or treaty, including the Geneva Conventions and their Additional Protocols,²¹⁸ as it was not envisaged as a category in

212. *Id.* at 35.

213. Ipsen, *supra* note 151, at 83 (“The term ‘unlawful combatant’ was particularly used after September 11, 2001, to introduce a third category of persons which under existing law may be either combatants or civilians, but are denied such status as not fulfilling essential conditions.”).

214. Israel Case, *supra* note 19, para. 27 (“These are people who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians.”).

215. Israel Case, *supra* note 19, para. 27 (“[T]hey are not entitled to the rights and privileges of combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war.”); SOLIS, *supra* note 14, at 207 (“A characteristic of unlawful combatants is that upon capture they are *not* entitled to POW status.”).

216. Eric Christensen, *The Dilemma of Direct Participation in Hostilities*, 19 FLA. ST. J. TRANSNAT’L L. & POL’Y 281, 291 (2009).

217. *Id.* at 282, 291.

218. SOLIS, *supra* note 14, at 206–07; Christensen, *supra* note 216, at 286. The First Geneva Convention protects the wounded and sick on the battlefield. The Second Geneva Convention protects the wounded, sick, and shipwrecked at sea. The Third Geneva Convention protects Prisoners of War, and the Fourth Geneva Convention protects civilians.

international humanitarian law.²¹⁹ The argument that it was never meant to be a legitimate category is supported by the fact that *Ex Parte Quirin* was decided seven years before the 1949 Geneva Conventions were adopted, and although the Conventions created the new civilian category,²²⁰ the unlawful combatant category was not included. Furthermore, critics of the category maintain that the term is merely “a shorthand expression useful for describing those civilians who take up arms without being authorized to do so by international law,”²²¹ and is simply a subset of civilian status.²²² This view is supported by the ICTY; in *Delalić*, the Trial Chamber observed that individuals who do not fall within the ambit of the Third Geneva Convention, which protects POWs, are to be covered by the Fourth Convention, which provides protections for civilians.²²³ There is no “intermediate status” where the law would not apply to an individual,²²⁴ a person who falls into enemy hands is either a member of the armed forces’ medical personnel covered by the First Convention, a POW covered by the Third Convention, or a civilian covered by the Fourth Convention.²²⁵ Thus, unlawful combatant status is not a legitimate individual classification in the law of armed conflict.²²⁶

219. Heintze, *supra* note 195, at 167.

220. GREEN, *supra* note 26, at 53 (The 1949 Geneva Conventions replaced the 1929 Geneva Conventions and created the completely new civilian convention.).

221. Antonio Cassese, *Expert Opinion on Whether Israel’s Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law* ¶ 26, <http://www.stoptorture.org.il/files/cassese.pdf> [hereinafter “Expert Opinion”].

222. SOLIS, *supra* note 14, at 208.

223. Prosecutor v. Delalić, Case No. IT-96-21-T, Trial Judgment, ¶ 271 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www/icty.org/x/cases/mucic/tjug/en/98/1116_judg_en.pdf.

224. Heintze, *supra* note 195, at 167 (“An ‘unlawful combatant’ would therefore be placed outside the regime of international humanitarian law, and hence be unprotected by that body of law.”).

225. INT’L COMM. OF THE RED CROSS (ICRC), COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean Pictet ed., 1958).

226. CASSESE, *supra* note 130, at 409 (“This category can be accepted only if it is used for *descriptive* purposes. Instead, it cannot be admitted as an intermediate category between combatants and civilians.”); Heintze, *supra* note 195, at 167 (“The correct position is that if a person is not a combatant in the sense of the Geneva Conventions, then he/she is a civilian subject to international criminal law and entitled to the protection of international human rights law.”).

B. Noncombatant Status

If combatants are members of the armed forces who are authorized to directly participate in the hostilities, noncombatants are the members of a party's armed forces who do *not* have authorization to directly participate in the hostilities.²²⁷ Members of the latter category include war correspondents, members of the merchant marine, medical and religious personnel, quartermasters, members of the military administration and legal services, and other non-fighting personnel.²²⁸ Noncombatants are not protected from being the object of an attack, save for medical and religious personnel.²²⁹ Although noncombatants are not entitled to participate directly in the hostilities, they are still entitled to treatment as POWs upon capture.²³⁰ Finally, noncombatants are not civilians.²³¹

C. Civilian Status

Civilians are individuals who are not members of the armed forces, including persons who were, but have retired or otherwise left the service.²³² They must not participate in military activities, as this activity is

227. Ipsen, *supra* note 151, at 80.

228. CRAWFORD, *supra* note 60, at 52; *cf.* Ipsen, *supra* note 151, at 96.

229. *See* Ipsen, *supra* note 151, at 104 (Medical personnel “are protected by the absolute rule—continuously repeated by the Geneva Conventions—of respect and protection ‘under all circumstances’ against *every* attack . . . the position [for religious personnel] is the same as for medical personnel; both must be respected and protected under all circumstances, which also means that every attack against religious personnel is contrary to international law.”).

230. CRAWFORD, *supra* note 60, at 52. But, if a member of the religious or medical personnel directly participates in the hostilities, thus becoming an unlawful combatant, he would forfeit his noncombatant immunity and become a lawful target, as well as subject himself to criminal charges for his acts during combat. SOLIS, *supra* note 14, at 194.

231. CRAWFORD, *supra* note 60, at 52; *see also* Ipsen, *supra* note 151, at 99 (“[N]oncombatants are not nor could they under any circumstances be protected as civilians.”).

232. Hans-Peter Gasser, *Protection of the Civilian Population*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 238 (Dieter Fleck ed., 2d ed. 2010) (“[O]nly members of the armed forces are combatants.”); SOLIS, *supra* note 14, at 232 (“[A] civilian is anyone not a member of the armed forces.”); Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgment, ¶ 180 (Int’l Crim. Trib. for the Former Yugoslavia March 3, 2000), <http://www.ity.org/x/cases/blaskic/tjug/en/blat000303e.pdf> (Civilians are “persons who are not, or no longer, members of the armed forces.”); *see also* AP I, *supra* note 46, art. 50(1) (“A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.”). Although the US is not a signatory to AP I, many provisions of AP I are considered customary international law, including the principle of distinguishing between civilians and combatants. *See ICRC Study*, *supra* note 24, at 187.

reserved for combatants.²³³ Civilians enjoy freedom from targeting and attack, as well as the right to be protected from such attack.²³⁴ Deliberate attacks on civilians are absolutely prohibited by IHL.²³⁵ Civilians are protected by the Fourth Geneva Convention; these protections were expanded by AP I.²³⁶ However, it is of note that the Convention protections only apply when civilians are actually in the “hands of the enemy,” and not in their home territory.²³⁷ Furthermore, the Convention protections begin to apply immediately upon commencement of the hostilities.²³⁸

As opposed to combatants, who may be lawfully attacked based on their legal status, civilians may only be lawfully targeted when their actions permit it.²³⁹ This is known as direct participation in hostilities (“DPH”). Upon joining the armed forces, civilians exchange their civilian rights for combatant rights.²⁴⁰ Civilians are not completely barred from actively participating in the hostilities,²⁴¹ however, if they were to participate, their actions could result in either prosecution under domestic law or exposure to being targeted and killed by the enemy.²⁴² Civilians who choose to participate in hostilities do not enjoy combatant immunity for the time period of such participation.

1. Direct Participation in Hostilities

In armed conflict, a State may not lawfully attack civilians, regardless of whether the conflict is international or non-international. This principle is expressed in AP I, Article 51, which sets out the customary protections from military activities enjoyed by the civilian population.²⁴³ But, Article

233. Gasser, *supra* note 232, at 238; Jensen, *supra* note 154, at 91 (“Civilians are those who are not combatants and who are not taking actions normally reserved for combatants.”).

234. Abresch, *supra* note 22, at 757; AP I, *supra* note 46, art. 51(2); Israel Case, *supra* note 19, para. 26 (noting the customary status of this principle).

235. SOLIS, *supra* note 14, at 232; *cf.* Kretzmer, *supra* note 53, at 190 (“Under the law of international armed conflicts the only legitimate aim of force is weakening the military potential of the enemy.”).

236. GREEN, *supra* note 26, at 256.

237. *Id.*

238. *Id.* at 258.

239. Kretzmer, *supra* note 53, at 192.

240. Abresch, *supra* note 22, at 757.

241. *Targeted Killings Study*, *supra* note 16, ¶ 71.

242. *Id.*

243. ICRC COMMENTARY, *supra* note 81, at 615, ¶ 1923 (Article 51 “explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far

51(3)²⁴⁴ introduces an exception to civilian immunity: direct participation in hostilities.²⁴⁵ Hostile acts are “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”²⁴⁶ DPH refers to conduct undertaken by civilians, such as directly attacking or engaging in acts of war against the enemy, which suspends their civilian protections.²⁴⁷ It can include actions taken against the civilian population, not just against the enemy’s armed forces.²⁴⁸ DPH applies uniquely to civilians, and makes no distinction between participation in an international or non-international armed conflict.²⁴⁹

The principle of DPH reflects the idea that an individual may only be either a combatant, or a civilian, but not both simultaneously.²⁵⁰ Civilians who participate in hostilities do not lose their civilian status, only its accompanying protections.²⁵¹ These civilians do not attain combatant status, and will not receive any of the privileges reserved specifically for combatants, such as combatant immunity.²⁵² Thus, civilians who unlawfully engage in armed conflict have the status of a civilian directly participating in hostilities.

If a civilian participates directly in hostilities, he or she may then be lawfully targeted, but only for the duration of his or her participation,²⁵³

as possible.”); *see* Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Judgment, ¶ 220 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005), <http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf> (“[T]he prohibition of attacks on civilians stated in the Additional Protocols attained the status of customary international law.”); *see also* Israel Case, *supra* note 19, para. 30 (The Supreme Court of Israel noted that although Israel was not a party to AP I, this principle has achieved customary status.).

244. “Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.” AP I, *supra* note 46, art. 51(2).

245. *See* SOLIS, *supra* note 14, at 202; ICRC COMMENTARY, *supra* note 81, at 618, ¶ 1942; *see* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Trial Transcript, (Nov. 24, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc224353.PDF>.

246. ICRC COMMENTARY, *supra* note 81, ¶ 1942.

247. MELZER, *supra* note 179, at 12; *see* SOLIS, *supra* note 14, at 203; HENDERSON, *supra* note 157, at 98–99.

248. Israel Case, *supra* note 19, ¶ 33.

249. SOLIS, *supra* note 14, at 202.

250. *Id.* at 233.

251. Israel Case, *supra* note 19, ¶ 31.

252. *Id.* ¶ 26 (“[A] civilian who takes a direct part in the hostilities does not, at such time, enjoy the protection granted to a civilian who is not taking a direct part in the hostilities. [The result is] that an unlawful combatant is not a combatant, rather a ‘civilian.’”).

253. ICRC COMMENTARY, *supra* note 81, ¶ 1942; *see also* Prosecutor v. Rutaganda, *supra* note 87, ¶ 99 (“However, if civilians take a direct part in the hostilities, they then lose their right to protection as civilians *per se* and could fall within the class of combatant.”); CASSESE, *supra* note 130, at 421 (“However, if civilians take a *direct part* in hostilities, . . . they may be targeted while they are actually engaging in combat, or while carrying arms openly during a military deployment preceding an attack in which

because civilian protections are not permanently lost with the commission of a single act.²⁵⁴ This does not mean that upon subsequent capture he or she is immune from punitive measures for such participation.²⁵⁵ It is important to note that DPH only includes conduct that directly supports combat, such as using weapons in the conflict, gathering intelligence, or preparing for hostilities;²⁵⁶ merely belonging to a group that conducts terrorist attacks does not imply that a civilian has directly participated in hostilities.²⁵⁷ However, DPH does not include participation in the war effort, as many States often require such participation from the general population in times of armed conflict.²⁵⁸ The ICTY has noted that while membership in the armed forces can be a strong indication that an individual is DPH, it alone is not enough to establish DPH.²⁵⁹ The determination of whether a civilian has directly participated in hostilities requires a case-by-case analysis.²⁶⁰

Three elements must be met for an act to be considered direct participation in hostilities: a threshold of harm, a direct causation between the harm and the act, and a belligerent nexus.²⁶¹ The first element, the

they participate. . .”); HENDERSON, *supra* note 157, at 95 (“A civilian loses their protection from attack only *for such time* as they take a direct part in hostilities.”).

254. HENDERSON, *supra* note 157, at 95 (“[A] civilian does not lose protection from attack once and for all by a single act of taking a direct part in hostilities.”).

255. ICRC COMMENTARY, *supra* note 81, at 619, ¶ 1944.

256. *Targeted Killings Study*, *supra* note 16, ¶ 60 (“[I]n order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat.”); Israel Case, *supra* note 19, para. 33.

257. Kretzmer, *supra* note 53, at 192; *see also* SOLIS, *supra* note 14, at 544 (“Mere membership in a terrorist organization, without more, is *not* sufficient to render one the lawful target of an opposing military armed force.”).

258. ICRC COMMENTARY, *supra* note 81, ¶ 1944, at 619; *see also* MELZER, *supra* note 179, at 11 (“Throughout history, the civilian population has always contributed to the general war effort of parties to armed conflicts, for example through the production and supply of weapons, equipment, food, and shelter, or through economic, administrative, and political support.”); *Targeted Killings Report*, *supra* note 16, ¶ 64 (“These criteria generally exclude conduct that is clearly indirect, including general support for the war effort.”).

259. Prosecutor v. Halilović, Case No. IT-01-48-T, Trial Judgment, ¶ 34, n.78 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005) (“The Trial Chamber notes that a person may be listed as a member of an armed force, without being mobilised. Furthermore, it is possible that in a state of war, the civilian police by law become part of the armed forces.”).

260. Kretzmer, *supra* note 53, at 192.

261. MELZER, *supra* note 179, at 46.

threshold of harm, requires “that the act be directed at the destruction of either the military property of one of the parties of the armed conflict, or at the infliction of harm on the persons or property of civilians or those otherwise protected from direct attack.”²⁶² The direct causation element requires a direct link between the act and the harm likely to be caused.²⁶³ It is not enough that an act resulted in some kind of harm, such as death or injury to a person or property; rather, the act must be committed with the intent to cause that harm.²⁶⁴ Finally, the belligerent nexus element of DPH requires that the civilian’s act must be done with the intention of benefiting one party of the armed conflict at the other party’s detriment.²⁶⁵ Note that the intent requirement here demands a state of mind that is greater than “mere thoughtless violence.”²⁶⁶

Critics of a narrow interpretation of DPH believe it creates a “revolving door” or “farmer by day, terrorist by night” problem, meaning civilians can repeatedly rotate between immune civilian activities, such as farming, and direct participation in hostilities.²⁶⁷ However, this criticism is flawed;

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

Id.

262. Kramer, *supra* note 12, at 386; *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 100 (Dec. 6. 1999) (“To take a ‘direct’ part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”); Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 279 (Jan. 27, 2000) (“To take a ‘direct’ part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”); Halilović, Case No. IT-01-48-T, ¶ 33 n.75 (“The Trial Chamber notes that ‘[active] participation in hostilities’ has been defined by the delegates as ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.’”) (alteration in original) (citations omitted).

263. MELZER, *supra* note 179, at 46; Kramer, *supra* note 12, at 386.

264. Kramer, *supra* note 12, at 386 (“[T]he harm must be *intended* to be the direct effect of the act.”); MELZER, *supra* note 179, at 46.

265. Kramer, *supra* note 12, at 387; MELZER, *supra* note 179, at 46.

266. Kramer, *supra* note 12, at 387.

267. HENDERSON, *supra* note 157, at 95; *see also* SOLIS, *supra* note 14, at 208 (noting that the concept “farmer by day, fighter by night” is founded on the idea that “[a] person . . . engages in military raids by night, while purporting to be an innocent civilian

there are no provisions found in IHL that permit an individual to bounce between combatant and civilian status.²⁶⁸ Once a civilian becomes a member of the military, that civilian is a combatant for the duration of the hostilities regardless of whether he or she is in combat or even armed.²⁶⁹ Furthermore, one of IHL's core principles is to protect civilians who are not a military threat, so the "revolving door" scenario is not a flaw in need of correction.²⁷⁰ The narrow interpretation of DPH is consistent with the following rationale: "the prohibition against targeting a civilian who does not take a direct part in hostilities, despite his possible (previous or future) involvement in fighting, is linked to the *need to avoid killing innocent civilians*."²⁷¹

It is logical, then, that a broad interpretation of DPH runs the risk of increasing the possibility of attacks on civilians.²⁷² Proponents of a broad interpretation of DPH may argue it discourages civilians from participating in hostilities and, in fact, protects combatants.²⁷³ The Supreme Court of Israel closely examined the principle of DPH as part of its analysis of the legality of Israel's targeted killing policy.²⁷⁴ Israel implemented a targeted killing policy in response to thousands of terror attacks, and opponents challenged this policy on the basis that it violated the rights of targeted individuals.²⁷⁵ The Israeli Supreme Court noted

by day."); Kretzmer, *supra* note 53, at 193 ("[T]errorists enjoy the best of both worlds – they can remain civilians most of the time and only endanger their protection as civilians while actually in the process of carrying out a terrorist act.").

268. INTER-AM. COMM'N ON HUMAN RIGHTS, OEA/Ser.L/V/II.116, REPORT ON TERRORISM AND HUMAN RIGHTS 62–63 (2002), available at <http://cidh.oas.org/Terrorism/Eng/exe.htm> ("[O]nce a person qualifies as a combatant, whether regular or irregular, privileged or unprivileged, he or she cannot on demand revert back to civilian status or otherwise alternate between combatant and civilian status."); see also ICRC COMMENTARY, *supra* note 81, ¶ 1677, at 515, ("[A]ny concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears.").

269. ICRC COMMENTARY, *supra* note 81, ¶ 1677, at 515.

270. MELZER, *supra* note 179, at 70 ("The 'revolving door' of civilian protection is an integral part, not a malfunction, of IHL. It prevents attacks on civilians who do not, at the time, represent a military threat.").

271. CASSESE, *supra* note 130, at 421.

272. Radsan & Murphy, *supra* note 5, at 1233.

273. Israel Case, *supra* note 19, ¶ 34.

274. *Id.* at ¶ 32 ("The first part [concerns] the requirement that the civilians take part in hostilities; the second part [concerns] the requirement that civilians take a 'direct' part in hostilities; the third part [concerns] the provision by which civilians are not protected from attack 'for such time' as they take a direct part in hostilities.").

275. See *id.* ¶¶ 1–2.

the possibility that a civilian may take part in hostilities without bearing arms since gathering intelligence or preparing for the hostilities is enough to qualify as DPH.²⁷⁶ Ultimately, the Supreme Court of Israel interpreted DPH broadly, and noted that civilians lose immunity when they prepare for hostilities, participate in planning a hostile act, or, as a member of a terrorist group, participate in a “chain of hostilities.”²⁷⁷ This decision, however, has been criticized for its deleterious effect on the meaning of DPH.²⁷⁸

2. *Direct Participation in Hostilities versus Continuous Combat Function*

DPH appears to have a lower threshold than CCF; an individual can be directly participating in hostilities, yet not repeatedly enough to qualify as a member of an organized armed group based on CCF. Recall that CCF requires lasting integration of the participating individual into the armed group and depends on the individual’s continuous function.²⁷⁹ Thus, under CCF, an occasional hostile act would not qualify an individual for membership in the organized armed group.²⁸⁰ DPH, on the other hand, has a different temporal component; civilians who directly participate may only be lawfully targeted for the time they participate in that act, marking the distinction between “for such time” with DPH, as opposed to “all the time” with CCF.²⁸¹ Further, CCF can attach to an individual before that individual even commits an act; DPH will only attach once the act has begun.²⁸²

Critics of the CCF approach point out that the definition is troubling because it permits the targeting of members of organized armed groups

276. *Id.* ¶ 33 (“[T]here is no condition that the civilian use his weapon, nor is their [sic] a condition that he bear arms (openly or concealed). It is possible to take part in hostilities without using weapons at all.”).

277. Radsan & Murphy, *supra* note 5, at 1212.

278. *Id.* (“This interpretation, however, drains close to all meaning from ‘direct’ participation.”).

279. SOLIS, *supra* note 14, at 206.

280. *Id.* (“Thus, a civilian’s unorganized or occasional hostile act does not constitute membership in an organized armed group or represent continuous combat function.”).

281. *Targeted Killings Study*, *supra* note 16, ¶ 62 (“[D]irect participation for civilians is limited to each single act: the earliest point of direct participation would be the concrete preparatory measures for that specific act, . . . and participation terminates when the activity ends.”); *id.* ¶ 65.

282. *See* MELZER, *supra* note 179, at 34 (“An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.”).

any time and anywhere.²⁸³ CCF does not seem to allow for individuals to disengage from their function.²⁸⁴ However, proponents of the principle argue CCF has solved DPH's "revolving door" problem discussed above.²⁸⁵ The principle of DPH does not address how many times a civilian can pass through the revolving door, while CCF dictates that at some point, the civilian will eventually become a member of an organized armed group.²⁸⁶

D. Mercenaries

Mercenaries are persons recruited to directly participate in hostilities on behalf of a party to an armed conflict.²⁸⁷ AP I, Article 47 provides criteria for determining who qualifies as a mercenary. Generally, the recruited individual will not have legal ties with the "hiring" party, such as the same nationality or residency in a territory controlled by that party if it is a State.²⁸⁸ Mercenaries are also not members of a State's armed forces (if the hiring party is a State), and are not entitled to receive combatant or POW status.²⁸⁹ A mercenary's motivation is purely monetary, and payment received for their services generally exceeds that of a typical combatant.²⁹⁰

E. Civilian Contractors

Private contractors are a result of shrinking defense budgets and the downsizing of military forces.²⁹¹ Both the United States Department of

283. *Targeted Killings Study*, *supra* note 16, ¶ 65.

284. Alston, *supra* note 6, at 325 ("Individuals are no longer targeted solely on the basis of their status as combatants, but of their individual profiles.").

285. *See, e.g.*, SOLIS, *supra* note 14, at 206 ("[A]n al Qaeda leader does not regain civilian protection against direct attack merely because he temporarily stores his weapon to visit his family in government-controlled territory.").

286. *Opportunity Lost*, *supra* note 153, at 661 ("[W]hen individuals go beyond spontaneous, sporadic, or unorganized direct participation, they become members of an organized armed group.").

287. Ipsen, *supra* note 151, at 84.

288. *Id.*

289. *Id.* at 83.

290. *Id.* at 84.

291. *Id.* at 107; *see also* Eugenio Cusumano, *Policy Prospects for Regulating Private Military and Security Companies*, in *WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS* 11, 12 (Francesco Francioni & Natalino Ronzitti, eds., 2011) ("First, the downsizing of major armies broadened the supply of

Defense (“DOD”) and Department of State employ private civilian contractors.²⁹² These civilians perform a wide variety of job functions, most of which are support functions.²⁹³ Many private contractors maintain weapons systems, handle security against opposing forces, and even gather intelligence.²⁹⁴ Civilians employed as private contractors are not combatants, as they do not belong to the State’s armed forces,²⁹⁵ and thus, do not have combatant immunity.²⁹⁶ Additionally, they cannot lawfully target and attack enemy combatants unless it is a use of force in self-defense.²⁹⁷

F. Prisoners of War

The Third Geneva Convention governs the treatment of prisoners of war, and its protections are generally considered customary law.²⁹⁸ Prisoners of war are those persons who have fallen into the hands of the enemy forces.²⁹⁹ Diplomats do not receive POW status, but rather must be returned to their home country.³⁰⁰ POW protection stems from the idea that “captured combatants no longer pose any threat to the lives of the persons who capture them nor to the detaining power.”³⁰¹ If it is not clear whether the captured belligerent is entitled to receive POW status, the presumption is in favor of POW status.³⁰²

Classifying the individuals involved in armed conflict is important because it provides guidance regarding which individuals may or may not lawfully take part in the armed conflict, and whom the enemy may target during the hostilities. The main actors in an international armed conflict are combatants, noncombatants, and civilians. In non-international

military expertise enormously. At the same time, the transformations within Western armies increased the demand for external contractors.”); Christensen, *supra* note 170, at 295.

292. Cusumano, *supra* note 291, at 14.

293. Christensen, *supra* note 170, at 295.

294. *Id.*

295. Dekker & Myjer, *supra* note 174, at 176; Christensen, *supra* note 170, at 296.

296. Ipsen, *supra* note 151, at 108. However, they “enjoy immunity from attack as civilians unless and as long as they participate directly in the hostilities.” Dekker & Myjer, *supra* note 174, at 176.

297. Dekker & Myjer, *supra* note 174, at 176.

298. GREEN, *supra* note 26, at 224. Thus, the basic principles of GC III are binding upon States who are not parties to the Geneva Convention. *See also* Horst Fischer, *Protection of Prisoners of War*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 367, 371 (Dieter Fleck, ed., 2d. ed. 2008).

299. GREEN, *supra* note 26, at 224–25.

300. *Id.* at 226.

301. Fischer, *supra* note 298, at 367.

302. *Id.* at 374.

armed conflict, there are no combatants or non-combatants, rather, members of organized armed groups are engaged in hostilities. However, civilian status is found in non-international armed conflict. Furthermore, there is no “terrorist” or “unlawful combatant” classification in either international or non-international armed conflict. During the hostilities, combatants and noncombatants (except for religious and medical personnel) are the only individuals who may lawfully be targeted; civilians can never lawfully be targeted, unless and for such time as they are directly participating in hostilities. These classifications are also important as they assist in assessing which individuals may lawfully be the objects of a targeted killing, which is discussed in the following section.

IV. TARGETED KILLINGS

For the past decade, the United States has increasingly used drone strikes to target, attack, and kill members of al Qaeda, the Taliban, and individuals who support the two groups in Iraq, Afghanistan, Yemen, Pakistan, and Somalia.³⁰³ The targeted individuals are “deemed dangerous, and their inclusion on what are known as kill/lists is based on undisclosed intelligence applied against secret criteria.”³⁰⁴ The CIA drone strike program is perceived as highly effective, and is set to expand in the coming years.³⁰⁵ However, critics of the program argue these targeted killings violate international law.³⁰⁶ This section will examine targeted killings, and identify the situations in which they are legal.

A. The Legality of Targeted Killings

A targeted killing is a State-sanctioned targeting and killing of a specific individual, usually a civilian or unlawful combatant.³⁰⁷ The

303. SOLIS, *supra* note 14, at 538; LYDIA DE BEER, UNMANNED AIRCRAFT SYSTEMS (DRONES) AND LAW 26 (Lydia de Beer ed., 2011) (“Target killing is a well known phenomenon in the United States’ fight against terrorism.”); *Targeted Killings Study*, *supra* note 16, ¶ 18.

304. Alston, *supra* note 6, at 285.

305. *Id.* at 286.

306. *See id.*; Ackerman, *supra* note 2.

307. *See* DE BEER, *supra* note 303, at 26 (A targeted killing is the “targeting and killing, by a government or its agents, of a civilian or ‘unlawful combatant’ taking a direct part in hostilities in the context of an armed conflict who is not in that government’s custody and cannot be reasonably apprehended.”); *see also* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 5 (Vaughan Lowe ed., 2008) (It is “the use

targeting and killing of a civilian in armed conflict is lawful when the individual loses his or her Geneva Convention protections for some reason, such as directly participating in hostilities.³⁰⁸ Although it is not a new concept,³⁰⁹ the term “targeted killing” only recently came into existence after Israel engaged in the public targeting and killing of alleged terrorists in Judea, Samaria, and the Gaza Strip during the “second *intifada*.”³¹⁰ Ironically, the United States was once a critic of Israel’s policy,³¹¹ yet is now criticized for its targeted killing practices.³¹²

Targeted killings have occurred both in times of peace and armed conflict,³¹³ and can be carried out in multiple ways, including shooting from a close range or sniper fire, and using drones, poison, bombs, or missiles.³¹⁴ While there is no legal distinction between a targeted killing carried out by drone, helicopter, or plane,³¹⁵ IHL does (and should) demand

of lethal force attributable to a subject of international law with the intent, premeditation, and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.”); SOLIS, *supra* note 14, at 538 (A targeted killing is “the intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended who is taking a direct part in hostilities, the targeting done at the direction of the state, in the context of an international or non-international armed conflict”).

308. DE BEER, *supra* note 303, at 26; see Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 329 (2004) (The targeted individual “is not an innocent civilian according to the Geneva Conventions. Rather, the individual is an illegal combatant who has either participated in terror attacks or ordered them to be carried out.”); see also Alston, *supra* note 6, at 301 (“Under the rules of IHL, reprisal or punitive attacks on civilians are prohibited, and targeted killing is only lawful when the target is a ‘combatant’ or ‘fighter’ or, in the case of a civilian, only for such time as the person ‘directly participates in hostilities.’”).

309. See *Targeted Killings Study*, *supra* note 16, ¶ 11 (“The phenomenon of targeted killing has been present throughout history.”); see also Yoo, *supra* note 200, at 63 (“Precise attacks against individuals have long been a feature of warfare.”).

310. *Targeted Killings Study*, *supra* note 16, ¶ 7; see also Alston, *supra* note 6, at 296 (At the time, the Israeli Military Intelligence Directorate “argued that they should be termed ‘preventive killing,’ which was consistent with the fact that they were ‘acts of self-defence and justified on moral, ethical and legal grounds.’”); Israel Case, *supra* note 19, ¶¶ 1–2.

311. *The Consequences of Selected Killing*, THE ECONOMIST, Aug. 4, 2001, at 40 (“The United States, in unwontedly strong language in relation to Israel, condemned [the targeted killing of Palestinian activists] as ‘excessive and highly provocative.’”).

312. Cf. Kretzmer, *supra* note 53, at 173 (“The Yemen attack by the US and the ‘targeted killings’ by Israeli forces have been castigated by human rights NGOs, and some UN bodies as ‘extra-judicial’ executions.”).

313. *Targeted Killings Study*, *supra* note 16, ¶ 8.

314. *Id.*

315. Alston, *supra* note 6, at 324; see *Targeted Killings Study*, *supra* note 16, ¶ 79 (“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.”).

more from the drone pilot, as AP I requires a “default” assignment of civilian status where an individual’s exact legal status is unclear.³¹⁶

The intent of targeted killings is to use lethal force,³¹⁷ which distinguishes them from “unintentional, accidental, or reckless killings, or killings made without conscious choice.”³¹⁸ Killing on the battlefield occurs when lawful combatants target, aim, and fire at their enemies who may be mere yards away.³¹⁹ By contrast, targeted killings occur when a drone, manned by someone thousands of miles away, fires upon a target likely unaware of its target status. Targeted killings are controversial because typically the individual has not been given a trial or even a hearing, and he or she has no recourse, such as an appeal, for the targeting order.³²⁰

For a targeted killing to be lawful under IHL, it must be conducted in the theater of an armed conflict.³²¹ Human rights law governs targeted killings conducted outside the scope of an armed conflict,³²² and the permissible level of force is limited based on the threat the suspect poses to others.³²³ Under human rights law, States are severely restricted in their “authority to kill—outside the full [judicial] process—to situations where the target poses an imminent risk of death or serious injury to others.”³²⁴ Thus, IHL gives States greater authority to target and kill enemy combatants and civilians who are participating directly in the hostilities.³²⁵ Targeted killings may also be conducted in relation to the use of force, usually as self-defense in response to an armed attack.³²⁶

In situations of international armed conflict, the targeted individual must be a direct participant in the hostilities, such as a combatant or

316. Radsan & Murphy, *supra* note 5, at 1226 (“Article 50(1) of Additional Protocol I declares that ‘[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.’”).

317. Alston, *supra* note 6, at 298 (referencing MELZER, *supra* note 307, at 5).

318. *Id.*

319. SOLIS, *supra* note 14, at 538.

320. Guiora, *supra* note 308, at 329 (“[T]he targeted individual is not afforded a hearing or granted the right to appeal the decision to target him (to date women have not been targeted). . .”).

321. SOLIS, *supra* note 14, at 542; *see also* Israel Case, *supra* note 19, ¶ 61 (determining the drone strikes were governed by IHL.).

322. *Targeted Killings Study*, *supra* note 16, ¶ 31.

323. *Id.* ¶ 32.

324. Radsan & Murphy, *supra* note 5, at 1208.

325. *Id.* at 1205 (“[S]tates have broader authority to kill under IHL than under human rights law that generally controls outside armed conflicts.”); *see also id.* at 1208.

326. Alston, *supra* note 6, at 305–06.

participating civilian, at the time the targeted killing is carried out.³²⁷ Targeted killings are legal in non-international armed conflict if the target is a fighter or civilian who is directly participating in hostilities.³²⁸ Thus, two elements must be analyzed when determining whether the targeted killing was lawful: the legal status of the conflict, and the legal status of the target.³²⁹ Furthermore, only a senior military commander is permitted to authorize targeted killings.³³⁰ This is to ensure the targeted killing is necessary, because “AP I requires that those who plan or decide an attack are to do everything feasible to verify that an objective is a military objective and that the objective is not subject to special protection.”³³¹ Finally, the use of force must be proportionate so as to prevent harm to civilians in the vicinity of the attack.³³²

What about the targeted killing of terrorists? That is, after all, the purpose of the United States’ drone strike program: to target and kill members of al Qaeda, the Taliban, and their supporters, all of whom are the enemy in the “war on terror.”³³³ Based on the above, targeted killing of terrorists may only be carried out on those terrorists who, in situations of armed conflict are combatants or civilians directly participating in hostilities (or members of an organized armed group in non-international

327. See, e.g., SOLIS, *supra* note 14, at 543 (The targeted individual “must be directly participating in the hostilities, either as a continuous combat function or as a spontaneous, unorganized act.”); *Targeted Killings Study*, *supra* note 16, ¶ 30 (Targeted killing is lawful under IHL only “when the target is a ‘combatant’ or ‘fighter’ or, in the case of a civilian, only for such time as the person ‘directly participates in hostilities.’” In addition, the killing must be militarily necessary, [and] the use of force must be proportionate . . .”); Kramer, *supra* note 12, at 381 (“[T]argeted killing in a time of armed conflict is not an assassination, and is therefore permissible domestic policy.”).

328. E.g., Kramer, *supra* note 12, at 382; Alston, *supra* note 6, at 301.

329. E.g., Kramer, *supra* note 12, at 382; see also SOLIS, *supra* note 14, at 542–43. “Recall the five characteristics of the definition of targeted killing. . . an international or non-international armed conflict must be in progress . . . the victim must be a specific individual . . . the individual who has engaged directly in hostilities must be beyond reasonable possibility of arrest . . . only a senior military commander representing the targeting state may authorize a targeted killing . . . the targeted individual must be directly participating in the hostilities. . .”)

330. SOLIS, *supra* note 14, at 543 (“[O]nly a senior military commander representing the targeting state may authorize a targeted killing.”).

331. HENDERSON, *supra* note 157, at 234.

332. Alston, *supra* note 6, at 302 (“[T]he use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity, and everything feasible must be done to prevent mistakes and minimize collateral harm to civilians.”).

333. See Jane Mayer, *The Predator War: What are the risks of the C.I.A.’s covert drone program?*, THE NEW YORKER, Oct. 26, 2009, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer (“The C.I.A.’s [drone strike] program is aimed at terror suspects around the world, including in countries where U.S. troops are not based.”).

armed conflict), or in situations outside armed conflict, pose an imminent risk of injury or death to others.³³⁴ The third possibility involves targeting terrorists in response to an armed attack; if a terrorist group carries out an armed attack on a State, that State is then entitled to defend itself against that group under the UN Charter.³³⁵ The next section will discuss self-defense in response to armed attacks from non-State actors.

A targeted killing carried out on the territory of another State may raise questions about State sovereignty.³³⁶ However, there will be no violation of a State's sovereignty if the "receiving" State consents to the targeting State's presence, or if the targeting State asserts its right to use force in self-defense.³³⁷ But, the targeting and consenting States must still abide by their legal obligations under both IHL and human rights law regarding the use of force against an individual.³³⁸ Thus, "[a] consenting State may only lawfully authorize a killing by the targeting State to the extent that the killing is carried out in accordance with applicable IHL or human rights law."³³⁹ If the consenting State discovers the killing was unlawful, it then has a duty to seek the prosecution of those responsible.³⁴⁰

B. Self-Defense

The United States justifies its targeting and killing of members of al Qaeda as an exercise of its right of self-defense.³⁴¹ This claim is based on Article 51 of the UN Charter. Recall that the UN Charter governs *jus ad bellum*, i.e. when States may resort to the use of force. Although Article 2(4) of the UN Charter prohibits the use of force, Article 51 permits

334. Guiora, *supra* note 308, at 331 ("Targeted killing can only be implemented against those terrorists who either directly or indirectly participate in terrorism in a fashion that is equivalent to involvement in armed conflict.").

335. See Kretzmer, *supra* note 53, at 188.

336. Alston, *supra* note 6, at 305 ("Targeted killings conducted in the territory of other states raise sovereignty concerns.").

337. *Id.* at 306 (The use of force in self-defense would be permitted by the UN Charter if: "(i) the second state is responsible for an armed attack against the first state, or (ii) the second state is unwilling or unable to stop armed attacks against the first state launched from its territory.").

338. *Targeted Killings Study*, *supra* note 16, ¶ 37.

339. *Id.*

340. *Id.* ¶ 38.

341. Weiner, *supra* note 13, at 141.

a State to use force in response to an armed attack.³⁴² The ICJ noted in *Nicaragua* that merely providing arms to an opposition group is not an armed attack on another state.³⁴³ Furthermore, a significant period of time between the alleged armed attack and the State's claim of self-defense in response to that armed attack, such as the three years El Salvador waited before requesting United States assistance, is an indicator that an armed attack has not actually occurred.³⁴⁴ Only the gravest instances of the use of force will constitute an armed attack.³⁴⁵

The requirement that an armed attack occur before the right of self-defense is triggered applies both where the victim State exercises this right on its own, as well as where another asserts this right on behalf of the victim State.³⁴⁶ The wording of Article 51 seemingly narrows the previous customary law right of self-defense, which sprang from the *Caroline* affair in 1837.³⁴⁷ The customary law definition, or "the *Caroline* doctrine," permits self-defense when the need for action in self-defense is instant and overwhelming, and there is no other choice or time to consider an alternative.³⁴⁸ The *Caroline*, a United States steamboat, was attacked by British forces while transporting supplies over the Niagara River to Canadian insurgents.³⁴⁹ The American Secretary of State, Daniel Webster, determined that Britain's actions did not meet the time or choice conditions, and thus, did not qualify as self-defense.³⁵⁰ In his opinion, self-defense was limited to "situations where there is a real threat, the response

342. Greenwood, *supra* note 18, at 5; *id.* at 2 ("States may resort to force only in the exercise of their inherent right of individual or collective self-defence."); Nicaragua, *supra* note 64, ¶ 232 ("The exercise of the right of collective self-defence presupposes that an armed attack has occurred. . .").

343. Nicaragua, *supra* note 64, ¶ 230.

344. *Id.* ¶ 236.

345. *Id.* ¶ 191; see also Andrew C. Orr, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT'L L.J. 729, 737 (2011).

346. JAMES A. GREEN, *THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENCE IN INTERNATIONAL LAW* 26 (2009).

347. See Guiora, *supra* note 308, at 323; see also Peter Haggemacher, *Self-Defence as a General Principle of Law and its Relation to War*, in *SELF-DEFENCE AS A FUNDAMENTAL PRINCIPLE* 3, 10 (Arthur Eyffinger et al. eds., 2009) (This definition was considered customary international law until the UN Charter narrowed the definition of self-defense); Jaemin Lee, *Terrorism Prevention and the Right of Preemptive Self-Defense*, 1 J. E. ASIA & INT'L L. 291, 294 (2008) ("As is well known, the *Caroline* case provides a classic guideline for the right of self-defense under customary international law.").

348. Guiora, *supra* note 308, at 323 ("Self-defense is only justified 'if the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'"); see also Haggemacher, *supra* note 347, at 10.

349. Guiora, *supra* note 306, at 323.

350. *Id.*; Haggemacher, *supra* note 347, at 10.

is essential and proportional, and all peaceful means of resolving the dispute have been exhausted.”³⁵¹

Situations where Article 51 justifies self-defense may include a State using military force directly against another State that is involved with terrorist actors.³⁵² But disagreement exists over the question of whether self-defense may be invoked when there has been an armed attack by a non-State actor.³⁵³ The ICJ recently held that self-defense may only be invoked when the armed attack is imputable to a State or State actors.³⁵⁴ Either test discussed in Part II above, the “effective control” or “overall control” test, may establish whether the State can be held responsible for the actions of the non-State actors.³⁵⁵ Recall that the effective control test, developed by the ICJ, requires more than mere control and dependence in order for the actions of the non-State actors to be attributed to the State.³⁵⁶ It is not clear which test the United States utilizes, but it likely would prefer the overall control test, partly due to its lower threshold, and partly because this has become the preferred test internationally.³⁵⁷

The only other instance when a State may be held responsible for the actions of non-State actors is if “it fails to take all necessary steps to prevent the effects of the conduct of [the non-State actor].”³⁵⁸ Opponents of restricting self-defense to situations of attack by State actors point out the customary law basis of self-defense itself, the *Caroline* doctrine, which arose from a situation of non-State hostilities.³⁵⁹ Opponents also cite Article 51’s drafting history, where one of the rejected versions of the

351. Guiora, *supra* note 308, at 323.

352. Heintze, *supra* note 195, at 166.

353. MYRA WILLIAMSON, *TERRORISM, WAR AND INTERNATIONAL LAW* 158 (2009) (“Although states traditionally interpreted Article 51 as applying to armed attacks by states, there has been a movement towards including actions of non-state actors. A clear divide has emerged between international law . . . and the practice of some states.”).

354. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9); *see also* Orr, *supra* note 345, at 738.

355. *See supra* Part II.A.1.

356. WILLIAMSON, *supra* note 353, at 154.

357. *Id.* at 158 (“The US policy is somewhat at odds with . . . the ICJ . . . which require[s] something more than dependence and control.”).

358. *Id.* at 155; *see also* Kretzmer, *supra* note 53, at 187 (“[I]f a state sponsors or controls a terrorist group, and possibly even if it takes no action to prevent use of its territory as a base for terrorist attacks against another state, such attacks may be imputed to the sponsor or host state.”).

359. Orr, *supra* note 345, at 740.

article referred to armed attacks carried out by any State, which supports the conclusion that the right of self-defense was not intended to be limited to attacks by State actors.³⁶⁰ This is similar to the dissent’s reasoning in the ICJ case of *DRC v. Uganda*, in which Judge Kooijmans opined that it is “unreasonable to deny the attacked State the right to self-defence merely because there is no attacker state.”³⁶¹ In that case, the Democratic Republic of the Congo (“DRC”) alleged Uganda commenced military action on DRC territory in violation of the UN Charter and provided support to DRC armed groups seeking to overthrow the president. In response, Uganda claimed its military activities were justified as self-defense in order to protect itself from attack by its enemies using the DRC as a “launching pad.”³⁶² However, the ICJ observed that Uganda did not actually claim “it had been subjected to an armed attack by the armed forces of the DRC.”³⁶³ Moreover, there was no evidence the attacks could be directly or indirectly attributed to the Government of the DRC.³⁶⁴ As such, Uganda could not lawfully claim it was acting in self-defense against the DRC.³⁶⁵ Judge Kooijmans disagreed, and opined that it was of no consequence that Uganda could not prove the DRC was directly or indirectly involved in the attacks; Uganda was attacked, and therefore entitled to exercise self-defense.³⁶⁶

What about pre-emptive or active self-defense—that is, a State’s use of force to deter or pre-empt a possible future attack?³⁶⁷ The reasoning behind this idea is that “the State, in order to adequately defend itself, must be able to take the fight to the terrorist before the terrorist takes the fight to it.”³⁶⁸ Supporters of this view argue that active self-defense gives the State the chance to better protect itself, and has the potential to minimize civilian injuries.³⁶⁹ However, the international community

360. *Id.* at 739.

361. Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 306, ¶ 30 (Dec. 19) (separate opinion of Judge Kooijmans).

362. *See id.* at 213, ¶¶ 109, 121 (majority opinion). Uganda’s assertion of self-defense revolved around its claims the Sudan, its enemy, provided military assistance to the DRC army.

363. *Id.* ¶ 146. The ICJ found the armed attacks came from the Allied Democratic Forces, a rebel group opposed to the Ugandan government.

364. *Id.*

365. *Id.* ¶ 147.

366. *Id.* at 315, ¶¶ 32–35 (separate opinion of Judge Kooijmans). However, Judge Kooijmans agreed with the majority that Uganda’s response was disproportionate to its stated aim of securing the border from further armed attacks.

367. WILLIAMSON, *supra* note 353, at 117.

368. Guiora, *supra* note 308, at 324.

369. *Id.*

does not seem eager to embrace the idea of pre-emptive self-defense.³⁷⁰ The Nuremberg Tribunal was one of the first to reject this idea when Germany attempted to defend its invasion of Norway as self-defense. Germany's attack plans on Norway were developed with the intention of preventing an Allied occupation at some time in the future, and not for the purpose of thwarting an imminent Allied landing.³⁷¹ Since then, there have been several attempts to justify pre-emptive self-defense, including the 1956 Suez crisis, the 1967 Six-Day War, and the 1981 Israeli strike on Osirak, an Iraqi nuclear reactor.³⁷² In each of these cases, the self-defense argument was rejected because the required "triggering" armed attack had not actually occurred.³⁷³ Ironically, the United States, the current leader in asserting the concept of pre-emptive self-defense, has previously decried the idea.³⁷⁴

Any action a State takes in self-defense must comply with IHL.³⁷⁵ Thus, self-defense is subject to the requirements of necessity and proportionality.³⁷⁶ To meet the criteria of necessity, the need to resort to force in self-defense must be "instant, overwhelming, and leave no choice of means, and no moment for deliberation."³⁷⁷ There must be a showing that the State had no other choice but to use force.³⁷⁸ Additionally, there must not be a significant delay between the armed attack and the State's response in self-defense.³⁷⁹

370. See WILLIAMSON, *supra* note 353, at 123–24 (as of 2008, only Israel, the United States, and Australia support the notion of pre-emptive self-defense); see also *Targeted Killings Study*, *supra* note 16, ¶ 45 ("This view is deeply contested and lacks support under international law.").

371. WILLIAMSON, *supra* note 353, at 118, n.121.

372. *Id.* at 119–20.

373. *Id.* at 118–19.

374. See *id.* at 118 ("In 1949–50 the US and the UK perceived Article 51 as preserving a right of self-defence but not a right of *pre-emptive* self-defence.").

375. Kretzmer, *supra* note 53, at 188.

376. HENDERSON, *supra* note 157, at 181; see also Lee, *supra* note 347, at 294 ("[A]ny use of force in self-defense must respect the principles of necessity and proportionality; necessity restricts the use of military force to the attainment of legitimate military objectives, and the proportionality requires the countermeasure adopted to be proportional to the threat posed.").

377. Lee, *supra* note 347, at 294.

378. WILLIAMSON, *supra* note 353, at 115; see also Kretzmer, *supra* note 53, at 187 ("Under the necessity principle, the victim state must not respond to the armed attack with force unless other means of defending itself are not available.").

379. WILLIAMSON, *supra* note 353, at 116.

To meet the proportionality requirement, the actions taken in self-defense cannot be unreasonable or excessive,³⁸⁰ and they cannot exceed the necessity that prompts the response.³⁸¹ The principle of proportionality in IHL dictates that when attacking a military objective,³⁸² combatants must balance the force used to achieve that objective with the effects of that force.³⁸³ Articles 57 and 58 of AP I codified³⁸⁴ this principle of customary IHL.³⁸⁵ The intent of this principle is to minimize the chance of injury to civilians or damage to civilian objects during the hostilities.³⁸⁶ The test for whether an attack is proportional is not whether attacking an object in a certain way would cause excessive collateral damage, but rather whether attacking that object *at all* would cause excessive collateral damage.³⁸⁷ Notably, the principle of proportionality does not entirely prohibit causing collateral damage; only the intentional causing of avoidable damage is prohibited.³⁸⁸ Furthermore, although single attacks that result in collateral damage to civilians may not *prima facie* violate the principle of proportionality, repeated attacks could give rise to a cumulative effect that would be in violation of IHL.³⁸⁹

Proportionality dictates that a State use the least harmful means possible when attacking civilians who are directly participating in hostilities.³⁹⁰

380. *Id.* at 115.

381. *Id.* at 116.

382. *See* HENDERSON, *supra* note 157, at 43, 80 (military objectives can be both human and non-human targets, and combatants are lawful targets); *see also* Sassoli & Olson, *supra* note 164, at 606 (“Combatants are part of the military potential of the enemy and it is therefore always lawful to attack them for the purpose of weakening that potential.”).

383. *See, e.g.*, Greenwood, *supra* note 18, at 35; Sunkavalli, *supra* note 178, at 155; HENDERSON, *supra* note 157, at 230.

384. HENDERSON, *supra* note 157, at 198.

385. Prosecutor v. Kupresić et al., Case No. IT-95-16-T, Trial Judgment, ¶ 524 (Int’l Crim. Trib. for the Former Yugoslavia) (Jan. 14, 2000) (“Such provisions, it would seem, are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol.”).

386. *Id.* (“[A]ny incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack.”).

387. HENDERSON, *supra* note 157, at 198; *see also* Kupresić et al., Case No. IT-95-16-T, ¶ 524 (“[A]ttacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians.”).

388. HENDERSON, *supra* note 157, at 198; Christensen, *supra* note 170, at 287 (“Proportionality indicates that civilian immunity from attack is not absolute; collateral damage might be acceptable under certain circumstances.”).

389. Kupresić, et al., Case No. IT-95-16-T, ¶ 526 (“[T]his pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.”).

390. *See* Israel Case, *supra* note 19, ¶ 40.

If a civilian can be captured or arrested for the purposes of interrogation and trial, such means should be used.³⁹¹ The European Court of Human Rights (“ECHR”) affirmed this principle in *McCann & Others v. The United Kingdom*. In that case, the United Kingdom authorities received notice of an impending terrorist attack on Gibraltar.³⁹² United Kingdom and Spanish authorities planned an operation with the intent to observe and arrest the suspects with minimum force.³⁹³ The operation ran afoul, and the suspects were shot and killed by the soldiers involved in carrying out the operation.³⁹⁴ The ECHR noted the governmental authorities had to balance their duty to protect the lives of the people on Gibraltar while resorting to the minimum use of lethal force against the suspected terrorists.³⁹⁵ The authorities had the opportunity to arrest the suspects on arrival at the border of Gibraltar, but did not do so.³⁹⁶ The ECHR found that killing the suspects was not the least harmful means,³⁹⁷ and thus there had been a violation of Article 2 of the European Convention of Human Rights.³⁹⁸ It is important to note the ECHR specified it was examining the anti-terrorist operation as a whole, and not the use of force by the individual soldiers.³⁹⁹

To summarize, targeted killings conducted in armed conflict are governed by IHL; human rights law governs targeted killings carried out in all other situations. Combatants are “fair game” as targets of a targeted killing in armed conflict, but civilians may only be lawfully targeted and killed in armed conflict when they lose their Geneva Convention protections in

391. *Id*; see also CASSESE, *supra* note 130, at 422 (“[W]hen it proves impossible to capture the suspected terrorists, belligerents may use lethal force against them only when it is absolutely sure that civilians are taking active part in hostilities and as an *extrema ratio*, when any other method has proved or may reasonably prove pointless.”).

392. *McCann and Others v. United Kingdom*, 21 Eur. Ct. H.R. 97, 103, ¶ 13 (1996).

393. *Id.* at 104, ¶ 17–18.

394. *Id.* at 114, ¶¶ 59–67. The soldiers admitted they shot to kill. See *id.* at 141, ¶ 199.

395. *Id.* at 142, ¶ 207.

396. *Id.* ¶ 208.

397. See *id.* at 143, ¶ 213.

398. Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2)(a), Nov. 4, 1950, 213 U.N.T.S. 221 (“Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence.”).

399. *McCann*, 21 Eur. Ct. H.R. at 100, ¶ 6(e) (The use of force may be justified “where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken.”).

some way, such as if they directly participate in hostilities. The United States' position is that its right of self-defense under Article 51 of the UN Charter permits it to target members of al Qaeda, the Taliban, and their supporters and attack them via drone strike in Yemen, Somalia, and Pakistan. Outside of situations of armed conflict, self-defense may only be invoked where there has been an armed attack upon a State by a State actor, or by a non-State actor whose actions may be imputed to a State.

V. LEGAL STATUS OF CIA OFFICERS INVOLVED IN TARGETED DRONE STRIKES

A. *Are the CIA Officers Operating Inside an Armed Conflict?*

1. *Armed Conflict with al Qaeda in Afghanistan*

As noted above, the first step in the analysis of a CIA officer's legal status is to determine whether the CIA is operating within an armed conflict. The United States considers itself to be involved in an armed conflict with specific terrorist groups, namely, al Qaeda, the Taliban, and those who support them.⁴⁰⁰ It justifies this armed conflict classification with Congress's 2001 Authorization of the Use of Military Force.⁴⁰¹ This gave the President "the power 'to use all necessary and appropriate force' against those responsible for the terrorists [sic] attacks realized in New York, Virginia, and Pennsylvania on September 11, 2001."⁴⁰² Both Presidents Bush and Obama have relied on the 2001 Authorization to justify the use of drones to target and kill suspected al Qaeda operatives and their supporters.⁴⁰³ The Authorization is based on the idea that the September 11 terror attacks were an armed attack upon the United States by a transnational terrorist organization, thus permitting the United States to invoke its right of self-defense under the UN Charter.⁴⁰⁴

On October 7, 2001, the United States informed the UN Security Council of its initiation of military action against al Qaeda and the Taliban government.⁴⁰⁵ It justified this action as an exercise of its right of self-defense under Article 51 of the UN Charter,⁴⁰⁶ with the events of September

400. Vogel, *supra* note 7, at 102, n.5.

401. *Id.* at 107; Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

402. Kramer, *supra* note 12, at 378.

403. Vogel, *supra* note 7, at 105, 107.

404. *Id.* at 108; *see also* Weiner, *supra* note 13, at 141 ("On September 11, the United States sustained an assault that qualifies, in scale and effect, as an 'armed attack' that would justify the use of force in self-defense under Article 51 of the UN Charter.").

405. Weiner, *supra* note 13, at 139.

406. *Id.*

11 as the armed attack prompting the response. At the time, al Qaeda's operations were based in Afghanistan, and the country was under the control of the Taliban.⁴⁰⁷ The United States argued that the Taliban government was supporting al Qaeda.⁴⁰⁸ The Taliban "maintained some form of governance over Afghanistan, occupied the capital, conducted foreign relations, and proved to be the most powerful military force in the country."⁴⁰⁹ When the United States-United Kingdom allies intervened in Afghanistan, the ensuing hostilities became an armed conflict.⁴¹⁰

The United States Supreme Court affirmed the view that the United States is in an armed conflict with al Qaeda in *Hamdan v. Rumsfeld*.⁴¹¹ In that case, the Supreme Court examined whether the procedures adopted to try Hamdan, a Yemeni national charged with various terrorism-related charges, violated the Geneva Conventions.⁴¹² Hamdan was captured during hostilities between the United States and the Taliban, was handed over to the American military, and transferred to a military prison in Guantanamo Bay, Cuba.⁴¹³ President Bush deemed him eligible to be tried by a military commission, and Hamdan claimed this was a violation of international law.⁴¹⁴ The Supreme Court held that the structure of the military commission violated the Geneva Conventions; furthermore, the Court noted Common Article 3 of the Geneva Conventions applied to non-international armed conflicts, and was applicable to the conflict with al Qaeda.⁴¹⁵ This holding is consistent with IHL; recall that an international armed conflict is a conflict between two States, and a non-international armed conflict takes place inside a State's borders between that State's government and an armed group. Indeed, despite the United States government's insistence to the contrary in *Hamdan*, it cannot be in an

407. Kramer, *supra* note 12, at 379.

408. Kretzmer, *supra* note 53, at 196.

409. Vogel, *supra* note 7, at 112.

410. Marouda, *supra* note 79, at 229; *see also* Vogel, *supra* note 7, at 111 ("[T]he United States was at least initially engaged in an international armed conflict with the Taliban as the functional government of Afghanistan, and with al Qaeda forces supporting the Taliban as a kind of militia.").

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

412. *Id.* at 560.

413. *Id.* at 566.

414. *Id.* at 566–67.

415. *Id.* at 630–33; *see also* Radsan & Murphy, *supra* note 5, at 1210 ("The Supreme Court . . . held that the conflict with Al Qaeda should be regarded as 'noninternational' because the conflict was not between states even though it spills over international borders.").

international armed conflict with al Qaeda because al Qaeda, quite simply, is not a State.⁴¹⁶

Furthermore, the two elements required to cross the threshold of an armed conflict are the intensity of the conflict and the organization of the parties thereto. The level of intensity required for an armed conflict must be such that it is distinguishable from situations of internal conflict or terrorist activities. Recall, that the criteria used to make this determination can include the protracted nature of the conflict, the seriousness of the hostilities, the types of weapons used by the parties, the spread of armed clashes throughout the territory, the number of casualties, and whether the hostilities have caught the attention of the UN Security Council. Aside from the fact that the very purpose of the intensity requirement is to distinguish armed conflict from terrorist activities, it has been argued that the intensity prong is met because al Qaeda is responsible for a large number of American casualties.⁴¹⁷ Additionally, the Security Council has passed multiple resolutions regarding the situation in Afghanistan, including Resolution 1373, passed on September 28, 2001, which reaffirmed the collective right of self-defense under the UN Charter and directed States to prevent the financing of terrorism, refrain from supporting individuals involved in terrorism, and take steps to prevent terror attacks.⁴¹⁸ Since Resolution 1373, the Security Council also passed Resolution 1378 (passed on November 14, 2001, in which it condemned the Taliban for allowing Afghanistan to be used as a base for terrorism),⁴¹⁹ and Resolution 1383 (passed on December 6, 2001, it reaffirmed Resolution 1378),⁴²⁰ among others.

The second element requires that al Qaeda be considered an organized armed group. Al Qaeda does maintain a minimal level of organization, has some form of a command structure, and engages in violence against the United States.⁴²¹ One author suggests the evidence that al Qaeda is

416. See *Hamdan*, 548 U.S. at 628–29.

417. See Orr, *supra* note 345, at 742; Weiner, *supra* note 13, at 141 (“Thus, although the United States’s war on terrorism does not meet the definition of war under positive international law, the nature of the violence that has been inflicted on the United States, the character and goals of the al-Qaeda organization responsible for that violence, and the presence of an ongoing threat, together provided justifiable *prima facie* functional grounds for the United States to extend the war regime to the conflict with al-Qaeda.”).

418. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

419. S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

420. S.C. Res. 1383, U.N. Doc. S/RES/1383 (Dec. 6, 2001).

421. Kramer, *supra* note 12, at 383 (“[B]oth the Taliban and al-Qaida maintain a minimal level of organization. Both have identifiable leadership: Muhammed Omar and Osama bin Laden’s closest officials, respectively, along with their underling commanders. The Taliban’s command structure seems to hinge on its leader and the Council of United Mujahedeen, while al-Qaida is run by the structure of vertical leadership established by

able to carry out military operations includes its previous attacks, such as the attack on American military personnel in Yemen in 1992, the 1993 World Trade Center bombing, and the London bombings of 2005.⁴²² Evidence of al Qaeda's hierarchical command structure includes the fact that it has bylaws, committee structures, and rules for succession, as well as regional commanders, personnel records, and multiple tiers of management.⁴²³ Thus, the two elements for armed conflict have been met, and the United States is in a non-international armed conflict with al Qaeda in Afghanistan.

2. *Armed Conflict with al Qaeda Outside Afghanistan*

However, American drone strikes on members of al Qaeda have not been limited to inside Afghanistan's borders. It has also attacked members of al Qaeda and the Taliban in areas outside the "geographical battlefield," including Pakistan, Yemen, and Somalia. The United States' reasoning is that because it is in an armed conflict with al Qaeda, it can use force against its leaders wherever they are located.⁴²⁴ Thus, the question becomes whether the United States is in an armed conflict with al Qaeda in States outside Afghanistan and can lawfully target al Qaeda members there.

The issue that surfaces here is the legality of the use of force in self-defense under Article 51 of the UN Charter. The United States claims it is the victim of an armed attack by al Qaeda. But, al Qaeda is not a State actor, and the majority view is that the exercise of self-defense requires the armed attack either be committed by a State actor or, in the case of non-State actors, be imputable to a State. The United States claimed that because al Qaeda was based in Taliban-controlled Afghanistan

bin Laden. Both groups continue to use armed violence to resist the NATO forces in Afghanistan. At least the Taliban also fights against the Afghani government, as evidenced in the violence it demonstrated around the September 2010 parliamentary elections."); *see also* Weiner, *supra* note 13, at 141 ("al-Qaeda seems to possess . . . clear, albeit decentralized, organizational and command structures. In addition, al-Qaeda had declared its intention, as an organization, to engage in violence against the United States for the political purpose of altering United States foreign policy on key issues.").

422. Orr, *supra* note 345, at 743.

423. *Id.* at 743-44; *see also* Matt Thompson, *Even Terrorists Have to Fill Out Expense Reports*, NPR (May 30, 2013, 10:16 AM), <http://www.npr.org/2013/05/29/187147334/even-terrorists-have-to-fill-out-expense-reports>.

424. Yoo, *supra* note 199, at 63.

at the time of the September 11 attacks, it could lawfully respond with the use of force in Afghanistan. Furthermore, the UN Security Council passed a resolution that “gave the US free rein in indicating the ‘inherent right of individual and collective self-defence in accordance to the Charter,’ as well as specifying the need to ‘bring to justice those responsible for aiding, supporting, or harbouring the perpetrators, organizers and sponsors of these acts,’ and holding them accountable.”⁴²⁵ This supported the United States position that its military response was justified by the principle of self-defense under Article 51 of the UN Charter.⁴²⁶

Regarding the link with al Qaeda to Pakistan, Yemen, and Somalia, recall that a State may be held responsible for the actions of non-State actors if it fails to prevent the effects of that non-State actor’s conduct. The United States claims that, “since 2002, there is a zone close to the Pakistan border, used by the Taliban to find shelter, organize and launch attacks. Pakistan forces tolerate the conduct, or cannot control the area, or are involved in the fighting in a number of ways.”⁴²⁷ While critics of American drone strikes in Yemen argue that since the United States is not officially involved in an armed conflict in Yemen the use of force against members of al Qaeda there is unlawful,⁴²⁸ the United States currently has Pakistan’s permission to target al Qaeda members inside Pakistan’s borders.⁴²⁹ Due to Pakistan’s consent, there is no sovereignty violation, and the United States can freely target suspected members of al Qaeda and the Taliban located in Pakistan. Yemen’s president recently acknowledged that he has permitted the drone strikes in Yemen;⁴³⁰ so, like in Pakistan, there is no sovereignty violation.

That leaves Somalia. The most enticing benefit of the existence of an armed conflict between the United States and al Qaeda in these countries is the United States gains powers under the *lex specialis* of IHL that

425. Gilles Dorransoro, *The Security Council and the Afghan Conflict*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR 452, 463 (Vaughan Lowe et al. eds., 2008).

426. *Id.* at 463–64.

427. Marouda, *supra* note 79, at 229. *But see* Orr, *supra* note 345, at 739 (“Al Qaeda’s activities, of course, are not attributable to Pakistan even if Pakistan’s intelligence service has turned a blind eye toward their operation.”).

428. Ackerman, *supra* note 2 (“The United States is not involved in any armed conflict in Yemen,” O’Connell tells Danger Room, ‘so to use military force to carry out these killings violates international law.’”).

429. Orr, *supra* note 345, at 733, 736.

430. Greg Miller, *In Interview, Yemeni President Acknowledges Approving U.S. Drone Strikes*, WASH. POST, Sept. 29, 2012, http://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-affd-d6c7f20a83bf_story.html?tid=wp_ipad (“Yemen’s leader said . . . that he personally approves every U.S. drone strike in his country.”).

otherwise would not apply.⁴³¹ Significantly, the United States would gain broader authority to target and kill al Qaeda members and their supporters in Somalia than if only human rights law applied.⁴³² Without the ability to impute al Qaeda's actions to Somalia, it does not appear that the United States can successfully claim self-defense in this country, as it treads too closely to pre-emptive self-defense, an idea not yet accepted by the international community. Thus, the drone strikes being conducted in Somalia are outside the context of armed conflict, and only human rights law applies.

B. Legal Classification of CIA Officers

The CIA is a governmental agency and is not part of the armed forces of the United States. In fact, many of the CIA's employees are retired military personnel.⁴³³ President Bush issued an order that authorized the CIA to kill or capture leaders of terrorist organizations, including al Qaeda.⁴³⁴ The CIA drone strike program in Pakistan began after September 11, 2001 "with a drone strike in Yemen in November 2002, but the program has expanded greatly, especially in Pakistan, under the Obama administration."⁴³⁵ Civilian employees at the CIA headquarters in Langley, Virginia, operate its drone fleet, under the control of the agency's Counterterrorism Center.⁴³⁶ In addition, CIA personnel near hidden airfields in Afghanistan and Pakistan handle the takeoffs and landings of these drones.⁴³⁷ CIA officers pilot the drones in Langley by using joysticks as they watch a live video feed from a camera on board the drone.⁴³⁸ Thus, their legal status when acting under the authorization to target suspected terrorists is not immediately clear.

The possible categories include combatant, noncombatant, members of an organized armed group, civilian, mercenary, civilian contractor, and prisoner of war. The mercenary, civilian contractor and prisoner of war categories can quickly be eliminated. AP I 47(2)(d) provides that

431. Kretzmer, *supra* note 53, at 196.

432. *See id.* at 200 ("Are we back to a licence to kill all persons suspected of being active members of the international terrorist group?").

433. Alston, *supra* note 6, at 329.

434. Yoo, *supra* note 200, at 59.

435. Alston, *supra* note 6, at 329–30.

436. *Id.*

437. *Id.*

438. Orr, *supra* note 345, at 735.

mercenaries are not nationals of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; thus, the mercenary classification would not apply here. CIA officers are therefore not mercenaries, as they have legal ties to the United States, and they are employed by a United States agency, likely have American nationality, and presumably reside in the United States, where the drones are being controlled. Furthermore, CIA employees are not private contractors; they are themselves employees of a governmental agency. Although they sometimes engage in targeted kill/missions in conjunction with the Department of Defense,⁴³⁹ this activity is not enough to qualify them as civilian contractors. They are not prisoners of war because they have not been captured by the enemy.

CIA officers are not combatants due to the fact that they are not members of the United States armed forces.⁴⁴⁰ Some CIA employees are retired military personnel who gave up their combatant status upon retirement from the armed forces. Although CIA officers may supply intelligence information to military officials, they are not subordinate to them or part of the “military chain of command.”⁴⁴¹ Furthermore, CIA officers neither wear a military uniform, nor display a fixed and distinctive emblem.⁴⁴² Despite government authority to “seek and kill” terrorists, this is not enough to qualify them as combatants. CIA officers are also not noncombatants. They are not war correspondents, current members of the merchant marine, medical or religious personnel, quartermasters, or members of the military administration and legal services.

CIA officers are not members of an organized armed group. This actor classification is specific to non-international armed conflicts, such as the type that exists between the United States and al Qaeda. However, organized armed groups are groups that conduct hostilities on behalf of a non-State party in an armed conflict; CIA officers are employees of a government agency, and if they were to conduct hostilities, it would be on behalf of the United States, a State party. Thus, this category does not apply.

Therefore, CIA officers are civilians, as they do not meet the requirements of any other category. This means CIA officers are protected from being targeted and attacked by the enemy in times of armed conflict as long as they refrain from taking part in the hostilities. But,

439. See Alston, *supra* note 6, at 285.

440. Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263, 270 (Simon Bronitt et al. ed., 2011).

441. *Id.*

442. *See id.*

civilians are not entirely prohibited from participating in hostilities; if CIA officers do directly participate in hostilities, they will not lose their civilian status, but rather their civilian immunity for as long as they participate in the hostilities.⁴⁴³ The next step is to analyze what activities are sufficient to constitute direct participation in hostilities. Does “pushing the button” on a drone attack qualify?

1. Are the CIA Officers Carrying Out the Drone Strikes Directly Participating in Hostilities?

Recall that the three elements required for a civilian to be directly participating in hostilities are: the threshold of harm, direct causation between the harm and the act, and a belligerent nexus.⁴⁴⁴ Regarding the first element, the civilian’s act must be directed toward inflicting harm on the enemy or enemy property. That requirement is met here; the CIA officers direct the drone strike at the target, an individual who has been deemed an “enemy combatant” due to his or her alleged status as a member of al Qaeda, the Taliban, or a supporter of either group. The drone strike is directed toward eliminating the enemy, so the CIA officer’s actions cross the threshold of harm required for direct participation in hostilities. Next, there must be a direct link between the harm likely to be caused by the civilian act and the act itself. This element requires that the act is committed with the specific intent to cause that harm. This element is also fulfilled because the CIA officer participating in the drone strike intends to kill the targeted individual. Finally, the third element, the belligerent nexus, requires that the act must be done with the intention of benefiting one party to the armed conflict at the other party’s detriment. The CIA officers participating in drone strikes intend to eliminate the threat of terrorism by killing al Qaeda members and destroying their network. Thus, the elements for direct participation in hostilities are fulfilled, and CIA officers participating in drone strikes are civilians directly participating in hostilities.

443. Vogel, *supra* note 7, at 135; *Targeted Killings Study*, *supra* note 16, ¶ 71; ICRC COMMENTARY, *supra* note 81, ¶ 1942.

444. See *supra* Part III(C)(i)

C. Consequences of Applying Civilian Status to CIA Officers

Now that the legal status of CIA officers engaged in drone strikes has been established, the next question is what the consequences of that status are. Generally, CIA officers are civilians. As civilians, the CIA officers are protected from being targeted by the enemy, which in this case is al Qaeda and the Taliban. Civilians are not completely barred from participating in the hostilities; they may choose to become involved in the conflict. If they do so, they do not lose their civilian status, but they will lose their protection from being targeted. Thus, it is not illegal for the CIA officers to carry out the targeted drone strikes against members of al Qaeda. Because they are directly participating in hostilities by engaging in such an act, they may themselves be targeted and killed for the duration of their participation in the drone strike.⁴⁴⁵ This is unlikely, as the CIA officers are located safely in Langley, Virginia, far away from Afghanistan, Yemen, Pakistan, and Somalia.

By participating in the targeted killings, the CIA officers could be exposing themselves to criminal charges.⁴⁴⁶ As a result, CIA officers risk prosecution under the domestic law of a country where they participated in a targeted killing outside of armed conflict.⁴⁴⁷ Although intelligence officers are usually entitled to diplomatic privileges and immunities,⁴⁴⁸ CIA officers who have directly participated in a targeted killing will likely not enjoy such diplomat status.⁴⁴⁹ If a CIA officer, suspected of participating in a drone attack, were to travel to the country where the strike was carried out, he or she could be detained by that country's authorities and tried for unlawful participation in the hostilities.⁴⁵⁰

CIA officers could also be prosecuted for violations of any applicable United States laws.⁴⁵¹ However, the United States would not likely permit the domestic prosecution of CIA officers for their participation in targeted drone strikes.⁴⁵² Other domestic lawsuits could arise, such as the one recently filed by the American Civil Liberties Union (“ACLU”).

445. *Targeted Killings Study*, *supra* note 16, ¶ 71.

446. *See* Alston, *supra* note 6, at 369–70.

447. *Targeted Killings Study*, *supra* note 16, at ¶¶ 70–71.

448. *Id.* (“[T]he practice is that intelligence operatives are often accorded diplomatic status by the sending country. In other words, they actually are or are represented to be diplomats and are thus entitled to diplomatic privileges and immunities, including immunity from host state prosecution.”).

449. *Id.* (“But CIA operatives involved in targeted killings will often not enjoy accredited status as diplomats.”).

450. *See id.*

451. *Id.*

452. *Id.* at 400 (“[T]he CIA itself will go to great lengths to avoid any criminal prosecution of its personnel.”).

The ACLU is currently suing several United States officials over the death of al-Awlaki, the United States citizen killed in Yemen in September 2011; the lawsuit alleges his targeted killing by the CIA violates the Fourth and Fifth amendments of the United States Constitution.⁴⁵³

The best solution is to transfer the responsibility for carrying out drone strikes entirely to the United States armed forces. The targeting of al Qaeda members is within their lawful combatant duties, and would eliminate potential criminal exposure for CIA officers currently engaged in drone strike activities. Furthermore, it would remove the confusion and sense of secrecy surrounding the program. The rules the Air Force must follow are clear, as they are dictated by IHL, while the rules that govern the CIA are not as clear, and in fact, unknown to the public.⁴⁵⁴ This shift might quiet the growing chorus of voices critical of the CIA's drone strike program. Finally, one author points out that by directly participating in hostilities, the CIA exposes not only its operatives to attack by the enemy, but also the CIA's physical assets.⁴⁵⁵ These physical assets have been used so frequently in the "war on terror" that they may be considered to offer a military advantage, and thus may be lawfully targeted by members of al Qaeda and the Taliban as a valid military objective.⁴⁵⁶

VI. CONCLUSION

In response to the terror attacks of September 11, 2001, the United States asserted its right of self-defense under Article 51 of the UN Charter to justify the targeting and killing of members of al Qaeda. To this end, the United States has utilized drones to target and attack members of al Qaeda located in Afghanistan, Yemen, Pakistan, and Somalia. These drone attacks have increased in frequency since they first began in 2002, and have been carried out by members of the American armed forces, as well as CIA officers. Each strike triggers increased criticism of the drone program. These attacks raise concerns about the legality of the CIA's

453. Anthony Bartkewicz, *ACLU Suing U.S. Over Drone Killings of Citizens in Yemen*, N.Y. Daily News, July 18, 2012, <http://www.nydailynews.com/news/justice-story/aclu-suing-u-s-drone-killings-citizens-yemen-article-1.1117095?localLinksEnabled=false>.

454. See Alston, *supra* note 6, at 359.

455. Robert P. Barnidge, Jr., *A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law*, 30 B.U. INT'L L. J. 409, 421 (2012).

456. *Id.* at 421.

participation in the drone attacks; specifically, whether the CIA officers carrying out the attacks may lawfully do so as the drone strikes are carried out under the guise of armed conflict.

The CIA is a civilian agency authorized by the President to kill leaders of al Qaeda, the Taliban, and their supporters, in the armed conflict with al Qaeda. CIA officers are civilians; as such, they are not members of the armed forces, so they are not entitled to take part in hostilities in times of armed conflict. However, if they choose to engage in the hostilities, they will be considered civilians directly participating in hostilities, and will lose their civilian immunity for the duration of their participation in the hostilities.

Thus, the CIA officers who participate in the drone strikes are civilians directly participating in hostilities. They are directing the drone strike at the enemy, a specified individual al Qaeda member, with the intent that the strike will kill the target and inflict further damage on the terrorist network. The CIA officers engaged in these attacks may be targeted for the duration of their participation, since their participation does not result in the loss of civilian status, only their civilian immunity. Additionally, after the CIA officer's participation ceases, he or she may still be subject to punitive measures for such participation. Therefore, the United States should rely entirely upon its armed forces to carry out the drone strikes, as it is legal for combatants to target the enemy—here, members of al Qaeda—within the arena of armed conflict. Transferring this duty to the armed forces would remove the secrecy and subsequent questions of legality surrounding the drone attacks. Moreover, continuing to allow CIA officers to engage in drone strike activities places CIA personnel at risk not only of criminal liability for their participation in the hostilities, but also to attack by the enemy while carrying out the drone strike.