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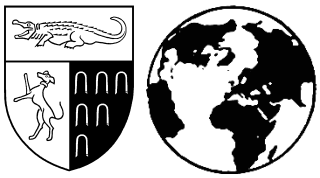

Blurred Lines: An Argument for a More Robust Legal Framework Governing the CIA Drone Program

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I. INTRODUCTION

"[Al Qaeda] does not follow a traditional command structure, wear uniforms, carry its arms openly, or mass its troops at the borders of the nations it attacks."

Those are the words of John Brennan, President Barack Obama's chief counterterrorism advisor at a September 2011 speech outlining the Obama administration's legal framework for its counterterrorism efforts.[1] Brennan's speech underscored the widespread understanding that, due to its basic organizational structure and failure to present itself formally as a recognizable armed force, al Qaeda lacks the legitimacy to participate in armed conflict and is not entitled to its concomitant privileges under international law.

The irony of Brennan's argument, however, is that many prominent academics argue that the same case can be made about the status of the reportedly civilian CIA employees who operate the armed, unmanned aerial drone counterterrorism strikes against al Qaeda militants.[2] In general, CIA employees

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1. John O. Brennan, Strengthening Our Security by Adhering to Our Values and Laws, Remarks at the Program on Law and Security, Harvard Law School (Sept. 16, 2001), *available at* http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

2. *See, e.g.*, *Rise of the Drones II: Examining the Legality of Unarmed Targeting*: *Hearing Before the Subcomm. on National Security and Foreign Affairs*, 111th Cong. 6 (2010) (statement of Mary Ellen O'Connell, Professor of Law, Univ. of Notre Dame), *available at* http://www.fas.org/irp/congress/2010_hr/042810oconnell.pdf [hereinafter *Rise of the Drones II*] ("Only members of the United States armed forces have the combatant's privilege to use lethal force without facing prosecution. CIA operatives are not trained in the law of armed conflict. They are not bound by the Uniform Code of Military Justice to respect the laws and customs of war. They are not subject to the military chain of command."); Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html.

are civilians and not combatants, and therefore do not enjoy any legal privilege to participate in hostilities pursuant to the laws of war.[3] Military combatants are privileged to participate in hostilities and kill other combatants (or civilians who directly participate in hostilities) during armed conflict, where killing is a principal means of achieving the objective of attrition. Further, any such participation in hostilities, without marking themselves as such through uniforms or insignia to distinguish themselves from noncombatants, arguably renders CIA personnel in violation of the international humanitarian law requirement known as "distinction."[4] That has led many to question whether the CIA civilian drone operators who engage in armed attacks against members of al Qaeda, the Taliban, and their associated forces might *share* the same legal status as the terrorists they combat.[5]

Initially, this Essay attempts to unpack that potential irony, laying out the legal framework that governs the law of armed conflict. More importantly, however, we propose possible courses of action that the Obama Administration could take to realign, revise, and strengthen the legal framework on which its highly effective drone program is based. We suggest two possible courses of action. First, and perhaps most intuitively, the Administration could transfer its drone program to military control and consolidate the separate CIA and military lists it reportedly maintains of targeted belligerents. Barring that transfer, however, we believe that broadening the U.S. government's view of who qualifies as a legal combatant—by publicly announcing the United States' acceptance, as a matter of legal obligation, of Articles 43 and 44 of the 1977 Additional Protocol I of the Geneva Conventions—would grant additional legitimacy under international law to buttress the drone program.[6]

In this Essay, we seek to: (1) outline our basic factual assumptions about the CIA's drone program based on open-source reporting; (2) examine the purported rationale for keeping the drone program divided between military and civilian operators; (3) clarify the legal status of CIA civilian drone operators; and (4)

For the purposes of this Essay, we use the terms "drone," "UAV," and "unmanned aerial vehicle" interchangeably.

3. *See Rise of the Drones II*, *supra* note 2 (statement of David Glazier, Professor of Law, Loyola Law School), *available at* www.fas.org/irp/congress/2010_hr/042810glazier.pdf ("CIA personnel are civilians, not combatants, and do not enjoy any legal right to participate in hostilities on our behalf."). A more difficult question, which this Essay does not explore, is whether civilian contractors who provide targeting data to U.S. Air Force operators of armed drones are similarly injecting themselves into roles traditionally reserved for combatants, and thus unlawfully directly participating in hostilities.

4. YORAM DINSTIEN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 82 (2004) (describing the principle of distinction as a "fundamental and 'intransgressible' principle of customary international law"); *see also* Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) (labeling the requirement of distinction "intrangressible" and "cardinal"); *Rule 1: The Principle of Distinction Between Civilians and Combatants*, INT'L COMM. RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (last visited Apr. 2, 2012).

5. *See, e.g.*, Solis, *supra* note 2 ("CIA [drone personnel] are, unlike their military counterparts but like the fighters they target, unlawful combatants. No less than their insurgent targets, they are fighters without uniforms or insignia, directly participating in hostilities, employing armed force contrary to the laws and customs of war.").

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

briefly outline two recommendations for a more robust legal framework for the drone program.

II. ASSUMPTIONS ABOUT THE CIA'S DRONE PROGRAM

Although officially unacknowledged by the U.S. government,[7] the existence of a CIA civilian-operated drone program has been the subject of significant open-source reporting and academic literature.[8] The CIA drone program is said to have significantly expanded under the Obama Administration and has become a key component in the Administration's global fight against al Qaeda.[9]

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7. As early as February 2002, then-Secretary of Defense Donald Rumsfeld stated that the CIA played a role in armed drone attacks in Afghanistan. Responding to a question about whether the Agency was "pulling the trigger" on a Predator strike, Rumsfeld demurred, but nevertheless acknowledged that he "[could not] speak to it, except to say that there tends to be a high degree of interaction between CENTCOM and CIA on a whole host of things, *and certainly on these matters*." Statement by Donald Rumsfeld, Sec'y of Def., Dep't of Def., (Feb. 8, 2002) (emphasis added), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636. At the same press conference, Rumsfeld underscored the rationale behind the military and non-military roles in the early days of Operation Enduring Freedom: "The overwhelming bulk of all activity in Afghanistan since the first U.S. forces went in have been basically under the control of the Central Command. And that's particularly true after the first month. The one exception has been the armed Predators—I shouldn't say 'the one exception.' An exception has been the armed Predators, which are CIA-operated." *Id.*

   In January 2012, President Obama publicly acknowledged for the first time that the United States operates an unmanned, armed drone program outside of Afghanistan (and Iraq), while not stating whether the CIA or the military operates it. When questioned about possible interference in other countries' affairs and the use of drones in the fight against al Qaeda and their associates, the President stated that while we seek to "limit our incursions into someone else's territory," drones offer an ability to pinpoint strike a target where the country might not have the capacity to engage the target themselves. *See* White House, *Your Interview with the President—2012*, YOUTUBE (Jan. 30, 2012), http://www.youtube.com/watch?v=eeTj5qMGTAI. The President then specified that "[o]bviously a lot of these strikes have been in the [Federally Administered Tribal Areas of Pakistan] going after al Qaeda suspects." *Id.* Suffice it to say, there has been significant debate over the continued officially unacknowledged status of the civilian drone program's existence. *See, e.g.*, Karen DeYoung, *After Obama's Remarks on Drones, White House Rebuffs Security Questions*, WASH. POST, Jan. 31, 2012, http://www.washingtonpost.com/world/national-security/after-obamas-remarks-on-drones-white-house-rebuffs-security-questions/2012/01/31/gIQA9s2LgQ_story.html (noting the White House "rebuffed questions . . . about whether [the President's comments] had violated intelligence restrictions on the secret U.S. drone program").
8. *See, e.g.*, Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, at 36 ("The program is classified as covert, and the intelligence agency declines to provide any information to the public about where it operates, how it selects targets, who is in charge, or how many people have been killed."); Scott Shane, *C.I.A. To Expand Use of Drones in Pakistan*, N.Y. TIMES, Dec. 4, 2009, http://www.nytimes.com/2009/12/04/world/asia/04drones.html (calling the program "[o]ne of Washington's worst-kept secrets"). Without quite acknowledging its existence, however, the CIA has defended the drone program: "While the C.I.A. does not comment on reports of Predator operations, the tools we use in the fight against Al Qaeda and its violent allies are exceptionally accurate, precise and effective." Shane, *supra* (quoting CIA spokesman Paul Gimigliano).
9. Shane, *supra* note 8 (noting a sharp increase in drone strikes due to "pressure from the Congressional intelligence committees, greater confidence in the technology and reduced resistance from Pakistan").

According to a study by the New America Foundation, since 2004, the CIA has conducted approximately three hundred drone strikes in Pakistan alone.[10] Other drone strikes have been reported in both Somalia and Yemen,[11] perhaps the most high profile of which was the September 2011 strike in Yemen that killed U.S. citizen and operational commander of al Qaeda in the Arabian Peninsula Anwar al Awlaki.[12] Recently, former Director of National Intelligence Dennis Blair recommended that the entire program be publicly acknowledged and placed under military control: "[W]hen you are going to be using drones over a long period of time, I would say you ought to give strong consideration to running those as [overt] military operations."[13] Blair's suggestion, however, was likely not based on the legal status of drone operators; rather, it reflected bureaucratic concerns over future covert operations.[14]

All of that said, many of the details of the drone program that have garnered the most attention are not relevant for our purposes. We do not question the legality of drone strikes either inside or outside of the "hot battlefields" of Afghanistan and Iraq. Nor is the geographical location of drone strikes central to the legal questions investigated in this Essay. We will not scrutinize the administration's claims that only militants and not civilians have been the casualties of drone strikes.[15] We do not believe that so-called targeted killings within an armed conflict violate either U.S. or international legal proscriptions against assassinations, as some have suggested.[16] The reported existence of some CIA involvement in foreign drone operations to kill al Qaeda terrorists is not something that we believe to be controversial.[17] It is the legal irony of those drone operators potentially sharing a similar status with their targets under the law of armed conflict that we find merits additional inquiry.

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10. *See, e.g.*, Peter Bergen, *Drones Decimating Taliban in Pakistan*, CNN.COM (July 3, 2012), http://www.cnn.com/2012/07/03/opinion/bergen-drones-taliban-pakistan/index.html.
11. Greg Jaffe & Karen DeYoung, *U.S. Drone Targets Two Leaders of Somali Group Allied with al-Qaeda, Official Says*, WASH. POST, June 29, 2011, http://www.washingtonpost.com/national/national-security/us-drones-target-two-leaders-of-somali-group-allied-with-al-qaeda/2011/06/29/AGJFxZrH_story.html (noting that the June 2011 "airstrike makes Somalia at least the sixth country where the United States is using drone aircraft to conduct lethal attacks, joining Afghanistan, Pakistan, Libya, Iraq and Yemen").
12. *See* Greg Miller, *Strike on Aulaqi Demonstrates Collaboration Between CIA and Military*, WASH. POST, Sept. 30, 2011, http://www.washingtonpost.com/world/national-security/strike-on-aulaqi-demonstrates-collaboration-between-cia-and-military/2011/09/30/gIQAD8xHBL_story.html.
13. Josh Gerstein, *Ex-DNI Dennis Blair: Get CIA Out of Long-Term Drone Campaigns*, POLITICO: UNDER THE RADAR (Nov. 30, 2011, 2:12 PM), http://www.politico.com/blogs/joshgerstein/1111/ExDNI_Dennis_Blair_Get_CIA_out_of_longterm_drone_campaigns.html.
14. *See id.* (according to Blair, "covert action should be retained for relatively short duration operations . . . . If something has been going for a long period of time, somebody else ought to do it, not intelligence agencies").
15. *See* Scott Shane, *CIA Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 12, 2011, at A1, *available at* http://www.nytimes.com/2011/08/12/world/asia/12drones.html (quoting counterterrorism advisor John Brennan as stating that "for almost a year there hasn't been a single collateral death because of the exceptional proficiency, precision of the capabilities we've been able to develop").
16. *See, e.g.*, Glenn Greenwald, *Attorney General Holder Defends Execution Without Charges*, SALON.COM (Mar. 6, 2012), http://www.salon.com/2012/03/06/attorney_general_holder_defends_execution_without_charges/singleton.
17. *But see, e.g.*, David Rohde, *The Drone War*, REUTERS MAG. (Jan. 26, 2012), http://www.reuters.com/article/2012/01/26/us-davos-reutersmagazine-dronewar-idUSTRE80P19R20120126.

III. WHY THE CIA? TITLE 10 VS. TITLE 50 AUTHORITY

It is well known that the U.S. Air Force operates a drone program, under the direction of the Joint Special Operations Command (JSOC), targeting militants in the current conflict, in various foreign countries.[18] Recent news reports that several high-ranking al Qaeda terrorists were killed by CIA drones, however, has raised the profile of the CIA's apparently parallel targeting activities. The question is: Why? Why would the CIA *need* to operate a drone program separate from the U.S. military? Would a CIA program have any operational, technical, or legal advantages over that of the Air Force? Any examination of the legal status of civilian drone operators first requires a review of *why* the U.S. government may have decided to authorize civilians to conduct lethal targeting—operations typically reserved exclusively for military actors.

Traditional military operations conducted by the Department of Defense derive from what is known as Title 10 authority—a shorthand reference to its title under the U.S. Code.[19] The CIA's domestic legal basis to conduct covert international operations is broadly referred to as "Title 50 authority." The term "covert" is defined as activities designed "to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly."[20] The legal basis for the CIA activities outside of intelligence collection—that is, covert operations—falls under what has been called the Agency's "Fifth Function," allowing the Agency to "perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct."[21] Broad conceptions of such "other functions and duties" apparently form the legal basis for the Agency's use of lethal force.[22]

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18. *See, e.g.*, U.S. Air Force, *United States Air Force Unmanned Aircraft Systems Flight Plan 2009-2047*, at 15 (May 18, 2009), http://www.fas.org/irp/program/collect/uas_2009.pdf ("[Unmanned aircraft systems] have experienced explosive growth in recent history, providing one of the most 'in demand' capabilities the USAF presents to the Joint Force . . . . [They] can aid forces in combat and perform strike missions against pre-planned or high-value opportunities, minimizing risk of collateral damage when it is a major consideration.").
19. *See* Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SECURITY L. & POL'Y 539, 539 n.2 (2012). Chesney, however, points out that what has come to be referred to as Title 10 authority of the military to conduct operations against al Qaeda is "quite imprecise":

    > [T]he actual domestic law source of the military's authority is found not in Title 10 as such but, rather, in either statutory authorization for using such force (such as the [Authorization for the Use of Military Force]) or the executive branch's inherent authority (and duty) to use force in national self-defense (founded in Article II of the Constitution).

    Id. at 615.
20. 50 U.S.C. § 413b(e) (2006).
21. 50 U.S.C. §§ 403-4a., 403-4a(d)(1)-(3) outline intelligence collection and dissemination as the primary roles and responsibilities of the Central Intelligence Agency, while § 403-4a(d)(4) allows for the "other functions and duties related to intelligence affecting the national security" that form the legal basis for the use of lethal force.
22. *See* Chesney, *supra* note 19, at 586-87 ("From the beginning, the executive branch has construed the generic terms of the 'fifth function' to include authority to engage in covert action: i.e., efforts to influence events overseas without the sponsoring role of the U.S. government being detected or acknowledged.").

Until recently, however, the CIA's ability to stray outside its intelligence collecting activities and to undertake lethal, covert action had reportedly been a matter of debate—even within the Agency.[23] For example, during the late 1990s, both the military and the CIA were pursuing Osama bin Laden after al Qaeda claimed credit for bombing the U.S. embassies in Kenya and Tanzania. The military operation—which included a failed cruise missile attack—was designed to kill bin Laden.[24] Yet, according to the 9/11 Commission Report, operatives in the CIA program were authorized to conduct lethal operations against bin Laden *only* in self-defense or in cases where capture was not feasible due to the administration's misgivings about the civilian agency's mandate to employ lethal force.[25]

Those misgivings changed after the terrorist attacks of September 11, 2001. As an outgrowth of the 2001 Authorization for the Use of Military Force (AUMF), President George W. Bush reportedly authorized the CIA "to kill or capture Qaeda militants around the globe."[26] Importantly, the AUMF, as reaffirmed by Section 1021 of the National Defense Authorization Act for Fiscal Year 2012, serves as the continuing justification for the U.S. military's global pursuit of al Qaeda terrorists to this day. The AUMF gives the President broad authorization

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[27]

Arguably, this provides the domestic legal authorization for CIA operations in the fight against al Qaeda not only within the geographic boundaries of Afghanistan, but wherever al Qaeda may be found. U.S. law, under the authorities contained in Title 10 and Title 50 as well as the specific authorities granted under the AUMF, apparently provides the military and the CIA with overlapping legal

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23. It should be noted that the rules governing the Agency's use of lethal force—directly or by proxy—are not publicly available. Those who have attempted to write about the subject, however, have suggested a number of concerns about the use of force, whether for legal or political reasons. *See id*. at 549-50 (noting "repeated debate within the Reagan administration over whether and when to use force to respond to or preempt terrorist attacks, including both the overt military option and the idea of instead using lethal force covertly (either directly by the CIA or through CIA-trained proxy forces)"). *See generally* NAT'L COMM'N ON TERRORISM, ATTACKS UPON THE U.S. 9/11 COMMISSION REPORT, INTELLIGENCE POLICY: STAFF STATEMENT 8-10 (2004), *available at* http://www.9-11commission.gov/staff_statements/staff_statement_7.pdf.
24. *See id.* at 134-35 (noting apprehensions over collateral damage caused by attacks that, if unsuccessful, would hamper future attempts at targeting bin Laden); *see also id.* at 116 (describing the 1998 cruise missile strikes in Afghanistan as designed to kill bin Laden and his lieutenants).
25. *Id*. at 131 ("The current Memorandum of Notification instructed the CIA to capture bin Ladin and to use lethal force only in self-defense."); Karen DeYoung, *Secrecy Defines Obama Drone War*, WASH. POST, Dec. 19, 2011, http://www.washingtonpost.com/world/national-security/secrecy-defines-obamas-drone-war/2011/10/28/gIQAPKNR5O_print.html (noting that the Memorandum of Notification overrode a long-standing ban on CIA assassinations overseas).
26. Eric Schmitt & Mark Mazzetti, *Secret Order Lets U.S. Raid Al Qaeda*, N.Y. TIMES, Nov. 10, 2008, http://www.nytimes.com/2008/11/10/washington/10military.html.
27. Authorization for the Use of Military Force, § 2(a), Pub. L. No. 107-40, 115 Stat. 224 (2001).

authority to target al Qaeda. Additional legal justification under international law may also stem from the United States inherent right of self-defense.[28]

Media accounts, however, suggest that differences in domestic legal authority do exist between the civilian- and military-run drone programs.[29] Numerous articles suggest that CIA drone operators have divergent levels of discretion in inflicting lethal force when compared to JSOC's drones.[30]

Obama Administration officials have publicly refuted the idea that the CIA drone program can elude aspects of international law that the military program cannot, as some have suggested.[31] In March of 2010, State Department Legal Adviser Harold Koh asserted that *all* U.S. targeting activities comply with the international law of war: "[I]t is considered the view of this administration . . . that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."[32]

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28. See, for example, Attorney General Eric Holder's March 2011 speech, which sought to provide a basic legal justification for the drone strike that killed Anwar al-Awlaki:

> [W]e must also recognize that there are instances where our government has the clear authority—and, I would argue, the responsibility—to defend the United States through the appropriate and lawful use of lethal force. . . . The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war.

Eric Holder, U.S. Att'y General, Address Before the Northwestern University School of Law, (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

29. *See* DeYoung, *supra* note 25 (stating that the U.S. drone operations actually represent three separate initiatives: (1) the military's "relatively public use of armed drones in combat in Afghanistan and Iraq," (2) the CIA's use of drones in Pakistan, and (3) "counterterrorism operations by the CIA and military in Yemen, Somalia, and conceivably beyond"). Indeed, according to one report,

> Yemen has become a template for growing CIA and JSOC counterterrorism collaboration. Unlike in Pakistan, where the CIA has had sole responsibility for hundreds of drone strikes against alleged insurgent safe havens in the tribal regions along the Afghan border, both the CIA and the military have participated in the Yemen strikes.

Karen DeYoung, *U.S. Airstrike Targets Al-Qaeda in Yemen*, WASH. POST, Feb. 1, 2012, at A10.

30. *See, e.g.*, Greg Miller, *Under Obama, An Emerging Global Apparatus For Drone Killing*, WASH. POST, Dec. 27, 2011, http://www.washingtonpost.com/national/national-security/under-obama-an-emerging-global-apparatus-for-dronekilling/2011/12/13/gIQANPdILP_story.html (describing how separate CIA and JSOC legal authorities enable varying operational capabilities); Greg Miller & Julie Tate, *CIA Shifts Focus To Killing Targets*, WASH. POST, Sept. 1, 2011, http://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvJ_story.html (describing the rationale for approving a new CIA drone base as deriving from "the [A]gency's unique authorities"); Gerstein, *supra* note 13 (quoting a "top Pentagon official" as saying that the diverging standards stem from each organization's distinct legal authorities and expertise).

31. *See, e.g.*, Keith Johnson, *U.S. Defends Legality of Killing with Drones*, WALL ST. J., Apr. 5, 2010, http://online.wsj.com/article/SB10001424052702303450704575159864237752180.html ("Professor Mary Ellen O'Connell of the University of Notre Dame law school has called the drone program 'unlawful killing,' and says it violates international law.").

32. Harold Hongju Koh, The Obama Administration and International Law, Address Before the American Society of International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm. Koh concludes, "In this ongoing armed conflict, the United States has the authority under international law, and the

What, then, is the practical basis for maintaining a civilian-run drone program if the U.S. military operates its own, parallel program? One report suggests the existence of separate U.S. military and CIA target lists (or "kill lists") that differ based on the identity of the target. According to *The Washington Post*,

> the lists vary because of the divergent legal authorities. JSOC's list is longer . . . because the [AUMF] as well as a separate executive order gave JSOC latitude to hunt broadly defined groups of al-Qaeda fighters, even outside conventional war zones. The CIA's lethal-action authorities, based on a presidential "finding" . . . were described as more narrow.[33]

Another possible rationale for the two programs is that, were the AUMF or the inherent right to self defense to fail as legal justifications for the drone program—or if administration officials harbor worries that this could be the case—Title 50 authority, combined with presidential authorization, could allow the CIA to assert lethal force so long as the actions remained covert. If true, the covert legal basis of the drone program would explain how the program has managed to be the subject of extensive open-source reporting—and potentially even acknowledgement by the President himself—while remaining officially unrecognized.[34]

Others contend that the different lists represent bureaucratic and temporal, rather than legal, considerations. Reportedly, since "the CIA had only recently resumed armed drone flights over Yemen, the agency hadn't had as much time as JSOC to compile its kill list. Over time . . . the agency would catch up."[35] Indeed, as far back as 2002, Secretary of Defense Donald Rumsfeld admitted that "the armed Predators, which are CIA-operated . . . . were operat[ed] . . . before the United States military was involved [in Afghanistan], and [are] doing a good job. And so *rather than changing that, we just left it*."[36] If true, there may be no obvious *legal* advantage—at least under international law—in using CIA civilian drone operators to conduct lethal force operations.

IV. TWO PROBLEMS POSED BY THE STATUS OF CIA CIVILIAN "COMBATANTS"

International laws governing the use of force have long focused on the distinction between civilians and combatants. Combatants are persons who can legally assert lethal force on behalf of the state, along with the privileges and responsibilities that status accords.[37] The distinction has traditionally been a binary one, with all other persons falling into the civilian category. Indeed, the

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responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al Qaeda leaders who are planning attacks." *Id.*

33. Miller, *supra* note 30. *But see* Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK (Feb. 13, 2011), http://www.thedailybeast.com/newsweek/2011/02/13/inside-the-killing-machine.print.html (noting that "[i]n truth, there is probably no official CIA roster" and citing former Deputy Secretary of State Richard Armitage as saying, "I never saw a list"). *See generally* Chesney, *supra* note 19, at 624-25.
34. *See* Shane, *supra* note 8.
35. Miller, *supra* note 30.
36. Statement by Donald Rumsfeld, *supra* note 7 (emphasis added).
37. *See*, *e.g.*, ICRC, Commentaries to the Third Geneva Convention, Article 4, *available at* http://www.icrc.org/ihl.nsf/COM/375-590007?OpenDocument ("Once one is accorded the status of a belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer.").

protection of civilians is the primary purpose of the modern law of war, with its "ravages" reserved exclusively to the soldiers who wage it.[38] Articles 9-11 of the 1874 Brussels Declaration, along with Article 1-3 of the 1907 Hague Regulations Respecting the Laws and Customs of War, serve as two examples of this well-established dichotomy.[39] Similarly, Article 4 of the Third Geneva Convention relies on this same mutual exclusivity to ensure that only lawful combatants and those that accompany them (i.e., contractors, correspondents, etc., under Article 4(4)-(5)) are entitled to the privileges of prisoner of war (POW) status.[40]

The law of war provides lawful combatants with certain well-recognized privileges. For example, lawful combatants have the right to engage in hostilities, kill other combatants with immunity from prosecution for those acts, and receive POW protections when captured. But in order to qualify as a combatant, one who engages in hostilities must meet certain standards. The Third Geneva Convention of 1949 sets out the following requirements in order for a combatant to be entitled to the benefits of POW status and thereby be inferred to be lawfully participating in hostilities: (A) members of the armed forces of states belonging to the conflict or (B) members of other militias and volunteer corps, belonging to a party in the conflict, including organized resistance movements, who: (1) are commanded by a person responsible for his or her subordinates; (2) possess a "fixed distinctive sign recognizable at a distance" identifying the person as a combatant; (3) carry arms openly; and (4) conduct operations in accordance with the customs of the law of war.[41] Those requirements seek to delineate clearly combatants from civilians.

Inasmuch as international law has focused on the civilian-combatant divide, significant controversy has existed in defining who, exactly, qualifies as a civilian and where to draw the line. During World War II, for example, the legal status of "quasi-combatants" was debated for German civilians working in arms factories.[42] Indeed, it has been argued that U.S. notions of legal combatancy at that time "extended the definition of combatant to include almost all important elements of the enemy's civilian population."[43] The current usage of the term "unprivileged enemy belligerent"—the Obama Administration's preferred nomenclature for al Qaeda members, associated groups, and some affiliates—highlights the extent to which this problem remains today. The administration uses the term to signify a person engaging in hostilities (that is, part of or substantially supporting enemy forces) who is not entitled to combatant immunity from prosecution or POW privileges. Put more simplistically, when a civilian engages in hostilities limited

38. Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L. 683, 685 (2009).
39. Project of an International Declaration Concerning the Laws and Customs of War, Brussels Conference of 1874, arts. 9-11, *reprinted in* 1 AM. J. INT'L L. 96-103 (1907); Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annexed Regulations, arts. 1-3, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.
40. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(1)-(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (defining POWs as either members of the armed forces of parties to the conflict or militia "belonging to a party to the conflict" (subject to certain requirements of distinction)).
41. *Id.* art. 4(2).
42. Lester Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, 39 AM. J. INT'L L. 680, 693 (1945), *cited in* K.W. Watkin, *Combatants, Unprivileged Belligerents and Conflicts in the 21st Century* 6 (Harvard Program on Humanitarian Policy and Conflict Research, Background Paper, 2003).
43. Nurick, *supra* note 42, at 680.

to combatants under international law, his belligerency is to be deemed "unprivileged."[44]

Civilian drone operators apparently cannot meet qualification (2) (wearing a fixed sign, that is, a uniform) or (4) (compliance with the customs and laws of war, as civilians participating in hostilities) under Article 4 of the Third Geneva Convention. In 2002, President Bush's legal advisers came to a similar conclusion with respect to both al Qaeda and the Taliban: that is, that the latter were not lawful combatants, and thus they did not qualify for any of the protections of either the Third or the Fourth Geneva Convention.[45]

In what ways, then, are civilian CIA drone operators legally distinct from the unprivileged belligerents they target? A strong argument exists that if civilians are operating armed drones, they assume a "continuous combat function" and thus are unlawfully taking a direct part in hostilities based on their status.[46] If so, then according to the International Committee of the Red Cross (ICRC), they would be considered an "armed organized group" and apparently legally indistinguishable from the terrorists they target.[47]

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44. *See* Watkin, *supra* note 42, at 4-5.
45. *See* Memorandum from Att'y Gen. Alberto Gonzales to President George W. Bush (Jan. 25, 2002); *see also* Off. of the Press Sec'y, The White House, Statement by the Press Sec'y on the Geneva Convention (Feb. 7, 2002), http://www.state.gov/s/l/38727.htm ("Under Article 4 of the [Third] Geneva Convention . . . [al Qaeda and] Taliban detainees are not entitled to POW status. To qualify . . . [t]hey would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda."). In 2006, however, the Bush Administration conceded in light of the Supreme Court's ruling in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that, at a minimum, the Department of Defense would treat detainees held pursuant to the law of war pursuant to the rights enumerated in Common Article III of the Geneva Conventions. U.S. DEP'T OF DEFENSE, DIR. 2310.01E, DOD DETAINEE PROGRAM, (Sept. 5, 2006), http://www.dtic.mil/whs/directives/corres/pdf/ 231001p.pdf.
46. Int'l Comm. of the Red Cross, *Direct Participation in Hostilities: Questions and Answers* (Feb. 26, 2009), http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm ("[C]ivilians cannot be regarded as members of an organized armed group unless they assume a 'continuous combat function,' i.e. unless they assume continuous function involving their direct participation in hostilities. Members of organized armed groups do not have the same privileged status as combatants of State armed forces and, therefore, can be subject to domestic prosecution even for simply taking up arms.").
47. We believe this argument remains strong regardless of whether the current conflict with al Qaeda is considered a non-international armed conflict, where only the basic minimum protections apply (as the Supreme Court found in *Hamdan*) or an international armed conflict, as some have argued. *See generally* John Bellinger, *Obama's Announcements on International Law*, LAWFARE BLOG (Mar. 8, 2011, 8:33 PM), http://www.lawfareblog.com/2011/03/obamas-announcements-on-international-law ("The Administration states that it will apply Article 75 [of AP I, which it now treats as international law,] only to individuals detained 'in an international armed conflict.' The Supreme Court in *Hamdan*, by contrast, concluded that the U.S. conflict with al Qaida is a 'non-international armed conflict.' Accordingly, it is not clear whether the Administration disagrees with the Supreme Court's characterization of the conflict or whether it actually intends *not* to apply Article 75 to current al Qaida and Taliban detainees."). For the Administration's views on Article 75 of AP I, see

The principle of "distinction" between civilians and combatants forms the basis for one of the core concepts of international humanitarian law. During armed conflict, civilians are presumptively assumed not to be taking a direct role in the conduct of hostilities, must not be attacked, and are entitled to various degrees of protection under the Fourth Geneva Convention. Civilians lose these protections under the law of war when they cease operating in a civilian capacity and instead take a direct role in the conduct of hostilities. According to the Interpretive Guidance of the ICRC, civilian "direct participation in hostilities" (DPH) refers to "specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict," and civilians become targetable while performing those acts.[48] For those unprivileged belligerents who assume a larger, consistent role in hostilities (know as a "continuous combat function"), such conduct alters their status, enabling them to be targeted as belligerents, rather than only for the time they commit a specific hostile act. Without the legal status of combatant, and thus the privileges described above, CIA civilians who operate drones that hunt and shoot Hellfire missiles at al Qaeda militants arguably lose both the protection due to civilians and the immunity reserved for lawful combatants, rendering them both lawful targets of attack and criminally liable (for war crimes under international law or for murder under domestic law where the hostilities occur).

Two principal problems arise from this uncomfortable similarity in legal status between CIA civilians and the terrorists they combat. The first is one of misalignment: it is less than ideal for the United States to be waging a military, diplomatic, and public relations campaign against a global network of terrorists whose members arguably share the same legal status as a segment of the Americans targeting them, *especially* when the legal status of the terrorists as unlawful belligerents is part of the justification for pursuing them. Second, U.S. domestic law itself (the Military Commissions Act of 2009) treats the conduct of unprivileged belligerents as inconsistent with the laws of war.[49] A legal regime

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infra note 53. For more on the applicability of AP I to international armed conflicts, see *infra* note 54.

48. *See* NILS MELZER, INT'L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *available at* http://www.icrc.org/eng/resources/documents/publication/p0990.jsp. While the ICRC's guidance has engendered significant criticism, we believe there is little doubt that a CIA civilian operating an armed aerial drone would qualify as a DPH under either a more expansive view of DPH or the ICRC's more limited guidance. For more on the debate over ICRC's interpretative guidance on DPH, see W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 784 (2010), which describes a 2008 meeting on the guidance in which "[m]ost experts' comments, and particularly those of the military experts, were strongly critical for reasons ranging from questions as to the study's remit to doubts about the ICRC's 'one size fits all' use-of-force formula that would apply to combatants in international armed conflict and across the conflict spectrum to civilians taking a direct part in hostilities." *See also* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 INT'L L. & POL. 641, 643 (2009) (stating that the guidance should have "provide[d] a solid basis for ensuring the protection of uninvolved civilians" but instead "falls short").

49. *See, e.g.*, JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41163, THE MILITARY COMMISSIONS ACT OF 2009: OVERVIEW AND LEGAL ISSUES 11, n.63 (2010) (according to the Manual for Military Commissions, "[t]he comment on the crime 'intentionally causing serious bodily injury' states that '[f]or the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for

justifying the United States' global fight against al Qaeda jeopardizes its sustainability, but most importantly, its credibility, with this type of contradiction at its core. Indeed, the undeniable success of the drone strikes in pushing al Qaeda to the brink of strategic defeat[50] makes it imperative that critics cannot assert a legal—or perhaps even moral—equivalency between the CIA and al Qaeda. The drone program's continued viability necessitates a stronger grounding in both international and domestic law.

V. TWO RECOMMENDATIONS

We propose two remedies for the possible contradiction outlined above. The first way for the United States to realign the legal paradigm justifying the United States' drone attacks against al Qaeda would be to simply transfer control of the civilian program to the military. That recommendation is not new. More than ten years ago, the 9/11 Commission Report recommended just that:

> Lead responsibility for directing and executing paramilitary operations, whether clandestine or covert, should shift to the Defense Department. . . . Whether the price is measured in either money or people, the United States cannot afford to build two separate capabilities for carrying out secret military operations, secretly operating standoff missiles, and secretly training foreign military or paramilitary forces. The United States should concentrate responsibility and necessary legal authorities in one entity.[51]

Based on our discussion in Part III, there seems to be no basis in international law to justify authorizing civilians to engage in targeted killings via drones. If the legal basis for the CIA's program is based largely within the domestic framework set in place by executive orders, this change should not prove too difficult to implement.[52]

Barring, however, the transfer of the drone program to military operators, we believe that U.S. recognition of Articles 43 and 44 of Additional Protocol I (AP

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lawful combatancy'"); *id.* at 42 ("10 U.S.C. § 950p [MCA 2009] continues to declare that the MCA as amended does not define new crimes, but rather codifies preexisting offenses for trial by military commission, which offenses 'have traditionally been triable under the law of war or otherwise triable by military commission.'").

50. Elisabeth Bumiller, *Panetta Says Defeat of Al Qaeda Is 'Within Reach,'* N.Y. TIMES, July 10, 2011, http://www.nytimes.com/2011/07/10/world/asia/10military.html.

51. NAT'L COMM'N ON TERRORISM ATTACKS UPON THE U.S 9/11 COMMISSION REPORT, *supra* note 23, at 415 (emphasis added).

52. Although we do not suggest such a change could—or should—occur overnight, the seemingly non-statutory framework of the civilian-military distinction suggests that it is within the power of the executive to merge the diverging authorities under a reasonable timeline. *See, e.g.*, Kenneth Anderson, *Why the CIA and Drones*, OPINIO JURIS (Oct. 20, 2011, 10:37 AM), http://opiniojuris.org/2011/10/20/why-the-cia-and-drones (noting that these executive order[s] are to be regarded "not [as] 'law' in the statutory sense, but neither are they instantly revisable policies, either; they seem to be 'structural' internal legal regulations that can be changed but are 'embedded' in ways that change has to be considered carefully"). Alternatively, the transition could occur in a much more exclusive, and limited, sense: the CIA could continue to maintain the non-lethal aspects of the drone program, while a uniformed member of the military, detailed to the Agency exclusively for this purpose, could ultimately be responsible for "pulling the trigger." Such a limited transition would presumably solve the legal issues we highlight with the drone program, but would not, unless publicized, improve the credibility of the program we address above.

I)—or their acceptance as a matter of legal obligation[53]—would expand the class of persons who can be considered combatants under international law, potentially to include CIA civilians.[54] Article 43(1) sets out the requirement of organization of command for combatant status, while Article 43(2) authorizes direct participation in hostilities for combatants. Article 44(3) recognizes that despite the requirement of distinction,

> there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.[55]

Formal adherence to those provisions might also solve the contradiction at the heart of the CIA drone program: it would remove the distinction requirement of the Third Geneva Convention (uniforms, open carrying of arms) for CIA civilians *but not* al Qaeda fighters, since their core ideological objectives do not fit within the "people" AP I intended to include, they fail to adhere to the laws of war, and their transnational terrorist activities target civilians.[56] Pursuant to Article 43(1), a party to the conflict must enforce an "internal disciplinary system" both to ensure adherence to the laws of war and to retain combatant status—something that al Qaeda lacks, while the CIA's drone program reportedly is managed and operated in such a fashion.[57]

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53. The Obama Administration in 2011 took this same approach with Article 75 of AP I. *See* Office of the Press Secretary, *Fact Sheet: New Announcements on Guantánamo and Detainee Policy*, WHITE HOUSE (Mar. 7, 2011), http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy.
54. Additional Protocols I and II were opened for accession in 1977. Prior to that, the rules governing the conduct of military operations predominantly came from customary international law and the specific restrictions contained in the Hague Regulations of 1907. In the late 1960s and early 1970s, a series of ICRC meetings resulted in two proposed protocols to the Geneva Conventions: one applying to international armed conflicts (AP I) and the other dealing with conflicts of a non-international character (AP II).
55. While this provision clearly was written with a physical "firefight" conception of conflict in mind, we believe that the long distances separating CIA drone operators and their targets does not violate the openness criterion—at least not more so than Air Force missile officers (or even military armed drone operators). Indeed, determining how the openness criterion applies in the age of modern warfare leaves room for long-distance combatant participation. *See* Watkin, *supra* note 42, at 9 ("One of the challenges of establishing combatant status, either under the Geneva Convention III criteria or under Additional Protocol I, has been interpreting what terms like 'carrying arms openly' actually mean.").
56. For example, AP I sought to expand the original 1949 Geneva Conventions: "The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." AP I, *supra* note 6, art. 1(4). It seems *highly* unlikely that States would endorse al Qaeda, a globally dispersed group of extremists, as a "people" or as engaged in a fight against a colonial domination, alien occupation, or a racist regime.
57. While details of the internal disciplinary system for CIA drone operators is not public, administration officials' statements and news accounts suggest the Agency adheres to a somewhat robust internal system governing the use of force through drones. *E.g.*, David S. Cloud, *Civilian Contractors Playing Key Roles in U.S. Drone Operations*, L.A. TIMES, Dec. 29, 2011, http://www.latimes.com/news/nationworld/world/la-fg-drones-civilians-20111230,0,4297891,full.story ("By law, decisions to use military force must be made by the military chain of command or, in the case of CIA strikes, by civilian officials authorized to conduct covert operations under presidential findings or other specific legal mandates.");

Unlike AP I, neither the Third Geneva Convention (which addresses only the protection of POWs and not the conduct of hostilities) nor the Fourth Geneva Convention (which sets out humane treatment standards for civilians affected by war) explicitly affirms combatant status.[58] While numerous countries have acceded to AP I, the United States has resisted under the belief that the protocol legitimizes terrorism.[59] While it is true that members of certain non-state armed parties are extended combatant status under the protocol,[60] Article 51(2), which the United States has acknowledged amounts to customary international law, prohibits terrorist activities of non-state parties: "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[61] As such, terrorist activities directed towards civilians render al Qaeda's belligerent activities unlawful under both customary international law and AP I, thereby excluding members of al Qaeda from the privileges of lawful combatant status.[62] Even if Protocol I were to provide some quasi-combatant status to a group like al Qaeda, Article 51(2) ensures that engaging in acts of terrorism would prevent al Qaeda members from the privileges that would

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Stephen W. Preston, General Counsel, CIA, "CIA and the Rule of Law," Address at Harvard Law School (Apr. 10, 2012), *available at* http://www.lawfareblog.com/2012/04/remarks-of-cia-general-counsel-stephen-preston-at-harvard-law-school (noting that the CIA "implement[s] its authorities in a manner consistent with the four basic principles in the law of armed conflict governing the use of force: Necessity, Distinction, Proportionality, and Humanity"); *accord* Koh, *supra* note 32 (stating that all U.S. targeting practices comply with the international laws of war); *see also* McKelvey, *supra* note 33 ("A look at the bureaucracy behind the [drone] operations reveals that it is multilayered and methodical, run by a corps of civil servants who carry out their duties in a professional manner.").

58. Rather, the definition of a combatant is implied in the recognition of prisoner-of-war status in the event of capture. *See* Claude Pilloud et al., ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, art. 43, ¶ 1677 (Yves Sandoz et al. eds., 1987) *available at* http://www.icrc.org/ihl.nsf/COM/470-750053?OpenDocument.

59. *See* Letter of Transmittal from President Ronald Reagan to the Senate of the United States (Jan. 29, 1987), *reprinted in* 81 AM. J. INT'L L. 910, 911 (1987) (arguing against ratifying AP I due to the fact that it "would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves"). *See generally* Abraham D. Sofaer, *The Position of the United States on Certain Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 460, 463 (1988).

60. AP I, *supra* note 6, arts. 43(1), (2).

61. *Id.* art. 51(2); *see also* Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and Opinion, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), *available at* http://www.icty.org/x/cases/ galic/tjug/en/gal-tj031205e.pdf ("The act of making the civilian population or individual civilians the object of attack . . . resulting in death or injury to civilians, transgresses a core principle of international humanitarian law and constitutes without doubt a serious violation of the rule contained in the relevant part of Article 51(2) of Additional Protocol I."); Memorandum from W. Hays Parks, Chief, Int'l Law Branch, Dep't of the Army, Judge Advocate, Int'l Affairs, et. al., for Mr. John H. McNeill, Assistant Gen. Counsel (Int'l), Office of Sec'y of Def. (May 9, 1986), *reprinted in* U.S. Army, The Judge Advocate General's Legal Ctr. and School, LAW OF WAR DOCUMENTARY SUPPLEMENT 234 (2011), *available at* http://www.loc.gov/rr/trd/military_law.pdf.law-of-war-documentary-supplement_2011.pdf (stating that art. 51(2) of AP I is customary international law).

62. We believe that al Qaeda cannot cloak itself in the protection of AP I for its hostilities against members of the U.S. armed forces or those of NATO's International Security Assistance Force as long as it continued to commit (and intended to commit) acts of terrorism against civilians, with no claim to territory or self-determination. *See* AP I, *supra* note 6, art. 1(4).

otherwise immunize lawful combatants for those belligerent acts. The ICRC also concedes that those who commit acts of terrorism cannot attain the status of combatants under AP I, since "it unequivocally prohibits acts of terrorism, such as attacks against civilians or civilian objects. AP I does not grant POW status to persons who unlawfully participate in hostilities."[63]

On the other hand, applying Articles 43 and 44 of AP I out of a sense of legal obligation, at a minimum, should extend lawful combatant status to civilian drone operators by sufficiently blurring the requirement of distinction, provided that the CIA is subject to an internal disciplinary system that enforces the rules of international law applicable in armed conflict.

We stress, however, the relatively "painless" nature of simply militarizing the program given the history and the myriad complexities that could arise from adhering to Articles 43 and 44 out of a sense of legal obligation. In our view, the clearest path to solving the dilemma posed by the similar legal status of CIA drone operators and the terrorists they target is to shift the program—or at the very least, the lethal nodes of it—to military control.

VI. CONCLUSION

The similarities in legal status between CIA civilian drone operators and the terrorists they target undermine the credibility of a national security tool that we believe to be otherwise lawful, successful, and effective. Indeed, in an age of tightening defense budgets, the low-cost, precision-targeting techniques of drone warfare will be increasingly crucial as the United States pursues its national security objectives overseas with greater precision and less risk to the men and women of our armed forces. Removing this fundamental legal contradiction at the heart of the U.S. armed drone program can only enhance its legitimacy, and ultimately, its sustainability.

63. INT'L COMM. OF THE RED CROSS, *The Relevance of IHL in the Context of Terrorism* (Jan. 1, 2011), http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm.