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*Like Playing Whack-A-Mole Without a Mallet? Allowing the State to Rebut the Civilian Presumption*

The term targeted killing has entered our lexicon because it grapples with killing non-combatants (civilians) during armed conflict – situations in which the use of deadly force by state actors is regulated by the law of war. These types of killings have been part of the military landscape for ages. However, President Obama’s purported determination that the law permits the targeting of an American radical Muslim cleric in Yemen has highlighted the significance of such operations. This article will argue that while status is paramount in targeting decisions, the status of a targeted individual should be tempered and informed by the individual’s pattern of conduct that rebuts the State’s presumption of protection afforded civilians. Targeting individuals posing a belligerent threat to the United States is domestically legal but such killing needs to evolve in the international law context; the reason is the viability of distinction.

As a result of civilian protection under the law of war, targeting that results in civilian deaths leads States to direct their actions more toward precision; that is, away from conduct posing a risk of collateral civilian injury or death. Yet, with this trend comes a heightened degree of responsibility on the part of the civilian. This responsibility is derived from the main pillar of the law of war—distinction. If a civilian takes a direct or active part in armed hostilities, then they lose their presumptive protection for, at a minimum, the duration of their hostile conduct. As asymmetric warfare grows and the distinction between “good” civilians – those who do not pose a threat – and “hostile” civilians – those taking participation in hostilities – becomes increasingly blurred, there is a need for States to recognize that not all civilians are equal. Even the International Committee on the Red Cross has opined that in non-international armed conflicts, hostile civilians – individuals they refer to as unprivileged belligerents – should not be given the same status as those innocent civilians. Because states must use precision to minimize civilian harm, civilians who eschew taking part in the armed conflict have greater protections than ever before in history. But this protection should only extend to civilians worthy of this status. Put differently, the civilian whose pattern of conduct shows a military function on behalf of an organized armed group cannot be hostile at one moment and then expect to regain his civilian status protections the next. Such a result would, in the end, undermine the protection of civilians because it stands the law of war framework on its head: distinction becomes impossible and thereby irrelevant. Status is paramount and lies at the core of the distinction equation, but the law of law should allow the State to rebut the civilian presumption through certain conduct.