
A QUALIFIED DEFENSE OF AMERICAN DRONE ATTACKS IN NORTHWEST PAKISTAN UNDER INTERNATIONAL HUMANITARIAN LAW

Robert P. Barnidge, Jr.*

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ABSTRACT

Since the terrorist attacks of September 11, 2001, international law has had to grapple with the fundamental challenges that large-scale violence carried out by non-State actors poses to the traditional inter-State orientation of international law. Questions related to the “adequacy” and “effectiveness” of international humanitarian law, international human rights law and the law related to the use of force have been particularly pronounced. This paper focuses on the international

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humanitarian law implications of American drone attacks in northwest Pakistan. A highly-advanced modality of modern warfare, armed drones highlight the possibilities, problems, prospects and pitfalls of high-tech warfare. How is the battlefield to be defined and delineated geographically and temporally? Who can be targeted, and by whom? Ultimately, this paper concludes that American drone attacks in northwest Pakistan are not unlawful as such under international humanitarian law, though, like any tactical decision in the context of asymmetric warfare, they should be continuously and closely monitored according to the dictates of law with sensitivity to facts on the ground.

I. INTRODUCTION

When the American people elected Barack H. Obama President of the United States on November 4, 2008, many observers envisaged a new focus for the United States' foreign policy. Gone, it was thought, was the derided "cowboy diplomacy" of his predecessor in the White House, President George W. Bush. Three of President Obama's first five executive orders made significant policy changes that were expected to positively influence foreign relations: the closing of detention facilities in Guantánamo Bay, Cuba, ordering a review of detention policies and ensuring the lawfulness of interrogations.¹ Domestically, a caustic presidential campaign gave way to an increase in support for the new leader, who would soon receive what is arguably the world's highest secular honor, the Nobel Peace Prize.² The title of President Obama's 2009 Nobel Lecture, "A Just and Lasting Peace," encapsulated the optimistic atmosphere. Many thought that nearly anything was possible now that a conscientious American leader with the will to 'speak truth to power' had arrived to guide the international community into the second decade of the twenty-first century.

Ironically, both President Obama's most ardent supporters and those cynics who derided his Nobel Lecture for being unrealistic and naïve seem to have missed a number of revealing nuances in his speech in Oslo. While stressing the need to adhere to internationally agreed upon rules regulating the use of force, he asserted a "right to act unilaterally if necessary to defend my nation."³ However, he did not expressly state whether

¹ E.O. 13493, Review of Detention Policy Options, Jan. 22, 2009; E.O. 13492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, Jan. 22, 2009; E.O. 13491, Ensuring Lawful Interrogations, Jan. 22, 2009.

² THE NOBEL PEACE PRIZE 2009, Nobelprize.org, Mar. 26, 2012, http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/.

³ Barack H. Obama, President of the United States of America, Nobel Lecture, A Just and Lasting Peace, Nobel Lecture, Oslo (Dec. 10, 2009), http://nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html. See also THE WHITE

this doctrine equated to, approximated, or diverged from each State's right of self-defense under the law related to the use of force.⁴ The world was also told evil still existed, that non-violent civil disobedience would not have stopped Hitler and the Holocaust and that negotiating with Al Qaeda would ultimately prove fruitless.⁵ As President Obama put it, "[t]o say that force is sometimes necessary is not a call to cynicism - it is a recognition of history, the imperfections of man and the limits of reason."⁶ Despite the proud claim Obama made on the campaign trail in Berlin during the summer of 2008 that he was a "fellow citizen of the world,"⁷ today Guantánamo remains open, the United States has not "resigned" the 1998 Rome Statute of the International Criminal Court, and many of the Bush Administration's policies in the fight against terrorism remain in place, albeit without the language of the "War on Terror."⁸ This is the context in which this article examines the lawfulness of the use of drone attacks in northwest Pakistan under international humanitarian law

Drone attacks in Pakistan are one of the most important and controversial aspects of the Obama Administration's approach to fighting terrorism.⁹ This article begins by exploring developments in drone

HOUSE, *National Security Strategy*, at 22 (May 2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (asserting the United States must "reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force").

⁴ Broader debates on the law related to the use of force – such as whether the Obama Administration's posture borders on aggression, as Henderson seems to imply, or whether the prohibition of the threat or use of force has itself fallen into desuetude, as Glennon argues – lie outside the scope of this article. See Christian Henderson, *The 2010 United States National Security Strategy and the Obama Doctrine of "Necessary Force,"* 15 J. CONFLICT & SECURITY L. 403 (2010); Michael J. Glennon, *Force and the Settlement of Political Disputes: Debate with Alain Pellet, Colloquium on Topicality of the 1907 Hague Conference at The Hague (Sept.7, 2007)*, http://www.unza.zm/index2.php?option=com_docman&task=doc_view&gid=345&Itemid=73.

⁵ Obama, *supra* note 3.

⁶ *Id.*

⁷ *Text of Obama's Speech in Berlin*, N.Y. TIMES, July 24, 2008, <http://www.nytimes.com/2008/07/25/world/americas/25iht-24textobama.14788397.html>.

⁸ See *National Security Strategy*, *supra* note 3, at 20 (stating that "this is not a global war against a tactic - terrorism, or a religion - Islam. We are at war with a specific network, al-Qa'ida, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners").

⁹ Drone attacks are a type of "targeted killing." For definitions of targeted killing, see H CJ 769/02 Public Committee Against Torture v. Government of Israel, ¶ 60 [2006] [hereinafter *Targeted Killings*] (identifying a targeted killing as a "preventative strikes which cause the deaths of terrorists and at times of nearby innocent civilians"); Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/14/24/Add.6, at 3 (May 28, 2010)

technology and translates that discussion into the context of the American drone campaign in northwest Pakistan. Assessing these attacks under international humanitarian law requires determining whether an armed conflict paradigm applies and, if so, how the armed conflict at issue should be classified. This article then examines three persistent issues that have arisen in the context of the American drone campaign in northwest Pakistan: first, the question of collateral damage, with particular reference to the drone attack that killed Tehrik-e-Taliban Pakistan (TTP) leader Baitullah Mehsud in August 2009; second, the concern raised in the 2010 Report of Philip Alston, the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, that “[i]t is not possible for the international community to verify the legality of a killing, to confirm the authenticity or otherwise of intelligence relied upon, or to ensure that unlawful targeted killings do not result in impunity;”¹⁰ and, finally, the legal implications of Central Intelligence Agency (CIA) involvement in drone attacks. Ultimately, this paper concludes that American drone attacks in northwest Pakistan are not unlawful as such under interna-

[hereinafter *Alston Report*] (defining a targeting killing as the “intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator”); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SECURITY J. 145, 147 (2010) (defining a targeting killing as the “deliberate assassination of a known terrorist outside the country’s territory (even in a friendly nation’s territory), usually (but not exclusively) by an airstrike”); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, May 11, 2009, at 2 (May 11, 2009) (unpublished manuscript), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0511_counterterrorism_anderson/0511_counterterrorism_anderson.pdf (arguing a targeting killing involves “targeting of a specific individual to be killed, increasingly often by means of high technology, remote-controlled Predator drone aircraft wielding missiles from a stand-off position”); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 5 (2009) (defining a targeted killing as the “use 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”). On targeted killings and Israel, the United States, and Russia, see *Alston Report*, *supra*, at 5-9. On targeted killings and the United States and Israel, see Michael N. Schmitt, *Targeted Killings and International Law: Law Enforcement, Self-Defense, and Armed Conflict*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 525, 525-28 (Roberta Arnold & Noëlle Quéniwet eds., 2008). For some examples of targeted killings, see MELZER, *supra*, app. at 436-44.

¹⁰ See *Alston Report*, *supra* note 9, at 27. Cf. Christof Heyns & Martin Scheinin, *Osama bin Laden: Statement by the UN Special Rapporteurs on Summary Executions and on Human Rights and Conter-Terrorism*, OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. (May 6, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E>.

tional humanitarian law, though, like any tactical decision in the context of asymmetric warfare, they should be continuously and closely monitored according to the dictates of law with sensitivity to the facts on the ground.

II. DRONE TECHNOLOGY AND THE AMERICAN DRONE CAMPAIGN IN NORTHWEST PAKISTAN

One of the great ironies of social contract theory is that despite humanity's flight from the state of nature to a more organized and "civilized" existence, violence remains a constant reality, both between and within States. Whether this state of affairs was, or is, inevitable is beyond the scope of this article. However, it is clear that technology has expanded and diversified the capacity for "civilized" violence. No longer limited to the fist, the rock or the boulder, individuals now have access to weapons of various degrees of precision and devastation, from the bullet to the nuclear weapon. This diversity in weaponry raises practical questions regarding accessibility and control, as well as normative questions related to how and when the use of such weapons is acceptable, if ever. Developments in drone technology should be viewed within this historical evolution toward "better" weapons.

The first reported use of a "drone" was in 1919, when the inventor of autopilot technology and the gyroscope, Elmer Sperry, sunk a German battleship with a pilotless aircraft.¹¹ The Vietnam War saw drones used for surveillance purposes.¹² Drones have the advantage of being able to gather valuable intelligence without the inherent risk to human life that a traditional sortie by a piloted craft would pose.¹³ Drone gathered intelligence can be assessed in real time by multiple actors, including military lawyers, leading to a potential increase in transparency and accountability of the decision-making process, particularly if the drone at issue has an attack capability and the use of that capability is being contemplated.¹⁴ With no fear of retaliation, more "objective" decisions may be reached

¹¹ U.S. Army UAS Ctr. of Excellence, "EYES OF THE ARMY" U.S. ARMY UNMANNED AIRCRAFT SYSTEMS ROADMAP 2010-2035, ARMY.MIL, 4 (2010), <http://www-rucker.army.mil/usaace/uas/US%20Army%20UAS%20RoadMap%202010%202035.pdf> [hereinafter *Eyes of the Army*].

¹² David Rodman, *Unmanned Aerial Vehicles in the Service of the Israel Air Force: "They Will Soar on Wings Like Eagles,"* 14 MIDDLE E. REV. INT'L AFF. 77 (2010); Andrew Callam, *Drone Wars: Armed Unmanned Aerial Vehicles*, 19 INT'L AFF. REV. (2010), available at <http://www.iar-gwu.org/node/144>.

¹³ See THE U.S. ARMY/ MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 365, 367-68 (2007).

¹⁴ See Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L L. 409, 417-22 (2009). See also Rodman, *supra* note 12, at 80.

without the interference of fatigue and stress.¹⁵ Dozens of States now possess drone technology for surveillance purposes; however, as with military hardware and software generally, some States have more sophisticated capabilities than others.¹⁶

There are two generations of drones. The first generation is used exclusively for surveillance. The *2009 Manual on International Law Applicable to Air and Missile Warfare* refers to these as “unmanned aerial vehicles,” or an “unmanned aircraft of any size which does not carry a weapon and which cannot control a weapon.”¹⁷ Depending upon the model, first generation drones can be flown remotely or can operate autonomously, can fly for days or for considerably shorter periods of time, can be built for multiple uses or for one mission only and can be as large as a traditional aircraft or much smaller.¹⁸ For example, the United States Army’s RQ-11 Raven B drone is about the size of a model plane that a young hobbyist might build in his or her basement.¹⁹ Second generation drones have an attack capability. The Manual refers to these as “unmanned combat aerial vehicles,” or an “unmanned military aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target.”²⁰ Depending upon the model, second generation drones have many of the same characteristics as first generation drones, but fewer States possess second generation drones.²¹ It is worth noting that the *2010 U.S. Army Unmanned Aircraft Systems Roadmap 2010-2035: Eyes of the Army* foresees future drones capable of reconnaissance and surveillance of biological, chemical, nuclear and radiological weapons as well as high-yield explosives and hazards; contributing to security; operating as an attack platform in close combat and on interdiction and strike missions; facilitating improved

¹⁵ See Beard, *supra* note 14, at 430-33. See also *Eyes of the Army*, *supra* note 11, at 2-3, 5. Beard soberly refers to these decisions as the “grim math of collateral damage assessments in the virtual era.” Beard, *supra* note 12, at 439.

¹⁶ See Mary Ellen O’Connell, *The International Law of Drones*, 14 AM. SOC’Y INT’L L. INSIGHT, Nov. 12, 2010, http://asil.org/files/2010/insights/insights_101112.pdf. See also Beard, *supra* note 14, at 444.

¹⁷ HARVARD UNIV. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE § A(1)(dd) (2009) [hereinafter HARVARD MANUAL], available at <http://ihlresearch.org/amw/HPCR Manual.pdf>.

¹⁸ HARVARD UNIV. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 54 (2010) [hereinafter HARVARD COMMENTARY], available at <http://ihlresearch.org/amw/Commentary%z20on%20the%20HPCR%20Manual.pdf>.

¹⁹ See *Eyes of the Army*, *supra* note 11, at 44, app. at 73.

²⁰ HARVARD MANUAL, *supra* note 17, at § A(1)(ee).

²¹ See HARVARD COMMENTARY, *supra* note 18, at 55.

command and control; supporting combat operations; delivering materials and supplies; and extracting personnel and damaged hardware.²²

Israel and the United States have driven most of the developments in drone technology, but other key States are making rapid progress in the field.²³ Beginning with Israel's use of drones as decoys during the Yom Kippur War, its success with drones has continued to expand. During its armed conflict in Lebanon in the early 1980s, while acting as a decoy, the Israeli-developed Samson drone successfully triggered Syrian radar systems in the Bekaa Valley. This allowed Israel to destroy Syria's considerable surface-to-air missile arsenal. Israeli drones also proved effective in monitoring Syrian-operated air bases and allowed the Israel Defense Forces (IDF) to track Syrian and Palestine Liberation Organization fighters. The sophistication of Israel's drones has increased over time, and they have been used successfully in all major armed conflicts involving Israel over the last few decades. Drones played a particularly important role during Operation Cast Lead, Israel's armed conflict with Hamas in the Gaza Strip between December 27, 2008 and January 18, 2009.²⁴ Armed drone technology has supplemented the capabilities of Israeli surveillance drones and has played an important role in allowing Israel to retain its military advantage against hostile State and non-State actors in the Middle East.²⁵

²² *Eyes of the Army*, *supra* note 11, at 3-4. See also JULIE WATSON, *Tiny Spy Planes Could Mimic Birds, Insects*, ARMY TIMES, Feb. 28, 2011, <http://www.armytimes.com/news/2011/02/ap-tiny-spy-planes-could-mimic-birds-022811/>; Nathan Hodge, *Drone Will Call Aircraft Carriers Home*, WALL ST. J., Feb. 8, 2011; <http://online.wsj.com/article/SB10001424052748703507804576130493035362556.html>; and Ellen Nakashima & Craig Whitlock, *With Air Force's Gorgon Drone "We Can See Everything"*, WASH. POST, Jan. 2, 2011, <http://www.washingtonpost.com/wpdyn/content/article/2011/01/01/AR2011010102690.html>.

²³ See William Wan & Peter Finn, *Global Race on to Match U.S. Drone Capabilities*, WASH. POST, July 4, 2011, http://www.washingtonpost.com/world/national-security/global-race-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH_story.html. On China's rapidly-improving program, see Jeremy Page, *China's New Drones Raise Eyebrows*, WALL ST. J., Nov. 18, 2010, <http://online.wsj.com/article/SB10001424052748703374304575622350604500556.html>. See also U.S. - CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, 111TH CONG., 2010 REP. TO CONGRESS 79 (2010), available at http://www.uscc.gov/annual_report/2010/annual_report_full_10.pdf. On Iran's Karrar attack drone, see Yiftah Shapir, *Iran's Late-Summer Display*, 205 INST. NAT'L SECURITY STUD. INSIGHT (2010), <http://www.inss.org.il/research.php?cat=3&incat=&read=4402&print=1>.

²⁴ See, e.g., Report of the United Nations Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, ¶ 1190, U.N. DOC. A/HRC/12/48 (Sept. 25, 2009).

²⁵ For a detailed account of these and other developments in the use of Israeli drones, see Rodman, *supra* note 12. See also Sharon Weinberger, *Israeli Company Debuts Tilt-Rotor Drone*, AOLNEWS.COM, Oct. 5, 2010, <http://www.aolnews.com/2010/10/05/israeli-company-debuts-tilt-rotor-drone/19661602> (describing the Panther

The United States' first sustained experience with drones coincided with the first decade after the end of the Cold War. The 1990s saw the Pioneer drone fly more than three hundred missions during Operations Desert Shield and Desert Storm, searching for Scud missiles and other targets of significance for Coalition forces as they sought to dislodge Iraqi troops from Kuwait.²⁶ During the North Atlantic Treaty Organization's (NATO) intervention in the Balkans, President William J. Clinton used drones in both Bosnia and Kosovo.²⁷ September 11, 2001 ushered in a new perspective for the United States on matters of international peace and security, with terrorism suddenly seen as more than just a law enforcement problem. As President Bush stated in an address to a joint session of the United States Congress shortly after September 11th, "[w]e will direct every resource at our command, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war, to the disruption and to the defeat of the global terror network."²⁸ Drones, both first and second generation, would play an important role in this new struggle.²⁹

The Bush Administration found great value in drone technology and used attack drones against targets in several countries, including Afghanistan, Yemen, Pakistan and Iraq.³⁰ Under President Obama, the use of attack drones has notably accelerated. The Taliban, subdued but not defeated, has not become a non-violent political force in the new Afghanistan. Instead, aided by loyalists from strongholds in neighboring Pakistan, it continues to challenge what the United Nations Security Council has reaffirmed as the "sovereignty, independence, territorial integrity and national unity of Afghanistan" established following NATO's 2001 invasion.³¹ Relatedly, Al Qaeda's reach, though never confined to Afghan territory alone, remains active in Afghanistan. Many of these issues

drone, which weighs under 150 pounds and can take off and land as a helicopter and can fly for up to six hours at a time); Tia Goldenberg, *Israel Unveils New Drone Fleet That Can Reach Iran*, HUFFINGTON POST, Feb. 21, 2010, http://www.huffingtonpost.com/2010/02/22/israel-unveils-new-drone-_n_471225.html (describing the Heron TP drone, which can fly for a day at a time and cover the distance between Israel and the Persian Gulf).

²⁶ *Eyes of the Army*, *supra* note 11, at 4.

²⁷ Beard, *supra* note 14, at 412 n.15.

²⁸ George W. Bush, Address Before a Joint Session of the Congress of the United States: Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1349 (Sept. 20, 2001).

²⁹ See Callam, *supra* note 12; Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

³⁰ See Blum & Heymann, *supra* note 9, at 149-51; Mayer, *supra* note 29; Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER FORUM OF WORLD AFF. 55, 62, 64-65 (2003).

³¹ S.C. Res 1943, U.N. Doc. S/RES/1943, at 1 (Oct. 13, 2010).

involve, as President Obama has put it, the “cancer [that] is in Pakistan.”³²

The border between Afghanistan and Pakistan may separate two sovereign States as a matter of law, but the Durand Line rarely functions as such in practice.³³ This is the Pashtun heartland, a transnational tribal-cultural geographical region with large populations of Pashtuns on either side of the border. It is because of this intermingling of culture and allegiance that the area is frequently referred to as “AfPak.” It is here where Al Qaeda’s then first- and second-in-command, Osama bin Laden and Ayman al-Zawahiri, were generally believed to be hiding until bin Laden was killed in an American raid on May 1, 2011 in Abbottabad, Pakistan. That bin Laden was found living in a large, secure compound of reinforced concrete some thirty miles from Islamabad and near the Pakistan Military Academy, with senior Pakistani military officials as neighbors, suggests the extent to which the “cancer” has spread.³⁴ Whether due to unwillingness, inability or some combination of unwillingness and inability,³⁵ it seems clear that Pakistan has for some time been in breach of the substantial and exacting counterterrorism obligations that the International Court of Justice (ICJ) recognized as binding all States as a matter of customary international law in its 2005 *Armed Activities on the Territory of the Congo* judgment.³⁶ As Anthony J. Blinken, National Security

³² BOB WOODWARD, *OBAMA’S WARS* 302 (2010). See Interview with Hamid Karzai, President of Afghanistan (July 14, 2008), available at <http://www.memritv.org/clip/en/1813.htm>.

³³ On the Durand Line, see AHMED RASHID, *TALIBAN: THE POWER OF MILITANT ISLAM IN AFGHANISTAN AND BEYOND* 187 (2010); Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, 85 INT’L L. STUD. SER. US NAVAL WAR COL. 109, 110-15 (2009); Andrew M. Roe, *What Waziristan Means for Afghanistan*, MIDDLE EAST QUARTERLY, Winter 2011, 37; Syed Manzar Abbas Zaidi, *Understanding FATA*, CONFLICT & PEACE STUD., Oct.-Dec. 2010, at 109-11.

³⁴ Al-Zawahiri’s location remains unknown, though he is likely in Pakistan.

³⁵ Unwillingness and inability, after all, are not always distinct or dichotomous. On this, see Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT’L L. 244, 246 (2011). Reinold concludes that the picture is unclear in the case of Pakistan. *Id.* at 282-83.

³⁶ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 226-27 (Dec. 19) (quoting G.A. Res. 2625 (XXV), Annex, U.N. Doc. A/8082 (Oct. 24, 1979)). The court opined:

Thus the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations [hereinafter the Declaration on Friendly Relations] provides that: ‘Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.’ The Declaration further provides that ‘no State shall organize,

Advisor to United States Vice President Joseph R. Biden, reportedly put it in a conversation with Husain Haqqani, then Pakistani Ambassador to the United States, “[t]here is appeasement one day, confrontation another day, and direction a third day.”³⁷

The 2010 *Report of the United Nations Commission of Inquiry into the Facts and Circumstances of the Assassination of Former Pakistani Prime Minister Mohtarma Benazir Bhutto* (Bhutto Report) illustrates the extent to which Islamist terror has come to debilitate the Pakistani State and establish northwest Pakistan as a virtually autonomous terrorist controlled territory.³⁸ While serious questions about the culpability for Prime Minister Bhutto’s assassination remain, what is undeniable from

assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.’ These provisions are declaratory of customary international law.

Id.

Of course, Pakistan is also bound by its counterterrorism obligations under international treaty law, including those contained in S.C. Res. 1373, (U.N. Doc. S/RES/1373 (Sept. 28, 2001)), that operates by virtue of treaty commitment. *See* Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 2011 STL-11-01/1, ¶ 102 (Feb. 16). “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” U.N. Charter art. 25. On the question of unwillingness and inability in the Pakistani context, *see Hearing to Receive Testimony on the U.S. Strategy in Afghanistan and Iraq Before the S. Comm. on Armed Services*, 112th Cong. (2011) (Statement of Admiral Michael Mullen, U.S. Navy, Chairman, Joint Chiefs of Staff), available at <http://armed-services.senate.gov/statemnt/2011/09%20September/Mullen%2009-22-11.pdf>; Eric Schmitt, *Pakistan’s Failure to Hit Militant Sanctuary Has Positive Side for U.S.*, N.Y. TIMES, Jan. 17, 2011, at A4; WOODWARD, *supra* note 32, at 3-4, 64-65; COUNCIL ON FOREIGN RELATIONS, INDEPENDENT TASK FORCE REPORT NO. 65: U.S. STRATEGY FOR PAKISTAN AND AFGHANISTAN 19-21 (2010); Sadanand Dhume, *A Sanctuary for Terror*, WALL ST. J., July 27, 2010; *Pakistan’s Double Game*, N.Y. TIMES, July 26, 2010, at A18; Sikander Ahmed Shah, *War on Terrorism: Self-Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9(1) WASH. U. GLOBAL STUD. L. REV. 77, 77-88 (2010); John F. Murphy, *Afghanistan: Hard Choices and the Future of International Law*, 85 INT’L L. STUD. SER. US NAVAL WAR COL. 79, 95-96 (2009); Murphy, *International Legality*, *supra* note 33, at 114-15, 132. On the “military-madrassa-mullah complex,” *see* Sanjeeb Kumar Mohanty & Jinendra Nath Mahanty, *Military-Madrassa-Mullah Complex: Promoting Jihadist Islam in Pakistan*, 66 INDIA QUARTERLY 133 (2010). For an insightful overview of Pakistani support for Islamist militants published just prior to September 11, *see* Jessica Stern, *Pakistan’s Jihad Culture*, FOREIGN AFF., Nov.-Dec. 2000, at 115.

³⁷ WOODWARD, *supra* note 32, at 286.

³⁸ REPORT OF THE UNITED NATIONS COMMISSION OF INQUIRY INTO THE FACTS AND CIRCUMSTANCES OF THE ASSASSINATION OF FORMER PAKISTANI PRIME MINISTER MOHTARMA BENAZIR BHUTTO (Apr. 15, 2010), http://www.un.org/News/dh/infocus/Pakistan/UN_Bhutto_Report_15April2010.pdf.

the Bhutto Report is the ineptitude and factionalism of the Pakistani State on security matters and the potent threat Islamist militants continue to pose to it. The Bhutto Report is a tragic account of violence, large-scale police raids on the media, *desaparecidos*, the Red Mosque confrontation between the State and Islamist militants in Islamabad, suicide bombings throughout Pakistan (directed at security forces and civilians alike) and a Pakistani military unable to stop Islamist militants from establishing “no go” areas in geopolitically strategic parts of the country.³⁹ It is a story of Al Qaeda and the Taliban, both the TTP and the Afghan Taliban.⁴⁰ The Bhutto Report’s depictions of Pakistan in 2007, the year Prime Minister Bhutto was assassinated in Rawalpindi, describe that year as “one of the most violent years in Pakistani history, with dramatic increases both in extremist attacks carried out by radical Islamists against local targets, including suicide bombings, and in the use of force by the authorities against opposition movements.”⁴¹ A report by the non-governmental organization Campaign for Innocent Victims in Conflict echoes this situation, estimating that the number of civilian casualties in Pakistan in 2009 due to the armed conflict in the northwest of the country exceeded the number of civilian casualties in Afghanistan during the same year.⁴² The American drone campaign in northwest Pakistan must be examined within this context.

Although dispositive conclusions about the lawfulness of individual American drone attacks in northwest Pakistan under international humanitarian law do not hinge upon statistics, considering the total num-

³⁹ See *id.* at 8-9. According to Ambassador Haqqani, the number of Pakistani soldiers who have died fighting the Taliban since September 11 outstrips the number of NATO soldiers who have died fighting the Taliban. 2,000 Pakistani police officers have been killed and tens of billions of dollars in government expenditures have been diverted to the fight against terrorism. See Husain Haqqani, *An Ally of Necessity*, WALL ST. J., July 27, 2010; See also CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, CIVILIANS IN ARMED CONFLICT: CIVILIAN HARM AND CONFLICT IN NORTHWEST PAKISTAN 9-12 (2010), available at <http://www.civicworldwide.org/storage/civicdev/documents/civic%20pakistan%202010%20final.pdf>.

⁴⁰ See Bhutto Report, *supra* note 38, at 48-50. See generally Khuram Iqbal, *Tehrik-e-Taliban Pakistan: A Global Threat*, CONFLICT & PEACE STUD., Oct.-Dec. 2010, 127 (2010); Defendant’s Motion to Dismiss, Exhibit 3, Statement for Record, Senate Homeland Security and Government Affairs Committee, Michael Leiter, Director of the National Counterterrorism Center, *Nine Years After 9/11: Confronting the Terrorist Threat to the Homeland*; *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

⁴¹ Bhutto Report, *supra* note 38, at 6. See also Hina Rabbani Khar, Foreign Minister of Pakistan, Statement at the General Debate of the 66th Session of the United Nations General Assembly (Sept. 27, 2011), http://gadebate.un.org/sites/default/files/gastatements/66/PK_en_0.pdf (articulating a similar state of affairs in September 2011).

⁴² See CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, *supra* note 39, at 65.

ber of deaths and injuries to civilians and the degree of damage to civilian objects in relation to the total number of members of the Taliban and its Al Qaeda allies killed and injured, as well as insurgent assets destroyed,⁴³ does help one better appreciate the impact the drone program has had on the ground. Of course, statistics should be approached with a critical mind and carefully assessed in terms of methodological rigor, relevance and applicability.⁴⁴ Gathering statistics for drone attacks in northwest Pakistan is complicated by the presence of the Pakistani Armed Forces and restrictions on media access to areas where drone attacks take place. The statistical studies that do exist rarely define in a methodical manner the distinction between, on the one hand, combatants and civilians who directly participate in hostilities and, on the other hand, *bona fide* civilians, that is, civilians who do not directly participate in hostilities.⁴⁵ These shortcomings make it difficult to ascertain legally crucial facts, such as whether any of the purported civilians killed or injured at the time were acting as human shields, either voluntarily or involuntarily, and whether any of the purported civilians were directly participating in hostilities at the time.⁴⁶ Nonetheless, it is worth looking at three of the most significant statistical studies that focus on northwest Pakistan: a February 2010 report conducted by Bergen and Tiedemann under the auspices of

⁴³ See discussion of collateral damage, *infra*, at 440-43.

⁴⁴ On this as regards drone attacks in northwest Pakistan in particular, see Gregory S. McNeal, *Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (Claire Finkelstein et al. eds., 2012); Jacob Beswick, Working Paper: The Drone Wars and Pakistan's Conflict Casualties, 2010 (May 2011), available at, http://www.oxfordresearchgroup.org.uk/publications/briefing_papers_and_reports/working_paper_drone_wars_and_pakistan%20%80%99s_conflict_casualties. See also Adam Roberts, *Lives and Statistics: Are 90% of War Victims Civilians?*, SURVIVAL, June-July 2010, at 115.

⁴⁵ This distinction is critical. The former are targetable, the latter are not. See Schmitt, *supra* note 9, at 542. Cf. ASA KASHER & AMOS YADLIN, *Military Ethics of Fighting Terror: Principles*, 34 PHILOSOPHIA 75, 79-80 (2006) (discussing, though not from an international law perspective, various types of direct and indirect forms of participation in terrorism and presumptions in this regard).

⁴⁶ See Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 FLA. ST. J. TRANSNAT'L L. & POL'Y 237, 277 (2010). As Bergen and Tiedemann state:

Counting drone strikes and fatalities is an art, not a science, as it's not possible to differentiate precisely between militants and non-militants because militants live among the population and do not wear uniforms, and because government sources have the incentive to claim that only militants were killed, while militants often assert the opposite.

Peter Bergen & Katherine Tiedemann, *There Were More Drone Strikes – And Far Fewer Civilians Killed*, FOREIGN POL'Y (Dec. 21, 2010), http://www.foreignpolicy.com/articles/2010/12/21/the_hidden_war?page=0,5.

the New America Foundation (NAF),⁴⁷ a July 2010 British Broadcasting Corporation (BBC) study⁴⁸ and an ongoing research project carried out by Roggio and Mayer under the auspices of the *Long War Journal* (LWJ).⁴⁹

The NAF report covers the period between 2004 and February 24, 2010, its date of publication. Particularly striking is that the number of drone attacks that took place during the first fifty-five days of 2010 were, at eighteen, exactly twice the number of drone attacks that took place during the entire four years from 2004 to 2007.⁵⁰ Overall, during the almost six years and two months covered by the study, the United States carried out 114 drone attacks, resulting in between 830 and 1,210 total deaths, with between 550 and 850 of the dead being militants.⁵¹ This means that slightly more than 30% of deaths from drone attacks in the study were civilian deaths, with the percentage dropping to slightly less than 25% if one focuses only on 2009, the most active year covered by the study.⁵² Ongoing reporting by the NAF continues to bring the Bergen and Tiedemann study up to the present.⁵³

The BBC study confirms that although drone attacks took place during the Bush Administration, they have increased significantly since President Obama took office in January 2009. Between January 2008 and January 2009 there were twenty-five drone attacks in northwest Pakistan. From late January 2009, when Obama became President, through June 2010, there were nearly ninety such attacks.⁵⁴ The number of deaths during these respective periods is estimated to have been just under 200 during the former and over 700 during the latter.⁵⁵ The period under review also saw a reported widening of potential targets of American drone attacks, from Al Qaeda alone to include Al Qaeda's ally the TTP.⁵⁶

⁴⁷ Peter Bergen & Katherine Tiedemann, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010*, NEW AMERICA FOUNDATION (Feb. 24, 2010), <http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf>.

⁴⁸ *Mapping US Drone and Islamic Militant Attacks in Pakistan*, BBC NEWS (July 22, 2010), <http://www.bbc.co.uk/news/world-south-asia-10648909?print=true>.

⁴⁹ Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004-2012*, LONG WAR J., <http://www.longwarjournal.org/pakistan-strikes.php> (last updated Mar. 15, 2012).

⁵⁰ Bergen & Tiedemann, *supra* note 47, at 3.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2012*, NEW AMERICA FOUNDATION, <http://counterterrorism.newamerica.net/drones> (last updated Apr. 4, 2012).

⁵⁴ *Mapping US Drone and Islamic Militant Attacks in Pakistan*, *supra* note 48.

⁵⁵ *Id.*

⁵⁶ *Id.*

Finally, the *LWJ*'s ongoing research project also shows a steady and consistent increase in the number of drone attacks since 2004. It gives raw figures for civilian casualties and Taliban and Al Qaeda casualties, as well as distributions for drone attacks over various tribal areas in northwest Pakistan. The research indicates drone attacks have killed 2,195 militants and 138 civilians since 2006.⁵⁷ An early January 2010 report from Roggio and Mayer suggests that drone attacks have become more precise over time, which has correlated with a corresponding decrease in collateral damage.⁵⁸

As these studies reveal, the number of member of the Taliban and its Al Qaeda allies who have been killed and injured in northwest Pakistan as a result of drone attacks considerably exceeds the number of deaths and injuries to civilians, though it is important to note that international humanitarian law does not require or endorse any particular ratio.⁵⁹ Since the introduction of attack drones in northwest Pakistan, several of the highest-ranking militants operating in the area, including Al Qaeda's leader in Afghanistan and Pakistan, Sheikh Fateh al Masri; Al Qaeda's chief finance officer, Mustafa Abu Yazid; Qari Mohammad Zafar, who the United States had wanted for his alleged involvement in a 2006 attack on the United States Consulate in Karachi; senior Al Qaeda operative and member of its military *shura*, or council, Mustafa al Jaziri; militants wanted by the United States for their alleged involvement in the 1998 bombings of the United States Embassies in Tanzania and Kenya; and TTP leader Baitullah Mehsud, have been killed.⁶⁰

III. SITUATIONS OF VIOLENCE AND SITUATIONS OF ARMED CONFLICT: CLASSIFICATION AND ITS CONSEQUENCE

It is undeniable that American drone attacks in northwest Pakistan have had a significant impact in terms of deaths and injuries to civilians and damage to civilian objects. In light of the stated purpose of these attacks, to facilitate the defeat of the Taliban and its Al Qaeda allies, this quantum of harm may or may not be justifiable in terms of 'morality, ethics or policy, but these considerations are not, or are at least not wholly, considerations that determine 'the legal analysis. For example, it is possible to support the use of drone attacks, either in particular situa-

⁵⁷ Roggio & Mayer, *supra* note 49. The *LWJ* reports that data from 2004 and 2005 is not available.

⁵⁸ See Bill Roggio & Alexander Mayer, *Analysis: US Air Campaign in Pakistan Heats Up*, *LONG WAR J.* (Jan. 5, 2010), http://www.longwarjournal.org/archives/2010/01/analysis_us_air_camp-print.php. See also Bergen & Tiedemann, *supra* note 46 (echoing this point).

⁵⁹ See discussion of collateral damage, *infra*, at 440-43.

⁶⁰ Bill Roggio & Alexander Mayer, *Senior Al Qaeda and Taliban Leaders Killed in US Airstrikes in Pakistan, 2004-2012*, *LONG WAR J.*, <http://www.longwarjournal.org/pakistan-strikes-hvts.php> (last updated Jan. 26, 2012). See also Mayer, *supra* note 29.

tions or entirely, as a matter of morality, ethics or policy, and still conclude that any attack is unlawful. The inverse position is also possible.⁶¹

This article's legal frame of reference for assessing drone attacks is rooted in international humanitarian law, and as such, it operates irrespective of the law related to the use of force.⁶² Put differently, whether or not drone attacks are legal under international law related to the use of force is not dispositive as to their legality under international humanitarian law. As with the juxtaposition of considerations of morality, ethics and policy, there need not be any correlation between 'the legal analysis under the law related to the use of force and' the legal analysis under international humanitarian law. As a matter of law, these are completely separate analyses.⁶³

Before assessing the lawfulness of each American drone attack in northwest Pakistan under international humanitarian law, it is necessary to first draw the distinction in law between situations of violence and situations of armed conflict and then to understand how international humanitarian law classifies situations of armed conflict.

i. *Determining Whether a Situation of Violence Amounts to a Situation of Armed Conflict*

For decades following the Second World War, international humanitarian law did not provide a clear definition of armed conflict, despite the fact that international humanitarian law's application relies upon the existence of an armed conflict. None of the Four Geneva Conventions of 1949,⁶⁴ nor either of the two 1977 Additional Protocols to the Geneva Conventions⁶⁵ define armed conflict, and the consensus view is that the

⁶¹ See Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3, 28 (2010).

⁶² See U.N. Charter art. 2(4).

⁶³ See generally Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47 (2009).

⁶⁴ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, art. 2, Aug. 12, 1949, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*, art. 2, Aug. 12, 1949, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, art. 2, Aug. 12, 1949, 75 U.N.T.S. 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, art. 2, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter the Four Geneva Conventions of 1949].

⁶⁵ *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; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, June 8, 1977, 1125 U.N.T.S. 3.

existence of an armed conflict is determined on the basis of the particular facts and circumstances.⁶⁶

A number of important developments in international law in the last two decades have begun to clarify the threshold between armed conflict and situations falling short of armed conflict. Three of these are worth considering here: *Prosecutor v. Tadić*, the seminal case heard by the International Criminal Tribunal for the Former Yugoslavia (ICTY);⁶⁷ the Supreme Court of Israel's 2006 judgment in *Public Committee Against Torture v. State of Israel*;⁶⁸ and the 2010 *Final Report of the International Law Association's Use of Force Committee on the Meaning of Armed Conflict in International Law* (Final Report).⁶⁹

Tadić stands as perhaps the most consequential decision of any international criminal tribunal since Nuremberg. One of the reasons for this is because it gives a comprehensive definition of armed conflict. The ICTY Appeals Chamber determined an armed conflict exists "whenever there is 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."⁷⁰ After the Appeals Chamber rejected Duško Tadić's jurisdictional challenge, the case returned to the Trial Chamber for a decision on the merits. The Trial Chamber affirmed the Appeals Chamber's comprehensive definition of armed conflict in its judgment and then clarified it by noting that the threshold between armed conflict and situations falling short of armed conflict requires

⁶⁶ Interestingly, in the 1974 case of *Pan American World Airways Inc. v. Aetna Casualty and Surety Co.*, the United States Court of Appeals for the Second Circuit stated that war's "ancient international law definition . . . refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character." 505 F.2d 989, 1012 (2d Cir. 1974).

⁶⁷ See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, (Int'l Crim. Trib. International Criminal Tribunal for the Former Yugoslavia May 7, 1997), <http://www.icty.org/cases/party/787/4>. See generally International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/cases/party/787/4>.

⁶⁸ See *Targeted Killings*, *supra* note 9. On targeted killings in the context of the principle of proportionality under international humanitarian law, see Georg Nolte, *Thin or Thick? The Principle of Proportionality and International Humanitarian Law*, 4 L. & ETHICS HUM. RTS. 244, 252-55 (2010). See also Blum & Heymann, *supra* note 9, at 156-59; Schmitt, *supra* note 9, at 549-52.

⁶⁹ *The Hague Conference: Final Report on the Meaning of Armed Conflict in International Law*, INT'L L. ASSN. (2010), <http://www.ilahq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87>. On this project of the International Law Association's Use of Force Committee on the Meaning of Armed Conflict in International Law, see Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY L. 393 (2008).

⁷⁰ *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

inquiry into the “intensity of the conflict and the organization of the parties to the conflict.”⁷¹ The threshold for armed conflict itself contains two sub-thresholds, intensity and organization, and both of these must be satisfied before an armed conflict can be said to exist as a matter of law.⁷²

Targeted Killings also provides some clarity as to the threshold between armed conflict and situations falling short of armed conflict. In that case, the Israeli Supreme Court was tasked with assessing the lawfulness of Israel’s policy of targeted killings in the West Bank and Gaza. Between the outbreak of the Second Intifada in 2000 and 2005, Israel’s targeted killing policy resulted in the death of nearly 300 suspected terrorists, over 100 civilian deaths and hundreds of injuries.⁷³ The most famous example of this policy was the 2004 attack on Sheikh Ahmed Yassin, founding member of Hamas, when an Israeli helicopter gunship killed him in Gaza. In discussing whether an armed conflict paradigm applied to Israel’s targeted killing policy, the court boldly stated that “there is no doubt today that an armed conflict may take place between a state and groups or organizations that are not states, *inter alia* because of the military abilities and weapons in the possession of such organizations and their willingness to use them.”⁷⁴ The court was also clearly influenced by the State Attorney Office’s argument that Israel had suffered proportionately a much greater loss in terms of terrorism victims during the period under review than the United States had on September 11, and that these attacks were in the nature of an “‘unceasing, continuous and murderous barrage of attacks, which are directed against Israelis wherever they are, without any distinction between soldiers and civilians or between men, women and children.’”⁷⁵ Thus, *Targeted Killings*’ main contribution to the discussion lies in its focus on the willing use of violence on a significant scale by an organized group.⁷⁶

A final important development in international law in the last two decades about the threshold between armed conflict and situations falling short of armed conflict is the Final Report. It gives an overview of how international law has classified situations of violence during three time periods: 1945-80, 1980-2000, and 2000-10.⁷⁷ It concludes, along the same

⁷¹ *Tadić*, *supra* note 67, at ¶ 562.

⁷² An exception to this would be for those situations of international armed conflict involving “partial or total occupation of the territory of a High Contracting Party, *even if the said occupation meets with no armed resistance.*” Four Geneva Conventions of 1949, *supra* note 64, at art. 2 (*emphasis added*).

⁷³ *Targeted Killings*, *supra* note, ¶ 2.

⁷⁴ *Targeted Killings*, *supra* note 9, at ¶ 11.

⁷⁵ *Id.* at ¶ 16 (citing the supplement to the summary submitted by the State Attorney’s Office).

⁷⁶ For a critique of *Targeted Killings*’ conclusion that the armed conflict at issue was international, see Ensign Scott L. Glabe, *Conflict Classification and Detainee Treatment in the War Against Al Qaeda*, (6) ARMY LAW 112, 113 (2010).

⁷⁷ See INT’L L. ASSN., *supra* note 69, at 9-28.

lines as *Tadić*, that “all armed conflict involves, at a minimum, intense fighting among organized armed groups.”⁷⁸ In addition to providing significant reference to State practice, the Final Report distinguishes the two key *Tadić* criteria of intensity and organization with reference to the jurisprudence of international courts and tribunals.⁷⁹ Relevant factors for intensity include the number of involved fighters, the war-fighting capacity, the number of casualties, the extent of population displacement and potential Security Council involvement.⁸⁰ A number of factors may be persuasive in satisfying the organization element, *inter alia*, a leadership hierarchy, the provision of military training and a command structure.⁸¹

What this overview of *Tadić*, *Targeted Killings* and the Final Report suggests is that international law classifies a situation of violence as a situation of armed conflict where the “facts on the ground, the facts of fighting,”⁸² are of a certain minimum intensity and when the fighters are organized.⁸³ It is the focus on the two key *Tadić* criteria of intensity and organization that marks the Rubicon between “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”⁸⁴ and situations of armed conflict. Once this line has been crossed, international humanitarian law will apply.⁸⁵ However, given the relative nature of the two criteria of intensity and organization, the fact that they can only be interpreted in light of particular facts and circumstances, one should be careful not to dismiss the “intrusion” of considerations of discretion and policy prefer-

⁷⁸ *Id.* at 3; see Reply Mem. from ACLU, et al., in Support of Plaintiff’s Motion for a Preliminary Injunction and in Opposition to Defendants’ Motion to Dismiss, at 34; Al-Aulaqi 727 F. Supp. 2d at 1.

⁷⁹ See INT’L L. ASSN., *supra* note 69, at 28-32. See also Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69, 76-77 (2009).

⁸⁰ See INT’L L. ASSN, *supra* note 69, at 30 (internal citations omitted).

⁸¹ See *id.* at 29 (internal citations omitted).

⁸² O’Connell, *supra* note 69, at 399.

⁸³ See Chesney, *supra* note 61, at 29-30. See also Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Trial Chamber, ¶¶ 531-42 (Int’l Crim. Ct., Mar. 14, 2012); INTERNATIONAL LAW COMMISSION, *Articles on the Effects of Armed Conflicts on Treaties, With Commentaries*, [2011] REP. INT’L L. COMM’N 179, 181, art. 2(b), U.N. DOC. A/66/10.

⁸⁴ Protocol II, *supra* note 65, art. 1, ¶ 2. Cf. Rome Statute of the International Criminal Court, art. 8, ¶¶ 2(d), 2(f), July 17, 1998, A/CONF.183/9.

⁸⁵ International humanitarian law will apply, according to the ICJ, as *lex specialis*, against a background of international human rights law as *lex generalis*. See Congo, *supra* note 36, at ¶¶ 215-18, 242-43; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8). See also Schmitt, *supra* note 9, at 542; Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT’L REV. RED CROSS 737, 737-38 (2005).

ence in this area of law.⁸⁶ As Major General Charles J. Dunlap, Jr., United States Air Force (Retired), has put it, “[a]ll law, but especially LOAC [law of armed conflict], necessarily involves subjectivity implicit in human reasoning that may be troubling to those of a technical mind-set accustomed to the precision that their academic discipline so often grants.”⁸⁷

ii. *Classifying Situations of Armed Conflict*

When a situation of violence amounts to a situation of armed conflict, how international humanitarian law applies depends upon how the armed conflict at issue is classified. The prevailing view since at least the adoption of the Four Geneva Conventions in 1949 until 1977 held there were two types of armed conflicts: (1) international armed conflicts between States and situations of occupation⁸⁸ and (2) “armed conflict[s] not of an international character [occurring] in the territory of one of the High Contracting Parties.”⁸⁹ 1977 saw the “internationalization” of armed conflicts involving national liberation movements through the adoption of Additional Protocol I to the Geneva Conventions (Additional Protocol I).⁹⁰ Additional Protocol II to the Geneva Conventions (Additional Protocol II) created a set of treaty rules that would apply to armed conflicts that satisfied the Common Article 3 baseline created in 1949 for non-international armed conflicts and in addition involved fighting between the armed forces of a State in its territory and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”⁹¹ From 1977 until September 11, 2001, the consen-

⁸⁶ See Vité, *supra* note 79, at 94; Louise Arimatsu, *Territory, Boundaries and the Law of Armed Conflict*, 12 Y.B. INT’L HUMANITARIAN L. 157, 182 (2009). *But see* Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SECURITY L. & POL’Y 343, 345 (2010).

⁸⁷ Charles J. Dunlap Jr., *Perspectives for Cyber Strategists on Law for Cyberwar*, 5 STRATEGIC STUD. Q. 81, 82 (2011).

⁸⁸ See the Four Geneva Conventions of 1949, *supra* note 64, art. 2.

⁸⁹ *Id.* at art. 3.

⁹⁰ See Protocol I, *supra* note 65, art. 1, ¶¶ 2 & 3-4. Protocol I defines national liberation movements by reference to the armed conflicts in which these actors are involved, namely:

Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Id. at art. 1, ¶ 4.

⁹¹ Protocol II, *supra* note 65, art. 1, ¶ 1.

sus view was that international humanitarian law recognized three types of armed conflicts: international armed conflict, Common Article 3 non-international armed conflict, and Additional Protocol II non-international armed conflict.⁹²

September 11 demonstrated that a State can suffer an “armed attack”⁹³ irrespective of whether such an attack can be attributed to another State and that the victim State can lawfully respond in self-defense on this basis.⁹⁴ Since September 11, the ICJ has held that a victim State’s response in self-defense requires prior State attribution,⁹⁵ but this thinking was not without pointed disagreements on the bench⁹⁶ and has drawn criticism in the academic literature.⁹⁷ It should also be recalled that although the ICJ has a unique role to play as the “principal judicial organ of the United Nations,”⁹⁸ a divided court of fifteen judges in The Hague

⁹² See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 601 (Int’l Crim. Trib. International Criminal Tribunal for Rwanda Sept. 2, 1998), <http://www.unictt.org/Cases/tabid/127/PID/18/default.aspx?id=4&mnid=4> (reflecting this consensus view). See also Int’l Committee of the Red Cross [hereinafter ICRC], *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper (Mar. 2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>. On whether articles 8(2)(e) & (f) of the 1998 Rome Statute of the International Criminal Court create a distinct type of non-international armed conflict to supplement Common Article 3 non-international armed conflicts and Protocol II non-international armed conflicts, see Vité, *supra* note 79, at 80-83.

⁹³ U.N. Charter art. 51.

⁹⁴ See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). See also U.N. Secretary General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident, ¶ 41 (Sept. 2011), http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf; Schmitt, *supra* note 9, at 532-33. On the “private-army rule” in the traditional international law context, see W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT’L L. 1, 2-4 (1973).

⁹⁵ See *Congo*, *supra* note 36, at ¶¶ 106-47; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9).

⁹⁶ On this disagreement in *Congo*, see, e.g., *Congo*, *supra* note 36, at ¶¶ 16-35 (opinion of Kooijmans, J.). On this disagreement in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, see, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 95, at ¶¶ 5-6 (declaration of Buergenthal, J.). See also H CJ 7957/04 *Mara’abe v. Prime Minister of Israel* [PD 1, 17-8, 34-35 [2005]].

⁹⁷ See YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 229-30 (5th ed. 2012). Schmitt describes the ICJ’s thinking in this regard as an “unfortunate anomaly in the post-9/11 normative environment.” Schmitt, *supra* note 9, at 533; Reinold, *supra* note 35; Chesney, *supra* note 61, at 20-21; Murphy, *International Legality*, *supra* note 33, at 123-31.

⁹⁸ U.N. Charter art. 92.

does not make international law.⁹⁹ However, these are questions of the law related to the use of force, not questions of international humanitarian law. What is relevant from this context is that the attacks of September 11 were committed by a nefarious combination of a State actor in the form of the Taliban regime, the *de facto* government of Afghanistan at the time, and a non-State actor, the international terrorist organization Al Qaeda.

Faced with what Eyal Benvenisti refers to as “transnational warfare,” or “armed conflicts between state military forces and foreign non-state actors that take place *beyond* state borders,”¹⁰⁰ the consensus view on classification of armed conflicts prior to September 11, though itself not without practical difficulties, has “crumbled.”¹⁰¹ Some explanation lies in the changing nature of warfare and the difficulties that even the most creative interpreters of legal language face when attempting to reconcile “old” law with “new” facts. The consensus view’s classifications were based on whether the armed conflict at issue was “international” or “not of an international character” and also considered Additional Protocol II addressing more “specific” types of non-international armed conflict. However, this view no longer seems to “neatly” apply in a transnational context of asymmetric warfare between various State and non-State actors that operate in shifting capacities with fluctuating capabilities.¹⁰² As the Israeli Turkel Commission put it in its 2011 report on the May 2011 *Mavi Marmara* flotilla incident off the coast of Gaza, “in reality, the complexities of modern warfare pose a significant challenge when classifying an armed conflict, since not all armed conflicts can be easily classified within the framework of the traditional definition.”¹⁰³

⁹⁹ See Sloane, *supra* note 63, at 79-80. On the “conflated” jurisprudence of the ICJ as regards questions of the law related to the use of force and international humanitarian law, see *id.* at 80-93.

¹⁰⁰ Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT’L L. 339, 341 (2010). The present author has elsewhere referred to the armed conflict between the United States and Al Qaeda as a “transnational international armed conflict.” This expression seeks to convey by its use of “transnational” the armed conflict’s cross-border nature and involvement of a non-State actor, Al Qaeda, and by its use of “international” the involvement of a State actor, the United States, as an opposing Party in the armed conflict. See ROBERT P. BARNIDGE, JR., *NON-STATE ACTORS AND TERRORISM: APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE* 172-73 (2008). Admittedly, however, “transnational international armed conflict” is an imperfect construction.

¹⁰¹ See Vité, *supra* note 79, at 92-93.

¹⁰² Arimatsu has described the “international” versus “not of an international character” dichotomy as an “analytic binary straightjacket imposed by the structure of LOAC.” Arimatsu, *supra* note 86, at 160.

¹⁰³ Turkel Commission, Public Commission to Examine the Maritime Incident of 31 May 2010, Report: Part One 45 (2011), available at <http://www.turkelcommittee>.

The United States Supreme Court's 2006 decision in *Hamdan v. Rumsfeld* reflects this view.¹⁰⁴ In that case, the Court, although clearly aware of the transnational nature of the armed conflict that the United States was engaged in, interpreted Common Article 3's "not of an international character" language as applying to any armed conflict that takes place other than between two States.¹⁰⁵ This, according to the Court, was Common Article 3's "literal meaning."¹⁰⁶ Justice Clarence Thomas, joined by Justice Antonin Scalia, strongly dissented from this interpretation, stating that President Bush's interpretation of Common Article 3 to the contrary was "reasonable and should be sustained. The conflict with Al Qaeda is international in character in the sense that it is occurring in various nations around the globe."¹⁰⁷ It is difficult to fault either of these inter-

gov.il/files/worddocs/8808report-eng.pdf. See Harold Hongju Koh, Legal Advisor, U.S. State Dep't, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (stating that the "laws of war were designed primarily for traditional armed conflicts among states, not conflicts against a diffuse, difficult-to-identify terrorist enemy, therefore construing what is 'necessary and appropriate' under the AUMF [the 2001 Authorization for Use of Military Force Act] requires some 'translation,' or analogizing principles from the laws of war governing traditional *international* conflicts"); ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Excerpt of the Report Prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, Geneva, December 2003*, 86 INT'L REV. RED CROSS 213, 214 (2004) (recognizing that "international opinion – both governmental and expert, as well as public opinion – remains largely divided on how to deal with new forms of violence, primarily acts of transnational terrorism, in legal terms"). "[N]early nine years into what will likely become the longest armed conflict in American history, there is little consensus as to exactly what kind of war the United States is fighting." Glabe, *supra* note 76, at 112.

¹⁰⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). On *Hamdan*, see John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, n.26 (2011); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 56-57 (2d ed. 2010).

¹⁰⁵ See *Hamdan*, 548 U.S. 628-31.

¹⁰⁶ *Id.* at 630.

¹⁰⁷ *Id.* at 718 (Thomas & Scalia, JJ., dissenting). On the Bush Administration's view of the classification of the armed conflict, see Memorandum from the White House to Vice President, et al., of February 7, 2002: Humane Treatment of Taliban and Al Qaeda Detainees, available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf. Cf. *Targeted Killings*, *supra* note 9, at ¶ 18 (defining an "armed conflict of an international character . . . [as] one that crosses the borders of the state – whether the place where the armed conflict is occurring is subject to a belligerent occupation or not"). As Israel's high court opined:

In today's reality a terrorist organization may have a considerable military capacity, sometimes exceeding even the capacity of states. Dealing with these

pretations. As Justices Thomas and Scalia conceded, both are “plausible, and reasonable.”¹⁰⁸

For all of the Court’s faith in its interpretation being *the* interpretation that accorded with Common Article 3’s “literal meaning,” its position that Common Article 3 applies to any armed conflict that takes place other than between two States *precisely because* Common Article 2¹⁰⁹ applies to armed conflicts between two States is itself incorrect; Additional Protocol I expressly brings within the scope of Common Article 2 armed conflicts between States and national liberation movements, and national liberation movements are, of course, non-State actors. The court’s reading of the *Commentary* to Common Article 3 also seems to be “overly generous “given that it clearly reflects the considerable reluctance by States at the time of the Geneva Conventions’ adoption in 1949 to countenance the application of international humanitarian law to armed conflicts within their territorial and maritime boundaries; that is, to *internal* armed conflicts.¹¹⁰ As the *Commentary* clearly states, “[s]peaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged

dangers cannot be limited merely to the internal affairs of a state and its criminal law. Contending with the risk of terror constitutes a part of international law that concerns armed conflicts of an international nature.

Id. at ¶ 21.

But see Alston Report, supra note 9, at 18 (stating that “non-international armed conflict can exist across State borders, and indeed, often does”). Though not expressly referring to *Hamdan* or Common Article 3, *see* Paust, *supra* note 46, at 261.

¹⁰⁸ *Hamdan*, 548 U.S. 719 (Thomas & Scalia, JJ., dissenting). For a critique of *Hamdan*, *see* Glabe, *supra* note 76, at 113-14.

¹⁰⁹ The relevant part of Common Article 2 to the Four Geneva Conventions reads:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Four Geneva Conventions of 1949, *supra* note 64, at 47.

¹¹⁰ *See* ICRC, COMMENTARY (IV) GENEVA CONVENTION: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 26-44 (Jean S. Pictet ed., 1958). *See also* ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: 27 DECEMBER 2008-18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS (July 2009), at 10 n.5, available at <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperation.pdf> (relating that the “law of international armed conflicts has traditionally been used for fighting across borders between sovereign States, while the law of non-international armed conflicts has traditionally been applied within the boundaries of a State, such as civil wars or insurgencies”); COUNTERINSURGENCY FIELD MANUAL, *supra* note 13, at 352 (stating that Common Article 3 is “specifically intended to apply to *internal* armed conflicts”) (*emphasis added*); Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment at ¶ 601 (Int’l Crim. Trib. International Criminal Tribunal for Rwanda Sept. 2, 1998) (equating “non-international” and “internal” in its description of “situations of non-international (*internal*) armed conflicts”) (*emphasis added*).

in hostilities – conflicts, in short, which are in many respects similar to an international war, but take place *within the confines of a single country*.”¹¹¹ The point is not that the court, or the dissent of Justices Thomas and Scalia, was or was not correct in its interpretation, but that the nature of “transnational warfare” makes less convincing hard and fast interpretations of what had hitherto been the consensus view regarding classification of armed conflicts.

Another example of the challenges raised by the contemporary context of classification of armed conflict is the 2006 Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1 (Lebanon Report).¹¹² According to the report, even though it was only the IDF and Hezbollah that engaged in hostilities with one another during the summer of 2006, with the Lebanese Armed Forces (LAF) not actively participating in hostilities, the situation was said to have amounted to a “legally cognizable *international* armed conflict.”¹¹³ The Lebanon Report gave three reasons for this: (1) Hezbollah formed part of the Lebanese coalition government; (2) the Lebanese national narrative of Hezbollah’s resistance to Israel’s previous occupation of south Lebanon in past decades had somehow transformed it into a force with a “national” spirit; and (3) the IDF caused damage within Lebanese territory during the armed conflict, including attacks on the LAF.¹¹⁴ While these reasons could be challenged, what is particularly interesting for present purposes is that the Lebanon Report’s classification of the armed conflict, although admittedly a unique case, appears to be a “mirror image” of *Hamdan’s* reasoning; namely, that any armed conflict that takes place other than between two States is “not of an international character.”

Although the classification question is clearly not an area of international law free of controversy or inconsistency, how a particular armed conflict is classified is actually less important than one might think when it comes to the application of many international humanitarian law norms. There are a number of reasons for this. As the ICJ determined in its 1986 *Military and Paramilitary Activities in and Against Nicaragua* judgment, Common Article 3 contains international humanitarian law’s “minimum rules applicable to international and to non-international con-

¹¹¹ COMMENTARY (IV) art. 3, *supra* note 110, at 36 (*emphasis added*).

¹¹² See Commission of Inquiry on Lebanon, Human Rights Council on its 3rd Sess., ¶¶ 50-62 U.N. Doc. A/HRC/3/2 (Nov. 23, 2006). For a critique of the Lebanon Report, see Vité, *supra* note 79, at 90-92. Cf. Jelena Pejić, *The Protective Scope of Common Article 3: More Than Meets the Eye*, 93 INT’L REV. RED CROSS 189, 195, 202 (2011).

¹¹³ Lebanon Report, *supra* note 112, at 22.

¹¹⁴ See *id.* at 22-23.

flicts.”¹¹⁵ The International Committee of the Red Cross’ (ICRC) *Customary International Humanitarian Law* (CIHL) affirms that many of the norms embodied in Common Article 3 generally apply irrespective of how the armed conflict at issue is classified under international humanitarian law, as a matter of customary international law.¹¹⁶ Common Article 3 norms apply as a matter of customary international humanitarian law to all armed conflicts, not simply to those “not of an international character.” Discussing the legality of targeting decisions in its 1996 *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, the ICJ noted that the “cardinal principles contained in the texts constituting the fabric of humanitarian law”¹¹⁷ are the principles of distinction, proportionality and the Martens Clause.¹¹⁸ The ICJ did not concern itself with how the armed conflict at issue was actually classified. These particular international humanitarian law norms are reflected in both international treaty law and customary international law and must undergird any international humanitarian law analysis.¹¹⁹

IV. THE PARTICULAR CHALLENGES OF APPLYING THE INTERNATIONAL HUMANITARIAN LAW PRINCIPLES OF DISTINCTION AND PROPORTIONALITY IN THE CONTEXT OF DRONE ATTACKS

Having set forth the distinction between situations of violence and situations of armed conflict and the debate regarding how international humanitarian law classifies situations of armed conflict, we can turn to some of the persistent issues and challenges that arise when assessing

¹¹⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 219 (June 27). See Pejic, *supra* note 112, at 197-98.

¹¹⁶ See generally *Customary International Humanitarian Law Database*, ICRC, <http://www.icrc.org/customary-ihl/eng/docs/home> (last visited Apr. 13, 2012).

¹¹⁷ *Nuclear Weapons*, *supra* note 85, at ¶ 78.

¹¹⁸ Reflecting the principle of distinction, the ICJ stated that this principle is “aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.” *Id.* As to the principle of proportionality, the ICJ stated that, accordingly, “it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.” *Id.* As to the Martens Clause, see Additional Protocol I, *supra* note 65, at art. 1(2).

¹¹⁹ On the treaty international humanitarian law principles of distinction and proportionality, see, e.g., Additional Protocol I, *supra* note 65, at arts. 48, 51(5)(b). On these principles under customary international humanitarian law, see generally *Customary International Humanitarian Law Database*, ICRC, http://www.icrc.org/customaryihl/eng/docs/v1_rul (rules 1-24) (last visited Apr. 13, 2012).

American drone attacks in northwest Pakistan. Is the United States engaged in an armed conflict with the Taliban and its Al Qaeda allies? If so, how is this armed conflict to be classified? What geographic and temporal constraints might apply? Given this article's focus on drone attacks in northwest Pakistan, is the United States engaged in an armed conflict there?

Though President Obama has called for a "new beginning between the United States and Muslims around the world, one based on mutual interest and mutual respect,"¹²⁰ the United States remains of the view that it is engaged in an armed conflict with the Taliban and its Al Qaeda allies, which began on September 11 and continues to the present. This is clear from President Obama's public statements, which by their very nature inject themselves into a context of international legal meaning and significance.¹²¹ The United States Department of State Chief Legal Advisor Harold Hongju Koh reiterated this position in unmistakable language at the 2010 annual meeting of the American Society of International Law in Washington, DC, when he stated that, "as a matter of international law, 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, and may use force consistent with its inherent right to self-defense under international law."¹²² Thus, from the United States' perspective, interna-

¹²⁰ The White House, Remarks by the President on a New Beginning, Cairo University, Cairo (June 4, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09>.

¹²¹ On January 7, 2010, for example, President Obama stated that "[w]e are at war. We are at war against al Qaeda, a far-reaching network of violence and hatred that attacked us on 9/11, that killed nearly 3,000 innocent people, and that is plotting to strike us again. And we will do whatever it takes to defeat them." The White House, Remarks by the President on Strengthening Intelligence and Aviation Security (Jan. 7, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-intelligence-and-aviation-security>. See *National Security Strategy*, *supra* note 3, at 4 (asserting that "we are fighting a war against a far-reaching network of hatred and violence. We will disrupt, dismantle, and defeat al-Qa'ida and its affiliates through a comprehensive strategy that denies them safe haven, strengthens front-line partners, secures our homeland, pursues justice through durable legal approaches, and counters a bankrupt agenda of extremism and murder with an agenda of hope and opportunity. The frontline of this fight is Afghanistan and Pakistan, where we are applying relentless pressure on al-Qa'ida, breaking the Taliban's momentum, and strengthening the security and capacity of our partners.").

¹²² Koh, *supra* note 103. See Eric H. Holder, Att'y Gen. of the United States, Address at Northwestern University School of Law (Mar. 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; John O. Brennan, Strengthening Our Security by Adhering to Our Values and Laws, Program on Law and Security, Harvard Law School (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>. Cf. REPLY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO THE REPORT OF THE FIVE UNCHR SPECIAL RAPPORTEURS ON

tional humanitarian law applies to its engagements with the Taliban and its Al Qaeda allies. This means, of course, that international humanitarian law would be the legal frame of reference for assessing the lawfulness of American drone attacks in northwest Pakistan.

However, if the United States is not in an armed conflict with the Taliban and its Al Qaeda allies in northwest Pakistan, then the application of an international human rights law paradigm to the facts would determine one's legal conclusions. Under international human rights law, it would seem to be more difficult to justify each American drone attack in northwest Pakistan, as international human rights law requires that States use force as a last resort, "to protect against concrete, specific, and imminent threats of death or serious physical injury."¹²³ The legal criteria of proportionality, necessity, imminence and legality would have to be carefully parsed and applied to the facts of each attack under this paradigm.¹²⁴ Having said that, however, an argument could be made that contemporary advances in information technologies and global capabilities have relaxed this standard somewhat, at least since September 11. According to this line of thinking, one could argue that American drone attacks on suspected terrorists in northwest Pakistan in the autumn of 2010 may not necessarily have been unlawful under international human rights law given an asserted increase in the terrorist threat to the United States and Europe, and to American interests in Europe,¹²⁵ and given the "consent" of the Pakistani State.¹²⁶ "IHRL [international human rights

DETAINEES IN GUANTANAMO BAY, CUBA, 45 INT'L LEGAL MATS. 742, 749-51 (2006) (articulating the Bush Administration's not altogether dissimilar view on this point).

¹²³ Reply Memorandum from ACLU, et al., in Support of Plaintiff's Motion for a Preliminary Injunction and in Opposition to Defendant's Motion to Dismiss, at 34, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (2010) (No. 10-1469), 2010 WL 4974323. See TURKEL, *supra* note 103, at 232-33; Stefanie Schmahl, *Targeted Killings — A Challenge for International Law?*, in *THE RIGHT TO LIFE* 233, 238-41 (Christian Tomuschat et al. eds., 2010). According to Schmahl, "targeted killings are only acceptable in cases of a concrete and imminent threat, that is, for example, the planting of a specific bomb or booby trap." *Id.* at 264.

¹²⁴ See Chesney, *supra* note 61, at 49-56 (applying these criteria in assessing whether a targeted killing of Al Qaeda in the Arabian Peninsula operative Anwar Al-Awlaki could be lawful under international human rights law). See also Schmahl, *supra* note 123, at 245-46; Schmitt, *supra* note 9, at 528-30. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted in Havana in 1990, are also worth considering in this context.

¹²⁵ See *Drone Attacks "Linked" to Suspected Europe Terror Plot*, BBC NEWS (Oct. 6, 2010, 9:48 AM) <http://www.bbc.co.uk/news/world-south-asia-11481733?print=true>; *Intelligence on Purported Europe Terror Plot Called "Credible,"* MSNBC (Sept. 30, 2010), http://www.msnbc.msn.com/id/39413455/ns/world_news-europe/#.

¹²⁶ Wikileaks' circulation of American diplomatic cables in late-2010 raised this possibility most dramatically. See *US Embassy Cables: Pakistan Backs US Drone Attacks on Tribal Areas*, GUARDIAN (Nov. 30, 2010), <http://www.guardian.co.uk/>

law] in this specific respect produces much the same result as would IHL [international humanitarian law], thereby reducing the significance of determining which model controls in the first place.”¹²⁷

As discussed above, the contemporary context of warfare has rendered “outdated” the traditional insistence that armed conflicts can take place only between States or within them. Such armed conflicts do take place, as they always have, but just as States can no longer credibly “hide behind” “matters which are essentially within the domestic jurisdiction of any state”¹²⁸ in an era of each State’s “responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity,”¹²⁹ so it must also be recognized that a State’s territorial and

world/us-embassy-cables-documents/167125/print. See also WOODWARD, *supra* note 32, at 26, 368. On consent in the Pakistani context, see Reinold, *supra* note 35, at 279-80. On consent in the Alston Report, see *Alston Report*, *supra* note 9, at 12. This article takes no particular position on the validity or otherwise of this circumstance precluding wrongfulness in the Pakistani case and recognizes that the facts and circumstances at issue would have to be carefully parsed before one could draw conclusions as a matter of law. See International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, [2001] 2(2) Y.B. INT’L L. COMM’N 30, 72-74, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). One would also want to consider the possible applicability of *lex specialis* rules of State responsibility and modalities of State responsibility that the principles of law embodied in at least some of the articles in the International Law Commission’s 2001 *Articles on Responsibility of States for Internationally Wrongful Acts* do not regulate. See *id.* at 139-41. See also Akbar Nasir Khan, *Legality of Targeted Killings by Drone Attacks in Pakistan*, PAKISTAN INSTITUTE FOR PEACE STUDIES (Feb. 2011), at 5, <http://www.san-pips.com/download.php?f=76.pdf>; Murphy, *International Legality*, *supra* note 33, at 118-20.

¹²⁷ Chesney, *supra* note 61, at 55-56 (making this point after having considered that a targeted killing of Al Qaeda in the Arabian Peninsula operative Anwar Al-Awlaki could be lawful under international human rights law). *But see Alston Report*, *supra* note 9, at 11. On the relationship between international human rights law and international humanitarian law, see PANEL OF INQUIRY REPORT, *supra* note 94, at 94-102.

¹²⁸ U.N. Charter art. 2(7). Arbitrator Max Huber classically described State sovereignty in the 1928 *Island of Palmas* case as “[i]ndependence in regard to a portion of the globe[,] . . . the right to exercise therein, to the exclusion of any other State, the functions of a State.” *Island of Palmas*, 2 R.I.A.A. 829, 838 (1928).

¹²⁹ G.A. Res. 60/1, at 30, U.N. Doc. A/RES/60/1 (Sept. 16, 2005). See, e.g., S.C. Res. 1970, pmb., U.N. Doc. S/RES/1970 (Feb. 26, 2011) (“[r]ecalling the Libyan authorities’ responsibility to protect its population”). Addressing the American people on March 28, 2011, President Obama seemed to take this concept a radically new step further, stating that “[t]o brush aside America’s responsibility as a leader and – more profoundly – *our responsibilities to our fellow human beings under such circumstances* would have been a betrayal of who we are.” The White House, Remarks by the President in Address to the Nation on Libya, National Defense University, Washington, DC (Mar. 28, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya> (*emphasis added*). Cf.

maritime boundaries are as much capable of harboring violence as they are of preventing its intrusion from outside. It is revealing that one of President Obama's first acts in office was to select Richard Holbrooke as Special Representative for Afghanistan and Pakistan, two States in one region, or, as the late Ambassador Holbrooke would put it, "two very distinct countries with extraordinarily different histories, and yet intertwined by geography, ethnicity, and the current drama."¹³⁰

To the extent a sufficient "nexus" exists between the armed conflict that ensued between the United States and the Taliban and its Al Qaeda allies in the wake of September 11, and the acts of a person who participates in hostilities, whether by his or her very nature, as a combatant, or directly, as a civilian,¹³¹ then it can be said that the "fight," as a matter of law, "follows the fighter."¹³² This was the case during the Second World War, when the United States Army Air Force shot down and killed Japanese Admiral Isoroku Yamamoto, the planner of the attack on Pearl Harbor, when he was flying to Bougainville Island on a planned inspection of Japanese soldiers, and it remains the rule today.¹³³

The effect of this is that international humanitarian law applies both to the immediate area of hostilities, that is, within Afghanistan, and "further afield," the only requirement being, to use the ICTY's language in its 2002 *Prosecutor v. Kunarac* judgment, one of "substantial[]

Reinold, *supra* note 35, at 245 (arguing that, post-September 11, "sovereignty entails responsibility for the effective control of one's territory and that failure to discharge this obligation legitimates a military response").

¹³⁰ United States Department of State, Secretary Clinton with Vice President Joe Biden Announce Appointment of Special Envoy for Middle East Peace George Mitchell and Special Representative for Afghanistan and Pakistan Richard Holbrooke (Jan. 22, 2009), <http://www.state.gov/secretary/rm/2009a/01/115297.htm>.

¹³¹ See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009*, 90 INT'L REV. RED CROSS 991 (2008).

¹³² See Blum & Heymann, *supra* note 9, at 168 (relating this view in stating that, "[i]f a terrorist plan is an act of war by the organization supporting it, any member of any such terrorist organization may be targeted anytime and anywhere plausibly considered 'a battlefield,' without prior warning or attempt to capture"). See also Paust, *supra* note 46, at 255. Chesney, though without expressly using the language of "nexus," makes this argument with respect to Al Qaeda in the Arabian Peninsula and Yemen. See Chesney, *supra* note 61, at 34-38. On the concept of "nexus," see *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶¶ 55-65 (INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA JUNE 12, 2002).

¹³³ On the shooting down and killing of Admiral Yamamoto, see *Barber v. Widnall*, 78 F.3d 1419, 1420-21 (9th Cir. 1996). Also referring to this incident, see Blum & Heymann, *supra* note 9, at 150; Adam Entous, *Special Report: How the White House Learned to Love the Drone*, REUTERS (May 18, 2010), <http://www.reuters.com/assets/print?aid=USTRE64H5SL20100518>; Holder, *supra* note 122; Koh, *supra* note 103; DINSTEIN, CONDUCT, *supra* note 104, at 103-04.

relat[ion].”¹³⁴ In this sense, it would not be entirely correct to assert, as O’Connell does, that, “[a]rmed conflict has a territorial aspect. It has territorial limits. It exists where (but only where) fighting by organized armed groups is intense and lasts for a significant period.”¹³⁵ *Kunarac* states “there is no necessary correlation between the area where the actual fighting is taking place, and the geographical reach of the laws of war.”¹³⁶ Of course, this understanding of armed conflict must be read in conformity with the two key *Tadić* criteria of intensity and organization.¹³⁷

An alternative view, distinct from the “extension” argument just discussed, is that the United States is engaged in an armed conflict *in north-west Pakistan in particular* given that it has intervened there in a way that has overlapped with the internal armed conflict in which Pakistan itself is engaged. The ICTY Appeals Chamber acknowledged this “overlap” understanding of armed conflict in its 1999 *Tadić* judgment when it stated:

It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alter-

¹³⁴ *Kunarac*, *supra* note 132, at ¶ 60 (stating that “[t]he laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it”).

¹³⁵ Declaration of Prof. Mary Ellen O’Connell, *Al-Aulaqi v. Obama* (Oct. 8, 2010), at 7, http://www.aclu.org/files/assets/O_Connell_Declaration.100810.pdf. *But see* Brennan, *supra* note 122 (making an opposing point as regards “hot battlefields”).

¹³⁶ *Kunarac*, *supra* note 132, at ¶ 57. According to the ICTY, relevant considerations include whether the victim is a non-combatant, whether the perpetrator is a combatant, and how the attack at issue relates to the overall strategic goal of the fighting forces. *See id.* at ¶ 59.

¹³⁷ The fact that Al Qaeda has both a unique organizational structure and a more familiar hierarchical system of leadership and committees that set policy and manage violent operations, media outreach and financial matters makes it particularly potent as an adversary for the United States. *See* Steve Coll, *House Testimony: The Paradoxes of Al Qaeda*, *NEW YORKER BLOG* (Jan. 27, 2010), <http://www.newyorker.com/online/blogs/stevecoll/steve-coll/2010/01> (describing Al Qaeda as “several things at once: An organization, a network, a movement or ideology, and a global brand”). *See also* Leah Farrall, *How Al Qaeda Works: What the Organization’s Subsidiaries Say About Its Strength*, 90 *FOREIGN AFF.* 128 (2011); Jayshree Bajoria, *Shared Goals for Pakistan’s Militants*, Council on Foreign Relations (May 6, 2010), <http://www.cfr.org/pakistan/shared-goals-pakistans-militants/p22064>.

natively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.¹³⁸

It is also worth mentioning in this context that Pakistani Minister of State for Foreign Affairs Hina Rabbani Khar's condemnation of American drone attacks in northwest Pakistan on March 17, 2011 was phrased in the language of armed conflict: "[s]uch strikes constitute a matter of serious concern and raise issues regarding respect for human rights and humanitarian law. Irresponsible and unlawful conduct cannot be justified on any grounds."¹³⁹ Admittedly, the Minister of State's statement was not particularly clear in recognizing that the United States was engaged in an armed conflict with the Taliban and its Al Qaeda allies on the Pakistani side of the Durand Line, but it is a legally significant admission that contributes to the case for the existence of an armed conflict in northwest Pakistan. Proceeding from the position that the situation of violence that the United States is engaged in with the Taliban and its Al Qaeda allies in northwest Pakistan amounts to an armed conflict, international humanitarian law would be the appropriate legal frame of reference for assessing the lawfulness of individual drone attacks in northwest Pakistan.

Given that the United States has conducted almost 300 drone attacks in northwest Pakistan in recent years and that international humanitarian law would require an exacting and individualized assessment for each of these attacks, space constraints preclude broad and sweeping generalizations about the compliance of each of these attacks under this branch of law. International humanitarian law is extraordinarily fact intensive, and the meaning attached to many of its key principles, in particular the principle of proportionality, is often contested and prone to political manipulation.¹⁴⁰ As the ICJ noted in its 1980 *Interpretation of the Agreement of*

¹³⁸ Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber, ¶ 84 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

¹³⁹ *Minister of State for Foreign Affairs Joins in the Condemnation*, DAWN.COM (Mar. 18, 2011, 10:41 PM), <http://www.dawn.com/2011/03/18/minister-of-state-for-foreign-affairs-joins-in-the-condemnation.html>. For the official Pakistani press releases on these particular drone attacks, see Pakistan Ministry of Foreign Affairs, Minister of State for Foreign Affairs Condemns Drone Attacks, press release n. 106/2011 (Mar. 18, 2011), http://www.mofa.gov.pk/Press_Releases/2011/Mar/Pr_106.htm; Pakistan Ministry of Foreign Affairs, US Ambassador Summoned to Protest 17 March Drone Attacks, press release n. 105/2011 (Mar. 18, 2011), http://www.mofa.gov.pk/Press_Releases/2011/Mar/Pr_105.htm; Pakistan Ministry of Foreign Affairs, Pakistan Strongly Condemns Drone Attacks, press release n. 104/2011 (Mar. 17, 2011), http://www.mofa.gov.pk/Press_Releases/2011/Mar/Pr_104.htm.

¹⁴⁰ Nolte refers to proportionality as a "concept which is process- and goal-oriented without necessarily claiming to fully predetermine outcomes. It evokes a common understanding, but at the same time it refers back to the specifics. It can be understood as a principle and as a rule, depending on the context in which it is applied, the case to which it is applied, and the aspect of the case to which it is applied." Nolte, *supra* note 68, at 247.

25 March 1951 *Between the WHO and Egypt* advisory opinion, “a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part.”¹⁴¹

The rest of this section examines three persistent issues identified at the beginning of the paper: (1) collateral damage; (2) accountability to the international community; and (3) the legal implications of CIA involvement in the drone attacks. These issues reveal some of the main challenges from an international humanitarian law perspective.

First, although international humanitarian law recognizes that it is “[u]nable to eliminate the scourge of war . . . [and instead] endeavours to master it and mitigate its effects,”¹⁴² the principle of proportionality does not forbid collateral damage when such damage is outweighed by a particular attack’s “concrete and direct military advantage anticipated.”¹⁴³ Indeed, it would not be putting it too strongly to say that State practice supports, even *endorses*, the inevitability of collateral damage, the “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof.”¹⁴⁴ Of course, international humanitarian law *does* prohibit disproportionate attacks,¹⁴⁵ and violations of this prohibition can entail State responsibility,¹⁴⁶ individual criminal responsibility¹⁴⁷ or both.¹⁴⁸ However, it is clear that collateral damage as such is not necessarily unlawful under international humanitarian law and that proportionality is a calculus of intangibles that balances military and civilian concerns. Proportionality must be assessed within the context of particular facts and circumstances, and conclusions of law cannot be drawn *in abstracto*.

With this understanding of the international humanitarian law principle of proportionality, one can begin to assess the legal implications of the drone attack that killed Baitullah Mehsud. When Hellfire missiles from

¹⁴¹ Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 76 (Dec. 20). Cf. *Mara’abe*, *supra* note 96, ¶ 61 (stating the legal maxim *ex facto jus oritur*, the idea that “the facts lie at the foundation of the law, and the law arises from the facts”).

¹⁴² ICRC, PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), 8 JUNE 1977 480 (Yves Sandoz, Christopher Swinarski & Bruno Zimmermann eds., 1987).

¹⁴³ Additional Protocol I, *supra* note 65, art. 51(5)(b).

¹⁴⁴ See Additional Protocol I, *supra* note 65, art. 51(5)(b).

¹⁴⁵ See *id.* at arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b).

¹⁴⁶ See International Law Commission, *supra* note 126, at 32, ART. 1.

¹⁴⁷ Additional Protocol I, *supra* note 65, art. 85(3)(b). Cf. Rome Statute, *supra* note 84, art. 8(2)(b)(iv).

¹⁴⁸ The question of individual criminal responsibility operates independently of the question of State responsibility. See International Law Commission, *supra* note 126, at 142, art. 58.

an American Predator drone killed Mehsud in South Waziristan, it was reported that he perished along with his wife, his mother- and father-in-law, seven bodyguards and a TTP lieutenant.¹⁴⁹ It was alleged that Mehsud played a key role in supporting the insurgency in Afghanistan and in numerous acts of terrorism inside Pakistan itself, including the Marriott Hotel bombing in Islamabad in September 2008 and the assassination of Prime Minister Bhutto.¹⁵⁰ Given Mehsud's leadership position in the TTP and the crucial role he played in the ongoing armed conflict in AfPak, opposing both the United States and Pakistan, the drone attack seems to have been proportionate despite the reasonable foreseeability of collateral damage. It would be disingenuous not to recognize this as being as much an ethical judgment as a legal judgment, but such is the nature of legal conclusions in this area of law.¹⁵¹

O'Connell suggests that the drone attack on Mehsud likely violated international humanitarian law because the TTP leader had, at the time of the fatal attack, reportedly been receiving an intravenous transfusion and, as such, was an enemy person *hors de combat*.¹⁵² An enemy person cannot be targeted and does not qualify as a military objective when he or she is *bona fide hors de combat*.¹⁵³ According to the *Commentary* to Common Article 3, the essence of this "categorical imperative"¹⁵⁴ is that the sick and wounded must be "respected and protected."¹⁵⁵ *CIHL* defines an enemy person *hors de combat* as one who is "no longer participating in hostilities, by choice or circumstance."¹⁵⁶ Article 41(2)(c) of Additional Protocol I gives an exclusive list of three subtypes of enemy persons *hors de combat*, and the relevant subtype for present purposes is the third subtype, that of an enemy person who "has been rendered

¹⁴⁹ See Mayer, *supra* note 29. Callam reports that Mehsud's uncle also died in the attack. See Callam, *supra* note 12.

¹⁵⁰ See Mayer, *supra* note 29. The investigation into Prime Minister Bhutto's assassination remains ongoing.

¹⁵¹ See *Targeted Killings*, *supra* note 9, at ¶ 45.

¹⁵² See Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009* (Notre Dame Law School Legal Studies Research Paper No. 09-43, 24-25, 2010), <http://ssrn.com/abstract=1501144>. See also Mayer, *supra* note 29 (describing the attack). As O'Connell somewhat sarcastically puts it, "[i]n this case, twelve persons were killed in the targeting of one man hooked up to an intravenous drip." O'Connell, *supra*, at 27.

¹⁵³ On this principle under treaty international humanitarian law, see Common Article 3 to the Four Geneva Conventions of 1949, *supra* note 64; Additional Protocol I, *supra* note 65, at art. 41; Additional Protocol II, *supra* note 65, at art. 4. On this principle under customary international humanitarian law, see ICRC, Rule 47, Attacks Against Persons Hors de Combat (Mar. 12, 2011), http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule47.

¹⁵⁴ Commentary, *supra* note 110, art. 3 at 40.

¹⁵⁵ *Id.* at 41.

¹⁵⁶ Rule 47, *supra* note 153.

unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself.”¹⁵⁷ It is important to stress, however, that none of these subtypes apply if the enemy person at issue does not “abstain[] from any hostile act.”¹⁵⁸ As the *Commentary* to Article 41 of Additional Protocol I stresses, “[a]ny hostile act gives the adversary the right to take countermeasures until the perpetrator of the hostile act is recognized, or in the circumstances, should be recognized, to be ‘hors de combat’ once again.”¹⁵⁹

O’Connell’s criticism of the drone attack on Mehsud on enemy person *hors de combat* grounds is unconvincing. As the TTP leader at the time of the attack, Mehsud was a highly-skilled and disciplined militant who survived previous threats and drone attacks and was wanted by both the United States and Pakistan.¹⁶⁰ It is reasonable to assume that he would not have left himself exposed and defenseless in a region well known for American drone strikes, which South Waziristan surely was and remains. Even if one assumes that Mehsud’s relatives were civilians *bona fide*, his over half a dozen bodyguards and the TTP lieutenant were not. Was Mehsud communicating with his bodyguards or with the lieutenant about military matters at the time of the attack? It seems reasonable to conclude that he was given the circumstances. If he was, then, according to the *Commentary* to Article 41 of Additional Protocol I, this would have been considered a hostile act that would have divested him of whatever protected status he might otherwise have been able to claim as an enemy person *hors de combat*.¹⁶¹ Even if one were to conclude that Mehsud had been an enemy person *bona fide hors de combat* at the time of the attack and, as such, could not have been targeted, it is important to recognize that Mehsud’s bodyguards and the TTP lieutenant were military objectives and, as such, could have been targeted. Given the hostile terrain in AfPak and the real challenges posed by the embedding of civilians *bona fide* by militants in violation of international humanitarian law,¹⁶² it could

¹⁵⁷ Additional Protocol I, *supra* note 65, at art. 41(2)(c). Article 41(2)’s two other subtypes, in sub-articles (a) and (b), are for enemy persons who are, respectively, “in the power of an adverse Party” or who have “clearly express[ed] an intention to surrender.” *Id.*

¹⁵⁸ *Id.* at art. 41(2).

¹⁵⁹ ICRC, *supra* note 142, art. 41 at 488 (*emphasis added*).

¹⁶⁰ See Callam, *supra* note 12.

¹⁶¹ See ICRC, *supra* note 142, at 488. “It is clear that it is sufficient for one of the two contingencies referred to here – a hostile act or an attempt to escape – to be committed, for the safeguard to cease. Moreover, these exceptions remain the same throughout the period of captivity.” *Id.* at 489.

¹⁶² On the prohibition of human shields under treaty international humanitarian law, see Fourth Geneva Convention, *supra* note 64, at art. 28; Additional Protocol I, *supra* note 65, at art. 51(7)-(8). On this question under customary international humanitarian law, see ICRC, Rule 97, Human Shields (Mar. 12, 2011), http://www.icrc.org/customaryihl/eng/docs/v1_rul_rule97.

be argued that an attack directed at Mehsud's bodyguards and the TTP lieutenant alone would not have been disproportionate in an alternative proportionality calculus despite reasonably foreseeable risk of collateral damage to Mehsud and his relatives.¹⁶³ A final point is that while O'Connell is certainly correct to note that doubt should be resolved in favor of recognizing a person's protected status,¹⁶⁴ a "reasonable man"¹⁶⁵ could have had no doubt in Mehsud's case. Indeed, given Mehsud's background and the context of the insurgency in AfPak, it would have been unreasonable to have doubted the legality of the attack.

A second persistent issue that has arisen is criticism that the United States has been insufficiently forthcoming and transparent about its drone attacks. In its "Conclusions and Recommendations" section, Philip Alston's *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution* (Alston Report) stresses the need for States that engage in targeted killings to publicly reveal the rules of law they believe justify each killing, the bases upon which they use deadly force rather than attempt capture, the nature of procedural safeguards that ensure compliance with international law and procedures for *post facto* assessment and remedial measures.¹⁶⁶ This concern evokes United States Supreme Court Justice Louis D. Brandeis' famous quip that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."¹⁶⁷

These interrelated concerns of transparency may or may not be understood as a matter of moral, ethical or policy preference, but they are not required from an international humanitarian law perspective.¹⁶⁸ Certainly, American drone attacks must comply with the "cardinal principles contained in the texts constituting the fabric of humanitarian law," and the United States must perform its treaty obligations in good faith¹⁶⁹ and

¹⁶³ Again, this assumes that Mehsud had been an enemy person *bona fide hors de combat* at the time of the attack and that his relatives were civilians *bona fide*.

¹⁶⁴ See O'Connell, *supra* note 152, at 25.

¹⁶⁵ ICRC, *supra* note 142, at 491, art. 41.

¹⁶⁶ See Alston Report, *supra* note 9, at 27. See also CAMPAIGN, *supra* note 39, at 68. Of course, consideration of the Alston Report as such sets aside, advisedly or not, the preliminary question of "institutional justiciability," that is, whether the mandate of a United Nations human rights special rapporteur extends to an assessment of *lex specialis* outside of international human rights law. See *Targeted Killings*, *supra* note 9, at ¶¶ 47-54 (comparing and contrasting "normative justiciability" and "institutional justiciability").

¹⁶⁷ LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT* 92 (2009).

¹⁶⁸ On this, see Anderson, *supra* note 9, at 28-31. According to Major General Dunlap, though writing in the context of international law and cyberwar, "many problems masquerading as 'legal' issues are really undecided policy issues with a number of legal alternatives." Dunlap, *supra* note 87, at 94.

¹⁶⁹ See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26.

interpret these obligations “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁷⁰ Apart from these broad legal obligations, the United States, as with all other States that engage in methods and means of warfare, is not required by international humanitarian law to reveal its tactical “playbook.” The United States need not reveal its understanding of civilians who directly participate in hostilities, though it must, of course, interpret this concept in good faith. Indeed, the Alston Report itself admits that the weight of State practice supports this understanding: “[b]ecause there is no commonly accepted definition of DPH [direct participation in hostilities], it has been left open to States’ own interpretation – which States have preferred not to make public – to determine what constitutes DPH.”¹⁷¹ The point is not that “much about the [Obama] Administration’s position remains unclear”¹⁷² anymore than it is to bemoan vague treaty language or vague provisions in United Nations Security Council Resolutions. The United States’ position is strategically vague but legally defensible, and international humanitarian law does not require more than this.

A final persistent issue that has arisen in the context of the American drone campaign in northwest Pakistan is the legal implications of CIA involvement. If, as this article maintains, the situation of violence that the United States is engaged in with the Taliban and its Al Qaeda allies in northwest Pakistan amounts to an armed conflict, then one must grapple with the so-called “combatant’s privilege,” that is, the “right to partici-

¹⁷⁰ *Id.* at art. 31(1). The United States is not a Party to the 1969 Vienna Convention on the Law of Treaties, but the ICJ has held that articles 31 and 32 of it reflect customary international law. *See Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, 48 (Mar. 31). *See also* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (No. 17), Advisory Opinion, 2011 I.T.L.O.S., http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf, ¶ 57 (Feb. 1).

¹⁷¹ *Alston Report*, *supra* note 9, at 19. *See* COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, *Targeting Operations with Drone Technology: Humanitarian Law Implications: Background Note for the American Society of International Law Annual Meeting*, 17-18 (2011), http://www.law.columbia.edu/ipimages/Human_Rights_Institute/BackgroundNoteASILColumbia.pdf (reflecting this view in stating that “there is a wide spectrum of views on what it means for civilians to directly participate in hostilities, and thereby lose protection against direct attack”). Of course, putative norms of law, such as the interrelated concerns as regards the transparency of the American drone campaign in northwest Pakistan, that are themselves disjointed from State practice reveal their more accurately-described nature as normative *lex ferenda* rather than normative *lex lata*.

¹⁷² *Id.* at 16.

pate directly in hostilities.”¹⁷³ As the Inter-American Commission on Human Rights put it in its 2002 Report on Terrorism and Human Rights, this is, “in essence[,] a license to kill or wound enemy combatants and destroy other enemy military objectives.”¹⁷⁴ Only certain organizations and persons have this right by their very nature; all other organizations and persons do not. As a civilian intelligence agency, the CIA falls into the latter category. It is not part of the American armed forces, and it has not been incorporated into it.¹⁷⁵

Given the significant CIA involvement in the drone program,¹⁷⁶ CIA agents who participate in drone attacks can be targeted “for such time as they take a direct part in hostilities.”¹⁷⁷ Furthermore, as a corollary, those physical assets of the CIA that “by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage” can be attacked.¹⁷⁸ That the United States has focused so much of its efforts in the fight against terrorism to its drone campaign suggests that the CIA’s physical assets do indeed make an “effective contribution to military action” in the sense of international humanitarian law and, as such, could lawfully be targeted by the Taliban and its Al Qaeda allies.¹⁷⁹

Although the CIA’s involvement in the drone campaign opens the CIA to attacks that international humanitarian law would not otherwise permit, it should be stressed that CIA involvement in drone attacks is not

¹⁷³ On this principle under treaty international humanitarian law, see Additional Protocol I, *supra* note 65, at art. 43(2). On this principle under customary international humanitarian law, see ICRC, Rule 3, Definition of Combatants (Mar. 12, 2011), http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule3. See also ICRC, *supra* note 131, at 1007 n.52.

¹⁷⁴ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS, ¶ 68, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (Oct. 22, 2002), available at <http://www.cidh.oas.org/Terrorism/Eng/part.b.htm>.

¹⁷⁵ “Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.” Protocol I, *supra* note 65, at art. 43(3). See ICRC, *Customary International Humanitarian Law*, at Rule 4 (2009.), available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule4. See also HUMAN RIGHTS INSTITUTE, *supra* note 171, at 27-29.

¹⁷⁶ See Tara Mckelvey, *Inside the Killing Machine*, NEWSWEEK (Feb. 11, 2011, 10:00 AM), <http://www.newsweek.com/2011/02/13/inside-the-killing-machine.print.html>; Gary Solis, *CIA Drone Attacks Produce America’s Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, at A17; Mayer, *supra* note 29. See also Al-Aulaqi 727 F. Supp. 2d at 11 (discussing so-called “kill lists”).

¹⁷⁷ Protocol I, *supra* note 65, at art. 51(3); Protocol II, *supra* note 65, at art. 13(3). See ICRC, *supra* note 175, at Rule 6.

¹⁷⁸ Protocol I, *supra* note 65, at art. 52(2). See ICRC, *supra* note 175, at Rule 8.

¹⁷⁹ Of course, any such attacks by the Taliban and its Al Qaeda allies would have to comply with the core tenets of international humanitarian law, in particular distinction and proportionality.

unlawful as such under international humanitarian law. The ICRC's 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (Interpretive Guidance)*, though itself not legally binding and controversial,¹⁸⁰ is surely correct to note that, "[i]n the final analysis, IHL neither prohibits nor privileges civilian direct participation in hostilities."¹⁸¹ Assuming that CIA agents whose actions amount to direct participation in hostilities otherwise comply with international humanitarian law in their targeting decisions and the attacks that they undertake on the Taliban and its Al Qaeda allies in northwest Pakistan, international humanitarian law does not criminalize their behavior, though States remain free to investigate and prosecute them for common crimes.¹⁸² In this sense, while Solis is certainly correct to note that CIA agents whose actions amount to direct participation in hostilities would not be entitled to prisoner of war status, he errs in suggesting that such CIA involvement amounts to a war crime.¹⁸³ As the 2009 Report of the United Nations Fact-Finding Mission on the Gaza Conflict notes, armed groups' "failure to distinguish themselves from the civilian population by distinctive signs is not a violation of international law in itself, but would have denied them some of the legal privileges afforded to combatants."¹⁸⁴

V. CONCLUSION

It has been said that "[c]onfronting the violent lawlessness that is terrorism with strict adherence to the rule of law makes common sense and

¹⁸⁰ See TURKEL COMMISSION, *supra* note 103, at 235; J. Jeremy Marsh & Scott L. Glabe, *Time for the United States to Directly Participate*, 1 VA. J. INT'L L. ONLINE 13 (2011); Dapo Akande, *Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities*, 59 INT'L & COMP. L.Q. 180 (2010); William H. Boothby, *Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance*, 1 INT'L HUMANITARIAN LEGAL STUD. 143 (2010); DINSTEIN, CONDUCT, *supra* note 104, at 146-47; Bill Gertz, *Inside the Ring*, WASH. TIMES, June 18, 2009, <http://www.washingtontimes.com/news/2009/jun/18/inside-the-ring-95264632/?page=all>. The *Interpretive Guidance* hopes for persuasive potential but admits, correctly, that a "legally binding interpretation of IHL can only be formulated by a competent judicial organ or, collectively, by the States themselves." ICRC, *supra* note 131, at 992.

¹⁸¹ *Id.* at 1047. See also *id.* at 1045 n.227.

¹⁸² See *id.* at 1045-47. See also *Alston Report*, *supra* note 9, at 21-22.

¹⁸³ See Solis, *supra* note 176. See also Dunlap, *supra* note 87, at 91-92.

¹⁸⁴ GAZA REPORT, *supra* note 24, at 123. See Pejic, *supra* note 112, at 33 (reaffirming this notion by stating that "civilian direct participation may be prosecuted under domestic law but does not constitute a violation of IHL and is not a war crime *per se* under treaty or customary IHL"); INTER-AMERICAN COMMISSION, *supra* note 174, at ¶ 69 (noting that "[m]ere combatancy by such persons is not tantamount to a violation of the laws and customs of war, although their specific hostile acts may qualify as such").

moral sense.”¹⁸⁵ However, in a world in which common sense is “seemingly the least common of all senses”¹⁸⁶ and most everyone claims the moral mantle, this is not particularly reassuring. Rule of law appears as an attractive option, but when international law kinetically pivots between State practice of the past and the dilemmas of the present, “it is much harder to say what the law exactly is, and how it should be applied in this context.”¹⁸⁷ “The law is the law” too often rings hollow, it seems, in all but the most indeterminate of senses. This is certainly the case within the context of the fight against terrorism, and it is quite clearly the case within the context of the American drone campaign in northwest Pakistan.

The drone campaign raises fundamental questions of the acceptability of violence as a form of conflict resolution. Chapter VI of the United Nations Charter, with its insistence on the pacific settlement of disputes, sought to “restart” history in this regard. It has partly succeeded; it has partly failed. Yet one should not lose sight of the fact that in grappling with the drone question, as with questions of violence generally, one is forced to face squarely and honestly the words of the aged soldier in Kipling’s great novel of British India, *Kim*: “[I]f evil men were not now and then slain it would not be a good world for weaponless dreamers. I do not speak without knowledge who have seen the land from Delhi south awash with blood.”¹⁸⁸

¹⁸⁵ O’Connell, *supra* note 152, at 26.

¹⁸⁶ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, 2010 I.C.J., ¶ 96 (Apr. 20) (separate opinion of Cançado Trindade, J.).

¹⁸⁷ John B. Bellinger III, *Prisoners in War: Contemporary Challenges to the Geneva Conventions*, 8 (Dec. 10, 2007), available at <http://insct.syr.edu/uploadedFiles/insct/uploadedfiles/PDFs/Bellinger%20Prisoners%20In%20War%20Contemporary%20Challenges%20to%20the%20Geneva%20Conventions.pdf>.

¹⁸⁸ RUDYARD KIPLING, *KIM* 47 (Zohreh T. Sullivan ed., 2008).

