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## **Unlawful Killing with Combat Drones** A Case Study of Pakistan, 2004-2009

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## Unlawful Killing with Combat Drones\*

A Case Study of Pakistan, 2004-2009

Mary Ellen O'Connell<sup>+</sup>

In May 2009, the Director of the United States Central Intelligence Agency (CIA), Leon Panetta, responded directly to the growing criticism of America's use of unmanned aerial vehicles, better known as "drones." The United States began using weaponized drones in 2001, but the criticism became heated as the U.S. increasingly used drones to attack in the border area between Afghanistan and Pakistan.<sup>1</sup> These attacks resulted in the deaths of hundreds of unintended victims, including children.<sup>2</sup> Panetta attempted to counter the criticism, asserting that drone attacks are "precise" and cause only "limited collateral damage."<sup>3</sup> "And very frankly," he said, "it's the only game in town in terms of confronting and trying to disrupt the al-Qaida leadership."<sup>4</sup>

Counter-terrorism experts David Kilcullen and Andrew Exum wrote in *The New York Times* in March 2009, however, that drones are anything but "precise" and the numbers of civilian casualties have not been "limited."<sup>5</sup> They estimated that at that time the U.S. was killing 50 unintended targets for each intended target.<sup>6</sup> Moreover, killing leaders has

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<sup>1</sup> For a details of the CIA drone program, see, Jane Mayer, *The Predator War, What are the Risks of the C.I.A.'s Covert Drone Program?*, THE NEW YORKER, Oct. 26, 2009.

<sup>2</sup> The United States does not release official data on the drone program. A number of Websites do provide data, e.g., the drone database of the New America Foundation, which tracks strikes in Pakistan. See <http://counterterrorism.newamerica.net/drones>. Care must be taken with this and most sources as international legal terms of art such as "civilian" and "combatant" are use imprecisely. See also n. 6 *infra*.

<sup>3</sup> Mary Louise Kelly, *Officials: Bin Laden Running Out of Space to Hide*, June 5, 2009, NPR, <http://www.npr.org/templates/story/story.php?storyId=104938490>.

<sup>4</sup> *Id.*

<sup>5</sup> David Kilcullen & Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. TIMES, Mar. 17, 2009. See also Hearing of the House Armed Services Committee, Effective Counterinsurgency: the future of the U.S. Pakistan Military Partnership, April 23, 2009 (Testimony of David Kilcullen).

<sup>6</sup> Kilcullen & Exum estimate that between 2006 and early 2009, 700 persons died in attacks killing 14 intended targets. *Supra* n. 5. Mirakmal Niyazmatov has confirmed the numbers in a check of public Websites. (Data on file with the author.) Peter Bergen and Katherine Tiedemann have found similar ratios of intended to unintended victims: "Since 2006, our analysis indicates 82 U.S. drone attacks in Pakistan

typically had only a short-term impact on repressing terrorist violence, while every civilian killed “represents an alienated family, a new desire for revenge, and more recruits for a militant movement that has grown exponentially even as drone strikes have increased.”<sup>7</sup> In general, studies show that military force has rarely ended terrorist groups in comparison with law enforcement approaches and political processes.<sup>8</sup> With respect to Pakistan, Kilcullen and Exum argue that the use of drones against targets there has alienated people from their government and contributed to Pakistan’s instability.<sup>9</sup> Pakistanis hold their government responsible for allowing the drone attacks to continue.

This Chapter analyzes the international law relevant to United States use of drones to carry out attacks in Pakistan starting in 2004 through 2009. The U.S. use of drones in Pakistan and elsewhere raises serious questions under the international law governing both resort to armed force as well as the law governing the conduct of armed conflict. The Chapter begins with an overview of the facts respecting drones and Pakistan; it then applies international law to these facts, concluding that in the circumstances of Pakistan between 2004 and 2009, U.S. attacks appear to have violated fundamental law. The Chapter also inquires into why America’s leaders—from both political parties—have been so willing to use an unlawful and arguably counter-productive tactic.

## I. Drones in Pakistan

The United States Department of Defense defines an unmanned aerial vehicle (UAV) as a “powered aerial vehicle that does not carry a human operator, ... can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload.”<sup>10</sup> Drones were probably invented during or right after the Second World War and were ready for use by the 1950s.<sup>11</sup> The first large-scale use of drones was for

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have killed between 750 and 1000 people. Among them were about 20 leaders of al Qaeda, the Taliban, and allied groups, all of whom have been killed since January 2008.” *Revenge of the Drones*, Oct. 19, 2009, [http://newamerica.net/publications/policy/revenge\\_drones](http://newamerica.net/publications/policy/revenge_drones).

Those who provide a lower ratio are basing their numbers on their own interpretation of who is a “civilian” and who is not. See, e.g., the Long War Journal which claims only “10%” of the persons killed are “civilians.” <http://www.longwarjournal.org/>. The problem with the claim, as this paper details, is that the United States has little concrete information about victims other than the “leaders” who have been the intended targets. It is very difficult to distinguish militants from non-militants in Western Pakistan but before the spring of 2009, there was not even an armed conflict in Pakistan. Outside of armed conflict everyone is a civilian. See *infra*. Thus, the most accurate way to characterize the persons killed as a result of U.S. drone attacks is to refer to the list of persons the U.S. intended to kill and the numbers of those who the U.S. did not intend to kill. See also n. 2 *supra*.

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., SETH G. JONES AND MARTIN C. LIBICKI, HOW TERRORIST GROUPS END, LESSONS FOR COUNTERING AL QA’IDA (2008), available at [http://www.rand.org/pubs/monographs/2008/RAND\\_MG741-1.pdf](http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf). See also *infra*, n. 63 and accompanying text.

<sup>9</sup> *Id.*

<sup>10</sup> THE DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 579, Joint Publication 1-02, April 12, 2001 (amended Oct. 17, 2008).

<sup>11</sup> GEOFFREY SOMMER, ET AL., THE GLOBAL HAWK UNMANNED AERIAL VEHICLE ACQUISITION PROCESS: A SUMMARY OF PHASE I EXPERIENCE 11 (Rand 1997); see also, Peter W. Singer, *Robots at War: The New Battlefield*, WILKINSON Q., Winter 2009, at 30,

reconnaissance during the Vietnam War. During the 1991 Gulf War, Iraqi soldiers surrendered to an unarmed surveillance drone.<sup>12</sup> Drones continued to be widely used for reconnaissance during the conflicts in the Balkans in the 1990s.

Reportedly, in 2000, the U.S. was ready to employ drones for a dramatic new use: as a launch vehicle for missiles. Reconnaissance drones found indications of Osama bin Laden's whereabouts in Afghanistan. Plans were then readied to kill him with missiles fired from a drone. The plans were not carried out, but drones with missile launch capability began to be used in early October 2001 in Afghanistan, apparently at first with the permission of the country hosting a U.S. airbase where the drones were kept, Uzbekistan. A drone was used in November 2001, to launch a missile to kill al-Qaida's Mohammed Atef in the eastern Afghan city of Jalalabad.<sup>13</sup>

On November 3, 2002, the U.S. used a drone outside a combat area to fire laser-guided Hellfire missiles at a passenger vehicle traveling in a thinly populated region of Yemen. The drone was operated by CIA agents based in Djibouti. The U.S. Air Force, at that time, operated the U.S.'s drones, but the Air Force was concerned about legal issues raised by the Yemen operation, so the CIA carried out the strike. All six passengers in the vehicle were killed. U.S. officials said one of six men was a suspected "lieutenant" in al-Qaida; another was an American citizen in his early twenties.<sup>14</sup> In January 2003, the United Nations Commission on Human Rights received a report on the Yemen strike from its special rapporteur on extrajudicial, summary, or arbitrary killing. The rapporteur concluded that the strike constituted "a clear case of extrajudicial killing."<sup>15</sup>

During its invasion of Iraq that began in March 2003, the U.S. regularly used reconnaissance and attack drones.<sup>16</sup> The United States has also used combat drones in Somalia probably starting in late 2006 during the Ethiopian invasion when the U.S. assisted Ethiopia in its attempt to install a new government in that volatile country.

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[http://www.wilsoncenter.org/index.cfm?fuseaction=wq.essay&essay\\_id=496613](http://www.wilsoncenter.org/index.cfm?fuseaction=wq.essay&essay_id=496613) and PETER W. SINGER, *WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21<sup>ST</sup> CENTURY* (2009).

<sup>12</sup> <http://www.pbs.org/wgbh/pages/frontline/gulf/weapons/drones.html>

<sup>13</sup> Eric Schmitt, *Threats and Responses: The Battlefield; U.S. Would Use Drones to Attack Iraqi Targets*, <http://www.nytimes.com/2002/11/06/world/threats-responses-battlefield-us-would-use-dro...>

<sup>14</sup> Doyle McManus, *A U.S. License to Kill, a New Policy Permits the C.I.A. to Assassinate Terrorists, and Officials Say a Yemen Hit Went Perfectly. Others Worry About Next Time*, L.A. TIMES, Jan. 11, 2003, at A1; Jack Kelly, *U.S. Kills Al-Qaeda Suspects in Yemen; One Planned Attack on USS Cole, Officials Say*, USA TODAY, Nov. 5, 2002, at A1. John J. Lumpkin, *Administration Says That Bush Has, in Effect, a License to Kill; Anyone Designated by the President as an Enemy Combatant, Including U.S. Citizens Can Be Killed Outright, Officials Argue*, ST. LOUIS POST-DISP., Dec. 4, 2002, at A12.

<sup>15</sup> UN Doc. E/CN.4/003/3, paras. 37 – 39. See also, Michael J. Dennis, *Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economics and Social Council*, 97 AM. J. INT'L L. 364, 367, n.17 (2003). "The United States' response to the ... Yemen allegations has been that its actions were appropriate under the international law of armed conflict and that the Commission and its special procedures have no mandate to address the matter." *Id.* But see the conclusion that the Yemen strike was an unlawful action because it was military force used outside of an armed conflict. Mary Ellen O'Connell, *Ad Hoc War*, in *KRISENSICHERUNG UND HUMANITÄRER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION* 405 (Horst Fischer et al, eds., 2004).

<sup>16</sup> Brian M. Carney, *Air Combat by Remote Control*, May 12, 2008, <http://online.wsj.com/article/SB121055519404984109.html#printMode>

Among other actions, the U.S. pursued fleeing terrorist suspects using helicopter gunships and attack drones. The U.S. continued to target and kill individuals in Somalia after Ethiopia pulled its forces out of the country.<sup>17</sup>

Drone attacks by the U.S. in Pakistan began in 2004.<sup>18</sup> The number of attacks jumped dramatically in 2008 and continued to climb in 2009.<sup>19</sup>

By 2009, the U.S. was deploying two types of combat drones: the MQ-1 or Predator and the MQ-9 or Reaper. The Reaper is similar in design and function to the Predator, but the Reaper is “a new[er] and more heavily armed cousin of the Predator.”<sup>20</sup> The U.S. is rapidly increasing its supply of drones.<sup>21</sup> By 2009, it had about 100 Predators and 15 Reapers.<sup>22</sup> The U.S. will soon have more unmanned than manned aerial vehicles in its arsenal. Other states and non-state actors are also acquiring drones, including Pakistan, Russia, Georgia, Brazil, China, Hamas, Iran, and Israel.<sup>23</sup>

Before they were outfitted with missiles, drones were used primarily for reconnaissance missions. They were “used as a cheap form of aerial reconnaissance which avoided endangering pilots' lives.”<sup>24</sup> After 9/11, the role of drones evolved from reconnaissance to attack vehicle. U.S. Joint Chiefs of Staff General Richard Myers has praised the drone's capacity to remain in the air for long periods and then respond immediately when a target is detected.<sup>25</sup> Drone technology is rapidly evolving. At time of writing, drones could linger for up to 24 hours at altitudes greater than 60,000 feet (18.3 km), providing real-time intelligence to commanders.<sup>26</sup> When a target of interest was detected, the same

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<sup>17</sup> S. Bloomfield, *Somalia: The World's Forgotten Catastrophe*, THE INDEPENDENT, 9 February 2008, available at <http://www.independent.co.uk/news/world/africa/somalia-the-worlds-forgotten-catastrophe-778225.html> (last visited June 8, 2009); See also, CBS NEWS, *U.S. Missile Strike Hits Town in Somalia*, 3 March 2008, available at <http://www.cbsnews.com/stories/2008/03/03/world/main3898799.shtml> (last visited June 8, 2009); SPIEGEL ONLINE, *A Strike Against Al-Qaeda's Hornet's Nest*, 1 September 2007, available at <http://www.spiegel.de/international/0,1518,458597,00.html> (last visited June 8, 2009).

<sup>18</sup> Nek Muhammad Wazir was killed in a strike near Wana in Pakistan. Four people were killed along with Nek Muhammad Wazir. It is not clear if they were Taliban fighters or not, <http://www.nytimes.com/2004/06/19/world/the-reach-of-war-militants-ex-fighter-for-taliban-dies-in-strike-in-pakistan.html>

<sup>19</sup> Phil Stewart and Robert Birsell, *Under Obama, Drone Attacks on the Rise in Pakistan*, REUTERS (Oct. 12, 2009), <http://www.reuters.com/articlePrint?articleId=USN11520882> (“There have been 39 drone strikes in Pakistan since Obama took office not quite nine months ago, according to a Reuters tally of reports from Pakistani security officials, local government officials and residents. That compares with 33 strikes in the 12 months before Obama was sworn in on Jan. 20”) (paragraph break omitted.) See also n. 6 *supra*.

<sup>20</sup> Christopher Drew, *Drones Are Weapons of Choice in Fighting Qaeda*, N.Y. TIMES, Mar. 16, 2009, available at [http://www.nytimes.com/2009/03/17/business/17uav.html?\\_r=1&hp](http://www.nytimes.com/2009/03/17/business/17uav.html?_r=1&hp).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Alex Rodriguez, *Pakistan Turns to Drones of Its Own*, latimes.com, Oct. 9, 2009. See also, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Study on Targeted Killings*, UN Doc. A/HRC/14/24/Add.6, para. 27 (May 28, 2010) (40 states have drones).

<sup>24</sup> Keith Somerville, *US Drones Take Combat Role*, BBC NEWS, Nov. 5, 2002, available at [http://news.bbc.co.uk/2/hi/in\\_depth/2404425.stm](http://news.bbc.co.uk/2/hi/in_depth/2404425.stm).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

drone could attack it with significant force.<sup>27</sup>

Clearly drones have a number of advantages for the U.S. in comparison to alternatives: First and foremost, they spare pilots' lives. "Pilots" operate the "unmanned" aerial vehicle with a joystick at a comfortable site far from the attack zone. Thus, even if a drone is shot down, there is no loss of human life. They are also relatively cheap and easy to manufacture. Drones cost less than manned military aircraft. In 2009, a Predator cost about \$4.5 million, 30 times less than a fighter jet. Further, drones can be used for any battlefield operation: surveillance, reconnaissance, precision attacks, targeted killings, etc. As any other robot, a drone can be used to carry out dull, dirty or dangerous battlefield operations, referred to as the "Three Ds."<sup>28</sup>

Nor do drones suffer from human weaknesses. They do not get hungry, scared, shocked, or tired (although they can run low of fuel.) You can use a drone whenever it is needed whereas pilots fly according to a certain schedule of flights. Predators and Reapers have been flying dozens of surveillance patrols each day in Iraq and Afghanistan and transmitting thousands of hours of video each month, some of it directly to troops on the ground. If a drone is shot at during surveillance, it, of course, does not panic. Drones keep flying if they can—over mountains and other rugged terrain to reach places ground troops would have great difficulty reaching. They then have the ability to hover for hours, which conventional aircraft cannot.

Perhaps most significant for the inquiry here, drones may be operated far from the target. Attack drones in Afghanistan have been "piloted" from as far away as Nevada.<sup>29</sup> According to Jane Mayer of *The New Yorker*:

The U.S. government runs two drone programs. The military's version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based. . . . The program is classified as covert, and the intelligence agency declines to provide any information to the public about where it operates, how it selects targets, who is in charge, or how many people have been killed.<sup>30</sup>

The two programs may not be as clearly separated as Mayer suggests, however. Many facts about the use of drones are classified, so it is difficult to get a full and accurate picture. Some evidence suggests a more complicated situation. In an interview with a former commander of the drone operation at Nellis Air Force Base in Nevada, it was

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<sup>27</sup> In addition to the United States, "Israel is a major producer and user of military drones, using them for reconnaissance of its borders and to gather military intelligence about its Arab neighbours' military capabilities." *Id.*

<sup>28</sup> Singer, *Robots at War*, *supra* n. 11.

<sup>29</sup> Peter Bergman & Katherine Tiedemann, *The Drone War*, NEW REPUBLIC, June 3, 2009, available at <http://www.tnr.com/politics/story.html?id=b951d70b-db5e-4875-a5b9-4501e713943d&p=1>.

<sup>30</sup> Mayer, *The Predator War*, *supra* n.1, at 37.

clear that all drone operations are “joint” operations—none is carried out by the Air Force alone. The commander said a “1000” people see the video—from “pilots” in their trailers in Nevada and New Mexico, to intelligence analysts at Central Command (CENTCOM) headquarters in Florida, to persons in “Japan,” to “POTUS” (the President of the United States).<sup>31</sup> There are also persons involved located in Afghanistan, Pakistan, and elsewhere where drones are kept ready for missions. Apparently, the U.S. now has secret airfields in Pakistan for this purpose.<sup>32</sup> A former assistant general counsel at the CIA, John Radsan, indicated to the author that all decisions to actually fire a missile are made by the CIA at their headquarters in Langley, Virginia.<sup>33</sup>

Whatever the actual organization of the operation, one thing is clear, the use of drones in Pakistan has resulted in a large number of persons being killed along with the intended targets. Several factors suggest why this has been the case. One problem is structural. The remote pilot of a drone is relying on cameras and sensors to transmit the information he or she needs to decide on an attack. The technology is improving, but it is still difficult to be certain about targets.<sup>34</sup> Weather plays a role, as does the attitude of the “pilot.” We also know there is a tendency to trust the computer in distinction to the pilot’s own judgment. If the computer registers that a target has a gun that was recently fired, pilots have a tendency to defer to the computer.<sup>35</sup> This tendency is encouraged by the multiple decisions pilots must make every day in split seconds. It is likely to increase as pilots oversee multiple drones. So while the computer is not technically “autonomous” in deciding to strike, that is becoming the reality.<sup>36</sup>

In the situation of Western Pakistan the U.S. has little reliable on-the-ground information to confirm or discredit computer data. A media report drawing attention to problems with target identification explained: “Somebody operating a Predator will see a bunch of vehicles and they’ll say, ‘We know they’re not ours.’” The Air Force’s standard tactics have been “to bring in other recon, like special operations teams, and try to figure out what they’re seeing. But to start with, all they know is that there’s movement.”<sup>37</sup> “Looking through the Predator’s camera is somewhat like looking through a soda straw. . . . Your field of view tends to become distorted. . . . [Y]ou might be able to tell a Saudi headdress from an Afghan one. They are different. But it’d be pretty hard to do.”<sup>38</sup>

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<sup>31</sup> The former commander asked that his name not appear in print despite the fact that he revealed no classified information. The interview took place by telephone on September 15, 2009. The commander’s name and notes of the conversation are on file with the author.

<sup>32</sup> Mayer, *supra* n. 1, at 38.

<sup>33</sup> A. John Radsan, Remarks to the author, Oct. 8, 2009, University of Notre Dame Law School. *See also*, Richard Murphy & A. John Radsan, *Due Process and Targeted Killing of Terrorists*, Working Paper No. 114 (March 2009), <http://ssrn.com/abstract=1349357>.

<sup>34</sup> Peter Bergen and Katherine Tiedemann indicate that the number of unintended victims is declining. *See No Secrets in the Sky*, N.Y. TIMES, Apr. 25, 2010, [http://www.nytimes.com/2010/04/26/opinion/26bergen.html?\\_r=1](http://www.nytimes.com/2010/04/26/opinion/26bergen.html?_r=1)

<sup>35</sup> Singer, *Robots at War*, *supra* n. 11, at 39-42.

<sup>36</sup> *Id.*; *see also*, Peter W. Singer, *In the Loop? Armed Robots and the Future of War*, Jan. 28, 2009, Brookings, [http://www.brookings.edu/articles/2009/0128\\_robots\\_sineger.aspx](http://www.brookings.edu/articles/2009/0128_robots_sineger.aspx)

<sup>37</sup> Eric Umansky, *Dull Drone: Why Unmanned U.S. Aerial Vehicles Are A Hazard to Afghan Civilians*, Mar. 13, 2002, *available at* <http://www.slate.com/id/2063105/>.

<sup>38</sup> *Id.*

This describes the approach that the Air Force has taken. It depends on having on-the-ground information. In Pakistan, the U.S. has had little on-the-ground information, and what it has had has not been very reliable.<sup>39</sup> “In Afghanistan and Pakistan, the local informants, who also serve as confirming witnesses for the air strikes, are notoriously unreliable.”<sup>40</sup> Even with the improvements in technology, reliable, ground-level information remains extremely important. Plenty of mistakes are being made:

The first two C.I.A. air strikes of the Obama Administration took place on the morning of January 23<sup>rd</sup>—the President’s third day in office. Within hours, it was clear that the morning’s bombings, in Pakistan, had killed an estimated twenty people. In one strike, four Arabs, all likely affiliated with Al Qaeda, died. But in the second strike a drone targeted the wrong house, hitting the residence of a pro-government tribal leader six miles outside the town of Wana, in South Waziristan. The blast killed the tribal leader’s entire family, including three children, one of them five years old.<sup>41</sup>

Another issue in drone use is the fact that strikes are carried out by joint operations. The heavy involvement of the CIA and CIA contractors in the decisions to strike may alone account for the high-unintended death rate. CIA operatives are not trained in the law of armed conflict.<sup>42</sup> They are not bound by the Uniform Code of Military Justice to respect the laws and customs of war. This fact became abundantly clear during the revelation of U.S. use of interrogation methods involving torture and cruel, inhuman and degrading treatment. Given the impact of that unlawful conduct it is difficult to fathom why the Obama Administration is using the CIA to carry out drone attacks. Under the law of armed conflict, only lawful combatants have the right to use force during an armed conflict. Lawful combatants are the members of a state’s regular armed forces. The CIA is not part of the U.S. armed forces. They do not wear uniforms. They are not subject to the military chain of command. They are not trained in the law of war, including in the fundamental targeting principles of distinction, necessity, proportionality, and humanity.<sup>43</sup> Rather, the CIA has a list of intended targets. They judge success by the number of persons on the list they kill.

It may also be that the U.S. military is no longer training its members in the law of war as it once did. The former drone commander emphasized that he had never had a single day of training in the law of armed conflict in his 17 years of active duty. A currently serving Army lawyer reported he had had only three days of international law training during his specialized course at the Army JAG School in Charlottesville, Virginia in 2005. He subsequently served an 18-month tour in Baqubah, Iraq, in some of the heaviest fighting

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<sup>39</sup> Mayer, *supra* n. 1, at 44.

<sup>40</sup> *Id.* at 45.

<sup>41</sup> *Id.* at 37.

<sup>42</sup> William C. Banks, expert on U.S. national security law, e-mail to the author, Sept. 28, 2009 (on-file with the author). Accord, Radsan, *supra* n. 33.

<sup>43</sup> *See infra.*



during the “surge” period. The Naval War College may be trimming its law of armed conflict program. These anecdotal accounts are of great concern given that the soldiers convicted of crimes at Abu Ghraib prison also reported they had had no training in the Geneva Conventions, despite the fact that the majority of Geneva Convention rules concern detention. After years in which the United States has disrespected the international law on the use of force, including having a White House counsel and later Attorney General call the Geneva Conventions “quaint” and “obsolete,”<sup>44</sup> it should be no surprise that training of troops in this area may be suffering. Inadequate training may account for the high rate of unintended deaths even where Air Force personnel are involved in the decision to strike. It would seem to be a time when the U.S. should be expanding its programs in the law of armed conflict and ethics.

On the other hand, law of armed conflict scholars and ethicists are just beginning to consider the implications of the new drone technology. So far they have little to offer the military or public officials specifically about drones, although there is plenty of law to draw on as will be discussed in more detail in the next section. The remainder of this section considers some of the unique features of drones that must be taken into account as we consider the law and ethical principles that apply to this technology.

As already mentioned, drone operators work at a distance—an amazing distance—from the scene of drone attacks. The “pilot” may be in Nevada; CIA personnel may be in Langley, Virginia at CIA headquarters; members of the military’s Central Command may be in Florida, and others in Afghanistan. The operators never see with their own eyes the persons they have killed. Indeed, they have no physical contact with the place where the attacks are happening. Even a pilot of a conventional bomber or fighter jet who, like the drone pilot, sees only with the aid of a radar screen or video camera, knows he is over the place where his attack will occur. He knows he may be shot down. In the trailer in Nevada, the pilot knows she will not be attacked. She will go home to her family at the end of the day, coach a soccer game, make dinner, and help with homework.

Lieutenant Colonel Dave Grossman in his 1996 book, *On Killing*, describes factors that can overcome the average individual’s resistance to killing. The most important of these factors characterize drone operations and while many also characterize high aerial bombardment from a plane, the distances are even more remote and disconnected for drone operators:

Miligram’s famous studies of killing behavior in laboratory conditions (the willingness of subjects to engage in behavior that they believed was killing a fellow subject) identified three primary situation variables that influence or enable killing behavior; in this model I have called these (1) the demands of authority, (2) group absolution (remarkably similar to the

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<sup>44</sup> Alberto Gonzales, Memorandum for the President Re: Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB 118 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

concept of diffusion of responsibility), and (3) the distance from the victim.<sup>45</sup>

For Grossman, “distance from the victim” includes various concepts of distance:

- Physical distance between the killer and the victim
- Emotional distance between the killer and the victim, including:
  - Social distance, which considers the impact of a lifetime of viewing a particular class as less than human in a culturally stratified environment
  - Cultural distance, which includes racial and ethnic differences that permit the killer to “dehumanize” the victim
  - Moral distance, which takes into consideration intense belief in moral superiority and “vengeful” actions
  - Mechanical distance, which includes the sterile “video game” unreality of killing through a TV screen, a thermal sight, a sniper sight, or some other kind of mechanical buffer.<sup>46</sup>

A 20-something Christian Air Force pilot living with her two children in suburban Las Vegas who views a monitor to locate her targets would seem to be as distant as a one can be from targets in rural, Muslim Pakistan. Television and YouTube video of drone pilots on the job reveal a set-up that looks very much like video game.<sup>47</sup> These factors and others likely contribute to the high death rate among unintended targets.

Even without killing, drones terrify people. They fly for hours overhead, hovering, filming, threatening to strike at any time. Residents of the Occupied Palestinian Territories report on the terror and oppression inflicted by Israeli drones.<sup>48</sup> With respect to Pakistan, Kilcullen and Exum have said: “While violent extremists may be unpopular, for a frightened population they seem less ominous than a faceless enemy that wages war from afar and often kills more civilians than militants.”<sup>49</sup>

Between 2006 and late 2009, about 20 suspected militant leaders have reportedly been killed in Pakistan during strikes that killed between 750 and 1000 other persons.<sup>50</sup> In June 2009, the former U.S. Afghan commander, Gen. Stanley McChrystal, restricted the

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<sup>45</sup> LT. COL. DAVE GROSSMAN, ON KILLING, THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 187 (1996).

<sup>46</sup> *Id.* at 188-89

<sup>47</sup> See, e.g., CBS *60 Minutes*, episode 29, May 10, 2009,

[http://www.cbs.com/primetime/60\\_minutes/video/video.php?cid=60%20Minutes/60%20Minutes%20Full%20Episodes&pid=miUvvt94XD89Z\\_dB12qJFU0x\\_u9BDLMg&category=episodes&play=true](http://www.cbs.com/primetime/60_minutes/video/video.php?cid=60%20Minutes/60%20Minutes%20Full%20Episodes&pid=miUvvt94XD89Z_dB12qJFU0x_u9BDLMg&category=episodes&play=true)

<sup>48</sup> For an account of the use of drones during the Israeli incursion in Gaza Dec. 2008-Jan. 2009, see, Clancy Chassay, *Cut to Pieces: the Palestinian Family Drinking Tea in Their Courtyard*, Guardian.co.uk, Mar. 23, 2009, <http://www.guardian.co.uk/world/2009/mar/23/gaza-war-crimes-drones>

<sup>49</sup> Kilcullen & Exum, *supra* n. 5.

<sup>50</sup> Bergen & Tiedemann, *Revenge of the Drones*, *supra* n. 6; see also Kilcullen & Exum, *supra* n. 5. Jane Mayer reports that between January and October 2009, “estimates suggest[] the C.I.A. attacks have killed between three hundred and twenty-six and five hundred and thirty-eight people. Critics say that many of the victims have been innocent bystanders, including children.” Mayer, *supra* n. 1, at 37.

use of airstrikes in Afghanistan because of the high number of civilian deaths. He ordered that “[t]he restrictions ... be especially tight in attacking houses and compounds where insurgents are believed to have taken cover.” McChrystal explained that “Air power contains the seeds of our own destruction if we do not use it responsibly.... We can lose this fight.”<sup>51</sup> Since this order, reports of deaths among unintended victims appear to be somewhat lower in Pakistan. Whether the numbers have actually declined is difficult to confirm because the U.S. and Pakistan have succeeded in keeping journalists out of the border region. The governments may also be controlling reports from on-the-ground contacts.<sup>52</sup>

Even if the numbers of persons killed are somewhat lower during particular attacks, the overall number of strikes has significantly increased. The intended targets of these attacks are in villages, in homes, in vehicles, and, in general, surrounded by many persons not involved in hostilities, not suspected militants, and not intended targets.<sup>53</sup> In August 2009, the U.S. attacked a home where an infamous Taliban leader, Baitullah Mehsud, was staying with one of his wives and her parents. He was on the roof of the house, at night, apparently receiving an intravenous transfusion.<sup>54</sup> He is known to have suffered from diabetes and a kidney ailment. His uncle, a medic, was believed to be administering the treatment. His wife was with him. Missiles from a drone tore him to pieces. His wife, parents-in-law, seven men described as “bodyguards” and one man described as a “lieutenant” also, reportedly, died in the strike.<sup>55</sup> Presumably only Mehsud was an intended target. The strike killed twelve for one intended target. Jane Mayer reports that the U.S. carried out as many as 16 attempts to kill Mehsud with drone strikes. In the conditions of the Pakistan border region, using drones to selectively target individuals has not been possible with current technology.

Despite these difficulties with drones, American leaders seem to be consider them an unqualified success:

Privately, American officials rave about the drone program. One former Bush administration official said that the drones had so crimped the militants’ activities in FATA [the Federally Administered Tribal Areas of Pakistan] that they had begun discussing a move to Yemen or Somalia. Two officials familiar with the drone program point out that the number of “spies” Al Qaeda and the Taliban have killed has risen dramatically in the past year, suggesting that the militants are turning on themselves in an effort to root out the sources of the often pinpoint intelligence that has led

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<sup>51</sup> Dexter Filkins, *U.S. Tightens Airstrike Policy in Afghanistan*, N.Y.TIMES, June 22, 2009.

<sup>52</sup> Mayer, *supra* n. 1.

<sup>53</sup> See, e.g., a report of a strike after McChrystal’s order that hit a funeral: Pir Zubair Shah and Salman Masood, *U.S. Drone Strike Said to Kill 60 in Pakistan*, N.Y.TIMES, June 23, 2009, <http://www.nytimes.com/2009/06/24/world/asia/24pstan.html>.

<sup>54</sup> Mayer, *supra* n. 1. Bergen and Tiedemann report that Mehsud was receiving a “leg massage.” The discrepancy indicates that even the information about the intended target may not be as solid as U.S. statements imply. *Supra* n. 6.

<sup>55</sup> *Id.*

to what those officials describe as the deaths of half of the top militant leaders in the FATA.<sup>56</sup>

At time of writing, however, the militants in Pakistan are carrying out deadly attacks on a regular basis. Baitullah Mehsud's followers quickly reconstituted themselves under two new leaders. This outcome recalls the hydra—one head is cut-off and several more take its place. The evidence is supporting Kilcullen's assessment that going after leaders with drones is proving counterproductive of peace and stability in Pakistan. New leaders have stepped up to take the place of the slain, and they have more than enough new recruits. Meanwhile, anti-American sentiment in Pakistan grows. During Secretary of State Clinton's visit to Pakistan in late October 2009, a woman at a town hall meeting "characterized U.S. drone missile strikes on suspected terrorist targets in northwestern Pakistan as de facto acts of terrorism themselves."<sup>57</sup>

Even if such strikes could be counted on to end terrorist or militant groups in Pakistan, the U.S. would still need to forgo them as if not consistent with America's legal duties. That is the topic of the next section.

## II. The Law on Drones

International law, like all law, provides an alternative to force and violence in human affairs. As in all human communities, the international community uses law to restrict the right to resort to force to emergency self-defense and to those authorized to use force for the good of the community. States may use force in self-defense or with the authorization of the United Nations Security Council. States are restricted from using military force outside these situations. They may resort to law enforcement measures in some cases. International humanitarian law further restricts the use of military force; all uses of force are also subject to human rights principles.<sup>58</sup>

The law respecting when states may resort to military force is set out in the United Nations Charter, in rules of customary international law, and in general principles (collectively the "*jus ad bellum*." ) The rules on resort to force were reconfirmed by a consensus of all UN members at the 2005 World Summit in New York.<sup>59</sup> The rules on how military force may be used during an armed conflict is found in the Hague Conventions, the Geneva Conventions and their Additional Protocols, customary

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<sup>56</sup> Peter Bergen & Katherine Tiedemann, *The Drone War*, June 3, 2009, [http://www.newamerica.net/publications/articles/2009/drone\\_war\\_13672](http://www.newamerica.net/publications/articles/2009/drone_war_13672).

<sup>57</sup> Alex Rodriguez, *Clinton's Pakistan Visit Reveals Widespread Distrust of U.S.*, LATIMES.COM, Oct. 31, 2009, [latimes.com/news/nationworld/world/la-fg-clinton-pakistan1-2009nov.01,0,1313175.story](http://latimes.com/news/nationworld/world/la-fg-clinton-pakistan1-2009nov.01,0,1313175.story)

<sup>58</sup> See NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 243 (2008); see also, O'Connell, *Ad Hoc War*, *supra* n. 15.

On the scope of international humanitarian law (IHL or law of armed conflict) and human rights law, see, e.g., Françoise Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90(871) INT'L REV. RED CROSS 549 (2008); and William Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum*, 40 ISR. L. REV. 592 (2007).

<sup>59</sup> 2005 World Summit Outcome, UN GAOR, 60th Sess., at 22-23, U.N. Doc. A/60/L.1 (Sept. 15, 2005). Today all fully sovereign states are members of the United Nations.

international law, and, again, general principles (collectively the “*jus in bello.*”) The rules on conduct of force are the subject of regular review and comment by the International Committee of the Red Cross (ICRC). Also in 2005, the ICRC published a comprehensive review of customary international humanitarian law, which had the effect of providing a handbook of international humanitarian law for the two types of armed conflicts for which there are well-developed sets of rules: international armed conflict and non-international armed conflict.<sup>60</sup> It is important to also emphasize that certain human rights principles apply even during an armed conflict.<sup>61</sup> Human rights principles are also the subject of litigation, review, and up-dating. The view that the world does not have up-to-date rules for responding to terrorism and other contemporary challenges is simply incorrect.<sup>62</sup>

In the period under review, international law contained a clear and up-to-date set of principles governing the use of force. Nevertheless, in the United States, at least since the 1960s, but especially since the end of the Cold War, political leaders and academics have chafed against international law limits on the use of force.<sup>63</sup> Realist and other ideologies have clouded our understanding of the very limited utility of military force<sup>64</sup> and the very real benefits of promoting peace and non-violence through law. It is hoped that the discussion in the next section might contribute to a renewed appreciation of the

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<sup>60</sup> I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 13 (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005).

<sup>61</sup> See, e.g., Legality of the Threat or Use of Nuclear Weapons: “The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.” 1996 ICJ 226, para. 25 (Advisory Opinion of July 8).

<sup>62</sup> For an author who questions the adequacy of international law, see, Peter M. Cullen, *The Role of Targeted Killing in the Campaign Against Terror*, JOINT FORCES QUARTERLY 28 (issue 48, 2008).

<sup>63</sup> See, e.g., Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* (May 11, 2009), <http://ssrn.com/abstract=1415070>. Anderson describes Melzer’s book TARGETED KILLING IN INTERNATIONAL LAW, *supra* n. 58, as “formidable,” the “leading treatise,” and “a marvelous work of scholarship.” *Id.* at 13, n. 38. Nevertheless, Anderson points out that Melzer’s book “gives some sense of how far American domestic political views in the centrist political spectrum are from the views of the ‘international law community,’ of which Melzer’s views are representative.” *Id.* 13.

Anderson’s own paper is an example of American political views that are removed from mainstream international law. His strongly criticizes Melzer for analyzing international law as it is and rejecting U.S. positions that are not in compliance with it. *Id.* n.38 Anderson apparently wants Melzer to accept that the U.S. should have a broader right to kill. Anderson does not explain why the U.S. should have this right. He incorporates none of the literature that demonstrates adherence to the accepted rule of law and law enforcement methods have had the best results against terrorism. He seems to assume with providing evidence that the U.S. needs a more flexible legal regime to kill people in certain places—places that are not scenes of armed conflict hostilities but are also not the U.S. itself or the territory of close allies, such as the United Kingdom. *Id.* at 29-31. For alternative views, see, John Mueller, *How Dangerous are the Taliban?*, FOREIGN AFFAIRS (2009) <http://www.foreignaffairs.com/print/64932>; JONES AND LIBICKI; *supra* n. 8; LOUISE RICHARDSON, WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT (2007); Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 COL. J. TRANS. LAW 435 (2005). For another author who believes the U.S. should have greater rights to use military force than other states, see, John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004).

<sup>64</sup> See on this topic, GENERAL RUPERT SMITH, THE UTILITY OF MILITARY FORCE, THE ART OF WAR IN THE MODERN WORLD (2007).

international law restricting the use of force and how respect for this law is the better path.

The drone attacks in Pakistan involve significant firepower—this is not the force of the police, but of the military. In law enforcement lethal force is restricted to situations of absolute necessity; not so on the battlefield, making the use of bombs and missiles lawful. The drones used in Pakistan are lawful for use only on the battlefield. The right to resort to them must be found in the *jus ad bellum*; the way they are used must be based on the *jus in bello* and human rights.

The United States provided no public statement about the legality of its drone use in Pakistan between 2004 and 2009.<sup>65</sup> In March 2010, the State Department Legal Adviser spoke briefly to the question.<sup>66</sup> This next section considers his argument and others.

### *Jus Ad Bellum*

The most important rule on resort to force, and perhaps in all of international law, is Article 2(4) of the United Nations Charter that prohibits the use of force.<sup>67</sup> Article 2(4) is properly interpreted as prohibiting all uses of force above a certain minimal level. Minimal uses of force such as firing a single shot across an international boundary might violate the principle of non-intervention, but is probably too minor to come within the purview of Article 2(4). The Charter contains two exceptions to this general ban on virtually all uses of force: In Chapter VII, the Security Council is given authority to act in cases of threats to the peace, breaches of the peace and acts of aggression. It may order measures to maintain or restore international peace and security, including mandating or authorizing the use of force by member states.

Chapter VII also provides in Article 51 that states may respond in self-defense “if an armed attack occurs” until the Security Council acts. The evident restrictions in this Article have come under some pressure, especially from academics in the United States.<sup>68</sup> The International Court of Justice, however, has restated in several cases that the Charter means what it says. The International Court of Justice (ICJ) in the 1986 *Nicaragua* case made clear that acts triggering the right to use armed force in self-defense must themselves amount to armed attacks. In *Nicaragua*, the Court held that low-level

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<sup>65</sup> Promotion and Protection of All Human Rights, Civil, Political Economic, social and Cultural Rights, Including the Right to development, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Add. Mission to the United States of America, 28 May 2009, Human Rights Council, UN Doc. A/HRC?11/2/Add.5. See also, Amelia Mathias, *UN Rights Investigator Warns US Drone Attacks May Violate International Law*, JURIST, Oct. 28, 2009, <http://jurist.law.pitt.edu/paperchase/2009/10/un-rights-investigator-wrns-us-drone.php#at>.

<sup>66</sup> Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting ASIL, U.S. DEPARTMENT OF STATE (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm> (emphasis in the original).

<sup>67</sup> Article 2(4): All Members shall refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

<sup>68</sup> See, e.g., Yoo, *supra* n. 63.

shipments of weapons did not amount to an armed attack and could not be invoked as a basis for self-defense.<sup>69</sup>

It is important to realize that “self-defense” is a term of art in international law. The reference in Article 51 to self-defense is to the right of the victim state to use significant offensive military force on the territory of a state legally responsible for the attack.<sup>70</sup> The ICJ has made clear that the armed attack that gives rise to this right of self-defense must be an attack that involves a significant amount of force—it must be more than a mere frontier incident, such as sporadic rocket fire across a border.<sup>71</sup> In the *Oil Platforms* case, the ICJ said,

Even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States of the kind that the court, in the case concerning Military and Paramilitary Activities in and against Nicaragua, qualified as a “most grave” form of the use of force.<sup>72</sup>

In addition to a lawful basis in the Charter, states using force must show that force is necessary to achieve a defensive purpose. If a state can make the necessity showing, it must also show that the method of force used will not result in disproportionate loss of life and destruction compared to the value of the objective. Necessity and proportionality are not expressly mentioned in the Charter, but the ICJ held in the *Nuclear Weapons* case “‘there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law’”. This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.”<sup>73</sup>

An armed response to a terrorist attack will almost never meet these parameters for the lawful exercise of self-defense. Terrorist attacks are generally treated as criminal acts because they have all the hallmarks of crimes,<sup>74</sup> not armed attacks that can give rise to the right of self-defense. Terrorist attacks are usually sporadic and are rarely the responsibility of the state where the perpetrators are located. The Supreme Court of Israel found in 2006 that Israel was engaged in a “continuous state of armed conflict” with various “terrorist organizations” due to the “constant, continual, and murderous waves of

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<sup>69</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 195, 230 (June 27) [hereinafter Nicaragua].

<sup>70</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 215 (July 9) (Separate Opinion of Judge Higgins) [hereinafter Wall].

<sup>71</sup> The ICJ also said that when a state has been attacked by a use of force too minor to trigger the Article 51 provision on self-defense, the right way to respond is with non-forceful countermeasures, such as economic sanctions. Nicaragua, at 110-11,127. States are also free, of course, to establish defenses on their own territory. See the Wall case.

<sup>72</sup> Oil Platforms (Iran v. U.S.) 2003 I.C.J. 161, 191 (Nov. 6).

<sup>73</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 245 (Jul. 8) [hereinafter Nuclear Weapons]. See also Nicaragua, at 94 and Oil Platforms, at 198.

<sup>74</sup> O’Connell, *Enhancing the Status of Non-State Actors*, *supra* n. 63.

terrorist attacks” and the armed response to these.<sup>75</sup> The court described a situation that was more than crime and would seem to share important features of the textbook case on self-defense, the 1990-91 liberation of Kuwait following Iraq’s invasion. After Iraq invaded, Kuwait had the right to use force in self-defense and other states could join it in collective self-defense in order to expel the invader.<sup>76</sup>

The Kuwait case had two aspects not found in connection with most terrorist attacks. First, no one doubted who carried out the aggression: Iraq. Second, the occupation of Kuwait created a continuing wrong that could be righted, especially since the Security Council had authorized a coalition of states to liberate Kuwait. In the case of September 11 and other terror attacks, the first task was evidence gathering. Solid evidence of actual armed attack has been the central focus of the debate among states over the right to use force in response to terrorism. Because the state must respond quickly to an armed attack and may even anticipate the attack in some circumstances, states have a problem responding lawfully using military force in the case of terror attacks. These attacks are usually brief and do not result in an on-going wrong such as the unlawful occupation of territory. It usually takes some time to find out who the perpetrators are and where they are. But force may not be used long after the terror act as it loses its defensive character and becomes unlawful reprisal.

Even where militant groups remain active along a border for a considerable period of time, their armed cross-border incursions are not considered attacks under Article 51 giving rise to the right of self-defense unless the state where the group is present is responsible for their actions. In the case of *Congo v. Uganda*, Uganda sent troops into Congo after years of cross-border incursions by armed groups from Congo into Uganda. Congo, however, was not responsible for the armed groups—it did not control them. Even Congo’s failure or inability to take action against the militants did not give rise to any right by Uganda to cross into Congo to attack the groups themselves:

During the period under consideration both anti-Ugandan and anti-Zairean rebel groups operated in this [border] area. Neither Zaire nor Uganda were in a position to put an end to their activities. However, in the light of the evidence before it, the Court cannot conclude that the absence of action by Zaire’s Government against the rebel groups in the border area is tantamount to “tolerating” or “acquiescing” in their activities. Thus, the part of Uganda’s first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be upheld.<sup>77</sup>

But Uganda was found to have violated Article 2(4) of the UN Charter for its attacks on Congolese territory. The ICJ did not have to decide the case of “large-scale attacks by

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<sup>75</sup> HCJ 769/02, *The Public Committee Against Torture in Israel v. Israel*, [2006] (2) IsrLR 459, ¶ 16 (Dec. 14, 2006). *But see* *The Wall Case*, *supra* n. 70.

<sup>76</sup> Mary Ellen O’Connell, *Enforcing the Prohibition on the Use of Force: The U.N.’s Response to Iraq’s Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 479-80 (1991).

<sup>77</sup> *Armed Activities on the Territory of the Congo (Congo v. Uganda)* 2005 I.C.J. para. 301 (Dec. 19).



irregular forces.”<sup>78</sup> The cross-border incursions resulted in dozens of deaths, not hundreds or thousands. One could predict a different assessment of state responsibility in the case of large-scale attacks. Such an eventuality would indicate that Congo had either consented to the force or had lost control of the territory where the force was.

These are the rules governing the resort to force between states. The Charter does not directly regulate the resort to force within states between government forces and non-state actors or between non-state actor militant groups. This is an unfortunate gap in the law as the most common form of armed conflict today is the internal armed conflict, armed conflicts mostly within the boundaries of a single state fought by groups contending for power or to secede. The tragic conflicts in Colombia, Congo, Somalia, Sri Lanka, Sudan, and the Philippines are examples. While international law does not include an express prohibition on the use of significant military force to take power within or to break away from a state, it does contain allied principles making such conduct generally unlawful. Most states make the use of force against a government a violation of domestic law, the crime of treason, but other domestic criminal law may be relevant as well, such as the crime of murder. Also, international human rights law prohibits a government from using excessive force in responding to an armed group seeking to take power or secede. A government may only resort to military force if the use of force by an opposing armed group is significant. In other cases, international human rights law restricts governments to the use of force permissible to police in responding to violent crime.<sup>79</sup> If a government seeks assistance from another state or international organization, the party providing assistance may only use that level of force that the government itself has the right to use. Those commenting on the right of the United States to use drones in Pakistan often overlook this important set of legal principles governing internal armed conflict.<sup>80</sup> For much of the period that the United States has used drones on the territory of Pakistan, there has been no armed conflict. Therefore, even express consent by Pakistan would not justify their use.

The Bush and Obama administrations have also made the argument that because the 9/11 attacks were significant and were preceded and succeeded by acts of terrorism, the U.S. may target and kill al Qaeda members wherever they are found.<sup>81</sup> As discussed above, this position ignores the law of state responsibility. However, the further argument is made that if the U.S. has the consent of the territorial state to carry out the attacks, there

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<sup>78</sup> *Id.* at para. 147.

<sup>79</sup> International Covenant on Civil and Political Rights, UN GAOR Supp. No. 16, at 52, UN Doc. A/6316 (1966), arts. 4 & 6 (no arbitrary deprivation of life.) See also cases of the European Court of Human Rights assessing excessive force used by Russia in the Chechen conflict and Turkey in the Kurdish conflict. *Isayeva, Yusopova and Bazayeva v Russia*, nos. 57947/00, 57948/00 and 57949/00, ECHR 24 February 2005. *Isayeva v Russia*, no. 57950/00, ECHR 24 February 2005 [hereinafter *Isayeva II*]; and *Khashiyev & Akayeva v Russia*, nos. 57942/00 and 57945/00, ECHR 24 February 2005. Similarly, in *Ergi v Turkey*, no. 66/1997/850/1057, ECHR 28 July 1998, the ECHR considered Turkey’s use of force to repress the Kurdish Worker’s Party. See also, NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW xiii (2008).

<sup>80</sup> See, e.g., Sean Murphy, *The International Legality of U.S. Military Cross-Border Operations from Afghanistan into Pakistan*, 85 INT’L L. STUDIES 109 (Naval War College 2009). Murphy discusses consent at length and raises concerns about it as a solid basis for the U.S. use of force in Pakistan, but he fails to begin by assessing what Pakistan has the legal right to consent to. *Id.* at 118-120.

<sup>81</sup> See Koh, *supra* n. 66.

is no violation of the law of state responsibility. This position ignores the law just discussed that the consenting state may not consent to the use of military force on its territory in the absence of armed conflict hostilities. Colonel Peter Cullen argues for new rules to allow the U.S. to use military force against terrorist suspects in just such situations. He wants an expansion of the *jus in bello* to apply to the use of force by a state against non-state actors suspected of terrorist attacks and located outside the state's own territory.<sup>82</sup> Under current law, if terrorist suspects are located in a state other than the United States, the U.S. may offer assistance to that other state. The *jus in bello* will apply if there is an armed conflict in the state. Peacetime criminal law applies if not. Indeed, as Cullen accepts, the United States is resorting only to peacetime criminal law on the territory of the U.S. He does not believe there is any right to kill without warning persons in the U.S.<sup>83</sup> How can there be any such right on the territory of others states that are, like the U.S., not experiencing hostilities on their territory?

By the spring of 2009, Pakistan's armed forces began engaging various Taliban militant groups when one group tried to take over Buner Province.<sup>84</sup> Pakistani forces repulsed the Taliban in fighting that plainly amounted to armed conflict.<sup>85</sup> Pakistan had a right to resort to major military force to respond to this type of challenge to the legitimate government of Pakistan. The government of Pakistan, however, did not request U.S. assistance, let alone the use of drones to end the challenge to its authority in Buner. On the contrary, many U.S. attacks have been in areas where the Pakistani government had been attempting through a variety of methods to prevent an armed conflict. The Pakistani government position until 2009 had been to seek stability through peaceful means.<sup>86</sup> The legal restriction on the use of military force in such situations is found in human rights law. The major human rights treaties, for example, permit derogation from the otherwise

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<sup>82</sup> Cullen, *supra* n. 62, at 23.

<sup>83</sup> *Id.* at 27.

<sup>84</sup> See Jane Perlez, *Taliban Seize Vital Pakistan Area Closer to the Capital*, N.Y. TIMES, April 22, 2009, [www.nytimes.com/2009/04/23/world/asia/23buner.html](http://www.nytimes.com/2009/04/23/world/asia/23buner.html). The situation in Pakistan is complex and changes rapidly. One observer points out that there are many groups that call themselves "Taliban." Some are organized armed groups; some are not. Some are sympathetic to al-Qaeda; some are not. This makes the U.S. decision to use drones in this context all the more questionable. Remarks of Mona Schleich, Kroc Institute for Peace Studies, University of Notre Dame, April 6, 2009.

<sup>85</sup> The International Law Association's Committee on the Use of Force Initial Report defines armed conflict as:

Looking to relevant treaties--in particular IHL treaties--rules of customary international law, general principles of international law, judicial decisions and the writing of scholars, as of the drafting of this Initial Report, the Committee has found evidence of at least two characteristics with respect to all armed conflict:

- 1.) The existence of organized armed groups
- 2.) Engaged in fighting of some intensity

International Law Association, Initial Report of the Use of Force Committee, The Meaning of Armed Conflict in International Law (Aug. 2008, Rio de Janeiro) [www.ilahq.org](http://www.ilahq.org). See also, Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY LAW (2008).

<sup>86</sup> See, e.g., David Cortright, "Winning" in Afghanistan, *How to Splinter the Taliban and Support Afghans*, SOJOURNERS MAGAZINE, Mar. 2009, <http://www.sojo.net/index.cfm?action=magazine.article&issue=soj0903&article=winning-in-afghanistan>

prevailing rules only in situations of emergency. Outside an emergency, a state may only take a human life when “absolutely necessary in the defence of persons from unlawful violence.”<sup>87</sup>

The United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials (*UN Basic Principles*), which are widely adopted by police throughout the world, provide in Article 9:

Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.<sup>88</sup>

When in 2009, Pakistan resorted to major military force, the U.S. could have joined it upon an invitation to do so. It is well known that the elected government of Pakistan is weak and that the military and the intelligence services have differing views to the president on various issues at various times. The Pakistani president has protested some strikes,<sup>89</sup> while the military and/or the intelligence services have reportedly assisted the U.S. with others. Moreover, it appears the drones operating in Pakistan are located in Pakistan. This is hardly a basis, however, to found the right to use significant lethal force on a state’s sovereign territory. The United States has put itself in a vulnerable position. Without express, public consent of the kind the U.S. received from Afghanistan and Iraq, Pakistan is in a position to claim the U.S. is acting unlawfully, even bringing a future legal claim for compensation. This would be true even if there were some sort of secret consent that the U.S. would have difficulty proving in a court or other public fora. In the 2004 *Congo v. Uganda* case, Congo expressly requested military assistance from Uganda, which it gave. The ICJ, nevertheless, found that Uganda violated the *jus ad bellum* when it did not withdraw its troops from Congo following Congo’s indirect signals to do so.<sup>90</sup> The Pakistan government’s protests to date would make a good argument that it, like Congo, has withdrawn any implicit consent that might have been given.

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<sup>87</sup> *McCann & Others v. United Kingdom*, Ser. A, No. 324, App. No. 18984/91 (1995).

<sup>88</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <http://www2ohchr.org/english/law/firearms.htm>. It is not possible to give a warning from a drone and thus drones, like bomber aircraft, cannot lawfully be used in law enforcement. The indication from the U.S. that it might use weaponized drones in action against pirates, a law enforcement operation (see Guilfoyle chapter, this volume), indicates confusion over this point of law. See *U.S. Deploys Drones Against Somali Pirates*, CBS NEWS, Oct. 24, 2009, <http://www.cbsnews.com/stories/2009/10/24/world/main5417885.shtml>

<sup>89</sup> See Karen DeYoung, *U.S. Options in Pakistan Limited*, WASH. POST, May 4, 2009,

[http://www.washingtonpost.com/wp-dyn/content/article/2009/05/03/AR2009050302212\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/05/03/AR2009050302212_pf.html)

<sup>90</sup> *Congo v. Uganda*, *passim*.

Besides the risky legal situation the U.S. is in, the United States wants Pakistan's civilian, elected government to succeed. The U.S. needs to treat that government with respect and defer to its policies aimed at extending its authority in Pakistan. It can hardly do so as it continues to send drones in the face of the government's protests.

Equally the Security Council has not authorized attacks, and the U.S. has no right on that basis to use drones. In the wake of the 9/11 attacks, the Security Council did find in Resolution 1368 that the attacks triggered Article 51 self-defense. The Council did not, however, authorize the use of force against any particular state. Even if it did, such action would have to comply with the principles of necessity and proportionality. Necessity in the *jus ad bellum* refers to the decision to resort to force as a last resort and that the use of major force can accomplish the purpose of defense. Apparently U.S. drone attacks in Pakistan aim at militants who attack U.S. troops in Afghanistan or join with al-Qaeda to plot future 9/11-type attacks in the U.S. One of the leading experts on counter-terrorism does not believe this will be the result of the drone attacks. In Congressional testimony in March 2009, David Kilcullen, said,

I think one of the things we could do that would send a strong message right now is we could call off the drone strikes that have been mounted in the western part of Pakistan.

I realize that they do damage to al Qaeda leadership. Since 2006 we've killed 14 senior al Qaeda leaders using drone strikes. In the same time period we've killed 700 Pakistani civilians in the same area. The drone strikes are highly unpopular.

They are deeply aggravating to the population. And they've given rise to a feeling of anger that coalesces the population around the extremists and leads to spikes of extremism well outside the parts of the country where we are mounting those attacks.

Inside the FATA [Federally Administered Tribal Areas] itself some people like the attacks because they do actually target the bad guys. But in the rest of the country there's an immense anger about them. And there's anger about them in the military and the intelligence service. I realize it might seem counterintuitive, but we need to take our foot off the necks of these people so they feel that there's a degree of trust. Saying we want to build a permanent relationship, a friendship with them whilst continuing to bomb their population from the air, even if you do it with robot drones, is something that they see through straight away.<sup>91</sup>

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<sup>91</sup> Hearing of the House Armed Services Committee, Effective Counterinsurgency: the Future of the U.S. Pakistan Military Partnership, April 23, 2009 (Testimony of David Kilcullen).

The views of Kilcullen and others raise serious questions as to whether drone strikes can be defended as accomplishing the military objective in any meaningful way.<sup>92</sup> Moreover, the difficulty of accomplishing the military objective is compounded by the disproportionate loss of civilian lives.<sup>93</sup> In Western Pakistan missile strikes are inevitably going to kill far more unintended than intended targets. Even with improvements in the technology, high numbers of civilians are going to be killed using missiles and bombs in places where no hostilities are occurring and, thus, civilians are living and working normally. In armed conflict zones, civilians will evacuate or take some precautions.<sup>94</sup>

The media have reported on another attempt at a legal argument to justify drone attacks: “hot pursuit”.<sup>95</sup> There is, however, no right of hot pursuit on land. Even attempting to extrapolate from the hot pursuit permitted under the law of the sea, the use of drones bear almost no resemblance to that right. Hot pursuit at sea provides a narrow right of coastal state law enforcement to extend the exercise of jurisdiction when a crime is suspected in the state’s territorial sea or contiguous zone. Coastal law enforcement agents may pursue a suspect on the high seas when attempting to make an arrest if the pursuit began in maritime zone where law enforcement agents have jurisdiction and the agents remain in visual contact with the suspect until the arrest.

Related to the hot pursuit argument is an argument that U.S. commando or special operation forces may cross from Afghanistan into Pakistan to kill or capture suspected militants or terrorists using drones or other weapons.<sup>96</sup> There appears to be no international law authority directly on point for this view, although the author has written that the law of countermeasures might support cross-border police action where a state has failed to exercise due diligence. The argument is at its strongest in a failed state situation. However, the U.S. does not recognize Pakistan as a failed state. The U.S. has urged Pakistan to make greater efforts to control lawlessness on its territory. To some extent, the U.S. and Pakistan disagree as a matter of policy as to what steps Pakistan should take. The situation does not appear to be an example where the U.S. may disregard Pakistan sovereignty to carry out its own police actions. Moreover, the U.S.

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<sup>92</sup> See also, n. 63 *supra* but see views of CIA Director Leon Panetta, *supra* p. 1.

<sup>93</sup> The principle of proportionality, like necessity, has a place in the *jus ad bellum*, as well as the *jus in bello*. According to Gardam: “The legitimate resort to force under the United Nations system is regarded by most commentators as restricted to the use of force in self-defense under Article 51 and collective security action under chapter VII of the UN Charter. The resort to force in both these situations is limited by the customary law requirement that it be proportionate to the unlawful aggression that gave rise to the right. In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.” Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391 (1993).

<sup>94</sup> The United States has an obligation to take feasible precautions to protect civilians, such as providing advance warning of an attack; never attacking homes; or only attacking at night in open spaces. The author has found no evidence that the U.S. is taking precautions in Pakistan. See *infra* n. and accompanying text.

<sup>95</sup> Jackie Northam, *Airstrikes in Pakistan’s Tribal Areas Legally Murky*, NPR, June 10, 2009, <http://www.npr.org/templates/story/story.php?storyID=101953944> (remarks of Harvey Rishikof, professor at the National War College.) See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 72-3 (2010).

<sup>96</sup> See Murphy *supra* n. 80.

needs Afghanistan's consent to carry out such raids from Afghan territory. Afghanistan has not, apparently, given this consent.

The strongest conclusion to draw under the *jus ad bellum* is that there is no legal right to resort to drone attacks in Pakistan. Drone attacks are uses of military force. Pakistan is not responsible for an armed attack on the United States and so there is no right to resort to military force under the law of self-defense. Pakistan has not expressly invited the United States to assist it in using force. At best there have been mixed signals from Pakistan about the U.S. strikes. Further, even with express consent, the attacks would have to be part of Pakistan's own military operations. Even then, drone attacks may well be counter-productive to the military objective of eliminating the challenge from Pakistani militants, and they have been responsible for the deaths of many unintended victims, leading to serious questions about whether they may be used consistently under the principle of proportionality.

### *The Jus in Bello*

If the government of Pakistan continues to be engaged in internal armed conflict on its territory and requests U.S. assistance, the U.S. must still comply with strict limits on how it uses drones. Indeed, in the circumstances of Western Pakistan, using drones lawfully may be an insurmountable challenge.

In the spring of 2009, Pakistan used major military force on its territory to respond to increasing challenges to central authority. In other words, the nature of the only armed conflict in Pakistan is an internal or non-international armed conflict. In such a conflict, some IHL rules applicable in international armed conflict do not apply, but these are generally rules respecting detention. The core IHL rules respecting targeting are the same in international and non-international armed conflict. These are the rules of distinction, necessity, proportionality, and humanity.<sup>97</sup>

One of the most important rules respecting the conduct of armed conflict may well be the rule of distinction. Under international law, civilians may not be intentionally targeted. Only members of a state's armed forces during armed conflict or persons taking a direct part in hostilities may be targeted. In the ICRC study of customary international humanitarian law, distinction is the first rule:

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.<sup>98</sup>

This rule is supported by a number of legal authorities, including, perhaps most importantly, Additional Protocol I of 1977 to the 1949 Geneva Conventions:

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<sup>97</sup> I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* n. 60, at 3, 29, 46. *See also*, YVES SANDOZ, ET AL, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, sec. 1389 (1987).

<sup>98</sup> I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* n. 60, at 3.

Article 43(2) Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

Article 51(3) Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.<sup>99</sup>

Persons with a right to take direct part in hostilities are lawful combatants; those without a right to do so are unlawful combatants.<sup>100</sup> Having a right to participate in hostilities means that the person may not be charged with a crime for using force. CIA operatives, like the militants challenging authority in Pakistan, have no right to participate in hostilities and are unlawful combatants.<sup>101</sup> They may be charged with a crime.<sup>102</sup>

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<sup>99</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3 (1979). *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 609 (1979).

<sup>100</sup> Knut Dörmann, *The legal situation of “unlawful/unprivileged combatants”*, 85 INT’L REV. RED CROSS 45, 46 (2003). “[U]nlawful/unprivileged combatant/belligerent” is “understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy.”

<sup>101</sup> Cullen, *supra* n., at 27: “The CIA has an important role in developing the actionable intelligence that is key to success. The operations themselves, however, should be executed solely by military personnel.”

<sup>102</sup> Some prefer to continue to reserve the term “combatant” for members of a state’s armed forces in an international armed conflict. *See, e.g.*, Jordan Paust, *Responding Lawfully to Al Qaeda*, 56 Cath. U. L. Rev. (2007). They use “unprivileged belligerent” for someone with no right to engage in an international armed conflict. Frits Kalshoven remarks, “The ‘unprivileged belligerent’ goes back to Baxter’s famous article; he was an army major (and a lawyer) at the time and his terminology came from the Hague Regulations. In the seventies, he [] was not using this terminology any longer, so we may all forget it. The choice is reduced to ‘combatant’ or ‘civilian!’” E-mail message to the author, Nov. 1, 2005. *See* Richard Baxter, *So-called Unprivileged Belligerency: Spies, Guerillas, and Saboteurs*, 28 Brit. Y.B. Int’l L. 323 (1951); Dörmann, *supra* n. 100. This term may also be used respecting rebels in a non-international armed conflict. The term is, however, increasingly being abandoned. *See* the discussion in *A, B v. Israel*, Supreme Court of Israel, sitting as the Court of Criminal Appeals (June 11, 2008) (Gaza Detainee Case). The court introduces a new test for combatancy: “indirect” participation in hostilities. This is a dangerous extension not supported by the weight of authority. The court’s decision was, however, limited to detention. The term “combatant” in English means someone who takes part in combat. That meaning tracks the more up-to-date use adopted here. Attempts to substitute other straightforward terms, such as “fighter” have not succeeded, in part because other languages do not reflect a distinction between “fighters” and “combatants”. I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW *supra* n. 60, at 13. *But see* Marco Sassòli, *The International Legal Framework for Stability Operations: when May International Forces Attack or Detain Someone in Afghanistan?*, 39 IS. YBK. HUM. RTS 177 (2009). Sassòli prefers the term “fighters.” The ICRC defines “enemy combatant” as “a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an international armed conflict.” International Committee of the Red Cross (ICRC), Official Statement, *The Relevance of IHL in the Context of Terrorism* (Jul. 21, 2005), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/terrorism-ihl-210705>. However, in its 2005 study of customary international law, the ICRC found:

Persons taking a direct part in hostilities in non-international armed conflicts are sometimes labeled “combatants”. For example, in a resolution on respect for human rights in armed conflict adopted in 1970, the UN General Assembly speaks of

In the case of drone attacks in Pakistan, there will generally be some question as to the identity of persons the U.S. intends to kill with missile strikes. This is not a situation like the invasion of Iraq where U.S. forces met large, organized units of the Iraqi Army outside Baghdad. Outside Baghdad, using drones to launch missile attacks might in fact have protected civilians from bombs dropped from airplanes flying at high altitudes. But can drones ever be precise enough to comply with the rule of distinction in the situation of Western Pakistan? Suspected militant leaders wear civilian clothes. Even the sophisticated cameras of a drone cannot reveal with certainty that a suspect being targeted is not a civilian. The ICRC Interpretative Guidance on Direct Participation in Hostilities points out that in just such a situation, international humanitarian law gives a presumption to civilian status:

[I]n case of doubt as to whether a [sic] specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not amount to direct participation in hostilities. The presumption of civilian protection applies, *a fortiori*, in case of doubt as to whether a person has become a member of an organized armed group belonging to a party to the conflict. Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal proceedings but rather must reflect the level of certainty that can reasonably be achieved in the circumstances.<sup>103</sup>

Even when a drone operator is reasonably certain in the circumstances that his or her target is not a civilian, the United States is obligated to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”<sup>104</sup> Little information is available as to whether the U.S. takes *any* precautions when carrying out drone strikes.

In addition to distinction, the U.S. must also respect the principles of necessity, proportionality and humanity in carrying out drone attacks. “Necessity” refers to military necessity, and the obligation that force is used only if necessary to accomplish a

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“combatants in all armed conflicts”. More recently, the term “combatant” was used in the Cairo Declaration and Cairo Plan of Action for both types of conflicts. However, this designation is only used in its generic meaning and indicates that these persons do not enjoy the protection against attack accorded to civilians, but does not imply a right to combatant status or prisoner-of-war status, as applicable in international armed conflicts.

I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* n. 60, at 12.

In its 2009 interpretative guidance on direct participation in hostilities, the ICRC has introduced new terminology for members of non-state actor military groups: “members of an organized armed group with a continuous combat function.” International Committee of the Red Cross, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* 27 (May 2009)[hereinafter ICRC Guidance on DPH]. Somehow one suspects that this will not become the phrase of art on the battlefield. It is imperative, however, to have a clear understanding of who may be lawfully targeted and who may not. Combatants may be targeted. Civilians may not.

<sup>103</sup> ICRC Guidance on DPH, at 75-76 (footnotes omitted).

<sup>104</sup> Additional Protocol I, Art. 57(2)(a)(ii).



reasonable military objective.<sup>105</sup> “Proportionality” prohibits that “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage anticipated.”<sup>106</sup> These limitations on permissible force extend to both the quantity of force used and the geographic scope of its use.

If, as discussed above, drone attacks in Pakistan are fueling interest in fighting against the United States rather than suppressing it, using drones is difficult to justify under the principle of necessity. Most serious of all, perhaps, is the disproportionate impact of drone attacks. Fifty civilians killed for one suspected combatant killed is a textbook example of a violation of the proportionality principle. Even in cases with fewer unintended victims, it makes a difference whether the victims are children, elderly people, in a home, and so on. Proportionality is not just a matter of numbers.

Another principle that provides context for all decisions in armed conflict is humanity. The principle of humanity supports decisions in favor of sparing life and avoiding destruction in close cases under either the principles of necessity or proportionality. Again, according to the ICRC Guidance, the principles of necessity and humanity are particularly important in situations such as Pakistan:

In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.<sup>107</sup>

In the well-documented case of the attack on Baitullah Mehsud’s in-laws house in August 2009, we see the serious legal problems with the U.S. approach.<sup>108</sup> Reports on the attack say that the CIA carried out the killing. CIA operatives have no legal right to participate in armed conflict killing. The reports indicate U.S. authorities were certain that they correctly identified Mehsud. They reported they could even see that Mehsud was receiving an intravenous transfusion. The very first Geneva Convention of 1864 forbids

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<sup>105</sup> W. Michael Reisman & Douglas Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT’L L. 86, 94-95 (1998).

<sup>106</sup> Additional Protocol I, Art. 51(5); see also Additional Protocol I, Art. 35(1): “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”

<sup>107</sup> ICRC Guidance on DPH, at 80-81.

<sup>108</sup> For a detailed description of the strike, see, Mayer, *supra* n. 1, at 36.

the targeting of the sick and wounded as a basic principle of humanity. The 2005 ICRC study of customary international humanitarian law says,

Rule 47. Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is:

...

(b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness. ...<sup>109</sup>

Without specific medical information regarding his conditions, it is impossible to say whether or not Mehsud's illnesses rendered him "defenceless" or "*hors de combat*." He might have continued to give orders by cell phone. Did the U.S. have such information? As already discussed, Mehsud was, presumably, the only intended target. He is likely the only target about whom the CIA had any detailed information. What did the U.S. know of the others in the house? Reports say a wife, her parents, "seven bodyguards" and one "lieutenant" were also killed. Was that all? What about the uncle, identified as a "medic"? Was anyone else in the house? Were the bodyguards and the lieutenant direct participants in hostilities? At the time of the attack, the "bodyguards" and "lieutenant" were not directly participating in hostilities. The ICRC Interpretative Guidance might still support targeting them if, as appears to have been the case that they were engaged in a continuous combat function. Without this sort of information, however, as the Guidance advises, the U.S. should treat individuals as civilians. In this case, twelve persons were killed in the targeting of one man hooked up to an intravenous drip.

The U.S. has publicized the Mehsud attack, and, therefore, presumably holds the position it was lawful. Yet, the killing raises concerns about possible negative repercussions. If Pakistani forces—police or military—following law enforcement rules had attempted to arrest Mehsud and the members of his organization, Pakistan might have had a chance of gaining information about the organization, to conduct more arrests, to hold trials, and to promote the rule of law in the region.<sup>110</sup> Instead, such U.S. strike may well keep the cycle of violence in motion.

## Conclusions

The U.S. use of combat drones in Afghanistan between 2004 and 2009 appears to fall far short of meeting the international law rules governing resort to armed force and the conduct of armed force.<sup>111</sup> The U.S. has used drones in Pakistan to launch significant military attacks, attacks only lawful in the course of an armed conflict. The U.S. has not, however, restricted its attacks to situations of armed conflict. Moreover, Pakistan has neither requested U.S. assistance in the form of drone attacks nor expressly consented to

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<sup>109</sup> I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* n. 60, at 164; see also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, art. 3, art. 12.

<sup>110</sup> Pakistani authorities arrested a number of Taliban leaders in 2010. See, e.g., Pakistan "Arrests Key Taliban Leader," Mar. 4, 2010, [http://news.bbc.co.uk/2/hi/south\\_asia/8550725.stm](http://news.bbc.co.uk/2/hi/south_asia/8550725.stm).

<sup>111</sup> See also, Alston, *supra* n. 23.

them. Pakistan's civilian authorities have protested on occasion, which is significant considering the many challenges to those authorities. There is no Security Council authorization for drone attacks nor does the U.S. have a basis in the law of self-defense for attacking inside Pakistan.

Even if the U.S. had a right to resort to combat drones in Pakistan, their use to date has conflicted with the principles governing the conduct of armed conflict. The CIA operatives involved are not lawful combatants with the combatant's privilege to kill during an armed conflict. CIA operatives are not trained in the IHL rules governing the use of force and there is evidence the rules are being violated in the context of Western Pakistan: Drones kill many unintended victims for each intended one, raising questions of proportionality. Counter-terrorism experts doubt the efficacy of military force to end terrorist group, raising doubts about the necessity of drone strikes. Nor has the U.S. apparently taken the necessary precautions to protect civilian lives. The ease of killing with drones seems to be encouraging the narrow U.S. view that military force is the only "game in town" in response to the serious problem of terrorism.<sup>112</sup>

International law, by contrast, supports the position of counter-terrorism experts that law enforcement methods are the proper means to employ in suppressing terrorism. Confronting the violent lawlessness that is terrorism with strict adherence to the rule of law makes common sense and moral sense.

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<sup>112</sup> Lawrence Korb, a respected commentator on military affairs, predicts robotic warriors will make the U.S. more likely to engage in war in general: "It will make people think, 'Gee, warfare is easy.' Remember all the claims of a 'cakewalk' in Iraq and how the Afghan model would apply? The whole idea that all it took to win a war was 'three men and a satellite phone?'" ... [H]e predicts more punitive interventions such as the Kosovo strikes of 1999, launched without ground troops, and fewer operations like the invasion of Iraq. As unmanned systems become more prevalent, we'll become more likely to use force...." Quoted in Singer, *Revenge of the Drones*, *supra* n. 6, at 44-45.