

Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan under International Law

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Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law

Andrew C. Orr[†]

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Introduction

In the war¹ against al Qaeda and other terrorists,² unmanned aerial vehicles (drones) have increasingly become the United States’ weapon of choice.³ In addition to the publicly acknowledged military drone programs in Iraq and Afghanistan, the CIA⁴ uses drones to target militants in the mountainous Federally Administered Tribal Area (FATA) of Pakistan along the Afghanistan border.⁵ Initiated during the second Bush administration, the CIA’s drone program in Pakistan has expanded considerably since President Obama took office,⁶ and 2010 saw more than twice as many drone strikes on Pakistani soil as 2009⁷. The Pakistani government has publicly denounced the attacks, but its intelligence service is cooperating with the CIA, and has even selected some of the targets.⁸ Drones have an obvious appeal in the United States national security community because they are effective, while posing minimal threats to American mili-

1. This Note does not use the term Global War on Terror, both because the Obama administration abandoned it, and because it is vague.

2. The complex relationships among al Qaeda, the Pakistani Taliban, and the Afghan Taliban are beyond the scope of this note. For the sake of convenience, my analysis aggregates all Islamic extremist fighters, actually working together or claiming to be part of the same overall (though broadly defined) “war” against America. I use the terms “al Qaeda,” “militants,” “fighters,” and other general terms in reference to this broad group of persons. See generally Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT’L L. 429 (2010).

3. Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009. This note relies significantly on Jane Mayer’s article, which, at the time of writing, is widely cited by both law review articles and other media sources. While various news outlets report on individual strikes, the Mayer article seems to be regarded as a major authority on the basics and background of the CIA’s drone program in Pakistan.

4. Officially, the CIA neither confirms nor denies the existence of the drone program. See *id.* Moreover, CIA agents, rather than military personnel, conduct the strikes, raising additional issues that are beyond the scope of this note.

5. *Id.*

6. Mark Mazzetti & Soud Mekhennet, *Drones Kill Westerners in Pakistan*, N.Y. TIMES, Oct. 4, 2010, at A13.

7. Associated Press, *Pakistan: Suspected U.S. Drone Strike Against Taliban Kills 18*, THE GUARDIAN (Dec. 27, 2010), <http://www.guardian.co.uk/world/2010/dec/27/pakistan-us-drone-strike-taliban>.

8. See David Ignatius, *A Quiet Deal with Pakistan*, WASH. POST (Nov. 4, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/03/AR2008110302638.html>.

tary personnel. Under international law, however, drone strikes against al Qaeda militants in Pakistan present a number of challenges.

The CIA's use of drones in Pakistan has become an increasingly central topic⁹ in the ongoing international legal discourse about the United States' use of force against al Qaeda and other terrorists.¹⁰

Scholars have raised a number of arguments for the illegality of American drone strikes in Pakistan. First, terrorism is a law enforcement issue rather than a military matter.¹¹ Second, drone attacks violate the territorial sovereignty of Pakistan, a nation that is not involved in an "armed conflict" with the United States.¹² Moreover, the attacks do not meet the requirements for self-defense under the United Nations Charter (Charter)¹³ as interpreted by the International Court of Justice (ICJ)¹⁴ and customary international law¹⁵. Similarly, the drone attacks violate the *jus ad bellum* requirements of necessity and proportionality, to which a State's initial use of force must conform.¹⁶ Under the Charter, acts of violence carried out by non-state actors such as al Qaeda cannot constitute "armed attack[s]" triggering a State's right of self-defense, and hostilities between the United States and al Qaeda do not rise to the level of an "armed conflict."¹⁷ Moreover, al Qaeda is actually a network of separate, loosely affiliated entities, and it does not make sense to characterize every act of violence carried out in the name of al Qaeda as actually the work of a single, well-defined organization.¹⁸ Finally, even if an armed conflict does exist, the drone strikes fail the *jus in bello* requirements of distinction and proportionality which govern hostilities once an armed conflict exists.¹⁹

9. See, e.g., Mary Ellen O'Connell, *Answers to the Ten Questions*, 36 WM. MITCHELL L. REV. 5127 (2010) (arguing, before his death, that it would be illegal under international law for the United States to kill Osama Bin Laden using a drone in Pakistan); Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77 (2010) (arguing that CIA drone strikes in Pakistan are illegal under international law).

10. See Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339 (2010); Peyton Cook, *Bringing the Spies in From the Cold: Legal Cosmopolitanism and Intelligence Under the Laws of War*, 44 U.S.F. L. REV. 601 (2010); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HAR. INT'L L.J. 41.

11. See generally Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009* (Notre Dame Law School, Legal Studies Research Paper No. 09-43), available at <http://ssrn.com/abstract=1501144> (arguing, *inter alia*, that current international law unambiguously prohibits the United States' drone attacks in Pakistan, even with the consent of the Pakistani government).

12. Shah, *supra* note 9, at 119 (arguing that drone attacks amount to "armed attacks on Pakistan" for purposes of international law).

13. U.N. CHARTER arts. 51; 2(4).

14. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 94, para. 176 (June 27) [hereinafter Nicaragua].

15. See Shah, *supra* note 9, at 122-23.

16. O'Connell, *supra* note 11, at 13.

17. *Id.* "Armed attack" and "armed conflict" are separate concepts. The former refers to specific acts of violence (see *infra* Part II.B while the latter is a classification of hostilities (see *infra* Part II.F).

18. See Waxman, *supra* note 2.

19. O'Connell, *supra* note 11, at 21-23.

Others argue that the American drone strikes in Pakistan are permissible,²⁰ or at least that certain existing legal models are inadequate to regulate American engagement with al Qaeda in that country²¹. First, prolonged, intense hostilities involving non-state actors that are capable of conducting large-scale strikes, merit military, rather than law-enforcement responses.²² American drone strikes also do not violate Pakistani sovereignty because Pakistan is unable or unwilling to prevent al Qaeda fighters from hiding and planning future attacks within its borders.²³ Moreover, because of past attacks and the ongoing threat of future al Qaeda attacks, the United States' use of self-defensive force is permissible under Article 51 of the U.N. Charter, and satisfies the necessity and proportionality requirements of *jus ad bellum*. Given its capability and organization, al Qaeda is capable of "armed attacks" triggering the United States' right to use self-defensive force under the Charter.²⁴ The acts of persons funded, supported, trained, or even inspired by the core group of fighters directly linked to Osama bin Laden should be considered acts of al Qaeda, particularly when that group takes credit for the attacks. Finally, the drone strikes satisfy the *jus in bello* requirements of distinction and proportionality.

Assuming the President has authorized it, the CIA's drone program is most likely legal under American law based on the Authorization for the Use of Military Force²⁵ passed by Congress immediately after September 11, 2001, as well as the National Security Act of 1947²⁶. Without explicitly acknowledging the drone strikes in Pakistan, the Obama administration has argued that targeted killings of terrorists comply with international law.²⁷ Some have also argued that targeted killing violates the domestic ban on assassinations. The ban, however, defines that term very narrowly, and targeted killings of military leaders have always been permissible during armed conflict. In any case, the compelling national security interests and the drones' effectiveness to date make it hard to imagine that the United States will discontinue drone strikes against al Qaeda fighters in Pakistan. Thus, the question becomes whether the program is legal under international law, and if not, why not.

20. See Jordan J. Paust, *Self-Defensive Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & PL'Y 237 (2010).

21. See Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L LAW & POL. 1 (2004) (considering the shortcomings of existing international law for accommodating terrorism).

22. See generally *id.*

23. See Paust, *supra* note 20, at 249-50.

24. Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 337, para. 12 (Dec. 19) (separate opinion of Judge Simma) [hereinafter *Armed Activities*] (criticizing the majority's failure to address States' right of self-defense against non-state actors, and arguing that States have that right); see also MALCOLM N. SHAW, *INTERNATIONAL LAW* 1136 (6th ed. 2008) .

25. S.J. Res. 23, 107th Cong. (2001).

26. 50 U.S.C. § 413b.

27. See Harold Hongju Koh, Legal Advisor, U.S. State Dept., Speech at Annual Meeting of the American Society of International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm>).

This Note considers some of the unresolved legal questions surrounding the United States' drone program in Pakistan; it argues that the program is legal in general; and it identifies some of the challenges to the case-by-case legality of individual drone strikes. It will argue that international law supports the intuitive sense that drone strikes killing only known al Qaeda fighters in Pakistan should be permissible, but that such operations become increasingly legally problematic as the number of civilian casualties increases. Moreover, the strikes are *ad bellum* permissible because they constitute a justified use of self-defensive force against al Qaeda under Article 51 of the UN Charter. Because hostilities between the United States and al Qaeda constitute an armed conflict, International Humanitarian Law permits targeted killing of persons actively participating in hostilities. Thus, the legality of the drone campaign must be determined on an individual basis, depending on each strike's adherence to the *in bello* requirements of distinction and proportionality.

Part I provides background on the CIA's use of predator drones to target terrorists in Pakistan and describes the facts relevant to the present analysis. Part II argues that the campaign as a whole is permissible as a result of Pakistan's failure to prevent al Qaeda operations within its borders. Part III considers the drones' compliance with *in bello* requirements, but concludes that a thorough assessment is impossible given the limited availability of facts. Part VI considers the drones' compliance with *in bello* requirements, but concludes that a thorough assessment is impossible given the limited availability of facts. Part VII presents a comparison between the law applicable to the drone program and that of espionage, an area of international law fraught with ambiguities and paradoxes of its own.

I. Factual Background

Certain legally salient facts define the scope of this note's analysis.

A. Pakistan-Specific Facts

The United States is not engaged in an armed conflict with Pakistan, and has Pakistan's permission to conduct drone attacks within its borders.²⁸ While the Pakistani intelligence and military services have not always cooperated with the United States' efforts to capture or kill al Qaeda members,²⁹ Pakistani leaders now have a say in targeting decisions³⁰. Unfortunately, Pakistani government's inability to control the FATA region

28. See Mayer *supra* note 3.

29. Karin Brulliard & Karen DeYoung, *U.S.-Pakistan Cooperation Has Led to Capture of Afghan Taliban Insurgents*, WASH. POST (Feb. 19, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/18/AR2010021800434.html?sid=ST2010021606198>.

30. Ignatius, *supra* note 8.

has allowed al Qaeda fighters to seek refuge there.³¹ The lawlessness of the region has allowed agents of al Qaeda to train, plan, and attempt substantial attacks against the United States, as well as its citizens, diplomats, and military personnel around the world.³² In particular, fighters attacking American military personnel in Afghanistan are able to avoid capture by fleeing across the border into Pakistan.³³

B. Al Qaeda-Specific Facts

Al Qaeda is distinguishable from past non-state actors to which the laws of war have been readily applied. Groups like the Tamil Tigers and the Irish Republican Army have used terror as a tactic, but they differ from al Qaeda in several key ways.³⁴ First, unlike al Qaeda, they have concrete, identifiable objectives of autonomy and statehood, and their use of terrorist tactics, while violating international law, is clearly part of their pursuit of these goals.³⁵ Though al Qaeda certainly has identifiable objectives, its goals are broad, general, and potentially varied among the different groups acting in its name.³⁶ Thus, the militants' goals differ from the specific objectives of liberation or separatist armies.³⁷

More importantly, while non-state actors such as separatist groups might violate the laws of war in pursuit of their objectives, they do not categorically repudiate the principles on which those laws are based.³⁸ Upon achieving independence, a new Tamil state, for example, would presumably seek to join the international community. Such groups, in other words, violate international law without rejecting its premises as a matter of principle.³⁹ Al Qaeda, on the other hand, does not want to join the international community, and generally rejects the norms on which the laws of war are based.⁴⁰ Finally, attacks by al Qaeda and affiliated militants have left thousands dead and show no signs of stopping.

31. Jackie Northam, *Pakistan's Tribal Areas Provide Haven for Militants*, NAT'L PUB. RADIO (Mar. 16, 2009), <http://www.npr.org/templates/story/story.php?storyId=101880188>.

32. See *Predator Drones and Unmanned Aerial Vehicles (UAVs)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned_aerial_vehicles/index.html (last visited Oct. 2, 2011) [hereinafter *Predator Drones and UAVs*].

33. See Northam, *supra* note 31.

34. Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 468-69 (2007).

35. *Id.*

36. For example, al Qaeda's goals have included the end of American influence in Muslim countries and the establishment of a single Islamic leadership in place of certain existing secular governments. See *Quick Guide: Al-Qaeda: Goals*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/pop_ups/04/world_al_qaeda/html/2.stm (last visited Oct. 3, 2011) [hereinafter *Al-Qaeda Goals*]; see generally MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN (Bruce Lawrence, ed., 2005) [hereinafter MESSAGES TO THE WORLD].

37. Sloane, *supra* note 34.

38. *Id.*

39. *Id.*

40. *Id.*

C. The Drone Strikes Themselves

Despite CIA secrecy and Pakistan's prohibition on foreign journalists, much is known about the program.⁴¹ The CIA makes targeting decisions based on intelligence from local informants, and the President approves at least some of the individual strikes.⁴² While the informants are not always reliable, the CIA goes to great lengths to confirm its information and to ensure that the strikes specifically target al Qaeda fighters.⁴³

"Pilots" in the United States control the drones using joysticks while watching a live video feed from a powerful on-board camera.⁴⁴ Accordingly, an obvious advantage of the program is the lack of risk to an on-board pilot. On the other hand, critics argue that removing the risk eliminates a natural check on commanders' decisions to attack, making the decision to use deadly force "easier."⁴⁵

CIA Director Leon Panetta has described the drones as "very precise . . . , very limited in terms of collateral damage," and "the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership."⁴⁶ According to one comprehensive study, drone strikes in Pakistan since 2004 have killed between 1,359 and 2,171 people, 1,082 to 1,736 of whom were militants.⁴⁷ Thus, the study puts the "non-militant fatality rate" since 2004 at roughly 21%, and only 6% in 2010.⁴⁸ A number of factors contribute to the drones' accidental killing of non-militants. First, while the drone strikes target specific persons, they depend on intelligence that may not be reliable.⁴⁹ Moreover, militants take refuge among civilians, making it difficult to avoid civilian casualties.

II. The Campaign as a Whole is Permissible

The United States' drone strikes in Pakistan are, in general, permissible under international law, but more serious legal issues arise on a strike-by-strike basis. In particular, the campaign does not violate Pakistani sovereignty, and constitutes lawful self-defensive force in response to armed attacks and threats from al Qaeda. Consequently, because hostilities

41. See Mayer *supra* note 3; see also *Predator Drones and UAVs*, *supra* note 32.

42. See Mayer *supra* note 3.

43. *Id.*

44. *Id.*

45. Peter Singer, online seminar, International Humanitarian Law Research Initiative, Harvard University, Dec. 17, 2009, audio recording available at <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewPage&pageID=2113>.

46. Ken Dilanian, *Panetta says CIA Operations in Pakistan Taking 'Serious Toll' on al Qaeda's Operations*, L.A. TIMES (Oct. 19, 2010), <http://www.latimes.com/sc-dc-1020-drones-20101019,0,6654257.story>.

47. Peter Bergen & Katherine Tiedemann, *The Year of the Drone: An Analysis of the U.S. Drone Strikes in Pakistan, 2004-2010*, NEW AMERICA FOUNDATION (Feb. 24, 2010) http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergen_tiedemann2.pdf.

48. *Id.*

49. Mayer *supra* note 3.

between the United States and al Qaeda constitute an armed conflict, targeted killing is permissible under International Humanitarian Law.

A. The Strikes Do Not Violate Pakistani Sovereignty

A state is required to prevent extra-state forces, which engage in hostile acts towards other states, from operating within its borders.⁵⁰ In particular, the United Nations Security Council (Security Council) has said that “every state has the duty to refrain from . . . acquiescing in activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force.”⁵¹ Moreover, as UN Special Rapporteur Philip Alston has explained: “A targeted killing conducted by one State in the territory of a second State does not violate the second State’s sovereignty [where] . . . the first, targeting State has a right under international law to use force in self-defence under Article 51 of the UN Charter, [and] the second State is unwilling or unable to stop armed attacks against the first State launched from its territory.”⁵²

Here, the United States is conducting drone strikes in Pakistan with that country’s permission.⁵³ Even without Pakistan’s permission, however, targeted drone killings would not constitute an improper violation of Pakistani sovereignty. Because of Pakistan’s failure to prevent al Qaeda from operating within its borders, Pakistan “may not oppose its sovereign rights to any foreign State that intends lawfully to use force against” al Qaeda.⁵⁴ Indeed, Pakistan’s failure to prevent militants’ operation within Pakistani borders is evidenced by the fighters’ ongoing activity and the number of high-level commanders still functioning in Pakistan.⁵⁵ Moreover, the strikes against al Qaeda are the kind of lawful self-defensive efforts identified by Special Rapporteur Alston and, therefore, do not violate Pakistani sovereignty.⁵⁶

B. *Jus ad Bellum*

1. *The Strikes Satisfy Article 51 and Jus ad Bellum Necessity*

As a general matter, the U.N. Charter forbids the use of force except in very narrow circumstances.⁵⁷ Specifically, the Charter makes an exception to this general prohibition by guaranteeing States “the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”⁵⁸ The ICJ has also recognized that a

50. Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INT’L & COMP. L.Q. 712, 729 (1958).

51. S.C. Res. 748, U.N. Doc. S/RES/508 (Mar. 31, 1992).

52. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, para. 29, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Alston Report].

53. Ignatius, *supra* note 8.

54. ANTONIO CASSESE, INTERNATIONAL LAW 472 (2d ed. 2005).

55. See, e.g., Associated Press, *supra* note 7.

56. See *infra* Part II.B.

57. U.N. CHARTER art. 2, para. 4.

58. *Id.* art. 51.

State's right to self-defense is inherent under customary international law,⁵⁹ and that States that have been victims of an armed attack may respond with force that is "proportional to the armed attack and necessary to respond to it."⁶⁰ In the *Nicaragua* case, the ICJ drew a distinction between "mere frontier incidents" and "grave forms of the use of force," noting that only the latter trigger a State's right to use self-defensive force under the Charter.⁶¹ Later, in the *Oil Platforms* case, the Court noted that "the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defense.'"⁶² Although the Court ultimately found the evidence insufficient to conclude that Iran actually carried out the bombing in that case, the majority opinion made it clear that an individual act of violence is sufficient to constitute an armed attack.⁶³

Some argue that armed attacks giving rise to the right of self-defense are limited to "massive armed aggression" that "imperils . . . life or government,"⁶⁴ and that individual acts of minor hostility do not, even in the aggregate, constitute an "armed attack" under the Charter.⁶⁵ Thus, the argument contends that al Qaeda's campaign against the United States does not trigger the right of self-defensive force under Article 51 because al Qaeda has not launched a full-scale military offensive.⁶⁶ The majority opinion in the *Nicaragua* case suggests a similarly high bar.⁶⁷

As Robert Sloane has pointed out, however, the problem with such an overly demanding standard for an armed attack is that "states which suffer attacks that fall short of the [*Nicaragua* majority's] 'armed attack' threshold must, in its view, simply endure low-intensity violence, even in the face of a paralyzed Security Council that proves consistently unable to respond as the Charter presupposes."⁶⁸ Antonio Cassese explains that "self-defence must cease as soon as its purpose . . . has been achieved," but otherwise, "self-defence may continue until the [Security Council] has taken *effective* action rendering armed force by the victim unnecessary."⁶⁹ Presently, the Security Council has not acted to address the ongoing threat to the United States from militants located in Pakistan.

Moreover, beyond "mere frontier incidents,"⁷⁰ violence by al-Qaeda and associated fighters has lasted since at least 1992 and left thousands dead in several different countries. The ongoing threat from al Qaeda is underscored by al Qaeda's emphasis on the fact that all Americans are

59. The *Oil Platforms (Iran v. U.S.)* Case, 2003 I.C.J. 189, para. 57 (Nov. 6) [hereinafter *Oil Platforms*].

60. *Nicaragua*, *supra* note 14, at 94.

61. *Id.* at 93.

62. *Oil Platforms*, *supra* note 59, at 195.

63. *Id.* at 195-96.

64. CASSESE, *supra* note 54, at 354.

65. Alston Report, *supra* note 52, at para. 41.

66. Shah, *supra* note 9, at 94.

67. *Nicaragua*, *supra* note 14, at 93.

68. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 *YALE J. INT'L LAW* 47, 82 (2010).

69. ANTONIO CASSESE, *INTERNATIONAL LAW* 305 (2001).

70. *Nicaragua*, *supra* note 14, at 93.

targets.⁷¹ Assuming that al Qaeda's goals survive the death of Osama bin Laden, al Qaeda holds American people complicit in the actions of their government, and regards those actions as justification for the armed attacks that bin Laden called "defensive jihad."⁷²

2. *The Drone Strikes May Satisfy Jus ad Bellum Proportionality, but the Unavailability of Facts Precludes a Legal Conclusion*

Under *jus ad bellum*, the initial use of force must also be proportionate to the campaign's objective.⁷³ "Jus ad bellum must be applied contextually" to determine whether the overall goal of a use of force, such as the isolation and incapacitation of the Iraqi regime during Operation Desert Storm, is a proportionate objective.⁷⁴ For example, Sloane has argued that the ouster of the Taliban in Afghanistan would not have been a proportionate objective for the United States in response to al Qaeda's attack on the U.S.S. Cole, but a full-scale invasion of Afghanistan was "overwhelmingly regarded as lawful as evidenced by the response of the Security Council, regional organizations, and many foreign states" after September 11th.⁷⁵ There is no specific formula, and the inquiry is highly fact-specific. Because of the secret nature of the CIA's drone strikes in Pakistan, the Obama administration has not identified their overall objective.⁷⁶ The fact that the drone strikes continue to target specific individual fighters (rather than, say, entire villages), however, suggests that their goal is limited to the elimination of ongoing threats to the United States. Such a goal would be *ad bellum* proportionate, but the unavailability of relevant facts precludes a conclusive legal analysis.

C. *The Drone Strikes Constitute Lawful Self-Defensive Force Against al Qaeda, A Non-State Actor*

Some commentators argue that the United States' use of force against al Qaeda is impermissible because only armed attacks by state actors trigger the right to use self-defensive force.⁷⁷ Indeed, the ICJ's recent jurisprudence limits the concept of Article 51 armed attacks to the actions of state actors.⁷⁸ This reading of Article 51, however, contradicts the provision's

71. See *MESSAGES TO THE WORLD*, *supra* note 36, at 140. Bin Laden also said, "The American People should remember that they pay taxes to their government and that they voted for their president. Their government makes weapons and provides them to Israel, which they use to kill Palestinian Muslims. Given that the American Congress is a committee that represents the people, the fact that it agrees with the actions of the American government proves that America in its entirety is responsible for the atrocities that it is committing against Muslims." *Id.* at 140-41.

72. *Id.*

73. Nicaragua, *supra* note 14, at 93.

74. Sloane, *supra* note 68, at 69.

75. *Id.* at 68-70.

76. Mayer, *supra* note 3.

77. Shah, *supra* note 9, at 93.

78. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 207, para. 139 (July 9) [hereinafter Wall]; Nicaragua, *supra* note 14, at 103.

plain meaning and drafting history, as well as customary international legal paradigms.

Al Qaeda's activities, of course, are not attributable to Pakistan even if Pakistan's intelligence service has turned a blind eye toward their operation.⁷⁹ Thus, the drone strikes against al Qaeda in Pakistan are only permissible as self-defensive force against a non-state actor. While the ICJ has famously held that acts constituting armed attacks must be "by or on behalf of a state,"⁸⁰ this reading of Article 51, is neither natural nor realistic.

Read naturally, Article 51 permits the use of self-defensive force in response to hostilities by non-state actors. The Vienna Convention on the Law of Treaties provides that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty."⁸¹ Read alongside Article 2(4)'s general prohibition on the use of force by "Members," against "any State," Article 51's conspicuous omission of a State actor requirement confirms that the Charter itself contains no such limitation.⁸² Indeed, writing separately in the *Wall* case, Judge Higgins sharply criticized the majority's purportedly textualist reading of Article 51, saying "there is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State."⁸³ Article 51 is, therefore, unambiguous by its terms.

The Charter's *travaux préparatoires* suggests a similar reading,⁸⁴ and at least three recent ICJ judges have questioned whether armed attacks are limited to State actors. While considering the Charter's accommodation of regional security agreements, such as the Rio Treaty, the delegates at San Francisco in 1945 rejected a version of Article 51 that referred to attacks carried out "by any State."⁸⁵ Therefore, Article 51's drafting history does not limit the concept of armed attacks to State actions.

Moreover, ICJ Judges Koojimans, Higgins, and Simma have questioned or rejected a state actor requirement under Article 51. In an era where non-state groups project military-scale power, the better view is that non-state actors, such as al Qaeda, can carry out armed attacks.⁸⁶ Writing separately in the *Armed Activities* case, Judge Koojimans noted that it is "unreasonable to deny the attacked State the right to self-defence merely because

79. See Int'l Law Comm'n, Articles on Internationally Wrongful Acts, art. 2, para. 1, U.N. Doc. A/56/10 (2001) [hereinafter ILC Articles].

80. Nicaragua, *supra* note 14, at 103; see also *Wall*, *supra* note 78, at para. 139.

81. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

82. U.N. CHARTER art. 2, para. 4; see also Murphy, *supra* note 10, at 47.

83. *Wall*, *supra* note 78, at para. 33 (separate opinion of Judge Higgins) (emphasis in original).

84. See Vienna Convention, *supra* note 81, at art. 32.

85. RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 698 (1958).

86. *Armed Activities*, *supra* note 24, at 337, para. 12 (separate opinion of Judge Simma); SHAW, *supra* note 24, at 1136.

there is no attacker State.”⁸⁷

Like the Charter and its drafting history, customary international law also supports this definition of an armed attack. The *Caroline* paradigm, which is the source of the modern customary understanding of self-defense,⁸⁸ permits States to use self-defensive force to repel attacks by non-state actors.⁸⁹ Indeed, the *Caroline* case itself involved non-state hostilities.⁹⁰ Finally, the acquiescence of the international community to the United States’ use of military force in Afghanistan after the attacks of September 11th supports the view that attacks by non-state actors can trigger a State’s right to use self-defensive force.⁹¹

D. The Drone Campaign Constitutes Lawful Anticipatory Self-Defensive Force

There is no universal agreement on the legality of anticipatory self-defense,⁹² and some argue that the plain meaning of “armed attack” precludes preemptive force.⁹³ Others read the United Nations Charter itself to permit the use self-defensive force against anticipated attacks.⁹⁴ The ICJ has noted that Article 51 refers to the “inherent” right of self-defense, and that the Charter affirms, but does not create it.⁹⁵ Determining the contours of the right self-defense, then, requires consideration of how the Charter’s drafters understood that right.⁹⁶

At the time the Charter was drafted, the well-established,⁹⁷ customary right of self-defense permitted States to use force based on anticipated threats.⁹⁸ In fact, the *Caroline* incident involved the use of force against an American (civilian) ship in anticipation of its future military contributions to Canadian rebels’ resistance against British rule.⁹⁹ Such an anticipatory right is especially appropriate where attacks have already occurred and the victim state expects additional offensives from the same source.¹⁰⁰ Finally, state practice and the international support for the American invasion of

87. Armed Activities, *supra* note 24, at 314, para. 30 (separate opinion of Judge Koojimans).

88. See SHAW, *supra* note 24, at 1131.

89. See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int’l L. 82, 82-89 (1938) (quoting 61 Parliamentary Papers (1843); 30 British & Foreign State Papers 193 (1843)); see also Murphy, *supra* note 10, at 50.

90. *Id.*

91. See SHAW, *supra* note 24, at 1136.

92. CASSESE, *supra* note 54, at 474.

93. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275-78 (1963).

94. See, e.g., D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 191 (1958).

95. Nicaragua, *supra* note 14, at 94.

96. BOWETT, *supra* note 94, at 182.

97. *Id.*

98. See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 711 n.40 (2005).

99. *Id.*

100. Oscar Schachter, *The Right of States to Use Armed Forces*, 82 MICH. L. REV. 1620, 1638 (1984).

Afghanistan in 2002 suggest substantial acceptance of such a right.¹⁰¹

Thus, the ongoing threat from militants in Pakistan also justifies the use of anticipatory force against persons planning or working towards future attacks against the United States.

E. The Drone Strikes Do Not Constitute Acts of Aggression

For many of the same reasons that they are *ad bellum* appropriate, American drone strikes in Pakistan do not constitute acts of aggression. The International Criminal Court recently defined aggression as the “use of armed force by one State against another State without the justification of self-defense or authorization by the Security Council.”¹⁰² That definition essentially restated the General Assembly’s widely accepted articulation in Resolution 3314.¹⁰³ Empowered by the UN Charter,¹⁰⁴ the Security Council determines the existence of any act of aggression,¹⁰⁵ and the ICJ has never formally determined the existence of an act of aggression.¹⁰⁶

The drone campaign does not constitute an act of aggression because the strikes are lawfully self-defensive.¹⁰⁷ Resolution 3314’s drafting history, however, further undermines the suggestion that American drone strikes against al Qaeda fighters in Pakistan constitute acts of aggression. Resolution 3314 identifies acts of aggression depending, *inter alia*, on their “consequences” and “gravity,” along with “other relevant circumstances.”¹⁰⁸ In negotiating the language of Resolution 3314, the delegates replaced the Six Power Draft’s explicit intent requirement with the more general consideration of “other relevant circumstances” as a compromise between those who favored a robust intent requirement and those who fiercely opposed it.¹⁰⁹ Thus, the phrase “other relevant circumstances” should be understood to make a State’s intention relevant, but not necessary to the identification of an act of aggression.¹¹⁰ Here, the United States’ narrow intention to defend itself, evidenced by the proportionate and targeted nature of the strikes, further undermines a finding that the drone program qualifies as aggression under Resolution 3314.

101. See CASSESE, *supra* note 54, at 476.

102. Int’l Criminal Court [ICC], Assembly of States Parties, The Crime of Aggression, Annex I, art. 8, ICC Doc. RC/Res.6 (advance version June 28, 2010).

103. G.A. Res. 3314 (XXIX), Supp. No. 31, U.N. Doc A/9631 (Dec. 14, 1974) [hereinafter G.A. Res. 3314].

104. Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT’L L. 71, 108-109 (2010).

105. U.N. CHARTER art. 39; see also Glennon, *supra* note 104, at 108.

106. Glennon, *supra* note 104, at 108. In *Armed Activities*, the Court declined to adjudicate the Democratic Republic of the Congo’s specific allegation of aggression despite holding that Uganda was guilty of a “grave violation” of Article 2(4) of the Charter. *Armed Activities*, *supra* note 24, at 180, para. 23.

107. See *supra* Part II.A-D.

108. G.A. Res. 3314, *supra* note 103.

109. JULIUS STONE, *CONFLICT THROUGH CONSENSUS: UNITED NATIONS APPROACHES TO AGGRESSION* 44 (1977).

110. *Id.* at 46-50.

F. Hostilities Between the United States and al Qaeda Constitute an Armed Conflict

The permissibility of targeted killings depends on the *lex specialis* applicable to a particular conflict, which, in turn, must be classified based on the nature of the violence and the parties involved.¹¹¹ States may conduct targeted killings under International Humanitarian Law applicable in the context of an “armed conflict.”¹¹² Neither the relevant Geneva Convention nor the additional Protocols define an “armed conflict;”¹¹³ the International Criminal Tribunal for the former Yugoslavia (ICTY), however, articulated what is now considered the authoritative¹¹⁴ test in *Tadic*¹¹⁵, and further developed it in *Boskoski*, where it determined that fighting between Macedonian security forces and the Albanian National Liberation Army constituted an armed conflict.¹¹⁶ The test consists of two prongs: (1) the intensity of the conflict, and (2) the organization of the parties thereto.¹¹⁷ In addition, the *Boskoski* court laid out factors relevant to the satisfaction of each prong in a lengthy opinion that sheds light on the highly fact-specific nature of the inquiry, particularly where one of the parties is a non-state actor.¹¹⁸ Under the *Boskoski* analysis, fighting between al Qaeda and the United States constitutes an armed conflict, permitting the United States to conduct targeted killings of al Qaeda fighters.¹¹⁹

1. American Drone Strikes in Pakistan Satisfy the *Boskoski* Test

a) Drone strikes satisfy the intensity prong

One factor in the *Boskoski* court’s evaluation of the conflict was the number of casualties.¹²⁰ The ICTY noted that the highest total estimate for the entire period at issue was 168,¹²¹ a tiny fraction of the total number of Americans that al Qaeda has killed.

The *Boskoski* analysis of the intensity prong also considered how the Macedonian government treated the hostilities.¹²² For example, the court

111. Alston Report, *supra* note 52, at para. 28.

112. *Id.*

113. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva IV]; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1), June 8, 1977, 1125 U.N.T.S. 609, 611 [hereinafter Protocol II].

114. See SHAW, *supra* note 24, at 1190.

115. Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter Tadic].

116. Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, at 78-93 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008) [hereinafter Boskoski].

117. *Id.*

118. *Id.* at 132.

119. Alston Report, *supra* note 52, at 28.

120. *Id.* at 113.

121. *Id.* at 113.

122. *Id.* at 113-14.

noted that the President's orders during the relevant period were issued pursuant to his Constitutional power as commander in chief.¹²³ The government also instructed personnel to engage in combat activities only permissible in a "conditions of war situation," while army and police forces were instructed to use tactics "beyond the legal regulations applicable in peacetime."¹²⁴ While not dispositive, the government's assessment and treatment of the situation was highly significant.¹²⁵ In this case, the U.S. government has obvious incentives to treat hostilities with al Qaeda as a war, and clearly such treatment should not be dispositive. The American government's response to the danger posed by al Qaeda, however, is evidence of its highly informed perception of that threat, and the Obama administration clearly perceives the threat to be significant.

Hostilities between the United States and al Qaeda, then, are sufficiently intense to constitute an armed conflict.

b) Drone Strikes Satisfy the Organization Prong

The *Boskoski* court's analysis under the organization prong considered factors including the armed group's "ability to carry out military operations,"¹²⁶ its "hierarchical command structure,"¹²⁷ and the existence of corresponding political operations.¹²⁸ In the case of al Qaeda, all of these factors demonstrate that al Qaeda is sufficiently organized to satisfy the second prong of the *Boskoski* test.

First, al Qaeda is clearly able to carry out military operations. Some of the group's notable attacks include: the attack on American military personnel in Yemen in 1992, the first World Trade Center bombing in 1993, the bombings of the American embassies in Tanzania and Kenya in 1998, the attacks of September 11, 2001, the London bombings in 2005, and the bombing of the Danish embassy in Pakistan in 2008.¹²⁹

Second, Al Qaeda has a hierarchical command structure. A former al Qaeda analyst for the CIA recently described al Qaeda as a group with "bylaws, committee structures, [and] rules for succession."¹³⁰ The group's governance structure also includes regional commanders who operate in accordance with the "Annual Plan" adopted at the "command council," where Osama bin Laden and Ayman al-Zawahiri casted "the deciding vote[s]."¹³¹ In addition, al Qaeda has multiple tiers of management, and

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 125.

127. *Id.* at 123.

128. *Id.* at 122.

129. Andrew Wander, *A History of Terror: Al Qaeda 1988-2008*, OBSERVER, July 13, 2008, at 27, available at <http://www.guardian.co.uk/world/2008/jul/13/history.alqaida>.

130. Barbara Sude, *Al-Qaeda Central: An Assessment of the Threat Posed by the Terrorist Group Headquartered on the Afghanistan-Pakistan Border*, NEW AMERICA FOUNDATION, Feb. 2010, at 2, available at http://www.humansecuritygateway.com/documents/NAF_AlQaedaCentral.pdf.

131. *Id.* at 3.

mid-level officers sometimes move up to replace senior leaders who die in combat.¹³²

Finally, al Qaeda behaves like a political entity. Before the fall of the Afghan Taliban, cooperation between al Qaeda and that government was readily apparent. Moreover, many of the group's stated goals, including the replacement of certain secular governments with religious leadership, are political.¹³³

Therefore, al Qaeda also satisfies the organization prong of the *Boskoski* test.

G. Applicable Treaty Law does not Forbid the Drone Strikes

1. *The Drone Strikes do not Violate the Geneva Conventions*

Armed conflicts can be international or non-international.¹³⁴ Article 2 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War limits the Convention's applicability to "armed conflict which may arise between two or more of the High Contracting Parties," or "partial or total occupation of the territory of a high contracting party."¹³⁵ Al Qaeda is obviously not a "High Contracting Party," and this case does not involve occupation, so that Convention does not apply. Similarly, Additional Protocol I does not apply to non-international armed conflicts¹³⁶ and the other Geneva Conventions are irrelevant, by their terms, to the present discussion of the legality of drone strikes.¹³⁷ While Protocol II can apply to non-international conflicts, it is only applicable where the non-state actor controls a substantial portion of a State's territory.¹³⁸ Therefore, the only applicable Geneva Convention provision is Common Article 3.

Targeted killing of al Qaeda fighters is permissible under Article 3, which applies protections to "persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat. . . ."¹³⁹ The drones do not attack such persons, instead targeting only al Qaeda fighters,¹⁴⁰ which is permissible during an armed conflict.¹⁴¹ Targeted killing is an especially appropriate technique where one party to the conflict is a non-state group whose

132. *Id.*

133. See generally MESSAGES TO THE WORLD, *supra* note 36; see also *Al Qaeda Goals*, *supra* note 36.

134. Alston Report, *supra* note 52, at para. 50.

135. Geneva IV, *supra* note 113, at art. 2.

136. See Protocol I, *supra* note 113.

137. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

138. Protocol II, *supra* note 113.

139. Geneva IV, *supra* note 113, at art. 3.

140. See Mayer, *supra* note 3.

141. Alston Report, *supra* note 52, at para 30.

fighters take refuge among civilians.¹⁴²

2. *The Drone Strikes do not Violate the International Covenant on Civil and Political Rights*

As a general matter, human rights law applies to armed conflicts, except where International Humanitarian Law (IHL) displaces it as the *lex specialis*.¹⁴³ Here, the United States is a signatory to the International Covenant on Civil and Political Rights (ICCPR), which prohibits “arbitrary” killing even during an armed conflict.¹⁴⁴ That prohibition is non-derogable,¹⁴⁵ and the ICCPR also forbids the punitive or deterrent killing of terrorists¹⁴⁶. Far from arbitrary, however, targeted drone strikes against al Qaeda fighters aim to disrupt future attacks on the United States, rather than punish or deter militant activity.¹⁴⁷ Moreover, it is not clear that the United States’ ICCPR jurisdiction extends to al Qaeda fighters in Pakistan at all.

The European Court of Human Rights (ECHR) has held that “the jurisdictional competence of a State is primarily territorial,” in the context of human rights treaties, and only applicable extraterritorially in exceptional cases, such as where the State exercises effective control over territory outside its borders.¹⁴⁸ It is important to distinguish the concept of jurisdiction in human rights treaties, where the term “denote[s] solely a sort of factual power that a state exercises over persons or territory,” from the more common legal term for the competence of a particular court.¹⁴⁹ Article 2(1), of the ICCPR obliges the United States to protect the human rights of persons “within its territory and subject to its jurisdiction,”¹⁵⁰ and al Qaeda fighters in Pakistan are clearly not within American territory. While the Human Rights Committee has read Article 2(1) of the ICCPR disjunctively (as if the “and” were an “or”), so that it actually provides two alternative bases for jurisdiction,¹⁵¹ such a construction is strained. Indeed, the Vienna Convention on Law of Treaties, provides for interpretation “in good faith in accordance with the ordinary meaning to be given to the terms”¹⁵² and the Convention’s interpretive principles reflect customary interna-

142. *See infra* Part III.C.

143. *See* Alston Report, *supra* note 52, at para 29.

144. International Covenant on Civil and Political Rights art. 2(1), Dec. 19, 1966, 993 U.N.T.S. 171 [hereinafter ICCPR].

145. *Id.* at art. 4; Alston Report, *supra* note 52, at para. 37.

146. *See* Final Observations of the Human Rights Committee Israel, U.N. Doc. CCPR/CO/78/ISR, Aug. 21, 2003.

147. *See supra* Part II.B.

148. *Bankovic v. Belgium*, App. No. 52207/99, Eur. Ct. H.R. (2001) at para. 71.

149. Marko Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, 8 *HUM. RTS. L. REV.* 411, 417 (2008).

150. ICCPR, *supra* note 144, at art. 2(1).

151. Draft General Comment on Article 2, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para. 9, CCPR/C/CRP.4/Rev.3 (May 5, 2003).

152. Vienna Convention, *supra* note 81, at art. 31(1).

tional law¹⁵³. Reading the “and” in Article 2(1) to mean “or” is obviously a substantial departure from the language,¹⁵⁴ and that provision should instead be given its “ordinary meaning”¹⁵⁵. Thus, properly construed, the jurisdictional provision of the ICCPR does not oblige the United States to safeguard the rights of al Qaeda fighters in Pakistan.

The Human Rights Committee also sought to stretch the concept of ICCPR jurisdiction in *Sergio Euben Lopez Burgos v. Uruguay*, where it read the provision to include “violations of rights under the Covenant which [a State’s] agents commit upon the territory of another State.”¹⁵⁶ This reading, however leads to “a result which is manifestly absurd” by extending a State’s ICCPR obligations universally.¹⁵⁷ Interpreting “subject to its jurisdiction” to include any situation where a state’s agents affect a person’s ICCPR rights would eliminate the concept of jurisdiction altogether because a state’s human rights obligations are only ever at issue *because* its agents have affected a person’s rights.¹⁵⁸

Thus, neither the Geneva Conventions nor the ICCPR prohibit the United States’ drone attacks against al Qaeda fighters in Pakistan.

It is also worth noting that, beyond refusing to adhere to both IHL, such as the Geneva Conventions, and human rights law, such as the ICCPR, al Qaeda completely rejects the premises that underlie those principles. As one commentator has stated:

The common denominator of the war convention—which, absent reciprocity, repudiation, and other interstate political dynamics, makes it “work,” however imperfectly—is a shared normative commitment to reducing superfluous suffering and harm in war. And the main convention by which IHL accomplishes this is the axiom of noncombatant immunity, which modern transnational terrorist networks typified by al Qaeda reject. This “new” genre of non-state actor also rejects the secular, aspirationally universal conception of human dignity underlying international human rights law.¹⁵⁹

Therefore, to insist that existing international law is perfectly capable of addressing the challenges posed by such groups,¹⁶⁰ is to ignore the discrepancies between the premises underlying that law and actors’ practices in the real world.

III. *Jus in Bello*: Strike-by-Strike Legal Analysis Requires More Facts

Because the drone campaign is not unlawful as a whole, the question becomes whether individual strikes violate international law. Under the

153. Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 41, 47 (Fons Coomans & Menno T. Kamminga eds., 2004).

154. *Id.* at 48.

155. Vienna Convention, *supra* note 81, at art. 31(1).

156. Sergio Euben Lopez Burgos v. Uruguay, para. 12.3, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981).

157. Vienna Convention, *supra* note 81, at art. 32(b).

158. See McGoldrick, *supra* note 153, at 45.

159. Sloane, *supra* note 34, at 468-69.

160. See, e.g., O’Connell, *supra* note 11, at 12.

rules of armed conflict, each drone strike against militants in Pakistan must conform to *jus in bello* principles “in consideration of the “delicate balance to be maintained between military necessity and humanitarian considerations.”¹⁶¹ The analysis of “proportionality should be a complex equation, taking into account factors such as the military importance or exigency of the target.”¹⁶² In addition, the core Geneva principle of distinction is customary international law, and every attack must distinguish between militants and persons not directly participating in hostilities.¹⁶³ Whereas *jus ad bellum* governs the initial resort to the use of force, *jus in bello* restricts individual operations. Because the *jus in bello* inquiry is highly factual and strike-specific, this note will not reach any conclusions about the *in bello* permissibility of the individual drone strikes. What is clear, however, is that the *in bello* requirements of proportionality and distinction represent the most significant hurdles for the legality of American drone strikes in Pakistan.

A. Proportionality

The holistic, fact-specific nature of the proportionality inquiry is illustrated by a report by the Military Advisor to the Secretary General on Israel's 1996 shelling of a U.N. compound in Qana, Lebanon, which contained 100 civilians seeking shelter.¹⁶⁴ Major General van Kappen's report was the product of an extensive investigation, including interviews and a forensic survey of the site, and ultimately concluded that the shelling was most likely not an accident.¹⁶⁵ The report also included many details: the proximity of the compound to the source of Hezbollah rockets fired at Israeli soldiers, possible inaccuracies in Israeli maps, the actual landing sites of Israeli shells, the specific chronology, proper functioning of weapons, and the professionalism employed by the Israeli artillery team.¹⁶⁶ The proportionality of individual military operations, therefore, involves a holistic, context-specific analysis.

Here, while the secret nature of the drone strikes and inaccessibility of the FATA region precludes such a thorough analysis, certain facts remain salient. First, the entire program's non-militant casualty rate is roughly 21%, though it was only 6% in 2010.¹⁶⁷ Drones also show their operators a “perfect picture” of the target, facilitating adherence to the principle of

161. SHAW, *supra* note 24, at 1184.

162. W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L LAW 381, 390 (1997).

163. Protocol I, *supra* note 113, at arts. 51(4), 52(2); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 257, paras. 78-79 (July 8) [hereinafter Nuclear Weapons]; CASSESE, *supra* note 54, at 416.

164. U.N. Secretary-General, Letter dated May 7, 1996 from the Secretary-General addressed to the President of the Security Council, at Annex, para. 1, U.N. Doc. S/1996/337 [hereinafter Qana Report] (containing a “[r]eport dated 1 May 1996 of the Secretary-General's Military Adviser concerning the shelling of the United Nations compound at Qana on 18 April 1996”).

165. *Id.*

166. *Id.*

167. Bergen & Tiedemann, *supra* note 47.

distinction.¹⁶⁸ Conversely, an obvious problem with the drone strikes is their dependence on potentially unreliable intelligence.¹⁶⁹ There is an obvious risk that a local informant may provide intentionally misleading information for any number of self-serving purposes.¹⁷⁰

Another pertinent consideration is the relative unavailability of other means of attacking al Qaeda fighters. The lawless FATA region is difficult to access,¹⁷¹ and attempting to actually control the territory through ground operations could result in even more casualties. Given the difficulty of accomplishing the compelling military objective of killing al Qaeda fighters, the drone strikes would most likely be *in bello* proportionate if they could bring their non-militant casualty rate below some minimum threshold.

B. Distinction

International law does not forbid civilian casualties, but instead requires that targeting decisions in individual military operations must avoid civilian casualties that are excessive in relation to the anticipated military advantage.¹⁷² Moreover, “laws of armed conflict are clear that an attacker is not precluded from attacking a legitimate military target by the proximity of civilians or civilian objects,” provided that “weapons [are] aimed individually.”¹⁷³ In the *Nuclear Weapons* case, the ICJ held that “weapons that are incapable of distinguishing between civilian and military targets” are forbidden,¹⁷⁴ but declined to hold that nuclear weapons are *per se* incapable of distinction¹⁷⁵. Accordingly, drones cannot be said to be incapable of adhering to the principle of distinction, and the unfortunate deaths of innocent civilians do not, without more, render the strikes unlawful. In general, drones are capable of achieving this distinction to the extent that their targeting decisions rely on intelligence sources that are, themselves, able to accurately distinguish. Therein, however, lies the difficulty.

Common Article 3 forbids all murder and requires humane treatment of non-militants.¹⁷⁶ Persons who are not members of armed groups enjoy protection from direct attack unless they directly participate in hostilities.¹⁷⁷ Regardless of applicable treaty provisions, the principle of distinc-

168. Mayer, *supra* note 3.

169. *See id.*

170. *Id.*

171. *Id.*

172. Protocol I, *supra* note 113, at art. 51(5)(b); *see also* SHAW, *supra* note 24, at 1184.

173. Roy Gutman & Daoud Kuttab, *Indiscriminate Attack*, in *CRIMES OF WAR 195, 195-97* (Roy Gutman & David Rieff eds., 1999).

174. *Nuclear Weapons*, *supra* note 163, at para. 78.

175. *Id.* at para. 95.

176. Geneva IV, *supra* note 113, at art. 3(1).

177. Int'l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991, 995 (2008) (“adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009”) [hereinafter *ICRC Interpretive Guidance*].

tion is customary international law,¹⁷⁸ and only permits targeting of persons who commit specific acts likely to influence military action¹⁷⁹. The International Committee of the Red Cross has also said that civilians enjoy a presumption of non-militant status, such that commanders may not target persons whose militant status is ambiguous.¹⁸⁰ Al Qaeda fighters wear no uniforms, do not travel in marked vehicles, or otherwise identify themselves in such a way as to facilitate distinction. Accordingly, drone operators must rely on informants to determine the status of a given target and the number of civilian casualties is indicative of the unreliability of this intelligence. Moreover, al Qaeda's use of human shielding undermines American efforts to distinguish between militants and civilians, further complicating the legality of American drone attacks in Pakistan.

C. Human Shielding

Human shielding is a complex issue that bears heavily on the legality of American drone strikes in Pakistan. When civilians become "involuntary" shields because al Qaeda fighters hide among them to deter attacks, those civilians continue to enjoy protection against direct attack because they are not participating in hostilities.¹⁸¹ Where civilians who are not otherwise participating in hostilities locate themselves near, or refuse to depart from the vicinity of al Qaeda fighters *with the intention of* deterring attacks, however, the question becomes more complex. One view holds that even such intentional interference, by creating legal or moral obstacles to attack, cannot constitute direct participation in hostilities, such that persons acting as voluntary shields retain immunity from attack.¹⁸² The contrary position is that where "a voluntary shield takes affirmative steps to frustrate harm to objects (or persons) that make [a military] contribution . . . he contributes to military action in a direct causal way [and] it is difficult to style his behavior as anything but direct participation."¹⁸³ This latter view is intuitively more compelling where, as here, voluntary human shielding thwarts defensive military operations. In other words, by intentionally deterring American drone strikes on militants, human shields affirmatively inhibit operations intended to disrupt al Qaeda attacks on the United States. Accordingly, voluntary human shielding should be regarded as direct participation, and those who so contribute to al Qaeda's efforts should not enjoy immunity from direct attack.

178. Nuclear Weapons, *supra* note 163, at 226-27.

179. ICRC *Interpretive Guidance*, *supra* note 177, at 1015.

180. *Id.* at 996.

181. See Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292, 316-18 (2009).

182. Jean-François Quéguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 INT'L REV. RED CROSS 793, 815-17 (2006).

183. Schmitt, *supra* note 181, at 319.

D. *Jus in Bello*: No Easy Answers

The obvious difficulty underlying the *jus in bello* issues of proportionality, distinction, and human shielding, is that all three inquiries are extremely fact-specific. In the FATA region, however, facts are difficult to come by. All three of these issues potentially require consideration of a potential militant's mental state, which is hard enough to ascertain in a courtroom with witnesses. Indeed, determining what a person did and why is a challenge in many branches of the law. Therefore, requiring commanders and their lawyers to make such assessments in real time, based on inferences and questionable intelligence, is a tremendous burden. This note cannot resolve that difficulty. Hopefully, however, the discussion has clarified that American drone strikes in Pakistan are generally permissible under international law, but determining the legality of specific strikes requires extremely thorough factual analysis.

IV. A Wrinkle: "Mutual-Espionage"

The ambiguities in the law applicable to groups like al Qaeda have a kind of symmetry with the paradoxical position of intelligence activities in international law.¹⁸⁴ International Humanitarian Law punishes spying without outlawing it,¹⁸⁵ and intelligence activity "occupies a very murky place in international law that might be characterized as either legal but discouraged, or illegal but not enforced"¹⁸⁶. A former CIA lawyer has even suggested that perhaps "espionage and international law cannot be reconciled in a complete synthesis" and, accordingly, that "we should tolerate the ambiguities and paradoxes inherent in the world's second oldest profession."¹⁸⁷

The international law governing the conflict between al Qaeda and the United States has paradoxes and ambiguities of its own. For example, al Qaeda "rejects the secular, aspirationally universal conception of human dignity underlying international human rights law,"¹⁸⁸ yet enjoys certain universal human rights protections¹⁸⁹. Similarly, al Qaeda fighters intentionally target civilians as a tactical matter, and hide among civilians to take advantage of the American desire to adhere to the principle of distinction.¹⁹⁰ This dissonance is unsettling, but it also evokes the disorder in the international law of espionage and invites comparison. If the law has, or does come to rest at a kind of tolerance for the "ambiguities and paradoxes

184. See Cooke, *supra* note 10.

185. International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949, at 564 (Yves Sandoz et al, eds. 1987) [hereinafter ICRC Commentary].

186. Cooke *supra* note 10, at 609.

187. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L. L. 595, 596-97 (2007).

188. Sloane, *supra* note 34, at 468-69.

189. See Alston Report, *supra* note 52.

190. Schmitt, *supra* note 181, at 319.

inherent in” espionage,¹⁹¹ perhaps the dissonance itself merits investigation as part of an effort to resolve counterterrorism’s own legal paradoxes.

A. Espionage and International Law

The status of spying in international law is informed by the fact that states want to engage in the practice while punishing the individuals caught spying on them.¹⁹² The 1977 First Additional Protocol to the Geneva Conventions stated that “[r]uses of war are not prohibited” but that spies do not enjoy prisoner of war status.¹⁹³ A former lawyer for U.S. European Command similarly remarked that “the status of espionage under international law is ambiguous, not specifically permitted or prohibited.”¹⁹⁴

Simon Chesterman writes: “Spies, therefore, bear personal liability for their acts but are not war criminals as such and do not engage the international responsibility of the state that sends them . . . [resulting in] the necessary hypocrisy of states denouncing the spies of their enemies while maintaining agents of their own.”¹⁹⁵ Therefore, states gain a kind of advantage by sending spies rather than soldiers, because individual actors, rather than governments, bear the risk of operations.¹⁹⁶ States engaging in espionage activities might be said to have it both ways, in that the States themselves will avoid responsibility, while enjoying the benefits of activities conducted by their agents. By attacking states but avoiding the accountability associated with *being* a state, capable of becoming the target of retaliation, al Qaeda also has it both ways.

B. Terrorism and Espionage

Taken to the extreme, the comparison between terrorism and espionage might result in a conceptualization of terrorism as a form of violent espionage, such that counterterrorism would constitute responsive espionage, which often necessitates violence of its own. Such a conclusion, however, leads further into the legal void. Instead, because the legal hurdles to the legality of drone strikes against al Qaeda fighters in Pakistan involve such fact-specific inquiries, the evolution of the applicable law should promote transparency. Perhaps, taking a cue from the realism underlying the international law governing espionage, the law of counterterrorism should evolve to explicitly permit American drone strikes against al Qaeda fighters in Pakistan. If drone strikes were unambiguously lawful, they would be easier to monitor, and the principles of proportionality and distinction easier to enforce. Moreover, the United States would

191. Radsan, *supra* note 187, at 596–97.

192. Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT’L L. 1071, 1078 (2006).

193. Protocol I, *supra* note 113, at art. 37.

194. Cmdr. Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law* 46 A.F. L. REV. 217, 223 (1999).

195. Chesterman, *supra* note 192, at 1081.

196. *See id.* at 1098.

have more incentive to adhere to those principles. Although clearly not a silver bullet, such a theoretical shift might better promote *jus in bello's* actual aim: reducing unnecessary suffering.

Conclusion

Ten years after September 11th, it seems almost absurd to argue that terrorism is a law enforcement matter. The scale, sophistication, and complexity of the al Qaeda threat has long-since evolved into something more substantial. Perhaps the first step is recognizing that groups like al Qaeda are really game changers in the world of international law, much like the internet was a game changer in the world of information and communication.

Perhaps, by doing what it deems necessary to protect its security interests, the United States, for better or worse, will alter norms, and customary international law will change. It seems likely, however, that the United States, and other countries that are the primary targets of terrorist organizations, will continue to conduct activities like the drone strikes in Pakistan to address terrorist threats no matter what. To those who envision a world in which countries feel bound by international law the same way individuals feel bound by domestic law, this is a hard conclusion to stomach. But international law regarding the use of force against terrorists can also conform to reality, rather than the other way around. A framework that accommodates the security needs of countries targeted by terrorism would promote the legitimacy of international law by reducing the instances in which countries are forced to choose between their own security needs and compliance with international norms. In the meantime, States need to defend themselves, and will almost certainly continue to do so.