

LAW FROM ABOVE:  
UNMANNED AERIAL SYSTEMS, USE OF FORCE,  
AND THE LAW OF ARMED CONFLICT

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## I. INTRODUCTION

In September 2009, the United States Air Force (USAF) graduated its first pilot training class that did not receive flight training.<sup>1</sup> These pilots are not headed for the cockpit but to the controls of an unmanned aircraft system (UAS). In 2009, the USAF trained more UAS pilots than fighter or bomber pilots<sup>2</sup> in an attempt to meet what the former commander of United States Central Command labeled an “insatiable need” for UAS.<sup>3</sup> While the UAS “surge” began under President Bush, President Obama is expanding both UAS acquisition and their use.<sup>4</sup> The proposed 2011 defense budget would double UAS production and for the first time the USAF will order more UAS than manned aircraft.<sup>5</sup>

While UAS are now ubiquitous on the modern day battlefield,<sup>6</sup> the disagreement and controversy surrounding them continues to grow. One commentator referred to UAS as “armed robotic killers,”<sup>7</sup> while a senior analyst at Human Rights Watch described them as the weapon system most

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1. Gordon Lubold, *US Air Force's Class of 2009: Pilots Who Won't Fly*, THE CHRISTIAN SCI. MONITOR, Sept. 28, 2009, at 2, available at <http://www.csmonitor.com/USA/military/2009/0928/p02s04-usmi.html>.

2. Fred Kaplan, *Attack of the Drones*, NEWSWEEK, Sept. 28, 2009, available at <http://www.newsweek.com/id/215825/page/1>.

3. U.S. GOV'T ACCOUNTABILITY OFFICE, UNMANNED AERIAL VEHICLES IMPROVED STRATEGIC AND ACQUISITION PLANNING CAN HELP ADDRESS EMERGING CHALLENGES 2, available at <http://www.gao.gov/new.items/d05395t.pdf> (testimony of Sharon Pickup and Michael Sullivan) [hereinafter GAO report]. Central Command is the command responsible for the wars in both Iraq and Afghanistan. General David Petraeus, the current commander of Central Command, said in January 2010 that “[w]e can't get enough drones.” P.W. Singer, *Defending Against Drones How Our New Favorite Weapon In The Way On Terror Could Soon Be Turned Against Us*, NEWSWEEK, March 8, 2010, available at <http://www.newsweek.com/id/234114>.

4. Jane Mayer, *The Predator War: What Are The Risks Of The CIA's Covert Drone Program?*, NEW YORKER, Oct. 28, 2009, at 37, available at [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer) (reporting that in President Obama's first nine and half months in office he authorized as many UAS strikes as President Bush did in his last three years in office).

5. Julian Barnes, *Pentagon Increases Drone Fleet in New Budget*, SEATTLE TIMES, Feb. 2, 2010, available at <http://seattletimes.nwsourc.com/html/nationworld/2010954876spenddig02.html>.

6. The United States Army reported a 400 percent increase in the amount of UAS flight hours from 1999 to 2009. J.D. Leipold, *Army to Increase Medevac Support, Add New CAB, More UAVs*, ARMY NEWS SERV., Jan. 7, 2010, available at <http://www.army.mil/news/2010/01/07/32603-army-to-increase-medevac-support-add-new-cab-more-uavs/>. In 1999, three UAVs flew 500 hours, compared with 1,700 UAVs flying more than 180,000 hours in 2009. *Id.*

7. John Pike, *Coming to the Battlefield: Stone-Cold Robot Killers*, WASH. POST, Jan. 4, 2009, at B3. Pike, the director of the military information website GlobalSecurity.org claims that “[w]ithin a decade, the Army will field armed robots with intellects that possess, as H.G. Wells put it, ‘minds that are to our minds as ours are to those of those of the beasts that perish, intellects vast and cool and unsympathetic.’” *Id.*

capable of destruction he has ever seen.<sup>8</sup> Much of the recent controversy and associated disagreement involves armed UAS launching missile attacks at al Qaeda and Taliban targets in the northwest portion of Pakistan.<sup>9</sup>

The disagreements manifest themselves in varying conclusions on the legality of a given UAS strike in Pakistan. Yet, that overt disagreement on the answer to the legality question masks that the various participants in the discussion are utilizing wholesale different methodologies and talking past each other in the process. Some speak in terms of how the United Nations Charter governs the overarching question of legality; others claim that the Charter provides only some of the framework; and still others posit that the Charter does not meaningfully apply at all.<sup>10</sup> This divergence leads to correspondingly varied answers as to what extent the law of armed conflict (LOAC) or human rights law applies to the use of force through the United States engaging targets in Pakistan. These answers range from the characterization of the conflict in Pakistan as a war and UAS strikes as “just the killing of the enemy, wherever and however found” to the same strike being labeled extrajudicial killings, targeted assassination, and outright murder.<sup>11</sup>

This article assesses the legality of armed UAS strikes in Pakistan through two normative constructs. The first is *jus ad bellum*, the law governing resorting to force. The second is *jus en bello*, the law governing the actual conduct of hostilities.<sup>12</sup> Together, the two constructs comprise what

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8. P.W. Singer, *Military Robots and the Laws of War*, THE NEW ATLANTIS, Winter 2009, at 41 (quoting Marc Garlasco of Human Rights Watch).

9. Peter Bergen & Katherine Tiedermann, *Revenge of the Drones An Analysis of the Drones Strikes in Pakistan*, NEW AM. FOUND., Oct. 19, 2009, at 1 (claiming “that [a]n important factor in the controversy over [drone attacks] is the widespread perception that they kill large number of Pakistani civilians”). Yet the attacks are perceived as effective, a point demonstrated by a recent al Qaeda attack. The site al Qaeda selected for a January 2010 suicide bombing was a United States Central Intelligence Agency base near Afghanistan’s border with Pakistan, a base which purportedly oversaw UAS attacks. Joby Warrick & Pamela Constable, *Attacked CIA Facility Supported Drone Strikes*, WASH. POST, Jan. 1, 2010, at A1. The attack killed seven CIA officers in the deadliest single attack against the CIA since the 1983 bombing of the United States Embassy in Beirut. *Id.*

10. Mary Ellen O’Connell, *Unlawful Killing with Combat Drones A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (forthcoming), available at <http://ssrn.com/abstract=1501144>. See Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANS. L. & POL. (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1520717###](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520717###).

11. James Kitfield, *Wanted: Dead*, NAT’L J., Jan. 9, 2010, at 21 (quoting the former CIA counter-terrorism chief for the wartime characterization).

12. See Eyal Benvenisti, *Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors*, YALE J. OF INT’L L. 541, 541-42 (2009). While acknowledging that the two norms are logically independent, Benvenisti raises some interesting questions as to the logic of that dichotomy given the influence of *jus ad bellum* considerations in *jus in bello* analysis, particularly as applied to nonstate actors. See 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

is referred to as the LOAC.<sup>13</sup> Unlike broader or more general legal constructs, the LOAC governs a specific subject matter, the use and application of force during armed conflict. This article considers both the question of the lawfulness of UAS strikes and the manner in which they occur through a LOAC prism.

This article also seeks to add clarity to the conversation by outlining the different levels of analysis utilized to assess UAS strikes as a use of force and how those levels lead to disagreement and misunderstanding well beyond differing conclusions on legality. The article begins by defining a UAS and discussing its prevalence around the world. Utilizing a recent UAS strike in Pakistan, the article then reviews the international law framework applicable to the use of armed UAS. The article then considers the associated LOAC targeting principles applicable to such a strike, exploring how in some ways UAS strikes are preferable compared to traditional aerial bombing, but in others less so. The article determines that while how one characterizes the conflict in Pakistan, internally and via the United States, and whether Pakistan has consented to the strikes, trigger different analytical frameworks; however, the conclusion is the same—that the UAS strikes are lawful. Yet ultimately, the current level of discourse demonstrates that constructive debate is needed, not just on UAS strike legality, but on the appropriate legal framework through which such conclusions are reached.

## II. BACKGROUND OF UAS

### A. WHAT IS AN UNMANNED AERIAL SYSTEM?

For the purposes of this article, the terms UAS, unmanned aerial vehicle (UAV), and drone are synonymous. The term UAS reflects the United States Army's current terminology.<sup>14</sup> The Department of Defense

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YALE J. INT'L L. 47, 50 (2009) (labeling the requirement that *jus ad bellum* and *jus in bello* be considered separately a dualistic axiom, which Sloane asserts is logically questionable).

13. See DAVID P. CAVALERI, THE LAW OF WAR: CAN 20TH-CENTURY STANDARDS APPLY TO THE GLOBAL WAR ON TERRORISM? 9 (Combat Studies Institute Press), available at [http://www.au.af.mil/au/awc/awcgate/army/csi\\_cavaleri\\_law.pdf](http://www.au.af.mil/au/awc/awcgate/army/csi_cavaleri_law.pdf) (tracing the development of just war theory including how, in the 17th century, Hugo Grotius, one of the founders of modern international law, expanded the list of principles of just war—*jus ad bellum*—to include fighting the war in a just manner, beginning the concept of *jus in bello* in the process). The Department of Defense defines the LOAC as “[t]hat part of international law that regulates the conduct of armed hostilities.” U.S. DEP’T OF DEF., DIRECTIVE 2311.01E, ¶ 3.1 (2006) [hereinafter DIRECTIVE 2311.01E].

14. Christopher B. Carlile, *Leading the Army's UAS Synchronization Efforts*, ARMY MAG., Jan. 2010, at 35 (describing the development of the United States Army's Unmanned Aircraft Systems Center of Excellence at Fort Rucker, Alabama).

still uses the term UAV, which it defines as “[a] powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and [ ] carr[ies] a lethal or nonlethal payload. Ballistic or semi ballistic vehicles, cruise missiles, and artillery projectiles are not considered unmanned aerial vehicles.”<sup>15</sup> Within the current United States inventory, UAS range in size from the Wasp and the Raven, at 38 inches long, both of which are “launched” by being thrown in the air by hand, to the twenty-seven foot long Predator and the forty-foot long Global Hawk.<sup>16</sup> The UAS capable of carrying weapons generally carry “Hellfire” missiles.<sup>17</sup>

This section should perhaps be titled “What is an UAS Now,” given how different future systems may be from those at issue today. In his book, *Wired For War: The Robotics Revolution and Conflict in the Twenty-First Century*, P.W. Singer details the UAS likely to be utilized in future conflicts.<sup>18</sup> These include a UAS which could remain airborne for up to five years; a high altitude airship “parked” as high as one hundred thousand feet up; micro-UAS the size of insects, and “robo-lobsters” and other drones intended for use at sea.<sup>19</sup> This evolution will render the associated legal analysis that much more difficult, reinforcing the imperative to reach consensus on the framework of that analysis. Before discussing that framework, the proliferation of UAS bears mention.

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15. JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 577 (2001). The distinction between autonomously and remotely piloted UAVs is that “[a]n autonomously piloted UAV is one that is pre-programmed for its mission before it takes off. It then flies its mission without a ground-based pilot. A remotely piloted UAV is controlled by a pilot in a control station on the ground during the flight.” GAO report, *supra* note 3, at 4 n.5.

16. Singer, *supra* note 8, at 37-39.

17. Hellfire is an air-to-ground missile system which uses laser guidance and a roughly twenty pound warhead to defeat tanks and other individual targets. Hellfire History, *Redstone Army Arsenal*, <http://www.redstone.army.mil/history/systems/HELLFIRE.html> (last visited Mar. 9, 2010). Each missile costs some \$58,000. The United States utilizes the Hellfire on a variety of weapons platforms. Sweden, Israel, and Egypt also use the system. Development of the Hellfire began over 40 years ago; so, not surprisingly, the United States military recently announced the Joint Air-to Ground Missile (JAGM) as the successor to the Hellfire missile as the armament for at least one model of UAVs, the Sky Warrior Extended Range Multi Purpose UAV. Scott Gourley, *Joint Air-to-Ground Missile* (JAGM), *ARMY MAG.*, Dec. 2009, at 59. The JAGM will be fielded in 2016 and offers increased range and accuracy over the Hellfire. *Id.* The extent to which this increased capability will alter what is feasible as well as required under IHL is beyond the scope of this article.

18. Singer, *supra* note 8, at 25.

19. *Id.* at 39-40.

## B. WHO HAVE UNMANNED AERIAL SYSTEMS?

Much of the UAS attention centers on the United States, and perhaps Israel, as the only countries that employ armed UAS. Yet at least forty-four countries have UAS.<sup>20</sup> While those countries currently employ UAS as surveillance platforms, most have the capability for armed UAS. The fact that countries around the world possess UAS is not new; yet the manifestations of that proliferation still seem surprising—that Iran utilizes UAS, which became obvious in the spring of 2009 when United States forces shot down an Iranian UAS in Iraq,<sup>21</sup> or that Hezbollah's UAS capability dates back to at least 2004.<sup>22</sup> Unmanned aircraft systems are very much a global business; a British company manufactures engines for Israeli UAS,<sup>23</sup> while Israel in turn sells UAS to Russia.<sup>24</sup>

Another example of where UAS proliferation can be found is Canada. Canada is participating in combat operations in Afghanistan as part of the North Atlantic Treaty Organization force. In support of those operations, Canada is leasing Israeli-made "Heron" model UAS.<sup>25</sup> Although the Heron is capable of carrying weapons, Canada elected not to arm them. Yet Canada recently announced its intention to expend \$500 million to acquire and employ armed UAS, to which the head of the Canadian Air Force added:

What we have to be very mindful of is that Canada very much respects the law of armed conflict and you have to satisfy a number of conditions before you drop a weapon on anything . . . .

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20. See Scott Shane, *Effective Yet Controversial, Drones are Here to Stay*, INT'L HERALD TRIB., Dec. 3, 2009, at 6 (quoting P.W. Singer). The wide range of other countries with UAS include Belarus, China, India, Pakistan and Russian to name just a few. Singer, *Defending Against Drones*, *supra* note 3. Singer claims that "two thirds of worldwide investment in unmanned planes in 2010 will be spent by countries other than the United States." *Id.* Further demonstrating the ubiquitous nature of UAS, Singer documents how an editor for Wired magazine built a hand-tossed UAS for \$1000 and "an Arizona-based anti-immigrant group instituted its own pilotless surveillance system to monitor the United States Mexico border for just \$25,000." *Id.*

21. Waleed Ibrahim & Missy Ryan, *US Forces Shot Down Iranian Drone Over Iraq*, REUTERS, Mar. 16, 2009, available at <http://www.reuters.com/article/idUSTRE52F2ZL20090316>.

22. Barbara Opall-Rome, "Mosquito Through a Net," UAV Finds Flaw in Israeli Air Defenses, DEFENSE NEWS, Apr. 18, 2005, at 1. While the Hezbollah UAS were primitive, that proved to be an advantage of sorts. The drones were so slow that Israeli jets stalled trying to slow down enough to be able to shoot them down. Singer, *Defending Against Drones*, *supra* note 3.

23. David Pallister, *British Link With Drone Aiding the Israeli War Effort*, THE GUARDIAN, Jan. 9, 2009, at 20.

24. *Israel Sells UAVs to Russia, On Condition*, UNITED PRESS INT'L, June 26, 2009, available at [http://www.upi.com/Business\\_News/Security-Industry/2009/06/26/Israel-sells-UAVs-to-Russia-on-condition/UPI-85331246030604/](http://www.upi.com/Business_News/Security-Industry/2009/06/26/Israel-sells-UAVs-to-Russia-on-condition/UPI-85331246030604/).

25. See *Canada to Acquire Attack Drones: Air Chief*, THE CANADIAN PRESS, Mar. 6, 2009, available at <http://www.cbc.ca/world/story/2009/03/06/cdn-drones.html> (describing the Heron lease as two years long and costing \$94 million).

And in the case of the UAV, those conditions will be very difficult to satisfy, but it will also be a very useful option to have.<sup>26</sup>

Canada's willingness to expend half a billion dollars on a combat system, the legal use of which it seems to question, is emblematic of the important role UAS play, and will continue to play, on the battlefield. It also speaks to the confused state of the legal analysis surrounding UAS, confusion that is unnecessarily increased when considering who controls the UAS.

### C. SETTING THE STAGE

The current controversy surrounding UAS strikes focuses on the Federally Administered Tribal Area (FATA) of northwest Pakistan, which runs along the eastern border of Afghanistan. In the FATA, Pakistan is engaged in a conflict with a combination of tribal groups, al Qaeda, and both the Afghan and Pakistani Taliban.<sup>27</sup> These groups are, in one sense, disparate entities with differing objectives, but for the purposes of this article will be collectively referred to as insurgents or organized armed groups. The conflict within the FATA dates back to at least 2004 and has involved over a 100,000 Pakistani troops and members of Pakistan's frontier corps on one side and up to an estimated 20,000+ insurgents on the other. The insurgents have controlled territory within the FATA and killed over 2,200 members of the Pakistani military.<sup>28</sup> While the intensity of the conflict has varied, the engagements between Pakistani forces and these organized armed groups operating within Pakistan have been characterized as offensives, battles, and indeed even outright war.

The insurgents pose a threat to Pakistan and, owing to their cross border operations, also to both United States and Afghan forces in adjacent Afghanistan. As President Obama stated, "[t]here is no doubt that the United States and Pakistan share a common enemy."<sup>29</sup> Consider the former leader of the Pakistani Taliban, Baitullah Mehsud, who was killed in an August 2009 UAS strike in Pakistan. At that time, the Pakistani Taliban had some 16,000 fighters, and while most of them were Pakistani, some 4,000 were Arabs and Central Asians.<sup>30</sup> Mehsud was the purported architect of the assassination of former Pakistani Prime Minister Benazir Bhutto and the bombing of a hotel in Islamabad, which killed more than 50

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26. *Id.* (quoting Canadian Lieutenant General Angus Watt).

27. See Sean Murphy, *The International Legality of U.S. Military Cross-Border Operations From Afghanistan Into Pakistan*, 84 INT'L L. STUDIES 111, 113 (Michael N. Schmitt ed., 2009).

28. See Pamela Constable and Haw Nawaz Khan, *U.S. Drone Attack May Have Killed Leader of Pakistani Taliban*, WASH. POST, Jan. 15, 2010, at A16.

29. Shane Harris, *Are Drone Strikes Murder?*, NAT'L J., Jan. 9, 2010, at 14.

30. *Id.* at 14.

people,<sup>31</sup> which led to him being described as Pakistan's top public enemy.<sup>32</sup> But Mehsud is also believed to have orchestrated numerous suicide bombings against the United States in Afghanistan,<sup>33</sup> against whom he declared a jihad.<sup>34</sup> Mehsud's actions, and those of other similarly situated (and acting) insurgents in the FATA, provide the backdrop for considering the legality of the United States response—armed UAS strikes.

### III. LEGAL ANALYSIS OF U.S. EMPLOYMENT OF ARMED UAS IN PAKISTAN

#### A. JUS AD BELLUM

Assessing the lawfulness of the UAS strikes first requires characterizing the nature of the conflict. While such a characterization sounds easy enough, as applied to the FATA, it is anything but. There would appear to be at least three characterizations of the conflict: (1) a non-international armed conflict (NIAC) between the United States and Afghanistan on one side and organized armed groups operating from the FATA<sup>35</sup> on the other, leading to an inherently confusing term, “internationalized” NIAC; (2) a NIAC between Pakistan on one side and the same organized armed groups operating from the FATA on the other; (3) international armed conflict (IAC) between Afghanistan and the United States on one side and if not Pakistan directly, Pakistan's agents or proxies on the other.

While noting Pakistan's intelligence service support of the Taliban, at least prior to September 11th,<sup>36</sup> this article does not further consider the concept of an IAC between the United States and Pakistan because recent Pakistani attacks on the Taliban undermine any agency or proxy argument. Instead, this article considers the lawfulness of UAS strikes within the two variants of NIAC. While the variants and the analysis that flows are not mutually exclusive by any means, they are treated as such to provide a clearer analytical framework. The reality seems to be a hybrid of the two

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31. See Constable & Khan, *supra* note 28 (describing how a UAS attack may also have killed Mehsud's successor as the leader of the Pakistani Taliban).

32. Haq Nawaz Khan & Pamela Constable, *Pakistani Taliban in Dire Position*, WASH. POST, Feb. 2, 2010, at A1.

33. Bergen & Tiedermann, *supra* note 9.

34. Harris, *supra* note 29, at 26.

35. The absence of a state on both sides of the conflict would preclude the characterization of the situation as an international armed conflict.

36. See Jayshree Bajoria, *The ISI and Terrorism: Behind the Accusations*, COUNCIL ON FOREIGN REL., May 28, 2009, available at <http://www.cfr.org/publication/11644/> (describing support by Pakistani's military intelligence of the Afghan Taliban).



NIAC variants, meaning that Pakistan is engaging in an internal fight, and aspects of that fight cross the border with Afghanistan, and impact the United States and its Afghan and NATO allies. Perhaps more accurately that is the “U.S. reality” as the Europeans purportedly recognize Afghanistan, but not Pakistan, as a designated combat zone.<sup>37</sup>

1. “*Internationalized NIAC*”

Under this characterization, United States forces in Afghanistan are engaged in a conflict with insurgents operating in and from the FATA. Additionally, Pakistan is either unwilling or unable to control the insurgents or at least prevent their use of force outside the borders of Pakistan. To further distinguish this NIAC characterization, assume that Pakistan does not consent to the UAS strikes within its borders. Finally, this article assumes the purpose of UAS strikes is a preemptive or preventive action against prospective hostile acts the target is likely to commit in the future.<sup>38</sup>

The starting point for the analysis under these circumstances is the United Nations Charter.<sup>39</sup> In Article 2(4), the Charter states that “[a]ll Members shall refrain in their international relations 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>40</sup> But this prohibition on the use of force is balanced against, and even subordinate to, Article 51, which provides in pertinent part that “[n]othing in the present Charter shall impair the *inherent right* of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . .”<sup>41</sup>

That the Charter acknowledges not just a right to self defense but that such a right is an inherent one is notable. The acknowledgment reflects and

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37. Harris, *supra* note 29, at 6 (quoting two former British security officials as stating that the UAS strikes “epitomize the difference between the American and European approaches” to counterterrorism).

38. The alternative to the assumption that UAS strikes are preemptive is that the strikes might be reactive, punitive, and action-based on the target’s prior acts. Such targeting would constitute a reprisal, a controversial issue in and of itself, and beyond the scope of this article. Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT’L L.J. 365, 382-86 (2009) (explaining and distinguishing reprisal from the concept of reciprocity).

39. *But see* O’Connell, *supra* note 10, at 16.

40. U.N. Charter art. 2, para. 4.

41. U.N. Charter art. 51 (emphasis added). Article 51 continues:

[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

*Id.*

codifies that for centuries before the Charter, states used force to defend their natural interests in ways the international community considered legitimate. Thus, the use of force in self-defense both precedes and survives the Charter. As such, the use of force in self-defense is subsumed by Article 51 and may be considered lawful. Specifically, pre-Charter use of force varied in both manner and level of acceptance. Even among advocates of the general proposition, the kinds of force that precede and survive the Charter is debated.<sup>42</sup> One such use of force potentially relevant to this discussion is the principal of “self-help” whereby a state uses force in defense of its nationals.<sup>43</sup>

In a December 2009 presentation to the American Society of International Law, Georgetown Professor David Luban explained his view that the inherent right of self-defense is a preemptive one, extending at least as far as the parameters of the *Caroline* test.<sup>44</sup> Here Luban refers to a 19th century attack by the United Kingdom of a United States steamship, the *Caroline*. The British claimed self-defense as the basis of their attack of the *Caroline*, which was intermittently used in support of Canadian insurrection against Britain. Daniel Webster, then United States Secretary of State, articulated what became the *Caroline* test in 1841.<sup>45</sup> Webster stated that the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>46</sup> Luban labels the use of force under such circumstances preemptive, and argues that the conditions of imminence and necessity have led to wide acceptance.<sup>47</sup> He contrasts this with preventive use of force, where an attack is anticipated but not imminent. Luban contends the consensus view is that Article 51 does not include a preventive use of force.<sup>48</sup>

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42. See Robert Turner, *State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World*, in LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT, 67 U.S. NAVAL WAR C. INT'L L. STUDIES 43, 62-64 (Albert R. Coll et al. eds.) (1992). Turner outlines the history, and scope, of the right of self-defense. He contends that “the nature of the wrongful act” dictates the classification of the response and lists retorsion, reprisal, self-help and self-defense as examples.

43. The concept of self-help might apply to the United States' use of force in the FATA to protect Americans in Afghanistan. The self-help aspect would derive from Pakistan's unwillingness or inability to prevent the attacks from the FATA into Afghanistan.

44. David Luban, Preventative War and the U.N. Charter, Presentation to the American Society of International Law, Washington, D.C. (Dec. 3, 2009) (on file with author).

45. *The Caroline*, 2 J. MOORE, DIG. OF INT'L L. 409, 412 (1906) (describing the exchange of diplomatic notes between Great Britain and the United States in 1842).

46. *Id.*

47. See Sean Murphy, *The Doctrine of Preemptive Self Defense*, 50 VILL. L. REV., 699, 699-719 (2005) (describing the doctrine's evolution and four schools of thought on its parameters: the strict constructionist school, the imminent threat school, the qualitative threat school, and the “[U.N.] charter is dead” school).

48. Luban, *supra* note 44.

Yet Luban acknowledges how the founders of natural law struggled with the boundaries of self-defense. Alberico Gentile, one of the first professors of international law, stated that “[w]e ought not wait for violence to be offered us, it is safer to meet it halfway. No one ought to expose himself to danger. No one ought to wait to be struck, unless he is a fool.”<sup>49</sup> Reduced to a maxim, under Gentile, “[a] defense is just which anticipates dangers that are . . . probably and possible.”<sup>50</sup> To this, Swiss philosopher Emer Vattel added the concept of proportionality,<sup>51</sup> that the justification for “forestalling a danger in direct ratio to the degree of the probability attending to it, and to the seriousness of the evil with which it is threatened.”<sup>52</sup>

There is an interesting parallel between the 250 year-old musings of European philosophers and the United States’ post 9/11 National Security Strategy. Under that strategy, “[t]he greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”<sup>53</sup> Also, the strategy provides an open acknowledgement that the United States must act “against such emerging threats before they are fully formed.”<sup>54</sup>

Applied to the FATA, the circumstances seem to meet a preventive but not preemptive threshold. While the circumstances leading up to a UAS strike are largely unknown (or not released), it seems reasonable to assume that few of the targets in Pakistan were in the process of an “imminent” attack. Consider the 2009 strike that killed Baitullah Mehsud. At the moment the missile struck Mehsud’s hideout, one account states Mehsud was on the roof receiving a massage,<sup>55</sup> while another account states he was

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49. *Id.*

50. *Id.* Gentile’s successor at Oxford, Hugo Grotius, “accepted something like the *Caroline* test: preempting an attack if justified, but only if the attack is immediate and imminent in point of time.” *Id.* Luban contrasts Grotius’ view with that of German natural law philosopher Samuel von Pufendorf, who found Grotius’ view of only slightly useful. According to Luban, “[f]or Pufendorf, fear alone can be a just cause but only if ‘we determine with a morally evident certitude that there is an intention to hurt us.’” *Id.*

51. In this context, proportionate response should not be confused with the *jus en bello* principle of proportionality.

52. See Luban *supra* note 44, at 2 (quoting Vattel).

53. NAT’L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>; see DEP’T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (Mar. 2005), available at <http://www.defense.gov/news/mar2005/d20050318nds1.pdf>.

54. George W. Bush, Foreword to NAT’L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002>.

55. Bergen & Tiedermann, *supra* note 9.

on the roof receiving medical care.<sup>56</sup> So while it may be reasonable, even prudent, to anticipate that Mehsud would organize further attacks, it is unlikely that he was doing so while on the roof that day. Accordingly, the *jus ad bellum* analysis depends on how one defines the parameters of self-defense under Article 51. If self defense extends to a preventive use of force, then where there is reliable intelligence of such a threat, the subsequent use of force against that threat in the form of a UAS strike is permissible, even without Pakistan's consent.

This analysis was predicated on the use of force in the territory of a sovereign state without that state's consent. Doing so invokes the U.N. Charter when in reality it may not apply. That's because

[t]he Charter does not directly regulate the resort to force within states between government forces and non-state actors or between non-state actor 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.<sup>57</sup>

Turning to that characterization of conflict—a non-international armed conflict—yields a different analysis but similar overall outcome.

## 2. *Non-International Armed Conflict*

The alternative characterization of the conflict is that of a NIAC between Pakistan on one side and organized armed groups operating from the FATA on the other. An assumption implicit in this characterization is that Pakistan consents to the UAS strikes and that the United States is either assisting with Pakistan's foreign internal defense or essentially acting as Pakistan's agent. The validity of the consent assumption is debatable.<sup>58</sup> Pakistan has not publicly announced its view, rendering inquiry into the relationship difficult.<sup>59</sup> The basis for the assumption is that Pakistan has

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56. O'Connell, *supra* note 10, at 11.

57. *Id.* at 16.

58. Sean Murphy, *The International Legality of U.S. Military Cross-Border Operations From Afghanistan Into Pakistan*, 85 INT'L L. STUD. 79, 118-20 (2009) (describing the role of Pakistan's consent, or lack thereof, in the analysis into the legality of the UAS strikes).

59. Shane, *supra* note 20, at 2. Philip Alston, United Nations Special Rapporteur for extrajudicial killings, stated that it is impossible to judge whether the UAV strikes violate international law without knowing whether Pakistan consented. *Id.* That would seem to overstate the matter. As this article explains, there is an analytical framework where Pakistan consents, and another—primarily the Article 51 analysis—if it does not.

knowledge of the strikes and the opportunity to formally and publicly object to the strikes, but has not done so.<sup>60</sup>

For example, in early December 2009, the Prime Minister of Pakistan said that United States UAS strikes in Pakistan “do no good, because they boost anti-American resentment throughout the country.”<sup>61</sup> Similarly, in January 2010, the Pakistani Foreign Minister said that expanding UAS strikes might “undermine” Pakistan’s relationship with the United States.<sup>62</sup> While not ringing endorsements of the strikes, the statements do not constitute an objection; in fact, the latter implies approval, but only to an undefined point.<sup>63</sup> On the other hand, in February 2010, the Washington Post reported that

[a]lthough the Pakistani government publicly complains about the drone attacks, it privately endorses the strategy under rules negotiated in mid-2008. This agreement permits the CIA to fire when it has solid intelligence and to provide “concurrent notification” to Pakistan, which typically means shortly after a Hellfire missile is launched.<sup>64</sup>

As previously mentioned, Pakistani consent is assumed in order to distinguish the two forms of NIAC for the purposes of breaking out the analytical frameworks. Without that assumption, the United States, through

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60. In the fall of 2008, the New York Times reported that an Obama administration official said that “no tacit agreement had been reached to allow increased [UAS] strikes [in Pakistan] in exchange for a backing off from additional American ground raids” referring to a September 3, 2009, raid by United States Special Operations personnel into Pakistan. Mark Mazzetti & Eric Schmitt, *U.S. Takes to Air to Hit Militants Inside Pakistan*, N.Y. TIMES, Oct. 27, 2008, available at <http://www.nytimes.com/2008/10/27/washington/27intel.html>. According to the story, “Pakistani officials have made clear in public statements that they regard the [UAS] attacks as a less objectionable violation of Pakistani sovereignty.” *Id.* More recent media reports claim that many of the American UAS strikes originate from a base in Pakistan and that their increased frequency is the result of a March 2009 deal between the United States and Pakistan, which provides Pakistanis greater control of the targets. Kitfield, *supra* note 11, at 6. According to Kitfield, “[f]or domestic political consumption, Pakistan’s leaders promote the image of CIA agents flying drones from its American headquarters, but the program clearly involves a high degree of involvement by Americans inside Pakistan, and by the Pakistani government.” *Id.*

61. Shane, *supra* note 20, at 2.

62. Joby Warrick & Pamela Constable, *Attacked CIA Facility Supported Drone Strikes*, WASH. POST, Jan. 1, 2010, at A1.

63. See Interview with Shah Mahmood Qureshi, Foreign Minister of Pakistan with Zeinab Badawi, Reporter, BBC NEWS, *Pakistan FM: US Drones a Threat to Sovereignty* (Dec. 1, 2009) available at <http://news.bbc.co.uk/2/hi/programmes/hardtalk/8388331.stm> (claiming that the Pakistani Foreign Minister referred to American UAV attacks as a threat to Pakistan’s sovereignty). The solution according to the Foreign Minister was for the United States to transfer its UAV technology to Pakistan, which presumably would continue the strikes. *Id.*

64. David Ignatius, *What The Partisan Squabbles Miss On Obama’s Terror Response*, WASH. POST, Feb. 17, 2010, at A13; see also Mark Mazzetti and Jane Perlez, *CIA and Pakistan Work Together, But Do So Warily*, NY TIMES, Feb. 25, 2010, at A1 (describing how the CIA and Pakistan “are working together on tactical operations,” both drone strikes and ground raids).

UAS strikes in the FATA, would be violating Pakistan's territorial sovereignty. As discussed in the prior example, the lawfulness inquiry would begin by applying Article 2(4) of the U.N. Charter, which requires that member states refrain from the use or force or the threat thereof, as well as the Article 51 self-defense provisions. But here, the assumption is that United States action is at the behest of the Pakistan government. As such there is not a *jus ad bellum* inquiry per se as the use of force by the United States is not against the territorial integrity of Pakistan, but against their shared enemy, organized armed groups operating in the FATA and eastern Afghanistan.

While the characterization of the conflict in Pakistan—either in regards to Pakistan or the United States, as well as whether Pakistan has consented to UAS strikes—prompts different *jus ad bellum* analysis, the result is the same: the UAS strikes are a lawful use of force. Such a result depends on the position that preventive use of force may qualify as self-defense under Article 51 of the U.N. Charter or in the alternative, that Pakistan has consented to the UAS strikes. But again, those conclusions address the question of whether resorting to force is lawful. The actual conduct of a UAS strike invokes a different construct and analysis.

#### B. JUS IN BELLO

Having considered *jus ad bellum*, the lawfulness of resorting to UAS strikes, the inquiry shifts to *jus en bello*, the law governing the conduct of the strikes themselves. As previously discussed, this analysis, like that under *jus ad bellum*, occurs through the prism of the LOAC. The impact of that point is more pronounced in the *jus in bello* analysis. The LOAC is the more specific law (*lex specialis*) for regulating the conduct of hostilities. Other, more general law (*lex generalis*), such as human rights law, may still apply but its application, and interpretation, is through the LOAC. In explaining the relationship between human rights law and the LOAC, the International Court of Justice's (ICJ) advisory opinion on the threat or use of nuclear opinions remains instructive. While considering the most sacrosanct of human rights, the right to life, the ICJ stated that

[t]he 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. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of [one's] life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then

falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>65</sup>

Accordingly, characterizations of UAS strikes using human rights terms like assassination or extrajudicial killing are incorrect as they rely on the *lex generalis*, human rights law, as opposed to the *lex specialis*, the LOAC.<sup>66</sup> That the LOAC is the applicable law in the FATA is borne out by another international tribunal. In fact, the International Criminal Tribunal of Yugoslavia's (ICTY) *Tadic* decision is instructive on two levels.<sup>67</sup> First, *Tadic* helps discern when an internal conflict rises to the level of an armed conflict. Secondly, *Tadic* instructs as to the scope of the LOAC which applies during such an armed conflict. As to the first point, according to the ICTY,

an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. International humanitarian law [LOAC] applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international

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65. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 240 (July 8). See also *Bankovic and others v. Belgium and 16 Other Contracting States*, Case No. 52207/99, 12 December 2001 (holding that NATO airstrikes in Kosovo did not constitute effective control sufficient to trigger application of the European Convention of Human Rights).

66. See Harris, *supra* note 29 (describing how many experts "believe that some drone attacks could rightly be called 'extrajudicial killing,'" a conclusion requiring analysis under human rights law, not the LOAC). Press Release, UN Expert Tells Third Committee No State Free from Human Rights Violations; Accountability System Must Be Effective in as Many States as Possible Committee Hears from Human Rights Council Experts on Education, Extrajudicial Execution, Foreign Debt, As Two-Week Debate Continues, U.N. Doc. GA/SHC/3960 (Oct. 27, 2009) (quoting Special Rapporteur Alston as stating that drone strikes "remained unchecked by rules governing international humanitarian law"). Without listing any authority or basis, Alston goes on to claim that the CIA had "determine[d] in complete isolation who, when, and where they would kill and . . . insist[ed] that they were not subject to human rights or humanitarian law." *Id.* Yet the application of human rights instruments, domestically or extraterritorially, requires a state to have effective control. Pakistan does not have effective control over the FATA, so state human rights obligations are not triggered.

67. *Prosecutor v. Tadic*, Case No. IT-96-21-A, Judgment (Feb. 20, 2001).

humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>68</sup>

In the case of the FATA, there is protracted armed violence between Pakistan and the insurgents, which are “organized armed groups.” Accordingly, the current environment is properly considered an armed conflict and not some lesser form of internal disturbance, for which a law enforcement framework might be more appropriate.<sup>69</sup>

The import of the determination that an armed conflict exists<sup>70</sup> is *Tadic*'s next contribution to the analysis. Under *Tadic*, where an armed conflict exists, the full panoply of customary international law of International Humanitarian Law (IHL) applies to the *jus in bello* analysis.<sup>71</sup> In other words, the much broader and more developed rules governing IAC apply to the NIAC in Pakistan.<sup>72</sup> Notwithstanding it is the *lex specialis*, one area where IHL is more developed and appropriate than human rights law is

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68. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

69. See Int'l Inst. Of Humanitarian Law (IHL), Manual on The Law of Non International Armed Conflict With Commentary, at 2-3, available at <http://www.michaelschmitt.org/images/Manual%5B1%5D.Final.Brill..pdf>. Indicia of this lesser form of disturbance include riots and sporadic or isolated acts of violence. *Id.* at 2.

70. One problem with this determination is that Pakistan has not acknowledged the existence of a NIAC within its borders. In some ways this is not surprising. Despite more than a hundred instances around the world over the last sixty years which may have constituted an armed conflict, only two states have explicitly made that acknowledgment: El Salvador regarding its conflict in the 1980s against the Frente Farabundo Martí para la Liberación Nacional (FMLN) and Columbia's long standing struggle with the Fuerzas Armados Revolucionarias de Columbia—Ejército del Pueblo (FARC). Reasons why states do not acknowledge a NIAC include the resulting implication that a state has lost control and increased chance that other states will involve themselves. One offshoot of not acknowledging a NIAC is that the states subsequent use of force is evaluated under a law enforcement, or human rights paradigm. Returning to UAS strikes in Pakistan, one could argue that there is in essence a conflict of laws between how the United States and Pakistan view the same conflict inside Pakistan. The disconcerting result is that were Pakistan to employ UAS in the FATA, that use of force would be judged differently than a similar UAS strike.

71. See Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 89 (Oct. 2, 1995) (describing the international humanitarian law applicable during an armed conflict as the Hague and Geneva Conventions as well as “customary rules on internal conflict” and even agreements binding between the parties to the conflict which are not customary international law).

72. The United States would not likely utilize the *Tadic* analysis. Instead, the United States, as a matter of policy, complies “with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.” Directive 2311.01E, *supra* note 13, at ¶ 4.1. From the DoD perspective, the LOAC “encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.” *Id.* at ¶ 3.1 (emphasis added).



in how targeting decisions are permissibly made and subsequently evaluated.<sup>73</sup>

#### IV. TARGETING PRINCIPLES

The laws governing targeting are primarily derived from two sources. The first is the Fourth 1907 Hague Convention, which regulates the “means and methods” of warfare.<sup>74</sup> The other source is the first two Additional Protocols (AP) to the Geneva Conventions.<sup>75</sup> According to one United States law of war expert, the protocols arguably merged the Hague means and methods tradition with the Geneva tradition of protecting victims of warfare.<sup>76</sup> This section will focus on the application of the AP I concepts of distinction, proportionality, and precautions in the attack to UAS strikes. The section concludes with a discussion about reciprocal responsibility and, who, in the case of UAS strikes in the FATA, is doing the targeting.

##### A. DISTINCTION

The principle of distinction flows from the prohibition against “[i]ndiscriminate attacks” which, among other limitations, are “not directed at a specific military objective.”<sup>77</sup> But do members of organized armed groups in Pakistan constitute such an objective? The basic rule under Article 48 of AP I is that “[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>78</sup>

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73. See Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. OF INT’L HUMANITARIAN L. STUD. (forthcoming 2010).

74. See Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Jan. 26, 1910, *reprinted in* DOCUMENTS ON THE LAW OF WAR 48 (Adam Roberts and Richard Guelff eds., Oxford University Press 1982).

75. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), June 8, 1977, 1125 U.N.T.S. 609; 26 I.L.M 568 (1987).

76. Richard Jackson, Special Assistant on Law of War Matters Army Judge Advocate General Corps, Panelist at the Willamette University College of Law Panel: Empirical Approaches to the International Law of War (Mar. 6, 2009) (on file with author). While the United States has not acceded to either AP I or AP II, the United States recognizes aspects of each as customary international law. As Jackson notes, “more importantly, the United States complies with these provisions in the relevant practice.” *Id.* at 9.

77. AP I, *supra* note 75, art. 51(4).

78. AP I, *supra* note 75, art. 48.

As a result, “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”<sup>79</sup> But civilians enjoy that protection “unless and for such time as they take a direct part in hostilities.”<sup>80</sup> What constitutes direct participation in hostilities is widely debated and the subject of recent interpretative guidance by the International Committee of the Red Cross (ICRC).<sup>81</sup> But the situation in the FATA avoids much of that disagreement, because members of an organized armed group do not qualify as civilians.<sup>82</sup> Such insurgents, through repeated direct participation in hostilities, perform what amounts to a continuous combat function that does not warrant the status and subsequent protections afforded civilians.<sup>83</sup> Killing such insurgents is a permissible military objective and, subject to the conduct of the attack, such an attack is not indiscriminate.

Yet, the individuals who happen to be near the insurgents may be entitled to the protections. While not the objective of the attack, such individuals may still be wounded or killed in an UAS strike on an insurgent. The principle of proportionality helps address whether their injury or death causes the attack to be considered indiscriminate.

#### B. PROPORTIONALITY<sup>84</sup>

The principle of proportionality “reflects this balance between humanitarian concerns and military necessity.”<sup>85</sup> As one commentator acknowledged, “[a]t its core, however, the principle of proportionality still

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79. AP I, *supra* note 75, art. 51(1).

80. AP I, *supra* note 75, art. 51(3).

81. NILS MELZER, Int’l Comm. of the Red Cross, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, 2009 [hereinafter DPH study]. While the DPH study involved input from several countries, the final document is solely an ICRC product, reflecting that “the participants failed to reach a consensus” in a process described as “highly contentious.” Harris, *supra* note 29, at 3.

82. DPH study, *supra* note 81, at 16.

83. DPH study, *supra* note 81, at 35. One difficulty is in parsing such members from those performing a “spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.” *Id.*

84. See generally Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, 8 Y.B. OF INT’L HUMANITARIAN L. 3 (2005).

85. Jackson, *supra* note 76. The concept of military necessity is first reflected in article 23 of the Hague Convention. 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, *supra* note 74, at art. 23. The fact that military aims play a role in the analysis is seen in the beginning of Hague IV, which was “inspired by the desire to diminish the evils of war, as far as military requirements permit.” *Id.* at prmb1. (emphasis added). Jackson notes that this principle is often lost in the targeting discussion. Jackson, *supra* note 76. While Jackson acknowledges this occurs due to the laudable concerns on the humanitarian impacts of warfare, doing so alters the essence of the law of war, which recognizes and attempts to balance both military necessity and humanitarian concerns. *Id.*

envisions that civilians may be harmed in the course of attacks against legitimate military objectives.”<sup>86</sup> AP I lays out the proportionality principle by listing as indiscriminate “[a]n attack 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 the concrete and direct military advantage anticipated.”<sup>87</sup>

Some mistakenly read the proportionality rule as lending itself to an empirical analysis of comparing the numbers of civilians wounded to the numbers of enemy, in this case insurgents, wounded or killed.<sup>88</sup> While that would make the application of the principle easier, the principle balances civilians wounded and killed and damage to their property against military advantage. Military advantage is a subjective determination the military commander makes “based on his or her experience and evaluation of the target in the context of the entire campaign, and the information reasonably available at the relevant time.”<sup>89</sup> As a general rule, proportionality does not limit the amount or type of force used; it considers the expected results.<sup>90</sup>

The proportionality test is “much easier to formulate in principle than to apply to a complex or uncertain set of circumstances. As a result, military commanders and states have enjoyed a great deal of discretion in making these evaluations.”<sup>91</sup> To illustrate the application of proportionality, consider the August 2009 UAS strike that targeted and killed Baitullah Mehsud. The attack also reportedly killed one to three other

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86. Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT’L L. 409, 427 (2009).

87. AP I, *supra* note 75, art. 51(5)(b).

88. *See, e.g.*, O’Connell, *supra* note 10, at 24. O’Connell incorrectly claims that “[f]ifty civilians killed for one suspected combatant killed is a textbook example of a violation of the proportionality principle.” *Id.* Since that is not even a correct recitation of the principle, it hardly stands as a textbook example of its application. The balance is between the fifty civilians killed and the military advantage anticipated from the death of the suspected combatant. Even if O’Connell’s claim of a 50 to 1 ratio is correct, and recent analysis suggests it’s not, the identity of that single combatant is key. For example, the view of 50 to 1 where the 1 is Mehsud or Osama Bin Laden is different than where the 1 is a much lower level figure. As to O’Connell’s 50 to 1 claim, the New America Foundation reported in October 2009 that UAS strikes had killed between 750 and 1000 people in Pakistan and that 66 to 68 percent of them were militants and between 31 and 33 percent were civilians. Bergen & Tiedermann, *supra* note 9. That analysis leads to a ratio of one civilian killed for every two militants.

89. Jackson, *supra* note 76, at 10.

90. *But see* H CJ 769/02 The Pub. Comm. Against Torture in Israel v. Israel, at 29 [2005], available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/A34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf) (claiming that Israel’s interpretation of proportionality results in adding an additional requirement to Israeli forces that “a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed”). It is important to remember the occupation setting, and attendant level of control, which underpins the case and decision.

91. Beard, *supra* note 86, at 428.

members of al Qaeda, including Mehsud's father in law, and two to four people who were reportedly civilians, including Mehsud's wife.<sup>92</sup>

Applying the principle of proportionality to the Mehsud strike results in balancing the deaths of the two to four civilians and damage to the building against the anticipated military advantage of killing the leader of the Pakistani Taliban. But again, in addition to not being an empirical analysis, the assessment is also not made with the benefit of hindsight, but based on the information available to the commander at the time of the strike.<sup>93</sup> Recognizing that even in the UAS era, intelligence is not perfect, the LOAC also mandates certain precautions before an attack.

### C. PRECAUTIONS IN THE ATTACK

Article 57 of AP I outlines precautions to be taken before an attack.<sup>94</sup> These begin with the requirement that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”<sup>95</sup> Of note, Article 57 continues with the requirement to “[d]o everything feasible” to verify that the target is a military objective and to “[t]ake 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>96</sup> The United States endeavors to meet the requirements of Article 57 through a variety of means. These include extensive intelligence gathering, preparing collateral damage estimates and “no strike lists,” and often the use of a computer program to model the likely effects of a given weapon on a given target and the area nearby.<sup>97</sup>

Here again, one finds very different applications of the same UAS qualities to the rule providing for precautions in the attack. Specifically,

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92. Bergen & Tiedermann, *supra* note 9.

93. See Beard, *supra* note 86, at 436-437 (describing the United States attack on the Al Firdos bunker during Operation Desert Storm). Prior to the attack, the United States possessed intelligence that the bunker was being used as a headquarters for the Baath Party Secret Police. While there were intelligence personnel in the bunker, Beard states that there were approximately 300 civilians in the bunker who were killed in the attack, including over 100 children. The analysis of the Al Firdos bunker attack is not retrospective based on the tragic reality of the civilians housed in the bunker but is based on the information the commander had before the attack. *Id.* at 437. Beard notes that the United States claimed its intelligence assets at the time were not able to detect that civilians were entering the bunker at night and questions how the analysis might vary today. *Id.* Beard posits that “what was previously not legally *feasible* is being radically altered by what is now operationally *required*.” *Id.* at 435 (emphasis in original).

94. AP I, *supra* note 75, at art. 57.

95. AP I, *supra* note 75, art. 57(1).

96. AP I, *supra* note 75, at art. 57(2)(a)(i)-(ii).

97. Jackson, *supra* note 76, at 11-12.

UAS have the ability to loiter in the vicinity of a target area for hours, beaming back high quality images in the process. One commentator labels this attribute as terrifying to people, because UAS “fly for hours overhead, hovering, filming, threatening to strike at any time.”<sup>98</sup> Yet another considers that same “persistent surveillance” as “vastly expand[ing] the information resources available to military commanders” and in the process redefining feasible precautions.<sup>99</sup> If, and how much, increases in UAS technology and prevalence shift the feasibility bar bears watching. In directing UAS strikes in the FATA, the United States is obligated to comply with the distinction and proportionality principles and precautions in the attack. But both the United States and the insurgents, like Mehsud, have an obligation to limit casualties.

#### D. RECIPROCAL RESPONSIBILITY<sup>100</sup>

Article 58 of AP I states that parties to the conflict shall, “to the maximum extent feasible . . . endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives.”<sup>101</sup> Similarly, the parties shall “[a]void locating military objectives within or near densely populated areas.”<sup>102</sup> Yet individuals like Mehsud deliberately place themselves in and amongst the civilian population, with the result being either the United States reluctant to attack or more civilian casualties if it does; however, the United States will bear the blame, if not legally, then in the public relations context. The Pakistan Taliban’s use of this tactic does not remove the United States from its obligations discussed above. But it should factor into the analysis of UAS targeting decisions and the inevitable post-strike discussion on the strike’s legality. The Pakistan Taliban’s failure to meet their reciprocal responsibilities under the LOAC may also factor into the proportionality analysis. To the extent that the “civilians” that the Pakistan Taliban live and operate among are considered voluntary human shields, then they are considered to be directly participating in hostilities.<sup>103</sup> As a result, they could be permissibly targeted outright. Their death or injury, or damage to their property, as the result of a UAS strike against the Pakistani Taliban would not be considered collateral damage.

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98. O’Connell, *supra* note 10, at 10.

99. Beard, *supra* note 86, at 434-35.

100. *See generally* Watts, *supra* note 38.

101. AP I, *supra* note 75, art. 58(a).

102. AP I, *supra* note 75, art. 58(b).

103. DPH study, *supra* note 81, at 13 n.6.

### E. WHO CONTROLS THE UAS?

Much attention has been given to the question of who is controlling the UAS being used in the strikes in the FATA. Is it the United States military? The CIA? Contractors working for either? The significance of the answer has been overblown. To the extent it is the United States military, they are required to follow the LOAC. Many believe that the CIA is the lead agency for the strikes in the FATA.<sup>104</sup> Yet former CIA officials have stated that the agency follows a LOAC-based targeting methodology.<sup>105</sup> It would seem to follow that to the extent contractors are involved at the behest of either the DoD or CIA, they follow the process and procedures of those agencies, including applying the LOAC. The only significance to a CIA operative or contract employee controlling the UAS is that they become targetable under the law of war and also lack the combatant immunity that law affords the members of the military who comply with the LOAC. That is not to say that their direct participation in the hostilities, by way of controlling a UAS strike, is prohibited or a war crime. Instead, it means that they lack immunity from the opposing state's national law.<sup>106</sup> But the reality in the FATA is that the insurgents do not constitute an opposing state and the strikes are apparently being conducted at the behest of Pakistan; thus, the strikes constitute no more of a violation of Pakistani law than do the actions of the Pakistani military and police who apply deadly force in the same conflict.

### V. CONCLUSION

Analyzing UAS strikes in Pakistan under both *jus ad bellum* and *jus en bello* provides a useful vehicle by which to consider not only the ultimate question of legality, but the framework used to do so. Implicit in the analysis are questions that require a determination of the parameters of self defense under the U.N. Charter, and even whether the Charter applies.

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104. Mayer, *supra* note 4, at 2; Harris, *supra* note 29, at 1; Kitfield, *supra* note 11, at 8.

105. Harris, *supra* note 29, at 5-6.

106. DPH study, *supra* note 81, at 83-84 (“The absence in [the LOAC] of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by IHL nor criminalized under the statutes of any prior or current international criminal tribunal or court. However, because civilians . . . are not entitled to the combatant privilege, they do not enjoy immunity from domestic prosecution for lawful acts of war, that is, for having directly participated in hostilities while respecting IHL. Consequently, civilians who have directly participated in hostilities and members of organized armed groups belonging to a non-State party to a conflict may be prosecuted and punished to the extent that their activities, their membership, or the harm caused by them is penalized under national law (as treason, arson, murder, etc.).”).

Similarly, how the conflict in the FATA is characterized, either internally or externally, shapes the analysis, as does whether Pakistan consents to the strikes.

This article argued that in the *jus ad bellum* context, UAS strikes are permissible as preventive use of force in self defense if Pakistan does not consent to the strikes. In the more likely event that Pakistan consents to the strikes, then they are at the implicit behest of Pakistan as part of a conflict against a mutual enemy. The LOAC informs the analysis at all stages, particularly in terms of the conduct of the strikes themselves, *jus en bello*. UAS raise situational awareness on the battlefield to unprecedented levels, but this should not be mistaken for omniscience.

It is a certainty that UAS capabilities will continue to advance, posing new challenges for the law in the process. What is uncertain is whether baseline agreement can be reached as to even the applicable legal framework in order to move from cognitive dissonance to constructive dialogue.