
STUDENT CONTRIBUTION

“Leashing the Dogs of War”: Towards a Modification of the Laws of Armed Conflict for the Regulation of the US Drone Strikes in Pakistan

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Transnational terrorism in the twenty-first century is a unique threat that has sparked equally unique responses from nations at the receiving end of it, particularly the US. Some of these responses, however, have ignored both provisions of international law and the political realities prevailing in regions of Pakistan where the Drone strikes have been conducted. This poses various policy problems as the US has continuously used legal lacunae in international humanitarian law to carry on its “war on terror.” This paper addresses the problem by proposing a new form of armed conflict known as “transnational armed conflict,” which accounts for the unique nature of a conflict between a State and a non-State actor operating from the territory of another State. It allows for the setting of appropriate impact and assessment thresholds that could effectively bring such countermeasures in compliance with the accepted principles of international humanitarian law.

Keywords

Drones, International Humanitarian Law, Law of Armed Conflict, Transnational Armed Conflict, US Foreign Policy, Pakistan

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I. Introduction

Drone attacks have become ubiquitous in the “war on terror”¹ since 2004² when the Bush administration began targeting terrorist groups.³ Drones or unmanned aerial vehicles (“UAVs”) are powered aerial vehicles without human operator and can fly automatically or be piloted by remote control.⁴ Due to their ability to carry lethal payloads, they have been used for reconnaissance or bombings against suspected terrorists in Yemen, Somalia, Afghanistan and Pakistan.⁵ Since the commencement of these attacks, it is estimated that 386 drone strikes have been responsible for the death of over 2,000 militants and anywhere between 500 and 1,000 civilians.⁶ These attacks are carried out against members of terrorist organizations and Non-State-Actors (“NSAs”) operating from Pakistani territory without official consent of the Pakistani Government. Thus, unilateral use of force in this manner needs to be analyzed from a viewpoint of international law.

The primary purpose of this research is thus to explore such methods of drone attacks staged by the US in Pakistani territory under international law.⁷ ‘Pakistan’ is chosen as our focal point mainly because the status of non-state terrorist groups such as Al-Qaeda operating in Pakistan would raise many key questions of international law with regard to the legitimacy of the war on terror. These include the regulation of the use of force against the NSAs and the validity of self-defense claims without the consent of the sovereign host-State.⁸ In addition, the Pakistani government has

¹ G. Bush, Joint Session of Congress and American People in the aftermath of the 9/11 Bombing (Sept. 21, 2001), available at <http://archive.vod.umd.edu/warpeace/gwb2001int.htm> (last visited on Oct. 30, 2015)

² M. Sterio, *Use of Drones in the War on Terror*, 45 CASE WESTERN RESERVE J. INT’L L. (2012).

³ P. Bergen & K. Tiedemann, *Washington’s Phantom War: The effects of the U.S. drone in Pakistan*, FOREIGN AFF. July-Aug. 2011, available at <http://www.foreignaffairs.com/articles/67939/peter-bergen-and-katherine-tiedemann/washingtons-phantom-war> (last visited on Oct. 6, 2015).

⁴ C. Jenks, *Law from Above: Unmanned aerial systems, use of force and the law of armed conflict*, 85 N. D. L. REV. 653 (2009).

⁵ J. Serie & A. Ross, *January 2014 Update: US covert actions in Pakistan, Yemen and Somalia*, BUREAU OF INVESTIGATIVE JOURNALISM, Feb. 3, 2014, available at <https://www.thebureauinvestigates.com/2014/02/03/january-2014-update-us-covert-actions-in-pakistan-yemen-and-somalia> (last visited on Oct. 6, 2015).

⁶ For reports on an identification of the victims of drone strikes, see *Naming the Dead*, THE BUREAU OF INVESTIGATIVE JOURNALISM, available at <https://www.thebureauinvestigates.com/namingthedead/?lang=en> (last visited on Oct. 6, 2015).

⁷ For details, see J. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT’L L. 422 (2009).

⁸ Qasim Nauman, *Pakistan condemns U.S. Drone Strikes*, REUTERS, June 4, 2012, available at <http://www.reuters.com/article/2012/06/04/us-pakistan-usa-drones-idUSBRE8530MS20120604> (last visited on Oct. 6, 2015). See also *Pakistan condemns U.S. drone strikes in North Waziristan*, SHANGHAI DAILY, July 11, 2014 available at http://www.shanghaidaily.com/article/article_xinhua.aspx?id=296430 (last visited on Oct. 6, 2015).

explicitly condemned the drone attacks being conducted on its territory, which leads to a deeper analysis of the concept of sovereignty. Such a legal analysis will finally serve as a litmus test for the study of the nexus between international law and the US counter-terrorism policy.

This paper is composed of eight parts including a short Introduction and Conclusion. Part two will analyze the legality of such attacks and seek to discredit various arguments raised by the US in their defense. In this part, the distinction principle enmeshed both in the Additional Protocol I of the Geneva Conventions⁹ and customary international law will be provided. Part three will point out how superficially the US has been interpreting drone attacks ignoring ground realities. Then, this part will also demonstrate how such a violation not only contravenes sacrosanct principles of inter-State relations, but also undermines the global world order. Part four will look forward a new paradigm of armed conflict. The existing paradigms of international armed conflict and non-international armed conflict are inadequate considering the contemporary dynamics known as “transnational armed conflict.” We believe this new paradigm will successfully capture the unique nature of the conflict between the US and non-State entities residing in foreign territories. Part five will investigate the commencement threshold. Part six will evaluate the regulatory humanitarian law framework. Part seven will discuss the practical aspect of transnational armed conflict.

No nation is entitled to take international law into its own hands and thereby abrogate any regulatory framework for its activities. It is time to “leash the dogs of war.”¹⁰

II. Ground Realities in Pakistan and the Distinction Principle

A. Ground Realities in Pakistan

A simple classification of all radical groups in the Federally Administered Tribal Areas (“FATA”) as ‘terrorist targets’ is misplaced, because of the maelstrom of complexities

⁹ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. (hereinafter Additional Protocol I) art. 51.

¹⁰ C. Crocker et al., *Leashing the Dogs of War*, in *LEASHING THE DOGS OF WAR: CONFLICT MANAGEMENT IN A DIVIDED WORLD*, (C. Crocker et al. eds., 2007), available at <http://www.gsdrc.org/document-library/leashing-the-dogs-of-war> (last visited on Oct. 30, 2015).

within the area itself.¹¹ In reality, these groups have largely separate agendas and *modus operandi*, though some of them may overlap.

Further, there are many innocent tribesmen residing in the FATA, who are completely unconnected to the terrorist factions in the region.¹² Drone strikes killing these civilians are sometimes used by regional terrorist groups. They try to recruit civilians by painting the US as supremacists whose agenda is intrinsically anti-Pakistani.¹³

B. The Distinction Principle

Classifying all inhabitants in the FATA region as combatants would be contrary to the principle of distinction.¹⁴ State advisor to the legal department of the Obama Administration, Harold Koh, staunchly submits that the requirements of the distinction principles are met by drone strikes in Pakistan. Koh stated that:

Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.¹⁵

His assertions, however, do not accurately reflect the targeting methods used by the US. Due to inaccurate information, drone strikes are not adequately carried out in accordance with the distinction principle.

In January 2014, Glenn Greenwald and Jeremy Scahill found that the ‘target’ of the drone strike is located by means of the Subscriber Identity Module (“SIM”) card or the handset of a suspected terrorist.¹⁶ This enables the authorities to conduct drone strikes at night to kill or capture the individual in possession of the device. Such an individual, however, would not know that their phone was being tracked.

¹¹ 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. 101 (2010).

¹² *Id.* at 81-4.

¹³ TARIQ ALI, THE DUEL PAKISTAN ON THE FLIGHT PATH OF MILITARY POWER 242 (2008). See also J. Landay, *Do U.S. drones kill Pakistani extremists or recruit them?*, MCCLATCHY NEWSPAPERS, Apr. 7, 2009, available at <http://www.mcclatchydc.com/news/nation-world/world/middle-east/article24532831.html> (last visited on Oct. 7, 2015).

¹⁴ N. MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2008).

¹⁵ Harold Koh, Speech at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (last visited on Oct. 30, 2015).

¹⁶ J. Seahill & G. Greenwald, *The NSA’s Secret Role in the U.S. Assassination Program*, INTERCEPT, Feb. 2, 2014 available at <https://theintercept.com/2014/02/10/the-nasas-secret-role/> (last visited on Nov. 9, 2015).

There were also possibilities where the targets lent their phones to children, friends, etc. who were unconnected with the conflict. The former Joint Special Operations Command (“JSOC”) operative said:

You know the phone is there... but we don't know who's behind it, who's holding it... We're not going after people - we're going after their phones, in the hopes that the person on the other end of that missile is the bad guy.¹⁷

This aspect of drones creates the following two qualifications as to their legality of the distinction principle: first, the target is received through concrete intelligence; and the second, the target is decided on the basis of triangulating a mobile phone.

Under the first point, the procurement of intelligence may suffer from the infirmity of a time lag. The target may have changed sites between the intelligence being sent and the drone attack commencing. Therefore, the words “near-certainty which is expected...” as referred to by President Obama cannot be ascertained.¹⁸ As, at all times in a drone attack, it is impossible to ascertain the location of the hostile target, the first method would violate the principle of distinction subject to the time gap.

The second - triangulating cell phones - may address the concerns of the time gap. However, it fails to ensure the distinction between civilians and combatants as required by the distinction principle. As stated above, if, while using drones, a party is unable to determine who is in possession of the phone, then attacking on a presumption that the phone is being used by the intended person also violates the principle of distinction.¹⁹

In this case, collateral damage or military necessity cannot be claimed as a defense, because ensuring that the target is at the location is an important component of the distinction principle.²⁰ Hence, in the second method, the distinction principle is violated, too. Having analyzed the *jus in bello* aspect of drone strikes and illustrated the misinterpretation of the distinction principle by the US, we proceed on to the *jus contra bellum*²¹ angle of whether the commencement of drone attacks can be justified through the paradigm of self-defense.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Additional Protocol I, art. 52.

²⁰ *Supra* note 14.

²¹ J. PICTET (ED.), GENEVA CONVENTIONS 12 AUGUST 1949: COMMENTARY I ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (1952), available at https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf (last visited on Oct. 30, 2015).

III. The Concept of Sovereignty in the Context of Drones

Up until March 2013, the Pakistani government had implicitly consented to these attacks being carried out on Pakistani soil.²² It is attributed to the alleged abrogation of the Pakistani sovereignty.

Essentially, the concept of sovereign equality proclaims that all States are internally bound by their domestic legal order and must externally conform to international law.²³ The drone attacks in Pakistan without Pakistani consent thus amounts to such a negation of the Pakistani sovereignty as domestic Pakistani decision-making regarding counter-terrorist operations within its jurisdiction is inferior to the decision-making capabilities of the US.

The supporters of drone attacks and other counter-insurgency operations in the area have consistently submitted that the concept of sovereignty is restricted by the inherent duty imposed on States not to allow its territory to be used in the violation of the rights of other States.²⁴ They do not allege that Pakistan can, in any way, be held responsible for or said to be connected to these attacks, but espouse an obligation on Pakistan to curtail the terrorist threat. If Pakistan fails to mitigate this threat, they claim that the US instead has a right to undertake operations in Pakistani territory without Pakistani consent.²⁵ Such an obligation on the part of the Pakistani state, however, must be subjected to a due diligence standard.²⁶ It is neither equitable, nor practical to impose identical parameters for judging counter-

²² M. Memmot, *U.S. Believes It Has Pakistan's 'Tacit Consent' For Drone Strikes*, 'WSJ' Report, NATIONAL PUBLIC RADIO, Sept. 26, 2012, available at <http://www.npr.org/sections/thetwo-way/2012/09/26/161799390/u-s-believes-it-has-pakistan-tacit-consent-for-drone-strikes-wsj-reports> (last visited on Oct. 7, 2015). [Emphasis added]

²³ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 25th Sess., U.N. GAOR, 25th Sess., Supp. No. 28, A/Res/25/2625 (Oct. 24, 1970), at 121, available at <http://www.un-documents.net/a25r2625.htm> (last visited on Oct. 30, 2015).

²⁴ R. Vogel, *Drone warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 109 (2011). See also J. Paust, *Self Defense Targeting of U.S. NSAs and permissibility of U.S. drones in Pakistan*, 19 FLA. ST. J. TRANSNAT'L L. & POL'Y 280 (2010).

²⁵ See The Hague Convention for the Pacific Settlement of International Disputes, 1 Bevans 577; 2 AJIL Supp. 43, art. 9 (Oct. 18, 1907); Convention for the Unification of Certain Rules for International Carriage by Air, 2242 U.N.T.S. 309, S. Treaty Doc. No. 106-45, art. 4 (May 28, 1999); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, art. 4(a), 1035 U.N.T.S. 167 (Dec. 14, 1973).

²⁶ Int'l Law Comm'n, Rep. on the Work of its Twenty-Fourth Session, U.N. Doc. A/8710/Rev.1, GAOR Supp. No. 10 (July 1972). See also TAL BECKER, *TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY* 140-1 (2006); R. Lillich & J. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 309-10 (1976).

insurgency standards on countries with differing capabilities. Pakistan's obligation to prevent terrorism extends as far as taking all 'practicable measures'²⁷ towards the elimination of the threat. In the *Bosnia Genocide* case, the ICJ explicitly stated that the obligation is one of conduct and not of result.²⁸ This due diligence standard needs to be evaluated on a two-pronged test - knowledge and capacity.²⁹ The knowledge prong is whether the State recognized a particular threat it ought to have known about with the means at its disposal.³⁰ The Pakistani government has satisfied this knowledge prong. This is evidenced by Pakistan's investigations to locate terrorists in the north-western provinces and air-raids against their hideouts when deemed strategically wise.³¹

With respect to the capacity prong, a maintenance of the due diligence standard mandates that the host State fully utilize its institutional, resource and territorial³² capacity to combat terrorist threats from its territory.³³ Institutional capacity is concerned with the legal regime including the criminal law enforcement mechanism in the State effectively used to prosecute terrorists and terrorism.³⁴ This aspect is limited to the prosecution of terrorists; it does not extend to preventing terrorism. The western authorities may contend that Pakistan's judicial system is unable to deal with the threat due to the high acquittal rate of terrorist suspects tried in the Pakistani courts.³⁵ Such allegations, however, have been just based on speculative statistics;³⁶ they cannot be a significant ground considering that Pakistan has not fulfilled the due diligence standards set by international law.

Another capacity specifically covers the financial, technical and human-based

²⁷ Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60 (Dec. 9, 1994), Annex, available at <http://www.un.org/documents/ga/res/49/a49r060.htm> (last visited on Oct. 30, 2015).

²⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb & Mont.) 2007 I.C.J. 2, ¶ 430 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf> (last visited on Oct. 30, 2015).

²⁹ K. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 67 (2011).

³⁰ *Id.* See also Lillich & Paxman, *supra* note 26.

³¹ See *Pakistan military launches ground attacks in North Waziristan*, GUARDIAN, June 30, 2014, available at <http://www.theguardian.com/world/2014/jun/30/pakistan-military-ground-attack-militants-north-waziristan> (last visited on Oct. 6, 2015).

³² US DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM 2008 (2009)

³³ *Supra* note 29.

³⁴ Alabama Claims (U.S. v. U.K.), 29 R.I.A.A. 125, 131 (Perm Ct. Arb. 1871).

³⁵ D. Nelson, *Pakistan 'incapable' of prosecuting terror suspects*, TELEGRAPH, Aug. 31, 2011, available at <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/8733203/Pakistan-incapable-of-prosecuting-terror-suspects.html> (last visited on Oct. 6, 2015).

³⁶ *Id.*

resources when a nation fights against terrorists.³⁷ A lack of territorial capacity envisages the difficulty in effectively combatting terrorist activities because terrorist bases are often located in regions of arduous terrain, extremes of climate or distance from the central regions.³⁸ Pakistan has taken all efforts necessary to meet these terrorist threats including ceasefire negotiations with Taliban and air-raids in the region.³⁹ In this course, Pakistan should be free to adopt these resources because she has no obligation to use these resources in the manner prescribed by any other authority. At the moment, no one can surely prove the failure of these efforts. Furthermore, the final results of these measures are irrelevant in assessing conformity with international obligations as long as Pakistan maintains the due diligence standard of conduct in preventing terrorism. If the US engages in the use of unilateral force on the Pakistani territory with her own standards as a metric, such use of force is certainly an encroachment of Pakistan's sovereign powers.

Explicitly revoking consent to the drone attacks being conducted in its territory was a conscious decision made by the Sharif government and an exercise of its sovereign powers.⁴⁰ Indeed, drone attacks in the FATA are leading to retaliatory measures by the terrorists on Pakistani soil, something the government kept in mind while taking the decision.⁴¹ Further, as the drone attacks are killing many Pakistani civilians,⁴² the Pakistani government is fully entitled to refuse the US to conduct these attacks.

Jordan Paust attempts to disregard the argument about the violation of Pakistani sovereignty through two largely unfounded illustrations.⁴³ First, Paust gives the example of NSAs in Mexico acquiring rockets and firing them into Fort Bliss, a US military base near El Paso without the consent or knowledge of the Mexican

³⁷ The ICJ has generally favored the lack of resource-capacity when assessing due diligence claims. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. ¶ 244 (Apr. 9); *US Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 I.C.J. 7, ¶¶ 63-4 (May 24). Then, the Court held that Iran certainly had resources at its disposal and could have used it effectively to end attacks on other embassies within Iran.

³⁸ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*; Request for the Indication of Provisional Measures, 2000 I.C.J. 168 (July 1), available at <http://www.icj-cij.org/doctet/index.php?p1=3&p2=3&k=51&case=116&code=co&p3=3> (last visited on Oct. 30, 2015).

³⁹ See *Pakistan air raids in North Waziristan kill militants*, BBC NEWS, June 15, 2014 available at <http://www.bbc.com/news/world-asia-27854580> (last visited on Oct. 06, 2015); *Pakistan begins long-awaited offensive to root out militants from border region*, GUARDIAN, June 15, 2014, available at <http://www.theguardian.com/world/2014/jun/15/pakistan-offensive-militants-north-waziristan> (last visited on Oct. 6, 2015).

⁴⁰ Qasim Naumsan, *Pakistan condemns U.S. Drone strikes*, REUTERS, June 4, 2012, available at <http://www.reuters.com/article/2012/06/04/us-pakistan-usa-drones-idUSBRE8530MS20120604> (last visited on Oct. 6, 2015)

⁴¹ *Id.*

⁴² Landay, *supra* note 13.

⁴³ Paust, *supra* note 24.

government. Would any action taken by the US government against these NSAs be an acceptable violation of Mexican sovereignty? Second, he takes the case of a person firing a rifle into a neighbor's house without the consent of the house owner from where he is firing. Would an act of self-defence without obtaining the owner's consent be illegal? He uses both examples to suggest the need for a pre-emptive self-defense.⁴⁴

If, in the first case, there was only a possibility or suspicion of NSAs acquiring rockets in the near future and launching them into the US, then the right to anticipatory self-defence does not exist and any unilateral use of force by the US government must be undertaken with the consent of the Mexican government. In the domestic criminal law analogy, a fine distinction has to be drawn between 'preparation' of a crime and an 'attempt' to commit a crime.⁴⁵ In Paust's second example, if the neighbor points the rifle through the window towards the person adjacent, then the person adjacent would be justified in shooting the neighbor even without the consent of the house owner. For this justification, the neighbor does not have to actually shoot the adjacent person, but pointing a gun through the window would justify the action. However, if the person living adjacent had the knowledge that the neighbor has purchased a rifle, he only foresaw a remote possibility of the neighbor attacking him. In case of shooting the neighbor first, however, he could certainly not cite his right to private defense and would be held liable. Further, as in the case of the US drone attacks which is taking the lives of innocent civilians, if he accidentally killed an innocent resident, he would be liable for the second death. In any case, this right would still not extend, if the house owner himself was being attacked by the tenant similar to the bombings in Peshawar.

The US has no further right to carry out operations in Pakistan for self-defense against the Al-Qaeda without the Pakistani consent. However, the American policy has consistently cited 'political expediency' in order to take the right to invoke its actions through a too much liberal reading of the laws of armed conflict.⁴⁶ It should be proved that Al-Qaeda was plotting an 'imminent' attack against the host State. 'Reprisal' attacks are forbidden under international humanitarian law ("IHL").⁴⁷

The US could manipulate and disregard the laws of armed conflict largely

⁴⁴ C. Richter, *Pre-emptive Self-Defense in International Law*, 2 DIALOGUE 4 (2003).

⁴⁵ G. WILLIAMS, *TEXT BOOK OF CRIMINAL LAW* 70-4 (1978)

⁴⁶ *Al-Aulaqi v. Obama*, Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum In Support of Defendant's Motion to Dismiss at 32-4,727 F. Supp. 2d 1 (D.D.C.) (No.10 Civ. 1469)

⁴⁷ D. FLECK, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAWS* 228 (2013). See also ICRC, *Customary IHL—Rule 146: Reprisals against Protected Persons* (2014).

because the current standards are applicable to the US-Al-Qaeda conflict flexibly. Such disguised interpretation is problematic for two reasons. First, it enables the US to impose its will and discretion on the rest of the world without any fetters. This negates the tenets of international law in terms of regulating the actions of State. Second, this unilateral interpretation forms a dangerous precedent on which other hegemonic nations can justify their actions.⁴⁸ The US has consistently invoked the catastrophic damage terrorists have caused in civilian areas all across the world to justify its actions.⁴⁹ International law should consider changing geo-political dynamics for developing new thresholds for the use of force and provide a corollary regulatory framework that accounts for the manner of its exercise.

IV. Looking Forward: A New Paradigm of Armed Conflict?

A. Can the NSAs Initiate an Armed Conflict?

The NSAs now have the capacity to initiate and participate in an armed conflict.⁵⁰ As the founders of the UN Charter did not consider the NSAs to perform an ‘armed attack’ against sovereign State,⁵¹ the right to self-defence of a particular State to the Actors of another country cannot be denied under contemporary international law.⁵²

In *Hamdi v. Rumsfeld*, the US Supreme Court accepted that the Al-Qaeda “were and are hostile forces engaged in armed conflict with the armed forces of the US.”⁵³ The Court allowed the application of Article 3 of the Geneva Convention by interpreting it to envisage basic principles applicable in both international and non-international armed conflicts.⁵⁴ The Court, however, failed to classify the armed

⁴⁸ See, e.g., Letter from Herbert S. Okun, Acting U.S. Representative to the United Nations (1986), Apr. 14, 1986, U.N. Doc. S/17990, available at http://dag.un.org/bitstream/handle/11176/61648/S_17990-EN.pdf?sequence=3&isAllowed=y (last visited on Oct. 30, 2015).

⁴⁹ *Supra* note 46.

⁵⁰ P. Wintour, K. Ahmed & E. Vulliamy, *It's time for war, Bush and Blair tell Taliban*, GUARDIAN, Oct. 7, 2001, available at <http://www.guardian.co.uk/world/2001/oct/07/politics.september11> (last visited on Oct. 6, 2015).

⁵¹ O. CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 480-6 (2010).

⁵² M. Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. INT'L L. 3 (1999). See also Y. DINSTEIN, WAR, AGGRESSION AND SELF DEFENCE 204-8 (2005).

⁵³ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), available at <https://www.law.cornell.edu/supct/html/03-6696.ZS.html> (last visited on Oct. 30, 2015).

⁵⁴ *Id.*

conflict in question as either international or non-international, consequently failing to recognize the applicability of a higher threshold of IHL principles as under common Article 2.⁵⁵

The US has been ambivalent on the type of armed conflict. Its policy-makers have manipulated lacunae in the existing jurisprudence to justify various counter-insurgency operations by falsely fitting them into the international legal framework.⁵⁶ The State Department Legal Advisor has claimed that they are locked in an armed conflict with a “non-state actor (as well as the Taliban which harboured Al-Qaeda).”⁵⁷ The Obama administration has significantly narrowed the scope of this armed conflict to a war against particular entities and, in accordance with the judgment laid down in *Hamdi v Rumsfeld*,⁵⁸ acquiesced to the conception of the war as a “non-international armed conflict.”⁵⁹ Yet, a few questions remain unanswered. Is the US engaged in multiple non-international armed conflicts with the NSAs separately? Can this non-international armed conflict transcend geographical borders?

B. The Traditional Classifications of Armed Conflict

The traditional classification of armed conflict is found under common Articles 2 and 3 of the Geneva Conventions of 1949.⁶⁰ These provisions deal with “international armed conflicts”⁶¹ and “non-international armed conflict,” respectively.⁶² Here, international armed conflict is defined as “any conflict which occurs between two states,”⁶³ while non-international armed conflict is characterized by protracted armed violence within the territory of a State between government forces and organized belligerent groups.⁶⁴ Classical examples of non-international armed conflict are

⁵⁵ ICRC, *How is the term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper of the International Committee of the Red Cross (2008), available at <https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm> (last visited on Oct. 30, 2015).

⁵⁶ *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010) (No. 10. Civ 1649), available at <https://casetext.com/case/al-aulaqi-v-obama> (last visited on Oct. 30, 2015). It held that the court could not comment on the nature and scope of the armed conflict in question due to the political question doctrine among other things.

⁵⁷ *Supra* note 15.

⁵⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁵⁹ *Id.*

⁶⁰ Geneva Conventions 1949, Aug. 12, 1949, 75 U.N.T.S. 287, art. 3.

⁶¹ *Id.* art. 2.

⁶² *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. ¶¶ 218-9 (June 27), available at <http://www.icj-cij.org/docket/files/70/6503.pdf> (last visited on Oct. 30, 2015).

⁶³ Geneva Convention 1949 art. 2.

⁶⁴ ICRC, *The Law of Armed Conflict: Non-International Armed Conflict*, available at <https://www.icrc.org/eng/assets/>

civil wars, internal armed conflicts, or internal armed conflicts which spill-over into another State.⁶⁵ However the threshold for determination of internal armed conflict remains controversial as situations may vary from violent internal disturbances which do not meet the threshold, to civil strife which clearly meets the threshold.⁶⁶

The *Prosecutor v. Tadic* case,⁶⁷ however, recognized a variation from the classical definitions of the armed conflict in the form of “internationalization of non-international armed conflict.”⁶⁸ The International Crimes Tribunal for former Yugoslavia (“ICTY”) was confronted with a situation that did not readily fit within the classical definitions of international and non-international armed conflict. The threshold for ‘internationalization’ is interpreted differently, ranging from mere overall control, indicating the knowledge, aid, financing and militarization, to a proxy war.⁶⁹ The ICTY’s approach is in contrast with the effective control test espoused by the ICJ.⁷⁰ Under this test, the threshold of internationalization to attribute State Responsibility arises when the belligerent forces render themselves in the overall control of another State.⁷¹ Thus, under this test, belligerent forces cannot have autonomy to decide their actions or military targets.⁷²

Although this test creates a variant from the classical definitions, it was not recognized as a new type of armed conflict, but merely regarded as an ‘extension’ of international armed conflict.

C. Geneva Convention in the US-Pakistan Context

Concerns about the insufficiency of the present classification of conflicts are not

files/other/law10_final.pdf (2002) (last visited on Oct. 6, 2015).

⁶⁵ ICRC, The Geneva Conventions of 1949 and their Additional Protocols, Oct. 29, 2010, available at <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> (last visited on Oct. 6, 2015).

⁶⁶ *Supra* note 29.

⁶⁷ *Prosecutor v. Tadic*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-I-I, at 70 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>. See also Case of the Major War Criminals, Judgment, Official Documents, vol. I, at 253-4 (Int’l Military Tribunal at Nuremberg, Oct. 1, 1946), available at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf (last visited on Oct. 30, 2015).

⁶⁸ *Prosecutor v. Tadic*, *id.*

⁶⁹ A. Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT’L L. 649 (2007).

⁷⁰ *Supra* note 61, at 122.

⁷¹ The point is important to be emphasized as the authors subsequently argue that an inversion of this would constitute a new category of armed conflict.

⁷² *Supra* note 68.

new.⁷³ The International Committee of the Red Cross (“ICRC”) proposed certain changes to the regime of 1977 to include the application of humanitarian law to internationalized non-international armed conflicts.⁷⁴ The ICRC’s position was criticized as it would facilitate belligerents to approach States to gain increased political status by raising the threshold of an internal disturbance to an armed conflict. The creation of separate regime to this nature of armed conflict was also rejected, as it was too radical for States to accept the risky interference of sovereignty.⁷⁵ Finally, the Additional Protocol was adopted and opened to the States to accept in practice. The creation of the Additional Protocol diverted the debate from the commencement threshold of each type of armed conflict to the impact threshold once the commencement threshold has been established. This led to the debate on classification being ignored and unaddressed.⁷⁶

Melzer argues that there is no requirement for an additional category of armed conflict. He claims that the present threshold under common Article 3 affords protection in any armed conflict⁷⁷ and therefore an interpretation of common Article 3, as given in the *Nicaragua* case,⁷⁸ addresses any insufficiency in the applicable principles of IHL.⁷⁹

Unfortunately, the current regime is insufficient to cover the situation of armed conflict which has arisen in the US-Pakistan context. The problem lies in applying Article 3 as a residuary measure without assessing the true protection afforded by IHL. In that scenario, this essentially means that all existing paradigms of armed conflict do not provide clear rules to assess collateral damage caused by the American drone strikes in Pakistan.

With regard to the potential applicability of the non-international armed conflict paradigm in the scenario, it is not accepted that common Article 3 of the Geneva Conventions prescribes a bare minimum of laws to be adhered in times of any

⁷³ D. Jinks, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts*, HARV. PROG. HUMAN. POL’Y & CONFLICT RES. 27-9 (2003)

⁷⁴ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva vol. XIV, CCDH/III/SR.29 (1974-1977), available at http://www.loc.gov/frd/Military_Law/pdf/RC-records_Vol-14.pdf (last visited on Oct. 30, 2015).

⁷⁵ H.-P. Gasser, *Cases of Internationalized Non-International Armed Conflict, Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV. 147 (1982).

⁷⁶ *Id.*

⁷⁷ *Supra* note 14.

⁷⁸ *Supra* note 61.

⁷⁹ J. Pejic, *The Protective Scope of Common Article 3: More Than Meets The Eye ICRC Review*, 93 (881) INT’L REV. RED CROSS 191 (2011).

armed conflict.⁸⁰ Thus, within this baseline, the parties to the conflict are free to engage in any means when dealing with their internal matters. In the particular case of drones, if the *jus contra bellum* aspect is satisfied, no liability would arise, provided that they have adhered to the minimum threshold of Article 3.⁸¹ Such a precedent is disputable as the degree of care required by a State is drastically reduced. Hence, in order to reduce atrocities of warfare and increase protection in times of armed conflict, the possibility of a new category of armed conflict, which could potentially require higher protection of IHL principles, cannot be dismissed.⁸²

In any case, “some situation of armed conflict” as stated in the *Hamdi* judgment,⁸³ needs to be further de-mystified. The armed conflict between Al-Qaeda and the US does not fall under the scope of “non-international armed conflict” because it is not carried out within a territory of the State or between the State governmental forces and belligerent groups. In the US-Pakistan context, it is the US military forces which engage in the sovereign territory of Pakistan with members of an organization. Invoking the application of Article 3 and enabling the US to conduct warfare, hinging on the bare minimum provisions effect is invalid as the scenario cannot be classified as a non-international armed conflict. This matters not just from a definitional point of view but also in its conceptual ramifications. The limited regulation in the field of non-international armed conflict arises for showing deference to the integral principle of territorial sovereignty and allowing the territorial State’s discretion in the enforcement of law within its boundaries. However, such a rationale cannot apply when a State is conducting the operations within the territory of another State, especially without the latter’s consent.

Even if Additional Protocol 2 and Common Article 3 of the Geneva Conventions were interpreted to cover the situation of a State helping another State (intervention by invitation),⁸⁴ such an interpretation could not be employed in the US-Pakistan scenario because Pakistan did not invite the US intervention.⁸⁵ The US cannot be considered as acting on behalf of the government of Pakistan. In the US-Pakistan

⁸⁰ *Id.* [Emphasis added]

⁸¹ D. Thürer, *The “failed State” and international law*, 836 INT’L REV. RED CROSS (1999).

⁸² See U.N. Human Rights Office of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict*, (2011), available at http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf (last visited on Nov. 9, 2015)

⁸³ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁸⁴ N. Ronzitti, *Use of Force, Jus Cogens and State Consent*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 159 (A. CASSESE ed., 1986).

⁸⁵ C. Woods, *Pakistani objection to US drones puts ‘nations at war’*, says *Democrat*, THE BUREAU OF INVESTIGATIVE JOURNALISM, June 29, 2012, available at <https://www.thebureauinvestigates.com/2012/06/29/pakistani-objection-to-us-drones-puts-nations-at-war-says-leading-democrat> (last visited on Oct. 06, 2015).

context, the foreign government is thus fighting against the belligerent forces acting against it, without the permission of the territorial State. As an example, UAVs have been used by the US to conduct targeted killings of ‘enemies’ located in Pakistan.⁸⁶

The second potential category in which the US-Pakistan scenario can be classified is as an international armed conflict, considering that it allows a higher threshold of protections. However, the present scenario does not adhere to the concept of an international armed conflict as under Article 2 of the Geneva Convention.

A third category would not be applied if Article 2 adequately captures the situation where the government of one State is conducting operations against an NSA in another State. As the objection of Pakistan⁸⁷ to UAV strikes initiated by the US, the dispute has become an international armed conflict. A more recent justification lies in the latter part of common Article 2 regarding international conflicts under the occupation of the territory. The second paragraph has been interpreted only between the occupying and the occupied State. This is actually intended to protect the sick and wounded military personnel of the occupied territory under IHL.⁸⁸

A different interpretation, however, could be theoretically made by analysing the said provision in the context of three entities such as the occupying entity, the occupied State, and the intervening State. In this case, the intervening State is bound to the Geneva Convention, while conflicting with the occupying entity despite the latter not being party to the Geneva Conventions. If Al-Qaeda forces against the US are ‘occupying’ the territory of Pakistan and the Af-Pak region, the US intervention should only be regarded as an international armed conflict under Article 2 as against Pakistan.⁸⁹ The argument could stem from the concept that NSAs can engage in an armed attack or self-defence.⁹⁰

There are, however, a few fallouts in this argument. If this interpretation is given to include three entities, one of which is not a State, first, it would violate the fundamental condition of an international armed conflict, namely, armed conflict between two States officially commenced with the declaration of war. Second, if the so-called ‘occupying’ power is not a distinct politically recognized entity, it cannot

⁸⁶ C. Henderson, *The Extraterritorial Seizure of Individuals under International Law – The Case of al-Liby: Part I*, EJIL: TALK! Aug. 19, 2013, available at <http://www.ejiltalk.org/the-extraterritorial-seizure-of-individuals-under-international-law-the-case-of-al-liby-part-one> (last visited on Oct. 6, 2015).

⁸⁷ *Supra* note 82.

⁸⁸ *Supra* note 21.

⁸⁹ S. Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 INT’L L. STUD. 696 (2013).

⁹⁰ *Supra* note 51.

be said to occupy the territory of another State without such recognition.⁹¹ Because both Taliban and Al-Qaeda are not independent political entities, they cannot be construed to occupy the State of Pakistan. Consequently, it is untenable that the US-Pakistan situation can be classified as an international armed conflict with ramifications under Article 2 of the Geneva Conventions.

D. Internationalized Non-International Armed Conflict?

The current situation between the US and Pakistan can be defined as a conglomeration of components of both kinds of armed conflicts. There is the component of international armed conflict wherein one foreign State is fighting against entities which are not its people. Meanwhile, there is a non-international component wherein the entity against which the State is fighting is neither another State nor an entity in the effective control of another State. Since neither the international armed conflict nor non-international armed conflict encompass the US-Pakistan scenario, the alternative is to create a new category of an armed conflict - "internationalized non-international armed conflict." In this case, the nature of the conflict could be recognized as a "domestication of an international conflict" or "transnational armed conflict," which would account for the unique situation between a State on one hand and an NSA acting out of foreign territory. It would provide the State attacked with the right to use force unilaterally but with different thresholds for commencement and impact assessment. To further develop a legal regime that is able to cater specifically to terrorism, "transnational counter-terrorist armed conflict" is also recommendable.

Arguably, merely making changes to an existing legal regime may not translate into a more prudent or effective foreign policy as there is no enforcement mechanism that could deter the US from continuing its actions. As mentioned before, however, regardless of the military or economic power of any State, globalization trends of the contemporary world necessitate dependence on other States for both trade and security.⁹² Hence, no State, including the US, can explicitly violate international law leading to the opposition not only from other States but also from the international community as a whole. As shown in the statements by Harold Koh,⁹³ the US attempts to justify how their actions are in consonance with international law. After the change is brought about and transnational armed conflict is recognized, the US will have to prove that she is taking measures to meet the threshold requirements.

⁹¹ Geneva Conventions 1949 art. 2.

⁹² E. HOBBSAWM, *GLOBALIZATION, DEMOCRACY AND TERRORISM* 169 (2007).

⁹³ *Supra* note 15.

V. Commencement Threshold

A. Transnational Armed Conflict

The transnational armed conflict would be triggered under the same terms with those of non-international armed conflict. It is important to look at who had created the harm in order to determine a normative threshold. Ultimately, the damage caused by the non-State entity disrupting civilian life in the foreign country is akin to the disturbance caused by a non-State entity in a domestic State. The threshold stems from Article 1(2) of Additional Protocol II of the Geneva Convention which comprises of two essential prongs: (1) violence must reach a minimum level of intensity; and (2) non-governmental groups must be recognized as parties to the conflict and possess a sustained hierarchy and organizational structure capable of taking part in military operations.⁹⁴ The intensity of violence is to be judged on a case-to-case basis.

The ICTY recognised the threshold where there is “... protracted armed violence between governmental authorities and armed groups or between such groups within a state.”⁹⁵ In this case, no official declaration of war is needed. To transpose this definition to the transnational armed conflict framework, any non-State entity that protracts armed violence in the territory of *another* State could be recognized as a party to the conflict.⁹⁶ The level of intensity is subjective and should be applied in a case-to case basis. Relevant factors may include damage to life and property, disruption to society and the duration of the violence.⁹⁷ The use of force against terrorists, however, calls for a separate analysis of the prongs of transnational armed conflict, which can be modified to accommodate counter-terrorist strategies, including drone strikes in Pakistan.

B. Transnational Armed Conflict applied in Counter Terrorism

With respect to the application of transnational armed conflict to counter-terrorism, the first prong of intensity of violence can be replaced with the condition of the act meeting the requirement of a ‘terrorist purpose.’ The second prong which regards the State as a party to the conflict can be customised with the requirement of the

⁹⁴ *Supra* note 55.

⁹⁵ *Supra* note 67, at 193.

⁹⁶ Geneva Conventions 1949 art. 2. [Emphasis added]

⁹⁷ *Supra* note 67, at 193.

organization being a “recognized terrorist entity.” The status of ‘terrorist entity’ can only be recognized as an organization by the UN Security Council resolution.⁹⁸

In order to analyse terrorist purpose, we must first try to define it. Such an attempt has emerged as a challenge for policymakers and academics alike.⁹⁹ The main issue is to segregate the acts of terrorism from those of violence perpetrated in furtherance of other purposes such as self-determination.¹⁰⁰ However, for the purpose of satisfying the threshold requirements of transnational counter-terrorist armed conflict, the definition forwarded by the General Assembly with Terrorism Suppression Conventions¹⁰¹ is recommended for illustrative guidance. Any act of terrorism must be accompanied by a terrorist purpose. It was thus an astute move for the General Assembly to define ‘terrorism’ as “a criminal act intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes.”¹⁰² As per this definition, the terrorist entity must intend to cause disarray among civilians. When evaluating whether a certain act is a terrorist act, only this intention must be taken into account; the intensity of violence is not significant, either, when analyzing the threshold requirements.¹⁰³ It should be read extensively if terrorist purpose has been proved. Whether the motive lies in a demand for statehood or the setting up of an Islamic Caliphate is irrelevant.¹⁰⁴ In most cases, the terrorist purpose can be gauged through the claims made by the entity perpetrating them, who will declare responsibility for such acts, thereby signalling the commencement of armed conflict.¹⁰⁵

According to O’Connell, an isolated terrorist attack cannot signal the commencement

⁹⁸ S.C. Res. 1267, U.N. Doc. SC/RES/1267 (Oct. 15, 1999).

⁹⁹ For a summary of the debate, see B. SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 7-10 (2006).

¹⁰⁰ See *Confronting Crimes against Humanity*, in *A STUDY GUIDE SERIES ON PEACE AND CONFLICT FOR INDEPENDENT LEARNERS AND CLASSROOM INSTRUCTORS* (United States Institute of Peace ed., 2008), available at <http://www.usip.org/sites/default/files/file/09sg.pdf> (last visited on Nov. 9, 2015)

¹⁰¹ Draft comprehensive convention against international terrorism: Consolidated text prepared by the coordinator for discussion arts. 2 & 3, UN Doc. A/59/284 (2005), Appendix II, available at <https://www.ilsa.org/jessup/jessup08/basicmats/unterrorism.pdf> (last visited on Oct. 30, 2015).

¹⁰² Declaration on International Terrorism, *supra* note 27, Annex.

¹⁰³ For details on a factor in terrorism, see G. Maifer, *Terrorism. On the Perception and Justification of Violence*, 22 JUNIOR VISITING FELLOWS CONFERENCES (2007), available at <http://www.iwm.at/publications/5-junior-visiting-fellows-conferences/vol-xxii/georg-maifer> (last visited on Nov. 9, 2015)

¹⁰⁴ Security Council Resolution 1566 also espouses the notion of ‘terrorist purpose’ see S.C. Res. 1566, U.N. Doc. SC/RES/1566 (Oct. 8, 2004), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/542/82/PDF/N0454282.pdf?OpenElement> (last visited on Oct. 30, 2015).

¹⁰⁵ See Letter from Osama Bin Laden to America (Nov. 24, 2002) (on file with The Guardian), available at <http://www.theguardian.com/world/2002/nov/24/theobserver> (last visited on Oct. 06, 2015).

of an armed conflict.¹⁰⁶ This model, however, is largely inapplicable. Even if a non-State entity were to engage in an act of violence, it would be deemed a ‘terrorist attack’ only if the attack were accompanied by a terrorist purpose and the entity was recognized as a terrorist organization. To that extent, the ‘terrorist purpose’ would certainly not be fulfilled by an isolated attack, but would be generally accompanied by future attacks from the same non-State entity whose sole agenda is to continuously disrupt civil society. If Al-Qaeda were to perpetrate an attack in the US and were either proved to be culpable for the attacks or claimed responsibility for them, the US could use force unilaterally against them. The entire situation would thus propel into a transnational armed conflict against Al-Qaeda regardless of the mode of attack - isolated or continuing. The “war on terror” is nothing but an invocation of a paradigm of transnational armed conflict.

VI. Impact Threshold: Evaluation of Impact and the Regulatory Humanitarian Law Framework

A. Transnational Armed Conflict

Such a new category may be inconsistent with IHL. However, these inconsistencies may be resolved by the general scheme of the Geneva Conventions. The Geneva Conventions envisage two situations as discussed above. The third category is an admixture of the two so that the test of application of the norms may have to be found within the interpretation of the Geneva Conventions. The new category is created keeping in mind that the threshold of Article 3 is applicable in any case. Still, due to the nature of the armed conflict which presents a combination of elements of both categories, the collateral damage requires evaluation with respect to the higher threshold provided for under Article 2. Such an interpretation may be done as was the case with Article 3. Despite the wording of Article 3 requiring its application only in cases of non-international armed conflict, the ICJ upheld its application to all armed conflicts as a result of minimum protections it affords.¹⁰⁷ The conflicts under the new category of transnational armed conflict arguably require the application

¹⁰⁶ Lawful use of combat drones: Hearing before the Subcomm. on National Security and Foreign Affairs, 111th Congress, 4 (Apr. 28, 2010), available at https://fas.org/irp/congress/2010_hr/042810oconnell.pdf (last visited on Oct. 30, 2015).

¹⁰⁷ *Supra* note 62, at 114; ICJ, *supra* note 37, at 22

of Article 2 as a higher standard in such cases.¹⁰⁸ The approach of the international tribunals and courts to this extent has to be analysed. Moreover, it is not in doubt that the normative objective is to maximize the applicability of the Geneva Conventions.¹⁰⁹

The Article 2 threshold would require a comparatively higher level of proportionality and necessity, along with distinction, than that under Article 3.¹¹⁰ It would ask the State party to conform to the principles of military necessity¹¹¹ and objective codified under Additional Protocol I.¹¹² This would ensure a higher protection of civilians within the sovereign State. Although political statements argued that drone attacks adhere to the principles of proportionality,¹¹³ the imposition of a *de jure* condition would obligate the party to meet these requirements.

B. Transnational Armed Conflict Applied in Counter-Terrorism

When a State may commence anti-terrorist operations based on the ‘terrorist purpose’ underlying the terrorist entities’ actions, she must bear in mind the higher impact threshold to abide by in the course of strategizing the possible modes of warfare. A standard for evaluation should be the well-developed Winning of Hearts and Minds (“WHAM”) doctrine.¹¹⁴ The military advantage in this specific kind of armed conflict cannot be gained merely by killing a handful of terrorist targets, but through the sustained use of other conjunctive measures that reduce the growth of terrorist organizations and prevent them from recruiting further individuals.

In practice, those are barely evaluated as successful counter-terrorist activities as the frequency of further attacks from that organization, the number of individuals being recruited in the area and the mindset of the local population where the terrorists are. To subdue these entities, the civilians harbouring them should be convinced that terrorism or fanaticism in any form is not the way forward. Such

¹⁰⁸ H. Kelsen, *Collective Security and Collective self-defence under the Charter of the United Nations*, 42 AM. J. INT’L L. 791 (1948). See also H. KELSEN, *THE LAW OF THE UNITED NATIONS* 792 (1951). Herewith, a merely ‘imminent’ attack or any act of aggression is not enough to trigger a right to self-defence. See I. BROWNLE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 275 (1966).

¹⁰⁹ E. GRIFFIN & B. CALI, *INTERNATIONAL LAW FOR INTERNATIONAL RELATIONS* 234-44 (B. Cali ed. 2009).

¹¹⁰ *Supra* note 62, at 114; ICJ, *supra* note 37, at 22

¹¹¹ Additional Protocol I, art. 57(3).

¹¹² *Id.* arts. 49-55.

¹¹³ *Supra* note 14.

¹¹⁴ J. Khalil, *Winning Hearts and Minds during COIN Campaigns: Political implications from Stathis Kalyvas’ Concepts of Attitudinal and Behavioral Support*, SMALL WARS J. (2012). See also R. MOLINARI, *WINNING THE MINDS IN “HEARTS AND MINDS” SYSTEMS APPROACH TO INFORMATION OPERATIONS AS A PART OF COUNTER-INSURGENCY WARFARE* 5-22 (2005).

'soft tactics' are integral to the "war on terror." Also, if a State decides to use military force for combatting terrorism, she must set up the long-term objectives in this new framework of armed conflict.

VII. Transnational Armed Conflict in Practice

The concept of transnational armed conflict will be tangible through a treaty that acknowledges it. All States signing the treaty will essentially consent to the unilateral use of force against the NSAs operating from their territories provided the threshold requirements have been met. This consent will not prevent the host State from barring specific manoeuvres as long as they can prove that Article 2, or the additional requirements for counter-terrorism, are not considered. Hence, this paradigm does not amount directly to a violation of the sovereignty of the host State. The inception of the armed conflict is a recognition by all signatories of the treaty that violent acts perpetrated by NSAs need to be routed. Another State affected by the actions of the same NSAs can do so without causing undue collateral damage on the territory of the host State. Transnational armed conflict amounts to upholding the sovereign equality of each State wilfully diluting the significance of her consent satisfying the threshold requirements for its inception and safeguarding global peace and security. Questions of territorial boundaries are rather nugatory, too, because many NSAs operate beyond the boundaries of one country. The right to the use of force under the transnational armed conflict can be thus implemented out of the territory it is operating from as long as all the host States have signed and ratified the treaty. In the present case of drone attacks, if Pakistan were to ratify this treaty on transnational armed conflict, the US could commence drone attacks on Pakistani soil against Al-Qaeda or Taliban in Afghanistan or Pakistan without the consent of the Pakistani government. However, it is not the case with the US; she will have to take measures for an international armed conflict. The US can then strike only when the intelligence regarding the location of a particular target in a certain area is clear and accurate, so as to avoid all collateral damages. However, if the Pakistani government has proof that these attacks are not conforming to the impact standards demanded by this new paradigm, then it can ask the US to alter her mode of warfare. Without response, then Pakistan can take recourse at the ICJ.

VIII. Conclusion

Through his commencement address at the US Military Academy at West Point, Barack Obama recognized many of the problems this paper has brought out. He acknowledged:

When crises arise that stir our conscience or push the world in a more dangerous direction but do not directly threaten [the US], then the threshold for military action must be higher. In such circumstances, we should not go it alone. Instead, [the US] must mobilize allies and partners to take collective action. We have to broaden our tools to include diplomacy and development, sanctions and isolation, appeals to international law, and, if just, necessary and effective, multilateral military action.¹¹⁵

An American president explicitly criticized the country against global peace and security for the first time since 2001. However, it is the manner of this “appeal to international law”¹¹⁶ by the US over the course of the past ten years which this paper sought to criticize.

The flimsy legal justifications of the US for anti-terrorism have been pointed out once again through an analysis of drone attacks. Security Council Resolutions passed after 2001 have not accorded the Americans the right to use force through any means; the global society has certainly not changed the accepted orders of international law. The conditions for the pre-emptive right to self-defense - necessity, proportionality and imminence - did not exist in this case so that the continuation of these attacks would negate Pakistan’s sovereignty and sovereign equality. Without any form of solid legal justification, the US has continued the “war on terror” through a *modus operandi* of their choice. She could do so because of lacunae in the existing international legal provisions.

The authors would offer a solution to the problem. In order to carry out the war against Al-Qaeda or Taliban, the US should develop a new model of armed conflict that should be able to account for and regulate this specific situation. Transnational armed conflict occurs between a State and an NSA operating from the territory of another State. While the threshold for commencing this type of armed conflict is

¹¹⁵ Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony> (last visited on Oct. 7, 2015).

¹¹⁶ N. Gal-Or, *The Concept of Appeal in International Dispute Settlement*, 19 EUR. J. INT’L L. (2008).

the same as that of non-international armed conflict, the impact will be evaluated in terms of the higher standards of Article 2 of the Geneva Convention rather than Article 3. It will bring the regulatory framework at par with the requirements of an international armed conflict. This will enable States to undertake acts without their unilateral beliefs to subvert international order, but still subject them to a strict regulatory framework. With regard to the specific situation of transnational terrorism, a terrorist purpose underpinning a violent act should be the threshold for the commencement of a special kind of armed conflict with more stringent regulatory thresholds that assess the soft prowess of the operation, including an analysis of WHAM.

The author would argue that Barack Obama's West Point speech, while being ambivalent on various points, is a positive step towards recognizing the contours of international law that the US must abide by. The Obama administration's policy on drone attacks will give the world an idea of how far President Obama wants to follow the principles he espouses. As the global community watches on, the international legal regime and global peace and security hang in the balance.

