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## Characterizing US Operations in Pakistan: Is the United States Engaged In An Armed Conflict?

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# Characterizing US Operations in Pakistan: Is the United States Engaged In An Armed Conflict?

Laurie R. Blank and Benjamin R. Farley

## Abstract

On January 14, 2010, four Hellfire missiles fired from an unmanned aerial vehicle (“drone”) slammed into a compound in Pakistan’s South Waziristan region, killing ten people. Hakimullah Mehsud, leader of Tehrik-e-Taliban Pakistan (“TTP”), was the reported target of the strike. Already the eighth US drone attack in Pakistan in 2010, these strikes followed two consecutive years of dramatically increased drone activity within Pakistan. Despite a high degree of media and scholarly interest in the United States’ use of drones in Pakistan, little attention has focused on whether the United States is engaged in an armed conflict in Pakistan, as defined and categorized by international humanitarian law (“IHL”). Instead, most analyses consider the efficacy of the campaign or the legality of the use of force and, in particular, the use of drones for so-called targeted killings. The primary debate has centered on whether the United States is acting lawfully in self-defense and presumes that the US drone campaign in Pakistan is an extension of either the NATO campaign in Afghanistan or the broader US conflict with Al Qaeda. Those who argue that the US drone attacks do not qualify as self-defense thus find that the United States is in violation of the international law governing the resort to force (*jus ad bellum*), and add that Pakistan has not specifically requested US support against militants within Pakistan. In contrast, some argue that the US drone campaign is justifiable self-defense, but suggest that actions taken in self-defense by a state against a nonstate actor do not necessarily result in an armed conflict. Kenneth Anderson, in particular, views the drone campaign through a lens of self-defense and sees each drone strike as a discrete self-defense event. The report of the United Nations Special Rapporteur on Extrajudicial Killings addresses the parameters and definition of armed conflict in analyzing the legality of the drone strikes, but does not reach a definitive conclusion regarding the existence or nature of the conflict in Pakistan. However, it is unsatisfactory to simply dismiss each drone strike as a discrete self-defense response—thus obviating the need to examine whether the United States is in an armed conflict in Pakistan—without examining whether the whole of the campaign might rise to the level of an armed conflict. The level of violence attending the drone campaign, the increasing rate of drone strikes since 2008, the drone campaign’s focus on the TTP, and the ongoing hostilities between Pakistan and the TTP all combine to make an assessment of the existence and nature of an armed conflict critical at this juncture. Moreover, the existence of armed conflict triggers the application of international humanitarian law, otherwise known as the law of armed conflict or the law of war. The law of armed conflict governs the conduct of both states and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare. This Article

examines whether the United States is engaged in an armed conflict—as defined by IHL—with the TTP in Pakistan, and if so, explores the nature of that engagement. Part I provides background information on the TTP and other militant groups; the development and current state of hostilities between Pakistan and the TTP; and the US drone campaign in Pakistan, particularly against targets linked to the TTP. Part II applies the legal framework of armed conflict to the situation in Pakistan. After setting forth the definition and elements of armed conflict, this Part analyzes the nature of the conflict between Pakistan and the TTP. Finally, Part III examines US involvement in the conflict in Pakistan to assess whether it constitutes an intervention in an ongoing conflict or a separate parallel conflict and how such determinations might affect the applicable law.

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## ARTICLES

### CHARACTERIZING US OPERATIONS IN PAKISTAN: IS THE UNITED STATES ENGAGED IN AN ARMED CONFLICT?

*Laurie R. Blank* \* and *Benjamin R. Farley* \*\*

#### INTRODUCTION

On January 14, 2010, four Hellfire missiles fired from an unmanned aerial vehicle (“drone”) slammed into a compound in Pakistan’s South Waziristan region, killing ten people.<sup>1</sup> Hakimullah Mehsud, leader of Tehrik-e-Taliban Pakistan (“TTP”), was the reported target of the strike.<sup>2</sup> Already the eighth US drone attack in Pakistan in 2010,<sup>3</sup> these strikes followed two consecutive years of dramatically increased drone activity within Pakistan. Despite a high degree of media and scholarly interest in the United States’ use of drones in Pakistan, little attention has focused on whether the United States is

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1. See *US Drone Attack Reportedly Injures Pakistan Taliban Chief Mehsud*, BBC MONITORING S. ASIA, Jan. 15, 2010; *Pakistan Taliban Says Leader Injured in Attack*, CNN, Jan. 15, 2010, [http://articles.cnn.com/2010-01-15/world/pakistan.taliban\\_1\\_baitullah-mehsud-drone-strike-hakimullah-mehsud?\\_s=PM:WORLD](http://articles.cnn.com/2010-01-15/world/pakistan.taliban_1_baitullah-mehsud-drone-strike-hakimullah-mehsud?_s=PM:WORLD).

2. *Mehsud Was Target of Attacks*, UNITED PRESS INT’L [UPI], Jan. 14, 2010, [http://www.upi.com/Top\\_News/US/2010/01/14/Mehsud-was-target-of-attacks/UPI-78931263530640](http://www.upi.com/Top_News/US/2010/01/14/Mehsud-was-target-of-attacks/UPI-78931263530640). For nearly four months following the January 14, 2010 drone strike, Mehsud’s death was the subject of speculation and controversy. Ultimately, in early May 2010, video and audio tapes of Mehsud surfaced. Those tapes, produced in early April 2010, demonstrated that Mehsud had survived the strike. See, e.g., *Hakimullah Mehsud is Alive*, UPI, May 3, 2010, [http://www.upi.com/Top\\_News/Special/2010/05/03/Hakimullah-Mehsud-is-alive/UPI-73561272904165](http://www.upi.com/Top_News/Special/2010/05/03/Hakimullah-Mehsud-is-alive/UPI-73561272904165); *Video Shows Taliban Chief Hakimullah Mehsud “Alive,”* BBC NEWS, May 3, 2010, <http://news.bbc.co.uk/2/hi/8657730.stm>.

3. *Mehsud Was Target of Attacks*, *supra* note 2. The United States launched fifty-three drone strikes in 2009 and thirty-four strikes in 2008. See Peter Bergen & Katherine Tiedemann, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2010*, COUNTERTERRORISM STRATEGY INITIATIVE POL’Y PAPER (New American Foundation, Washington, D.C.), Feb. 24, 2010, at 3.

engaged in an armed conflict in Pakistan, as defined and categorized by international humanitarian law (“IHL”).<sup>4</sup> Instead, most analyses consider the efficacy of the campaign or the legality of the use of force and, in particular, the use of drones for so-called targeted killings. The primary debate has centered on whether the United States is acting lawfully in self-defense and presumes that the US drone campaign in Pakistan is an extension of either the NATO campaign in Afghanistan or the broader US conflict with Al Qaeda.<sup>5</sup> Those who argue that the US drone attacks do not qualify as self-defense thus find that the United States is in violation of the international law governing the resort to force (*jus ad bellum*),<sup>6</sup> and add that Pakistan has not specifically requested US support against militants within Pakistan.<sup>7</sup> In contrast, some argue that the US drone campaign is justifiable self-defense, but suggest that actions taken in self-defense by a state against a nonstate actor do not necessarily result in an armed conflict.<sup>8</sup> Kenneth Anderson, in particular, views the drone campaign through a lens of self-defense and sees each drone strike as a discrete self-defense event.<sup>9</sup> The report of the United Nations Special Rapporteur on Extrajudicial Killings addresses the parameters and definition of armed conflict in analyzing the legality of the drone strikes, but does not reach a

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4. See Shane Harris, *Are Drone Strikes Murder?*, NAT’L J., Jan. 9, 2010, at 14; Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.’s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, at 37, 40–41.

5. See 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 (Simon Bronitt ed., forthcoming 2010); Jordan J. Paust, *Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 FLA. ST. J. TRANSNAT’L L. & POL’Y (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1520717](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520717). See generally Kenneth Anderson, *Targeted Killings in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM (Benjamin Wittes ed., 2009).

6. See O’Connell, *supra* note 5, at 14–15.

7. See *id.* at 17.

8. See e.g., *Rise of the Drones: Unmanned Systems and the Future of War: Hearing Before the Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov’t Reform*, 111th Cong. 5 (2010) (written testimony of Kenneth Anderson, Professor, Washington College of Law, American University); Kenneth Anderson, *Predators over Pakistan*, WEEKLY STANDARD, Mar. 8, 2010, at 30–33; Paust, *supra* note 5.

9. See Anderson, *supra* note 5, at 366–70.

definitive conclusion regarding the existence or nature of the conflict in Pakistan.<sup>10</sup>

However, it is unsatisfactory to simply dismiss each drone strike as a discrete self-defense response—thus obviating the need to examine whether the United States is in an armed conflict in Pakistan—without examining whether the whole of the campaign might rise to the level of an armed conflict. The level of violence attending the drone campaign, the increasing rate of drone strikes since 2008, the drone campaign’s focus on the TTP, and the ongoing hostilities between Pakistan and the TTP all combine to make an assessment of the existence and nature of an armed conflict critical at this juncture. Moreover, the existence of armed conflict triggers the application of international humanitarian law, otherwise known as the law of armed conflict or the law of war. The law of armed conflict governs the conduct of both states and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare.<sup>11</sup>

This Article examines whether the United States is engaged in an armed conflict—as defined by IHL—with the TTP in Pakistan, and if so, explores the nature of that engagement. Part I provides background information on the TTP and other militant groups; the development and current state of hostilities

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10. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, ¶¶ 53–56, U.N. Doc. A/HRC/14/24Add.6 (May 28, 2010) (by Philip Alston).

11. See International Committee of the Red Cross [ICRC], *International Humanitarian Law in Brief*, [http://www.icrc.org/web/eng/siteeng0.nsf/humall/section\\_ihl\\_in\\_brief](http://www.icrc.org/web/eng/siteeng0.nsf/humall/section_ihl_in_brief). The law of armed conflict is set forth primarily in the four Geneva Conventions of August 14, 1949 and their Additional Protocols. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; 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 AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

between Pakistan and the TTP; and the US drone campaign in Pakistan, particularly against targets linked to the TTP. Part II applies the legal framework of armed conflict to the situation in Pakistan. After setting forth the definition and elements of armed conflict, this Part analyzes the nature of the conflict between Pakistan and the TTP. Finally, Part III examines US involvement in the conflict in Pakistan to assess whether it constitutes an intervention in an ongoing conflict or a separate parallel conflict and how such determinations might affect the applicable law.

### I. *TEHRIK-E-TALIBAN PAKISTAN AND HOSTILITIES IN PAKISTAN*

In December 2007, Pakistani tribal militias from across the Federally Administered Tribal Areas (“FATA”) and the Northwest Frontier Province (“NWFP”)<sup>12</sup> united to become Tehrik-e-Taliban Pakistan. TTP is an umbrella group for what were once locally-oriented tribal militias involved in varying, individualized conflicts with the state of Pakistan.<sup>13</sup> Unlike other armed groups operating in northwest Pakistan, which focus their primary efforts on combating the government of Afghanistan and NATO (often with the support, tacit or otherwise, of the Pakistani government),<sup>14</sup> the TTP directly opposes the

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12. The Northwest Frontier Province was officially renamed Khyber Pakhtunkhwa on April 15, 2010. Constitution (Eighteenth Amendment) Act of 2010 (Pak.), *available at* [http://www.comparativeconstitutionsproject.org/files/Pakistan\\_2010.pdf](http://www.comparativeconstitutionsproject.org/files/Pakistan_2010.pdf). For the sake of familiarity, this Article will continue to refer to Khyber Pakhtunkhwa by its former name.

13. See Brian Fishman, *The Battle for Pakistan: Militancy and Conflict across the FATA and NWFP*, COUNTERTERRORISM STRATEGY INITIATIVE POLY PAPER (New American Foundation, Washington D.C.), Apr. 2010, at 6. The forty-person *shura* that produced the TTP included leaders from all seven FATA tribal agencies, as well as several districts in the NWFP. *Id.*

14. For example, the Haqqani Network, founded by Jalaluddin Haqqani and currently led by his son Sirajuddin, is an independent armed group that operates from North Waziristan. Jalaluddin rose to prominence by being a remarkably successful *mujahid* during the Soviet War in Afghanistan. The Haqqani Network seeks to drive NATO from Afghanistan and is believed to receive support from the government of Pakistan. See Nahal Toosi, *Haqqani Network Challenges US-Pakistan Relations*, ABC NEWS, Dec. 29, 2009, <http://abcnews.go.com/International/wireStory?id=9442987>. Similarly, Hafiz Gul Bahadar leads an armed group in North Waziristan that is focused on launching attacks against NATO in Afghanistan rather than against the state of Pakistan. *Tehrik-e-Taliban Pakistan (TTP)*, JANE’S WORLD INSURGENCY AND TERRORISM, Apr. 6, 2010 [hereinafter JANE’S WORLD INSURGENCY]. Though he was among the founders of

government of Pakistan. The TTP seeks to establish an Islamic emirate in Pakistan modeled after the Afghan Taliban's Islamic Emirate of Afghanistan.<sup>15</sup> Although the TTP also shares the Afghan Taliban and Haqqani Network's goals of disrupting NATO operations in Afghanistan and ousting the Afghan government of President Hamid Karzai, the Afghan Taliban's Quetta Shura and the Haqqani Network view the Pakistani state as a benefactor and seek accommodation with it.<sup>16</sup> The TTP, in contrast, focuses primarily on its opposition to the Pakistani state. Thus, elements of the Pakistani government sometimes describe the TTP as the "bad Taliban," while referring to the Afghan Taliban, the Haqqani Network, and similarly aligned groups as the "good Taliban."<sup>17</sup>

Pakistan was at odds with—and in many cases, engaged in hostilities against—many of these locally-oriented militia before the TTP's formation,<sup>18</sup> but the conflict between the Pakistani state and the TTP, and therefore the otherwise locally-oriented militia which comprise it, has intensified noticeably since the TTP's formation. Before the TTP formed, halfhearted Pakistani

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Tehrik-e-Taliban Pakistan ("TTP"), he quickly broke from the group due to the TTP's insistence on fighting the Pakistani state. *Id.* Armed hostilities have subsequently occurred between Bahadar's fighters and TTP fighters. *See id.*; Bill Roggio, *The Pakistani Taliban's Top Leaders*, LONG WAR J., May 17, 2010, [http://www.longwarjournal.org/archives/2010/05/the\\_pakistani\\_taliba\\_1.php](http://www.longwarjournal.org/archives/2010/05/the_pakistani_taliba_1.php) (noting that Bahadar is *not* a leader of Tehrik-e-Taliban Pakistan).

15. JANE'S WORLD INSURGENCY, *supra* note 14; *see* Fishman, *supra* note 13, at 6 ("[Tehrik-e-Taliban Pakistan] attracted support from militants across the FATA and the Malakand division of the NWFP by arguing that Pakistan's support for the U.S. and NATO effort in Afghanistan made the government illegitimate.").

16. *See* Bill Roggio, *US Airstrike Targets Haqqani Network in North Waziristan*, LONG WAR J., Jan. 29, 2010, [http://www.longwarjournal.org/archives/2010/01/us\\_airstrike\\_targets\\_3.php](http://www.longwarjournal.org/archives/2010/01/us_airstrike_targets_3.php). The Quetta Shura refers to the governing body of the Afghan Taliban led by Mullah Omar. It is called the Quetta Shura because it is believed to receive sanctuary in—and operate from—the Pakistani city of Quetta, located in Baluchistan. *See* Bill Roggio, *The Afghan Taliban's Top Leaders*, LONG WAR J., Feb. 23, 2010, [http://www.longwarjournal.org/archives/2010/02/the\\_talibans\\_top\\_lea.php](http://www.longwarjournal.org/archives/2010/02/the_talibans_top_lea.php).

17. *See* Bill Roggio, *Latest US Airstrike Kills 3 in North Waziristan*, LONG WAR J., Feb. 17, 2010, [http://www.longwarjournal.org/archives/2010/02/latest\\_us\\_airstrike\\_1.php](http://www.longwarjournal.org/archives/2010/02/latest_us_airstrike_1.php) ("The Pakistani military and government are unwilling to target Bahadar and the Haqqanis as these two are viewed as 'good Taliban' since they do not directly threaten the Pakistani state and are seen as part of Pakistan's strategic depth against India and Afghanistan.").

18. *See* Sameer Lalwani, *Pakistan's COIN Flip: The Recent History of Pakistani Military Counterinsurgency Operations in the NWFP and FATA*, COUNTERTERRORISM STRATEGY INITIATIVE POL'Y PAPER (New American Foundation, Washington D.C.), Apr. 2, 2010, at 1–2.

military offensives against locally-oriented tribal militias produced peace agreements that generally bolstered the militants.<sup>19</sup> For example, in 2004, the Pakistani military launched a campaign against Nek Muhammad, a tribal leader in South Waziristan,<sup>20</sup> which ultimately led to Pakistan agreeing to compensate Muhammad for the fighters and materiel he lost in exchange for his commitment to register foreign fighters in the area and cease hostilities against the state.<sup>21</sup> Muhammad abided by neither condition.<sup>22</sup> In the wake of a similar offensive against Baitullah Mehsud in 2006, Pakistan essentially legitimized Mehsud's control of South Waziristan.<sup>23</sup>

Pakistan initially approached the TTP in a similar manner: halfhearted assaults followed by cease-fire agreements. In fact, the government of Pakistan was reluctant to ban the TTP at first. By August 2008, however, the government of Pakistan had embraced a qualitatively different approach to addressing the TTP threat.<sup>24</sup> That month, Pakistan launched an offensive in the Bajaur Agency<sup>25</sup> that, after seven months of continuous operations, forced the local TTP commander, Faqir Muhammad, to declare a cease-fire.<sup>26</sup>

Following the Bajaur offensive, Pakistan launched assaults on the TTP in Orakzai, South Waziristan, and the Swat Valley. In April and May 2009, Pakistan deployed more than 15,000 soldiers, supported by artillery and air power, to the Swat Valley to combat the TTP in Pakistan's "most concerted and successful

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19. See, e.g., Scott Stewart, *Pakistan: The South Waziristan Migration*, STRATFOR, Oct. 14, 2009, available at [http://www.stratfor.com/weekly/20091014\\_pakistan\\_south\\_waziristan\\_migration](http://www.stratfor.com/weekly/20091014_pakistan_south_waziristan_migration).

20. See Lalwani, *supra* note 18, at 2.

21. See Fishman, *supra* note 13, at 9.

22. See *id.*

23. See *id.*

24. See JANE'S WORLD INSURGENCY, *supra* note 14.

25. Agencies are administrative subdivisions in Pakistan's Federally Administered Territories. There are seven agencies within FATA: Bajaur, Khyber, Kurram, Mohmand, Orakzai, North Waziristan, and South Waziristan. Jayshree Bajoria, *Pakistan's Tribal Areas*, COUNCIL ON FOREIGN RELATIONS, Nov. 9, 2006, [http://www.cfr.org/publication/11973/pakistans\\_tribal\\_areas.html](http://www.cfr.org/publication/11973/pakistans_tribal_areas.html).

26. *Id.*; Bill Roggio, *Taliban Has 'Lost' in Bajaur, Mohmand: Pakistan Military*, LONG WAR J., Mar. 1, 2009, [http://www.longwarjournal.org/archives/2009/03/taliban\\_lost\\_in\\_baja.php](http://www.longwarjournal.org/archives/2009/03/taliban_lost_in_baja.php).

campaign to date.”<sup>27</sup> On the heels of its offensive in Swat, Pakistan launched a similar assault on the TTP’s heartland in South Waziristan in October 2009.<sup>28</sup> Some 30,000 Pakistani soldiers, again backed by air support and artillery, launched an attack on an estimated 7000 to 10,000 TTP and foreign militants.<sup>29</sup> By December 2009, the Pakistani government was hinting at victory in South Waziristan and looking forward to its offensive in Orakzai.<sup>30</sup> Finally, in March 2010, the Pakistani army pushed into Orakzai, where many TTP leaders and fighters reportedly fled following the October 2009 assault on South Waziristan.<sup>31</sup> The Pakistani military declared victory over the TTP in Orakzai on June 1, 2010.<sup>32</sup>

The United States launched what is believed to be its first drone attack inside Pakistan in 2004, targeting and killing Nek Muhammad, the South Waziristan tribal leader.<sup>33</sup> The United States launched just eight more drone strikes in Pakistan through the end of 2007.<sup>34</sup> Beginning in 2008, the United States dramatically increased its use of drones in Pakistan, launching thirty-four attacks, killing between 263 and 296 individuals—of these, between 106 and 134 are believed to have been militants.<sup>35</sup>

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27. *Pakistan Steps Up Swat Offensive*, BBC NEWS, [http://news.bbc.co.uk/2/hi/south\\_asia/8043185.stm](http://news.bbc.co.uk/2/hi/south_asia/8043185.stm) (last updated May 11, 2009). See generally JANE’S WORLD INSURGENCY, *supra* note 14.

28. Aryn Baker, *Pakistan: Behind the Waziristan Offensive*, TIME, Oct. 18, 2009, <http://www.time.com/time/world/article/0,8599,1930909,00.html>.

29. *Id.*

30. Nahal Toosi, *Pakistan Eyes Taliban Front after S. Waziristan*, ABC NEWS, Dec. 12, 2009, <http://abcnews.go.com/International/wireStory?id=9318842> (“The operation in South Waziristan is over. Now there are talks about Orakzai,” [Pakistani Prime Minister Yousuf Raza] Gilani told reporters in televised remarks from the eastern city of Lahore.”).

31. See, e.g., *40 Militants Killed in Pakistan*, HINDUSTAN TIMES (New Delhi), Mar. 25, 2010, available at <http://www.hindustantimes.com/News-Feed/pakistan/40-militants-killed-in-Pakistan/Article1-523232.aspx>.

32. Anwar Shakir, *Pakistan’s Military Completes Offensive in Orakzai Tribal Area*, BLOOMBERG BUSINESSWEEK, June 1, 2010, <http://www.businessweek.com/news/2010-06-01/pakistan-s-military-completes-offensive-in-orakzai-tribal-area.html>.

33. David Rohde & Mohammed Khan, *Ex-Fighter for Taliban Dies in Strike in Pakistan*, N.Y. TIMES, June 19, 2004, at A6. Shortly before his death, Muhammad and his fighters had driven the Pakistani state to negotiations after the Pakistani government attempted—and failed—to establish its writ over South Waziristan in April 2004. *Id.*

34. Bergen & Tiedemann, *supra* note 3, at 3.

35. Peter Bergen & Katherine Tiedemann, NEW AMERICA FOUND., *Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010*, <http://counterterrorism.newamerica.net/drones> (last updated Nov. 4, 2010) [hereinafter *Year of the Drone*].

In 2009, the United States launched fifty-three strikes—a rate of at least one drone strike per week; in the first half of 2010, the United States is on pace to double the total number of 2009 drone assaults in Pakistan.

Accurately determining the proportion of drone strikes that specifically target the TTP is difficult. Open source analyses rely on news reporting, which is severely restricted in FATA and NWFP. News reports also generally do not distinguish among the various militant organizations operating in Northwest Pakistan. Those considerations aside, however, a large proportion of the drone strikes appear to be aimed at the TTP's leadership and infrastructure. In 2009, for example, the United States launched at least sixteen attacks—nearly one third of all drone strikes that year—directly targeting the leader of the TTP, Baitullah Mehsud, and eventually killing him on August 5, 2009.<sup>36</sup> Three drone strikes have targeted Baitullah's successor and clansman, Hakimullah Mehsud, since his accession as *amir* of the TTP.<sup>37</sup> Of the fifty-three strikes launched in 2009, twenty-six were launched against targets in South Waziristan, the TTP's heartland, while an additional twenty-three targeted North Waziristan, where the TTP operates but competes for control with Hafiz Gul Bahadar.<sup>38</sup> Of the forty-five drone strikes in Pakistan between January 1, 2010 and June 30, 2010, only eighteen are clearly linked to a particular militant group: nine strikes targeted the militants linked to Hafiz Gul Bahadur, five targeted the TTP, two targeted Al Qaeda, and two definitively targeted the Haqqani Network.<sup>39</sup>

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36. *Id.*

37. Strikes on January 14, 15, and 17, 2010, are all believed to have targeted Hakimullah Mehsud. Imitez Gul, *Death by Drone?*, FOREIGN POLY, Jan. 31, 2010, [http://afpak.foreignpolicy.com/posts/2010/01/31/death\\_by\\_drone\\_is\\_hakimullah\\_mehsud\\_dead\\_or\\_alive](http://afpak.foreignpolicy.com/posts/2010/01/31/death_by_drone_is_hakimullah_mehsud_dead_or_alive); *Pakistan Taliban Chief Hakimullah Mehsud "Safe,"* BBC MONITORING SOUTH ASIA, Jan. 14, 2010; *Year of the Drone*, *supra* note 35. In addition, it is likely that more strikes would have targeted him were it not for the nearly four months of 2010 during which he was widely believed to be dead. Bergen & Tiedemann, *supra* note 3, at 4.

38. *See Year of the Drone*, *supra* note 35.

39. *See id.* These numbers diverge from the target coding done by the New America Foundation, which does not differentiate between the TTP, Hafiz Gul Bahadar, and the manifold other armed groups in Northwest Pakistan. This Article's target affiliation attribution is, like the New America Foundation's, based on open source reporting that is frequently imprecise and contradictory. The broader point remains that armed individuals in Northwest Pakistan do not belong to a single organization and the United States is not targeting members of just one organization.

Twenty-six of the remaining twenty-seven strikes occurred in North Waziristan, where the TTP has found refuge since Pakistan's offensives in Swat and South Waziristan.<sup>40</sup> Importantly, fifteen of these strikes have occurred in and around Miranshah,<sup>41</sup> a reported TTP "stronghold."<sup>42</sup>

Over the past two years, the TTP has attacked NATO and US forces in addition to attacking Pakistani targets. For instance, the TTP has attacked NATO convoys transiting through Pakistan,<sup>43</sup> and has launched attacks killing US military advisors inside Pakistan.<sup>44</sup> It has also launched a "*fedayeen* style" attack on the US Consulate in Peshawar, involving both car bombs and an assault team armed with rocket launchers and automatic weapons.<sup>45</sup> Reports also indicate that the TTP participated in the suicide bomber attack on Forward Operating Base Chapman that killed seven Central Intelligence Agency employees,<sup>46</sup> an attack that was followed closely by the spate of drone strikes targeting TTP leader Hakimullah Mehsud.

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40. See *id.*; Omar Waraich & Andrew Buncombe, *CIA Drones Kill 14 in Strike Linked to Times Square Plot*, INDEPENDENT (London), May 12, 2010, at 30.

41. *Year of the Drone*, *supra* note 35.

42. See, e.g., Zeeshan Haider, *Analysis: The Ties that Kill: Pakistan Militant Groups Uniting*, REUTERS ALERTNET, May 30, 2010, available at <http://www.alertnet.org/thenews/newsdesk/SGE6400AU.htm>; Syed Mozzam Hashmi, *Pakistan Nods Affirmative for North Waziristan Operation*, XINHUA (Beijing), June 10, 2010, [http://news.xinhuanet.com/english2010/indepth/2010-06/10/c\\_13344208.htm](http://news.xinhuanet.com/english2010/indepth/2010-06/10/c_13344208.htm) ("Miranshah, the headquarters of North Waziristan, and Mir Ali are reported to be the strongholds of Al-Qaeda that include TTP . . ."); *Punjabi Taliban Leader Qari Zafar Killed in US Drone Attack*, THE STATESMAN (Kolkata), Feb. 26, 2010, <http://www.thestatesmen.net/news/punjabi-taliban-leader-qari-zafar-killed-in-us-drone-attack/> (highlighting relationship between Miranshah-based Qari Zafar and TTP *amir* Hakimullah Mehsud); cf. Sherin Zada, *Suicide Car Bomber Kills Soldier in NW Pakistan*, ABC NEWS, July 5, 2010, <http://abcnews.go.com/International/wireStory?id=11088076> (noting that the Pakistani Army claimed to have killed Amirullah Mehsud, a top Tehrik-e-Taliban commander, in Miranshah).

43. Mansoor Khan, *3 Hurt as NATO Convoy Ambushed in Karachi*, THE NATION (Islamabad), Jan. 28, 2010, <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Opinions/29-Jan-2010/3-hurt-as-Nato-convoy-ambushed-in-Karachi>; Shahan Mufti, *Taliban Hijacking Threatens Key NATO Supply Route*, CHRISTIAN SCI. MONITOR, Nov. 12, 2008, at 25; Jane Perlez, *100 Trucks of Supplies Destroyed in Pakistan*, N.Y. TIMES, Dec. 8, 2008, at A6.

44. See, e.g., *Pakistan: Americans at Girls School in Lower Dir Were Target*, RIGHT VISION NEWS (Lahore), Feb. 5, 2010; Declan Walsh, *US Soldiers and Schoolgirls among Seven Killed by Taliban Bomb Attack in North-west Pakistan*, GUARDIAN (London), Feb. 4, 2010, at 17.

45. JANE'S WORLD INSURGENCY, *supra* note 14.

46. Roy Gutman & Saeed Shah, *Taliban Chief Tied to CIA Bombing Believed Dead*, HOUSTON CHRONICLE, Feb. 1, 2010, at A6.

II. *THE EXISTENCE OF AN ARMED CONFLICT: APPLYING THE LAW TO THE FACTS ON THE GROUND*

IHL applies only during an armed conflict, so determining whether violence between states, between a state and a nonstate actor, or between two or more nonstate actors rises to the level of an armed conflict is a foundational analytical step. In Pakistan, three actors are engaged in hostilities of some type, whether or not they rise to the level of an armed conflict: Pakistan, the United States, and various nonstate actors, including the TTP. The nature of these hostilities, the key inquiry here, determines whether and what part of IHL applies to the conduct of the parties and the status of persons in the conflict areas.

The 1949 Geneva Conventions endeavor to address all instances of armed conflict<sup>47</sup> and set forth two primary categories of armed conflict that trigger the application of IHL: international armed conflict and non-international armed conflict. Common Article 2 of the Geneva Conventions of August 1949 states that the Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>48</sup> Common Article 3 of the Geneva Conventions of August 1949 sets forth minimum provisions applicable “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>49</sup> Notably, the Geneva Conventions adopted the term “armed conflict” specifically to avoid the technical legal and political pitfalls of the term “war.”<sup>50</sup> As such,

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47. ICRC, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 26 (Oscar M. Uhler & Henri Coursier eds., 1958) [hereinafter GC IV COMMENTARY] (“Born on the battlefield, the Red Cross called into being the First Geneva Convention to protect wounded or sick military personnel. Extending its solicitude little by little over other categories of war victims, in logical application of its fundamental principle, it pointed the way, first to the revision of the original convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle in *all* cases of armed conflicts, including those of an internal character.”).

48. GC I, *supra* note 11, art. 2; GC II, *supra* note 11, art. 2; GC III, *supra* note 11, art. 2; GC IV, *supra* note 11, art. 2.

49. GC I, *supra* note 11, art. 3; GC II, *supra* note 11, art. 3; GC III, *supra* note 11, art. 3; GC IV, *supra* note 11, art. 3.

50. See generally GC IV COMMENTARY, *supra* note 47, at 17–25 (addressing Article 2 common to the Geneva Conventions).

determination of the existence of an armed conflict does not turn on a formal declaration of war—or even on how the participants characterize the hostilities—but rather on the facts of a given situation.<sup>51</sup>

Just as the existence of an armed conflict triggers the application of IHL to govern the status of persons and the rights and obligations of parties to the conflict, the nature of the conflict—whether international or non-international—determines the extent of the applicable law. International armed conflicts are subject to the full panoply of the Geneva Conventions and the customary laws of war.<sup>52</sup> Non-international armed conflicts are subject to the more limited legal regime of Common Article 3 and the steadily growing customary international law applicable in non-international armed conflict, including the principles of humanity, proportionality, distinction, and necessity.<sup>53</sup> In particular, Common Article 3 provides that civilians or individuals who are *hors de combat* shall not be killed or tortured, taken as hostages, or subjected to humiliating or degrading treatment. Common Article 3 further requires measures to care for the wounded and sick. Within the Common Article 3 framework, parties to a non-international

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51. Common Article 2 of the 1949 Geneva Conventions applies to “all cases of declared war or of any other armed conflict . . . between two or more [states], even if the state of war is not recognized by one of them.” GC I, *supra* note 11, art. 2; GC II, *supra* note 11, art. 2; GC III, *supra* note 11, art. 2; GC IV, *supra* note 11, art. 2; *see, e.g.*, Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 85 (2005) (“[I]t is worth emphasizing that recognition of the existence of armed conflict is not a matter of state discretion.”).

52. Geoffrey S. Corn, *What Law Applies to the War on Terror?*, in THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 1, 15 (Michael Lewis et al. eds., 2009).

53. Prosecutor v. Tadić, Case No. IT-94-I-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 100–27 (Int’l Crim. Trib. for the Former Yugoslavia [ICTY] Oct. 2, 1995) (highlighting the development and applicability of necessity, distinction, humanity, and proportionality to internal armed conflict); LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 133–34 (2002); Geoffrey S. Corn & Eric T. Jensen, *Untying the Gordian Knot*, 81 TEMP. L. REV. 788, 827 (2008); Christopher Greenwood, *International Law and the Tadic Decision*, 7 EUR. J. INT’L L. 265, 275–78 (1996); *see* Abella v. Argentina (*La Tablada*), Case 11.137, Inter-Am. C.H.R., Report No. 55/97, ¶¶ 176–77 (1997); Maj. Ian G. Corey, *The Fine Line between Policy and Custom: Prosecutor v. Tadic and the Customary International Law of Internal Armed Conflict*, 166 MIL. L. REV. 145 (2000); Cullen, *supra* note 51, at 66; William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT’L L.J. 907 (2003).

armed conflict can also enter into special agreements to implement additional provisions of the Geneva Conventions.<sup>54</sup>

A. *Defining Armed Conflict*

Neither Common Article 2 nor Common Article 3 specifically defines armed conflict. The most common and oft-cited contemporary definition of armed conflict is from the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in *Prosecutor v. Tadić*, where the tribunal held that 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.”<sup>55</sup> The first portion of the definition refers to international armed conflict; the second to non-international armed conflict.

According to the Commentary to the Geneva Conventions (“Commentary”), “[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.”<sup>56</sup> The duration of the hostilities or the number of wounded or killed does not impact the characterization as an armed conflict. The facts on the ground in Pakistan demonstrate that the present situation there does not constitute an international armed conflict because there

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54. See *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-A, Judgment, ¶ 69 (ICTY May 5, 2009) (“However, even in the context of an internal armed conflict, Geneva Convention III applies where the parties to the conflict have agreed that the Convention shall apply. In this respect, the Appeals Chamber recalls the ECCM instructions to its monitors on the implementation of the Zagreb Agreement which indicated that the Geneva Conventions were to be applied to the prisoners of war.”); *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶ 583 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (describing an agreement entered into by the then Presidents of Bosnia-Herzegovina, the Croatian Democratic Community, and the Serbian Democratic Party to apply certain provisions of the Geneva Conventions in accord with Common Article 3).

55. *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY Oct. 2, 1995). Indeed, the so-called *Tadić* test has not only been the driving factor in the ICTY’s jurisprudence, it was also adopted by the drafters of the Rome Statute establishing the International Criminal Court and by the International Criminal Tribunal for Rwanda. See Rome Statute of the International Criminal Court, art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90; see also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 620 (Sept. 2, 1998); Cullen, *supra* note 51, at 98.

56. GC IV COMMENTARY, *supra* note 47, at 20.

is no conflict between two High Contracting Parties. The United States and Pakistan are indeed both High Contracting Parties,<sup>57</sup> but they are not engaged in hostilities against each other.

The next inquiry, then, is whether the situation in Pakistan meets the requirements of Common Article 3, which provides a minimum threshold for distinguishing internal armed conflict from riots or banditry.<sup>58</sup> According to the Commentary, no specific test for determining the applicability of Common Article 3 exists; rather, the goal is to interpret Common Article 3 as broadly as possible.<sup>59</sup> The Commentary does, however, offer some guidance in the form of indicative—but not dispositive—factors or characteristics of a Common Article 3 conflict based on the nature and behavior of both state and nonstate parties. For example, the response of the state is a critical component,<sup>60</sup> in particular whether it employs its regular armed forces in combating the nonstate actor and whether it has recognized the nonstate actor as a belligerent. In addition, several considerations can provide useful guidance for understanding whether violence or hostilities have progressed beyond internal disturbances, such as whether the nonstate actor: (1) has an organized military force; (2) has an authority responsible for its acts; (3) acts within a determinate territory, having the means of ensuring respect for the Geneva Conventions; and (4) acts as a de facto governing entity with its armed forces prepared to obey the laws of war.<sup>61</sup>

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57. The United States ratified the Geneva Conventions of August 12, 1949 on August 2, 1955. Pakistan ratified the Geneva Conventions of August 12, 1949 on June 12, 1951. *State Parties/Signatories to the Geneva Conventions of August 12, 1949*, ICRC, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited Nov. 3, 2010).

58. See Corn, *supra* note 52, at 16–17; Cullen, *supra* note 51, at 70; see also Richard A. Falk, *Janus Tormented: The International Law of Internal War*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE 197–99 (James N. Rosenau ed., 1964); cf. LOTHAR KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 230 (1956) (defining rebellion, insurgency, and belligerency).

59. GC IV COMMENTARY, *supra* note 47, at 36 (“Does this mean Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of [the suggested criteria]? We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible.”).

60. Corn, *supra* note 52, at 17.

61. GC IV COMMENTARY, *supra* note 47, at 35–36. None of these factors is dispositive; rather, these and other factors may be used to distinguish acts of banditry, short-lived insurrection, or terrorist acts from armed conflict. *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 49 (ICTY Apr. 3, 2008) (examining the number,

Two considerations have proven to be particularly important to courts and tribunals faced with uncertainty about the existence of a non-international armed conflict: “the intensity of the conflict and the organization of the parties to the conflict.”<sup>62</sup> These criteria help to “distinguish[] an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”<sup>63</sup> For example, when anti-government protestors attacked an Argentine military barracks, leading to a thirty-hour firefight, the Inter-American Commission of Human Rights differentiated the events from a “situation of internal disturbances . . . [because] what happened at [La Tablada] was not equivalent to large scale violent demonstrations, students throwing stones at the police, bandits holding hostages for ransom, or the assassination of government officials for political reasons.”<sup>64</sup> Instead, the court concluded that “the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence” rendered the attack on, and recapture of, the barracks at La Tablada an armed conflict, triggering IHL.<sup>65</sup>

B. *The Nature of the Conflict between Pakistan and the TTP*

As detailed above, the nature and quantity of the armed engagements between Pakistan and militant groups, including

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duration, and intensity of individual confrontations); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 84 (ICTY Nov. 30, 2005) (examining the increasing frequency of clashes, the use of heavy weapons and mortars, as well as armored personal carriers, and the deployment of regular armed forces); Prosecutor v. Lukić, Case No. IT-98-32/1-T, Judgment, ¶¶ 879–88 (ICTY July 20, 2009) (highlighting the territorial control and administration exerted by a militia as demonstrative of its degree of organization); Prosecutor v. Tadić, Case No. IT-94-I-T, Judgment, ¶¶ 562–67 (highlighting the geographic distribution of clashes and examining whether a militia had captured and held territory); Sylvain Vite, *Typology of Armed Conflicts in International Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 76–77 (2009).

62. *Tadić*, Case No. IT-94-I-T, Judgment, ¶ 562 (ICTY May 7, 1997); Vite, *supra* note 61, at 75–76.

63. *Tadić*, Case No. IT-94-I-T, Judgment, ¶ 562. Government forces are presumed to be sufficiently organized to be a party to an armed conflict. *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 60; Vite, *supra* note 61, at 77.

64. *La Tablada*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, ¶ 154 (1997).

65. *Id.* ¶ 155 (“[P]articularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective—a military base.”).

the TTP, have developed and changed over the past few years. An examination of the current state of the fighting in the context of existing jurisprudence regarding the definition of armed conflict confirms the already prevalent conclusion in the general media that Pakistan and the TTP—and possibly the United States—are involved in an armed conflict. This section will analyze the two main considerations—intensity and organization—to demonstrate that the fighting between the TTP and Pakistan does indeed meet the standard for a Common Article 3 non-international armed conflict.

### 1. Intensity

Intensity requires an analysis of the seriousness of the fighting in order to determine whether it has passed from riots and other random acts of violence to engagements more akin to regularized military action. Analyzing intensity thus encompasses a range of specific factors regarding the actual hostilities. For example, the ICTY considered factors such as the number, duration, and intensity of individual confrontations; the types of weapons and other military equipment used; the number of persons and types of forces engaged in the fighting; the geographic and temporal distribution of clashes; the territory that has been captured and held; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.<sup>66</sup> The ICTY has also declared that the involvement of the UN Security Council may reflect the intensity of a conflict.<sup>67</sup> Additional relevant factors include the collective nature of the fighting, the state's resort to its armed forces, the duration of the conflict, and the frequency of the acts of violence and military operations.<sup>68</sup>

The intensity and duration of clashes between the government of Pakistan and the TTP, the spread of clashes over territory and time, and Pakistan's increasing reliance on its regular armed forces in confronting the TTP indicate that the TTP and the Pakistani state are in an armed conflict. While none of these three factors are necessarily dispositive of a conflict

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66. *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 49; *Limaj*, Case No. IT-03-66-T, Judgment, ¶¶ 135–43; *Tadić*, Case No. IT-94-1-T, Judgment, ¶¶ 564–65.

67. *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 49.

68. *Vite*, *supra* note 61, at 76.

sufficiently intense to be an armed conflict, taken together they suggest a level of violence that exceeds the minimum threshold in Common Article 3.

a. Seriousness of Attacks and Increase in Armed Clashes

Clashes between the government of Pakistan and elements of the TTP have already spanned nearly two-and-a-half years. Since mid-2009, the Pakistani government launched offensives in Bajaur, Orakzai, South Waziristan, and Swat.<sup>69</sup> The recent fighting in Orakzai has involved 7000 Pakistani troops.<sup>70</sup> The Pakistani newspaper *Dawn* has described the fighting in Orakzai as a “relentless military offensive.”<sup>71</sup> Large-scale clashes involving the use of air strikes, artillery, and thousands of Pakistani troops were nearly continuous between October 2009, when the Pakistani government began its campaign in South Waziristan, and June 2010, when the Pakistan Army declared victory over the TTP in Orakzai. Since its inception, the TTP has launched attacks against government targets including Frontier Corps outposts, the Pakistani General Headquarters, military convoys, and police stations.<sup>72</sup> TTP forces attack Pakistani government

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69. See Ismail Khan, *Battle for Waziristan Looms*, DAWN, Oct. 2, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/11-battle-for-waziristan-looms-il-12> (Pakistan employed 28,000 troops in its offensive in South Waziristan. There, it faced some 6000–7000 TTP and local militants); Sailab Mehsud, *Army Embarks on Rah-i-Nijat Finally*, DAWN, Oct. 18, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/07-curfew-imposed-in-south-waziristan-ahead-of-operation-ha-01>; *Times Topics: Swat Valley*, N.Y. TIMES, [http://topics.nytimes.com/top/news/international/countriesandterritories/pakistan/northwest-pakistan/swat\\_valley/index.html](http://topics.nytimes.com/top/news/international/countriesandterritories/pakistan/northwest-pakistan/swat_valley/index.html) (updated Nov. 16, 2010); Roggio, *supra* note 26; Bill Roggio, *Taliban Kill 9 Pakistani Soldiers in Ambush*, LONG WAR J., May 10, 2010, [http://www.longwarjournal.org/archives/2010/05/taliban\\_kill\\_nine\\_pa.php](http://www.longwarjournal.org/archives/2010/05/taliban_kill_nine_pa.php) (“The Pakistani military launched an offensive in [Orakzai] at the end of March, and have claimed success. On April 11, the Inter-Services Public Relations directorate, the military’s public affairs division, said the Taliban were ‘fleeing’ [Orakzai].”).

70. Anwar Shakir, *Pakistan Seizes 2nd Tribal Zone in Anti-Taliban War*, BLOOMBERG BUSINESSWEEK, Apr. 14, 2010, <http://www.businessweek.com/news/2010-04-14/pakistan-seizes-second-tribal-region-in-anti-taliban-fight.html>; cf. *Limaj*, Case No. IT-03-66-T, Judgment, ¶ 151 (highlighting the movement of 300 Serbian government troops); *Tadić*, Case No. IT-94-I-T, Judgment, ¶¶ 564–66.

71. *Ten Militants Killed as Orakzai Offensive Continues*, DAWN, Apr. 6, 2010, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/provinces/16-ten+militants+killed+as+orakzai+offensive+continues-hs-02>.

72. See, e.g., *Pakistani Troops Kill 11 Militants in Orakzai*, BBC MONITORING SOUTH ASIA, May 9, 2010; *Pakistan: TTP Claims Bombing*, RIGHT VISION NEWS, May 6, 2010 (“The

outposts weekly.<sup>73</sup> Over the past two years, 2000 Pakistani soldiers and untold hundreds, perhaps thousands, of militants have been killed, while hundreds of thousands of Pakistani civilians have been displaced by the ongoing hostilities between Pakistan and the TTP.<sup>74</sup>

Past cases suggest that the types of campaigns and attacks and the increasing level of violence in Pakistan are sufficiently intense to constitute a non-international armed conflict. For example, the ICTY examined the fighting between the Kosovo Liberation Army (“KLA”) and the government of Yugoslavia in a string of cases to determine if the situation in Kosovo amounted to armed conflict, thus giving the tribunal jurisdiction. In *Prosecutor v. Limaj*, the defendant argued that “regionally disparate and temporally sporadic attacks carried out over a broad and contested geographic area should not be held to amount to an armed conflict.”<sup>75</sup> The Trial Chamber held that the nature of the armed incidents and hostilities were of sufficient intensity to constitute an armed conflict. In reaching this conclusion, the trial chamber pointed to, for example, firefights

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Tehrik-e-Taliban Pakistan . . . claimed responsibility for a bomb attack on a police officer in the limits of Shakardarra police station on Tuesday . . .”); *Rawalpindi GHQ Attack May Trigger Pak Gov't to Launch Military Offensive in Waziristan*, ASIAN NEWS INT'L, Oct. 21, 2009, [http://www.thaindian.com/newsportal/feature/rawalpindi-ghq-attack-may-trigger-pak-govt-to-launch-military-offensive-in-waziristan\\_100259979.html](http://www.thaindian.com/newsportal/feature/rawalpindi-ghq-attack-may-trigger-pak-govt-to-launch-military-offensive-in-waziristan_100259979.html); Bill Roggio, *Taliban, Frontier Corps Clash in North Waziristan*, LONG WAR J., Sept. 28, 2009, [http://www.longwarjournal.org/archives/2009/09/taliban\\_frontier\\_cor.php](http://www.longwarjournal.org/archives/2009/09/taliban_frontier_cor.php); Ashfaq Yusufzai, *Pakistan: Police Pay Heavy Toll in Fight against Terrorism*, INTER PRESS SERVICE, Feb. 3, 2010.

73. See generally *TOPICS: Pakistan*, LONG WAR J., [http://www.longwarjournal.org/cgi-bin/mt-search.cgi?tag=Pakistan&blog\\_id=7](http://www.longwarjournal.org/cgi-bin/mt-search.cgi?tag=Pakistan&blog_id=7) (providing accounts of various violent clashes and confrontations). The *Limaj* trial chamber emphasized that clashes between Serbian government forces and the KLA were occurring every three to seven days. *Limaj*, Case No. IT-03-66-T, Judgment, ¶ 168.

74. Jane Perlez & Eric Schmitt, *Pakistan Army Finds Taliban Tough to Root Out*, N.Y. TIMES, July 4, 2010, at A1; Ariane Rummery & Rabia Ali, U.N. High Comm'r on Refugees [UNHCR], *UNHRC Distributing Winter Aid to Tens of Thousands of Displaced Pakistanis*, Nov. 24, 2009, available at <http://www.unhcr.org/4b0bfc4e9.html> (indicating that more than 268,000 displaced people from South Waziristan have been verified by Pakistan's National Database and Registration Authority); Tom Wright & Siobhan Gorman, *Militants Overtake India as Top Threat, Says Pakistan's ISI*, WALL ST. J., Aug. 16, 2010, <http://online.wsj.com/article/SB10001424052748703908704575433433670192748.html> (as a demonstration of the intensity of the hostilities, in comparison just over 2000 multinational (ISAF) soldiers have been killed in Afghanistan over the past nine years).

75. *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 168 (ICTY Nov. 30, 2005).

that lasted twenty minutes, a clash resulting in sixteen deaths, and engagements involving fifty to one hundred rounds of ammunition to show that the hostilities were “not accurately described as temporally sporadic or geographically disperse[d].”<sup>76</sup> Rather, “periodic armed clashes occurred virtually continuously at intervals averaging three to seven days over a widespread and expanding geographic area.”<sup>77</sup> Similarly, the Tribunal found that a KLA attack against a Serbian police station, the deployment of heavy weapons by Serbian government forces, and “heavy fighting . . . [that] continued for two days”<sup>78</sup> constituted attacks serious enough to trigger jurisdiction. The large scale nature of the armed engagements in Pakistan over the past year far outstrip the clashes in Kosovo with regard to the number of troops involved, the types of weapons and targets, and the number of displaced.<sup>79</sup>

b. Distribution of Clashes over Territory and Time

Armed incidents between Pakistan and the TTP cover a wide geographic area and have now been steady for the more than two years since the TTP’s formation. Large-scale clashes between the TTP and the government of Pakistan have occurred and continue to occur in at least three tribal agencies in the FATA and four districts in the NWFP, covering an area over 20,079 square kilometers.<sup>80</sup> Smaller scale clashes where the TTP has attacked or overrun Frontier Corps posts, without large deployments of Pakistani troops in response, have occurred in at least two additional FATA tribal agencies.<sup>81</sup> Furthermore, the

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76. *Id.* ¶ 168; *see id.* ¶¶ 138, 140.

77. *Id.* ¶ 168.

78. *Id.* ¶¶ 138–39, 142.

79. *180 Taliban Killed in South Waziristan*, *THE STATESMAN* (Kolkata), Nov. 18, 2009 (“Pakistani security forces have cleared the Taliban stronghold of Srarogha in South Waziristan after an intense five-day battle in which 180 militants and seven soldiers were killed, an army officer disclosed today.”); *see also* Limaj, Case No. IT-03-66-T, Judgment, ¶139 (noting the displacement of eighteen Serbian families in addressing the impact of the hostilities).

80. Pakistan has launched offensives in Buner, Lower Dir, Shangla, and Swat in NWFP. It has also launched offensives in Bajaur, Orakzai, and South Waziristan in FATA.

81. *See, e.g., Pakistan: Pre-dawn Pak Violence Kills 32*, *RIGHT VISION NEWS*, Apr. 2, 2010 (describing a suspected TTP assault on a Frontier Corps post in Khyber Agency); Roggio, *supra* note 72 (describing a suspected TTP assault on a Frontier Corps post in North Waziristan).

TTP has launched attacks at targets in Rawalpindi, located in Punjab, and Peshawar, the capital of NWFP.<sup>82</sup> As Pakistan has continued its offensives in successive tribal agencies against the TTP and the TTP has continued to launch attacks against the Pakistani state, these incidents became nearly constant between October 2009 and August 2010.<sup>83</sup>

In comparison with past determinations of the existence of armed conflict, the territorial and temporal reach of the armed incidents in Pakistan is substantial. Small scale clashes spread over Kosovo—an area comparable to FATA but significantly smaller than the FATA plus the NWFP—merited a finding that the KLA and the government of Serbia were engaged in a non-

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82. *Rawalpindi GHQ Attack May Trigger Pak Gov't to Launch Military Offensive in Waziristan*, ASIAN NEWS INTERNATIONAL, Oct. 21, 2009; JANE'S WORLD INSURGENCY, *supra* note 14 (describing the TTP assault on the US consulate in Peshawar).

83. *See, e.g., 7 Soldiers, 48 Ultras Killed in Pakistan*, THE STATESMAN (Kolkata), Nov. 1, 2009, available at 2009 WLNR 21779029; *13 Militants Killed, 2 Commanders Arrested in NW Pakistan*, XINHUA (Beijing), Dec. 5, 2009; *17 Soldiers, 22 Militants Killed*, THE NATION (Islamabad), Nov. 12, 2009 ("Stiff Taliban resistance killed at least 17 soldiers Thursday in the military's deadliest day since launching a major offensive in South Waziristan, security officials said. The military has pressed around 30,000 forces, backed by warplanes and attack helicopters, into battle in a US-endorsed mission to wipe out the chief strongholds of Tehreek-e-Taliban in South Waziristan. But troops were dragged into fighting when trying to clear rebels from areas adjoining Taliban stronghold of Kanigurram."); *Airstrike Kills 66 in Orakzai Agency*, DAILY TIMES (Lahore), Mar. 26, 2010; *Five Militants Killed in Swat*, THE PAKISTAN NEWSWIRE, Mar. 2, 2010; *Five Pak Security Officials Killed in Militant Strike in NWFP*, ASIAN NEWS INT'L, Mar. 27, 2010; *Pakistan: Over 40,000 Flee Looming Operation in Orakzai Agency*, DAILY THE PAK BANKER, Dec. 14, 2009; *Pakistan Army Kills 25 Militants in Orakzai Tribal Area*, XINHUA (Beijing), Apr. 3, 2010; *Pakistani Troops Kill 18 Militants in Orakzai Tribal Area*, BBC MONITORING SOUTH ASIA, Dec. 23, 2009; *Troops Backed by Warplanes, Advance from Three Directions*, DAILY TIMES (Lahore), Oct. 18, 2009 ("The military launched its long-awaited Operation Rah-e-Nijat (Path of Salvation) late on Friday night, combating the Hakeemullah Mehsud-led Pakistani Taliban in South Waziristan on three different fronts to neutralise the 'centre of gravity of terrorism' in Pakistan, a military spokesman and several senior officials said. The ground offensive comes hours after the country's military and political leaders agreed to stage the final assault on the 'headquarters of terrorism' following a wave of terror attacks throughout the country in the past two weeks."); *Troops Clear Damadola of Taliban*, DAILY TIMES (Lahore), Feb. 7, 2010; *Troops Retaliate, Kill 18 in Orakzai*, SOUTH ASIA MEDIA NETWORK, Apr. 11, 2010, available at 2010 WLNR 7456604 ("At least 18 militants were killed and four others arrested when security forces repulsed their attack on checkpoint in Orakzai Agency Friday."); *Two Key Taliban Commanders Killed in Swat*, DAILY TIMES (Lahore), Oct. 25, 2009; Tushar Ranjan Mohanty, *Pakistan's Operation in Orakzai: Conjuring 'Victories'*, EURASIA REV., July 26, 2010, <http://www.eurasiareview.com/201007265907/pakistans-operation-orakzai-conjuring-victories-south-asia-intelligence-review.html> (listing clashes between the TTP and Pakistani forces during June and July 2010).

international armed conflict. Moreover, sporadic clashes between Serbian government forces and KLA fighters over a period of just one year were considered sufficiently constant to constitute an armed conflict. In Pakistan, regular clashes involving intensive military operations over a broad area and for more than two years far outstrip the hostilities in Kosovo.

c. Increase in the Number and Mobilization of Government Forces

The number of Pakistani troops deployed in the FATA and the NWFP has dramatically increased since the formation of the TTP.<sup>84</sup> Although Pakistan employed mostly lightly trained Frontier Corps troops to suppress militant activity in FATA before the TTP's founding, the Pakistani government has used tens of thousands of Pakistan's regular armed forces to confront the TTP in FATA and NWFP since 2009.<sup>85</sup> In fact, Pakistani armed forces have redeployed from the border with India in the course of Pakistan's anti-TTP campaigns.<sup>86</sup> Given Pakistan's strategic preoccupation with its Indian rival, the redeployment of any regular armed forces from that border is a testament to how seriously the government of Pakistan views its confrontation with the TTP.<sup>87</sup>

Despite Pakistan's assertions that its efforts to combat the TTP are strictly law-enforcement activities, the intensity of the fighting between the two sides, the distribution and time span of that fighting, and the heavy deployment of regular Pakistani armed forces are all indicative of a conflict with an intensity that greatly exceeds banditry or a short-lived insurrection.

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84. See generally Lalwani, *supra* note 18.

85. See *id.* at 7–9 (“The Pakistani military still uses substantial air power to soften up militant targets, but has begun to combine this with more follow-on ground forces to disperse militants and secure the area for the local population.”).

86. *Pakistan: Troops' Shift from East Border to West Border*, SOUTH ASIAN MEDIA NETWORK, May 1, 2010; Carlotta Gall & Elisabeth Bumiller, *Pakistanis Take Steps to Drive Out the Taliban*, N.Y. TIMES, Apr. 28, 2009, at A4; Brian Cloughy, *Defeating the Taliban in Pakistan's Tribal Areas*, INFORMED CONSENT BLOG (Nov. 20, 2009), <http://www.juancole.com/2009/11/cloughy-defeating-taliban-in-pakistans.html>.

87. Recently, the Pakistani intelligence service, Inter-Services Intelligence, concluded that militants have eclipsed India as the greatest threat to Pakistan. Tom Wright & Siobhan Gorman, *Pakistan Says Militants Surpass India as Threat—Fundamental Shift Could Affect Afghan War, Bilateral Talks*, WALL ST. J., Aug. 16, 2010, at A9.

## 2. Organization

Courts look to a nonstate party's level of organization as one way to distinguish armed conflict from unorganized violence and riots. Although a group must have some level of organization to be a party to an armed conflict, that level of organization need not rise to the level required to establish command responsibility for subordinates' actions.<sup>88</sup> Factors the ICTY has identified as relevant to determining whether a group is sufficiently organized to be a party to an armed conflict include a hierarchical structure;<sup>89</sup> territorial control and administration;<sup>90</sup> the ability to recruit and train combatants;<sup>91</sup> the ability to launch operations using military tactics;<sup>92</sup> and the ability to enter peace or cease-fire agreements.<sup>93</sup> In addition, the ICRC also considers relevant the authority to launch attacks bringing together different units and the existence or promulgation of internal rules.<sup>94</sup> The TTP's hierarchy, control, and administration of territory within Pakistan, use of complex assaults, and ability to enter into cease-fire agreements indicate that it is sufficiently organized to be a party to an armed conflict.

### a. Hierarchical Structure

The TTP is an umbrella organization comprised of disparate pro-Taliban groups that once operated independently of one another in Pakistan's FATA and NWFP areas. These component groups share several unifying goals, including uniting pro-Taliban groups in FATA and NWFP against the Pakistani state, establishing an Islamic emirate in Pakistan modeled after the Islamic Emirate of Afghanistan, and supporting the Afghan Taliban in its campaign against the Karzai government and

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88. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 90 (ICTY Nov. 30, 2005).

89. See *id.* ¶¶ 95–109.

90. Prosecutor v. Lukić, Case No. IT-98-32/1-T, Judgment, ¶ 884 (ICTY July 20, 2009) (highlighting militias' organization by noting their control of territory in the vicinity of Visregard and their control of "all of the roads").

91. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (ICTY Apr. 3, 2008).

92. Lukić, Case No. IT-98-32/1-T, Judgment, ¶ 884 ("[T]he Muslim forces regularly undertook offensive and defensive military actions."); Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60.

93. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60.

94. Vite, *supra* note 61, at 77.

NATO.<sup>95</sup> Representatives from each of the agencies in FATA and the districts in which the TTP is active in NWFP gather at a *shura* to choose the *amir* who has overall command of the TTP.

The TTP is not strongly hierarchical when compared to the Army of the Republika Srpska (“VRS”), analyzed in *Tadić*, or the KLA, examined in *Limaj*. In *Limaj*, the Trial Chamber noted that the KLA maintained a general staff, divided Kosovo into zones of operation, and appointed zone commanders who were generally responsive to commands issued by the KLA’s general staff.<sup>96</sup> It thus concluded that “the KLA sufficiently possessed the characteristics of an organised armed group, able to engage in an internal armed conflict.”<sup>97</sup> The *Tadić* Trial Chamber found that the VRS was effectively made up of ethnic Serb units ceded from the disintegrating Yugoslav People’s Army (“JNA”).<sup>98</sup>

Unlike the KLA or the VRS, the TTP does not seem to maintain the rigid hierarchy generally associated with armed forces. However, just as the ICTY overlooked some of the KLA’s organizational faults, noting that these were due to the nascent, underground nature of the KLA,<sup>99</sup> the TTP’s organizational deficiencies may also be attributed to its origin and the nature of its conflict with Pakistan. The TTP has divided its area of operations between local commanders, but this has occurred organically rather than at the TTP’s central direction. The local commanders within the TTP are the commanders of the local militia that came together to form the TTP. That said, however, the TTP maintains a central body that sets the direction and policy of the TTP’s component units, much like the KLA’s general staff.<sup>100</sup> In fact, as a result of disagreement with one or more TTP policy directives, one local commander left the TTP and hostilities between that commander and the TTP later erupted.<sup>101</sup> In another similarity with the KLA, the TTP has a

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95. See generally JANE’S WORLD INSURGENCY, *supra* note 14; Hassan Abbas, *A Profile of Tehrik-i-Taliban Pakistan*, CTC SENTINEL, Jan. 2008, at 1, available at <http://www.ctc.usma.edu/sentinel/CTCSentinel-Vol1Iss2.pdf>.

96. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 96–104 (ICTY Nov. 30, 2005).

97. *Id.* ¶ 134.

98. See Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶¶ 114–15 (ICTY May 7, 1997).

99. *Limaj*, Case No. IT-03-66-T, Judgment, ¶¶ 94, 104.

100. CTC SENTINEL, *supra* note 95; JANE’S WORLD INSURGENCY, *supra* note 14.

101. JANE’S WORLD INSURGENCY, *supra* note 14.

political and public relations operation responsible for issuing reports and press releases and for communicating the TTP's goals to the people of Pakistan.<sup>102</sup> Thus, although the TTP command structure does not appear to be as strongly hierarchical as that of the KLA, it is a command structure nonetheless and appears sufficient to constitute an organized armed group in light of existing jurisprudence.<sup>103</sup>

#### b. Territorial Control and Administration

Like the VRS and other armed nonstate actors that the ICTY and other courts have examined, the TTP exercises control and administration over a sizeable portion of Pakistani territory. For example, the ICTY determined that armed entities it called "Muslim forces" were sufficiently organized to constitute a party to an armed conflict in *Lukić* because they "controlled territory in and around the Višegrad municipality."<sup>104</sup> Similarly, in *Tadić*, the Trial Chamber found that the VRS exercised exclusive administrative control over Serb-dominated areas of Bosnia.<sup>105</sup> The ICTY also noted that the KLA established checkpoints on

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102. For example, after its founding, the TTP issued a communiqué outlining its goals. Since then, its spokespersons have asserted the group's responsibility for some attacks, denied responsibility for other attacks, and announced compliance with cease-fires the group has entered into with the Pakistani government. *See, e.g.*, JANE'S WORLD INSURGENCY, *supra* note 14 ("TTP spokesman Azam Tariq . . . claimed [the October 2009 attack on Pakistan's General Headquarters in Rawalpindi] had been carried out by the TTP's Punjab unit."). This activity is similar to that of the KLA described in *Limaj*. *See Limaj*, Case No. IT-03-66-T, Judgment, ¶101 (describing how "the General Staff . . . issued political statements and communiqués which informed the general public in Kosovo and the international community of its objectives and its activities").

103. *La Tablada*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, ¶ 155 (1997) ("[T]he [La Tablada] attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective—a military base."); *cf. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 132 (highlighting the complexity of KLA operations as indicative of a group's organization). The ICRC defines the level of organization of a group necessary to take part in an armed conflict as one with "a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces." ICRC Legal Advisor, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law* 32 (May 2009).

104. *Prosecutor v. Lukić*, Case No. IT 98-32/1-T, Judgment, ¶ 884 (ICTY July 20, 2009).

105. *See generally*, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶¶ 123–25 (ICTY May 7, 1997) (describing the Yugoslav People's Army ("JNA") taking control of various Serbian regions of Bosnia and the transfer of control to the Army of the Republika Srpska ("VRS") after formal JNA withdrawal).

highways in Kosovo.<sup>106</sup> The TTP does not merely exert administrative authority over the environs of a village; rather, it administers and has administered entire districts within FATA and the NWFP.<sup>107</sup> The Pakistani government has launched “offensives” against the TTP in a number of tribal agencies—including both South Waziristan and Orakzai—to “wrest [those districts] . . . back from Taliban control.”<sup>108</sup>

Finally, and perhaps most telling, the TTP has entered into cease-fire and peace agreements with the state of Pakistan.<sup>109</sup> Although these agreements have been largely unfulfilled by either side, the fact that the state of Pakistan is willing to—and does—enter into agreement with the TTP as an entity strongly suggests that the TTP is sufficiently organized to constitute a party to an armed conflict.

### c. Complexity of Operations

The TTP also demonstrates that it can coordinate its armed activities, regularly launching complex defensive and offensive operations. TTP forces regularly attack Pakistani military outposts and, at least twice in 2010, TTP forces have overrun Frontier Corps outposts. One or more of these operations were conducted at night, involving the use of both small arms and crew-served weapons like mortars.<sup>110</sup> The TTP has also targeted NATO forces by participating in the suicide bombing at Forward Operating Base Chapman in Afghanistan on December 30, 2009,<sup>111</sup> and

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106. *Limaj*, Case No. IT-03-66-T, Judgment, ¶¶ 144–45.

107. For example, since April 2009, the government of Pakistan has launched offensives in Bajaur, Orakzai, South Waziristan, and Swat to *retake* those agencies. That is, the Pakistani state was forced to launch “offensives” against a nonstate actor to reassert the state’s authority over those districts. See Bill Roggio, *Taliban’s Influence in Pakistan’s Northwest*, *LONG WAR J.*, <http://www.longwarjournal.org/multimedia/maps/FullImageWrapperLatestFullImage.php> (last visited Nov. 6, 2010).

108. Anwar Shakir, *Pakistan Seizes 2nd Tribal Zone in Anti-Taliban War*, *BLOOMBERG BUSINESSWEEK*, Apr. 14, 2010, <http://www.businessweek.com/news/2010-04-14/pakistan-seizes-second-tribal-region-in-anti-taliban-fight.html>.

109. Eric Schmitt & Mark Mazzetti, *Pakistan’s Planned Accord with Militants Alarms U.S.*, *N.Y. TIMES*, Apr. 30, 2008, at A10; see Ismail Khan & Carlotta Gall, *Pakistan Lets Tribal Chiefs Keep Control Along Border*, *N.Y. TIMES*, Sept. 6, 2006, at A8.

110. Bill Roggio, *Taliban Counterattack in Arakzai, Overrun Military Outpost*, *LONG WAR J.*, Mar. 26, 2010, [http://www.longwarjournal.org/archives/2010/03/taliban\\_counterattac.php](http://www.longwarjournal.org/archives/2010/03/taliban_counterattac.php).

111. Roy Gutman & Saeed Shah, *Taliban Chief Tied to CIA Bombing Believed Dead*, *HOUSTON CHRON.*, Feb. 1, 2010, at A6.

attacking a United States-Pakistani convoy on February 3, 2010.<sup>112</sup> The TTP is such a formidable military force that hostilities with the Pakistani state have led to cease-fire agreements and the withdrawal of Pakistani government forces from tribal agencies controlled by the TTP.<sup>113</sup> Indeed, some commentators attribute the TTP's current strength to its ability to fight the Pakistani state to stalemates.<sup>114</sup> Despite any organizational deficiencies, the TTP has demonstrated many times that it can design and implement complex military operations.<sup>115</sup>

The ICTY highlighted the complexity of KLA activities in determining that the KLA was sufficiently organized to constitute a party to an armed conflict. Among other activities, the ICTY emphasized that the KLA fortified its positions,<sup>116</sup> used rocket launchers in an attack, which indicated its "ability to conduct more sustain[ed] operations,"<sup>117</sup> and was able to "offer strong and often effective resistance to Serbian forces."<sup>118</sup> These factors led the ICTY to determine that "the ability of the KLA to engage in such varied operation is a[n] . . . indicator of its level of organisation."<sup>119</sup> Similarly, in *Lukić*, the ICTY highlighted the use of "offensive and defensive actions . . . [indicating] . . . military planning and tactics" in determining that an armed group was sufficiently organized to be a party to an armed conflict.<sup>120</sup> These actions included fortifying and camouflaging positions, setting

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112. Moreover, the *Limaj* Trial Chamber found it an important indicator of organization that the KLA, like the TTP here, was able to engage in varied operations over a wide swath of territory. See *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 172 (ICTY Nov. 30, 2005).

113. See JANE'S WORLD INSURGENCY, *supra* note 14.

114. Int'l Crisis Group, *Pakistan: Countering Militancy in FATA*, at i, Asia Report No. 178 (Oct. 21, 2009).

115. Jane Perlez, *Pakistan Attacks Show Tightening of Militant Links*, N.Y. TIMES, Oct. 16, 2009, at A1 ("The assaults in Lahore, coming after a 20-hour siege at the army headquarters in Rawalpindi last weekend, showed the deepening reach of the militant network, as well as its rising sophistication and inside knowledge of the security forces, officials and analysts said. The umbrella group for the Pakistani Taliban, Tehrik-e-Taliban, claimed responsibility for the attacks in Lahore, the independent television news channel Geo reported on its Web site.").

116. *Limaj*, Case No. IT-03-66-T, ¶ 79.

117. *Id.* ¶ 158 (cited at ¶ 172 as an indicator of the KLA's organizational capacity).

118. *Id.* ¶ 169.

119. *Id.* ¶ 172.

120. *Prosecutor v. Lukić*, Case No. IT-98-32/1-T, Judgment, ¶¶ 880–84 (ICTY July 20, 2009).

ambushes, attacking and holding villages, and using mortars and “significant quantities of other forms of ammunition.”<sup>121</sup>

The above analysis demonstrates that the conflict between Pakistan and the TTP is of sufficient intensity, and the TTP is sufficiently organized, to meet the threshold for a non-international armed conflict under Common Article 3.

### III. *CHARACTERIZING US INVOLVEMENT IN PAKISTAN*

Having established the existence of a non-international armed conflict in Pakistan between the government and the TTP (among other groups, perhaps), this Part analyzes US engagement in Pakistan. Foreign state involvement in a conflict can take several different forms: recognition of a nonstate actor, support for a recognized nonstate actor in violation of neutrality principles, intervention, or a wholly separate but parallel conflict. This Part will focus on intervention and the notion of a separate conflict, the two most relevant options for this analysis. Before doing so, this Part will briefly explore the nature of the hostilities between the United States and the TTP and whether an armed conflict exists. The TTP demonstrates a measure of organization and coordination, as set forth above. Therefore, the primary question is whether hostilities between the United States and the TTP are of sufficient intensity to go beyond isolated targeted strikes and cross the threshold of armed conflict.

#### A. *Hostilities between the United States and the TTP*

The US drone campaign in Pakistan has increased from only nine total attacks launched between the outset of the campaign in 2004 and the founding of the TTP in late 2007 to thirty-four attacks in 2008, fifty-three in 2009, and forty-five in the first half of 2010.<sup>122</sup> Since the TTP’s founding, drone strikes are estimated to have killed between 961 and 1483 individuals, an average of seven to eleven individuals per strike.

Targets of drone strikes have included compounds and training camps, as well as individual vehicles or convoys. Each drone strike involves one or more Predator or Reaper drones

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121. *Id.* ¶¶ 90–100, 880–84.

122. *See Year of the Drone*, *supra* note 35.

firing at least one Hellfire missile at a target.<sup>123</sup> Hellfire missiles are air-to-ground missiles that are able to deliver a twenty-pound warhead. The January 14, 2010 assault on Hakimullah Mehsud, for example, reportedly used four Hellfire missiles. A May 11, 2010 assault on a training camp reportedly operated by Hafiz Gul Bahadar, a sometimes ally of the TTP,<sup>124</sup> employed eighteen Hellfire missiles.<sup>125</sup> Drone strikes have spread across the FATA—an area spanning some 10,500 square miles, which is larger than Kosovo.<sup>126</sup> While most of the violence between the United States and the TTP has been directed by the United States against the TTP, the latter has directed attacks against the United States as well, including the suicide bombing of Forward Operating Base Chapman and an assault on the US Consulate in Peshawar in March 2010. The TTP's primary tactic has been to attack NATO convoys passing through Pakistan, killing members of the United States armed forces and capturing American materiel.<sup>127</sup>

123. Jane Perlez & Pir Zubair Shah, *Tribal Areas Of Pakistan Are Pounded By Drones*, N.Y. TIMES, May 12, 2010, at A8.

124. Hafiz Gul Bahadar was one of the leaders who took part in the *shura* that created the TTP in December 2007. Shortly after TTP's formation, Bahadar broke with the TTP over the TTP's insistence on attacking the Pakistani state. Bahadar, in contrast to the TTP, does not see the government of Pakistan as his enemy. Like the Afghan Taliban and Haqqani, Bahadar views the state of Pakistan as a benefactor. After open fighting between Bahadar and the TTP, Mullah Omar, leader of the Afghan Taliban, is reported to have brokered a peace agreement between the two organizations. Bahadar shares control of North Waziristan with the Haqqani and the TTP. JANE'S WORLD INSURGENCY, *supra* note 14.

125. Bill Roggio, *US Pounds Taliban in Pair of Strikes in North Waziristan*, LONG WAR J., May 11, 2010, [http://www.longwarjournal.org/archives/2010/05/us\\_pounds\\_taliban\\_co.php](http://www.longwarjournal.org/archives/2010/05/us_pounds_taliban_co.php).

126. The Federally Administered Tribal Areas cover 27,220 square kilometers. *Federally Administered Tribal Areas*, GLOBAL SECURITY.ORG, <http://www.globalsecurity.org/military/world/pakistan/fata.htm> (last visited Nov. 6, 2010). North Waziristan and South Waziristan have a combined area of 11,327 square kilometers. *See North Waziristan*, GLOBAL SECURITY.ORG, <http://www.globalsecurity.org/military/world/pakistan/fata-north-waziristan.htm> (last visited Nov. 6, 2010); *South Waziristan*, GLOBAL SECURITY.ORG, <http://www.globalsecurity.org/military/world/pakistan/fata-south-waziristan.htm> (last visited Nov. 6, 2010). Kosovo's territory is 10,887 square kilometers. *Kosovo*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html> (last visited Nov. 6, 2010).

127. Chris Brummitt, *Officials Say US Missiles Kill 12 at Pakistan Taliban Gathering, but Top Chief Is Safe*, GUELPH MERCURY (Ontario), Jan. 14, 2010, at 1; Robert Fisk, *Shadow Lands: Pakistan—A Nation Under Attack*, INDEPENDENT (London), Apr. 6, 2010 (“The Taliban's attacks on these [NATO] convoys—both the Pakistani and Afghan versions of the movement (for they are not the same)—have over the past two years netted some incredible dividends, which NATO has not seen fit to disclose. Gunmen have managed to steal three separate—disassembled but complete—military helicopters and a clutch of

In light of the seriousness of the attacks the United States has launched and continues to launch against the TTP; the attacks launched by the TTP against NATO forces and US targets; the distribution of the attacks across broad swaths of Pakistan; the increasing frequency of US drone strikes; and the armaments employed, the violence between the United States and the TTP exceeds that associated with riots and banditry and likely rises to the level requisite for a non-international armed conflict. Given this intensity, and the organization of the TTP, it is reasonable to conclude that the United States is engaged in an armed conflict with the TTP. This armed conflict could take one of two primary forms: an intervention in the conflict between Pakistan and the TTP or a separate conflict occurring parallel to the one between those two parties.

### B. *Intervention*

Intervention is the “interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things.”<sup>128</sup> In *Nicaragua v. United States*, the International Court of Justice (“ICJ”) explained that an intervention occurs when a state “intervene[s] directly or indirectly in internal or external affairs of other States.”<sup>129</sup> For the purposes of this Article, the term intervention refers specifically to one state’s involvement in another state’s internal affairs through force of arms, particularly in the context of an ongoing non-international armed conflict.

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American Humvee armoured vehicles, one of which was used by the Pakistani Taliban’s leader, Hakimullah Mehsud. At least 62 Humvees were burned out in just one raid near Peshawar in 2008.”); Riaz Khan, *2 Pakistan Bombings Kill 23 near Protest, School*, CHI. TRIB., Apr. 19, 2010, at 13 (“[S]uspected Taliban militants in the northwest detonated two bombs that destroyed a pair of oil tankers along a vital route used to supply NATO and U.S. forces in Afghanistan.”); *Pakistan Fighters Torch Afghan Supply Truck*, AL ARABIYA (Dubai Media City), Mar. 14, 2009, <http://www.alarabiya.net/articles/2009/03/15/68478.html>; Asif Shahzad, *Blast Kills 16 Cadets in Pakistan; NATO Trucks Hit in Separate Attack*, BOSTON GLOBE, Aug. 31, 2009, at 4 (“Bombings targeted a Pakistani police station and set a NATO fuel convoy ablaze yesterday.”); Delcan Walsh, *Taliban Torch 50 NATO Supply Trucks on Outskirts of Islamabad*, GUARDIAN (London), June 9, 2010, <http://www.guardian.co.uk/world/2010/jun/09/taliban-torch-nato-trucks-pakistan>.

128. LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 304 (H. Lauterpacht ed., 8th ed. 1955).

129. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 205 (June 27).

Armed intervention by a third-party state in an ongoing non-international armed conflict will complicate that armed conflict both politically and legally. First, intervening states usually assert multiple defenses of their intervention, frequently and simultaneously citing invitation, consent, and self-defense to justify their actions.<sup>130</sup> Second, and particularly relevant here, the characterization of an armed conflict that includes an intervening state—regardless of the legality of the intervention<sup>131</sup>—impacts the extent of the applicable IHL.<sup>132</sup> Putting aside the scenario of multilateral intervention for peacekeeping,<sup>133</sup> intervention may have one of two effects on the character of the internal armed conflict, depending on the configuration of the parties involved. Intervention in support of a nonstate actor against the territorial state places the intervening state and the territorial state in an international armed conflict.<sup>134</sup> For example, many view the US invasion of Afghanistan in the aftermath of the September 11th attacks as an intervention of a third state on behalf of a nonstate actor. The Northern Alliance, a nonstate actor, had been engaged in a civil war against the Taliban regime of Afghanistan since the mid-1990s.<sup>135</sup> Once the United States intervened in early October 2001, it internationalized the armed conflict because two states—

130. ANTONIO TANCA, FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT 24–25 (1993).

131. For a methodological approach to the legality of intervention, see *id.* See also *Nicaragua*, 1986 I.C.J. 14, ¶ 209 (“The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law.”).

132. See Anwar T. Frangi, *The Internationalized Noninternational Armed Conflict in Lebanon 1975–1990: Introduction to Configology*, 22 CAP. U. L. REV. 965, 966–67 (1993).

133. See Vite, *supra* note 61, at 87.

134. *Id.* at 85–87; Dietrich Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, 64 INT’L REV. RED CROSS 255, 258–60 (1982); Denise Bindschedler-Robert, *A Reconsideration of the Law of Armed Conflicts*, in THE LAW OF ARMED CONFLICTS 52 (1971); see also Prosecutor v. Tadić, Case No. IT-94-I-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 72 (ICTY Oct. 2, 1995); *Nicaragua*, 1986 I.C.J. 14.

135. Although the Taliban government of Afghanistan was only recognized by three states, it was, at least, the *de facto* government of Afghanistan. US recognition of its initial invasion of Afghanistan as an international armed conflict indicates that the United States accepted that the Taliban government was the government of Afghanistan. Corn, *supra* note 52, at 4.

the United States and Afghanistan—were engaged in hostilities with each other.<sup>136</sup>

The alternative, intervention in support of the government of the territorial state against a nonstate actor—assuming the intervening state and the nonstate actor engage in hostilities sufficient to establish an armed conflict—puts the intervening state and the nonstate actor in a non-international armed conflict.<sup>137</sup> Thus, following the Taliban's ouster and the establishment of the Karzai government, the ongoing conflict between the United States and the now-insurgent Taliban became a non-international armed conflict with the United States intervening on behalf of the Karzai government.<sup>138</sup>

### 1. Analyzing Intervention

Past conflicts provide useful examples of both the types of intervention and how the complexities of different conflicts can make assessing the nature of intervention quite challenging. For example, thirty years ago, Soviet intervention in Afghanistan on behalf of the government of Afghanistan against the *mujahideen* placed the Soviet Union in a non-international armed conflict with the *mujahideen*.<sup>139</sup> Notwithstanding significant complicating circumstances,<sup>140</sup> the Soviet intervention was clearly in opposition

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136. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT* 14 (2004); Corn, *supra* note 52, at 4 (noting that the United States ultimately conceded that the conflict between the United States and the Taliban government of Afghanistan was an interstate armed conflict).

137. See Bindschedler-Robert, *supra* note 134, at 52; Corn, *supra* note 52, at 1–2; Vite, *supra* note 61, at 86; see also YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* 7 (2005); Jelena Pejic, *Status of Armed Conflicts*, in *PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 92 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

138. See, e.g., Geoffrey S. Corn, *Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, Al Qaeda, and the Limits of the Associated Militia Concept*, 85 *INT'L L. STUD.* 181, 181–82 (2009). The situation here described—one of intervention on behalf of a nonstate actor which becomes the government, transforming the intervention into one in support of a state—is remarkably similar to Vietnam's intervention in Cambodia in 1979. See Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 *AM. U. L. REV.* 145, 150–52 (1983).

139. See Gasser, *supra* note 138, at 145, 148–52; Schindler, *supra* note 134, at 255–56.

140. The Soviet intervention in Afghanistan is a particularly difficult example: both the Soviet Union and the government of Afghanistan disputed the existence of an armed conflict; the Soviet Union was apparently complicit in a *coup d'état* that replaced

to the *mujahideen* and in defense of the Soviet-style government then in place in Afghanistan, even if the Soviet Union had orchestrated a change in that government's leadership. Thus, the Soviet intervention is most often viewed as an intervention on behalf of a government against the nonstate actor challenging it, placing the USSR in a non-international armed conflict with the *mujahideen*.

Similarly, the US engagement in Vietnam—supporting the government of the Republic of Vietnam against the National Liberation Front (“Viet Cong”)—constituted third-state intervention in support of a government against a nonstate actor, placing the United States, the intervening state, in a non-international armed conflict with the Viet Cong, the nonstate actor.<sup>141</sup> Two conditions form the basis for this conclusion: first, the government of South Vietnam was engaged in a non-international armed conflict with the Viet Cong; and second, the United States engaged in hostilities of sufficient intensity with the Viet Cong to constitute an armed conflict. The United States chose to treat the conflict as an international armed conflict as a matter of policy—an approach the International Committee of the Red Cross (“ICRC”) urged and supported—lending credence to the view that once the United States intervened, the whole conflict was internationalized.<sup>142</sup>

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one pro-Soviet leader of Afghanistan with another pro-Soviet leader of Afghanistan on the eve of its intervention; the initial invitation from the Afghan government may not have been in any sense lawful. Even before the intervention, Soviet troops were deployed in Afghanistan in support of the Afghan government, and the Soviet Union and Afghanistan had entered into a Treaty of Friendship just weeks before the intervention. See Tanca, *supra* note 130, at 176–77; see also Gasser, *supra* note 138, at 148–52. But see Michael Reisman & James Silk, *Which Law Applies to the Afghan Conflict*, 82 AM. J. INT'L L. 459, 466–74 (1988).

141. Schindler, *supra* note 134, at 255–56. Some scholars, notably Meyrowitz, disagree with this mode of analysis for “mixed” armed conflicts. See Gasser, *supra* note 138, at 147; James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313, 333–41 (2003). Instead, Meyrowitz applies the so-called global analysis of an armed conflict, urging that where third states intervene in a non-international armed conflict, the whole of the armed conflict is internationalized. See Henri Meyrowitz, *The Law of War in the Vietnamese Conflict*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 516–33 (Richard Falk ed., 1968).

142. See Gasser, *supra* note 138, at 147. However, even though the ICRC in fact urged the internationalization view of the United States' intervention in Vietnam in 1965—and the United States and the government of South Vietnam adopted it—both the ICJ and the ICTY have implicitly endorsed the differentiation approach. Military and

US intervention in Nicaragua, however, resulted in parallel conflicts: one between the United States and Nicaragua and one between the *contras* and Nicaragua. In *Nicaragua v. United States*, the ICJ characterized the conflict between Nicaragua and the *contras* as a non-international armed conflict and determined that the United States' support for the *contras* constituted US intervention into that non-international armed conflict, stating<sup>143</sup>: "The Court therefore finds that the support given by the United States . . . to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention."<sup>144</sup> However, despite US intervention on behalf of the nonstate actor against a state in an ongoing non-international armed conflict, the court did not apply Common Article 2 to the *contras*. Instead, the court treated US intervention—particularly its mining of Nicaraguan ports—as a conflict distinct from the conflict between Nicaragua and the *contras*.

## 2. US Intervention in Pakistan

Analyzing the situation in Pakistan within this framework suggests that US engagement could constitute an intervention. As in both the Vietnam War and the Soviet War in Afghanistan, a non-international armed conflict between the government and a nonstate actor forms the backdrop for the foreign state's involvement. The United States drone campaign is directed at the TTP, Pakistan's foe in its non-international armed conflict. To the extent that US involvement rises to the level of armed conflict, it is an intervention into a non-international armed conflict in support of the territorial state and is therefore governed by Common Article 3 and the full range of IHL applicable in non-international armed conflict.

Some scholars highlight statements by the Pakistani government opposing the US drone campaign and argue that

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Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14, ¶ 219 (June 27); *Prosecutor v. Tadić*, Case No. IT-94-I-T, Judgment, ¶ 116 (ICTY May 7, 1997); *see also* Stewart, *supra* note 141, at 335.

143. *Nicaragua*, 1986 I.C.J. 14, ¶ 219 (finding the *contras* and the State of Nicaragua to be in an armed conflict not of an international character).

144. *Id.* ¶ 242; *see also id.* ¶ 246 ("[T]he activities of the United States in relation to the activities of the *contras* in Nicaragua constitute prima facie acts of intervention.").

Pakistan has not consented to the campaign.<sup>145</sup> And yet it is not clear that the territorial state's consent has any impact on the characterization of the armed conflict. Underlying the whole body of the law of armed conflict is a preference for fact-driven, objective analysis irrespective of technicalities. Thus, for example, the Soviet Union's role in a coup d'état at the outset of the Soviet intervention did not prevent the general view that the Soviets intervened on the Afghan government's side in a non-international armed conflict—even though it is hard to imagine the legitimate Afghan government consenting to an intervention concurrent with its ouster. Rather, most analyses highlight that the Soviet operations were directed not at the state but at nonstate actors.<sup>146</sup> Here, the United States is similarly directing its drone strikes not at the state of Pakistan, Pakistani troop formations, military bases, or infrastructure, but at the TTP's leadership, training camps, and militants.

Moreover, in contrast to the public statements of the government of Pakistan,<sup>147</sup> it appears that Pakistan has or at least may have consented to the US drone campaign. The US drones flying over Pakistan are launched from and maintained at bases within Pakistan.<sup>148</sup> The government of Pakistan is reportedly not only involved in the targeting decisions for drone strikes—either by receiving notification prior to an impending strike or by actually nominating targets to be attacked by US drones<sup>149</sup>—but it has also reportedly bargained with the US government to allow expansion of drone strikes in exchange for a greater focus on the

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145. O'Connell, *supra* note 5, at 18; *Lawful Use of Combat Drones: Hearing on the Legality of Unarmed Targeting Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov. Reform*, 111th Cong. (2010) (statement of Mary Ellen O'Connell, Professor of Law, University of Notre Dame). O'Connell further argues that, even if Pakistan were to consent to drone strikes, those strikes prior to May 2009 would have been illicit because there was no armed conflict in Pakistan at least until then. *Id.* She does not clarify whether an armed conflict currently exists in Pakistan.

146. Gasser, *supra* note 138, at 151–52.

147. Scott Shane & Eric Schmitt, *C.I.A. Deaths Prompt Surge in U.S. Drone Strikes*, N.Y. TIMES, Jan. 22, 2010, at A1.

148. *Id.*

149. Mayer, *supra* note 4, at 36 (“Last March [2009], the Obama Administration made an unannounced decision to win support for the drone program inside Pakistan by giving President Asif Ali Zardari more control over whom to target. ‘A lot of the targets are nominated by the Pakistanis—it’s part of the bargain of getting Pakistani cooperation,’ says Bruce Riedel, a former C.I.A. officer who has served as an adviser to the Obama Administration on Afghanistan and Pakistan.”).

TTP.<sup>150</sup> Finally, the drone campaign appears to be coordinated with Pakistani offensives launched against the TTP: for example, at the request of the Pakistani government, drone strikes in South Waziristan all but ceased after Pakistan launched an offensive there on October 17, 2009.<sup>151</sup> Drone strikes in North Waziristan, in contrast, have increased dramatically as members of the TTP have sought refuge there.<sup>152</sup>

Combined, these factors point to US intervention in the ongoing non-international armed conflict between Pakistan and the TTP through its drone campaign targeting the TTP. As a result, rather than treat each drone strike as a separate discrete event or action in self-defense against an identifiable threat, the hostilities between the United States and the TTP constitute a non-international armed conflict. As such, Common Article 3 and the customary international law applicable in non-international armed conflicts govern.

### C. *Two Separate Parallel Conflicts*

Alternatively, the conflict between the United States and the TTP could be a separate but parallel conflict. Many argue, for example, that the current US conflict with the Taliban in Afghanistan and the US conflict with Al Qaeda are two such separate conflicts.<sup>153</sup> Such a conflict could take a few different forms, in particular a non-international armed conflict under Common Article 3 or a so-called “transnational armed conflict.”

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150. James Kitfield, *Wanted: Dead*, NAT'L J., Jan. 9, 2010, [http://nationaljournal.com/member/magazine/-wanted-dead-20100109?mrefid=site\\_search](http://nationaljournal.com/member/magazine/-wanted-dead-20100109?mrefid=site_search).

151. Shane & Schmitt, *supra* note 147; Katherine Tiedemann, *Spotlight on North Waziristan*, FOREIGN POL'Y, Mar. 18, 2010, [http://afpak.foreignpolicy.com/posts/2010/03/18/spotlight\\_on\\_north\\_waziristan](http://afpak.foreignpolicy.com/posts/2010/03/18/spotlight_on_north_waziristan).

152. *See* Tiedemann, *supra* note 151.

153. *See, e.g.*, Corn, *supra* note 138, at 181, 190–211; Marco Sassòli, *The Status of Persons Held in Guantanamo under International Humanitarian Law*, 2 J. INT'L CRIM. JUST. 96, 98–100 (2004); *see also* Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L L. 127, 154 (2003) (disaggregating the United States' conflict with the Taliban from its conflict with Al Qaeda but concluding that Al Qaeda in Afghanistan was so intertwined with the Taliban that its members ought to be afforded POW status); *cf.* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 219 (June 27) (treating the conflict between the *contras* and Nicaragua as a non-international armed conflict while characterizing any conflict between the United States and Nicaragua as an international armed conflict).

### 1. Common Article 3 Conflict

In the aftermath of 9/11 and the US campaign against Al Qaeda, scholars and policymakers debated whether Common Article 3 applied to conflicts with nonstate actors occurring across borders or outside the territory of the state party. The argument centered, in many ways, on a textual interpretation of Common Article 3. Those taking a more limited view of Common Article 3's scope argued that the words "non-international armed conflict" encompassed only civil wars, or internal conflicts taking place entirely within the territory of a High Contracting Party.<sup>154</sup> This interpretation was criticized, however, because it would leave conflicts between states and nonstate actors beyond their territorial boundaries outside the framework of the Geneva Conventions.

Many instead chose to take a more expansive view of Common Article 3, arguing that it applies to all conflicts not covered by Common Article 2. After *Hamdan v. Rumsfeld*, this is now the dominant interpretation—and the law of the land in the United States. In that case, the US Supreme Court endorsed a broad reading of Common Article 3 and rejected the notion that any form of armed conflict could remain unregulated by the Geneva Conventions. The Court declined to view Common Article 3 as a provision governing only internal armed conflict, instead holding that "[t]he term 'conflict not of an international character' is used here in contradistinction to a conflict between nations."<sup>155</sup> Because, under this view, all forms of armed conflict must fit into the Common Article 2-Common Article 3 framework, any conflict not between two High Contracting

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154. See Memorandum from Alberto R. Gonzales to the President (Jan. 25, 2002) (Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban) ("More importantly . . . [the war in Afghanistan] is a new type of warfare—one not contemplated in 1949 when [Geneva Convention III on the Treatment of Prisoners of War] was framed—and requires a new approach in our actions towards captured terrorists."); see also UK MINISTRY OF DEFENSE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004); John R. Crook, *Contemporary Practice of the United States Relating to International Human Rights and International Criminal Law*, 99 AM. J. INT'L L. 895, 897–98 (2005); Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 307 (2007) ("Nonetheless, during the five plus decades between 1949 and 2001, the term 'non-international' evolved to become synonymous with internal.").

155. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006).

Parties is therefore a Common Article 3 conflict. The US conflict with the TTP fits squarely within this interpretation of Common Article 3. It is “non-international” because it does not meet the definition on international armed conflict in Common Article 2. Common Article 3 and the customary laws of war applicable in non-international armed conflicts thus apply to the conflict between the United States and the TTP.

## 2. Transnational Armed Conflict

Claims that the Common Article 2-Common Article 3 framework does not apply to a cross-border armed conflict between a state and a nonstate entity in essence create a situation of “law avoidance.” In 1949, the drafters of the Geneva Conventions sought to eliminate an earlier type of law avoidance by substituting the objective term “armed conflict” for the more politicized—and easily manipulated—term “war.”<sup>156</sup> “Whereas once countries denied *jus in bello* obligations by claiming that they were not engaged in ‘war,’ a term with specific legal connotations, the Geneva Conventions eliminated that particular circumlocution by creating a trigger for law applicability based on the existence of an armed conflict.”<sup>157</sup> The US Supreme Court’s decision in *Hamdan*, as explained above, offered one way to put this law avoidance to rest.

Another argument is that a cross-border conflict between a state and a nonstate actor constitutes, in essence, a form of armed conflict that could be termed “transnational armed conflict,” one governed by customary principles of the laws of war.<sup>158</sup> The US conflict with the TTP—to the extent it is

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156. GC IV COMMENTARY, *supra* note 47, at 17–21.

157. Laurie R. Blank, *In Counterterrorism, the Law of War Is a Key Source of Law for the Courts*, 32 ABA NAT’L SEC. L. REP. (forthcoming Winter 2010) (manuscript at 9–12); Geoffrey S. Corn, *The Problem with Law Avoidance*, 32 ABA NAT’L SEC. L. REP. (forthcoming Winter 2010).

158. Geoffrey S. Corn & Eric T. Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISR. L. REV. 46, 65–66 (2009); Geoffrey S. Corn, *Multi-National Operations, Unity of Effort, and the Law of Armed Conflict* 1, 3–11 (Program on Humanitarian Policy and Conflict Research, Working Paper), available at [http://ihl.ihlresearch.org/\\_data/global/images/HPCR-WPS-Corn%20Final.pdf](http://ihl.ihlresearch.org/_data/global/images/HPCR-WPS-Corn%20Final.pdf); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1 (2004) (discussing the complex challenge of conflict categorization in military operations conducted against highly organized nonstate groups with transnational reach).

considered a separate conflict from the conflict between Pakistan and the TTP—certainly seems to fit within the concept of transnational armed conflict. Unlike the traditional conceptions of international armed conflict and non-international armed conflict, however, there is no treaty provision or other codified definition of transnational armed conflict. In the absence of such guidance, one way to categorize transnational armed conflict is to examine the nature of the state response to the nonstate actor specifically by assessing the nature of the authority to use force against that threat. By doing so, one can distinguish between situations of armed conflict—marked by the authority to use deadly force as a first resort—and law enforcement operations—marked by carefully proscribed regulations on the use of force in self-defense only. Rules of engagement (“ROE”), which are the operationalization of the relevant law and the state’s broader strategic policy, offer a useful tool for analyzing this use of force authority. Thus, “a nation’s adoption of status-based rules of engagement for its military . . . should constitute the trigger requiring that nation and its military to apply the laws of war to that operation.”<sup>159</sup> ROE that authorize the use of deadly force only in response to an individual’s conduct, on the other hand, do not authorize the use of deadly force as a first resort and do not import the law of armed conflict.<sup>160</sup>

An airstrike directed against a terrorist training facility offers an example of status-based ROE:

It is inconceivable that the authority to employ deadly force relied on by the air assets executing the mission [against the terrorist training facility] will be contingent on a provocation from the terrorist target. It is equally inconceivable that the air assets will be obliged to offer the potential targets the opportunity to submit to apprehension as a condition precedent to the employment of combat power. Instead, the authority to employ that power will almost certainly be based on an inherent invocation of the principle of military objective, allowing the use of deadly combat power based solely on the identification of the target as one falling into the category of a defined terrorist enemy.<sup>161</sup>

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159. Corn & Jensen, *supra* note 53, at 790.

160. Corn, *supra* note 52, at 29.

161. *Id.* at 30.

Applying this theory to US conduct and operations against the TTP in Pakistan suggests that the United States is indeed engaged in an armed conflict—a transnational armed conflict, it would appear—with the TTP and other targeted armed groups. US drone strikes employ lethal force as a first resort based solely on the target’s identification, not on any provocation or self-defense. Targets are often identified based on their membership in or status within the TTP and other militant groups, not on the basis of conduct at any given time—although certainly many strikes are launched on the basis of specific intelligence regarding involvement in past, present, or future terrorist attacks. Nonetheless, the nature of US strikes and targeting determinations suggests that US actions are not law-enforcement actions, marked by strict regulations on the use of force, but rather military operations based on the law of armed conflict and the principle of military objective. Key principles of the laws of war, applicable in all conflicts as customary law and historic regulations on the conduct of military operations, apply to US operations against the TTP, regardless of whether the conflict can be characterized as a non-international armed conflict under Common Article 3.<sup>162</sup>

#### *CONCLUSION*

International humanitarian law provides a comprehensive framework for analyzing the existence and nature of conflicts between states, between states and nonstate actors, and among nonstate actors, whether within the territory of a single state or spreading across national borders. Over the past few years, however, as US drone strikes in Pakistan have increased steadily in frequency, regularity, and lethality, the general discourse has focused on the use of drones as a weapon for counter-terrorism, the lawfulness of acting in self-defense against nonstate armed groups, and other related questions. These issues are both interesting and highly important, but should not be the focus of analysis to the exclusion of the questions addressed here regarding the existence and characterization of the conflict.

The extent and nature of the hostilities between the TTP and Pakistan demonstrate that there is currently a non-

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162. *Id.* at 16–23.

international armed conflict in Pakistan, between the government and the TTP at least, and likely involving other armed groups as well. As detailed above, the intensity of the hostilities and the extent of the TTP's organizational structure meet the thresholds set forth in existing jurisprudence on the existence of non-international armed conflict. Common Article 3 and the principles of IHL recognized as customary law applicable in non-international armed conflicts therefore govern the conduct of Pakistan, the TTP, and other relevant armed groups. Furthermore, as the TTP continues to attack US targets and US drone strikes on TTP targets continue, the hostilities between the United States and the TTP have reached a steadily increasing level of intensity over the past two years. In 2009 and 2010, the intensity appeared to reach, if not easily surpass, the threshold for intensity as analyzed in the jurisprudence of the ICTY and other international tribunals. Once identified as an armed conflict rather than as isolated acts of violence, the hostilities between the United States and the TTP can be characterized as an intervention into the ongoing non-international armed conflict between Pakistan and the TTP. That conflict remains a non-international armed conflict because the United States is intervening on the side of the state actor. Alternatively, the conflict between the United States and the TTP can be characterized as a separate parallel conflict, either a Common Article 3 conflict, using the broad standard established in *Hamdan*, or, at a minimum, a transnational armed conflict triggering the application of fundamental principles of the law of war that govern the conduct of any military operations.