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# “Kill ‘em and Sort it Out Later:” Signature Drone Strikes and International Humanitarian Law

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# “Kill ‘em and Sort it Out Later:” Signature Drone Strikes and International Humanitarian Law

*Kristina Benson\**

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## I. INTRODUCTION

As of this writing, drone strikes have become a critical tool in the War on Terror.<sup>1</sup> Used regularly in Afghanistan, Yemen, and Pakistan,<sup>2</sup> they have

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1. *Drones*, REPRIEVE, <http://www.reprive.org.uk/investigations/drones/> (last visited Nov. 10, 2013); *Drone Strikes Kill, Maim and Traumatize Too Many Civilians, U.S. Study Says*, CNN, <http://www.cnn.com/2012/09/25/world/asia/pakistan-us-drone-strikes/index.html?iref=allsearch> (last updated Sept. 25, 2012, 8:33 PM).

2. Cora Currier, *Everything We Know So Far About Drone Strikes*, PROPUBLICA (Feb. 5, 2013, 10:50 AM), <http://www.propublica.org/article/everything-we-know-so-far-about-drone-strikes>.

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additionally carried out occasional missions in the Philippines,<sup>3</sup> Iraq, Libya, and Somalia,<sup>4</sup> and have even been occasionally used in U.S. airspace to provide surveillance functions on domestic populations.<sup>5</sup> Although the drone program remains officially classified, a mix of on-the-ground reporting, eye-witness accounts, and leaked information allow us to make tentative assessments of the legality of signature drone strike protocol, both in theory and as it has been executed. The head of the Central Intelligence Agency (“CIA”) developed “signature strikes,” and the CIA made critical decisions about the development and use of the drone program during President George W. Bush’s second presidential term.<sup>6</sup> Such strikes target individuals due solely to their observed pattern of behavior, or “signature,”<sup>7</sup> and have been deployed with the most frequency in the Federally Administered Tribal Areas (“FATA”) of Pakistan, Yemen, and Afghanistan.<sup>8</sup>

In spite of President Obama’s insistence that such strikes do not cause a “huge number of civilian casualties,”<sup>9</sup> there is mounting evidence that signature strike protocol does a poor job of distinguishing between combatants and non-combatants, resulting in a disproportionate amount of civilian casualties and the infliction of grave psychological trauma on civilians in a given strike zone.<sup>10</sup> Clive Stafford Smith, director of the anti-drone activist group *Reprieve*, put it as follows, “[a]n entire region [of Pakistan] is being terrorized by the constant threat of death from the skies . . . Their way of life is collapsing: kids are too terrified to go to school, adults are afraid to attend weddings, funerals, business meetings, or anything that involves gathering in groups.”<sup>11</sup>

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3. Akbar Ahmed & Frankie Martin, *Deadly Drone Strike on Muslims in the Southern Philippines* (Mar. 5, 2012), <http://www.brookings.edu/research/opinions/2012/03/05-drones-philippines-ahmed>.

4. Currier, *supra* note 2.

5. Ryan Gallagher, *FBI Fesses Up: We’ve Used Domestic Drones 10 Times*, SLATE (July 26, 2013, 4:37 PM), [http://www.slate.com/blogs/future\\_tense/2013/07/26/fbi\\_admits\\_in\\_letter\\_to\\_rand\\_paul\\_that\\_it\\_s\\_used\\_domestic\\_drones\\_10\\_times.html](http://www.slate.com/blogs/future_tense/2013/07/26/fbi_admits_in_letter_to_rand_paul_that_it_s_used_domestic_drones_10_times.html).

6. Adam Entous et al., *U.S. Tightens Drone Rules*, WALL ST. J., (Nov. 4, 2011), <http://online.wsj.com/news/articles/SB10001424052970204621904577013982672973836>.

7. Greg Miller, *At CIA, a Convert to Islam Leads the Terrorism Hunt*, WASH. POST (Mar. 24, 2012), [http://articles.washingtonpost.com/2012-03-24/world/35447818\\_1\\_cia-officials-robert-grenier-ctc](http://articles.washingtonpost.com/2012-03-24/world/35447818_1_cia-officials-robert-grenier-ctc) [hereinafter *At CIA*]; Greg Miller, *White House Approves Broader Yemen Drone Campaign*, WASH. POST (Apr. 25, 2012), [http://articles.washingtonpost.com/2012-04-25/world/35452363\\_1\\_signature-strikes-drone-strikes-qaeda](http://articles.washingtonpost.com/2012-04-25/world/35452363_1_signature-strikes-drone-strikes-qaeda) [hereinafter *White House approves*].

8. See generally INT’L HUMAN RIGHTS & CONFLICT RESOLUTION CTR. (STAN. L. SCH.) & GLOBAL JUSTICE CLINIC (N.Y.U. SCH. OF L.), *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN*, (Sept. 2012), available at <http://www.livingunderdrones.org/wp-content/uploads/2013/10/Stanford-NYU-Living-Under-Drones.pdf> [hereinafter *LIVING UNDER DRONES*].

9. Chris Woods et al., *Emerging from the Shadows: US Covert Drone Strikes in 2012*, BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 3, 2013), <http://www.thebureauinvestigates.com/2013/01/03/emerging-from-the-shadows-us-covert-drone-strikes-in-2012-2/>.

10. *Drone Strikes Kill*, *supra* note 1.

11. *Id.*

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This Article will use on-the-ground, eyewitness reports, recently leaked Justice Department legal analysis, and HELLFIRE<sup>12</sup> missiles' specifications and testing data to explore the legality of signature strikes under International Humanitarian Law ("IHL") insofar as the principles of distinction and proportionality are concerned. Additionally, it will interrogate claims that drone technology itself is inherently less likely to lead to civilian casualties due to claims of drones' accuracy and precision, as well as assertions that U.S. drone pilots are unburdened by the psychological stresses that normally accompany "traditional" military operations.

This Article will begin with a short history of the use of drones in the global war on terror, before confirming that IHL applies where signature strikes have been most frequently used.<sup>13</sup> The sections that follow will discuss signature strike protocol and its usefulness as a proxy for direct participation in combat,<sup>14</sup> and then move on to an assessment of proportionality.<sup>15</sup> After addressing arguments that drone technology inherently distinguishes and minimizes the danger of disproportionately, the final sections will discuss the relevance of IHL in a post-9/11 world.<sup>16</sup> Finally, the Article will conclude with a discussion of the ramifications of signature drones strikes, both for local populations and for American strategic objectives.<sup>17</sup>

## II. A BRIEF HISTORY: SIGNATURE STRIKES AND THE WAR ON TERROR

Sources generally trace the birth of the drone program to 2000, when the CIA began flying unstaffed drones over Afghanistan to support military surveillance operations.<sup>18</sup> Some reports indicate that the first drone strike was a joint effort between the CIA and the military, when an armed drone was sent after six terrorist suspects in Yemen on November 3, 2002.<sup>19</sup> Lieutenant General Michael DeLong, watching a video feed at Centcom headquarters in Tampa, called then

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12. According to Boeing, the HELLFIRE missile (initially named the Helicopter Launched Fire and Forget missile), "is a short-range, laser or radar-guided, air-to-ground missile system designed to defeat tanks and other individual targets, while minimizing the exposure of the launch vehicle to enemy fire. It was designed during the 1970s as a multimission, anti-armour, precision attack weapon that would be effective against tanks, bunkers and structures. Advanced development of the missile continued through 1976, when the U.S. Army awarded an engineering contract to Rockwell International." *History: AMG-114 HELLFIRE Missile*, BOEING, <http://www.boeing.com/boeing/history/bna/hellfire.page> (last visited Nov. 10, 2013).

13. *See infra* Part II.

14. *See infra* Part V.

15. *See infra* Part VI.

16. *See infra* Part VII.

17. *See infra* Part VIII.

18. John Sifton, *A Brief History of Drones*, THE NATION (Feb. 27, 2012), <http://www.thenation.com/article/166124/brief-history-drones#>.

19. Chris Woods, 'OK, Fine. Shoot him.' *Four Words That Heralded a Decade of Secret US Drone Killings*, BUREAU OF INVESTIGATIVE JOURNALISM (Nov. 3, 2012), <http://www.thebureauinvestigates.com/2012/11/03/ok-fine-shoot-him-four-words-that-heralded-a-decade-of-secret-us-drone-killings/>.

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CIA Director George Tenet, and together, they decided to fire. “Tenet goes, ‘[y]ou going to make the call?’ And [DeLong] said, ‘I’ll make the call.’ [Tenet] says, ‘[t]his SUV over here is the one that has Ali in it.’ [DeLong] said, ‘OK, fine.’ You know, ‘[s]hoot him.’ They lined it up and shot it.”<sup>20</sup>

Eight thousand miles away, the drone fired, killing a U.S. citizen along with the five other men in the SUV.<sup>21</sup> One of these men, the intended target,<sup>22</sup> was Qa’id Salim Sinan al-Harithi, an Al-Qaeda affiliate accused of orchestrating the attack on the USS Cole.<sup>23</sup> Al-Harethi had not been on the FBI’s twenty-two most-wanted terrorist fugitive list at the time of his death, and although investigators had wanted to question him about the USS Cole bombing, law enforcement officials were not consulted before the strike was carried out.<sup>24</sup>

According to other sources, however, the first use of armed drones occurred in February of 2002, when a CIA-operated drone spotted a “tall man” around whom others were “acting with reverence.”<sup>25</sup> As in the Yemeni operation, the strike against the tall man was run entirely by the CIA, absent any pretext of support for a military mission.<sup>26</sup> “A decision was made to fire the Hellfire missile,” at the target, although the identity of the person or organization making this decision still remains unclear.<sup>27</sup> But the “tall man” was not Osama bin Laden.<sup>28</sup> Reporters who traveled to the site of the strike learned that he was a local named Daraz Khan, who at 5’11” was tall compared to other Afghans, but “six inches shorter than bin Laden.”<sup>29</sup> Daraz Khan died along with two others, neither of whom were alleged terrorists.<sup>30</sup> Military officials insisted nonetheless that the target had been “legitimate.”<sup>31</sup>

Towards the end of President Bush’s second term, “Roger,” a code name for the person heading the drone program,<sup>32</sup> argued that the CIA should launch attacks based solely on an individual’s observed “pattern of behavior” or “signature.”<sup>33</sup> President Bush agreed, and the frequency of CIA-operated drone

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Sifton, *supra* note 18.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *At CIA, supra* note 7.

33. *Id.*; Azmat Khan, *The Covert Convert Behind the CIA’s Drone Program* (Mar. 26, 2012, 2:02 PM), <http://www.pbs.org/wgbh/pages/frontline/afghanistan-pakistan/secret-war/the-covert-convert-behind-the-cias-drone-program/>.

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strikes increased dramatically.<sup>34</sup> Upon taking office, however, President Obama expressed reservations about the use of “signature strikes.”<sup>35</sup> One advisor reportedly told him:

“Mr. President, we can see that there are a lot of military-age males down there, men associated with terrorist activity, but we don’t necessarily know who they are.” Obama reacted sharply, “[t]hat’s not good enough for me.” According to one adviser describing the president’s unease: “He would squirm . . . he didn’t like the idea of kill ‘em and sort it out later.”<sup>36</sup>

Like other controversial counterterrorism policies the Obama administration inherited, “signature strikes” did end up “good enough,” and President Obama overcame his initial discomfort to eventually become an enthusiastic supporter of the drone program.<sup>37</sup> In 2009, he organized the drone program into fourteen drone “orbits,” each consisting of three drones providing constant surveillance over the tribal areas of Pakistan.<sup>38</sup> Strikes increased, and whereas the Bush administration ordered one drone strike over Pakistan in all of 2004, the Obama administration was ordering a strike every four days when the program was at peak usage,<sup>39</sup> with fifty-three strikes in 2009 and 117 in 2010.<sup>40</sup>

By 2011, drones had logged approximately 2.7 million hours of flight time and completed over 80,000 missions.<sup>41</sup> Strikes in Pakistan killed more than 1,500 people between 2009 and 2011 alone,<sup>42</sup> and Pakistani officials, along with American diplomats and military personnel, complained that the relationship between the two countries was incurring damage as a result.<sup>43</sup> Strikes in Pakistan had become so frequent in fact, that the U.S. military found itself in the unusual position of urging the CIA to use restraint, complaining that the CIA launched attacks even during high-level diplomatic exchanges with Pakistan.<sup>44</sup> The CIA

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34. Entous et al., *supra* note 6.

35. Micah Zenko, *Targeted Killing and Signature Strikes*, COUNCIL ON FOREIGN REL. (July 16, 2012), <http://blogs.cfr.org/zenko/2012/07/16/targeted-killings-and-signature-strikes/>.

36. *Id.*

37. Entous et al., *supra* note 6.

38. *Id.*

39. Woods, *supra* note 19.

40. Indira A.R. Lakshmanan, *Pakistan Ends Drone Strikes in Blow to U.S. War on Terror*, BLOOMBERG (Mar. 12, 2012, 7:22 PM), <http://www.bloomberg.com/news/2012-03-13/pakistan-tells-white-house-to-stop-drone-missions-after-disputes-fray-ties.html>.

41. Thomas M. McDonnell, *Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists*, 44 GEO. WASH. INT’L L. REV. 243, 248 (2012).

42. Entous et al., *supra* note 6.

43. *Id.*

44. *Id.*

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was urged to “be more selective,” particularly with Osama bin Laden dead and Pakistan demanding an end to signature strikes.<sup>45</sup>

In response, the Obama administration launched a review that led to minor changes in the program: the State Department would participate more heavily in strike decisions, Pakistan would be given advance notice of drone strikes on a more regular basis, and the CIA would agree to suspend operations when Pakistani officials visited the United States<sup>46</sup> The name of the program was also changed from “signature strike” to TADS.<sup>47</sup> According to Daniel Klaidman of the Council on Foreign Relations:

[S]ignature strike has gotten to be, you know, sort of a pejorative term. They sometimes call it crowd killing. And it makes a lot of people uncomfortable . . . So the CIA actually changed the name of signature strikes to something called TADS . . . . I had the acronym but I didn’t know what it stood for . . . eventually I figured it out. It was [sic] terrorist attack disruption strike. And I was going to put it in . . . Newsweek. And actually it was the excerpt from my book. And various agencies from the government were very unhappy about that. And I sort of could not understand why . . . they said, well, it’s a classified term. And I said, well, why would it be classified? It doesn’t make any sense. It’s just a term to describe . . . a particular kind of activity that we know takes place . . . they asked me not to print it . . . You know, I printed it anyway.<sup>48</sup>

The name change to TADS did not reflect a profound structural policy shift and was not accompanied by a reduction in the use of signature strikes.<sup>49</sup> In the first ten days of 2013, there were seven drone strikes in Pakistan alone, which killed at least forty people,<sup>50</sup> and in January of that year, President Obama announced that he wanted John Brennan, a key architect of the drone program, to head the CIA.<sup>51</sup> The drone program, therefore, has a considerable fan base and plenty of proponents within the Obama Administration, in the media, and in

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45. *Id.*

46. *Id.*

47. David E. Sanger et al., *Views from the Newsroom: Challenges to American Power*, COUNCIL ON FOREIGN REL. (June 22, 2012), <http://www.foreignaffairs.com/discussions/audio-video/david-sanger-and-daniel-klaidman-on-national-security>.

48. *Id.*

49. Spencer Ackerman, *U.S. Drones Pound Pakistan, Which Responds by Doing Exactly Nothing*, WIRED (Jan. 10, 2013, 12:45 PM), <http://www.wired.com/dangerroom/2013/01/pakistan-drone-war/>; Peter Bergen & Jennifer Rowland, *John Brennan, Obama’s Drone Warrior*, CNN (Jan. 9, 2013, 8:39 AM), <http://www.cnn.com/2013/01/07/opinion/bergen-brennan-drones>.

50. Ackerman, *supra* note 49.

51. Bergen & Rowland, *supra* note 49.

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academia.<sup>52</sup> This article will consider pro-drone arguments in a later section, but first, it will confirm that IHL, otherwise known as the laws of war, applies where signature strikes are deployed.

III. INTERNATIONAL HUMANITARIAN LAW: WHEN IT APPLIES, AND WHAT IT MEANS IN A POST-9/11 WORLD

As per the International Criminal Tribunal for the Former Yugoslavia (“ICTY”)’s Tadić decision, the threshold for determining that a non-international armed conflict (“NIAC”) is at hand breaks down into two elements: “(a) the intensity of the violence and (b) the organization of the parties.”<sup>53</sup> Both must be “evaluated on a case-by-case basis by weighing up a host of indicative data.”<sup>54</sup> Protocol II excludes:

situations of internal disturbances and tensions . . . and other acts of a similar nature . . . Relevant factors that contribute to an armed conflict include: intensity; number of active participants . . . duration and protracted character of the violence; organization and discipline of the parties; capacity to respect IHL; collective, open, and coordinated character of the hostilities; direct involvement of governmental armed force . . . and de facto authority by the non-state actor over potential victims.<sup>55</sup>

Therefore, the section below will confirm that conflicts are at hand where signature strikes are used, it will then discuss what this means under international law.

A. *Yemen*

In considering the criteria of threshold and intensity of the conflict in Yemen, this article will limit its analysis to the drone strikes and joint operations between Yemeni and American authorities that began in 2009.

The Washington Post reported in early 2010 that “U.S. military teams and intelligence agencies are deeply involved in secret joint operations with Yemeni troops who in the past six weeks have killed scores of people, among them six of fifteen top leaders of a regional Al-Qaeda affiliate, according to senior

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52. *See generally id.*

53. Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. OF THE RED CROSS 69, 72 (2009).

54. *Id.*

55. Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, 6 HPCR OCCASIONAL PAPER SERIES 1, 6 (2006).



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administration officials.”<sup>56</sup> The Post also reported, “American advisers are acting as intermediaries between the Yemeni forces and hundreds of U.S. military and intelligence officers . . . the combined efforts have resulted in more than two dozen ground raids and airstrikes [in Yemen].”<sup>57</sup> The New York Times corroborated the existence of such raids, and characterized American operations in Yemen as part of a “shadow war” involving American personnel, cruise missiles, and fighter jets.<sup>58</sup>

Signature strikes were approved for use in Yemen in 2011, and drones are currently launched with the consent of the Yemeni government from the U.S. Africa Command, a military base in Djibouti.<sup>59</sup> Some claim that drones are only used in Yemen “when there is clear indication of the presence of an Al-Qaeda leader or [alternatively] of plotting against targets in the United States or Americans overseas.”<sup>60</sup> Others, like The Wall Street Journal, concluded the opposite, reporting on April 25<sup>th</sup>, 2012 that the administration had relaxed circumstances wherein signature strikes could be used, approving signature lite for Yemen.<sup>61</sup>

State Department Legal Adviser Harold Koh gave a speech to the American Society of International Law in early 2010 in which he expressed agreement with the view that “the United States is in an armed conflict with Al-Qaeda, as well as the Taliban, and associated forces.”<sup>62</sup> Additionally he stated that the United States was permitted to “use force consistent with its inherent right to self-defense under international law.”<sup>63</sup> Finally, he said that attacks must also conform to “law of war principles” including those of distinction and proportionality; however, this final issue will be addressed in later sections.<sup>64</sup>

Given the frequency of drone strikes and other military operations against Al-Qaeda in the tribal areas of Yemen for nearly two years, there can be little doubt that U.S. activities in Yemen rise to the level of an armed conflict.<sup>65</sup> The

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56. Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Drone Strikes*, WASH. POST, (Jan. 27, 2010), at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html>.

57. *Id.*

58. Scott Shane et al., *Secret Assault on Terrorism Widens on Two Continents*, N.Y. TIMES, (Aug. 14, 2010), at A1, available at <http://www.nytimes.com/2010/08/15/world/15shadowwar.html?pagewanted=all>.

59. Currier, *supra* note 2; Susan Breau et al., *Discussion Paper 2: Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict*, OXFORD RESEARCH GROUP 1, 1 (June 2011), available at <http://www.oxfordresearchgroup.org.uk/sites/default/files/ORG%20Drone%20Attacks%20and%20International%20Law%20Report.pdf>.

60. *White House Approves*, *supra* note 7.

61. *See id.*

62. Harold Koh, Legal Advisor, U.S. Dep’t of State, Keynote Address at the American Society for International Law Annual Meeting: The Obama Administration and International Law (March 25, 2010). 104 AM. SOC’Y INT’L L. PROC. 207, 218 (2010).

63. *Id.*

64. *Id.* See Parts IV-VI.

65. *See* Priest, *supra* note 56; *see also* Vité, *supra* note 53, at 72.

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fact that these activities are at the invitation of the Yemeni government, or at the very least occur with its permission, renders the conflict non-international.<sup>66</sup>

*B. Pakistan*

In theory, Pakistan and the United States are allies, and although there is some discomfort with the frequency and intensity of drone strikes in the tribal region of Pakistan, there have been cases wherein certain attacks have been praised, if not celebrated, by Pakistani officials.<sup>67</sup> The “tribal” region, to be clear, refers to the FATA, on the Pakistan side of the Durand line.<sup>68</sup> After Pakistan gained its independence from the British Empire in 1947, this area was officially left to the management of local tribes in keeping with the British system, wherein the tribes were held “collectively responsible” for maintaining security in the territory.<sup>69</sup> During the Soviet invasion and occupation of Afghanistan, FATA became a sort of a sanctuary for Afghan Taliban and Al-Qaeda, as well as a hotbed of political (and sometimes military) activity directed against the Pakistan government by disenchanting Pashtun youths.<sup>70</sup> Therefore, a common argument is that FATA is an “ungoverned territory” outside of Pakistani control.<sup>71</sup> But some Pakistani officials see things differently, and “all leading political parties in Pakistan declared” in a December 2010 statement that drone strikes in this region “compromis[e] the sovereignty of Pakistan.”<sup>72</sup>

Even so, the Pakistan government has assisted the U.S. government in the execution of these sovereignty-compromising drone strikes, occasionally claiming that “militants,” rather than U.S. drones, have been responsible for civilian deaths in spite of evidence to the contrary.<sup>73</sup> Furthermore, the intended targets of the CIA drone program in Pakistan are Al-Qaeda operatives, their affiliates, members of the Taliban, and those responsible for the 9/11 attacks.<sup>74</sup> This conflict, it should be noted, has also been characterized as “part and parcel of the Non-International Armed Conflict in Afghanistan.”<sup>75</sup>

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66. See Priest, *supra* note 56; see also Vité, *supra* note 53, at 72.

67. Shuja Nawaz, *Drone Attacks Inside Pakistan: Wayang or Willing Suspension of Disbelief?*, 12 GEO. J. INT'L AFF. 79, 80 (2011), available at <http://journal.georgetown.edu/wp-content/uploads/Drone-Attacks-Inside-Pakistan-Wayang-or-Willing-Suspension-of-Disbelief.pdf>.

68. The Durand Line refers to the Pakistan-Afghan border, which was drawn in 1893 by the British government. For more information, see Jayshree Bajoria, *The Troubled Afghan-Pakistani Border*, COUNCIL ON FOREIGN REL. (Mar. 20, 2009), <http://www.cfr.org/pakistan/troubled-afghan-pakistani-border/p14905>.

69. Nawaz, *supra* note 67, at 81.

70. *Id.*

71. *Id.* at 82-83.

72. *Id.* at 84.

73. See generally *Drones*, *supra* note 1.

74. Koh, *supra* note 62, at 218.

75. Breau et al., *supra* note 59, at 1.

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This conflict also rises without question to the level of an armed conflict set forth by Tádíc, given that drone strikes killed 2,562-3,325 people in Pakistan between 2004 and 2012.<sup>76</sup> There is also some indication that American troops and helicopters are stationed in Pakistan, though the official position is that they are there to conduct civil affairs-related training at the invitation of the Pakistan government.<sup>77</sup>

Although drone strikes have tapered from their peak usage in 2010, residents of the northwest tribal region of Pakistan hear drones flying twenty-four hours per day, seven days per week, and report living with the fear that they could be struck at any moment.<sup>78</sup> “Signature strikes make up a significant proportion of” drone strikes in Pakistan, and show no sign of abating.<sup>79</sup> As the targets of drone strikes are non-state, transnational armed groups, and as drone strikes only take place with the approval of local officials, a non-international armed conflict is taking place in Pakistan.

#### *C. Afghanistan*

As of this writing, the conflict in Afghanistan is entering its eleventh year.<sup>80</sup> Although President Obama has promised a drawdown from Afghanistan and a near-complete reduction in ground troops by 2014, drone strikes have been occurring at an accelerated rate.<sup>81</sup> In 2012, thirty-three drone strikes per month were being carried out in Afghanistan, compared to twenty-four and a half per month in 2011,<sup>82</sup> and a recently leaked Justice Department White Paper, likely written around the time that a drone strike killed American citizen Anwar al-Awlaki in Afghanistan, refers repeatedly to “applicable laws of war principles” and to the conflict as “non-international.”<sup>83</sup> Indeed, as Afghanistan drone strikes take place with the permission of the Afghan government and are “ordered by a

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76. *Drone Strikes Kill*, *supra* note 1.

77. Noah Shachtman, *3 GIs Killed in Pakistan. Now Can We Start Treating This Like a Real War? (Updated Once More)*, WIRED (Feb. 3, 2010, 10:30 AM), <http://www.wired.com/dangerroom/2010/02/3-gis-killed-in-pakistan-when-do-we-start-treating-this-like-a-real-war/>.

78. *Drone Strikes Kill*, *supra* note 1.

79. CENT. FOR CIVILIANS IN CONFLICT & COLUMBIA LAW SCH. HUMAN RIGHTS CLINIC, THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS 9 (2012), *available at* <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf>. [hereinafter CIVILIAN IMPACT OF DRONES].

80. Noah Shachtman, *Military Stats Reveal Epicenter of U.S. Drone War*, WIRED (Nov. 9, 2012, 4:00 AM), <http://www.wired.com/dangerroom/2012/11/drones-afghan-air-war/>.

81. *See id.*

82. *Id.*

83. U.S. DEP’T OF JUSTICE, LAWFULNESS OF A LEGAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 1, 3, *available at* [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

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local commander, overseen by military lawyers,”<sup>84</sup> the ICRC agrees with the Justice Department’s assessment that the conflict is non-international.<sup>85</sup>

IV. IHL APPLIES TO SIGNATURE STRIKES IN AFGHANISTAN,  
YEMEN, AND PAKISTAN

Given that IHL applies in Yemen, Afghanistan, and Pakistan, each party is bound to apply at minimum the fundamental provisions contained in Article 3 common to all four Geneva Conventions, which are further developed in the Geneva Protocol II of 1977. Both Common Article 3 and Geneva Protocol II apply with equal force to all parties in an armed conflict, government and transnational armed groups alike.<sup>86</sup> The rules of customary international law as well as the basic principles of distinction, military necessity, and proportionality similarly apply, given that IHL is in play.<sup>87</sup> Article 52, section 1 and section 2 of Protocol I of 1977 authorizes armed attacks only if they are directed towards military objectives, and grants general protection to civilian objects.<sup>88</sup> Although a number of states (including the United States) are not party to the Additional Protocol, this general principle of distinction is widely recognized as binding customary international law, meaning that states that have not signed the treaty are bound to the aspects recognized as customary.<sup>89</sup>

It is, of course, tempting to conclude that IHL, while technically applicable, has become irrelevant in the post-9/11 world, given that the enemy is a transnational armed group rather than a nation state. But this is difficult to reconcile with the fact that Common Article 3 anticipated the existence of such groups and clearly applies to conflicts with them, even if these groups are themselves not parties to relevant treaties.<sup>90</sup>

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84. Shachman, *supra* note 80.

85. Annysa Bellal et al., *International Law and Armed Non-State Actors in Afghanistan*, 93 INT’L REV. OF THE RED CROSS 47, 51 (2011), available at <http://www.icrc.org/eng/assets/files/review/2011/irrc-881-bellal-giacca-casey-maslen.pdf>.

86. Common Article 2 to the Geneva Conventions of 1949 states, “[i]n addition to the provisions which shall be implemented in peacetime, the present Convention 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. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” For analysis and more information, see ICRC, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL LAW? 1 (March 2008), available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

87. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. 1: RULES XXXV (2009), available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

88. See ICRC, *supra* note 86, at 2.

89. For a discussion of applications for Customary International Law see *Customary International Humanitarian Law*, ICRC, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm> (last visited Dec. 12, 2013).

90. Bellal et al., *supra* note 85, at 55.

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According to the ICRC:

To what extent Common Article 3 directly addresses [armed non-state actors, or “ANSAs”] has been debated. The article states that ‘each Party to the conflict shall be bound to apply, as a minimum’ its provisions. It has sometimes been claimed that the term ‘each Party’ does not apply to ANSAs, even though they may meet the criteria for being a party to the conflict, but only to government armed forces. State practice, international case law, and scholarship, have, however, confirmed that Common Article 3 applies to such ANSAs directly. . . Suffice to acknowledge that, although the legal reasoning to sustain this conclusion remains unsettled, it has now become uncontroversial, even ‘commonplace,’ [sic] that ANSAs are bound by international humanitarian law.<sup>91</sup>

Additionally, a resolution adopted in 1970 by the UN Assembly speaks of combatants in all armed conflicts,<sup>92</sup> suggesting that attacks on transnational armed groups are still subject to the principles of distinction. The language of Article 51(3) is fairly succinct, stating: “civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.”<sup>93</sup>

This is not to say that there are no reputable figures arguing that the rise of transnational armed groups has “discredited” literal or conservative readings of various aspects of International Humanitarian Law.<sup>94</sup> Indeed, on February 10, 2003, Professor Rüdiger Wolfrum, Director of the Max Planck Institute for Comparative Public Law and International Law, stated that international law was in a period of “transition.”<sup>95</sup> Wolfrum referred to a “reformulation” of self-defense concepts that impacted the “legitimacy” of the use of force, both in the realms of *jus in bello* and *jus ad bellum*.<sup>96</sup>

However, at the World Summit of 2005, the Charter rules were reconfirmed as written, with the Summit Outcome document bereft of any new rules on the use of force contrary to those in the Charter.<sup>97</sup> Furthermore, the Charter and its attendant legal framework has been used by Bush-Cheney and the Obama

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91. *Id.* at 55-56.

92. *Practice Relating to Rule 6. Civilians’ Loss of Protection from Attack*, ICRC, [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule6](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule6) (last visited July 26, 2013).

93. *Id.*

94. William K. Lietzau, *Old Law, New Wars: Jus Ad Bellum in the Age of Terrorism*, 8 MAX PLANCK Y.B. OF U.N. L. 384, 399 (2004).

95. *Id.* at 386.

96. *Id.*

97. Mary Ellen O’Connell, *Drones Under International Law*, WASH. UNIV. L. INT’L DEBATE SERIES 585, 590 (2010).

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administration as a source of authority that legitimates the right to self-defense,<sup>98</sup> making it difficult to conclude that the UN Charter has become irrelevant.

President Obama and his supporters, in fact, have used essentially the same arguments as Bush-Cheney, contending that that the United States is “in armed conflict with Al-Qaeda, the Taliban, and associated forces in response to the 9/11 attacks, and we may also use force consistent with [the] inherent right of national self-defense.”<sup>99</sup> John Brennan, a top counter-terrorism adviser to the Obama administration, to this end, claimed:

There is nothing in international law that bans the use of remotely piloted aircraft for [the above] purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.<sup>100</sup>

Finally, the recently leaked Justice Department White Paper refers repeatedly to “laws of war principles” and “international law” throughout and was likely written in 2010.<sup>101</sup> It is thus possible to conclude that the United States government still regards international law, the laws of war, and IHL as sources of authority.

The ongoing use of IHL as a source of legitimacy, both in private and public government communications about the global war on terror,<sup>102</sup> makes it difficult to conclude that IHL is irrelevant in a post 9/11 world. This Article will now turn to a discussion of “signature strikes” and whether they are an appropriate proxy for “direct participation” as defined by IHL. If so, it can be concluded that the principle of distinction is respected by signature strike protocol. If not, the legality of signature strike protocol may be in doubt.

#### V. SIGNATURE STRIKES AND “OBSERVED PATTERNS OF BEHAVIOR:” A LEGAL (OR USEFUL) PROXY FOR “DIRECT PARTICIPATION?”

The theory behind signature strikes is that an individual’s pattern of behavior—or “signature”—serves as a proxy for determining if that individual

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98. See, e.g., Legal Advisor William H. Taft IV’s Remarks Regarding the Use of Force Under International Law, given Oct. 27, 2004, which repeatedly invokes the U.N. Charter’s right of self-defense and its applicability to September 11th, available at <http://www.state.gov/s/l/2004/78298.htm>. See generally Koh, *supra* note 62. For the Obama administration’s reliance on the U.N. Charter and its attendant legal framework to justify the use of drones and the use of force in Yemen and elsewhere, see U.S. DEP’T OF JUSTICE, *supra* note 83, at 3.

99. Stephanie Kennedy, *Top Aide To Barack Obama Pleads the Case for the Use of Drones*, ABC NEWS (May 1, 2012), <http://www.abc.net.au/worldtoday/content/2012/s3492761.htm>.

100. *Id.*

101. U.S. DEP’T OF JUSTICE, *supra* note 83, at 4.

102. See, e.g., Kennedy, *supra* note 99.

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either has a continuous combat function (making the individual a lawful combatant) or alternatively, is directly participating in the conflict (possibly making that individual an unlawful combatant).<sup>103</sup> If the individual is a combatant, lawful or otherwise, the use of lethal force is generally appropriate under international law.<sup>104</sup> “Direct participation” in hostilities, according to IHL, occurs when a given act fulfills the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).<sup>105</sup>

Activities that meet the necessary “threshold of harm” might include:

Capturing, wounding or killing military personnel; damaging military objects; or restricting or disturbing military deployment, logistics and communication, for example through sabotage, erecting road blocks or interrupting the power supply of radar stations. Interfering electronically with military computer networks (computer network attacks) and transmitting tactical targeting intelligence for a specific attack are also examples. The use of time-delayed weapons such as mines or booby-traps, remote-controlled weapon systems such as unmanned aircraft, also “directly” causes harm to the enemy and, therefore, amounts to direct participation in hostilities.<sup>106</sup>

Alternatively, a given activity could fall under the category of “indirect” participation.<sup>107</sup> These types of activities, which fail to meet the necessary

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103. *See Practice Relating to Rule 6, supra* note 92.

104. *See Id.*

105. NILS MELZER, ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 20 (2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

106. *Direct Participation in Hostilities: Questions and Answers*, ICRC RESOURCE CENTRE (Feb. 6, 2009), <http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>.

107. *Id.*

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threshold of harm, are indirect participation because they contribute to the general war effort of the party but “[do] not directly cause harm and, therefore, [do] not necessarily lead to a loss of protection against direct attack.”<sup>108</sup> This includes the production and shipment of helmets for military personnel, “the construction of roads and other infrastructure, and financial, administrative and political support for military bodies.”<sup>109</sup>

Direct participants and persons with continuous combat function may be attacked at any time under IHL: while planning military operations, while engaging in active hostilities, or even when they are on their way to the barracks from the battlefield.<sup>110</sup> Civilians, on the other hand, are regarded as impermissible military targets, and traditionally, have been negatively defined as individuals who are not directly participating in hostilities.<sup>111</sup> Specific acts may be considered “direct participation” in conflict even if they are not likely to adversely affect the military operations or military capacity of a party to the conflict.<sup>112</sup> Absent military harm, however, such acts must at the very least be likely to cause death, injury, or destruction.<sup>113</sup>

Signature strike protocol, however, does not map onto the definition of direct participation or continuous combat function under IHL. Comments by CIA and White House officials indicate that drone strike operators may be instructed to assume all military-aged men in a strike zone are “combatants” unless there is explicit intelligence proving that the men do not have a continuous combat function, or are not directly participating in hostilities.<sup>114</sup> In the aforementioned leaked Justice Department White Paper, the Administration argued for an expanded definition of “imminent” danger, contending that an individual’s mere membership in Al-Qaeda would be enough for exposure to the legal use of lethal force.<sup>115</sup> Additionally, the administration claims that defining the scope of “direct participation” in this manner allows the United States to “avoid broader harm to civilians and civilian objects.”<sup>116</sup> Counterterrorism officials have furthermore insisted that a person in an area of known terrorist activity or in the presence of a top Al-Qaeda operative is most likely up to no good and thus a suitable target for a signature strike: “Al-Qaeda is an insular, paranoid organization—innocent neighbors don’t hitchhike rides in the back of trucks headed for the border with

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108. *Id.*

109. *Id.*

110. See MELZER, *supra* note 105, at 16.

111. *Id.* at 20.

112. *Id.*

113. *Id.* at 46.

114. Chris Woods, *Analysis: Obama Embraced Redefinition of ‘Civilian’ in Drone Wars*, BUREAU OF INVESTIGATIVE JOURNALISM (May 29, 2012), <http://www.thebureauinvestigates.com/2012/05/29/analysis-how-obama-changed-definition-of-civilian-in-secret-drone-wars/>.

115. U.S. DEP’T OF JUSTICE, *supra* note 83, at 8.

116. Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. & POL’Y 101, 121 (2011).



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guns and bombs,” one official told the New York times on condition of anonymity.<sup>117</sup>

Acting on these sorts of assumptions, however, may be against international law. Even in the context of the War on Terror, actors do not become a legitimate target due to official membership status in a terrorist organization, nor through their physical association with members of a terrorist organization.<sup>118</sup> Actors become legitimate targets due to their role in the organization as determined by actual activities.<sup>119</sup> In other words, a man may have lunch with a member of Al-Qaeda, attend prayers with him, attend a community meeting with him, or ride with him in the same pickup truck without losing his civilian status under IHL.<sup>120</sup> Furthermore, the idea of “membership” in an organization cannot be established simply through affiliations, family ties, or mere association; within the context of IHL, the term “combatants” refers only to members of a transnational group’s armed forces.<sup>121</sup> In other words, a web developer for Al-Qaeda is most likely not a “combatant” consistent with a strict reading of IHL; a suicide bomber, however, is.

According to the ICRC:

For the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-state party to the conflict. Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: “continuous combat function”).<sup>122</sup>

Worth noting again is the repeated use of words like “function” and “act.” In other words, there must be an action, and it must contribute to a continuous role in the group. The Obama administration’s insistence that a person in physical proximity to terrorists is a combatant is therefore not necessarily in compliance with international law.<sup>123</sup> However, this method of counting casualties may

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117. Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), [http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=3&\\_r=3&hp](http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=3&_r=3&hp).

118. MELZER, *supra* note 105, at 44.

119. *Id.*

120. *See id.*

121. *Id.* at 33.

122. *Id.*

123. *See generally* U.S. DEP’T OF JUSTICE, *supra* note 83.

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explain the administration's low tally of civilian deaths. As recently as 2011, Obama advisor and CIA director appointee John Brennan said "not a single noncombatant had been killed in a year of strikes."<sup>124</sup> On another occasion, an unnamed senior administration official told the New York Times that the number of civilians killed in drone strikes in Pakistan under the Obama administration was in the "single digits" and that any claims otherwise were "propaganda" from "militants."<sup>125</sup>

Colonel William Tart, a manager of drone operations at Creech Air Force Base in Nevada, claimed that he never saw a civilian casualty in his two years with the program, insisting *inter alia* that drone pilots are privy to such detailed information that mistakes rarely occur.<sup>126</sup>

The MQ-9, an unstaffed aerial vehicle capable of carrying up to four HELLFIRE missiles and a pair of 500-pound laser-guided bombs, is equipped with an infrared camera that enables the operator to "see some[one] smoking a cigarette from about 25,000 feet."<sup>127</sup> In certain regions of Pakistan, drones gather surveillance data constantly. According to a man who lost his cousin in a drone strike, "when the weather is clear, three or four [drones] can be seen . . . They are in the air 24 [hours a day], seven [days a week], but not when it's raining."<sup>128</sup>

This constant level of drone surveillance through high-powered, infrared cameras allows drone operators to watch private activities such as spousal intimacy, parents playing with their children, and family members mourning at a funeral.<sup>129</sup> Drone operators, Colonel Tart explained, become extremely familiar with the lives of people in a strike zone: "[w]e watch people for months. We see them playing with their dogs or doing their laundry. We know their patterns like we know our neighbors' patterns. We even go to their funerals."<sup>130</sup>

Even so, an official speaking to the New York Times noted that the use of a "signature", which in theory should map onto behavior consistent with terrorism, or at least, with combatancy, often accidentally conflates civilians with combatants: "[i]t bothers me when they say there were seven guys, so they must all be militants. They count the corpses and they're not really sure who they are."<sup>131</sup> Others—also from the State Department, also speaking to the New York Times on condition of anonymity—complain that when the CIA sees "three guys

124. Becker & Shane, *supra* note 117.

125. *Id.*

126. Nicola Abé, *Dreams in Infrared: The Woes of an American Drone Operator*, SPIEGEL ONLINE (Dec. 14, 2012, 5:03 PM), <http://www.spiegel.de/international/world/pain-continues-after-war-for-american-drone-pilot-a-872726.html>.

127. David Piper, *Trim Reaper: Streamlined Killer Drone Begins Combat Operations in Iraq*, FOX NEWS (July 24, 2008), <http://www.foxnews.com/story/0,2933,389962,00.html>.

128. LIVING UNDER DRONES, *supra* note 8, at 150.

129. *See generally* Abé, *supra* note 126.

130. *Id.*

131. Becker & Shane, *supra* note 117.

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doing jumping jacks,” the agency thinks they are witnessing some sort of a terrorist training camp.<sup>132</sup>

There is little public information about what kinds of behavior are sufficiently suspicious to merit a signature strike. Still, it can be inferred from a combination of confidential information leaks and investigative reporting that the “signature” of a potential militant or terrorist is defined very broadly. Once again, it bears mentioning that “terrorist” and “militant” are political terms with no grounding in IHL: in IHL, a person is either a combatant or civilian, and there is no such thing as a “militant” or a “terrorist.”<sup>133</sup> The “signature” of a terrorist or militant, therefore, may not be consistent with the “signature” of a combatant simply because “combatant” and “terrorist/militant” are not synonyms.<sup>134</sup>

Of course, this may be a feature, rather than a bug, of the signature strike program, which may be in place to snuff out militants and terrorists rather than snuff out combatants. It should also be noted that in addition to “signature strikes,” drone operators may use “personality strikes,” which refers to strikes targeting known terrorists or known members of Al-Qaeda.<sup>135</sup> Signature strikes, on the other hand, target persons who act like they are Al-Qaeda.<sup>136</sup> This, of course, assumes that a person who acts like Al-Qaeda *is* Al-Qaeda. However, in some communities there may not be a significant difference between the day-to-day behavior of Al-Qaeda and the day-to-day behavior of a civilian. In some strike zones, “fighters regularly intermingle with civilians . . . and do not wear uniforms,”<sup>137</sup> and signature strike operators have conflated otherwise normal behavior with suspicious behavior on several occasions, targeting people who were carrying weapons, were present in a location identified as a militant compound, or were traveling in a convoy of vehicles.<sup>138</sup> Individuals have also been targeted for driving a suspicious vehicle, spending time in or around certain facilities, or operating certain types of communications equipment.<sup>139</sup>

One Pakistani community elder tried to explain the types of everyday, commonplace activities that would lead to drone strikes:

[T]hese attacks have been on schools, on *maliks*, on elders, and on different buildings . . . [S]ometimes when people are moving in cars, they are hit. Sometimes when they are gathering with friends, they are

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132. *Id.*

133. See MELZER, *supra* note 105, at 44.

134. See generally ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW, ICRC, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (July 2004), available at [http://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf).

135. Becker & Shane, *supra* note 117.

136. See generally Eric Schmitt & David E. Sanger, *Pakistan Shift Could Curtail Drone Strikes*, N.Y. TIMES, (Feb 22, 2008), available at [http://www.nytimes.com/2008/02/22/washington/22policy.html?\\_r=0](http://www.nytimes.com/2008/02/22/washington/22policy.html?_r=0).

137. LIVING UNDER DRONES, *supra* note 8, at 112.

138. CIVILIAN IMPACT OF DRONES, *supra* note 79, at 33, 41.

139. *Id.* at 33.

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hit. Sometimes when people are gathering to offer prayers to those killed, there are drone attacks on those people . . . [M]y own relatives, close family relatives, have been killed. Elders of the villages, the *maliks*, the children of the schools, other children, all have been victims of strikes. [In one case,] [t]here was a drone attack on a religious teacher while he was coming in a car with some other people, after which he was brought to the village. A lot of people were gathering, the small children and families were gathered, and another drone attack happened, killing the small children. Two drone attacks in a single day.<sup>140</sup>

None of these activities, however, automatically equate to direct participation, nor turn a civilian into a person with a continuous combat function.<sup>141</sup> Nor do they even rise to the level of indirect participation even under a liberal reading of IHL, given that they do not seem to contribute even indirectly to the success of enemy forces.<sup>142</sup> To be sure, the fact that Taliban and Al-Qaeda fighters mingle regularly with civilian populations certainly poses challenges to drone operators and their commanders.<sup>143</sup> However, IHL nonetheless dictates that militaries engaged in an armed conflict must always attempt to distinguish between legitimate and illegitimate targets for an attack.<sup>144</sup>

Given that such a wide scope of activities exposes individuals to being targeted by a drone strike, (assuming, of course, that oral reports from FATA can be taken at face value) it is possible that a suspicious “signature” has been defined so broadly, and the definition of imminence expanded so greatly, that it serves as poor proxy for direct participation or continuous combat function.

Alternatively, it can be concluded that the problem is not one of broadness, but of cultural context: suspicious behavior in the United States may not be suspicious in Pakistan, Afghanistan or Yemen. A drone operator launching missiles from a control room hundreds or thousands of miles away may be unable to contextualize what he is seeing or why he is seeing it, leading him to conflate normal behavior with suspicious activity.

Although the amount and quality of cultural training drone pilots are exposed to is not made explicit, the Air Force discloses that newly recruited drone pilots are subjected to a four week, drone-specific training regimen.<sup>145</sup> During the course of this training, each recruit is exposed to “strict instructions on rules of engagement, ‘and on when and how [to] employ ordnance’” combined with

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140. LIVING UNDER DRONES, *supra* note 8, at 152.

141. *See supra* Part V.

142. *See supra* Part V.

143. LIVING UNDER DRONES, *supra* note 8, at 112.

144. ICRC, BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS (1988), available at [http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0365.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0365.pdf).

145. Anna Mulrine, *UAV Pilots*, AIR FORCE MAGAZINE, Jan. 2009, at 34, 36, available at <http://www.airforcemag.com/MagazineArchive/Pages/2009/January%202009/0109UAV.aspx>.

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training from soldiers in combat zones.<sup>146</sup> The purpose of this training is to help them cultivate an awareness of friendly locations and strategies for positively identifying targets.<sup>147</sup> Although the training schedule is not disclosed to the public, the short period of training suggests that operators may not be heavily exposed to the normative cultural, ethnic, and religious practices common to the targeted country. Therefore, the most conservative application of signature strike protocol may not enable a drone operator to accurately interpret what is being seen, or understand why people are acting suspiciously, even if he has the best of intentions and a sincerely held interest in following IHL.<sup>148</sup>

Signature strike protocol, therefore, not only risks violating the mandate to distinguish, but also the mandate to exercise proportionality, which will be discussed in the next section.

### VI. DO SIGNATURE STRIKES VIOLATE THE PRINCIPLE OF PROPORTIONALITY?

Proportionality is a critical component of IHL, and refers to the notion that an attack “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, [and] which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”<sup>149</sup> Article 51(5)(b) of the 1977 Additional Protocol I prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>150</sup>

While Additional Protocol II does not contain an explicit reference to the principle of proportionality in attack,<sup>151</sup> it has been argued that it “is inherent in the principle of humanity” explicitly applicable to the Protocol in the preamble,<sup>152</sup> and additionally, has been included in the Amended Protocol II to the Convention on Certain Conventional Weapons,<sup>153</sup> and is therefore relevant to non-international armed conflicts. For example, according to the U.S. Naval Handbook, “[i]t is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage must not, however, be excessive

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146. *Id.*

147. *Id.*

148. *See supra* Part V.

149. *Rule 14. Proportionality in Attack*, ICRC CUSTOMARY IHL, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter4\\_rule14](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14) (last visited Dec. 11, 2013).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

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in light of the military advantage anticipated by the attack.”<sup>154</sup> The fact that drone strike protocol seems unable to take cultural context into account, however, may have lead to several disproportionate attacks on civilians in violation of IHL.

For example, tribal elders hold a position in Pushtun culture that is difficult for the average American to appreciate. “Pushtunwali,” a Pushtun socio-legal system found in Afghanistan and Pakistan, is a series of local and cultural practices that regulate behavior and maintain social order.<sup>155</sup> Pushtunwali, among other things, obligates a villager to open his home to tribal elders, including those that the United States has designated as “militants” or “terrorists.”<sup>156</sup> In homosocial societies like Pakistan and Afghanistan, it is also possible that a tribal leader would meet with military-aged men for reasons other than to “plan or conduct attacks, regroup for future hostilities, [or] train.”<sup>157</sup> As Waziristan resident Daud Khan explained, “all the local people must offer [the Taliban] food” and, if they stop by, it is impossible to turn them away.<sup>158</sup> Cultural practices such as this may lead drone operators to conclude civilians are part of the Taliban, when in fact they are simply bound to offer them hospitality as dictated by Pushtunwali.

The inability to contextualize commonplace social gatherings within their proper cultural frame has led on occasion to a disproportionate amount of civilian deaths. On one occasion, a signature strike was executed against a heavily armed group that was believed to be “act[ing] in a manner consistent with [Al-Qaeda]-linked militants” and included men “connected to Al-Qaeda.”<sup>159</sup> After executing the strike, the United States claimed it had killed twenty “militants”; however, community members and Pakistani officials said that the missiles had struck a “jirga”—a type of meeting held to resolve local disputes.<sup>160</sup> Such a meeting requires the presence of high-ranking tribal officials, some of whom are Taliban, in order for the resolution to have any legitimacy.<sup>161</sup> In the end, it turned out that only four Taliban were present and killed at the meeting because any resolution to the dispute would have lacked binding authority absent their approval.<sup>162</sup> The

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154. THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, DEP’T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS & HEADQUARTERS, U.S. MARINE CORPS, DEPARTMENT OF TRANSP., AND U.S. COAST GUARD § 8.1.2.1 (1995).

155. MARINE CORPS INTELLIGENCE ACTIVITY, CULTURAL INTELLIGENCE FOR MILITARY OPERATIONS: PASHTUNS IN AFGHANISTAN 1, *available at* <http://info.publicintelligence.net/MCIA-AfghanCultures/Pashtuns.pdf>.

156. *See id.* at 24.

157. Vogel, *supra* note 116, at 122.

158. CIVILIAN IMPACT OF DRONES, *supra* note 79, at 42.

159. Scott Shane, *Contrasting Reports of Drone Strikes*, N.Y. TIMES (Aug. 11, 2011), <http://www.nytimes.com/2011/08/12/world/asia/12droneside.html>; LIVING UNDER DRONES, *supra* note 8, at 57, n.283.

160. CIVILIAN IMPACT OF DRONES, *supra* note 79, at 34.

161. DONALD P. WRIGHT ET AL., A DIFFERENT KIND OF WAR: THE UNITED STATES ARMY IN OPERATION ENDURING FREEDOM OCTOBER 2001-SEPTEMBER 2005 11 (2010).

162. CIVILIAN IMPACT OF DRONES, *supra* note 79, at 34.

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rest of the dead included thirty-eight civilians, one of which was Daud Khan's son.<sup>163</sup> Pakistan's Army Chief, General Ashfaq Parvez Kayani, issued a statement saying "[the] tribal elders had been 'carelessly and callously targeted with complete disregard to human life.'<sup>164</sup>

Western misunderstanding of Pakistani morés surrounding hospitality may also inadvertently fuel claims that Al-Qaeda intermix with civilian populations to use them as shields,<sup>165</sup> and that a Taliban fighter will "purposefully obfuscate his belligerent status by posing as a civilian—and in many cases targets civilians and conducts operations in civilian settings. Al-Qaeda and its associates also routinely use protected persons and objects as shields."<sup>166</sup>

Along these lines, Ryan J. Vogel, foreign affairs specialist for the Office of the Secretary of Defense, invites consideration of the fact that our "foes gather in civilian settings, such as homes and boarding houses."<sup>167</sup> His conclusion highlights the many cultural and contextual obstacles that inform signature strike policy, as well as its current execution in South Asia and the Middle East:

There is no doubt that a person's residence is civilian in status, but when the home is used to house belligerents, store weapons, plan or conduct attacks, regroup for future hostilities, train, or any number of other activities that make an effective contribution to the war effort, that home's nature, location, purpose, or use arguably changes in such a way that it forfeits its protected civilian status and becomes a military objective.<sup>168</sup>

First, it should be noted that according to Article 50 of Protocol I, the presence of non-civilians within a civilian area does not automatically transform the area into a military object, and civilians conducting business with members of the armed forces do not automatically lose their civilian status.<sup>169</sup> His argument, however, is that the house may be used to shelter "belligerents," thus transforming the character of the house under IHL.<sup>170</sup> Of course, "belligerents" are not a recognized category of persons under IHL; in the world of IHL, there

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163. *Id.*

164. *Id.*

165. Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANS. NAT'L L. & POL'Y 237, 276 (2009).

166. Vogel, *supra* note 116, at 117.

167. *Id.* at 122.

168. *Id.*

169. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts (Protocol I) art. 50, June 8, 1977, 1125 U.N.T.S. 3, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E1F8F99C4C3F8FE4C12563CD0051DC8A> [hereinafter Geneva Protocol I].

170. Vogel, *supra* note 116, at 122.

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are “combatants” and “civilians.”<sup>171</sup> “Belligerent,” like “militant,” is a political category that has no meaning in the laws of war. If a house is used to shelter “combatants,” it may lose its civilian status, given, as aforementioned, that combatants are vulnerable to lethal force at any time.<sup>172</sup> But if a house is used to shelter “belligerents,” its status is less clear. This fictional home may also remain “civilian” in status even if it hosts men who “regroup” for future hostilities.<sup>173</sup> Who is doing the regrouping? Fighters who need to rest before launching another attack or construction workers who are preparing to repair damaged civilian infrastructure? Without knowing who exactly is regrouping, from what they are regrouping, and why, it is difficult to comment on the legality of using lethal force under IHL.

Even if we discard Article 50 of Protocol I and take Vogel’s arguments at face value, it is important to consider that he does not present these hypotheticals within the framework of Pushtunwali.<sup>174</sup> In so doing, he fails to consider that a gathering where Taliban fighters are present can take place for the purposes of non-military objectives and can include people who are not a part of the Taliban, as well as any gathering of “military-aged” men, particularly in homosocial societies such as Pakistan, Yemen, and Afghanistan.

The fact that a location is used for storing weapons, which, to Vogel, means that a civilian object has been turned into a military one,<sup>175</sup> is also contextually dependent. Given the prevalence of guns and gun culture in Central Asia and the Middle East,<sup>176</sup> weapons storage may not be an accurate proxy for direct participation, or even for establishing “continuous combat function” as per the language of Article 51(3).<sup>177</sup>

Pakistan ranks sixth in the world in terms of per capita gun ownership,<sup>178</sup> with 11.6% of the civilian population armed with 18 million total small arms in civilian hands.<sup>179</sup> Iraq is the fifth most armed country in the world, with approximately thirty-five guns per hundred people.<sup>180</sup> In Yemen, where gun ownership is similarly part of local culture, government officials have expressed

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171. See Rule 14. *Proportionality in Attack*, *supra* note 149.

172. Kennedy, *supra* note 99.

173. See Geneva Protocol I, *supra* note 169.

174. See Vogel, *supra* note 116, at 122.

175. *Id.*

176. See AM. FRIENDS SERV. COMM. & REG’L HUMAN SEC. CTR., TRADITIONAL CULTURAL PRACTICES AND SMALL ARMS IN THE MIDDLE EAST: PROBLEMS AND SOLUTIONS 14 (2002), available at [http://www.quno.org/geneva/pdf/disarmament-peace/amman\\_seminar\\_report.pdf](http://www.quno.org/geneva/pdf/disarmament-peace/amman_seminar_report.pdf).

177. MELZER, *supra* note 105, at 16; AM. FRIENDS SERV. COMM. & REG’L HUMAN SEC. CTR., *supra* note 176, at 14.

178. Laura MacInnis, *U.S. Most Armed Country With 90 Guns per 100 People*, REUTERS, (Aug. 28, 2007), <http://www.reuters.com/article/2007/08/28/us-world-firearms-idUSL2834893820070828>.

179. Simon Rogers, *Gun Homicides and Gun Ownership Listed by Country*, GUARDIAN (July 22, 2010, 8:01 AM), <http://www.theguardian.com/news/datablog/2012/jul/22/gun-homicides-ownership-world-list>.

180. MacInnis, *supra* note 178.



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reservations that the presence of weapons can serve as a reasonable proxy for direct participation or for “militant” activity.<sup>181</sup> “Every Yemeni is armed,” said one Yemeni official, “so how can they differentiate between suspected militants and armed Yemenis?”<sup>182</sup> It is not an exaggeration to characterize “every Yemeni” as armed; Yemen has the second most guns per person out of every country on Earth with 54.8 guns for every hundred Yemenis.<sup>183</sup> The United States, meanwhile, is the only country with more per capita privately owned guns than Yemen, with 88.8 guns for every hundred civilians.<sup>184</sup> “Storing weapons” may indicate that a house is used for military purposes; however, depending on the cultural context in which it occurs, it may not.

The prevalence of weapons in places like Yemen also makes it difficult to count the number of civilian casualties. Not only are many military-aged male non-combatants armed (much like in the United States),<sup>185</sup> but confusion is further compounded by the Yemeni government’s active obfuscation of the number of civilian deaths:

A rickety Toyota truck packed with 14 people rumbled down a desert road from the town of Radda, which Al-Qaeda militants once controlled. Suddenly a missile hurtled from the sky and flipped the vehicle over. Chaos. Flames. Corpses. Then, a second missile struck. Within seconds, 11 of the passengers were dead, including a woman and her 7-year-old daughter. A 12-year-old boy also perished that day, and another man later died from his wounds. The Yemeni government initially said that those killed were Al-Qaeda militants and that its Soviet-era jets had carried out the September 2nd attack. But tribal leaders and Yemeni officials would later say that it was an American assault and that all the victims were civilians who lived in a village near Radda, in central Yemen. U.S. officials last week acknowledged for the first time that it was an American strike. “Their bodies were burning,” recalled Sultan Ahmed Mohammed, 27, who was riding on the hood of the truck and flew headfirst into a sandy expanse. “How could this happen? None of us were Al-Qaeda.”<sup>186</sup>

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181. CIVILIAN IMPACT OF DRONES, *supra* note 79, at 33.

182. Adam Entous et al., *U.S. Relaxes Drone Rules: Obama Gives CIA, Military Greater Leeway in Use Against Militants in Yemen*, WALL ST. J., (Apr. 26, 2012), <http://online.wsj.com/article/SB10001424052702304723304577366251852418174.html>.

183. Rogers, *supra* note 179.

184. *Id.*

185. *See id.*

186. Sudarsan Raghavan, *When U.S. Drones Kill Civilians, Yemen’s Government Tries To Conceal It*, WASH. POST (Dec. 24, 2012), [http://www.washingtonpost.com/world/middle\\_east/when-us-drones-kill-civilians-yemens-government-tries-to-conceal-it/2012/12/24/bd4d7ac2-486d-11e2-8af9-9b50cb4605a7\\_story.html](http://www.washingtonpost.com/world/middle_east/when-us-drones-kill-civilians-yemens-government-tries-to-conceal-it/2012/12/24/bd4d7ac2-486d-11e2-8af9-9b50cb4605a7_story.html).

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On one hand, it can be argued that this incident, like those in Pakistan, may have happened due to a misunderstanding of Yemeni culture. Perhaps mistakes like these would become infrequent if drone operators were given exposure to Yemeni or Pakistani behavior, culture, and customs, and had on-the-ground personnel approving drone strikes.

On the other hand, drone strikes in Afghanistan “are ordered by a local commander, [and] overseen by military lawyers,”<sup>187</sup> and Americans have had an ongoing presence for over a decade. There have nonetheless been culturally-driven misunderstandings and misinterpretations resulting in civilian deaths. On one occasion, a group that included military age men decided to travel in a convoy through an insurgent stronghold for safety purposes.<sup>188</sup>

From the surveillance of a Predator, US forces came to believe that the group was Taliban. As described by [a U.S.] Army officer who was involved: “[w]e all had it in our head, ‘[h]ey, why do you have 20 military age males at 5 a.m. collecting each other?’ . . . . There can be only one reason, and that’s because we’ve put [U.S. troops] in the area.” The US forces proceeded to interpret the unfolding events in accordance with their belief that the convoy was full of insurgents. Evidence of the presence of children became evidence of “adolescents,” unconfirmed suspicions of the presence of weapons turned into an assumption of their presence. The United States fired on the convoy, killing twenty-three people.<sup>189</sup>

Signature strike protocol and its inability to properly distinguish between civilians and combatants,<sup>190</sup> therefore, may lead to violations of proportionality, but so too might the unpredictable character of signature strike protocol itself due to the stress it inflicts on civilian populations.<sup>191</sup> A common thread in interviews with Waziristan residents is a fear of the inherently uncertain and unpredictable nature of drone strikes.<sup>192</sup> This fear has paralyzed entire communities, leading people to stop going to work, attending school, shopping at the market, or gathering in large groups.<sup>193</sup> According to one man whose brother died in a drone strike:

[“Before, e]verybody was involved in their [sic] own labor work. We were all busy. But since the drone attacks have started, everybody is very scared and everybody is terrorized . . . People are out of business, people are out of schools, because people are being killed by these drone

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187. Shachtman, *supra* note 80.

188. CIVILIAN IMPACT OF DRONES, *supra* note 79, at 42.

189. *Id.*

190. LIVING UNDER DRONES, *supra* note 8, at 151.

191. *Id.* at 149.

192. *Id.* at 151.

193. *Id.* at 149.

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attacks.” Tahir emphasized, “It’s not a [fictional] story. It’s brutality that we are undergoing and that needs to be stopped.”<sup>194</sup>

The uncertainty of signature strike protocol may violate the principle of proportionality, given that the general rules of IHL were developed to “protect civilians from the effects of hostilities”<sup>195</sup> and “limit the damage and provide care for the casualties.”<sup>196</sup> The Red Cross suggests that the infliction of psychological trauma on civilians constitutes “[a] lack of respect shown by weapons bearers and their political operatives” for their obligations under IHL: “[t]he right to life, respect for family unity, and respect for dignity and physical and psychological integrity [which] are central to these obligations.”<sup>197</sup> This suggests that the mandate to distinguish and use proportionality extends beyond the use of lethal force, armed attacks, or a strict reading of Article 52(2), and includes activities that inflict psychological trauma on civilians.

The ICRC also acknowledges, however, that the law remains underdeveloped in this regard: the extent to which force can be used for purely psychological purposes, such as shutting down a civilian radio station for the sole purpose of undermining the morale of the civilian population, is an issue that has yet to be addressed authoritatively by the international community.<sup>198</sup> Furthermore, there is no evidence that drone strike protocol operates with the intention of inciting terror among the civilian population.<sup>199</sup> However, according to a Pakistani community elder:

“We know that the consequences of drone strikes are extremely harsh. Our children, our wives know that our breadwinners, when they go out to earn a livelihood, they might not come back, and life may become very miserable for them in the years to come.” Khalid further explained, “Now we are always awaiting a drone attack and we know it’s certain and it’s eventual and it will strike us, and we’re just waiting to hear whose house it will strike, our relatives’, our neighbors’, or us. We do not know. We’re just always in fear.”<sup>200</sup>

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194. *Id.*

195. Dr. Jakob Kellenberger, President, ICRC, Keynote Address at the 34th Round Table on Current Issues of International Humanitarian Law, San Remo, Sept. 8-10 2011, *available at* <http://www.icrc.org/eng/resources/documents/statement/new-weapon-technologies-statement-2011-09-08.htm>.

196. Knut Dörmann, *Computer Network Attack and International Humanitarian Law*, ICRC (May 19, 2001), <http://www.icrc.org/eng/resources/documents/article/other/5p2alj.htm>.

197. *Protection of the Civilian Population*, ICRC (Oct. 29, 2010), <http://www.icrc.org/eng/what-we-do/protecting-civilians/overview-protection-civilian-population.htm>.

198. Dörmann, *supra* note 196.

199. *See generally id.*

200. LIVING UNDER DRONES, *supra* note 8, at 151.

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VII. ARGUMENTS FOR DRONES: “ACCURACY,” “PRECISION,”  
AND OPERATORS’ MENTAL HEALTH

It should by this point be clear that signature drone strikes raise many uncomfortable issues and may violate IHL mandates regarding proportionality as well as the need to distinguish between civilians and combatants.<sup>201</sup> Nevertheless, there are still many drone advocates and plenty of arguments advanced in favor of using drone technology, much of which revolves around drones’ purported adherence to the laws of war. For example, Andrew C. Orr, while admitting that civilian casualties pose legal challenges to the framework of IHL, states that:

Targeted killing of Al-Qaeda fighters is permissible under Article 3, which applies protections to “persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat” . . . The drones do not attack such persons, instead targeting only Al-Qaeda fighters, which is permissible during an armed conflict.<sup>202</sup>

Michael W. Lewis, professor at the Petit College of Law at Ohio Northern University, makes a similar argument, writing:

The longer loiter time of drones allows for a much higher level of confidence that the target has been properly identified . . . Even if the drone is evading fire at the time of weapons release, those making the final decision to carry out the attack are not dealing with the decision-impairing effects of mortal fear. Although the sanitary environment of the drone control room has been criticized for making war too much like a video game, it undoubtedly leads to much sounder proportionality determinations.<sup>203</sup>

And finally, Bradley J. Strawser of the University of Connecticut, writing in the *Journal of Military Ethics*, claims:

Recent studies bear out that UAVs [unmanned aerial vehicles, or drones] appear to have, in fact, greater technical capabilities at making determinations of combatant status. Avery Plaw (2010) has recently compiled a database combining reports from a variety of sources on the results of United States UAV attacks carried out in Pakistan from 2004 to 2007. This data shows that UAV strikes were far better at noncombatant

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201. *See supra* Part VI.

202. Andrew C. Orr, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 *CORNELL INT’L L.J.* 729, 744 (2011).

203. Michael L. Lewis, *Drones and the Boundaries of the Battlefield*, 47 *TEX. INT’L L.J.* 293, 297-98 (2012).

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discrimination than all other methods used for engaging Taliban fighters in the region. For example, the UAV strikes resulted in a ratio of over 17 to 1 of intended militant targets to civilian deaths compared with a 4 to 1 ratio for Pakistan Special Weapons and Tactics Teams team offensives or a nearly 3 to 1 for Pakistan Army operations in the same region during the same time period. Or, compare the 17 to 1 ratio for the UAV employment to the shocking 0.125 to 1 militant to civilian casualty ratio estimate for all armed conflict worldwide for the year 2000 (Plaw 2010). If these numbers are even close to accurate, it seems that there is strong evidence which directly contradicts the central premise of objection 1. That is, UAVs are better, not worse, at noncombatant discrimination.<sup>204</sup>

This Article does not attempt to single out these men's views as particularly egregious or shocking. It also does not attempt to suggest that their respective publications are informed by a casual attitude toward civilian death and suffering, nor does it suggest that drone operators themselves are unaware or unconcerned with the ethical implications of drone strikes: a 2011 report commissioned by the Department of Defense stated that 17% of drone pilots show signs of "clinical distress" due in part to the trauma of "pressing a button that can lead to someone's death half a world away."<sup>205</sup> The report also referred to high operation stress due to a shortage of qualified drone operators, long and odd hours, short staffing, and monotony, which in combination led to fatigue and "burnout."<sup>206</sup> The quotes from the authors above are included because they are good examples of common, pro-drone-strike arguments held by scholars, political commentators, and military officials alike.<sup>207</sup> However, it is pertinent to note that other law professors and legal commentators are similarly interested in drones' purported ability to minimize injury and psychological trauma to American forces and effectively carry out missions against Al-Qaeda and other terrorist groups.<sup>208</sup>

That all said, these arguments do not necessarily rest on stable ground.<sup>209</sup> First, the targeted killing of Al-Qaeda members who have a continuous combat function is generally permissible under IHL.<sup>210</sup> But, as discussed at length, Al-Qaeda fighters are not the only people targeted by drone strikes.<sup>211</sup> A study by Stanford Law School and New York University's School of Law concluded the

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204. Bradley Jay Strawser, *Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles*, 9 J. OF MILITARY ETHICS 342, 352 (2010).

205. Phil Stewart, *Overstretched U.S. Drone Pilots Face Stress Risk*, REUTERS (Dec. 19, 2011, 5:41 PM), <http://www.reuters.com/article/2011/12/18-usa-drones-stress-id>.

206. Jeremy Herb, *Air Force Study Finds Drone Pilots Face High Stress*, THE HILL (Dec. 19, 2011, 10:54 PM), <http://thehill.com/blogs/defcon-hill/air-force/200405-air-force-study-finds-drone-pilots-face-high-stress>.

207. See *supra* Part VII.

208. See generally Orr, *supra* note 202; see generally Lewis, *supra* note 203.

209. See *infra* Part VII.

210. See LIVING UNDER DRONES, *supra* note 8, at 150.

211. See *supra* Part VI.

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number of “high-level” targets killed as a percentage of total casualties was extremely low, about two-percent.<sup>212</sup> The militant-to-target ratio, furthermore, is difficult to verify given that military-aged males in the strike zone are often counted as “militants;” so too are affiliates of Al-Qaeda or the Taliban.<sup>213</sup> It is, however, clear from witness statements, as well as from statements made by drone operators themselves, that the signature strike protocol has led to the deaths of civilians, including women and children: “I saw men, women and children die . . . I never thought I would kill that many people. In fact, I thought I couldn’t kill anyone at all,”<sup>214</sup> Brandon Bryant, a former drone operator with the U.S. Air Force, told *Der Spiegel*.<sup>215</sup> On one occasion, in October of 2010, sixty-nine children were killed when a drone strike hit a religious seminary in Chenegai, in Bajaur Agency.<sup>216</sup> The target was apparently the headmaster, who was a “known militant.”<sup>217</sup> The Pakistan army initially took responsibility for the strike, and it is still not clear why the school was targeted when so many children were inside it.<sup>218</sup> It is therefore difficult to claim that drones are inherently more likely to adhere to IHL by virtue of their enhanced technical capabilities.<sup>219</sup>

Second, “the longer loiter time of drones” which, according to Professor Lewis, “allows for a much higher level of confidence that the target has been properly identified,”<sup>220</sup> does not speak to the criteria for properly identifying appropriate targets.<sup>221</sup> According to comments made by an anonymous official to the *Washington Post* in 2011, for example, two times as many “wanted terrorists” have been killed by the United States in signature strikes than in personality strikes.<sup>222</sup> Additionally, those individuals on the kill list have been killed by a signature strike “when the [CIA] didn’t know they were there.”<sup>223</sup>

Of course, if the definition of a militant’s “signature” reliably and consistently overlapped with IHL’s definition of “direct participation” or “continuous combat function,” Professor Lewis would have a point. However, as discussed, there are indications that that a “signature” is not a reliable proxy for distinction.<sup>224</sup> A drone may be able to hit its target with more accuracy than a

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212. Tahir Khan, *US Drones Traumatizing Tribal Children*, EXPRESS TRIB. (Dec. 19, 2012), <http://tribune.com.pk/story/481473/us-drones-traumatizing-tribal-children/>.

213. See Woods, *supra* note 114.

214. Abé, *supra* note 126.

215. *Id.*

216. Chris Woods, *The Day 69 Children Died*, EXPRESS TRIB. (Aug. 12, 2011), <http://tribune.com.pk/story/229844/the-day-69-children-died/>.

217. *Id.*

218. *Id.*

219. See *supra* Part VI.

220. Lewis, *supra* note 203.

221. See CIVILIAN IMPACT OF DRONES, *supra* note 79, at 9.

222. *Id.*

223. *Id.*

224. See *Drones*, *supra* note 1.

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traditional, staffed aircraft;<sup>225</sup> however, the target itself may not be a legal one under IHL.<sup>226</sup>

Supporters of drone strikes also frequently tout the “accuracy” of drones, arguing that they are an ideal weapon for minimizing civilian casualties.<sup>227</sup> Vogel writes:

With their ability to surveil for hours or days at a time, and to perform surgical strikes with pinpoint accuracy, drones typically offer a cleaner alternative to other forms of aerial bombardment or missile strikes. P.W. Singer writes that “[u]nmaned systems seem to offer several ways of reducing the mistakes and unintended costs of war,” including by using “far better sensors and processing power . . . allow[ing] decisions to be made in a more deliberate manner,” and “remov[ing] the anger and emotion from the humans behind them.” “Such exactness,” Singer argues, “can lessen the number of mistakes made, as well as the number of civilians inadvertently killed.” Senior U.S. officials have consistently stated that “procedures and practices for identifying lawful targets” in the AUMF conflict “are extremely robust, and advanced technologies have helped to make our targeting even more precise.”<sup>228</sup>

By and large, the mainstream media have agreed with this narrative, characterizing drones as offering “pinpoint accuracy”<sup>229</sup> in the field. Again, as it is difficult to know exactly how many civilians have been killed in drone strikes, it is difficult to assess the veracity of claims regarding drones’ target finding capabilities.<sup>230</sup> Counterterrorism advisor John Brennan stated in 2011 that “there hasn’t been a single collateral death,”<sup>231</sup> but in April of 2013, Brennan admitted: “[civilians] have been accidentally injured, or worse, killed in these strikes. It is

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225. *U.S. Drone Strikes More Deadly to Afghan Civilians Than Manned Aircraft*, WAR IN CONTEXT (July 3, 2013), <http://warincontext.org/2013/07/03/u-s-drone-strikes-more-deadly-to-afghan-civilians-than-manned-aircraft/>.

226. LIVING UNDER DRONES, *supra* note 8, at 150.

227. Vogel, *supra* note 116, at 102.

228. *Id.*

229. See *Flight of the Drones: Why the Future of Air Power Belongs to Unmanned Systems*, ECONOMIST (Oct. 8, 2011), available at <http://www.economist.com/node/21531433>; see also *NOVA: Rise of the Drones*, KPBS, <http://www.kpbs.org/news/2013/jan/22/nova-rise-drones/> (last updated Mar. 15, 2013, 10:56 AM); see also Denis D. Gray, *New Role for Drones—Wildlife, Eco-conservation*, YAHOO! NEWS (Aug. 19, 2012, 2:19 AM), <http://news.yahoo.com/role-drones-wildlife-eco-conservation-060727498.html>; see also Max Hastings, *We’ll Need Great Courage to Tackle This Deadly New Face of Terror*, MAIL ONLINE, <http://www.dailymail.co.uk/news/article-2264819/MAX-HASTINGS-Well-need-great-courage-tackle-deadly-new-face-terror.html?ito=feeds-newsxml> (last updated Jan. 20, 2013, 7:07 PM).

230. See Raghavan, *supra* note 186 (stating that the government often tries to conceal civilian deaths from the public, fearing rebellion if hostility toward U.S. policies increases even more).

231. Peter Bergen & Jennifer Rowland, *New View of Drone Death Toll*, CNN, <http://www.cnn.com/2013/07/26/opinion/bergen-pakistan-drone-debate> (last updated July 26, 2013, 3:33 PM).

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exceedingly rare, but it has happened. When it does, it pains us, and we regret it deeply, as we do any time innocents are killed in war.”<sup>232</sup>

Pakistan’s Interior Minister, Rehman Malik, has disputed the latter assertion, saying that only 20% of drone strike victims are in fact militants, and the rest are civilians.<sup>233</sup> A leaked Pakistani government document puts the number of civilian deaths far lower than Rehman Malik’s 80% but far higher than Brennan’s assertion of 0%, finding that 20% of the people killed between 2006 and 2009 were civilians.<sup>234</sup>

Whatever the real civilian death toll, “surgical strike,” like “pinpoint accuracy,” is a term with no real substance and no connection to observable or measurable data.<sup>235</sup> It has never been seriously claimed that a drone can fire a HELLFIRE missile at a pin from 15,000 feet and hit it with any degree of consistency. These terms—“surgical strike” and “pinpoint accuracy”—therefore either do not mean anything concrete and do not tell us anything useful, or alternatively, are to be taken at face value and are plainly wrong.

Furthermore, “accuracy” and “precision” are not synonyms: it is possible for a weapon to be accurate but not precise, or precise but not accurate.<sup>236</sup> “Accuracy” describes the closeness of a drone strike to its chosen target.<sup>237</sup> “Precision” refers to how close drone strikes fall to each other when aimed at a single target.<sup>238</sup> For example, if five HELLFIRE missiles are launched one after the other and all fall on the same spot, the HELLFIRE missile can be called “precise.”<sup>239</sup> If that spot, however, is nowhere near the designated target, the HELLFIRE missiles are not “accurate.”<sup>240</sup> If the HELLFIRE missile in this scenario truly is both accurate and precise, all five missiles would form a tight cluster around the designated target.<sup>241</sup>

Unfortunately, the HELLFIRE missile may be neither accurate nor precise, as suggested by a Pentagon report on the AGM-114 HELLFIRE missile.<sup>242</sup> Developed in the 1970s, the HELLFIRE is designed to defeat tanks “and other

232. *Drone Strikes Kill*, *supra* note 1.

233. See Bergen & Rowland, *supra* note 231.

234. *Id.*

235. See *supra* Part VII.

236. See Benjamin Shotzberger, *Precision vs. Accuracy*, AMERICAN RIFLEMAN (Apr. 30, 2013), <http://www.americanrifleman.org/articles/precision-vs-accuracy/>.

237. See *id.*

238. *Accuracy Versus Precision*, NOAA CELEBRATES 200 YEARS OF SCI, SERVICE, & STEWARDSHIP, [http://celebrating200years.noaa.gov/magazine/tct/tct\\_side1.html](http://celebrating200years.noaa.gov/magazine/tct/tct_side1.html) (last updated July 19, 2012). See also Shotzberger, *supra* note 236.

239. See Shotzberger, *supra* note 236.

240. See *id.*

241. *Id.*

242. See Matthew J. Nasuti, *HELLFIRE Missile Accuracy Problems Uncovered in Pentagon Data: Official Claims of “Pinpoint” Accuracy Are Exaggerated*, KABULPRESS.ORG (Nov. 27, 2011), <http://kabalpress.org/my/spip.php?article89242>.



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individual targets”<sup>243</sup> and “hosts precision kill technology against high-value armour, air defense, ship, waterborne, and non-moving targets.”<sup>244</sup> An archived U.S. Navy Fact File page from 2002 describes it in similar terms, highlighting its efficiency in destroying tanks, helicopters, and slow-moving aircraft:

HELLFIRE can be used as an air-to-air or an air-to-ground missile. The Air-to-Ground (AGM)-114 provides precision striking power against tanks, structures, bunkers and helicopters. The HELLFIRE missile is capable of defeating any known tank in the world today. It can be guided to the target either from inside the aircraft or by lasers outside the aircraft.<sup>245</sup>

The most recent upgrade, the Romeo II, is tested on stationary targets sitting in the open in a flat test range at an Air Force base in Florida and is yielding inflated numbers regarding both the accuracy and precision of the weapon.<sup>246</sup> The Brookings Institution estimated in a 2009 report that a HELLFIRE missile killed ten civilians for each “militant.”<sup>247</sup> This could serve either as an indictment of signature strike protocol or alternatively suggest that the HELLFIRE (which, was originally designed for engagement with tanks and tank-sized targets) is not “pinpoint accurate” when fired at humans.<sup>248</sup>

The “double tap,” wherein the drone operator fires at an intended target, and then at rescuers offering assistance to any survivors, may have in fact been initiated at the suggestion of Lockheed-Martin as a way to compensate for the inaccuracy of HELLFIRE missiles.<sup>249</sup> In the “double tap” method, missiles strike the initial target, and then strike rescuers and medical personnel who arrive at the scene to offer assistance.<sup>250</sup> According to a recent report that makes use of on-the-ground investigative reporting and eye-witness interviews, the double-tap has been used with growing frequency in Afghanistan and Pakistan to the point that “almost every other” strike in certain regions of Pakistan is a double tap.<sup>251</sup>

243. BOEING, *supra* note 12.

244. *HELLFIRE II Anti-Armour Missile*, ARMED FORCES INT’L, [http://www.armedforces-int.com/projects/hellfire\\_ii\\_anti\\_armour\\_missile.html](http://www.armedforces-int.com/projects/hellfire_ii_anti_armour_missile.html) (last visited Nov. 10, 2013).

245. U.S. NAVY, AGM-114B/K/M HELLFIRE MISSILE, [http://www.navy.mil/navydata/fact\\_display.asp?cid=2200&tid=400&ct=2](http://www.navy.mil/navydata/fact_display.asp?cid=2200&tid=400&ct=2) (last visited Nov. 10, 2013).

246. Nasuti, *supra* note 242.

247. Derrick Crowe, *Brookings Report on Drones Confirms High Civilian Death Rate and Misses the Point*, FIREDOGLAKE (July 21, 2009, 10:09 AM), <http://my.firedoglake.com/derrickcrowe/2009/07/21/brookings-report-on-drones-confirms-high-civilian-death-rate-and-misses-the-point/>.

248. See Nasuti, *supra* note 242; see also Crowe, *supra* note 247.

249. Michael Kelley, *More Evidence That Drones Are Targeting Civilian Rescuers In Afghanistan*, BUS. INSIDER (Sept. 25, 2012, 10:23 AM), <http://www.businessinsider.com/drone-double-tap-first-responders-2012-9>.

250. *Id.*

251. Jerome Taylor, *Outrage at CIA’s Deadly ‘Double Tap’ Drone Attacks*, THE INDEP. (Sept. 25, 2012), <http://www.independent.co.uk/news/world/americas/outrage-at-cias-deadly-double-tap-drone-attacks-8174771.html>.

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The effect of the double tap on civilians has been profound.<sup>252</sup> In addition to adding to the mounting death toll of non-combatants,<sup>253</sup> double taps have essentially trained first responders not to assist or rescue drone strike victims and to withhold emergency services and medical help from survivors:

A father of four, who lost one of his legs in a drone strike, admitted: “[w]e and other people are so scared of drone attacks now that when there is a drone strike, for two or three hours nobody goes close to [the location of the strike]. We don’t know who [the victims] are, whether they are young or old, because we try to be safe.”<sup>254</sup>

At this point, it is not clear if the “double tap” falls under the umbrella of signature strike protocol.<sup>255</sup> It is, however, clear that the double tap violates specific protections in place for the “sick, wounded . . . [and] others such as medical and religious personnel, humanitarian workers, and civil defense staff.”<sup>256</sup> A 2007 Homeland Security Report referred to the double tap as a “favorite tactic of Hamas” and one employed by “terrorists,”<sup>257</sup> and Christof Heyns, a U.N. special rapporteur on extrajudicial killings, has characterized drone strikes on first responders as a “war crime.”<sup>258</sup>

Claims that the drone is an ideal weapon that is more humane due to its “accuracy” and “precision” must therefore be subjected to scrutiny, given that the facts on the ground seem to tell a very different story.<sup>259</sup>

### VIII. CONCLUDING OBSERVATIONS

It should be clear at this point that “signatures” are not necessarily an accurate proxy for determining direct participation consistent with IHL, and that the problematic nature of signature strike protocol may lead to a disproportionate number of civilian deaths.<sup>260</sup> It should also be clear that the unpredictability of signature drone strikes has put local civilian populations in a state of terror, which may not be illegal under IHL, but certainly compromises the stated goal of winning over hearts and minds.<sup>261</sup>

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252. *See id.*

253. *Id.*

254. *Id.*

255. *See generally Other Protected Persons: Humanitarian Workers, Journalists, Medical and Religious Personnel*, ICRC (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/protected-persons/other-protected-persons/overview-other-protected-persons.htm>.

256. *Id.*

257. Kelley, *supra* note 249.

258. LIVING UNDER DRONES, *supra* note 8.

259. *See supra* Part VII.

260. *See supra* Parts V-VII.

261. Letta Tayler, *Losing Yemeni Hearts and Minds*, SALON (May 31, 2012, 8:33 AM), <http://www>.

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We did not know that America existed. We did not know what its geographical location was, how its government operated, what its government was like, until America invaded Iraq and Afghanistan. We do know that Americans supported the Taliban in our area, North Waziristan, to fight off the Soviets. But [now with] the Soviets divided and broken . . . we have become victims of Americans. We don't know how they treat their citizens or anything about them. All we know is that they used to support us, and now they don't. . . . [W]e didn't know how they treated a common man. Now we know how they treat a common man, what they're doing to us.<sup>262</sup>

There are several possibilities that can explain the unpredictability of signature drone strikes.<sup>263</sup> The first is that signature strike protocol is underdeveloped, giving it an improvisatory and therefore unpredictable nature.<sup>264</sup> Drone operators and their supervisors may be left to their own devices to figure out what behaviors merit the lethal use of force, and assessment of such behaviors may vary from operator to operator, or even from shift to shift.<sup>265</sup> The risk, however, is that the improvisatory nature of such protocol becomes codified: drone operators may conclude regularly that driving in convoy, for example, is suspicious.<sup>266</sup> Administration officials may then infer from the fact that drone strikes have often killed military-aged males traveling in convoys that terrorists or combatants are more likely than others to drive in a convoy.<sup>267</sup> As time passes, driving in a convoy may join an official list of behaviors deemed suspicious.<sup>268</sup>

Another possibility, however, is that the protocol itself is designed to target *terrorists* rather than *combatants*, and that there is not enough of an overlap between the two to effectively and consistently distinguish them.<sup>269</sup> The overlap between the day-to-day life of a terrorist and the day-to-day life of a civilian, as

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salon.com/2012/05/31/losing\_yemeni\_hearts\_and\_mind/. See Kristi Keck, *U.S. Must Win Afghan Hearts and Minds, Commander Says*, CNN (Sept. 28, 2009, 5:02 PM), [http://articles.cnn.com/2009-09-28/politics/afghanistan.obama\\_1\\_new-strategy-additional-forces-afghan?\\_s=PM:POLITICS](http://articles.cnn.com/2009-09-28/politics/afghanistan.obama_1_new-strategy-additional-forces-afghan?_s=PM:POLITICS). See also Michael Georgy, *Drones Hurt Pakistan Bid to Win Hearts and Minds*, REUTERS, Feb. 14, 2011, 9:09 AM, <http://www.reuters.com/article/2011/02/14/us-pakistan-usa-drones-idUSTRE71D1DU20110214>.

262. *Victim Stories*, LIVING UNDER DRONES, <http://www.livingunderdrones.org/victim-stories/> (last visited Oct. 29, 2013).

263. See *supra* Part VI.

264. See *supra* Part VI.

265. See *supra* Part VI.

266. See *supra* Part VI.

267. See *supra* Part VI.

268. See *supra* Part VI.

269. See *supra* Part V.

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noted, may be profound given that a drone operator is not privy to cultural context.<sup>270</sup> As a result, civilians are often mistakenly targeted.<sup>271</sup>

This leads us to a final possibility, which is that signature strike protocol conforms in theory with IHL, but in practice is difficult to apply due to cultural misunderstandings.<sup>272</sup> Drone operators and their supervisors may simply not be exposed to enough cultural material to understand which practices are commonplace in a given strike zone, and which are indeed suspicious, out of the ordinary, or consistent with terrorists' behavior.<sup>273</sup>

Whatever the case, it is clear from eye-witness reports and on-the-ground reporting that signature drone strike protocol requires revisiting and fine-tuning, as it may be in violation of several aspects of IHL.<sup>274</sup>

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270. *See supra* Part V.

271. *See supra* Parts V-VIII.

272. *See supra* Part V.

273. *See supra* Part V.

274. *See supra* Parts III-VIII.