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Rule of Law in the Age of the Drone: Requiring Transparency and Disqualifying Clandestine Actors—the CIA and the Joint Special Operations Command

THOMAS MICHAEL McDONNELL *

Since shortly after 9/11, weaponized drones have become part of the fabric of United States policy and practice in countering Islamic terrorist organizations and personnel. Although many diplomats, UN officials, and scholars have criticized the widespread use of this weapon system for “targeted killing,” drones are here to stay. But how much investigation and oversight must a democratic country carry out over such a program, and more critically, how can a country do so effectively when the Executive has handed primary responsibility for drone targeted killing attacks to its clandestine forces, the Central Intelligence Agency and the Joint Special Operations Command?

* B.A., J.D., Fordham University; Professor of Law, Elisabeth Haub School of Law at Pace University. I dedicate this article to my uncle, Alexander A. McDonnell, who bravely fought for his country and, throughout his life, remained dedicated to his art and to his family.

I wish to thank my wife Kathryn Judkins McDonnell for her invaluable support. For reviewing a draft of this article, I thank Professor Susan M. Akram, Boston University School of Law; Professor Mark A. Drumbl, Washington and Lee University School of Law; Professor Vanessa H. Merton, Elisabeth Haub School of Law; Professor John E. Noyes, Roger J. Traynor Professor of Law Emeritus, California Western School of Law; and Professor Jason Parkin, Elisabeth Haub School of Law. For their hard work, diligence, and enthusiasm for this piece, I thank my research assistants, Rocky J. Boussias, Matthew B. Liponis, and Gloria Mejia-Repp. Lastly, I thank my Administrative Assistant Judith A. Jaeger for proofreading this article.

In a confrontation with extremely violent terrorist organizations, the balance between secrecy and transparency is not easily struck. But compiling, in essence, a hit list and telling our secret agents to employ from the safety of a control room a weaponized drone to target individuals on the list demands greater openness. In addition, the line between lawful killing of combatants and extrajudicial taking of life grows increasingly thin, particularly when the state carries out such killings outside of armed conflict zones. A democratic nation and a superpower needs to do more than claim it is in the right and that it complies with international law—that nation must show that it is doing so.

Since they keep their operations and the effects of all their operations secret, the CIA and JSOC cloud the explosive tactic of targeted killing. Consequently, they literally keep the American public and the world community in the dark about deliberate, institutional taking of life. Such a program of secrecy, with little known accountability, leads to speculation about who and why selected persons were killed and to what extent, if any, civilians were included in their number. Furthermore, such secrecy deprives the United States of the opportunity to show it is complying with applicable international humanitarian law and human rights law.

Because terrorist organizations, to a great extent, operate underground in many countries and because they employ guerilla tactics and can inspire lone wolves anywhere on the globe, little chance exists that the U.S. military alone can eliminate the threat of terrorism. The United States and its Western allies need the help of Muslim countries, Muslim governments, and Muslim communities around the world to stop those extremists who would do us harm. Using our secret forces to engage in such killing may, however, undermine the moral authority of the United States, especially in the eyes of Muslims. Such secrecy suggests we have something to hide. Using the CIA and JSOC, on top of the perceived Muslim immigration bans, can only add to distrust of the United States in the Muslim community, whose cooperation is crucial to eliminating the extremists' threat.

Thus, the United States must take away from the CIA and JSOC the responsibility to conduct drone targeted killing attacks and give that authority to more transparent armed service commands.

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INTRODUCTION

Responding to the mega-terrorist attacks of September 11, 2001, the United States invaded two Islamic countries, Iraq and Afghanistan, with the unintended consequence of contributing to the rise of Daesh (or ISIS) and to increased violence in the Middle East and Africa.¹ In addition to conducting air strikes in Iraq and Afghanistan,

¹ See Tom McDonnell, *Questions on President Obama's Strategy Against ISIS*, THE HILL (Sept. 17, 2014, 1:00 PM), <http://thehill.com/blogs/congress-blog/homeland-security/217888-questions-on-president-obamas-strategy-against-isis> (describing the roles of Presidents George W. Bush and Barack Obama in the rise of ISIS).

the United States has done so in at least five other Islamic countries: Pakistan, Syria, Yemen, Somalia, and Libya.² In these strikes, the United States has routinely employed the ultimate counter-terrorist weapon: the missile- and bomb-carrying drone, typically operated via satellite from two continents away.³

Drones have increasingly threatened Daesh leaders and fighters from Libya to Iraq with destruction. Drones have largely deprived Taliban and al Qaeda leaders and members of their remote mountainous havens in Afghanistan and Pakistan.⁴ Drones also have seemingly eliminated American casualties because such attacks are launched from the comfort of a control room in a U.S. military base or a Central Intelligence Agency establishment usually located in the United States, but sometimes abroad.⁵ Since shortly after 9/11, drones have become part of the fabric of United States policy and practice in countering Islamic terrorist organizations and personnel.⁶ Regularly employing drones to target and kill, however, has raised troubling questions of law and morality.⁷

Government officials and other proponents of drones have asserted that few civilians have been killed in drone strikes because

² The American Civil Liberties Union alleged that the United States has also carried out “targeted killings” in the Philippines. Complaint at 2, *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014) (No. 12-1192 (RMC)). See also Reuters, *Niger Defense Minister Asks U.S. to Deploy Armed Drones Against Militants*, N.Y. TIMES (Nov. 2 2017), <https://www.nytimes.com/reuters/2017/11/02/world/africa/02reuters-niger-security-usa.html>.

³ See *MQ-9 Reaper*, U.S. AIR FORCE (Sept. 23, 2015), <http://www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/> [hereinafter *MQ-9 Reaper Factsheet*].

⁴ See Reuters, *Drone Kills ISIS’s Afghanistan, Pakistan Leader*, NEWSWEEK (Aug. 13, 2016, 5:34 PM), <http://www.newsweek.com/drone-kills-isis-afghanistan-pakistan-leader-490184>.

⁵ See Cora Currier, *Everything We Know So Far About Drone Strikes*, PROPUBLICA (Feb. 5, 2013, 11:50 AM), <https://www.propublica.org/article/everything-we-know-so-far-about-drone-strikes>.

⁶ See *Drone Strikes: Pakistan – Which Militant Leaders Have Been Killed in Strikes?*, NEW AMERICA FOUND., <https://www.newamerica.org/in-depth/american-counterterrorism-wars/pakistan/> (last visited Aug. 13, 2017).

⁷ See e.g., Laurie R. Blank, *After “Top Gun”: How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT’L L. 675, 676–77 (2012).

the technologically advanced character of the drone and the ordinance carried make such strikes precise.⁸ Indeed, for a long time, the CIA claimed that no civilians died in drone strikes.⁹ Subsequently, the CIA has claimed that few of those it kills have been civilians.¹⁰

In July 2017, the Obama administration released the total number of casualties caused by drone strikes, with extraordinarily low civilian casualty figures.¹¹ The administration calculated that, in areas outside “war zones like Afghanistan,” drone strikes killed about 2,500 terrorist group members and between 64 and 116 civilians.¹² But the Bureau of Investigative Journalism estimates that drone strikes have caused between 2,511 and 4,020 casualties in the Pakistani tribal areas alone; among these, between 424 and 969 were civilians, including 172 to 207 children.¹³ On President Obama’s

⁸ See Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES (Aug. 11, 2011), http://www.nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=all&_r=0 (quoting CIA Director John O. Brennan claiming, “there hasn’t been a single collateral death because of the exceptional proficiency, precision of the capabilities we’ve been able to develop.”).

⁹ See *id.*

¹⁰ See OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, SUMMARY OF INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES (2016), available at <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF> (reporting that there were 473 drone strikes, leaving “combatant deaths” of 2,372 to 2,581 and “non-combatant deaths” of 64 to 116). See also Charlie Savage & Scott Shane, *U.S. Reveals Death Toll From Airstrikes Outside War Zones*, N.Y. TIMES (July 1, 2016), <https://www.nytimes.com/2016/07/02/world/us-reveals-death-toll-from-airstrikes-outside-of-war-zones.html?action=click&contentCollection=Middle%20East&module=RelatedCoverage®ion=Marginalia&pgtype=article>; Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES (Aug. 11, 2011), http://www.nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=all&_r=0.

¹¹ See Savage & Shane, *supra* note 10.

¹² *Id.*

¹³ *Drone Strikes in Pakistan*, BUREAU OF INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/projects/drone-war/pakistan> (last visited Mar. 14, 2017). See also Jack Serle, *Afghan Airstrikes Killed and Injured Record Number of Civilians in 2016*, BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 6, 2017), <https://www.thebureauinvestigates.com/stories/2017-02-06/afghan-airstrikes-killed-and-injured-record-number-of-civilians-in-2016>. In this piece, the Bureau stated that:

last day in office, the Director of National Intelligence released a report indicating that in 2016, in areas outside of active hostilities, United States' drones killed between 431 and 441 "combatants" and only one "non-combatant" or civilian.¹⁴ The Bureau of Investigative Journalism's findings suggest that this report underestimates non-combatant casualties.¹⁵

In any event, these claims are difficult to verify because the United States' agencies generally charged with carrying out drone targeted killing (and signature strikes¹⁶) keep most, if not all, of the

Air attacks by Afghan and international forces caused a total of 590 civilian casualties in 2016 (250 deaths and 340 people injured), almost double that of 2015. The conflict as a whole killed and injured more than 11,000 civilians in total last year, of which 3,512 were children – the highest number of child casualties recorded by [the U.N. Assistance Mission in Afghanistan] in a single year and a 24% increase from 2015.

Id. On the other hand, the New America Foundation concluded that the Obama administration has conducted more than ten times the number of drone strikes in Pakistan than the Bush-Cheney administration. *See Drone Strikes: Pakistan*, NEW AMERICA FOUND., <https://www.newamerica.org/in-depth/americas-counterterrorism-wars/pakistan/> (last visited Aug. 13, 2017) (finding that the U.S. launched 353 drone strikes in Pakistan under Obama compared with 48 under Bush-Cheney).

¹⁴ OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, SUMMARY OF 2016 INFORMATION REGARDING UNITED STATES COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES, (2017), *available at* <https://www.dni.gov/files/documents/Summary%20of%202016%20Information%20Regarding%20United%20States%20Counterterrorism%20Strikes%20Outside%20Areas%20of%20Active%20Hostilities.pdf> [hereinafter SUMMARY OF U.S. STRIKES]. *See also* Gregory Korte, *Drone Strikes Killed One Civilian in 2016, Obama Administration Says*, USA TODAY (Jan. 20, 2017, 10:49 AM), <https://www.usatoday.com/story/news/politics/2017/01/19/drone-strikes-killed-just-one-civilian-2016-obama-administration-says/96810780/>.

¹⁵ *See* Jack Serle & Jessica Purkiss, *Drone Wars: The Full Data*, BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 1, 2017), <https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data> (reporting U.S. drone strikes in Afghanistan, Pakistan, Somalia, and Yemen).

¹⁶ Signature strikes refer to "those aimed at groups of individuals 'based solely on their intelligence "signatures"—patterns of behavior that are detected through signals intercepts, human sources and aerial surveillance . . . that indicate the presence of an important operative or a plot against U.S. interests.'" Gregory S. McNeal, *Targeting Killing and Accountability*, 102 GEO. L.J. 681, 701 n.93 (2014) (quoting Greg Miller, *White House Approves Broader Yemen Drone Cam-*

information about these attacks secret.¹⁷ Instead of giving the regular armed forces primary responsibility for carrying out drone targeted killing and signature strikes, the Bush and Obama administrations assigned most of that authority to our espionage agency, the CIA, and to the clandestine Joint Special Operations Command (JSOC).¹⁸ The Trump administration is reportedly expanding the CIA's authority over drone strikes¹⁹ and may expand JSOC's, as well.²⁰

By placing this awesome power in the hands of our secret forces, the United States government makes it extraordinarily difficult for independent journalists and non-governmental organizations (NGOs) to confirm how the Executive branch is carrying out these “targeted killing” operations and “signature strikes,” and whether it

paign, WASH. POST (Apr. 25, 2012), https://www.washingtonpost.com/world/national-security/white-house-approves-broader-yemen-drone-campaign/2012/04/25/gIQ82U6hT_story.html?utm_term=.b582e76c276f).

¹⁷ See Savage & Shane, *supra* note 10.

¹⁸ See Eric Schmitt & Matthew Rosenberg, *C.I.A. Wants Authority to Conduct Drone Strikes in Afghanistan for the First Time*, N.Y. TIMES (Sept. 15, 2017) (“The C.I.A. is pushing for expanded powers to carry out covert drone strikes in Afghanistan and other active war zones, a proposal that the White House appears to favor despite the misgivings of some at the Pentagon . . .”), <https://www.nytimes.com/2017/09/15/us/politics/cia-drone-strike-authority-afghanistan.html>. See also McNeal, *supra* note 16, at 693–94; Editorial, *The C.I.A. and Drone Strikes*, N.Y. TIMES: SUNDAY REVIEW (Aug. 13, 2011), <http://www.nytimes.com/2011/08/14/opinion/sunday/the-cia-and-drone-strikes.html>.

¹⁹ Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html>. See Gordon Lubold & Shane Harris, *Trump Broadens CIA Powers, Allows Deadly Drone Strikes*, WALL ST. J. (Mar. 13, 2017, 6:32 PM), <https://www.wsj.com/articles/trump-gave-cia-power-to-launch-drone-strikes-1489444374>.

²⁰ See Charlie Savage & Eric Schmitt, *Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules*, N.Y. TIMES (Mar. 12, 2017), https://www.nytimes.com/2017/03/12/us/politics/trump-loosen-counterterrorism-rules.html?_r=1 (declaring three provinces of Yemen “to be an ‘area of active hostilities’ where looser battlefield rules apply,” thus permitting a Special Operations raid leading to several civilian deaths). See also Charlie Savage & Eric Schmitt, *Trump Eases Combat Rules in Somalia Intended to Protect Civilians*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html> (declaring Somalia an “area of active hostilities” for the same purpose).

is complying with domestic and international law.²¹ Consequently, employing secret governmental agencies, primarily the CIA and JSOC, to carry out these controversial attacks makes it far more difficult for the United States to demonstrate that it has adhered to international law.²² This failure likely harms our world reputation and discourages allies from helping us in the struggle against terrorism.²³

Furthermore, most of the targeted killing drone attacks have been carried out in areas to which U.S. forces, allies, NGOs, and independent media have little, if any, access, thus making verification of civilian deaths difficult.²⁴ For example, most of the drone attacks in Pakistan have occurred in its mountainous tribal areas²⁵

²¹ “Executive unilateralism legitimates secrecy, and secrecy promotes effective decisionmaking in the public interest only in exceptional circumstances. An administration’s conspicuous availability to have its performance subjected to public scrutiny will improve both the quality of that performance and public confidence in the executive branch.” Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Analysis*, 5 J. NAT’L SEC. L. & POL’Y 507, 519 (2012). The National Security Agency apparently has worked closely with the CIA in identifying individuals for weaponized drones to target. See Greg Miller, Julie Tate, & Barton Gellman, *Documents Reveal NSA’s Extensive Involvement in Targeted Killing Program*, WASH. POST (Oct. 16, 2013), https://www.washingtonpost.com/world/national-security/documents-reveal-nsas-extensive-involvement-in-targeted-killing-program/2013/10/16/29775278-3674-11e3-8a0e-4e2cf80831fc_story.html?utm_term=.019a6feb24e9.

²² See Alexandra H. Perina, *Black Holes and Open Secrets: The Impact of Covert Action on International Law*, 53 COLUM. J. TRANSNAT’L L. 507, 564–65, 569 (2015).

²³ See Richard Wike, *Europe Still Has Love for America*, POLITICO (July 10, 2016, 9:27 AM), <http://www.politico.eu/article/europe-still-has-love-for-america-barack-obama-brexit-nato/> (noting Europeans generally approved President Obama’s policies, but still widely criticized him for drone strikes). See also Bruce Drake, *Report Questions Drone Use, Widely Unpopular Globally, But Not in the U.S.*, PEW RESEARCH CTR. (Oct. 23, 2013), <http://www.pewresearch.org/fact-tank/2013/10/23/report-questions-drone-use-widely-unpopular-globally-but-not-in-the-u-s/>.

²⁴ See Shane, *supra* note 8 (quoting a Pakistani lawyer, who is suing the CIA on behalf of civilians who claim they have lost family members in the strikes, describing Waziristan, where most strikes occur, as “a black hole of information”).

²⁵ See Mark Mazzetti, *A Secret Deal on Drones, Sealed in Blood*, N.Y. TIMES (Apr. 6, 2013), <http://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html> (describing the first “targeted killing” drone strike in Pakistan in 2004). Pakistan is situated in the western part of the Indian subcontinent with Afghanistan and Iran to the west, India to the east, and

and those against Daesh occur in ISIS-controlled areas of Iraq, Syria, or Libya from which foreign reporters are generally excluded.²⁶ So, journalists from reliable media outlets rarely have the opportunity to examine first hand the claims of zero or extraordinarily low collateral damage made by CIA, JSOC, or other Executive officials. Reporters state that they have had to rely on Pakistani stringers and U.S. government sources to confirm casualty figures and the status of those killed or injured in drone attacks occurring in the tribal areas.²⁷ The reporters indicate that the stringers themselves in writing their stories may feel coerced by the Taliban and others.²⁸ In Daesh-controlled areas of Iraq and Syria, the situation has been far worse. There has been virtually no independent media access to the Iraqi, Syrian, or Libyan territories held by Daesh.²⁹ Similarly, independent humanitarian bodies, like the International Committee of the Red Cross (ICRC), have not been granted access to these territories.³⁰

the Arabian Sea to its south. The north and northwestern highlands of Pakistan contain the Karakoram Range, which includes the world's second highest mountain—K2 with an elevation of 28,251 feet (8,611 meters). Amanda Briney, *Geography of Pakistan*, THOUGHTCO (Mar. 3, 2017), <https://www.thoughtco.com/geography-of-pakistan-1435275>.

²⁶ Telephone Interview by Rocky Boussias with Declan Walsh, Journalist, New York Times (June 18, 2013) (It is “almost impossible [for western journalists] to visit drone strike sites in Waziristan.”) [hereinafter Interview with Declan Walsh]. Most Pakistani journalists do not have access either, and the Taliban typically close off the drone strike sites. *Id.* U.S. intelligence officials base their statements on hearsay. Telephone Interview by Rocky Boussias with Chris Brumitt, Journalist, Associated Press (Apr. 11, 2013) [hereinafter Interview with Chris Brumitt]. There is “a lot of uncertainty.” *Id.*

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See, e.g.,* Adam Withnall, *ISIS: The First Western Journalist Ever to be Given Access to the ‘Islamic State’ Has Just Returned*, INDEPENDENT (Dec. 21, 2014, 10:00 AM), <http://www.independent.co.uk/news/world/middle-east/inside-isis-the-first-western-journalist-ever-given-access-to-the-islamic-state-has-just-returned-9938438.html>. ISIS, however, has just lost almost all of its territory in Iraq and Syria. Charlie Winter, *Is Islamic State losing control of its ‘virtual caliphate’?*, BBC NEWS (Nov. 9, 2017), <http://www.bbc.com/news/world-middle-east-41845285>. *See also* Syria War: Army Retakes Last IS Urban Stronghold, BBC NEWS (Nov. 9, 2017), <http://www.bbc.com/news/world-middle-east-41918913>.

³⁰ *See* Reuters, *Red Cross Demands Access to ISIS-Held Palestinian Refugee Camp in Syria*, JERUSALEM POST (Apr. 9, 2015, 12:23 PM), <http://www>.

The powerful nature of the ordnance typically used by Predator and Reaper drones raises doubt about the government's claim of zero or very low civilian casualties.³¹ The Hellfire missile, the principal weapon of the Predator drone, was initially designed to destroy a tank and can certainly destroy a house, killing everyone inside.³² Typically, more than a single Hellfire missile is fired at a target, a tactic known as a "double tap," thus making the standard drone

jpost.com/Middle-East/Red-Cross-demands-access-to-ISIS-held-Palestinian-refugee-camp-in-Syria-396652. See also Peter Yeung, *UK Air Strikes Kill 1,000 Isis Fighters in Iraq and Syria but No Civilians, Officials Claim*, INDEPENDENT (Apr. 30, 2016, 3:45 PM), <http://www.independent.co.uk/news/uk/home-news/iraq-syria-air-strikes-civilians-casualties-killed-isis-daesh-islamic-state-air-wars-a7008276.html> (noting "[t]here is a real issue with the credibility" of UK statements denying civilian casualties in its anti-terror conflict against ISIS and emphasizing the need for the government "to be honest about the reality of the situation," in a context where "Amnesty International called for a 'comprehensive' investigation into the impact of UK air strikes on civilians"); Currier, *supra* note 5 (noting that estimates on civilian casualties, for instance, "are largely compiled by interpreting news reports relying on anonymous officials or accounts from local media, whose credibility may vary"); *Children of the Taliban: Synopsis and Video*, PBS: FRONTLINE (2009), http://www.pbs.org/frontlineworld/stories/pakistan802/video/video_index.html (noting that, while the Taliban openly invited journalists "to the heart of the tribal areas for a show of strength," a woman journalist, Obaid-Chinoy, was told she was not welcome and that she would be killed if she went).

³¹ Some arms manufacturers have been developing a less powerful missile than the Hellfire, but to date no published report has been found indicating that a less powerful missile has been employed either by the Reaper or the Predator drone. See, e.g., IHS, *Strike Out: Unmanned Systems Set for Wider Attack Role*, JANES INT'L DEF. REV., http://www.janes360.com/images/assets/146/53146/unmanned_systems_set_for_wider_attack_role.pdf (last visited Mar. 16, 2017) (quoting a weapon's manufacturer noting "trends moving towards precision-guided low-collateral damage weapons that can be carried on a variety of manned and unmanned platforms"). See also SSW: SMALL SMART WEAPON, LOCKHEED MARTIN (2008), <https://s3.amazonaws.com/a.nnotate/docs/2010-08-02/Q9xUyR25ncmC/martin.pdf> ("The Small Smart Weapon (SSW) is a lightweight, compact munition that provides the warfighter with low cost lethality against a broad target set."). But see Kris Osborn, *U.S. Revs Up HELLFIRE Missiles to Attack ISIS*, SCOUT (Apr. 6, 2016, 1:04 PM), <http://scout.com/military/warrior/Article/Pentagon-Revs-Up-HELLFIRE-Missiles-to-Attack-ISIS-101453686> (noting that the Hellfire is the chosen weapon of Reaper drones).

³² See Osborn, *supra* note 31.

strike doubly deadly.³³ The Reaper drone typically carries four Hellfire missiles, as well as two laser-guided 500-pound bombs.³⁴ These are all precision-guided weapons and, for that reason, limit civilian casualties far more than unguided gravity bombs or cluster bombs.³⁵ But the enormous explosive force of the Hellfire missile, the 500-pound bomb, or both, significantly increases the risk of substantial, if not huge, numbers of civilian casualties considering, for example, that fighters in these terrorist organizations often live alongside innocent civilians and their communities.³⁶

International humanitarian law (IHL) applies only in armed conflict. If the largely ungoverned Pakistan tribal areas are considered part of the armed conflict in Afghanistan, if a target is a legitimate military objective, and if necessity and proportionality are met, the United States' use of drones there may satisfy international humanitarian law.³⁷ On the other hand, international human rights law would never permit using such weapons to stop a dangerous offender who is imminently threatening another person in the United

³³ See Ayaz A. Khan, *Revenge Attacks*, PAKISTAN OBSERVER, Feb. 10, 2010, 2010 WLNR 27028644 (noting that in fifty-one Predator attacks in 2009, 102 Hellfire missiles were launched and that in January 2010, "22 drones fired 44 Hellfire missiles . . .").

³⁴ See *MQ-9 Reaper Factsheet*, *supra* note 3. The Reaper also has a "synthetic aperture radar to enable future GBU-38 Joint Direct Attack Munitions targeting." *Id.*

³⁵ See, e.g., Thomas Michael McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 41–42 (2002).

³⁶ See Shane, *supra* note 8.

³⁷ But see Chris Woods & Christina Lamb, *CIA Tactics in Pakistan Include Targeting Rescuers and Funerals*, BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 4, 2012), <https://www.thebureauinvestigates.com/stories/2012-02-04/cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals> (finding that the "CIA's drone campaign in Pakistan has killed dozens of civilians who had gone to help rescue victims or were attending funerals"). This was accomplished in the first example by firing a second missile, typically twenty minutes after the first, killing or wounding first responders. Telephone Interview by the author with Chris Woods, Journalist, Guardian (July 15, 2013). If these allegations are substantiated, it could be considered an intentional attack on civilians and possibly a war crime. See also Thomas Michael 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, 273–75 (2012) [hereinafter McDonnell, *Sow What You Reap?*].

States or anywhere else not subject to armed conflict.³⁸ Furthermore, the broad use of such weapons, even when legal, may nonetheless inspire outrage, prove counter-productive, and erode the moral authority of the United States.³⁹

Aside from noting the power of this ordnance, determining who is a combatant (and thus generally targetable in armed conflict) and who is an ordinary civilian (and thus not targetable) is a challenging, technical legal question.⁴⁰ A reporter not trained in IHL may easily make a good faith error in characterizing an individual as a combatant (or a civilian directly participating in hostilities), when, in law, that individual might not be under either status.⁴¹ For example, one who is simply a financial supporter (say, a drug dealer who backs

³⁸ Drone attacks do not produce the degree of casualties of innocent civilians on the order of the firebombing of Tokyo in World War II, where estimates suggest that over 80,000 innocent civilians were killed. See THOMAS MICHAEL McDONNELL, *THE UNITED STATES, INTERNATIONAL LAW, AND THE STRUGGLE AGAINST TERRORISM* 139 (2010) [hereinafter McDONNELL, *STRUGGLE AGAINST TERRORISM*] (citing CONRAD C. CRANE, *BOMBS, CITIES, AND CIVILIANS: AMERICAN AIRPOWER STRATEGY IN WORLD WAR II* 132 (1993)). We are examining the administration's claim that few civilians have died and the related claim that the number of civilian casualties falls well within the collateral damage or proportionality rule governing the conduct of hostilities under international humanitarian law (IHL). The weaponized drone attacks produce far fewer civilian casualties than in World War II, but more than would be permitted under international human rights law.

³⁹ See McDonnell, *Sow What You Reap?*, *supra* note 37, at 305–10.

⁴⁰ See *Rule 1. The Principle of Distinction Between Civilians and Combatants*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (last visited Aug. 16, 2017).

⁴¹ IHL never uses the term “militant.” It is a term journalists employ. Under IHL, an individual is either “a combatant or a civilian.” An individual may be targeted by the other side in an armed conflict if the individual is a combatant. Civilians may not be targeted unless they “take a direct part in hostilities.” *Id.* As a non-uniformed force, al Qaeda, Taliban, and ISIS fighters are often characterized either as unlawful combatants or as civilians directly participating in hostilities. See *United States v. Hausa*, 12 Cr. 0134 (BMC), 2017 WL 2788574, at *6 n.6 (E.D.N.Y. June 27, 2017) (noting that al Qaeda “has no leader responsible for its fighters, wears no recognizable uniform or emblem . . .”). *United States v. Khadr*, 717 F. Supp. 2d 1215, 1226 (C.M.C.R. 2007) (“The United States previously determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.”). The better description for such individuals is “unprivileged combatants.” ICRC, *Combatants and POWS*, <https://casebook.icrc.org/law/combatants-and-pows> (last visited Oct. 20, 2017).

the Taliban⁴²), or one who routinely supplies general, strategic intelligence (rather than tactical intelligence) to a terrorist organization, is usually not considered a combatant.⁴³ Thus, making this distinction is sometimes counter-intuitive, raising the question whether reporters and stringers, who make these observations in highly dangerous circumstances after the fact, are accurately reporting the status of those killed or injured.

President Barack Obama's May 23, 2013, address promising to virtually eliminate civilian casualties in weaponized drone strikes was welcome.⁴⁴ His administration, however, carried out more than ten times the number of drone attacks than the Bush-Cheney administration.⁴⁵ Aside from vastly increasing the number of drone strikes, the Obama administration established a dangerous precedent for future presidents by cementing the CIA's and JSOC's roles as the major players in carrying out drone attacks, with the inherent institutional blind spots possessed by these two organizations.⁴⁶

⁴² See 'Capture or Kill': Germany Gave Names to Secret Taliban Hit List, SPIEGEL ONLINE (Aug. 2, 2010, 11:50 AM), <http://www.spiegel.de/international/germany/capture-or-kill-germany-gave-names-to-secret-taliban-hit-list-a-709625.html> (noting, relying on WikiLeaks, that Taliban drug dealers were on the "kill list" NATO prepared).

⁴³ See *infra* notes 154–92 and accompanying text.

⁴⁴ The President stated, "[T]here must be near-certainty that no civilians will be killed or injured – the highest standard we can set." Associated Press, *Obama Defends Drone Strikes But Says No Cure-All*, PBS NEWSHOUR: THE RUNDOWN (May 23, 2013, 4:41 PM), <http://www.pbs.org/newshour/rundown/obama-defends-drone-strikes-but-says-no-cure-all/>. President Trump is loosening Obama's reins on collateral damage and will permit greater civilian casualties. See Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, N.Y. TIMES (Oct. 28, 2017), <https://www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html> ("[W]hile the Trump administration decided to keep an Obama-era requirement of 'near certainty' that no civilians would be killed, it reduced the required level of confidence that the intended target was present in a strike zone from 'near certainty' to 'reasonable certainty,' one official said—further lowering constraints on attacks."). Under the Trump administration, the number of civilian casualties has already significantly increased. See *infra* text accompanying note 281.

⁴⁵ See Jessica Purkiss & Jack Serle, *Obama's Covert Drone War in Numbers: Ten Times More Strikes than Bush*, BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 17, 2017), <https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush>.

⁴⁶ See Miller, *supra* note 16.

Part I of this Article discusses attack drones and their capabilities, with emphasis on the destructive ordnance they typically carry. Part II analyzes the law governing attacks on combatants and civilians and discusses applicable international human rights law and humanitarian law. Part III demonstrates why neither the CIA nor JSOC should be granted the responsibility of carrying out drone signature strikes or targeted killings of alleged Islamic terrorists.

I. UNITED STATES WEAPONIZED DRONES AND THEIR TYPICAL ORDNANCE

Since 2002, the United States has deployed weaponized drones against suspected Islamic terrorists in Iraq, Afghanistan, Pakistan, Yemen, Somalia, Syria, Libya, and the Philippines.⁴⁷ The United States has also employed surveillance drones in Bosnia and Kosovo during the 1999 war against Serbia⁴⁸ and in the border areas of the United States.⁴⁹ This Article focuses solely on the deployment of weaponized drones. The main weaponized drones or Unmanned Aerial Vehicles (UAVs) that the United States has deployed in these areas are the MQ-1 Predator and the MQ-9 Predator B, the latter commonly known as the Reaper.⁵⁰ The Predator and Reaper drones

⁴⁷ See generally Adam Gallagher, *Obama's Dangerous Drone Policy*, AM. PROSPECT (Sept. 29, 2016), <http://prospect.org/article/obama%E2%80%99s-dangerous-drone-policy>; Akbar Ahmed & Frankie Martin, *Deadly Drone Strike on Muslims in the Southern Phillipines*, BROOKINGS (March 5, 2012), <https://www.brookings.edu/opinions/deadly-drone-strike-on-muslims-in-the-southern-philippines/>.

⁴⁸ See Elizabeth Becker, *Crisis in the Balkans: The Drones; They're Unmanned, They Fly Low, and They Get the Picture*, N.Y. TIMES (June 3, 1999), <http://www.nytimes.com/1999/06/03/world/crisis-balkans-drones-they-re-unmanned-they-fly-low-they-get-picture.html?mcubz=3>.

⁴⁹ See Conor Friedersdorf, *The Rapid Rise of Federal Surveillance Drones Over America*, ATLANTIC (Mar. 10, 2016), <https://www.theatlantic.com/politics/archive/2016/03/the-rapid-rise-of-federal-surveillance-drones-over-america/473136/>.

⁵⁰ See Forecast Int'l, *MQ-1 Predator / MQ-9 Reaper*, AEROWEB, <http://www.fi-aeroweb.com/Defense/MQ-1-Predator-MQ-9-Reaper.html> (last visited Sept. 14, 2017). The Air Force has announced that it plans to retire the MQ-1 Predator drone next year. See Christian Clausen, *Air Force to Retire MQ-1 Predator Drone, Transition to MQ-9 Reaper*, U.S. DEP'T OF DEFENSE (Feb. 27, 2017), <https://www.defense.gov/News/Article/Article/1095612/air-force-to-retire-mq-1-predator-drone-transition-to-mq-9-reaper/>. There is a third weaponized drone in use by the U.S., the MQ-1C Grey Eagle. See JEREMIAH GERTLER, CONG.

are about the size of a general aviation aircraft with a fifty-five foot and sixty-six foot wingspan, respectively.⁵¹ Each can remain in flight from fourteen to forty hours, and possibly even more, without refueling.⁵² They are operated remotely.⁵³ Employing a ground control station for takeoff and landing, the Predator and Reaper drones can be operated in flight from two continents away, using a satellite uplink.⁵⁴

Because of their long endurance (i.e., the amount of time drones can remain airborne without refueling), relatively slow speed, and highly accurate sensors and cameras, Predator and Reaper drones

RESEARCH SERV., R42136, U.S. UNMANNED AERIAL SYSTEMS 34 (2012), <https://fas.org/sgp/crs/natsec/R42136.pdf>. Used by the U.S. Army, the Grey Eagle is described as a somewhat larger and heavier Predator drone. *Id.* The Pentagon is reportedly testing and developing many other types of drones as well. *See, e.g.*, Brit McCandless, *Capturing the Swarm*, CBS NEWS: 60 MINUTES OVERTIME (Jan. 8, 2017, 6:30 PM), <https://www.cbsnews.com/news/60-minutes-capturing-the-perdix-drone-swarm/> (footage of a swarm of autonomous Perdix drones launched from fighter jets).

⁵¹ *MQ-1B Predator*, U.S. AIR FORCE (Sept. 23, 2015), <http://www.af.mil/About-Us/Fact-Sheets/Display/Article/104469/mq-1b-predator/>; *MQ-9 Reaper*, U.S. AIR FORCE (Sept. 23, 2015), <http://www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/>. *See also* Robert Valdes, *How the Predator UAV Works*, HOWSTUFFWORKS.COM (Apr. 1, 2004), <http://science.howstuffworks.com/predator.htm/printable> [hereinafter *How the Predator UAV Works*].

⁵² *See* Mark Pomerleau, *Reaper's Retrofits Extend Its Range and Endurance*, DEFENSE SYSTEMS (Mar. 2, 2016), <https://defensesystems.com/articles/2016/03/02/reaper-retrofits-extend-range-and-endurance.aspx>. *See also* Bill Carey, *General Atomics Flies Extended-Range 'Long Wing' Reaper*, AINONLINE (Feb. 25, 2016, 2:23 PM), <http://www.ainonline.com/aviation-news/defense/2016-02-25/general-atomics-flies-extended-range-long-wing-reaper>.

⁵³ *See How the Predator UAV Works, supra* note 51.

⁵⁴ *Id.* The proposed total cost of the drone program for fiscal year 2017 is approximately \$4.6 billion. *See* DAN GETTINGER, CTR. FOR THE STUDY OF THE DRONE AT BARD COLLEGE, DRONE SPENDING IN THE FISCAL YEAR 2017 DEFENSE BUDGET 1 (2016), http://dronecenter.bard.edu/files/2016/03/DroneSpendingFy17_CSD_3-1.pdf [hereinafter FY 2017 DRONE SPENDING]. The Air Force plans to spend \$906.1 million on the MQ-9 Reaper, allocating \$575.6 million towards purchasing twenty-four new aircraft and \$254 million towards modifications and upgrades. *See* FY 2017 DRONE SPENDING, *supra* at 3.

can loiter over a potential target for hours, surveilling it deliberately.⁵⁵ Furthermore, both the Predator and the Reaper drones employ only Precision-Guided Munitions (PGMs).⁵⁶ Unlike unguided gravity bombs, which often miss their targets by a wide margin, PGMs generally (but not always) strike their target.⁵⁷

The ordnance typically carried by the Predator and Reaper drones is tremendously powerful. The Predator drone is equipped with two Hellfire AGM-114 (“air-to-ground”) missiles.⁵⁸ Far more heavily armed than the Predator, the Reaper drone can carry much more ordnance,⁵⁹ but typically carries four Hellfire missiles and two GBU-12 Paveway II laser-guided 500-pound bombs.⁶⁰ The following two sections discuss in more detail these deadly armaments.

A. *The Hellfire Missile—AGM-114*

The Hellfire missile was developed in the 1970s and 1980s as an “anti-armour and precision attack weapon that would be effective against tanks, bunkers and structures.”⁶¹ After the 1991 Gulf War, namely, Operation Desert Storm, new “variants” of the Hellfire mis-

⁵⁵ See *How the Predator UAV Works*, *supra* note 51; *MQ-9 Reaper Factsheet*, *supra* note 3.

⁵⁶ See Robert Farley, *America’s Ultimate Weapon of War: Precision-Guided Munitions*, NATIONAL INTEREST (Oct. 2, 2014), <http://nationalinterest.org/feature/americas-ultimate-weapon-war-precision-guided-munitions-11389?page=2> (noting that PGMs have “enabled the long-running drone campaigns that the United States has conducted in Somalia, Yemen and Pakistan”).

⁵⁷ Compare *id.* (“[PGMs] helped the United States military destroy an Afghan government in a few months, with minimal footprint.”), with David Axe, *Russia Is Using Old, Dumb Bombs, Making Syria War Even More Brutal*, DAILY BEAST (Oct. 2, 2015, 1:00 AM), <https://www.thedailybeast.com/russia-is-using-old-dumb-bombs-making-syria-air-war-even-more-brutal> (“Instead of dropping precision-guided munitions like the U.S.-led coalition does, the Russians are joining the Syrian air force in deploying unguided ‘dumb’ bombs . . . which are much more likely to kill bystanders.”).

⁵⁸ See *MQ-1B Predator*, U.S. AIR FORCE (Sept. 23, 2015), <http://www.af.mil/About-Us/Fact-Sheets/Display/Article/104469/mq-1b-predator/>.

⁵⁹ See *MQ-9 Reaper Factsheet*, *supra* note 3.

⁶⁰ See *id.*

⁶¹ *AGM-114 HELLFIRE*, JANE’S (Oct. 13, 2000), <http://archive.li/zMbdL>. The AGM-114 Hellfire, an acronym for “Heliborne, Laser, Fire and Forget,” contains a modular missile system. *Id.*

sile, including the AGM-114K (Hellfire II), were designed to overcome perceived shortcomings of the missile during that conflict.⁶² Among other things, the variants sharpened the missile's laser acquisition capacity, increased its speed, and made its explosive charge more powerful.⁶³

Hellfire variants have been continually developed. Another Hellfire II variant, the AGM-114K, was produced in 1994, "with a blast fragmentation warhead for use against more general battlefield and maritime targets."⁶⁴ After 9/11, the Thermobaric Hellfire, AGM-114N, was developed to penetrate caves and bunkers in Afghanistan.⁶⁵ The Army commissioned a Hellfire, designated as AGM-114L Longbow, which uses radar, rather than laser guidance, to reach its target, so as to be more accurate at night and in adverse weather conditions.⁶⁶ In 2009, aerospace manufacturer Lockheed Martin announced its first test of an enhanced, multi-functional Hellfire missile that would become the sole production variant and

⁶² See *id.*

⁶³ See Logan Nye, *Why the Hellfire is one of America's Favorite Missiles*, BUSINESS INSIDER (June 17, 2017, 1:30 PM), <http://www.businessinsider.com/why-the-hellfire-is-one-of-americas-favorite-missiles-2017-6>. The improvements in the Hellfire II are described as follows:

AGM-114K incorporates improvements over the AGM-114F including solving the laser obscurant/backscatter problem. Other improvements incorporated are[:] improved target re-acquisition capability, a digital autopilot to increase launch speeds from 300 knots to M1.1 and produce a steeper terminal dive onto armoured targets, a more powerful precursor warhead, re-programmability to adapt to changing threats and mission requirements, improved electro-optical countermeasures and regaining the original Hellfire missile length and weight.

AGM-114 HELLFIRE, *supra* note 61.

⁶⁴ See *AGM-114 HELLFIRE*, *supra* note 61.

⁶⁵ See *AGM-114N Metal Augmented Charge (MAC) Thermobaric Hellfire*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/systems/munitions/agm-114n.htm> (last modified Oct. 22, 2013) (The AGM-114N is fitted with a thermobaric warhead officially described as the Metal Augmented Charge (MAC). This Hellfire version was developed for the Marine Corps as a speedy advanced concept technology demonstration program following the September 11, 2001 terrorist attacks on the United States.)

⁶⁶ "In 1992, the US [sic] Army selected a millimetric-wave seeker version of the Hellfire 2 missile for its Longbow helicopter programme and this has the designator AGM-114L. The requirement was to give the Hellfire missile system an all-weather and day/night capability." *AGM-114 HELLFIRE*, *supra* note 61.

missile of choice for the U.S. Army.⁶⁷ The AGM-114R has a multi-purpose warhead to defeat a wide range of targets, including bunker structures, small boats, and personnel both out in the open and hidden behind masonry structures.⁶⁸ The Hellfire AGM-114R has a special “three-axis inertial measurement” guidance system that permits it to seek out and keep an eagle eye on its target.⁶⁹

The Hellfire missile is a precision-guided munition, meaning “[i]t requires a coded laser beam to be placed [or painted] on the target, and the missile will actually follow or ‘ride’ the properly coded beam to the point of impact.”⁷⁰ The laser beam can emanate

⁶⁷ Press Release, Lockheed Martin Corp., Successful First Flight for Lockheed Martin’s New HELLFIRE II Missile Design (Oct. 26, 2009), <http://www.lockheedmartin.com/us/news/press-releases/2009/october/SuccessfulFirstFlightforL.html>. See also John Keller, *Lockheed Martin to Build More AGM-114R Laser-Guided Hellfire Missiles in \$424.3 Million Order*, MILITARY & AEROSPACE ELECS. (Mar. 6, 2017), <http://www.militaryaerospace.com/articles/2017/03/hellfire-missiles-agm-114r-laser-guided.html>.

⁶⁸ See John Keller, *Lockheed Martin to Build More AGM-114R Laser-Guided Hellfire Missiles in \$424.3 Million Order*, MILITARY & AEROSPACE ELECS. (Mar. 6, 2017), <http://www.militaryaerospace.com/articles/2017/03/hellfire-missiles-agm-114r-laser-guided.html>; *US to Deploy Deadlier ‘Hellfire Romeo’ Precision-Strike Missiles in War Against Terrorism*, ANDHRANEWS.NET (Oct. 16, 2011), <http://www.andhranews.net/Intl/2011/US-deploy-deadlier-Hellfire-Romeo-precision-strike-17228.htm> (“The ‘R’ version’s warhead combines the shaped-charge anti-armour capability of the initial anti-tank version with the enhanced effects of fragmentation, blast fragmentation and heat blast overpressure built into later models . . . The new version also will be able to be fired at ‘off-bore’ targets for the first time, meaning the aircraft or helicopter doesn’t have to be pointing at the target to acquire it . . .”). See also OFFICE OF THE DIR., OPERATIONAL TEST AND EVALUATION, FY 2015 ANNUAL REPORT 115 (2016), <http://www.dote.osd.mil/pub/reports/FY2015/pdf/other/2015DOTEAnnualReport.pdf> (“The Hellfire Romeo missile variant[] [i]s an air-to-surface missile intended to be launched from Air Force UAV platforms. It uses a new warhead and a semi-active laser seeker to home-in on its target.”).

⁶⁹ “These missiles can seek out their targets autonomously or with designation from remote laser designators . . . enabl[ing] it to attack targets from the side and behind.” Keller, *supra* note 68.

⁷⁰ Adam W. Lange, *Hellfire: Getting the Most from a Lethal Missile System*, ARMOR 25, 26 (Jan.–Feb. 1998), <http://www.globalsecurity.org/military/library/news/1998/01/1helfire.pdf>. “Thus, the missile never actually acquires the target in question, but rather acquires the laser beam.” *Id.* It has a maximum effective range of eight kilometers. *Id.* Captain Lange explains how the laser seeker works:

Located in the nose of the missile, the laser seeker is programmed from inside the aircraft to receive a specific laser

from the Predator or Reaper drone itself (autonomous engagement) or from other sources on the ground or in the air (remote engagement).⁷¹ The Hellfire missile system is described as “an extremely lethal and effective point weapon system, capable of precision accuracy and destruction when properly employed.”⁷²

Some have questioned the claim that the Hellfire missile almost always hits its target with pinpoint accuracy.⁷³ According to the Pentagon, the weapon has a Circular Error Probable (CEP) of five meters (16.4 feet).⁷⁴ This means that fifty percent of the Hellfire missiles will strike within a five-meter radius circle, while the other fifty

code. When the missile recognizes this code being emitted from a designator and reflected off of the target, it ‘locks on’ to this emission. After lock-on, the seeker then sends this information to the guidance section which directs the missile to the target.

Id.

⁷¹ *See id.* at 27.

⁷² *Id.* at 25. Predator and Reaper drones typically use the AGM-114K (Hellfire II) missile described as follows:

This missile has the highest probability of re-acquiring a target if the missile flies into low clouds. It is the only missile produced with an internal guidance algorithm to account for this condition by design. If the missile loses laser lock after initial acquisition, the seeker section will continue to point at the target. Instead of continuing to climb and fly a normal profile, the missile is programmed to turn and point in the same direction as the seeker. This causes the missile to fly down (out of the clouds) toward the target and maximize the probability of re-acquiring the target.

Id. at 26.

⁷³ *See, e.g.,* Chris Cole, *Are We Being Misguided About Precision Strike?*, DRONE WARS UK (Apr. 12, 2015), <https://dronewars.net/2015/12/04/are-we-being-misguided-about-precision-strike/> (noting “[t]he constant presentation of air strikes as ‘precise’ and ‘pinpoint accurate’ has serious implications for our understanding of the actual impact of war” and arguing that this “may in fact lead to an increase in civilian casualties”). *See also* Matthew J. Nasuti, *Hellfire Missile Accuracy Problems Uncovered in Pentagon Data*, KABULPRESS.ORG (Nov. 27, 2011), <https://www.kabulpress.tv/article89242.html>.

⁷⁴ *See* Nasuti, *supra* note 73. The United States Department of Defense defines CEP as “the radius of a circle within which half of a missile’s projectiles are expected to fall.” JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 76 (as amended through Jan. 10, 2000). *See also* Christopher B. Puckett, Comment, *In this Era of “Smart Weapons,” Is a State Under an International Legal Obligation to Use Precision-Guided Technology in Armed Conflict?*, 18 EMORY INT’L L. REV. 645,

percent will strike outside that circle.⁷⁵ Furthermore, laser-guided missiles do not operate accurately in adverse weather conditions because “[a]ny obscuration that prevents target illumination [painting the target], like weather, will result in miss distance and a less effective weapon.”⁷⁶ Similarly, “[c]oncrete dust and dirt from previous explosions in the area make use of the Hellfire difficult.”⁷⁷ The Federation of American Scientists explains in more detail how weather conditions may affect accuracy of the Hellfire missile:

The effects of smoke, dust, and debris can impair the use of laser-guided munitions. The reflective scattering of laser light by smoke particles may present false targets. Rain, snow, fog, and low clouds can prevent effective use of laser-guided munitions. Heavy precipitation can limit the use of laser designators by affecting line-of-sight. Snow on the ground can produce a negative effect on laser-guided munition accuracy. Fog and low clouds will block the laser-guided munition seeker’s field of view which reduces the guidance time. This reduction may affect the probability of hit.⁷⁸

649 (2004); W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE L. REV. 1, 53 n.197 (1990) (“Historically bombing accuracy diminishes by 200% once an aircraft is taken under fire. Thus, an aircraft whose normal [CEP] (the radius of a circle within which half of the bombs are expected to fall) is, for example, 500 meters would increase to 1500 meters once the aircraft is taken under attack.”).

⁷⁵ See Cole, *supra* note 73 (illustrating circular diagram of CEP).

⁷⁶ BENJAMIN F. KOUDELKA, JR., CTR. FOR STRATEGY & TECH., AIR WAR COLL., AIR UNIV., NETWORK-ENABLED PRECISION GUIDED MUNITIONS 85 (2005) (noting that “excessive miss distance will result in minimal to no target damage”). See also PCTEL CONNECTED SOLS., PRECISION GUIDED MUNITIONS AND THE HISTORIC ROLE OF GPS 2, available at https://s3-eu-west-1.amazonaws.com/cdn.webfactore.co.uk/sr_517176.pdf (last visited Sept. 30, 2017) (“Many of these early laser guided weapons did not lack accuracy but suffered from vulnerability to weather conditions and in particular low-hanging clouds.”).

⁷⁷ Puckett, *supra* note 74, at 717. Problems also arise if a building has “a large amount of glass which, like dust, will cause a specular reflection instead of the diffuse spot needed to fire a laser weapon.” *Id.*

⁷⁸ John Pike, *Laser Guided Bombs*, FAS: MILITARY ANALYSIS NETWORK, <https://fas.org/man/dod-101/sys/smart/lgb.htm> (last updated Feb. 12, 2000). *But see USAF to Integrate Litening Pod onto Reaper*, UAS VISION, <http://www.>

Lastly, even when the Hellfire missile strikes the designated target, the selection of the target itself depends on obtaining accurate intelligence in often remote, alien, and hard-to-get-to regions—often held by ISIS, Taliban, al Qaeda, or other hostile forces—that are difficult to penetrate.⁷⁹

The power of this missile needs to be seen to be truly appreciated.⁸⁰ The Hellfire can smash a massive, armor-hardened tank to bits.⁸¹ The momentum of the Hellfire missile adds to its destructive impact, with current variants of the missile travelling at supersonic speeds up to 950 miles per hour.⁸² When used on a softer target, such

uasvision.com/2016/04/15/usaf-to-integrate-litening-pod-onto-reaper/ (Apr. 15, 2016) (adding a pod to the Reaper that will “offer precision strike and non-traditional intelligence, surveillance, and reconnaissance (ISR) capabilities in day/night/under the weather conditions for fighter and tactical strike aircraft via a staring forward looking infrared (FLIR); charge-coupled device (CCD) TV cameras; a laser designator; laser marker; laser spot tracker; and an Inertial Navigation Sensor (INS) on the stabilised gimbal.”). Apparently, the United States does not fly weaponized drones on cloudy days, making those the days of choice for people living in North Waziristan. See Alexander Abad-Santos, *This 13-Year-Old Is Scared When the Sky Is Blue Because of Our Drones*, ATLANTIC (Oct. 29, 2013), <https://www.theatlantic.com/politics/archive/2013/10/saddest-words-congress-briefing-drone-strikes/354548/>.

⁷⁹ See KOUDELKA, *supra* note 76, at 86 (noting that although “skilled human operators employing PGMs enable precision strike . . . the root cause of most operational limitations is a lack of real-time information” to accurately pinpoint a target).

⁸⁰ See TheMilitaryConceptChannel, *The AGM-114 Hellfire Missile*, YOUTUBE (July 1, 2012), <https://www.youtube.com/watch?v=byIsaZ5WYyM>, for a visual of the missile in action.

⁸¹ One military commentator describes the destructive power of the Hellfire missile as follows: “Originally designed for use in the anti-tank role, the Hellfire missile has also been used successfully to engage other targets as well. Point targets such as bunkers, radars, large antenna arrays and communications equipment, small buildings or towers, and even fast-moving boats can be effectively neutralized or destroyed.” Lange, *supra* note 70, at 26.

⁸² See *AGM-114 Hellfire*, AVIATORS DATABASE, <https://www.aviatorsdatabase.com/wp-content/uploads/2013/07/AGM-114-Hellfire-.pdf> (last visited Sept. 3, 2017) (“Maximum velocity of the missile is 950 miles per hour.”); accord Lange, *supra* note 70, at 26 tbl.1 (“Max. Velocity: 950 mph – 475m/sec – 1393 fps (1.4 mach)). The missile weighs 100 pounds, has a seven-inch diameter and is 64 inches (5’4”) long. *AGM-114 Hellfire*, *supra*.

as a vehicle, the Hellfire missile wreaks utter destruction.⁸³ Furthermore, the typical “double-tap” deployment, in which at least two Hellfire missiles are fired at a single target, assures the destructiveness of the standard drone strike.⁸⁴

B. *The 500-Pound Bomb—GBU-12, Paveway II*

While the Predator drone can carry only two Hellfire missiles, the Reaper drone can carry four Hellfire missiles, along with two 500-pound bombs known as the Guided Bomb Unit-12 Paveway II (“GBU-12”).⁸⁵ The GBU-12 is a hybrid bomb, with both an MK-82 500-pound general purpose blast/fragmentation warhead and a laser-guided system.⁸⁶ The GBU-12’s laser-guided system works like

⁸³ See Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT’L L. & FOR. AFF. 331, 380 (2003) (observing that “it might seem that targeting a sport utility vehicle with a Hellfire anti-tank missile is overkill . . .”) (footnote omitted).

⁸⁴ See Tara McKelvey, *Drones Kill Rescuers in ‘Double Tap’, Say Activists*, BBC NEWS MAG. (Oct. 22, 2013), <http://www.bbc.com/news/world-us-canada-24557333>; Chris Woods & Mushtaq Yusufzai, *Get the Data: The Return of Double-Tap Drone Strikes*, BUREAU OF INVESTIGATIVE JOURNALISM (Aug. 1, 2013), <https://www.thebureauinvestigates.com/stories/2013-08-01/get-the-data-the-return-of-double-tap-drone-strikes>; John F. Burns, *U.N. Panel to Investigate Rise in Drone Strikes*, N.Y. TIMES (Jan. 24, 2013), http://www.nytimes.com/2013/01/25/world/europe/un-panel-to-investigate-rise-in-drone-strikes.html?_r=0. See also Ben Emmerson (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *Third Rep. on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, paras. 50, 53, U.N. Doc. A/HRC/25/59 (Mar. 11, 2014) (noting that, in two separate drone attacks, witnesses and reports indicated that there were two strikes that occurred either simultaneously or shortly afterward).

⁸⁵ The GBU-12 is manufactured by the Raytheon corporation. See *Paveway Laser-Guided Bomb: Converting Bombs into Precision-Guided Weapons*, RAYTHEON, <http://www.raytheon.com/capabilities/products/paveway-laser-guided-bomb/> (last visited Sept. 16, 2017).

⁸⁶ See *Guided Bomb Unit-12 (GBU-12): Paveway II*, GLOBALSECURITY.ORG, <https://www.globalsecurity.org/military/systems/munitions/gbu-12.htm> [hereinafter *GBU-12: Paveway II*] (last modified July 7, 2011). For a discussion of bomb types, see *Damage*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/systems/munitions/damage.htm> (last modified July 7, 2011). Blast and fragmentation are two different types of munition damage mechanisms. The effects of blast are described as follows:

that of the Hellfire missile: “The operator illuminates a target with a laser designator and then the munition guides to a spot of laser energy reflected from the target.”⁸⁷ The expected degree of error (CEP)

Blast is caused by tremendous dynamic overpressures generated by the detonation of a high explosive. Complete (high order) detonation of high-explosives can generate pressures up to 700 tons per square inch and temperatures in the range of 3,000 to 4,500° prior to bomb case fragmentation This effect is most desirable for attacking walls, collapsing roofs, and destroying or damaging machinery The effect of blast on personnel is confined to a relatively short distance (110 feet for a 2000 pound bomb).

Id. Fragmentation and its effects are described as follows:

Fragmentation is caused by the break-up of the weapon casing upon detonation. Fragments of a bomb case can achieve velocities from 3,000 to 11,000 fps [feet per second] depending on the type of bomb (for example GP [General Purpose] bomb fragments have velocities of 5,000 to 9,000 fps). Fragmentation is effective against troops, vehicles, aircraft and other soft targets. The fragmentation effects generated from the detonation of a high-explosive bomb have greater effective range than blast, usually up to approximately 3,000 feet regardless of bomb size.

Id.

⁸⁷ *GBU-12: Paveway II*, *supra* note 86. “Target designators are semi-active illuminators used to ‘tag’ [or paint] a target.” Pike, *supra* note 78. The laser coding system integrated in the GBU-12 Paveway II enhances its guidance and targeting accuracy:

Laser designators and seekers use a pulse coding system to ensure that a specific seeker and designator combination work in harmony. By setting the same code in both the designator and the seeker, the seeker will track only the target designated by the designator Coding allows simultaneous or nearly simultaneous attacks on multiple targets by a single aircraft, or flights of aircraft, dropping laser guided weapons (LGWs) set on different codes. This tactic may be employed when several high priority targets need to be expeditiously attacked and can be designated simultaneously by the supported unit(s).

Id. Equally impressive, the GBU-12’s maneuvering features enhance its precision:

A laser guidance kit is integrated with each bomb to add the requisite degree of precision. The kit consists of a computer control group at the front end of the weapon and an airfoil group at the back. When a target is illuminated by a laser - either airborne or ground-based - the guidance fins (canards) react to signals from the control group and steer the weapon to the target.

is nine meters.⁸⁸ According to the U.S. Air Force, the GBU-12 had an eighty-eight percent accuracy rate during Operation Desert Storm.⁸⁹

The MK-82 bombs carried by the GBU-12 are particularly destructive and “are used in the majority of bombing operations *where maximum blast and explosive effects are desired.*”⁹⁰ It has an effec-

Wings on the airfoil group add the lift and aerodynamic stability necessary for in-flight maneuvering.

GBU-12: Paveway II, *supra* note 86.

⁸⁸ See *GBU-12: Paveway II*, *supra* note 86. Early in its production history, the GBU-12 exhibited mechanical flaws. See AIR FORCE ARMAMENT LAB., AFATL-TR-/6-85, INVESTIGATION OF POSSIBLE FIN FAILURES OF GBU-10 AND GBU-12 BOMBS CARRIED ON THE INBOARD WING STATION OF AN F-4 AIRCRAFT 1 (1976).

⁸⁹ See *GBU-12: Paveway II*, *supra* note 86. For that conflict, the GBU-12 was typically launched from jet fighters. There are two versions of the GBU-12 LGBs in operation:

Paveway I with fixed wings and Paveway II with folding wings. Paveway II models have the following improvements: detector optics and housing made of injection-molded plastic to reduce weight and cost; increased detector sensitivity; reduced thermal battery delay after release; increased maximum canard deflection; laser coding; folding wings for carriage, and increased detector field of view. (Paveway II’s instantaneous field of view is thirty percent greater than that of the Paveway I’s field of view).

Id. New advances have increased the accuracy of the GBU-12:

The Enhanced-GBU-12 [EGBU-12] is a dual-mode guided bomb designed to effectively operate in all-weather conditions. Enhanced Paveway II features a GPS-aided Inertial Navigation System as well as a laser guidance system to offer one precision guided weapon for all situations. The resulting dual-mode capability offers true all-weather operational flexibility not found in other weapons systems being produced: GPS guidance for poor weather conditions and precise laser guidance when required for mobile targets of opportunity.

Id. Research has not revealed whether the GBU-12s have been deployed on all Reaper drones.

⁹⁰ *Mk82 General Purpose Bomb*, GLOBALSECURITY.ORG, <https://www.globalsecurity.org/military/systems/munitions/mk82.htm> (last modified July 7, 2011) (emphasis added).

tive casualty radius of approximately 200 to 300 feet and a kill radius of approximately 50 feet.⁹¹ Reaper drone “pilots” typically fire two GBU-12s at a single target, thus executing the “double tap” strike method.⁹² While GBU-12s are apparently used most often in strikes against “high-value targets,” their explosive power presents special risks for civilians and civilian objects.⁹³

II. UNDER INTERNATIONAL LAW, WHEN MAY THE STATE KILL CIVILIANS?

Although 102 states have abolished the death penalty in law and another 38 states have done so in practice,⁹⁴ international law has not yet abolished the punishment of death.⁹⁵ But international law *has* limited the use of capital punishment⁹⁶ and requires a full and

⁹¹ See Derek Gregory, *Theory of the Drone 12: ‘Killing Well’?*, GEOGRAPHICAL IMAGINATIONS (Dec. 8, 2013), <https://geographicalimagination.com/tag/kill-radius/>.

⁹² See Adam Hudson, *Beyond Drones Debate: Should US Be Judge, Jury & Executioner?*, POPULAR RESISTANCE (Jun. 3, 2015), <https://popularresistance.org/beyond-drones-debate-should-us-be-judge-jury-executioner/>.

⁹³ See Henny A.J. Kreeft, *Why Have US Drones Targeted So Many Houses in Pakistan?*, ALTAHRIR NIEUWS BLOG (May 23, 2014), <https://altahrir.wordpress.com/2014/05/23/why-have-us-drones-targeted-so-many-houses-in-pakistan/>.

⁹⁴ See Press Release, Amnesty Int’l, *Death Penalty 2016: Alarming Surge in Recorded Executions Sees Highest Toll in More Than 25 Years* (Apr. 6, 2016), <https://www.amnestyusa.org/press-releases/death-penalty-2016-alarming-surge-in-recorded-executions-sees-highest-toll-in-more-than-25-years/>.

⁹⁵ See *Buell v. Mitchell*, 274 F.3d 337, 373 (6th Cir. 2001) (“The prohibition of the death penalty is not so extensive and virtually uniform among the nations of the world that it is a customary international norm.”). *But see Roper v. Simmons*, 543 U.S. 551, 575–76 (2005) (noting the virtual universal consensus that the juvenile death penalty violates international law).

⁹⁶ See Convention on the Rights of the Child art. 37, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (“Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age . . .”). *Accord Roper*, 543 U.S. at 576–78 (citing Article 37(a) of CRC as support in finding that Eighth and Fourteenth Amendments prohibit the juvenile death penalty). One hundred ninety-six countries have become parties to the CRC. See *Status of Ratification Interactive Dashboard*, U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM’R, <http://indicators.ohchr.org> (last updated Sept. 12, 2017) (information accessible under the “Select a treaty” dropdown list).

fair trial before a state may carry out a death sentence.⁹⁷ Outside the death penalty context, a state official in peacetime may kill a person only if the person imminently threatens the life of another or threatens to cause another imminent and serious bodily harm.⁹⁸

⁹⁷ See, e.g., International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. Safeguard 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the U.N. Economic and Social Council in 1984, provides as follows:

Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

Economic and Social Council Res. 1984/50 (May 25, 1984), available at <https://www.un.org/ruleoflaw/files/SAFEGU~1.PDF>.

⁹⁸ See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Aug. 27-Sept. 7, 1990, *Basic Principles for the Use of Force and Firearms by Law Enforcement Officials*, ¶ 9, U.N. Doc. A/CONF.144/28/Rev.1, annex, at 114 [hereinafter *U.N. Basic Principles*]. Paragraph 9 permits the use of deadly force to prevent the escape of a person, but only “when strictly unavoidable in order to protect life.” *Id.* See also Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AM. J. INT’L L. 747, 749 (2005) (assuming “that there is an emerging norm of customary international law that generally prohibits the death penalty”); Paul Marcus, *Capital Punishment in the United States and Beyond*, 31 MELB. U. L. REV. 837, 865–66 (2007) (stating that “[s]everal significant international pacts call for the abolition of the death penalty” in evaluating common misconceptions regarding U.S. capital punishment when placed in an international context); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 51 (2004) (stating the premise that “abolition of the death penalty has become a cornerstone of European human rights policy”); Hansje Plagman, *The Status of the Right to Life and the Prohibition of Torture Under International Law: Its Implications for the United States*, 2003 J. INST. JUST. & INT’L STUD. 172, 174–75 (stating that the non-arbitrary taking of life is allowed under the ICCPR, the European Convention on Human Rights and the American Convention of Human Rights, and therefore—although the European Court on Human Rights has acknowledged that in Europe the death penalty has been abolished—“[s]tates that have not ratified specific treaties or protocols abolishing the death penalty are still allowed to impose the death penalty under certain conditions”); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT’L L. 873, 880 (2001) (noting that, although the American Declaration of the Rights and Duties of Man

So, state actors may kill an individual who kidnaps a baby and brandishes a knife, immediately threatening to kill the child.⁹⁹ State actors, however, may not kill a mob boss, unless that person is likewise imminently threatening the life of another (or imminently threatening to do another serious bodily harm).¹⁰⁰ Thus, international human rights law allows state actors to kill only in narrow circumstances and bans the arbitrary taking of life.¹⁰¹

In armed conflict, however, the limits on state killing considerably widen. State officials may not only kill enemy combatants without warning—they may also target and kill civilians who “take a direct part in hostilities.”¹⁰² In addition, the state may legally kill civilians not directly participating in hostilities if such civilians fall into the expansive category of collateral damage.¹⁰³

This section will first discuss the restrictive rules that international human rights law places on state officials in armed conflict. It will then discuss the more liberal rules under international humanitarian law (also known as the “law of armed conflict” or “*jus in bello*”). Lastly, this section will examine the trend towards applying international human rights law to counter-terrorism operations in non-international armed conflict and other similar developments.

“does not proscribe capital punishment altogether,” it “does prohibit its application in a manner that would constitute an arbitrary deprivation of life”).

⁹⁹ For a domestic law example of the permissible use of deadly force, see Good Morning America, *Video of Deadly Hostage Standoff in Walmart Released*, ABC NEWS (July 1, 2013), <http://abcnews.go.com/blogs/headlines/2013/07/video-of-deadly-hostage-standoff-in-walmart-released/> (police kill man who kidnapped a two-year-old and threatened child with a knife).

¹⁰⁰ See *U.N. Basic Principles*, *supra* note 98.

¹⁰¹ See ICCPR, *supra* note 97, art. 6, para. 1 (“No one shall be arbitrarily deprived of his life.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 cmt. f (AM. LAW INST. 1987).

¹⁰² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51, ¶ 3, *adopted* June 8, 1977, 1125 U.N.T.S. 3, 26 [hereinafter AP I].

¹⁰³ See *id.* art. 51, ¶ 5(b). For a more detailed discussion of the collateral damage and proportionality rules, see McDonnell, *supra* note 35, at 77, 97–98.

A. *Peace v. War*

Absent armed conflict, a state-sponsored transnational assassination violates international law.¹⁰⁴ Article 2(4) of the U.N. Charter

¹⁰⁴ Professor Oren Gross states in an explanatory parenthetical that, in my previous article on drones, I “characteriz[e] targeted killings as assassinations[.]” Oren Gross, *The New Way of War: Is There a Duty to Use Drones?*, 67 FLA. L. REV. 1, 10 n.50 (2015) (citing McDonnell, *Sow What You Reap?*, *supra* note 37, at 261–63). I respectfully disagree with his take on my article. The first two pages of my article to which he refers point out that the answer to the question of targeted killing’s legality “depends” on the circumstances. McDonnell, *Sow What You Reap?*, *supra* note 37, at 261–62. The article later notes that “[u]nder certain limited circumstances, using attack drones to target and kill a person complies with international law.” *Id.* at 297. A footnote to the quoted language in the previous sentence further explains, “[t]argeted killings carried out against combatants or those carrying out a continuous combatant function in zones of armed conflict like Afghanistan, assuming the requirements of proportionality and military necessity are met, comply with humanitarian law.” *Id.* n.227.

The words “Assassinations or Targeted Killings” in the article’s title are designed to show that both legal characterizations are possible. The Bush-Cheney and the Obama administrations have argued that the law of war extends beyond areas of armed conflict and, to use the Obama administration’s test, a targeted killing of Islamic terrorists is permitted in a state that is “unable or unwilling to take action against the threat[.]” presumably to kill or capture them. John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Woodrow Wilson Int’l Ctr. for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>).

Certainly, the United States has made powerful arguments that it has the right to so operate, see McDonnell, *Sow What You Reap?*, *supra* note 37, at 284–86; *infra* note 127, but it is far from settled that the extraordinary legal regime of armed conflict may so extend throughout so much of the world. See McDonnell, *Sow What You Reap?*, *supra* note 37, at 287–91; CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM, 329–30 (2d ed. 2015); *infra* note 128. See also Savage & Shane, *supra* note 10. Nonetheless, targeted killings—creating kill lists and then ordering U.S. agents to kill persons on the list—are, in my view, an explosive counterterrorism tactic that may result in greater support for terrorist movements in the Islamic World. Consequently, as a matter of applying sound policy, of advancing world public order, and of preventing the erosion of U.S. moral authority, targeted killings, even when legal, should be carried out rarely and only as a last resort.

Subsections A, B, D, and E here are largely drawn from my book, McDONNELL, STRUGGLE AGAINST TERRORISM, *supra* note 38, at 156–59, and my article McDonnell, *Sow What You Reap?*, *supra* note 37, at 262–63, 269–75. *But see* Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of bin*

Laden, 39 DENV. J. INT'L L. & POL'Y 569, 580–81 (2011); E-mail from Jordan Paust, Professor, University of Houston Law Ctr., to author (Dec. 29, 2011) (on file with author) (arguing that “the real issue is whether something is [an] ‘assassination’ (because it is treacherous) or a selective killing[P]eople are rightly killed during permissible uses of force in self-defense.”). He argues that outside of armed conflict, armed force may be used to carry out what he terms “Self-Defense Targeting.” *Id.*

Some have argued that assassinating/targeted killing of a country’s leader or high military command may be justified in anticipatory self-defense. *See, e.g.*, Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 646 (1992). *See also* Raffaella Nigro, *International Terrorism and the Use of Force against Non-State Actors*, ISPI POLICY BRIEF NO. 150 (July 2009), available at http://www.ispionline.it/sites/default/files/pubblicazioni/pb_150_2009_0.pdf. Such a position must meet the standards of Article 51 of the U.N. Charter, which, on its face, requires an “armed attack” to invoke the use of armed force in self-defense. *See* U.N. Charter art. 51. Arguing that the customary law of self-defense permitted preemptive attack in narrowly defined circumstances, many scholars assert that Article 51 must be read broadly to include this pre-existing custom. *See* MCDONNELL, STRUGGLE AGAINST TERRORISM, *supra* note 38, at 245–58. Others argue that there is an inherent natural law right of the oppressed to assassinate a tyrant. *See, e.g.*, Luis Kutner, *A Philosophical Perspective on Rebellion*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 51, 52–61 (M. Cherif Bassiouni ed., 1975).

Lastly the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (entered into force Feb. 20, 1977), had it been in force at the time of the Fidel Castro assassination attempts, might have been violated. This Convention prohibits the murder or attempted murder of, among others, a “Head of State.” *Id.* art. 1, para. 1(a), art. 2, paras. 2(a), 2(d). The Convention is generally interpreted as applying only when the protected person travels abroad. *See* Schmitt, *supra*, at 619.

prohibits the use of force in the territory of another state.¹⁰⁵ Such assassinations also violate international human rights law.¹⁰⁶ Furthermore, customary international law¹⁰⁷ and human rights treaties, such as the International Covenant on Civil and Political Rights,¹⁰⁸ bar extrajudicial killing.¹⁰⁹ For example, Chile violated both the

¹⁰⁵ See U.N. Charter art. 2, ¶ 4. Of course, a state (the “receiving state”) could give another state (the “sending state”) permission to carry out a targeted killing on the receiving state’s soil, thus absolving the sending state from any Article 2(4) violation. Unless another exception applies, such a killing would still violate human rights law. Reportedly, the United States had the permission of Pakistan and Yemen to carry out drone attacks. See Kimberly Dozier, *Survey Finds Growing US Drone Attacks on Terror Suspects Unpopular Around the World*, ASSOCIATED PRESS (June 13, 2012), <https://www.yahoo.com/news/survey-finds-growing-us-drone-attacks-terror-suspects-133013523.html>; see also Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.’s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, <http://www.newyorker.com/magazine/2009/10/26/the-predator-war>; Indira A.R. Lakshmanan, *Pakistan Ends Drone Strikes in Blow to U.S. War on Terror*, BLOOMBERG NEWS (Mar. 12, 2012, 10:22 PM), <https://www.bloomberg.com/news/articles/2012-03-13/pakistan-tells-white-house-to-stop-drone-missions-after-disputes-fray-ties>. But see Muhammad Idrees Ahmad, *Obama Won’t End the Drone War, but Pakistan Might*, ALJAZEERA (July 3, 2013, 10:05 AM), <http://www.aljazeera.com/indepth/opinion/2013/06/20136247465532652.html> (Pakistan’s then prime minister, Nawaz Sharif, asked the United States “to respect his country’s sovereignty and refrain from further attacks.”)

¹⁰⁶ See McDonnell, *Sow What You Reap?*, *supra* note 37, at 290; Mayer, *supra* note 105.

¹⁰⁷ Unless permitted by international humanitarian law, an extrajudicial killing violates a peremptory norm of international law. See Derek P. Jinks, Note, *The Federal Common Law of Universal, Obligatory, and Definable Human Rights Norms*, 4 ILSA J. INT’L & COMP. L. 465, 470–71 n.34 (1998); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702; see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 3 (Dec. 10, 1948) (“Everyone has the right to life, liberty and the security of person.”); *Alejandro v. Cuba*, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997) (“So widespread is the consensus against extrajudicial killing that every instrument or agreement that has attempted to define the scope of international human rights has recognized a right to life coupled with a right to due process to protect that right.”) (citation and internal quotation marks omitted).

¹⁰⁸ See ICCPR, *supra* note 97, art. 6, para. 1.

¹⁰⁹ Applying the ICCPR and other human rights treaties requires interpreting the treaties to impose obligations on states when acting outside their own territory. Although some *travaux préparatoires* suggest that the drafters did not intend the ICCPR to apply extraterritorially, the trend in decision in international tribunals and bodies is toward imposing obligations under human rights treaties wherever a state’s military or law enforcement agents are operating: “Article 2.1 . . . does

U.N. Charter and international human rights law when it sent an assassin to Washington, D.C. to kill former Chilean ambassador Orlando Letelier because such action was both an impermissible use of armed force in the territory of another state (the United States) and an arbitrary, extrajudicial killing.¹¹⁰ Other examples include the United States' bungled attempts to assassinate Fidel Castro¹¹¹ and Syria's alleged complicity in the assassination of former Lebanon Prime Minister Rafiq Hariri.¹¹²

not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State[.]” ANTONIO CASSESE, *INTERNATIONAL LAW* 385 (2d ed. 2005) (quoting U.N. Human Rights Comm., *Lopez Burgos v. Uruguay*, Comm. No. R12/52, paras. 12.2–12.3, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (July 29, 1981)); *see also* McDonnell, *Sow What You Reap?*, *supra* note 37, at 290; Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 360 n.40; *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. 62–63 (2011) (holding that the European Convention on Human Rights applies extraterritorially to the United Kingdom's alleged human rights abuses committed in Basra, Iraq over which U.K. forces had effective control). *But see* Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 126 (2005) (noting the original intent of the drafters of Article 2 limited human right treaties to the territory of the party).

¹¹⁰ Although the United States had not ratified the ICCPR at the time of Letelier's assassination, Chile had done so in 1972. *See* ICCPR, *supra* note 97, at 172; *see also* sources cited *supra* note 109 (discussing extra-territorial application of human rights treaties). In any event, such an extrajudicial execution at that time can be said to have violated customary international law as well as human rights treaties. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. c.

¹¹¹ *See* Mark David Maxwell, *Targeted Killing, the Law, and Terrorists*, 64 JOINT FORCE Q. 123, 124–125 (2012), available at <http://ndupress.ndu.edu/portals/68/Documents/jfq/jfq-64.pdf>.

¹¹² *See* S.C. Res. 1636, ¶¶ 10–15 (Oct. 31, 2005) (requiring Syria to cooperate with U.N. investigators concerning Prime Minister Hariri's murder). In 2007, the Security Council established the Special Tribunal for Lebanon to investigate and prosecute the assassination. S.C. Res. 1757, annex, Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon (May 30, 2007). Such an assassination would also violate Syria's obligations as an occupying power. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 27, 47, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

B. *Jus in Bello: The Rules of the Game*

If an armed conflict (for example, World War II or the Vietnam War) arises, a different legal regime is triggered. *Jus ad bellum*, which is principally founded on the U.N. Charter and related custom, determines whether a state has the right to use armed force.¹¹³ On the other hand, *jus in bello* is utterly indifferent as to which side possesses this right.¹¹⁴ The *jus in bello* regime sets forth “the rules” of the game, namely, the rules under which hostilities may be carried out.¹¹⁵ These rules are primarily found in the Hague Convention of 1907,¹¹⁶ the four Geneva Conventions of 1949,¹¹⁷ and their two Additional Protocols of 1977.¹¹⁸ These multilateral treaties (and relevant international custom) constitute the major part of the regime of international humanitarian law.¹¹⁹ This legal regime immunizes individual soldiers and commanders from criminal liability for what

¹¹³ See McDonnell, *Sow What You Reap?*, *supra* note 37, at 264–69.

¹¹⁴ In modern history, both sides typically claim that the other was the aggressor; determining which side was right in starting the armed conflict is so contentious that it fails to advance the parties’ bearing the responsibility of carrying out the conflict within the bounds of humanitarian law: “To this day, the idea that animates the *jus in bello*, embodied in the ICRC’s ethos, is that ‘human suffering is human suffering, whether incurred in the course of a “just war” or not Humanity, not Justice, is its *prime* concern.’” Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 64 (2009) (quoting GEOFFREY BEST, HUMANITY IN WARFARE 4–5 (1980)).

¹¹⁵ See Sloane, *supra* note 114, at 50.

¹¹⁶ See Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land, annex, art. 1, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention IV].

¹¹⁷ See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

¹¹⁸ See AP I, *supra* note 102, art. 51, ¶ 2; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. Crimes against humanity and war crimes are now principally codified in the 1998 Rome Statute. See Rome Statute of the International Criminal Court arts. 7–8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹¹⁹ It is also called “the law of armed conflict.” See *What is International Humanitarian Law?*, INT’L COMM. OF THE RED CROSS (Dec. 31, 2014), <https://www.icrc.org/en/document/what-international-humanitarian-law>. Aside from these conventions, there are other conventions banning certain weapons. See, e.g.,

otherwise would be murder (intentionally killing a combatant)¹²⁰ and criminal mischief (intentionally destroying property).¹²¹

Humanitarian law and its accompanying combat immunities enter into effect only upon a finding that there is a “state of armed conflict.”¹²² That term is not clearly defined, but available definitions, particularly of “non-international armed conflict,” impose geographic limits.¹²³ The International Criminal Tribunal for the former Yugoslavia (ICTY) found that “an armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence* between governmental authorities and *organized armed groups* or between such groups *within a State*.”¹²⁴ The Rome

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 (entered into force Mar. 1, 1999); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 (entered into force Dec. 2, 1983); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571; Hague Declaration (IV, 2) Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases, July 29, 1899, 187 Consol. T.S. 453.

¹²⁰ See AP I, *supra* note 102, art. 43. Intentional murder is defined by the Model Penal Code as follows: “A person is guilty of [intentional murder] if he [or she] purposely [or] knowingly . . . causes the death of another human being.” MODEL PENAL CODE §§ 210.1, 210.2(1)(a) (AM. LAW INST. 1985). Combat immunities also extend under the same principles to the destruction of property in armed conflict.

¹²¹ See, e.g., MODEL PENAL CODE § 220.3(1); OR. REV. STAT. § 164.365(1)(a) (2015).

¹²² INT’L LAW ASS’N, COMM. ON THE USE OF FORCE, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 2, 24, 32–33 (2010) [hereinafter REPORT ON THE MEANING OF ARMED CONFLICT] (identifying organization of the parties and intensity of the fighting as the two principal characteristics of an armed conflict).

¹²³ See HELEN DUFFY, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 219 (2005). *But see infra* Part II Subsection C and accompanying footnotes (discussing the “unable or unwilling” doctrine implemented by the United States).

¹²⁴ Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). For a detailed discussion of the meaning of “non-international armed conflict,” including the requirement that the non-state actor have a sufficient level of organization and that the hostilities reach a sufficient intensity, see ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED

Statute of the International Criminal Court adopted the ICTY's definition.¹²⁵ Virtually any level of hostilities between states triggers international humanitarian law.¹²⁶ Hostilities between a state and a non-state actor, such as al Qaeda, however, must reach a certain

CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 123–33 (2010); REPORT ON THE MEANING OF ARMED CONFLICT, *supra* note 122, at 28–32.

¹²⁵ The relevant Article of the Rome Statute provides as follows:

Paragraph 2 (e) [enumerating prohibited conduct] applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

Rome Statute, *supra* note 118, art. 8, para. 2(f). Criticizing the United States' broad definition of armed conflict, Nils Melzer, former ICRC legal adviser, states as follows:

The US Government has identified its adversary in this war [the war on terrorism] interchangeably as 'Al Qaida and its affiliates', as 'every terrorist group of global reach' or simply as 'terrorism' per se, and has emphasized that no distinction would be made between 'the terrorists' and 'those who knowingly harbour or provide aid to them.' These sweeping descriptions hardly meet the minimum requirements for a 'party to the conflict.' For the practical reasons pointed out above, the notion of armed conflict must remain restricted to armed contentions between organized groups of individuals that are sufficiently identifiable based on objective criteria. In order to prevent total arbitrariness in the use of force, this minimum requirement must be upheld in spite of the practical difficulties that doubtlessly arise in identifying the members and structures of loosely organized and clandestinely operating armed groups. No social phenomenon, whether terrorism, capitalism, nazism, communism, drug abuse or poverty can be a 'party' to a conflict.

NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 262–63 (2008) (footnotes omitted).

¹²⁶ See CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 618, para. 1942 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY]. *But see* REPORT ON THE MEANING OF ARMED CONFLICT, *supra* note 122, at 2 (disagreeing with the ICRC Commentary on the point, noting that, even between states parties, international armed conflict requires "fighting of some intensity").

threshold for the humanitarian law of a non-international armed conflict to apply.¹²⁷ Protracted armed conflict contemplates battles, fighting between the parties, and not merely a sporadic hit-and-run characteristic of many terrorist operations.¹²⁸ Protracted armed conflict also occurs within a specific territory: “While the area of war is extensive, it is *not unlimited* and does not in general extend for example to the territory of other states not party to the conflict, unless those states allow their territory to be used by one of the belligerents.”¹²⁹

¹²⁷ Traditionally that strand of humanitarian law applied only to actions of such groups “within the State.” AP II expressly covers non-international armed conflict. It applies “in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations” AP II, *supra* note 118, art. 1, ¶ 1. Although the United States has not ratified AP II, Article 1 can be said to reflect customary international law. *See, e.g.*, Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law*, 99 AM. SOC’Y INT’L L. PROC. 423, 424–25 (2005).

¹²⁸ *See* Laurie R. Blank & Benjamin R. Farley, *Identifying the Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World*, 36 MICH. J. INT’L L. 467, 483–84 (2015) (“Thus, as the Special Committee tasked with formulating the text of what would become Common Article 3 reported in July 1949, the notion of armed conflicts not of an international character ‘presupposed an armed conflict resembling an international war in dimensions, and did not include a mere strife between the forces of the State and one or several groups of persons (uprisings, etc.)’”) (footnote omitted).

¹²⁹ DUFFY, *supra* note 123, at 223 (emphasis added) (footnote omitted). Professor Mary Ellen O’Connell also has stressed the geographic limitations on non-international armed conflict. Mary Ellen O’Connell, *The ILA Use of Force Committee’s Final Report on the Definition of Armed Conflict in International Law (August 2010)*, in WHAT IS WAR?: AN INVESTIGATION IN THE WAKE OF 9/11, 37 INT’L HUMANITARIAN L. SERIES 366 (Mary Ellen O’Connell ed., 2012) (“States rarely recognize armed conflict beyond the zone of intense fighting, whether the fighting is in an international or non-international armed conflict.”) (footnote omitted). *See also* Mary Ellen O’Connell, *Obama’s Illegal War: The Islamic State Never Attacked Us. So Why Are We Attacking Them?*, POLITICO MAG. (Sept. 11, 2014), <http://www.politico.com/magazine/story/2014/09/obamas-illegal-war-110863?o=1> (stating that “[a]lmost every U.S. attack on Yemen has been unlawful either because [the U.S.] had no consent or—when consent was obtained—there was no armed conflict in Yemen that would permit the use of major military force under human rights law”); CULLEN, *supra* note 124, at 140. *But see* Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use*

C. *Armed Conflict Divorced from Geography*

Since the September 11, 2001, attacks, the United States and the United Kingdom have argued for a much broader right to use force.¹³⁰ President George W. Bush announced a “global war on terrorism,” presumably giving the United States the right to use force against any country where it perceived international terrorists were operating.¹³¹ However, the Obama administration adopted a different formulation that essentially achieved the same result, proclaiming that where a country is “unable or unwilling” to capture or kill Islamic terrorists, the United States has the right to use armed force in that country.¹³² Although, at first glance, the “unable or unwilling” formulation appears reasonable, upon further examination, it

of Drones in Pakistan, 19 J. TRANSNAT’L L. & POL’Y 237, 271–72 (2010) (arguing that combatants located outside a zone of armed conflict may be attacked).

¹³⁰ See generally *Case Study: Anti-Terrorist Legislation Post Sept. 11*, BBC WORLD SERVICE, http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/casestudy_art09.shtml (describing legislative measures taken by the United States and the United Kingdom).

¹³¹ Just nine days after the 9/11 attacks, before a joint session of Congress, President Bush declared: “Our war on terror begins with al-Qaeda, but it does not end until every terrorist group of global reach has been found, stopped, and defeated.” *Transcript of President Bush’s Speech Before a Joint Session of Congress, Sept. 20, 2001*, NPR: AMERICA TRANSFORMED, <http://www.npr.org/news/specials/americantransformed/reaction/010920.bushspeech.html> (last visited Sept. 17, 2017). See also Ed Vulliamy et al., *Get Ready for War, Bush Tells America*, GUARDIAN (Sept. 16, 2001, 11:31 PM), <https://www.theguardian.com/world/2001/sep/16/terrorism.september11>.

¹³² John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Harvard Law School Program on Law and Security: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>) [hereinafter Brennan Remarks]. See also Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Keynote Address at the Annual Meeting of the Am. Soc’y of Int’l Law: The Obama Administration and International Law (Mar. 25, 2010), <https://www.state.gov/documents/organization/179305.pdf> (explaining the administration’s view, namely, that the United States is in a non-international armed conflict with al-Qaeda and associated forces and that “the willingness and ability” of other states to suppress terrorists is part of the equation in determining whether the U.S. will target a particular individual). See also Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 770, 776 (2012) (principle 12 sets forth requirements for attacking a nonstate organization in a host state without the host state’s consent).

authorizes an overly broad use of force.¹³³ One commentator observed that the advent of high technology, the Internet, the National Security Agency's communications intercept capability, video surveillance, and drone strike capability have fostered a hunt-to-kill mentality beyond any geographic boundary, rather than an effort to win hearts and minds and get at the root of terrorist violence.¹³⁴ President Obama's 2013 "Policy Standards for the Use of Force Outside the United States and Areas of Active Hostilities" noted that "the United States will use lethal force only against a target that poses a

¹³³ See McDonnell, *Sow What You Reap?*, *supra* note 37, at 286–88 (discussing U.N. Human Rights Council rapporteur's criticism of the "unable or unwilling" doctrine) (citing Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Addendum: Study on Targeted Killings*, para. 43, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) [hereinafter *U.N. Addendum on Targeted Killings*]). See also Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, at 16–17 (Notre Dame Law Sch., Legal Studies Research Paper No. 09-43, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144; Dire Tladi, *The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12*, 107 AM. J. INT'L L. 570, 575–76 (2013) (criticizing Bethlehem, *supra* note 132, as violating the spirit and letter of Article 51 of the U.N. Charter and noting that "[t]he use of force by a state against nonstate actors for acts not attributable at all to another state falls to be considered under the paradigm of law enforcement (in which the consent of the territorial state would be required) and not the law of self-defense"); Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AM. J. INT'L L. 563, 570 (2013) (criticizing Bethlehem's principles on the use of force against non-state actors for being insufficiently precise and noting that "more attention needs to be paid to what necessity, imminence, and proportionality actually require"). For a nuanced view of Bethlehem's principles, see Elizabeth Wilmschurst & Michael Wood, *Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles"*, 107 AM. J. INT'L L. 390, 390 (2013).

¹³⁴ The U.S. has "wholly given over to targeting, waiting for (or creating) an opportunity to find and to kill has become the preferred and seemingly only option, whether at the American border or in the remotest corner of Syria or Pakistan." WILLIAM M. ARKIN, UNMANNED: DRONES, DATA, AND THE ILLUSION OF PERFECT WARFARE 12 (2015). See also Wesley Morgan, *The Not-So-Secret History of the U.S. Military's Elite Joint Special Operations Command*, WASH. POST (Dec. 16, 2015), https://www.washingtonpost.com/news/checkpoint/wp/2015/12/15/the-not-so-secret-history-of-jsoc/?utm_term=.13396076b72b (quoting one JSOC commander's definition of the mission of a JSOC task force: "We hunt men").

continuing, imminent threat to U.S. persons.”¹³⁵ Nonetheless, the CIA, JSOC, and the U.S. military apparently do not understand “continuous, imminent threat” to mean “imminent” in the sense that a deadly threat against the U.S. or its citizens is about to be carried out,¹³⁶ but instead consider it to be a far broader notion.¹³⁷ In any event, the “unable or unwilling” test has become the standard U.S. position for justifying the use of armed force in the struggle against terrorism.¹³⁸ Nothing suggests, as of this writing, that President

¹³⁵ Press Release, The White House, Office of the Press Sec’y, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>. *But see* Adam Entous, *Obama Kept Looser Rules for Drones in Pakistan; Waived Requirement to Show Proposed Targets Pose Imminent Threat to the U.S.*, WALL STREET J. (Apr. 26, 2015, 7:57 PM), <https://www.wsj.com/articles/obama-kept-looser-rules-for-drones-in-pakistan-1430092626> (arguing that “President Barack Obama tightened rules for the U.S. drone program in 2013, but he secretly approved a waiver giving the [CIA] more flexibility in Pakistan than anywhere else to strike suspected militants”).

¹³⁶ Merriam Webster defines “imminent” as “ready to take place . . . hanging threateningly over one’s head[;] was in *imminent* danger of being run over[.]” *Definition of Imminent*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/imminent> (last visited Sept. 17, 2017).

¹³⁷ *See* Greg Miller, *Legal Memo Backing Drone Strike that Killed America Anwar al-Awlaki is Released*, WASH. POST (June 23, 2014), https://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1_story.html?utm_term=.4b702bc6226c (describing the “broad outlines of the [41-page] memo” which revealed that both the U.S. military and CIA “intend[ed] to capture” U.S.-born Awlaki, after “being linked to an al-Qaeda affiliate in Yemen,” because he posed “an imminent threat of violent attack against the United States”).

¹³⁸ *See* McDonnell, *Sow What You Reap?*, *supra* note 37, at 284 n.175 (quoting John O. Brennan, former CIA Director and Assistant to the President of Homeland Security & Counterterrorism):

The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to “hot” battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa’ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa’ida and its associated forces without doing a separate self-defense analysis each time.

Brennan Remarks, *supra* note 132; *see also* Eric Holder, Att’y Gen., Address at the Northwestern University School of Law (Mar. 5, 2012) (transcript available

Trump will limit the “unable or unwilling” test; his comments and news reports suggest the opposite.¹³⁹

D. *The Violence Threshold for Non-International Armed Conflict*

Additional Protocol II to the Geneva Conventions (“AP II”) does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence”¹⁴⁰ Before 9/11, terrorist offenses were considered ordinary crimes subject to the law

at https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/52-1_agr_holder_speech.authcheckdam.pdf (stating “[o]ur legal authority is not limited to the battlefields in Afghanistan” and affirming that the use of force would be satisfactory “after a determination that [a] nation is unable or unwilling to deal effectively with a threat to the United States”).

¹³⁹ See Savage & Schmitt, *supra* note 19. The Trump administration proposes to eliminate high-level vetting of drone strikes and to expand targets beyond “high level militants deemed to pose a ‘continuing and imminent threat’ to Americans . . . to include foot-soldier jihadists with no special skills or leadership roles.” *Id.* The proposal is said to retain the “requirement of ‘near certainty’ that no civilian bystanders will be killed.” *Id.* Given the increased civilian casualties in air-strikes to date, one wonders how strictly such a requirement will be observed. See *infra* note 281; see also Savage, *supra* note 44 (suggesting that “near certainty” will now mean “reasonable certainty,” which is a lower standard). On the Trump administration’s empowering the CIA, see Kanishka Singh, *Trump gives CIA Authority to Conduct Drone Strikes: WSJ*, REUTERS (Mar. 13, 2017, 7:04 PM), <http://www.reuters.com/article/us-usa-trump-cia-drones-idUSKBN16K2SE> (citing a Wall Street Journal report that President Donald Trump has given new powers to the CIA to conduct drone strikes against suspected militants in the Middle East). See also Barbara Starr & Ryan Browne, *US Orders First Drone Strikes Under Trump*, CNN POLITICS (Jan. 24, 2017, 8:10 AM), <http://www.cnn.com/2017/01/23/politics/drone-strikes-president-trump/index.html>; Ken Dilanian, Hans Nichols & Courtney Kube, *Trump Admin Ups Drone Strikes, Tolerates More Civilian Deaths: U.S. Officials*, NBC NEWS (Mar. 14, 2017, 1:46 PM), <https://www.nbcnews.com/news/us-news/trump-admin-ups-drone-strikes-tolerates-more-civilian-deaths-n733336> (“The Trump administration is moving ahead with plans to make it easier for the CIA and the military to target terrorists with drone strikes, even if it means tolerating more civilian casualties”). The human rights community in the United States is concerned about the Trump administration’s reported “efforts to weaken policies that are intended to protect civilians and the right to life.” Letter from Am. Civil Liberties Union et al., to H.R. McMaster, Jr., Assistant to the President for Nat’l Sec. Aff. (June 1, 2017), <https://www.hrw.org/news/2017/06/05/letter-possible-changes-us-policies-use-force-counterterrorism-operations>.

¹⁴⁰ AP II, *supra* note 118, art. 1, ¶ 2.

enforcement regime.¹⁴¹ But, in deciding whether the violence has risen to the level of an “armed conflict,” government authorities and international tribunals should consider “the nature, intensity, and duration of the violence, and the nature and organisation of the parties.”¹⁴² And, the non-state group must exhibit sufficient organization to be identified: “Critically, the non-state (or ‘insurgent’) groups that may constitute parties must be capable of identification

¹⁴¹ See KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 137 (2001) (noting that “situations of internal disturbances and tensions, unorganized and short-lived insurrections, banditry, or terrorist activities are not subject to international humanitarian law”) (citation omitted). However, the line between non-international armed conflict and law enforcement jurisdiction has been difficult to identify. See Charles Garraway, Professor, Royal Inst. of Int’l Aff. (Chatham House), Conference Brief at the U.S. Naval War College: Non-International Armed Conflict (NIAC) in the 21st Century (June 21–23, 2011) (“The challenge is, if human rights law and LOAC [Law of armed conflict] are not to collide, there needs to be compromises where they differ, such as targeting. We need to know what law applies in which circumstances. The answer might lie in the intensity of the violence. Where the intensity is similar to IAC [International armed conflicts], LOAC has priority; where the level is less, human right law has priority.”).

¹⁴² DUFFY, *supra* note 123, at 221 (footnotes omitted).

as a party to the conflict and have attained a certain degree of internal organisation.”¹⁴³ Otherwise, the state may target an individual at its whim, without affording any legal process whatsoever.¹⁴⁴

In an armed conflict, international humanitarian law generally permits the combatants on one side to attack the opposite side’s combatants and other military targets without warning. Unless the enemy forces have clearly thrown down their arms, there is usually no obligation to request surrender before attack or to capture rather than kill.¹⁴⁵ During World War II, the United States learned that Ad-

¹⁴³ *Id.* at 221–22 (citing the 2011 ICRC Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts and noting control of territory is not necessary for armed conflict despite the language of AP II quoted above). See also Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27:2 FLETCHER F. WORLD AFF. 55, 60 (2003) (noting that “[t]here can be no humanitarian law conflict without identifiable parties” and criticizing the formulation “war on terror,” because “terror” cannot be a party). Meeting the threshold of being able to be identified as a party corresponds to the requirement that the group attain a sufficient level of organization. See CULLEN, *supra* note 124, at 123–24 (“The general consensus of expert opinion is that armed groups opposing a government must have a minimum degree of organization and discipline - enough to enable them to respect international humanitarian law - in order to be recognized as a party to the conflict.”) (quoting Int’l Comm. of the Red Cross, *Armed Conflicts Linked to the Disintegration of State Structures* (Jan. 23, 1998), available at <https://www.icrc.org/eng/resources/documents/misc/57jplq.htm>). Given the decentralized nature of al Qaeda, with some adherents receiving little more than inspiration from Osama bin Laden (dead or alive), and now from ISIS leaders, identification of parties to the alleged non-international armed conflict is problematic. See Thomas Michael McDonnell, *The Death Penalty—An Obstacle to the “War against Terrorism”?*, 37 VAND. J. TRANSNAT’L L. 353, 397 n.205 (2004) (discussing so-called “leaderless resistance,” now generally referred to as the lone wolf terrorist).

¹⁴⁴ See MELZER, *supra* note 125, at 246–61.

¹⁴⁵ See DUFFY, *supra* note 123, at 311 n.177 (acknowledging this proposition and arguing “that such a preference [for arrest rather than killing] (at least so far as [it] causes no military disadvantage) is implicit.”); cf. Schmitt, *supra* note 104, at 644 (noting that “targeting someone meeting the criteria of a combatant in armed conflict, but whose death is not ‘necessary,’ would be illegal”). But see Vincent-Joël Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 884–85 (2005) (arguing that the right to quarter bars targeted killing). See *infra* notes 150–52 and accompanying text for a more detailed discussion of military necessity, and *infra* note 152 and accompanying text for a more detailed discussion of the right to quarter.

miral Isoroku Yamamoto, Japanese naval commander and the “architect of the Pearl Harbor attack,” was on a military plane; to kill him, the U.S. Army Air Forces deliberately targeted and ambushed the plane.¹⁴⁶ Some would suggest that targeting Yamamoto was not chivalrous,¹⁴⁷ but he was a combatant and, therefore, a lawful subject of attack.¹⁴⁸ However, combatants may not target civilians, unless “they take a direct part in hostilities.”¹⁴⁹ Even with respect to

¹⁴⁶ Joseph Connor, *Have You Heard?: The Secret Mission to Kill Isoroku Yamamoto*, HISTORYNET (Dec. 21, 2016), <http://www.historynet.com/have-you-heard-isoroku-yamamoto.htm>. See also BRIAN MICHAEL JENKINS, UNCONQUERABLE NATION: KNOWING OUR ENEMY, STRENGTHENING OURSELVES 172 (2006).

¹⁴⁷ See THEODOR MERON, 3 THE HUMANIZATION OF INTERNATIONAL LAW 2 (THE HAGUE ACAD. OF INT’L LAW 2006) (stating that “[c]hivalry and principles of humanity are a competing inspiration for the law of armed conflict, creating a counterbalance to military necessity”). On the other hand, one of the American pilots in the attack on Yamamoto “was lost in action.” Kennedy Hickman, *World War II: Operation Vengeance*, THOUGHTCO., <https://www.thoughtco.com/operation-vengeance-death-yamamoto-2360538> (last updated Apr. 27, 2017).

¹⁴⁸ The targeted killing of Yamamoto does not appear to have violated The Hague Convention, which prohibits treacherous killing of the enemy. See Hague Convention IV, *supra* note 116, annex, art. 23(b) (noting that “it is especially forbidden: . . . [t]o kill or wound treacherously individuals belonging to the hostile nation or army . . .”). See also Schmitt, *supra* note 104, at 635–37 (noting that killing an enemy during armed conflict constitutes an illegal killing if the actor feigns civilian status or wears a uniform of the enemy and that irregular combatants commit treachery “if an attack is executed while the enemy uniform is worn”).

¹⁴⁹ AP I, *supra* note 102, art. 51, ¶ 3. The ICRC Commentary on Article 51(3) of AP I notes that “[h]ostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of armed forces.” ICRC COMMENTARY, *supra* note 126, at 618, para. 1942. “Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities.” *Id.* The ICRC Commentary notes that “the word ‘hostilities’ covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon.” *Id.* at 618–19, para. 1943. Although the United States has not ratified AP I, it considers Article 51 as reflecting customary international law. See INT’L AND OPERATIONAL LAW DEP’T, JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 11 (Jeanne M. Meyer & Brian J. Bill eds., 2002) (U.S. considers as custom “[art.] 51 (protection of the civilian population, except para. 6 – reprisals).” The AP I rule reaffirms

combatants in armed conflict, targeted killing must pass the test of military necessity.¹⁵⁰ For example, if enemy troops are *obviously* unarmed, the opposing military force should capture, rather than kill them.¹⁵¹ Jean Pictet, main author of the ICRC commentaries on the 1949 Geneva Conventions and the 1977 Protocols, states as follows:

If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.¹⁵²

Common Article 3 of the Geneva Conventions of 1949, which prohibits combatants from attacking “[p]ersons taking no active part in the hostilities” Third Geneva Convention, *supra* note 117, art. 3(1). All 194 states of the world are parties to the four Geneva Conventions of 1949. See *The Geneva Conventions of 1949 and their Additional Protocols*, INT’L COMM. OF THE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

The ICRC published a guidance on direct participation, presumably with the challenge of international terrorism foremost in view. See NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 9 (2009), available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [hereinafter ICRC INTERPRETIVE GUIDANCE]. But see Eric T. Jensen, *Targeting of Persons and Property*, in *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 37, 56–57 (2009) (defending the 2006 Military Commissions Act definition of “unlawful enemy combatant” as including not only individuals who have “engaged in hostilities,” but also persons “who ha[ve] purposefully and materially supported hostilities against the United States,” a broader definition than that contained either in Common Article 3 or AP I).

¹⁵⁰ See MELZER, *supra* note 125, at 286–89; see also AP I, *supra* note 102, arts. 51, 57; Paust, *supra* note 129, at 270–72; 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 3, 25, 37, 60–61 (2005).

¹⁵¹ See MELZER, *supra* note 125, at 289.

¹⁵² *Id.* (quoting JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 75–76 (1985)). Melzer underlines that combatants need not take unreasonable risks to capture, rather than kill, an enemy:

[W]hile the operating forces can hardly be required to take additional risks in order to capture rather than kill an armed adversary, it would defy basic notions of humanity to shoot to kill an adversary or to refrain from giving him or her an opportunity

Therefore, the law of war permits armed forces to defeat the enemy, but does not provide an unlimited license to kill.¹⁵³

E. *Civilian or Combatant: Whom May a State Target?*

The question of whom a combatant may target is not simple. AP I to the Geneva Conventions of 1949 provides that “[m]embers of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.”¹⁵⁴ Consequently, members of the United States military in Afghanistan

to surrender where the circumstances are such that there manifestly is no necessity for the immediate application of lethal force.

Id.

¹⁵³ Furthermore, the ban on weapons that cause “superfluous injury or unnecessary suffering” stems again from limits imposed by military necessity. HENCKAERTS & DOSWALD-BECK, *supra* note 150, at 240–41. One aspect of this ban is described as follows: “The preamble to the St. Petersburg Declaration states that the use of . . . weapons [that render death inevitable] ‘would be contrary to the laws of humanity,’ and it was this consideration that led to the prohibition of exploding bullets by the Declaration.” *Id.* at 241. The notion is that an armed force does not necessarily have to kill an enemy to achieve a military objective; wounding may be enough. A targeted killing operation, as its name suggests, demands the death of an enemy. Disregarding such a general obligation may not render the weaponized drone illegal, but so using drones does contradict the spirit of this ban.

Likewise, humanitarian law requires that armed forces give enemy troops quarter. *See* Hague Convention IV, *supra* note 116, annex, art. 23(d). Thus, enemy forces who surrender should be captured or arrested, but may not be killed. Putting it another way, a “take no prisoners” order is per se illegal. Targeted killing by drone challenges both principles. A drone (like a jet fighter) cannot capture or arrest a combatant. So while troops may capture unarmed combatants (rather than kill them), drones lack that ability. Likewise, a combatant cannot surrender to a drone (or a jet fighter). *But see* ARKIN, *supra* note 134, at 43–44 (describing a perhaps legendary story of Iraqi soldiers attempting to surrender to a drone during Desert Storm). Even if an unarmed surrendering combatant might be easily captured by a patrol, the drone pilot often will be unable to ascertain that information and, in any event, lacks the ability to capture or arrest. Given the parallel between drones and jet fighters, for example, one cannot assert that the limits on military necessity and on the ability to give quarter make weaponized drones an illegal weapon. Certainly, jet fighters are not. On the other hand, the inability of combatants (or non-combatants) to surrender in the face of, or during, such a drone attack adds to the terror drones inspire.

¹⁵⁴ AP I, *supra* note 102, art. 43, ¶ 2 (emphasis added).

and the Afghan Army are combatants, but what about rebel or insurgent forces or terrorist organizations, such as al Qaeda, ISIS, and the Taliban after losing control of the Afghan government? This question is generally governed by Article 51(3) of AP I, which makes civilians who directly participate in hostilities targetable, but only for such time when they are so participating.¹⁵⁵ Article 51(3) reaffirms Common Article 3 of the Geneva Conventions of 1949, which prohibits attacks on “[p]ersons taking no active part in the hostilities”¹⁵⁶

Put another way, Article 51 protects civilians—not combatants—from attack.¹⁵⁷ But Article 51 does create a narrow exception by removing that protection from those civilians while they are directly taking part in hostilities.¹⁵⁸ Additionally, the drafting history of Article 51 suggests that the framers of Additional Protocol I intended to sharply circumscribe the category of targetable civilians.¹⁵⁹

After World War II, the international community was gravely concerned with protecting civilians from warfare. World War II had enshrined the concept of “total war.”¹⁶⁰ Under this concept, the ci-

¹⁵⁵ *Id.* art. 51(3) (“Civilians shall enjoy the protection afforded by this Section, *unless and for such time as they take a direct part in hostilities.*”) (emphasis added). The Second Additional Protocol contains an identical provision in Article 13(3). *See* AP II, *supra* note 118, art. 13, ¶ 3.

¹⁵⁶ Third Geneva Convention, *supra* note 117, art. 3(1). “Common Article 3” is so called because Article 3 in each of the four Geneva Conventions of 1949 has identical language. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Fourth Geneva Convention, *supra* note 112, art. 3.

¹⁵⁷ *See* AP I, *supra* note 102, art. 51.

¹⁵⁸ *See id.*

¹⁵⁹ *See* INT’L COMM. OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949: COMMENTARY 58 (1973) (noting that the immunity of civilians provided by Article 46, the predecessor to Article 51, was “subject to a very strict condition: they must not take a direct part in hostilities”).

¹⁶⁰ *See* RENÉ A. WORMSER, THE STORY OF THE LAW AND THE MEN WHO MADE IT 542–43 (rev. ed. 1962) (describing the concept of “total war” in relation

vilian infrastructure, which plays a part in developing the technology used in warfare, is fair game.¹⁶¹ Thus, when one accepts the concept of “total war,” destroying everyone and everything that even remotely contributes to the war effort inevitably seems justified.

Some commentators suggest that “quasi-combatants,” for example, civilians working in important industries for the war effort, could be made the subject of attack.¹⁶² Under this theory, these civilians presumably could be killed in their homes as a lawful military objective.¹⁶³ Major General Ira Eaker, Commander of the Eighth Air Force in World War II, stated: “The material destruction by these overcast attacks *in workmen’s homes* and in harbor facilities and allied war industries is considerable and is certainly alone worth the effort.”¹⁶⁴ Ultimately, the quasi-combatant notion essentially legitimizes the concept of total war.

One of the most important humanitarian law treaties, the 1977 Additional Protocol I to the Geneva Conventions of 1949, however, completely rejects this notion by broadly defining civilians as anyone who is not a member of the armed forces or who is not otherwise

to the atom bomb). The following three paragraphs are largely taken from McDonnell, *Cluster Bombs over Kosovo*, *supra* note 35, at 77.

¹⁶¹ See John C. Ford S.J., *The Morality of Obliteration Bombing*, 5 THEOLOGICAL STUD. 261, 309 (1944) (concluding that legitimizing target area bombing or “obliteration bombing” of large sections of cities would “lead . . . to the immoral barbarity of total war”); Mark L. Sacharoff, *Problems and Paradoxes of the Laws of Warfare*, 6 TEMP. INT’L & COMP. L.J. 71, 72 n.8 (1992) (explaining that “[t]otal war describes strategies, tactics, and weapons that result in wholesale destruction of cities and a great part of populations”) (internal quotation marks omitted).

¹⁶² See, e.g., L. Doswald-Beck, *The Value of the 1977 Geneva Protocols for the Protection of Civilians*, in ARMED CONFLICT AND THE NEW LAW 137, 147 (Michael A. Meyer ed., 1989) (citing JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 630–31 (1954)).

¹⁶³ See *id.*

¹⁶⁴ CONRAD C. CRANE, BOMBS, CITIES, AND CIVILIANS 67 (1993) (emphasis added) (quoting Maj. Gen. Ira Eaker as “especially enthusiastic” about “nonvisual attacks” occurring at night or in overcast skies, using primitive radar systems). Major General James Doolittle, who later commanded the Eighth Air Force, opposed non-visual bombing and urged only precision bombing. See *id.* at 72.

directly participating in the conflict.¹⁶⁵ In the negotiating conference, Vietnam proposed the following definition: “A civilian is anyone who is not a member of the armed forces and who does not directly *or indirectly participate in hostilities*.”¹⁶⁶ Not only did the Conference reject this proposal, it also rejected Canada’s, which provided that “[a] civilian is anyone who is not a member of the armed forces *or of an organized armed group*.”¹⁶⁷ Therefore, one can conclude that the drafters opposed making civilians who “indirectly” participate in hostilities targetable, and that members of non-state “organized armed groups” would not necessarily be targetable absent direct participation in hostilities. Presumably, the drafters were concerned that both the Vietnamese and the Canadian proposals cast too wide a net, making civilians who were not directly contributing to the hostilities subject to attack.

The authoritative ICRC Commentary to Article 51(3) supports this narrow interpretation. In remarking on the draft of Article 51(3), the ICRC Commentary notes as follows: “[A] civilian who has taken part in hostilities is no longer a lawful target from the moment he

¹⁶⁵ The Protocol defines “civilian” negatively, namely, as one who neither is a member of the armed forces nor is otherwise taking an active part in the conflict:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

AP I, *supra* note 102, art. 50. This broad definition of “civilian” has drawn sharp criticism. *See, e.g.*, Parks, *supra* note 74, at 116–35; Burrus M. Carnahan, *Additional Protocol I: A Military View*, 19 AKRON L. REV. 543, 544–46 (1986).

¹⁶⁶ IV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA 1974–1977, annex II, at 173 (1978), http://www.loc.gov/r/frd/Military_Law/pdf/RC-records_Vol-4.pdf.

¹⁶⁷ *Id.* annex IV, at 200.

ceases to do so. It is essential to have such a regulation if the population as a whole is to be afforded effective protection.”¹⁶⁸

Likewise, in *Public Committee Against Torture v. Gov’t of Israel*, the Israeli Supreme Court interpreted Article 51(3) in a restrictive manner.¹⁶⁹ This case is significant because the Court applied the Article to unlawful (or unprivileged) combatants, similar to those whom the United States is facing in the so-called “war against terrorism” today.¹⁷⁰ The Court concluded that the following classes of individuals “should also be included in the definition of taking a ‘direct part’ in hostilities”:

[A] person who *collects intelligence* on the army, whether on issues regarding the hostilities, or beyond those issues; a person who *transports* unlawful combatants to or from the place where the *hostilities are taking place*; a person who *operates weapons* which unlawful combatants use, or *supervises* their operation, or *provides service* to them, be the distance from the battlefield as it may. All those persons are performing the function of combatants.¹⁷¹

On the other hand, the Court excluded those who provide food, medicine, general strategic intelligence, financing, or propaganda from the same definition:

[A] person who *sells food or medicine* to an unlawful combatant is not taking a direct part, rather an indi-

¹⁶⁸ INT’L COMM. OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTION OF AUGUST 12, 1949: COMMENTARY 58 (1973), http://www.loc.gov/frd/Military_Law/pdf/RC-Draft-additional-protocols.pdf.

¹⁶⁹ HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel, slip op. para. 35 (2005), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

¹⁷⁰ See *id.* para. 2 (“In its war against terrorism, the State of Israel employs various means . . . [including the] kill[ing] members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel.”).

¹⁷¹ *Id.* (emphasis added) (citing W. Hays Park, *Air War and the Law of War*, 32 AIR FORCE L. REV. 1, 116 (1990); Michael N. Schmitt, “Direct Participation in Hostilities” and 21st Century Armed Conflict, in CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 505, 511 (Horst Fischer et al., eds., 2004)).

rect part in the hostilities. The same is the case regarding a person who *aids* the unlawful combatants *by general strategic analysis*, and grants them *logistical, general support, including monetary aid*. The same is the case regarding a person who *distributes propaganda* supporting those unlawful combatants.¹⁷²

To be sure, the Court's opinion suggests that a taxicab driver who knowingly transports terrorist fighters to the place of hostilities would be considered taking a direct part in the hostilities. Yet, the opinion also implies that transporting such individuals to other areas would *not* necessarily place the taxi driver in that category. Individuals providing "logistical . . . support" are likewise exempt. Presumably, those providing shelter to terrorist fighters would thus fall outside the Court's definition.¹⁷³ Consequently, while such fighters are within a residence, it may be attacked, and the host, if killed or wounded, would be considered permissible collateral damage; but the host could not necessarily be attacked apart from the terrorist fighters.¹⁷⁴

As to the time frame afforded by Article 51(3)—"unless and for such time as [a civilian] take[s] a direct part in hostilities"¹⁷⁵—the Israeli Supreme Court made a fact-based analysis, concluding that a civilian who takes part in hostilities either once "or sporadically," and later on stops such involvement, "is entitled to protection from attack."¹⁷⁶ Nonetheless, full-time terrorist fighters can be targeted at any time:

¹⁷² *Id.* (emphasis added).

¹⁷³ *See id.* The Israeli Supreme Court has been criticized for unduly expanding the definition of "direct participation": "[T]he court [] expanded the traditional definition of 'direct participation' and the time period during which civilians may lawfully be attacked. By disregarding the 'direct participation' requirement's important evidentiary function, the court weakened the protections that international law affords to all civilians, not just to terrorists." Kristen E. Eichensehr, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 *YALE L.J.* 1873 (2007).

¹⁷⁴ *See Pub. Comm. Against Torture in Israel*, para. 35.

¹⁷⁵ API, *supra* note 102, art. 51, ¶ 3.

¹⁷⁶ *Pub. Comm. Against Torture in Israel*, para. 39.

[A] civilian who has joined a terrorist organization which has become his “home”, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.¹⁷⁷

Borrowing from the Israeli Supreme Court, the International Committee of the Red Cross fashioned a guidance concerning the meaning of civilians directly participating in hostilities.¹⁷⁸ The ICRC Guidance distinguishes between individuals who engage in sporadic direct participation and those who carry out a “continuous combat function” as full-time members of non-state organized armed groups.¹⁷⁹

However, the Guidance implicitly adopts the rejected Canadian proposal that “armed forces” include non-state “organized armed groups.”¹⁸⁰ Since these groups are often informally organized and operated, the ICRC adopts a functional definition concerning whether individuals in such non-state organized armed groups are considered combatants or civilians.¹⁸¹ The ICRC observes: “In view of the wide variety of cultural, political, and military contexts in which organized armed groups operate, there may be various degrees of affiliation with such groups that do not necessarily amount to ‘membership’ within the meaning of IHL.”¹⁸² Consequently, the ICRC adopts the “continuous combat function” rationale:

¹⁷⁷ *Id.* (citation omitted).

¹⁷⁸ ICRC INTERPRETIVE GUIDANCE, *supra* note 149.

¹⁷⁹ *Id.* at 70–72. The Guidance states:

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians . . . and lose protection against direct attack, for as long as they assume their continuous combat function.

Id. at 70.

¹⁸⁰ *Id.* at 31–32.

¹⁸¹ *See id.*

¹⁸² *Id.* at 33.

[Continuous combat function] distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions. *Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict.*¹⁸³

The ICRC singles out full-time fighters and treats them differently from other civilians who directly participate in hostilities occasionally or part-time:

This case *must be distinguished from persons comparable to reservists* who, after a period of basic training or active membership, leave the armed group and re-integrate into civilian life. Such ‘reservists’ are civilians until and for such time as they are called back to active duty.¹⁸⁴

Under the “continuous combat function” formulation, individuals who are essentially full-time fighters for irregular armed forces are combatants who are continually targetable.¹⁸⁵ This interpretation, however, excludes significant classes of individuals from combatant status and reaffirms their civilian status and their protection from attack. Individuals protected from attack include those accom-

¹⁸³ *Id.* at 33–34 (emphasis added) (footnote omitted). The ICRC Guidance further explains:

Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.

Id. at 34.

¹⁸⁴ *Id.* (emphasis added) (footnote omitted).

¹⁸⁵ *See id.*

panying the fighters (such as spouses and children), financiers, recruiters, trainers, and propagandists.¹⁸⁶ The ICRC also excludes “individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations, or to the collection of intelligence other than of a tactical nature.”¹⁸⁷

The ICRC interprets “taking a direct part in hostilities” somewhat more narrowly than the Israeli Supreme Court. The latter’s approach may not protect from attack those who smuggle and manufacture weapons for a non-state armed group.¹⁸⁸ Yet, both the Israeli Supreme Court and the ICRC make the full-time terrorist fighter continuously targetable, but prohibit targeting, among others, propagandists, financiers, and those providing general strategic, rather than tactical, intelligence.¹⁸⁹

The ICRC’s interpretation has been criticized from various sides. Noted international humanitarian jurist and scholar Antonio Cassese advocated for a narrower interpretation of “taking a direct part in hostilities.”¹⁹⁰ W. Hays Parks, noted United States interna-

¹⁸⁶ See *id.* These individuals “continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities.” *Id.* (footnote omitted).

¹⁸⁷ *Id.* at 34–35 (footnote omitted).

¹⁸⁸ Once again, the weapon can be targeted and destroyed even if the smuggler is present, but an individual, when detached from the weapon, may be arrested, rather than targeted and killed. In the former case the smuggler’s death would presumably be acceptable collateral damage. In the latter case, the killing of the smuggler in his or her home would be a violation of the law of war under the ICRC interpretation. See *id.*

¹⁸⁹ See ICRC INTERPRETIVE GUIDANCE, *supra* note 149, at 34–35; HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel, slip op. para. 35 (2005).

¹⁹⁰ See Antonio Cassese, Expert Opinion On Whether Israel’s Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law paras. 12–15, <http://www.hamoked.org/files/2017/7901.pdf> (last visited Sept. 21, 2017). Professor Cassese served as the first President of the International Criminal Tribunal for the former Yugoslavia and the first President of the Special Tribunal for Lebanon. He observed: “Both principles of international humanitarian law and military manuals lead to the conclusion that *civilians may not be attacked while planning or preparing an attack or after committing it*. In such cases, if suspected of directly engaging in military operations, *they may be arrested*.” *Id.* at 19 (emphasis in original). In the words of the Israeli Supreme Court, Professor Cassese

tional humanitarian law scholar and former judge advocate, has criticized the ICRC Guidance as unduly limiting the class of individuals from non-state armed groups who may be attacked.¹⁹¹

Although appearing to stretch the plain meaning of the various Conventions' text to permit broader attacks against civilians participating in non-state armed groups, the ICRC Guidance expresses the spirit of the Conventions to avoid civilian casualties and to recognize military necessity in neutralizing increasingly dangerous armed non-state organizations.¹⁹²

F. *Transparency and Drone Attacks*

Cicero famously stated that “in times of war, the law falls silent,”¹⁹³ but the international community, particularly since World War II, has rejected that proposition. Indeed, since 1945, a plethora of international human rights law conventions, tribunals, and other bodies have been created, including human rights instruments, such as the U.N. Charter, the Universal Declaration of Human Rights, the Genocide Convention, the International Covenant on Civil and Political Rights, and the Convention against Torture, as well as international bodies, such as the United Nations, the International Court of Justice, the European Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human and People's Rights, and several official U.N. com-

takes the “position . . . that the terms ‘direct part’ and ‘such time’ are to be interpreted strictly and narrowly.” *Pub. Comm. Against Torture in Israel*, para. 7.

¹⁹¹ See W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 793 (2010). *But see* Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831, 834, 892 (2010) (responding to W. Hays Parks' criticism of the ICRC Interpretive Guidance). For additional criticism of the Guidance, see Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 643–45 (2010); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SECURITY J. 5, 6 (2010).

¹⁹² See ICRC INTERPRETIVE GUIDANCE, *supra* note 149, at 11–12.

¹⁹³ Cicero's actual words were “Silent enim leges inter arma.” OXFORD DICTIONARY OF QUOTATIONS 219 (Elizabeth Knowles ed., 8th ed. 2014)

mittees monitoring compliance with the human rights conventions.¹⁹⁴ Significant international humanitarian law conventions and tribunals have likewise been created, such as the Geneva Conventions of 1949 and their two 1977 Protocols, the Rome Statute of the International Criminal Court, the ICC itself, following the Nuremberg Tribunal in 1945, and the ad hoc international criminal tribunals established by the U.N. Security Council, mainly in the 1990s.¹⁹⁵

Since law can no longer be silent during war, neither can governments completely shroud their conduct of war under the label of “national security.”¹⁹⁶ For the rule of law to function, the public (and where applicable, the litigants and the courts) needs to have access to the essential facts—to be informed of what their government is doing.¹⁹⁷ When governments conceal how military operations have been carried out and fail to identify the number and status of the resulting casualties, neither the domestic public nor the international community can readily judge whether that government has complied with relevant human rights, humanitarian, or domestic law.¹⁹⁸ Two commentators note that, particularly in conducting asymmetric warfare in distant lands with weaponized drones, transparency is essential:

Within this frame [of asymmetric warfare], transparency assumes a crucial importance for advancing the

¹⁹⁴ For an in-depth discussion of the human rights revolution, see MCDONNELL, *STRUGGLE AGAINST TERRORISM*, *supra* note 38, at 104–05.

¹⁹⁵ *See id.*

¹⁹⁶ *See* WHITE HOUSE, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 15–16 (2002), <https://www.state.gov/documents/organization/63562.pdf> (last visited Sept. 22, 2017) (outlining the Bush strategy in the “war against terrorism”).

¹⁹⁷ *See e.g.*, Len Ackland, *The Press, “National Security,” and Nuclear Weapons: Lessons from Rocky Flats*, 24 *J. LAND RESOURCES & ENVTL. L.* 17, 18 (2004) (arguing that “it has never been more important for the public to be informed about what is occurring with . . . U.S. weapons of mass destruction” in light of the government’s “claims of ‘national security’ to justify its ‘War on Terror,’ its war against Iraq, and . . . its right to use military force against any country it deems a potential threat”).

¹⁹⁸ *See* Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 *HARV. NAT’L SEC. J.* 283, 285 (2011).

humanitarian objectives of [international humanitarian law] and alleviating its ‘enforcement deficit’: free access to and flow of information regarding the conduct of hostilities are likely to encourage precaution on the part of political and military leadership; bring violations to an end quicker than would have been feasible otherwise; and generate a heightened awareness of accountability.¹⁹⁹

Granted, the major humanitarian law conventions are generally silent regarding an obligation of transparency.²⁰⁰ Certainly, methods, tactics, and sources may remain properly classified.²⁰¹ A growing movement, however, is demanding that, to carry out humanitarian law’s obligation to protect civilians, states should (a) determine the casualties that their armed forces and other agents have caused, (b) identify the casualties as combatants or non-combatants, and (c) routinely and promptly publish the numbers and, to the extent possible, the names of the persons killed or wounded.²⁰² Informing the public about whether the attack took place in an area subject to armed conflict can also help determine whether humanitarian law or human rights law applies.²⁰³

International human rights conventions do not expressly impose on states the duty to investigate alleged human rights violations.

¹⁹⁹ Orna Ben-Naftali & Roy Peled, *How Much Secrecy Does Warfare Need?*, in *TRANSPARENCY IN INTERNATIONAL LAW* 321, 343 (Andrea Bianchi & Anne Peters, eds. 2013).

²⁰⁰ See Lesley Wexler, *International Humanitarian Law Transparency*, 23 *J. TRANSNAT’L L. & POL’Y* 93, 110 (2014).

²⁰¹ See Ben-Naftali & Peled, *supra* note 199, at 343–45 (noting that “it is necessary to balance transparency and secrecy”).

²⁰² See Susan Breau & Rachel Joyce, *Discussion Paper: The Legal Obligation to Record Civilian Casualties of Armed Conflict*, at 1–2 (June 2011) (unpublished manuscript), available at <http://www.oxfordresearchgroup.org.uk/sites/default/files/1st%20legal%20report%20formatted%20FINAL.pdf>. See also Alon Margalit, *The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice*, in 15 *Y.B. OF INT’L HUMANITARIAN L.* 155, 167–72 (T.D. Gill et al., eds., 2012); Wexler, *supra* note 200, at 110 (characterizing the demand for transparency about armed conflicts as a “groundswell of support for greater public access”).

²⁰³ See generally *U.N. Addendum on Targeted Killings*, *supra* note 133, paras. 28–30.

However, human rights bodies and tribunals quickly realized that an investigation is critical to ensuring that states are carrying out their international obligations to protect human rights²⁰⁴ and so established the remedy of an impartial, independent, and transparent investigation.²⁰⁵ The human rights revolution after World War II has also influenced humanitarian law²⁰⁶ and supports far greater transparency in conducting military operations in the context of armed conflict.²⁰⁷

²⁰⁴ The European Court of Human Rights expressly dealt with this issue:

[A] general legal prohibition of arbitrary killing by the agents of the State *would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities*. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", *requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State*.

McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 41, ¶ 161 (1995) (emphasis added). In a later case, the Court noted the need for an independent and impartial investigation: "[T]he procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force *by subjecting their actions to some form of independent and public scrutiny* capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances." *Kaya v. Turkey*, 1998-I Eur. Ct. H.R. 324, ¶ 87 (emphasis added). *See also Velásquez Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 172, 174 (July 29, 1988) ("a State is obligated to *prevent, investigate and punish*" any violation of the rights recognized by the American Convention on Human Rights) (emphasis added).

²⁰⁵ *See U.N. Addendum on Targeted Killings*, *supra* note 133, paras. 87–92.

²⁰⁶ *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 244 (2000). For an in-depth discussion of the human rights revolution and related IHL development, *see* McDONNELL, STRUGGLE AGAINST TERRORISM, *supra* note 38, at 104–05.

²⁰⁷ In March 2017, thirty-seven high executive officials, primarily from the Obama administration, wrote to Secretary of Defense James Mattis expressing their concern about President Trump's loosening rules of engagement in the struggle against terrorism and urging the Secretary to assure that the United States, among other things, acts transparently:

While certain kinds of information must remain secret in the interest of national security, transparency to the public and

In applying these principles to drone targeted killings and signature strikes, we must recognize that foreign reporters are generally excluded from Pakistan's Federally Administered Tribal Areas (FATA) where most drone attacks have occurred.²⁰⁸ In ISIS-held areas of Syria and Iraq, journalists have been subject to assassination and imprisonment.²⁰⁹ Pakistan's mountainous FATA region is difficult to enter because much of this territory is held by the Pakistani Taliban or by those with some degree of sympathy toward the Taliban.²¹⁰ Generally, the only individuals who can access drone attack

oversight by Congress enhances the legitimacy of U.S. actions. Public disclosure regarding the legal and policy frameworks pursuant to which the U.S. operates—and the effects of those operations—enables the United States to broadcast successes; restore credibility when mistakes occur; and correct erroneous allegations of civilian casualties or unlawful operations that fuel enemy propaganda and recruitment, and can turn allies, partners, and local populations against the United States.

Letter from Rand Beers, Former Undersecretary for Nat'l Protection & Programs, Dep't of Homeland Sec., et al. to James Mattis, Sec'y of Def., Dep't of Def. (Mar. 10, 2017), *available at* <https://www.documentcloud.org/documents/3515908-Use-of-Force-Principles-FINAL.html>. *But see* Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 31, 83 (2011). He warns against applying human rights-specific procedures to investigations of IHL violations. *Id.* He also observes that each of the four Geneva Conventions of 1949 requires the states party to “search for persons alleged to have committed . . . grave breaches” and to bring such persons “before its own courts.” *Id.* at 36–37 (quoting Fourth Geneva Convention, *supra* note 112, art. 146). He argues that these provisions implicitly require an investigation into the international law violation. *Id.* at 38–39.

²⁰⁸ See AMNESTY INT'L, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 7–8, 10, 12 (2013), <https://www.amnesty.org/download/Documents/12000/asa330132013en.pdf> [hereinafter DRONE STRIKES IN PAKISTAN].

²⁰⁹ See *id.* at 10 (“Independent observers risk accusations of espionage, abduction and death at the hands of [armed groups like the Taliban] for seeking to shed light on human rights in North Waziristan.”). See also Anjali Singhvi, *When Journalists Are Killed, Prosecutions Are Rare*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/interactive/2016/06/17/world/journalists-killed-prosecutions-rare.html> (noting that the Islamic State is responsible for the deaths “of at least 24 journalists since 2013, mostly in Iraq, but also in Syria, Turkey and France”). Rarely have Western journalists been allowed access to ISIS-controlled territory. See Withnall, *supra* note 29 (reporting on the first Western journalist ever to be granted access to ISIS-controlled territory). *But see* Winter, *supra* note 29 (noting that ISIS has lost nearly all of its Iraqi and Syrian territory).

²¹⁰ DRONES STRIKES IN PAKISTAN, *supra* note 208, at 10.

sites are Pakistani stringers who may feel coerced by the Taliban in reporting their stories.²¹¹ The journalists also report that the United States government provides its own version of the attacks, based apparently in part on U.S.-paid undercover operatives in the FATA region.²¹² Presumably, this is related to the intelligence the CIA (and possibly JSOC) gathers in determining to make an attack.

It is in the interest of the Taliban, al Qaeda, and ISIS to inflate casualty figures of innocent civilians, whereas it is in the interest of the United States to downplay such figures.²¹³ Nothing in our interviews suggests that the Pakistani stringers or Western journalists themselves have been trained in international humanitarian law. In fact, virtually all the journalists with whom we talked refused to consider international humanitarian law in discussing drone strikes, either being uncomfortable with the subject or feeling it goes beyond their expertise.²¹⁴ These journalists indicate that they have little faith in the accuracy of the reporting of drone strikes from the Pakistani tribal areas.²¹⁵ Yet, the estimated number of “militant” versus “non-militant” casualties from drone strikes stems largely from the same reporting.²¹⁶

²¹¹ See Interview with Declan Walsh, *supra* note 26 (noting that “[t]hese reporters [working in the Pakistan tribal areas] are quite vulnerable”); Interview with Chris Brumitt, *supra* note 26.

²¹² See Interview with Declan Walsh, *supra* note 26. “[The] Taliban and U.S. and Pakistan have their own agendas . . .” *Id.* It is “almost impossible to visit drone strike sites in Waziristan.” *Id.*

²¹³ See *id.* (“Everyone has an interest to manipulate the truth.”).

²¹⁴ See, e.g., Interview with Chris Woods, *supra* note 37. He indicated that the Bureau of Investigative Journalists looked to how the local community regarded the casualties as “civilian,” and whether, for example, those killed were buried in local cemeteries rather than in the Taliban’s martyr’s cemetery. *Id.*

²¹⁵ See Interview with Declan Walsh, *supra* note 26 (noting “quite inaccurate” reports and that stringers have difficulty getting to the drone strike sites); Interview with Chris Brumitt, *supra* note 26 (noting great uncertainty). See also Interview by Rocky Bousias with Ken Dilanian, Reporter, L.A. Times (Oct. 31, 2013) (noting that there is “no first-hand knowledge of drone strikes” and that the L.A. Times no longer has a correspondent in Pakistan).

²¹⁶ See Peter Bergen et al., *America’s Counterterrorism Wars: Methodology*, NEW AM. FOUND., <https://www.newamerica.org/in-depth/americas-counterterrorism-wars/pakistan/>; *Drone Warfare: Our Methodology*, BUREAU OF INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/explainers/our-methodology> (last modified Feb. 2017). For an excellent, detailed analysis of civilian casualties from United States drone strikes, see STANFORD LAW SCH.

From the previous section, one can understand the complexity of the question of who can be targeted. Might a journalist count as a militant in a strike killing a drug dealer who has financially supported the Taliban but has never taken part in hostilities? What about a recruiter or a trainer? Might a journalist, who has not studied international humanitarian law, likewise count such individuals as “militants,”²¹⁷ not to mention an individual who provided general strategic intelligence to the Taliban, al Qaeda, or ISIS? Might we need far greater transparency to be able to analyze the facts and answer these and other related questions?

III. TRANSFERRING RESPONSIBILITY FOR CONDUCTING DRONE TARGETED KILLINGS AND SIGNATURE STRIKES FROM THE CIA AND JSOC TO MORE TRANSPARENT ARMED SERVICE COMMANDS

A. *CIA: The Right Institutional Actor?*

The reporting is complicated by the CIA’s exclusive role in carrying out drone strikes in Pakistan and JSOC’s near exclusive role in other theaters. Officially, the United States denies conducting such strikes and reveals little if any information about them.²¹⁸ Apparently, this fig leaf approach allows the United States to deny official military intervention in the territory of its presumably close ally, Pakistan. As our chief espionage agency, the CIA routinely conducts its operations in secret.²¹⁹ Transparency in the way it conducts and reviews its operations would contravene the purpose and

INT’L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC & N.Y.U. SCH. OF LAW GLOB. JUST. CLINIC, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN (Sept. 2012), <http://chrgj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf>.

²¹⁷ The term “militant” has no legal significance. *See supra* note 41.

²¹⁸ *See Mazzetti, supra* note 25. The Trump administration is planning to expand the CIA’s authority to conduct drone strikes in Afghanistan and other “active war zones.” *See Schmitt & Rosenberg, supra* note 18; *Savage & Schmitt, supra* note 19.

²¹⁹ The CIA’s covert actions are operated under its clandestine arm known as the Directorate of Operations and less formally called the Clandestine Service. *See* Offices of the CIA, *Our Mission*, CENTRAL INTELLIGENCE AGENCY (last updated Aug. 3, 2016), <https://www.cia.gov/offices-of-cia/clandestine-service>.

culture not only of the CIA itself, but also of all countries' espionage agencies, from MI6 to the KGB.²²⁰

Yet, virtually everyone knows that the United States is carrying out such strikes and 58% of Americans approve of them.²²¹ The credibility of the United States has been undermined by the strikes and by the allegations of excessive civilian casualties in the face of U.S. claims of zero, or near zero, civilian casualties.²²² Despite being precision-guided weapons, the extraordinarily powerful ordnance that the drones carry lends credence to those who criticize the United States' claims. Indeed, the CIA's and JSOC's lack of transparency makes the U.S. case for low collateral damage from drone strikes more difficult to establish.²²³

Much has been written demonstrating that the CIA should not be charged with singling out individuals by name, targeting, and killing them.²²⁴ Despite often being criticized, the CIA does play a vital function in the struggle against international terrorism.²²⁵ The

²²⁰ The infamous KGB was disbanded in 1991 with the fall of the Soviet Union, but its activities were soon replaced by other Russian agencies, among them the SVR (Foreign Intelligence Service) and the FSO (Federal Protective Service). See Andrei Soldatov, *Putin Has Finally Reincarnated the KGB*, STANDARD-EXAMINER (Sept. 16, 2016, 12:30 PM), <http://www.standard.net/World/2016/09/21/Putin-has-finally-reincarnated-the-KGB>.

²²¹ See PEW RESEARCH CTR., PUBLIC CONTINUES TO BACK U.S. DRONE ATTACKS 1 (May 28, 2015), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2015/05/5-28-15-Foreign-Policy-release.pdf>.

²²² See Savage & Shane, *supra* note 10; SUMMARY OF U.S. STRIKES, *supra* note 14. See also Mark Mazzetti & Matt Apuzzo, *Deep Support in Washington for C.I.A.'s Drone Missions*, N.Y. TIMES (Apr. 25, 2015), <https://www.nytimes.com/2015/04/26/us/politics/deep-support-in-washington-for-cias-drone-missions.html>.

²²³ See Perina, *supra* note 22, at 564–65.

²²⁴ See Steve Coll, *The Unblinking Stare: The Drone War in Pakistan*, NEW YORKER (Nov. 24, 2014), <http://www.newyorker.com/magazine/2014/11/24-unblinking-stare>; Chris Woods, *CIA's Pakistan Drone Strikes Carried out by Regular US Air Force Personnel*, GUARDIAN (Apr. 14, 2014, 9:30 AM), <https://www.theguardian.com/world/2014/apr/14/cia-drones-pakistan-us-air-force-documentary>.

²²⁵ See Michael Waltz, "Bring the Magic": Using Drones in Afghanistan, in DRONE WARS: TRANSFORMING CONFLICT, LAW, AND POLICY 209, 214 (Peter L. Bergen & Daniel Rothenberg, eds., 2015) (recognizing the value of drones but criticizing overreliance on them: "There's an element of my profession in Special Forces that involves building relationships, developing cultural understanding,

question here, however, is whether the CIA is best positioned institutionally to carry out such killings. Professor Robert Chesney suggests that the CIA is institutionally suited to this role: “[Regarding] the meticulous identification and tracking of specific terrorists and the eventual use of an airstrike to kill them—it is not at all clear that [the] CIA is less accountable and less concerned with relevant legal constraints than the military.”²²⁶ Yet, for many reasons, the CIA should not be tasked with carrying out targeted killing drone strikes: (1) the CIA keeps drone operations and any after action reports secret; (2) the CIA drone “pilots” are not uniformed and are, therefore, unprivileged combatants; (3) CIA officers are not subject to the Uniform Code of Military Justice (UCMJ) and are probably not schooled in international humanitarian law;²²⁷ (4) the CIA made egregious blunders in the run-up to the U.S. 2003 invasion of Iraq; and (5) the CIA has a troubling history, having assassinated foreign political leaders in the 1960s and 1970s.²²⁸

B. *JSOC: Materially Different From the CIA?*

Presumably responding to the criticism of granting our espionage agency with such daunting responsibility, the Obama administration attempted to move some of the authority to carry out drone

being a teacher, and training others to be a force enabler . . . Unmanned technology cannot replace those very human skills.”)

²²⁶ Robert Chesney, *A Revived CIA Drone Strike Program? Comments on the New Policy*, LAWFARE BLOG (Mar. 14, 2017, 12:12 PM), <https://www.lawfareblog.com/revived-cia-drone-strike-program-comments-new-policy>.

²²⁷ See Sarah Holewinski, *Just Trust Us: The Need to Know More About the Civilian Impact of US Drone Strikes*, in DRONE WARS, *supra* note 170, at 42, 49 (noting that unlike the military, “there is no indication that the CIA has an ethos that would motivate it to reduce civilian harm”).

²²⁸ See Ewen MacAskill, *The CIA Has a Long History of Helping to Kill Leaders Around the World*, GUARDIAN (May 5, 2017, 11:43 AM), <https://www.theguardian.com/us-news/2017/may/05/cia-long-history-kill-leaders-around-the-world-north-korea>. See also EMILY CRAWFORD, IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT 101 (Oxford, 2015) (“[The CIA] has orchestra[ted] or attempted the assassinations of world leaders including Fidel Castro, Patrice Lumumba, Rafael Trujillo, and Ngo Dinh Diem.”). Even CIA Director John Brennan stated, “The CIA should not be doing traditional military activities and operations.” Micah Zenko, *Transferring CIA Drone Strikes to the Pentagon*, COUNCIL ON FOREIGN REL.: CTR. FOR PREVENTIVE ACTION (Apr. 16, 2013), <https://www.cfr.org/report/transferring-cia-drone-strikes-pentagon>.

targeted killing attacks from the CIA to the U.S. military.²²⁹ Unfortunately, the administration put this weighty authority to target and kill in the hands of the least transparent command in the military—the Joint Special Operations Command.²³⁰ Like the CIA, JSOC plays a significant role in safeguarding the security of the United States, with troops possessing among the highest skills the military has to offer and having the ability to leave a small footprint in handling delicate covert operations.²³¹ However, “JSOC operates in a black hole of accountability. Secrecy pervades all aspects of JSOC, from its structure, to its size, to its budget.”²³²

Consequently, JSOC suffers from the same chief institutional flaws as the CIA. Congress exercises little oversight over JSOC, and, consequently, neither Congress nor the public can generally determine whether JSOC is complying with domestic or international law.²³³ Furthermore, JSOC members often operate outside of uniform, likewise rendering them unprivileged combatants in armed

²²⁹ See Thomas Gibbons-Neff & Dan Lamothe, *Obama Administration Expands Elite Military Unit's Powers to Hunt Foreign Fighters Globally*, WASH. POST (Nov. 25, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/11/25/obama-administration-expands-elite-military-units-powers-to-hunt-foreign-fighters-globally/?utm_term=.e629e98bf0c9.

²³⁰ See *id.* Micah Zenko, Senior Fellow at the Council on Foreign Relations, argued for this change from the CIA to JSOC, noting that the U.S. could then provide “a much clearer and more detailed explanation” of drone targeted killings, but admitting that “JSOC is also a highly secretive organization” Zenko, *supra* note 228.

²³¹ JSOC, for example, played a critical role in the targeting and killing of Osama bin Laden in a 2011 raid by the Navy SEALs and of Abu Musab al-Zarqawi, the leader of al Qaeda in Iraq, which later became Daesh (ISIS). See Gibbons-Neff & Lamothe, *supra* note 229. JSOC also has engaged in “hostage rescue and weapons of mass destruction search and recovery” ARKIN, *supra* note 134, at 212.

²³² Holewinski, *supra* note 227, at 48. See also Naureen Shah, *A Move Within the Shadows: Will JSOC's Control of Drones Improve Policy?*, in DRONE WARS, *supra* note 225, at 160, 163 (suggesting that JSOC is even more secretive than the CIA); Dana Priest & William M. Arkin, ‘Top Secret America’: A Look at the Military's Joint Special Operations Command, WASH. POST (Sept. 2, 2011), https://www.washingtonpost.com/world/national-security/top-secret-america-a-look-at-the-militarys-joint-special-operations-command/2011/08/30/gIQAvYuAxJ_story.html?utm_term=.873699757053. But see Morgan, *supra* note 134.

²³³ See Scott Horton, *Inside a Secret DOD Prison in Afghanistan*, HARPER'S BLOG (Oct. 19, 2010, 2:39 PM), <https://harpers.org/blog/2010/10/inside-a-secret-dod-prison-in-afghanistan/>. See also JEREMY SCAHILL, DIRTY WARS: THE WORLD

conflict.²³⁴ Like the CIA, JSOC has been linked in the past to assassinations, in its case, to those carried out in the drug wars in Colombia.²³⁵

Unlike the CIA, JSOC commanders and troops *are* bound by the Uniform Code of Military Justice (UCMJ)²³⁶ and are trained in humanitarian law.²³⁷ JSOC, however, often conducts operations jointly with the CIA, and in such operations, JSOC might feel it can operate under looser CIA rules.²³⁸ “Most notably, in contrast to the [Department of Defense], the CIA has never clarified whether and to what

IS A BATTLEFIELD 48–49 (2013) (“When a president of the United States wanted to conduct an operation in total secrecy, away from the prying eyes of Congress, the best bet was not the CIA, but rather JSOC.”). *But see* Chesney, *supra* note 226 (stating that “lethal operations conducted by the military for counterterrorism purposes outside areas of active combat operations are now subject to an increased degree of oversight by the armed services committees”).

Congress relatively recently did slightly broaden a 2013 federal statute requiring the U.S. military to notify Congress within 48 hours of “a lethal operation . . . carried *outside* a declared theater of active armed conflict.” 10 U.S.C. § 130f(d)(1) (effective Dec. 23, 2016) (emphasis added). While welcome, this statute thus exempts from notification JSOC operations, including drone strikes in “declared theater[s] of active armed conflict.” So, Afghanistan, Iraq, Syria, and perhaps Libya are presumably excluded from the amended statute. Likewise excluded are Somalia and parts of Yemen, which President Trump declared “areas of active hostilities.” *See* Savage and Schmitt, *supra* note 20. *See also* Paul D. Shinkman, ‘Areas of Active Hostilities’: Trump’s Troubling Increases to Obama’s Wars, U.S. NEWS AND WORLD REPORT (May 16, 2017), <https://www.usnews.com/news/world/articles/2017-05-16/areas-of-active-hostilities-trumps-troubling-increases-to-obamas-wars>. For a more detailed discussion of this issue, see Chesney, *infra* note 243.

²³⁴ *See* MICHAEL SMITH, KILLER ELITE: THE INSIDE STORY OF AMERICA’S MOST SECRET SPECIAL OPERATIONS TEAM 40, 141 (2d ed. 2008). *But see* W. Hays Parks, *Special Forces’ Wear of Non-Standard Uniforms*, 4 CHIC. J. INT’L L. 493, 515–16 (2003) (arguing that Special Forces sufficiently distinguish themselves from the civilian population).

²³⁵ *See* SMITH, *supra* note 234, at 171–74.

²³⁶ *See* 10 U.S.C. § 802(a)(1) (2012), amended by National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, 130 Stat. 2000, 2894.

²³⁷ *See generally* PATRICK PATERSON, JOINT SPECIAL OPERATIONS UNIV., JSOU REP. 16-9, TRAINING SURROGATE FORCES IN INTERNATIONAL HUMANITARIAN LAW: LESSONS FROM PERU, COLOMBIA, EL SALVADOR, AND IRAQ (2016), <http://chds.dodlive.mil/files/2013/12/Paterson-JSOU16-9.pdf>.

²³⁸ *See* Jennifer D. Kibbe, *Conducting Shadow Wars*, 5 J. NAT’L SEC. L. & POL’Y 373, 386 (2012).

degree it considers itself legally bound by international law.”²³⁹ Some have questioned whether judge advocate generals (JAGs or military lawyers) review JSOC operations and troops as they do in other commands.²⁴⁰ Military lawyers play a critical role in ensuring that the military complies with humanitarian law.²⁴¹ A judge advocate of great integrity with decades of experience has assured the author that military lawyers “are fully embedded” with JSOC units and play a critical role in targeting decisions.²⁴² JSOC has been described as “an almost industrial-scale counterterrorism killing machine”²⁴³ that, like the CIA, operates clandestinely often in hostile

²³⁹ Shah, *supra* note 232, at 172 (footnote omitted). *See also* Kibbe, *supra* note 238, at 386. Similarly, Professor Kibbe observed:

Michael Vickers, then with the Center for Strategic and Budgetary Assessments but soon to become the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, emphasized in a congressional hearing that “[m]aking full use of authorities in the Global War on Terror” is critical, “particularly the flexible detailing and exploitation of the CIA’s Title 50 authority.” In other words, by detailing JSOC personnel to the CIA, an administration could leverage the CIA’s clearer legal authority to act covertly to conduct JSOC operations on a more wide-ranging basis.

Kibbe, *supra* note 238, at 387 (citation omitted).

²⁴⁰ *See* Shah, *supra* note 232, at 172.

²⁴¹ *See id.* *See also* Mike Newton, *The Military Lawyer: Nuisance or Necessity?*, 120, 127 (paper presented at the Int’l Inst. of Humanitarian Law, 28th Roundtable on Current Problems of International Humanitarian Law, San Remo, Sept. 2–4, 2004), *available at* <http://www.iihl.org/wp-content/uploads/2015/12/Strnghtening-measures-for-the-respect-and-implementation-of-IHL.pdf>.

²⁴² Conversation with author (June 28, 2017). The JAG officer prefers to remain anonymous.

²⁴³ Holewinski, *supra* note 227, at 48 (quoting Gretchen Gavett, *What is the Secretive U.S. “Kill/Capture” Campaign?* PBS: FRONTLINE (June 17, 2011), <http://www.pbs.org/wgbh/frontline/article/what-is-the-secretive-us-killca/> (quoting retired Lt. Col. John Nagl, former counterinsurgency adviser to Gen. David Petraeus)). *See also* Alston, *supra* note 198, at 347–48 (quoting investigative journalist Seymour Hersh describing JSOC as an “executive assassination ring, [over which] Congress has no oversight”); Brandon Webb, *Memorial Day to Me: Then as a US Navy SEAL, Now a US Citizen*, SOFREP (May 29, 2017), <https://sofrep.com/82459/memorial-day-us-navy-seal-now-us-citizen-2/> (“If you’re wanted dead by JSOC, you’d better get your affairs in order and prepare to meet Allah . . .”). General McChrystal had large television screens installed in the Global Operations Center when he was in command of JSOC, which were promptly called, “Kill TV.” SEAN NAYLOR, *RELENTLESS STRIKE: THE SECRET HISTORY OF*

territory.²⁴⁴ President Obama reportedly gave JSOC independent authority both to make up its own “kill list” and to carry out those killings.²⁴⁵ Former Secretary of Defense Donald Rumsfeld envisioned an expanded JSOC as constituting “hunter-killer” teams that would pursue terrorists around the globe.²⁴⁶ International humani-

JOINT SPECIAL OPERATIONS COMMAND 255–56 (2015); SCAHILL, *supra* note 233, at 303. But see, on congressional oversight, Robert Chesney, *Expanding Congressional Oversight of Kill/Capture Ops Conducted by the Military: Section 1036 of the NDAA*, LAWFARE BLOG (Dec. 8, 2016, 6:25 PM), <https://www.lawfare-blog.com/expanding-congressional-oversight-killcapture-ops-conducted-military-section-1036-ndaa>; (“Just in time for a potential expansion of the range of circumstances in which the U.S. military (particularly JSOC) engages in kill/capture operations, we are getting at least a slight expansion of oversight by the Senate and House Armed Services Committees.”); accord H.R. REP. NO. 114-840, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017, at 395, § 1036(a) (Conf. Rep.), <https://www.congress.gov/114/crpt/hrpt840/CRPT-114/hrpt840.pdf> [hereinafter NDAA FOR FY 2017] (amending 10 U.S.C. § 130f as discussed *supra*, note 233).

²⁴⁴ See Shah, *supra* note 232, at 164 (noting that in 2010 President Obama reportedly “sent several dozen JSOC troops to Yemen to kill ‘scores of people on JSOC’s hit list’”) (quoting DANA PRIEST & WILLIAM M. ARKIN, TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE 251 (2011)).

²⁴⁵ See Priest & Arkin, *supra* note 232 (“The president has given JSOC the rare authority to select individuals for its kill list — and then to kill, rather than capture, them.”). President Obama likewise “gave JSOC “standing authority to use whatever military resources it needs anywhere in the world in pursuit of its counterterrorist mission, avoiding what had been sometimes costly delays while the military bureaucracy processed the proper requests for use of a submarine, for instance, for a particular mission.” Kibbe, *supra* note 238, at 377. In 2011, a Targeting and Analysis Center (TAAC) was constructed “near the Pentagon to help it monitor the increased use of special operations missions against suspected militants around the world. Modeled after the National Counterterrorism Center . . . the TAAC combines JSOC’s elite special operators with at least 100 counterterrorism analysts from various intelligence agencies in an effort to speed up information sharing and shorten the time between picking up a piece of intelligence and acting on it.” *Id.* at 378–79. “While JSOC effectively had a global range . . . the 2009 changes were intended to make efforts to use military capabilities outside of war zones ‘more systematic and long term.’” *Id.* at 378 (quoting Mark Mazzetti, *U.S. Said to Order an Expanded Use of Secret Action*, N.Y. TIMES, May 25, 2010, at A1). “Symbolically and operationally, the new targeting center clearly establishes JSOC as the lead agency in the counterterrorism battle.” *Id.* at 379.

²⁴⁶ The following explains JSOC’s internal structure:

JSOC is made up of three shadowy units, the existence of which the Pentagon does not officially acknowledge: the Army’s 1st

tarian law does not require that a combatant *offer* an enemy the opportunity to surrender, unless the enemy is clearly unarmed. Yet, if the reporting on JSOC is accurate, its emphasis on killing rather than capturing stretches the limits military necessity imposes²⁴⁷— all the more reason that strict oversight of such a command is necessary.²⁴⁸

Special Forces Operational Detachment–Delta (Delta Force), the Naval Special Warfare Development Group (DEVGRU, formerly known as SEAL Team 6), and the Air Force’s 24th Special Tactics Squadron. Finally, there is also a highly classified Intelligence Support Activity team (known as ISA, or, more recently, as Gray Fox, although its name is changed so often that it is probably something else by now), which was recently transferred from the intelligence command to SOCOM [Special Operations Command]. It is the JSOC units and Gray Fox that are to play the key role in Rumsfeld’s plans for “hunter-killer” teams that will pursue “high-value targets” (terrorists) around the world.

Jennifer D. Kibbe, *The Rise of the Shadow Warriors*, 83 FOREIGN AFF. 102, 110 (2004).

²⁴⁷ See PICTET, *supra* note 152 and accompanying text. One commentator describes one division within JSOC as having a “cowboy mentality.” SMITH, *supra* note 234, at 116 (quoting a former ISA officer). *But see* STANLEY MCCHRISTAL, *MY SHARE OF THE TASK: A MEMOIR* 191 (2013) (“No raid force ever went on a mission under my command with orders not to capture a target if he tried to surrender. We were not death squads.”). *See also* Micah Zenko, *Donald Trump is Pushing America’s Special Forces Past the Breaking Point*, FOREIGN POLICY, (Aug. 1, 2017), <http://foreignpolicy.com/2017/08/01/donald-trump-is-pushing-americas-special-forces-past-the-breaking-point-jsoc-navy-seal/> (noting that special operations forces “express a distinct preference for capturing terrorist suspects—a dead terrorist cannot provide the intelligence that allows special operators to increase their situational awareness of a given country.”).

²⁴⁸ *See* Kibbe, *supra* note 238, at 388 (“While the Obama administration reportedly has increased the requirements for White House, National Security Council, and Department of Defense review of JSOC operations outside of war zones, that does not obviate the need for legislative oversight.”). *See also* Mark Mazzetti et al., *SEAL Time 6: A Secret History of Quiet Killings and Blurred Lines*, N.Y. TIMES (June 6, 2015), https://www.nytimes.com/2015/06/07/world/asia/the-secret-history-of-seal-team-6.html?_r=0#story-continues-1 (noting that the regular military provides little oversight over any alleged SEAL Team 6 misconduct). In its early history, the secrecy surrounding JSOC and the general lack of oversight over it contributed to charges of corruption. *See* SMITH, *supra* note 234, at 112–17.

Aside from sharing many of the same institutional blind spots, JSOC receives even less scrutiny than the CIA.²⁴⁹ Technically, JSOC is prohibited from carrying out covert action, but in practice, JSOC's operations are often tantamount to covert action.²⁵⁰ The President and the Secretary of Defense have authority over JSOC.²⁵¹ However, both Presidents Bush and Obama decided not to "brief Congress" ahead of JSOC operations and "rarely" did the Presidents do so afterwards.²⁵² Both Presidents argued that JSOC operations fall under the category of regular military activities, which lie exclusively within Executive authority.²⁵³ Adding to red flags raised by employing this force, JSOC has also exponentially expanded since September 11, 2001.²⁵⁴ Before the 9/11 attacks, JSOC had approxi-

²⁴⁹ See Robert Chesney, *Storifying the Oversight System for JSOC Kill/Capture Ops*, LAWFARE BLOG (June 19, 2015, 3:39 PM), <https://www.lawfare-blog.com/storifying-oversight-system-jsoc-killcapture-ops> (noting that the "formal covert action oversight system" required of the CIA by federal law would not be required of similar actions carried out by JSOC). *But see* NDAA FOR FY 2017, *supra* note 243, § 1036(a) (requiring the Secretary of Defense to notify the congressional defense committees within 48 hours of such operations); Chesney, *supra* note 226.

²⁵⁰ See Priest & Arkin, *supra* note 232; see also *Better than the CIA: JSOC*, LAW IN ACTION BLOG (Sept. 9, 2011), http://www.alphabetic.info/international/cia_jsoc/ (arguing that obscurity has been one of the unit's hallmarks); SCAHILL, *supra* note 233, at 96–97.

²⁵¹ *Better than the CIA: JSOC*, *supra* note 250 (the military command retains a managerial role).

²⁵² Priest & Arkin, *supra* note 232. See also John Glaser, *JSOC: The End of Military Accountability*, ANTIWAR.COM BLOG (Feb. 14, 2012), <https://www.antiwar.com/blog/2012/02/14/jsoc-the-end-of-military-accountability/>.

²⁵³ See Kibbe, *supra* note 238, at 381. ("Critics charged that the Bush administration was shifting ever more covert activity from the CIA to the military in a deliberate strategy to exploit the 'traditional military activities' loophole and evade congressional oversight."). *But see* Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539, 540 (2012) (arguing that "[t]he existing rules attempt to promote accountability . . . [1] within the executive branch by requiring explicit presidential authorization for certain activities, and . . . [2] between the executive branch and Congress by requiring notification to the legislature in a broader set of circumstances") (emphasis in original); Zenko, *supra* note 228.

²⁵⁴ See Priest & Arkin, *supra* note 232.

mately 1,800 members and was devoted primarily to hostage rescue.²⁵⁵ After 9/11, Secretary of Defense Rumsfeld dramatically increased JSOC's numbers, transforming it into "America's secret army" to combat Islamic terrorists.²⁵⁶ JSOC is estimated now to have more than 25,000 troops and is thus probably much larger than the CIA's covert action division.²⁵⁷

JSOC has had some notable successes—the killing of Osama bin Laden on May 2, 2011, is probably considered the most significant.²⁵⁸ But, it has also had some notable failures. For example, the disastrous 1993 Black Hawk Down incident, resulting in the loss of two JSOC helicopters over Somalia and the dragging of JSOC operators' bodies through the streets of Mogadishu.²⁵⁹ JSOC was also

²⁵⁵ See *id.* See also *Better than the CIA: JSOC*, *supra* note 250.

²⁵⁶ See Priest & Arkin, *supra* note 232 (JSOC "has grown from a rarely used hostage rescue team into America's secret army"). In 2004, Rumsfeld approved a Pentagon order making JSOC "the Pentagon's executive agent for global operations against the targets [on the Pentagon's] list," thus permitting JSOC to use "any weapon in the US arsenal" including drones. JOHN PRADOS, *THE U.S. SPECIAL FORCES: WHAT EVERYONE NEEDS TO KNOW* 127–28 (2015).

²⁵⁷ See Priest & Arkin, *supra* note 232 (quoting a JSOC member stating, "The CIA doesn't have the size or the authority to do some of the things we can do"). See also SCAHILL, *supra* note 233, at 181–82 (noting JSOC's rise); Nick Turse, *The Startling Size of US Special Forces*, *MOTHER JONES* (Jan. 8, 2014, 11:00 AM), <http://www.motherjones.com/politics/2014/01/map-startling-size-us-special-forces/> ("In the post-9/11 era, the [U.S. Special Operations Command] has grown steadily . . . [from] about 33,000 personnel in 2001 [to almost] 72,000 in 2014. [A]bout half this number are called . . . "badged operators"—SEALs, Rangers, Special Operations Aviators, Green Berets—while the rest are support personnel.[.]"); Michael B. Kelley, *US Special Ops Have Become Much, Much Scarier Since 9/11*, *BUSINESS INSIDER: MILITARY & DEFENSE* (May 10, 2013, 11:50 AM), <http://www.businessinsider.com/the-rise-of-jsoc-in-dirty-wars-2013-4> ("JSOC, which includes troops from a variety of America's best units, grew from fewer than 2,000 troops before 9/11 to as many as 25,000 today.").

²⁵⁸ See *This Day in History: Osama bin Laden Killed by U.S. Forces*, *HISTORY*, <http://www.history.com/this-day-in-history/osama-bin-laden-killed-by-u-s-forces> (last visited Sept. 24, 2017). JSOC also rescued Private Jessica Lynch from a hospital then in enemy Iraqi hands. SEAL Team 6 successfully freed the captain of the *Maersk Alabama* from pirates in April 2009, a rescue made into the movie "Captain Phillips." Kibbe, *supra* note 238, at 386.

²⁵⁹ See SCAHILL, *supra* note 233, at 55–56. There was also the 2010 Gardez night raid in Southeast Pakistan resulting in the killing of an Afghan police officer and six other family members including two pregnant women, a raid that was initially covered up. See *id.* at 334–46.

responsible for the widely-reported July 2002 bombing at a wedding party in Afghanistan, killing 48 people and injuring 117 at the party.²⁶⁰ Despite its mixed record, its focus on killing, rather than capturing, perceived enemy operatives and forces,²⁶¹ and its strict adherence to a regime of secrecy even after its operations have been completed, JSOC was granted broad authority to act in fifteen countries by Secretary of Defense Rumsfeld.²⁶² Accordingly, Rumsfeld established JSOC, rather than regular military commands, as the “tip of the spear” of U.S. counter-terrorism and counter-insurgency operations.²⁶³

²⁶⁰ See Liam Stack, *U.S. Airstrikes, Afghan Casualties*, N.Y. TIMES (Oct. 4, 2015), <https://www.nytimes.com/interactive/2015/10/04/world/asia/us-airstrikes-afghan-casualties.html>. In attempting to rescue Linda Norgrove, a British aid worker held hostage in Afghanistan, a JSOC operator threw a grenade that killed her. Morgan, *supra* note 134.

²⁶¹ See John Glaser, *US Preparing for JSOC ‘Kill-Capture’ Operations in Libya After Consulate Attack*, ANTIWAR.COM (Oct. 2, 2012), <http://news.antiwar.com/2012/10/02/us-preparing-for-jsoc-kill-capture-operations-in-libya-after-consulate-attack/>. See also Priest & Arkin, *supra* note 232. But see Chesney, *supra* note 226; Turse, *The Startling Size of US Special Forces*, *supra* note 257 (stating that U.S. Special Operations Command “is tasked with carrying out Washington’s most specialized and secret missions, including assassinations, counterterrorist raids, special reconnaissance, unconventional warfare, psychological operations, foreign troop training, and weapons of mass destruction counter-proliferation operations”). But see Zenko, *supra* note 247 (noting special operators’ “preference” for capturing, rather than killing suspected terrorists).

²⁶² See Priest & Arkin, *supra* note 232.

²⁶³ See Kibbe, *supra* note 238, at 376 (noting that “President Bush signed the Unified Command Plan 2004, designating SOCOM [Special Operations Command] as the ‘lead combatant commander for planning, synchronizing, and as directed, executing global operations’ in the war on terror”) (citing *Capability and Force Structure of the United States Special Operations Command To More Effectively Combat Terrorism: Hearing Before the Subcomm. on Emerging Threats and Capabilities of the S. Armed Servs. Comm.*, 109th Cong. 3 (2006) (statement of Vice Admiral Eric T. Olson, U.S. Navy Deputy Commander, U.S. Special Operations Command), at 3, available at http://www.globalsecurity.org/military/library/congress/2006_hr/060405-olson.pdf). See also SCAHILL, *supra* note 233, at 182 (quoting a source by the name of “Hunter” stating JSOC “guys are like wolf packs at the tip of the spear . . .”).

Additionally, Rumsfeld argued that we have to “[t]ake the fight to the terrorists.”²⁶⁴ Presumably, he believed that to counter a terrorist organization that operates clandestinely in over 100 countries—with the primary goal of killing Americans and destroying American assets—is to develop a force of our own that operates clandestinely around the world—with the primary goal of killing Islamic terrorists and destroying their organizations.²⁶⁵ The Obama administration continued the preeminence of JSOC in counter-terrorism and counter-insurgency actions.²⁶⁶

At first glance, such an approach appears reasonable. If the United States kills a “terrorist,” that is one less terrorist fighter to deal with, one less threat to American interests, and one more stroke in favor of the United States and the West. Consequently, all that the U.S. must do is kill all the terrorists. With our technology and our secret JSOC army, not to mention our over one million strong military force,²⁶⁷ we could meet this goal. After all, ISIS is said to have

²⁶⁴ Donald H. Rumsfeld, *Take the Fight to the Terrorists*, WASH. POST (Oct. 26, 2003), https://www.washingtonpost.com/archive/opinions/2003/10/26/take-the-fight-to-the-terrorists/71910c86-cec0-444e-9796-9f413a156d21/?utm_term=.88493329c910. CIA Director John Brennan had adopted a similar policy and practice. In May 2010, he stated “that the United States would not ‘merely respond after the fact’ of a terrorist attack but would ‘take the fight to al Qaeda and its extremist affiliates wherever they plot and train. In Afghanistan, Pakistan, Yemen, Somalia and beyond.’” Kibbe, *supra* note 238, at 387 (quoting Press Release, White House Office of the Press Sec’y, Remarks by Assistant to the President for Homeland Sec. & Counterterrorism John Brennan at CSIS (May 26, 2010), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/remarks-assistant-president-homeland-security-and-counterterrorism-john-brennan-csi>).

²⁶⁵ See Rumsfeld, *supra* note 264 (stating that “the way to defeat terrorist is to take the war to them – to go after them where they live and plan and hide . . .”).

²⁶⁶ See Matthew Alexander, *JSOC and the Shadow War on Terror*, NBC NEWS (Jun. 19, 2013, 6:18 AM), <http://www.nbcnews.com/id/52100170/t/jsoc-shadow-war-terror/#.WMgrORhh2uU> (quoting Jeremy Scahill stating that Obama will “go down in history as the president who legitimized and systematized a process by which the United States asserts the right to conduct assassination operations around the world,” and discussing how Scahill’s documentary, “Dirty Wars,” aims at exploring “the rising use of Special Forces during the Obama administration, which operate[d] under the secretive [JSOC]”).

²⁶⁷ See HERITAGE FOUND., 2017 INDEX OF U.S. MILITARY STRENGTH 279, http://ims-2017.s3.amazonaws.com/2017_Index_of_Military_Strength_ASSESSMENT_MILITARY_ARMY.pdf (last visited Oct. 5, 2017) (“In FY 2016, total Army end strength was 1,030,000 soldiers: 483,000 Active soldiers,

only about 25,000 fighters, and al Qaeda and the Taliban far fewer than that.²⁶⁸

This approach, however, is divorced not only from law, but also from a grave reality: religiously motivated terrorists and terrorist organizations with a suicide-bombing ethos.²⁶⁹ As for law, Pictet, explained that the legal doctrine of military necessity permits combatants to use armed force that would normally be prohibited in peacetime, but the doctrine also limits what combatants can do.²⁷⁰ Combatants should capture, rather than kill, and avoid inflicting “superfluous injury,” if they can obviously do so without risking harm to themselves.²⁷¹ Thus, policies that encourage or require “targeted killing” at a minimum violate the spirit of the limiting principle of military necessity.²⁷²

In addition, the killing approach fails to fully recognize that terrorist actors typically drape themselves in the civilian community and that targeted killing may result in unintended consequences. Attempting to kill a terrorist actor can often result in the killing of innocent civilians. International humanitarian law grants combatants

200,000 in the Army Reserve, and 348,000 in the Army National Guard.”) (footnote omitted).

²⁶⁸ See Jim Sciutto, Jamie Crawford & Chelsea J. Carter, *ISIS can ‘muster’ between 20,000 and 31,500 fighters, CIA says*, CNN (Sept. 12, 2014, 6:59 AM), <http://www.cnn.com/2014/09/11/world/meast/isis-syria-iraq/index.html>; CBS/AP, *Defense Officials Says Number of ISIS Fighters is Lower in Iraq, Syria*, CBS NEWS (Feb. 4, 2016, 2:51 PM), <https://www.cbsnews.com/news/defense-official-says-number-of-isis-fighters-has-dropped-in-iraq-syria/>; Nicole Gaouette, *U.S. General: Number of ISIS Fighters in Libya Doubles*, CNN (Apr. 8, 2016, 3:28 PM), <http://www.cnn.com/2016/04/08/politics/libya-foreign-fighters-isis-doubles/index.html>; Richard Esposito, Matthew Cole & Brian Ross, *President Obama’s Secret: Only 100 al Qaeda Now in Afghanistan*, ABC NEWS (Dec. 2, 2009), <http://abcnews.go.com/Blotter/president-obamas-secret-100-al-qaeda-now-afghanistan/story?id=9227861>. But see Nicole Gaouette, *U.S. General: Number of ISIS Fighters in Libya Doubles*, CNN (Apr. 8, 2016, 3:28 PM), <http://www.cnn.com/2016/04/08/politics/libya-foreign-fighters-isis-doubles/index.html>.

²⁶⁹ See generally Bill Roggio, *Targeting Leaders Won’t Deter Taliban’s ‘Jihad,’ Group Says*, FDD’S LONG WAR J. (June 18, 2016), http://www.longwarjournal.org/archives/2016/06/targeting-leaders-wont-deter-talibans-jihad-group-says.php?utm_source=feedburner&utm_medium=ema.

²⁷⁰ See PICTET, *supra* note 152, at 62.

²⁷¹ *Id.* at 75–76.

²⁷² See McDonnell, *Sow What You Reap?*, *supra* note 37, at 316.

considerable leeway because the so-called collateral damage, or proportionality rule, weighs in favor of the military and allows a substantial number of civilian casualties, as long as the combatant is aiming at a legitimate military objective.²⁷³ Nonetheless, there are considerable currents moving in state practice to limit the expansive collateral damage rule.²⁷⁴ Furthermore, inflicting civilian casualties can inspire outrage and help terrorist organizations recruit followers.²⁷⁵ Religiously motivated terrorist organizations with a suicide bombing mantra are unlikely to be deterred by targeted killings and may even be strengthened by them.²⁷⁶ Lastly, a broad targeted killing and signature strike policy and practice may undercut the moral authority of the United States.²⁷⁷

²⁷³ See McDonnell, *supra* note 35, at 83.

²⁷⁴ See MCDONNELL, STRUGGLE AGAINST TERRORISM, *supra* note 38, at 143–48 (noting that the European Court of Human Rights markedly restricted the proportionality rule in internal armed conflict to protect civilians).

²⁷⁵ See Roggio, *supra* note 269. A statement from the Taliban published on the “Voice of Jihad,” explains their “resolve to continue fighting:”

Is it not absurd then that one party [The Taliban] yearns for martyrdom, raises their hands five times a day for it, considers it as the greatest achievement possible, is proud of it, always ponders on it and nostalgically reflects that so and so was lucky because he gained martyrdom. Yet the other party [the U.S. and its coalition partners] then threatens it with the same yearning (martyrdom) and barks at him that if you do not give up your resolve then we will fulfill this yearning of yours.

Id. Roggio, whose website generally adopts a pro-U.S. military perspective, added, “While the Taliban’s rhetoric is often viewed as mere propaganda, the group has followed these principles.” *Id.* See also McDonnell, *Sow What You Reap?*, *supra* note 37, at 316; SCAHILL, *supra* note 233, at 297.

²⁷⁶ Roggio, *supra* note 275; McDonnell, *Sow What You Reap?*, *supra* note 37, at 305–15.

²⁷⁷ There are approximately 1.6 billion Muslims in the world. See PEW RESEARCH CTR. FORUM ON RELIGION & PUBLIC LIFE, MAPPING THE GLOBAL MUSLIM POPULATION 1 (Oct. 2009), <http://allafrica.com/download/resource/main/main/idatcs/00011909:cbf45d797f6515d212cec2ec2ec5ef6fb5f.pdf> (finding a Muslim global population of 1.57 billion). A routine campaign of targeted killing Muslims, however extreme they are alleged to be, appears unjust, particularly to the Islamic nations and communities around the world. See e.g., David Pilling, *Legal or Not, Drone Strikes Set a Dangerous Precedent*, FINANCIAL TIMES (Oct. 23, 2013), <https://www.ft.com/content/b50462f0-3b4b-11e3-87fa-00144feab7de> (speaking about the “visceral anger that drone strikes

C. *Secrecy v. Transparency*

In a confrontation with extremely violent terrorist organizations, the balance between secrecy and transparency is not easily struck.²⁷⁸ But, compiling a hit list and targeting individuals with drones from the safety of a control room thousands of miles away demands greater openness. The line between lawful killing of combatants and extrajudicial taking of life grows increasingly thin, particularly when we carry out such killings outside of armed conflict zones.²⁷⁹ As a democratic nation and a superpower, it is not enough to claim that we are in the right; we must show that we are in the right.

In any event, the “unable or unwilling” approach advocated by the Obama administration, and presumably embraced by the Trump administration, at best exists in the twilight between the plenary scope of international human rights law in peacetime and the dominance of international humanitarian law in armed conflict. At a minimum, the expansion of the permissible use of armed force sought by U.S. administrations calls for greater oversight and transparency in the conduct of targeted killings and signature strikes.

The long-standing practice of considering terrorist offenses within the jurisdiction of law enforcement,²⁸⁰ rather than military

provoke among many Pakistanis – even those strongly opposed to Islamist militancy” and how the “[s]o-called ‘rescuer attacks’, in which those who come to the aid of the wounded are hit with secondary drone strikes, cause particular outrage”). *See also* C. Christine Fair, Karl Kaltenthaler & William J. Miller, *Pakistani Opposition to American Drone Strikes*, 129 POL. SCI. Q. 1, 24 (2014) (noting wide disapproval of U.S. drone strikes by 2,000 Pakistani’s polled from a 2010 Pew survey). *Cf.* DALIA MOGAHED & YOUSSEF CHOUHOUD, INST. FOR SOCIAL POL’Y AND UNDERSTANDING, AMERICAN MUSLIM POLL 2017: MUSLIMS AT THE CROSSROADS 4–5 (2017), <https://www.ispu.org/wp-content/uploads/2017/03/American-Muslim-Poll-2017-Report.pdf> [hereinafter AMERICAN MUSLIM POLL 2017] (finding that sixty percent of Muslims in the United States report experiencing religious discrimination and, of all ethnic groups, were least supportive of a Donald Trump presidency).

²⁷⁸ *See* McDonnell, *Sow What You Reap?*, *supra* note 37, at 258 n.63.

²⁷⁹ *See id.* at 284.

²⁸⁰ *See generally* Tyler Raimo, Comment, *Winning at the Expense of Law: The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas*, 14 AM. U. INT’L L. REV. 1473, 1493 (1999) (“Based on broad powers of extraterritorial jurisdiction, American law enforcement agencies are authorized to investigate, apprehend, and prosecute terrorists who violate United States law.”) (footnotes omitted).

operations, likewise supports adopting some procedural safeguards associated with law enforcement in using deadly force against suspected terrorist actors. Even in countries like Iraq, Syria, and Libya, where armed conflict rages, greater transparency is required to show the world that *all* United States forces are complying with applicable international humanitarian law and international human rights law. This is especially true if the Trump administration is embarking on a policy and practice of loosening restrictions on civilian casualties and giving the military and non-uniformed forces far greater freedom of action,²⁸¹ emblematic of the Bush-Cheney administration's failed counter-terrorism policies.²⁸²

²⁸¹ Since coming into office, the Trump administration has significantly increased the number of airstrikes in the so-called war against terror, and the number of civilian casualties has reportedly dramatically increased. Jack Moore, *War on ISIS under Trump Set to Double Civilian Death Toll Compared to Obama*, NEWSWEEK (July 17, 2017), <http://www.newsweek.com/president-trumps-isis-war-course-double-obamas-civilian-deaths-637538>; *Coalition airstrikes in Iraq and Syria: Alleged civilian deaths and levels of reporting*, AIRWARS, <https://airwars.org/data/>. See also *All Feasible Precautions?, Civilian Casualties in Anti-ISIS Coalition Airstrikes in Syria*, HUMAN RIGHTS WATCH, (Sept. 24, 2017), <https://www.hrw.org/report/2017/09/24/all-feasible-precautions/civilian-casualties-anti-isis-coalition-airstrikes-syria>; Spencer Ackerman, "They're going to kill me next," THE GUARDIAN (Mar. 30, 2017), 2017 WLNR 9825828.

According to a Pew poll, just 22% of persons in thirty-seven countries had confidence in President Trump "to do the right thing when it comes to international affairs," and so far, his short presidency has seriously damaged the image of the United States worldwide. RICHARD WIKI ET AL., PEW RESEARCH CTR., U.S. IMAGE SUFFERS AS PUBLICS AROUND WORLD QUESTION TRUMP'S LEADERSHIP 3 (June 26, 2017), https://www.brookings.edu/wp-content/uploads/2017/06/2017_0627_fp_pew_report.pdf.

²⁸² These include invading Iraq, establishing CIA black sites, rendering detainees to states that torture, mistreating, if not, torturing detainees, holding many indefinitely, and setting up special courts—military commissions—to try a discrete class of detainees. These policies and practices violated international law, harmed the reputation of the United States, and undermined our moral authority. See MCDONNELL, STRUGGLE AGAINST TERRORISM, *supra* note 38, at 282–83. Unfortunately, the Obama administration continued many of these practices and, relevant here, solidified the role of the CIA and JSOC as the chief agencies for carrying out drone targeted killings and signature strikes. See *supra* notes 218–266, and accompanying text; McDonnell, *Sow What You Reap?*, *supra* note 37, at 259 n.67. See also Letta Tayler, *How Obama's Drones Rulebook Enabled Trump*, HUMAN RIGHTS WATCH (Sept. 26, 2017), <https://www.hrw.org/news/2017/09/26/how-obamas-drones-rulebook-enabled-trump>.

The remedy of an open, impartial investigation has long been recognized in international human rights law and has become increasingly recognized in international humanitarian law.²⁸³ Furthermore, a growing movement is calling upon states to identify the names and civilian or combatant status of all casualties that states inflict. Absent such open and impartial investigations, the state carrying out attacks, including drone strikes, is asking individuals, communities, local and national governments, and the international community to unquestionably trust the attacking state.²⁸⁴ That is, to trust that the attacking state is complying with the complex and challenging requirements of international law, as well as the fundamental principles of humanity.

Prompt, impartial, independent, and transparent investigations also would enable the United States to restore its reputation in the struggle against terrorism as a law abiding and human rights respecting nation.²⁸⁵ Such investigations would permit the United States to show that it regularly follows the rules and would encourage U.S. officials to adhere to the same. As a result, the United States would likely gain more cooperation from countries and their people, especially Muslim communities,²⁸⁶ both domestically and throughout the world, in the struggle against the global threat of international terrorism.

²⁸³ See *Kaya v. Turkey*, 1998-I Eur. Ct. H.R. 324, ¶ 87.

²⁸⁴ See *Shane*, *supra* note 21, at 519 (“[S]ecrecy promotes effective decision-making in the public interest only in exceptional circumstances.”).

²⁸⁵ See *Drake*, *supra* note 23.

²⁸⁶ See *Fair et al.*, *supra* note 277, at 24; AMERICAN MUSLIM POLL 2017, *supra* note 277, at 8.

Investigations could be carried out more routinely by the Inspector Generals of the CIA and the Defense Department,²⁸⁷ by the regular military branches,²⁸⁸ by the Judge Advocate General's Corps,²⁸⁹ by the Justice Department,²⁹⁰ and by congressional committees.²⁹¹ Furthermore, federal courts should be more receptive to civil suits under the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA).²⁹²

²⁸⁷ See Ryan M. Check & Afsheen John Radsan, *One Lantern in the Darkest Night: The CIA's Inspector General*, 4 J. NAT'L SEC. L. & POL'Y 247, 249 (2010); See also Offices of the CIA, *Inspector General*, Central Intelligence Agency (last updated Dec. 21, 2016), <https://www.cia.gov/offices-of-cia/inspector-general>.

²⁸⁸ See Colin Cusack, *We've Talked the Talk, Time to Walk the Walk: Meeting International Human Rights Law Standards for U.S. Military Investigations*, 217 MIL. L. REV. 48, 64–67 (2013) (arguing that U.S. defense regulations anticipate dual investigations (administrative and criminal) into alleged law of war violations but are seldom followed in practice); Sylvaine Wong, *Investigating Civilian Casualties in Armed Conflict: Comparing U.S. Military Investigations with Alternatives Under International Humanitarian and Human Rights Law*, 64 NAVAL L. REV. 111, 164–65 (2015) (“While the prevention of civilian casualties is of primary importance, transparent and legitimate investigation of incidents that do occur contributes equally to ‘winning hearts and minds.’”).

²⁸⁹ See, e.g., Marc Warren, *The “Fog of Law”: The Law of Armed Conflict in Operation Iraqi Freedom*, 86 INT'L L. STUD. 168–170 (2010) (stating “conventional military forces in Iraq kept remarkable faith to the law of armed conflict . . . due to the efforts of judge advocates who accompanied the forces into combat”) (footnote omitted).

²⁹⁰ See Schmitt, *supra* note 207, at 77.

²⁹¹ Congressional committee investigations may, however, be subject to political winds. See, e.g., Katie Bo Williams, *Trump Administration Sends CIA Torture Report Copies Back to Congress*, THE HILL (June 2, 2017, 3:18 PM), <http://thehill.com/policy/national-security/336135-trump-administration-sends-cia-torture-report-copies-back-to> (“raising the possibility that the 6,700-page document could be locked away for good”).

²⁹² The federal courts should interpret the phrase “claims that touch and concern the territory of the United States” more broadly to permit suits when our military or other U.S. agents violate the international law rights of foreigners abroad. See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013) (sharply limiting the ATS to claims arising only in U.S. territory). See also Ekaterina Apostolova, Comment, *The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L L. 640, 643 (2010) (stating that “Courts in different Circuits diverge in their reading of the legislative history—some courts have cited it in support of the proposition that the TVPA and the ATS provide two separate claims for torture and extrajudicial killing while other courts have interpreted it as weakening this proposition”); Douglas Cox &

CONCLUSION

For any transparent, independent, and impartial investigation to be carried out effectively, the United States must take away from the CIA and JSOC the responsibility to conduct drone targeted killing attacks. Both the CIA and JSOC play important roles in our national defense and their members demonstrate incredible commitment and valor in the defense of the United States.²⁹³ Yet, as clandestine actors, they are ill-suited to carry out this type of attack.²⁹⁴

Because of their clandestine operative nature, the CIA and JSOC cloud the explosive tactic of targeted killing.²⁹⁵ By doing so, they

Ramzi Kassem, *Off the Record: The National Security Council, Drone Killings, and Historical Accountability*, 31 YALE J. ON REG. 363, 389 (2014) (criticizing the “extremely limited” availability of judicial recourse in this field and arguing that “judicial oversight and the related need for an adequate record remain relevant”).

²⁹³ As of this writing, since September 11, 2001, forty-one CIA agents have been killed in the line of duty. See Mike Pompeo, Director, CIA, Remarks at the Office of Strategic Services 75th Anniversary Ceremony (June 16, 2017) (transcript available at <https://www.cia.gov/news-information/speeches-testimony/2017-speeches-testimony/remarks-by-director-pompeo-at-oss-75th-anniversary-ceremony.html>); John O. Brennan, Director, CIA, Prepared Remarks at the 9/11 Memorial Museum in New York City (Sept. 26, 2016) (transcript available at <https://www.cia.gov/news-information/speeches-testimony/2016-speeches-testimony/director-brennan-speaks-at-the-9-11-memorial-museum-in-new-york-city.html>); Drew Brooks, *JSOC Memorial Planned at Fort Bragg*, FAYETTEVILLE OBSERVER (Sept. 28, 2016, 12:01 AM), <http://www.fayobserver.com/151fd03f-20e4-5ec2-a45d-e1885f6c0951.html> (noting JSOC deaths in combat since its founding in 1980). See also Dave Phelps, *Special Operations Troops Top Casualty List as U.S. Relies on Elite Forces*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/us/navy-seal-william-ryan-owens-dead-yemen.html> (“Over the last year, Special Operations troops have died in greater numbers than conventional troops—a first.”); Eric Schmitt, *3 Special Forces Troops Killed and 2 Are Wounded in an Ambush in Niger*, N.Y. TIMES (Oct. 4, 2017), <https://www.nytimes.com/2017/10/04/world/africa/special-forces-killed-niger.html>.

²⁹⁴ The CIA should be removed entirely, but can play an important intelligence role. Unless JSOC becomes far more transparent, it likewise should not have the independent authority to carry out such attacks, but can also play an intelligence and support role.

²⁹⁵ See generally Perina, *supra* note 22, at 520–21 (discussing the CIA’s “insistence upon secrecy” and arguing that “covert conduct sometimes violates basic tenets of international law”) (quoting Richard A. Falk, *CIA Covert Action and International Law*, 12 SOC’Y 39, 40 (1975)).

keep the American public and the international community in the dark about deliberate institutional taking of life.²⁹⁶ Such a program of secrecy, with little known accountability, leads to speculation about who and why selected persons were killed and to what extent, if any, non-combatants were included in their number. Granted, certain information will need to remain classified,²⁹⁷ but virtually complete secrecy undermines our reputation as a law-abiding nation and demands blind trust, which few Americans would ever consider granting to any other country.

²⁹⁶ See Priest & Arkin, *supra* note 232.

²⁹⁷ Sources and methods employed to determine whom, when, and where to target individuals should remain classified. But evidence concerning the identity of the target, the location of the target, the number of combatant and non-combatant casualties, and the knowledge of the commanders ahead of the strike concerning all the above should be made discoverable to the public.