# ARTICLE

# The CIA and Targeted Killings Beyond Borders

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Abstract

This Article focuses on the accountability of the Central Intelligence Agency (CIA) in relation to targeted killings, under both United States law and international law. As the CIA, often in conjunction with Department of Defense (DOD) Special Operations forces, becomes more and more deeply involved in carrying out extraterritorial targeted killings both through kill/capture missions and drone-based missile strikes in a range of countries, the question of its compliance with the relevant legal standards becomes ever more urgent. Assertions by Obama administration officials, as well as by many scholars, that these operations comply with international standards are undermined by the total absence of any forms of credible transparency or verifiable accountability. The CIA's internal control mechanisms, including its Inspector General, have had no discernible impact; executive control mechanisms have either not been activated at all or have ignored the issue; congressional oversight has given a "free pass" to the CIA in this area; judicial review has been effectively precluded; and external oversight has been reduced to media coverage that is all too often dependent on information leaked by the CIA itself. As a result, there is no meaningful domestic accountability for a burgeoning program of international killing. This in turn means that the United States cannot possibly satisfy its obligations under international law to ensure accountability for its use of lethal force, either under IHRL or IHL. The result is the steady undermining of the international rule of law and the setting of legal precedents which will inevitably come back to haunt the

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United States before long when invoked by other states with highly problematic agendas.

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> *"[U.S. Special Forces are] the most lethal hunter-killers . . . that any nation has to offer."*
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> Admiral Eric T. Olson, head of U.S. Special Operations Command.[1]
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> *"Although you might have concerns about what might potentially be going on, those potentials are not actually being realized and if you could see what was going on, you would be reassured just like everyone else."*
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> Alexander Joel, head of the Civil Liberties and Privacy Office, Office of the Director of National Intelligence.[2]

## I. Introduction

Since 9/11, both the Central Intelligence Agency ("CIA") and the United States Department of Defense ("DOD") have rapidly expanded their covert operations around the world. Both are significantly engaged in extraterritorial targeted killings, neither operates with the degree of accountability officially envisaged under domestic law, and neither is in any meaningful way accountable for its actions in terms of the international legal obligations undertaken by the United States.

The Commission created by Congress to examine the events of 9/11 and the response to them concluded in 2004 that the DOD should take "[l]ead responsibility for directing and executing paramilitary

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[1] Karen Parrish, *SOCOM's Impact Outweighs its Size, Commander Says*, U.S. SPECIAL OPERATIONS COMMAND (Mar. 3, 2011), *available at* http://www.socom.mil/News/Pages/SOCOMimpactoutweighsitssize.aspx.

[2] Quoted in Anne Marie Squeo, *New U.S. Post Aims to Guard Public's Privacy*, WALL ST J., (Apr. 20, 2006), http://online.wsj.com/public/article/SB114549771456130732-fNMKc3AWRNO7Kt58oXWNzzR_pms_20060519.html?mod=tff_main_tff_top. Although Mr. Joel was discussing the National Security Agency's wiretapping program, his comments are entirely apposite to the position of the United States intelligence community in relation to the issues under discussion here.

operations, whether clandestine or covert" and recommended that responsibility and legal authority should be concentrated in one entity.[3] The recommendation was premised in part on the need to ensure compliance with domestic law and to facilitate effective congressional oversight, which the Commission assumed would happen if the DOD were in charge. Instead, U.S. practice has moved dramatically in the opposite direction, with the CIA becoming ever more active in what the 9/11 Commission referred to as paramilitary activities and the DOD itself spawning an almost autonomous and at best minimally accountable force within its own ranks—the Joint Special Operations Command ("JSOC"). The combination of high levels of secrecy, combined with poor accountability, mean that it is impossible to verify the extent to which applicable international standards are respected in practice. Because these covert forces often operate as self-described killing machines,[4] their existence and continuing rapid expansion have grave consequences for the twin regimes of international human rights law ("IHRL") and international humanitarian law ("IHL") which aim to uphold the value of human life and minimize the brutalities of warfare.

The two principal targeted killing techniques are kill-or-capture raids and air strikes from unmanned aerial vehicles commonly known as drones. The individuals targeted are alleged terrorists or others deemed dangerous, and their inclusion on what are known as kill/capture lists is based on undisclosed intelligence applied against secret criteria. In Afghanistan alone it appears that there are at least six different kill/capture lists, with a total of thousands of names on them. While the CIA has been actively engaged in kill/capture missions since its arrival in Afghanistan in the days immediately after 9/11, it sometimes operates in conjunction with DOD Special Operations Forces under the command of JSOC, a body that also leads a determinedly twilight existence. Because the targeting operations and the kill/capture lists on which they are based are secret, the CIA will neither confirm nor deny their existence.

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[3] Officially known as the National Commission on Terrorist Attacks Upon the United States. THE 9/11 COMMISSION REPORT 415 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf.

[4] *See* comment of Admiral Olson, supra note 1; Greg Miller & Julie Tate, *CIA Shifts Focus to Killing Targets*, WASH. POST (Sept. 1, 2011), *available at* http://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvJ_story.html (quoting a former senior U.S. intelligence official as saying that the CIA has been turned "into one hell of a killing machine").

The CIA's drone-based killing programs have so far killed well in excess of 2,000 persons in Pakistan, and it has been involved in such drone programs in at least four other countries. This number is likely to expand significantly in the years ahead as a result of a combination of factors, including the perceived effectiveness of drone killings, the relatively low costs involved, shrinking overall defense budgets, a diminishing appetite for traditional warfare, the very low risk to United States personnel, the rapidly growing sophistication of tracking, targeting, and delivery technologies, and major investments aimed at further accelerating technological breakthroughs.

Seen against this background, the targeted killing of Osama bin Laden in May 2011 was not a dramatic departure from the United States' established practice, but rather just another example of its increasingly frequent use of extraterritorial targeted killings as an integral part of its overall national security strategy. As the CIA Director observed at the time, the Special Forces that carried out the bin Laden raid—the United States Navy SEALS—"conduct these kinds of operations two and three times a night in Afghanistan."[5]

The extent to which these different forms of targeted killings are, or could be, consistent with international human rights law and international humanitarian law has been a matter of extensive controversy in the policy and academic communities. Some have claimed that many or even most such targeted killings violate international law,[6] while others have advocated approaches designed to provide legal legitimacy to the killings,[7]

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[5] *PBS Newshour: CIA Chief Panetta: Obama Made 'Gutsy' Decision on Bin Laden Raid* (PBS television broadcast May 3, 2011), *available at* http://www.pbs.org/newshour/bb/terrorism/jan-june11/panetta_05-03.html. A senior Defense Department official indicated that on the night of bin Laden's killing, Special Forces in Afghanistan carried out 12 kill/capture missions which "captured or killed between fifteen and twenty targets." Nicholas Schmidle, *Getting bin Laden: What Happened that Night in Abbottabad*, THE NEW YORKER, Aug. 8, 2011, 34, at 41.

[6] Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, *in* SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Bronitt, ed.) (forthcoming), at http://ssrn.com/abstract=1501144.

[7] In 2009, one of the CIA's Assistant General Counsel, after reviewing a recently released 1973 internal CIA review of questionable programs which included a plot to assassinate Fidel Castro, concluded that an "argument could be made that the CIA needed to have the ability to take even drastic action to protect this country, including the targeted killing

or to expand the circumstances in which they may be carried out.[8] Rather than revisiting most of those issues, the focus of this Article is on the hitherto largely neglected dimensions of transparency and accountability. While the analysis deals mostly with the CIA, it also raises significant questions in relation to the relevant DOD programs. In essence, the argument is that none of the many existing oversight mechanisms have been even minimally effective in relation to targeted killings, and that the resulting legal "grey hole" cannot be justified on national security grounds.

*A. Salience of the Issue*

The resurgence of these types of extraterritorial targeted killings is of particular salience for at least three reasons: (i) it represents a fundamental regression in the evolution of both international law and United States domestic law; (ii) it provides legitimacy to the increasingly vocal calls by some officials, commentators, and scholars who advocate that the United States should formally adopt a policy of extraterritorial targeted killings that would go well beyond what is currently permitted by international law; and (iii) it supports the notion that intelligence agencies can legitimately expand their activities from traditional intelligence gathering to killing and still enjoy the same *de facto* immunity from the constraints of international law.

In terms of the first, attempts to legitimate targeted killings under international law represent a dramatic reversal of history. By the last decades of the twentieth century, the notion that an individual could legally be targeted and killed by one state on the territory of another in circumstances to which the law of armed conflict did not clearly apply had been thoroughly discredited. The relevant normative prohibitions, famously remarked upon by Thomas Jefferson in 1789,[9] date back at least

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of threatening foreign leaders. As horrific as such an act might have been, it would have paled in comparison to the bloodshed that could have occurred to this country if, for example, Castro had launched a nuclear attack against the United States. . . . Merely having the option available, even if never utilized, might have served as a deterrent to the nation's enemies." Daniel L. Pines, *The Central Intelligence Agency's "Family Jewels": Legal Then? Legal Now?*, 84 IND. L.J. 637, 688 (2009).

[8] Kenneth Anderson, *Predators over Pakistan*, WEEKLY STANDARD, Mar. 8, 2010, 26, *available at* http://www.weeklystandard.com/articles/predators-over-pakistan.

[9] Thomas Jefferson wrote to James Madison that "[A]ssassination, poison, [and] perjury" were all "legitimate principles in the dark ages . . . but exploded and held in just horror in

to the early seventeenth century.[10] Of course, such things still happened in the late twentieth century, but they were not part of a declared policy; when they were exposed, the state concerned would go to considerable lengths to deny the allegations;[11] and when the state was caught out there was rarely an attempt to provide a legal justification. Arguments revolved mainly around the facts.[12] And when the international community has been able to credibly assign responsibility for such targeted killings it has condemned the practice.[13]

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the 18th century." Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 367 (Julian P. Boyd ed., 1958).

[10] Ward Thomas, *The New Age of Assassination*, 25 SAIS REV. 27, 29 (2005) ("whatever tactics anarchists and revolutionaries might adopt, civilized nations simply did not engage in [assassinations]. The norm was so powerful and long-lived that it shielded generations of international provocateurs, from Gustaphus Adolphus and Napoleon to Hitler and Saddam Hussein.").

[11] *See*, *for example* a description of various assassination projects undertaken by Israel, but never officially acknowledged as such. Ephraim Kahana, *Israeli Intelligence: Organization, Failures, and Successes*, *in* THE OXFORD HANDBOOK OF NATIONAL SECURITY INTELLIGENCE 818 (Loch K. Johnson ed., 2010) (describing various assassination projects undertaken by Israel, but never officially acknowledged as such).

[12] To give but one of many examples, between 1976 and 1992, an elite unit of the British army, the Special Air Services (SAS) regiment killed 37 members of the Irish Republican Army in Northern Ireland. Amnesty International accused the government of pursuing an "official policy of planned killings of suspected members of armed opposition groups." The government denied that any such policy existed, and when the facts seemed to tell a different story, set up various inquiries. These rarely provided any clarification, at least not for public consumption. *See generally* AMNESTY INTERNATIONAL, POLITICAL KILLINGS IN NORTHERN IRELAND 4 (1994); MARK URBAN, BIG BOYS' RULES: THE SAS AND THE SECRET STRUGGLE AGAINST THE IRA 238 (1992).

[13] *See, e.g.,* Press Release, Council of the European Union, 738/04 (Presse 80) (Mar. 2004), *available at*
http://www.consilium.europa.eu/App/NewsRoom/loadBook.aspx?target=2004&infotarget=&max=15&bid=78&lang=EN&id=1850 (condemning Israeli forces' killing of Hamas leader Sheikh Ahmed Yassin and seven other Palestinians as "extrajudicial-killing"); U.N. SCOR, 59th Sess., 4945th mtg., U.N. Doc. S/PV.4945 (Apr. 19, 2004) (condemnation of Israeli killing of Hamas leader Al-Rantisi by Russia, Pakistan, United Kingdom, Germany and Spain); Brian Whittaker & Oliver Burkeman, *Killing Probes the Frontiers of Robotics and Legality*, GUARDIAN, Nov. 6, 2002 (quoting Swedish Foreign Minister on US targeting of al-Harithi in Yemen: "If the USA is behind this with Yemen's consent, it is nevertheless a summary execution that violates human rights. If the USA has conducted the attack without Yemen's permission it is even worse. Then it is a question of unauthorised use of force.").

Targeted killings by the CIA also represent a significant regression in terms of United States law and policy. As noted below, a regime of prohibitions against arbitrary extraterritorial killings was painstakingly constructed during the 1970s in response to the CIA's excesses in the 1950s and 1960s and the extensive use of large-scale programs during the Vietnam War. The steady loosening of constraints on extraterritorial killing, a process initiated by the CIA in the late 1990s without any public debate or congressional approval, risks making targeted killings an option for dealing with a growing range of perceived problems.

Thus, from the perspective of both domestic and international law, the practice of secret killings conducted outside conventional combat settings, undertaken on an institutionalized and systematic basis, and with extremely limited if any verifiable external accountability, is a deeply disturbing and regressive one. These developments threaten to do irreparable harm to the international legal framework designed to establish and uphold foundational protections for the right to life and human dignity.

The second reason why current developments are of particular concern is that they vindicate and encourage the arguments increasingly being put forward by scholars and officials both to defend the practice of targeted killings and to urge that it be accepted by law, either through the reinterpretation of existing norms or the adoption of new authorizations. Michael Gross, for example, has argued that assassination

> was long reviled but took on new life in the 21st century to wage war against militants entrenched among civilians. Initially condemned as extra-judicial execution (by this writer among others),[14] targeted killing has emerged as an effective means to disable non-uniformed combatants while sparing civilians many of the horrors of full-scale battle.[15]

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[14] Gross refers here to a 2003 analysis in which he had argued that assassinations violated human rights law and also fell afoul of IHL's proscription against perfidious and treacherous means of warfare. Michael L. Gross, *Fighting by Other Means in the Mideast: A Critical Analysis of Israel's Assassination Policy*, 51 POLITICAL STUD. 350, 364–65 (2003).

[15] Michael Gross, *Response to "Notes on Asymmetric War"*, CURRENT INTELLIGENCE (Feb. 2, 2011), *available at* http://www.currentintelligence.net/reviews/2011/2/15/notes-on-asymmetric-war.html.

In a recent book, Gross has argued that targeted killing is an essential tool for combating non-state actors, because they do not wear uniforms. He thus puts "militants, insurgents, guerillas, and terrorists" together in a group that can lawfully be targeted, provided only that they have been identified by intelligence operations and named on a list. He argues that such killings are actually necessary in order to restore a certain element of equilibrium in favor of the attacking military forces that are otherwise put at such a disadvantage in the context of an asymmetric war in which their opponents are ununiformed.[16]

Amos Guiora has described targeted killing as a legitimate and effective form of "active self-defense,"[17] and Jason Fisher has predicted that "an international norm permitting the use of targeted killing as a counter-terrorism tactic is likely to emerge because targeted killing's environmental fit, prominence and coherence favor such a development."[18] Kenneth Anderson is one step ahead of him and describes targeted killings as "a vital strategic, but also humanitarian, tool in long-term counterterrorism."[19] Other commentators have embraced the same logic, and have formulated permissive norms to make it easier for governments to kill, while also identifying precautions to ensure that the open season thus declared is not abused. Gabriella Blum and Philip Heymann have recently proposed in this Journal that

> If a terrorist plan is an act of war by the organization supporting it, any member of any such terrorist organization may be targeted anytime and anywhere plausibly considered "a battlefield," without prior warning or attempt to capture.[20]

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[16] MICHAEL L. GROSS, MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT 118–21 (2010).
[17] Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 334 (2004).
[18] W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L 711, 717 (2007).
[19] KENNETH ANDERSON, TARGETED KILLING IN US COUNTERTERRORISM STRATEGY AND LAW (2009), *available at* http://www.brookings.edu/papers/2009/0511_counterterrorism_anderson.aspx.
[20] Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145, 168 (2010). In defense of the proposition they note that "[p]ublicly acknowledged targeted killings are furthermore an effective way of appeasing domestic audiences, who expect the government 'to do something' when they are attacked by

Anne-Marie Slaughter has also proposed that the UN Security Council should introduce a system of "mercy killings" leading it to authorize the targeted killing of a head of state whose actions it had condemned as criminal. Writing in 2003 about Saddam Hussein, but in support of a more broadly applicable policy, she proposed that as "an absolute last resort," the Council "should have authorized the use of deadly force in the efforts to capture him—either by his own people or by the agents of foreign governments."[21] By 2011, she had refined her proposal so that United Nations authorization would follow only after an indictment by the International Criminal Court. Even then, the order would be to seek to capture first, and only to kill if the person resists arrest.[22]

Similar proposals have also been put forward by others. A former CIA assistant general counsel has argued that killing leaders of regimes with which the US is involved in an armed conflict may "however regrettable, . . . be an appropriate policy option."[23] In making such decisions, United States policymakers (there would be no international authorization needed) would take account of certain criteria. For example, as far as possible, only those "persons within the regime that are responsible for the threats" should be killed.[24] A potentially even broader proposal, again justified on utilitarian grounds, has been put forward by two philosophers who call for consideration to be given to the establishment of an international institution with the mandate of authorizing "the targeted killing of corrupt leaders."[25]

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terrorists. The visibility and open aggression of the operation delivers a clearer message of 'cracking down on terrorism' than covert or preventive measures that do not yield immediate demonstrable results." *Id.* at 167.

[21] Anne-Marie Slaughter, *Mercy Killings: The United Nations can and should target dictators directly, instead of their peoples*, FOR. POL'Y, May/June 2003, 72. Philosophers have also developed a comparable proposal, albeit without reference to Slaughter's work.

[22] *The UN Should Issue Death Warrants Against Dangerous Dictator*s, CNN WORLD, GLOBAL PUBLIC SQUARE (May 13, 2011), *available at* http://globalpublicsquare.blogs.cnn.com/2011/05/13/the-un-should-issue-death-warrants-against-dangerous-dictators/.

[23] Catherine Lotrionte, *When to Target Leaders*, 26 THE WASH. Q. 73, 84 (2003).

[24] *Id.*

[25] *See* Andrew Altman & Christopher Heath Wellman, *From Humanitarian Intervention to Assassination: Human Rights and Political Violence*, 118 ETHICS 228, 253, 257 (2008) (arguing that the assassination of a political leader is morally permissible if (i) "the target had rendered himself morally liable to being killed" and (ii) "the risk to human rights is not disproportionate to the rights violations that one can reasonably expect to avert.").

While the United States government has not actually endorsed any of these specific proposals, it hardly needs to, because in practice it is already carrying out targeted killings with growing frequency in various countries, both in situations of armed conflict and in other settings. It is for this reason that it becomes especially important to shine a clear light on what is already taking place and on the extent to which it is occurring within the framework of comprehensive transparency and accountability deficits.

The third reason for concern is that the emergence of a major CIA-run program of targeted killings is premised on the unacceptable assumption that intelligence agencies can legitimately move from traditional intelligence gathering to killing without even a nod towards the notions of transparency and accountability that would automatically be assumed to apply to any other government agency engaged in such practices. This assumption that the *de facto* immunity from the constraints of international law that apply in relation to espionage can be transferred to killings augurs very badly in terms of aspirations for an international community governed even minimally by the rule of law.

Yet, as argued below, the United States has intentionally sought to reinforce the immunity of its intelligence operatives through a policy known as "double-hatting" in which the distinction between military and covert action, and thus the distinct identities of personnel operating under the auspices of the military and the CIA, have been deliberately blurred. As a result, the United States is setting deeply troubling precedents which will redound to its detriment when invoked by other states seeking justifications for their own efforts to flout international legal prohibitions on arbitrary executions.

*B. Structure of the Article*

The Article starts by exploring the international legal obligations relating to targeted killings and argues in Part II that they require a significant degree of transparency, without which there can be little if any of the accountability required by international law. Part III documents the practice of the United States in this area. Part IV turns to an examination of CIA's transparency in relation to targeted killings. In essence, the agency "declines to provide any information to the public about where it operates,

how it selects targets, who is in charge, or how many people have been killed."[26] It would be naïve not to acknowledge that intelligence agencies have always operated covertly and sometimes clandestinely, but I argue that there is a fundamental distinction to be drawn between traditional intelligence activities and operations that involve the drawing up of lengthy lists of individuals to be killed on foreign soil.

Part V then explores the response most frequently offered by proponents of the United States' programs: while transparency might inevitably be limited, there are extensive arrangements in place to ensure that the CIA is fully accountable in relation to any such programs. These officials and commentators point to the panoply of administrative, judicial, and congressional checks on executive discretion that serve to ensure such accountability. By carefully and systematically scrutinizing all that is publicly known in relation to these mechanisms, I conclude that whether or not they are effective in relation to other CIA activities, there is no evidence in relation to targeted killings to indicate that they provide anything other than a façade of legality to dignify official lawlessness. I argue not only that the resulting vacuum violates international law but that it is, in large part, the result of deliberate design and planning rather than merely an outcome of the necessary secrecy required for intelligence activities.

Part VI considers whether Israel's approach to targeted killings offers an alternative route by which the United States might ensure accountability for its own program. Commentators proposing that the United States should follow suit tend to rely in particular on the legal criteria laid down by the Israeli Supreme Court with a view to preventing abuses and suggest that an equivalent United States policy would be acceptable if comparable restrictions could be imposed. A careful analysis of Israeli practice, however, yields two conclusions. The first is that there is a vast gap, unacknowledged in most of the literature, between policy and practice in Israel, and the second is that the types of restrictions proposed are in direct contradiction of firmly established U.S. policies and could only be adopted if radical changes were to be made in both law and policy.

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[26] Jane Mayer, *The Predator War: What Are the Risks of the CIA's Covert Drone Program?* NEW YORKER, Oct. 26, 2009, 38, *available at* http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

Having concluded that the CIA's approach is characterized by neither transparency nor accountability, Part VII asks whether this situation can be justified. The argument engages in particular with Adrian Vermeule's sustained and elaborate attempt to do so based on Carl Schmitt's theory of states of exception. Vermeule builds upon David Dyzenhaus's notion of "legal grey holes" that legal systems sometimes generate when confronted by a perceived emergency. These are areas where constraints upon executive action appear to exist, but where in practice the government can do as it pleases.[27] While remedies exist in theory, they are devoid of substance. Vermeule has argued that such grey holes are not only inevitable in relation to matters of national security in times of emergency but that their existence should be accepted as a necessary part of the very fabric of United States administrative law post 9/11.[28] Although some commentators have questioned whether in fact the United States federal appellate courts have adopted this approach,[29] I conclude that it is an accurate reading of the position taken in relation to the CIA, even when its actions involve killings that appear to be in violation of both domestic and international legal norms. Vermeule's theory would limit or adjust the scope of the rule of law to accommodate this reality. In response I argue that his claim that American administrative law is Schmittian is not well grounded in Schmitt's theories, and that his empirical findings mask what is really a normative argument seeking to justify the exemption of counterterrorism measures from the reach of the law. He also takes no account of the international legal norms governing states of emergency that apply to the United States and that cannot be interpreted to accommodate "legal grey holes."

This leads to Part VIII in which I argue that the international community has a clear and pressing obligation to subject the United States to far more vigorous and rigorous forms of accountability than have been applied to date. It is precisely when domestic legal systems have been constructed in such a way as to generate legal grey holes in the fabric of

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[27] DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 3 (2006). These grey holes build upon the observation that counter-terrorism measures have also given rise to "legal black holes," defined as areas in which the executive is explicitly exempted from compliance with the rule of law. Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q., 1 (2004).

[28] Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

[29] *E.g.*, Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. COLLOQUY 309, 312 (2010).

executive accountability that effective action by international human rights bodies is most needed. I conclude by calling for major changes in United States practice for the pragmatic reasons of its own credibility in promoting an international rule of law, its need to address growing pressures from foreign courts and governments, and its self-interest in shaping prudent precedents for others to follow.

### *C. Defining "Targeted Killings"*

As with many terms that have entered the popular consciousness as though they had a clear and defined meaning, there is no established or formally agreed upon legal definition of the term "targeted killings" and scholarly definitions vary widely. Some commentators have sought to "call a spade a spade" and used terms such as "leadership decapitation,"[30] which clearly captures only some of the practices at stake, assassinations,[31] or "extrajudicial executions," which has the downside of building *per se* illegality into the description of the process, or "targeted pre-emptive actions," which is designed to characterize a killing as a legal exercise of the right of self-defense.[32] But these usages have not caught on and do not seem especially helpful in light of the range of practices generally sought to be covered by the use of the term-targeted killing.

The term was brought into common usage after 2000 to describe Israel's self-declared policy of "targeted killings" of alleged terrorists in the Occupied Palestinian Territories.[33] But influential commentators also sought to promote more positive terminology. The present head of the

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[30] Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leadership Decapitation*, 18 SECURITY STUD. 719 (2009) http://cpost.uchicago.edu/pdf/Jordan.pdf (Jordan studied 298 attempts carried out between 1945 and 2004 to weaken or eliminate terrorist groups through eliminating people in senior positions. Her findings suggested, inter alia, that decapitating the leadership of groups may be counterproductive, especially for groups with an avowed "religious" ideology. She found that killing the leaders of such groups may increase—from 67% to 83%—the likelihood that the group will survive.). *See id.* at 748.

[31] For a refutation of the utility in this context of the term "assassination," see STEVEN R. DAVID, FATAL CHOICES: ISRAEL'S POLICY OF TARGETED KILLING: MIDEAST SECURITY AND POLICY STUDIES NO. 51 2 (Ramat Gan, Israel: The Begin-Sadat Center for Strategic Studies, September 2002).

[32] Orna Ben-Naftali & Keren Michaeli, *We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 235 (2003).

[33] *See id.* at 234–35; Adam Stahl, *The Evolution of Israeli Targeted Operations: Consequences of the Thabet Thabet Operation*, 33 STUD. CONFLICT & TERRORISM, 111, 118 (2010).

Israeli Military Intelligence Directorate, for example, argued that they should be termed "preventive killing," which was consistent with the fact that they were "acts of self-defense and justified on moral, ethical and legal grounds."[34] Others followed suit and adopted definitions designed to reflect Israeli practice.[35] Kremnitzer, for example, defined a "preventative (targeted) killing" as "the intended and precise assassination of an individual; in many cases of an activist who holds a command position in a military organization or is a political leader."[36] For Kober, it is the "selective execution of terror activists by states."[37] But such definitions reflect little, if any, recognition of the constraints imposed by international law, a dimension to which subsequent definitions have, at least in theory, been more attuned. Most recently, Michael Gross has defined such killing as "an unavoidable, last resort measure to prevent an immediate and grave threat to human life." Although this too remains rather open-ended, Gross relies on international standards to defend it when he suggests that it tracks "exactly the same rules that guide law enforcement officials."[38] He cites as authority for that proposition the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[39] but these principles contain no such provisions. The quotation he uses is, in fact, a rough summary of the text of Article 2(2) of the European Convention on Human Rights, a standard that was adopted in 1950 and has since been interpreted in a much more restrictive manner than he suggests.[40] Gross then goes on to suggest that the approach he proposes is "like that of the Israeli courts," when in fact the key judgment of the Israeli Supreme Court on the question

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[34] Asa Kasher & Amos Yadlin, Assassination and Preventive Killing, 25 SAIS REV. 41, 55–56 (2005).

[35] Thus Cullen defines targeted killing as "the intentional slaying of a specific individual or group of individuals undertaken with explicit government approval." Peter M. Cullen, *The Role of Targeted Killing in the Campaign Against Terror*, 48 JOINT FORCES Q 22 (2008), citing David, *supra* note 31. Fisher, *supra* note 18, at 715, uses the same definition but adds "when they cannot be arrested using reasonable means."

[36] Mordechai Kremnitzer, 'ARE ALL ACTIONS ACCEPTABLE IN THE FACE OF TERROR?': THE ISRAEL DEMOCRACY INSTITUTE POLICY PAPER NO. 60 (2005).

[37] Avi Kober, *Targeted Killing During the Second Intifada: The Quest for Effectiveness*, 27 J. CONFLICT STUD. 76 (2007).

[38] Gross, *supra* note 16, at 106.

[39] *Id.* at n.11.

[40] DAVID HARRIS ET AL, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 61–66 (2d ed. 2009) (noting that the test applied is rigorous and that no deference is given to the state in such contexts: "the [European Court of Human Rights] makes its own objective assessment of the strict proportionality of the force used.").

of targeted killings does not apply international human rights law at all, but instead uses the customary law applicable to international armed conflicts.[41]

At the other end of the definitional spectrum is a five-part definition proposed by Gary Solis. For there to be a targeted killing: (i) there must be an armed conflict, either international or non-international in character; (ii) the victim must be specifically targeted; (iii) he must be "beyond a reasonable possibility of arrest"; (iv) the killing must be authorized by a senior military commander or the head of government; (v) and the target must be either a combatant or someone directly participating in the hostilities.[42] But whereas Gross seeks to use a human rights-based definition, Solis proposes one which is unsuitable outside of international humanitarian law.

A more flexible approach is needed in order to reflect the fact that "targeted killing" has been used to describe a wide range of situations. They include, for example: the killing of a "rebel warlord" by Russian armed forces, the killing of an alleged al Qaeda leader and five other men in Yemen by a CIA-operated Predator drone using a Hellfire missile; killings by both the Sri Lankan government and the Liberation Tigers of Tamil Eelam of individuals accused by each side of collaborating with the other; and the killing in Dubai of a Hamas leader in January 2010, allegedly carried out by a team of Israeli Mossad intelligence agents. Targeted killings therefore take place in a variety of contexts and may be committed by governments and their agents in times of peace as well as armed conflict, or by organized armed groups in armed conflict. The means and methods of killing vary, and include shooting at close range, sniper fire, firing missiles from helicopters or gunships, firing from UAVs, the use of car bombs, and poison.

There are thus three central requirements for a workable definition. The first is that it be able to embrace the different bodies of international law that apply and is not derived solely from either IHRL or IHL. The second is that it should not prejudge the question of the legality or illegality

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[41] HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel [2006] IsrSC 57(6) 285.

[42] GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 542–43 (2010).

of the practice in question. And the third is that it must be sufficiently flexible to be able to encompass a broad range of situations in relation to which it has regularly been applied.

The common element in each of the very different contexts noted earlier is that lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator.[43] In a targeted killing, the specific goal of the operation is to use lethal force. This distinguishes targeted killings from unintentional, accidental, or reckless killings, or killings made without conscious choice. It also distinguishes them from law enforcement operations, *e.g.*, against a suspected suicide bomber. Under such circumstances, it may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill.

Although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal. This is in contrast to other terms with which "targeted killing" has sometimes been interchangeably used, such as "extrajudicial execution," "summary execution," and "assassination," all of which are, by definition, illegal.[44] Consistent with the detailed analysis developed by Nils Melzer,[45] this Article adopts the following definition: a targeted killing is the intentional, premeditated, and deliberate use of lethal force, by States or their agents acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.[46]

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[43] NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 4–5 (2008).
[44] W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, 1989 ARMY LAWYER 4, 7–8 (1989) (describing assassination of specific individuals under U.S. law as illegal and generally requiring a political purpose); Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 611–12 (1992).
[45] Melzer, *supra* note 43, at 4–5.
[46] The importance of the state or state agent dimension of this definition is underscored by the extent to which the term "targeted killing" is now commonly used in Pakistan to cover almost any deliberate killing as the following news report illustrates: "70 target killing incidents took place in January this year. Out of these 70 victims, around 20 were workers and supporters of different political parties, and one was a policeman while the rest were common citizens, including a journalist, who was not part of any conflict or organised rivalry." *Hidden realities behind targeted killings must be exposed: Sindh governor*, PAKISTAN TODAY,

*D. Sources of Information*

Before proceeding with the analysis, a brief note on sources is in order. A major challenge in writing this Article was to put together the pieces of the jigsaw puzzle that reflects the actuality of the policies and practices surrounding targeted killings. A great deal of the relevant information is classified. In order to establish the key facts it has been necessary to draw upon disparate sources such as the cache of United States diplomatic cables leaked to and published by Wikileaks and selected newspapers, background briefings by intelligence and other officials, testimony that might add to what is otherwise in the public domain, and reports from diffuse media sources. The difficulties involved in this process are further compounded by an almost surreal tendency on the part of the executive and the courts to pretend that information that has been comprehensively leaked, and the accuracy of which is for all other intents and purposes confirmed, remains unknown or at least uncognizable. This problem reflects the deeper reality that when one is dealing with the activities of intelligence agencies, the essential currency is deception. Phrases like "plausible deniability," "unknown unknowns," and "neither confirm nor deny" pepper the relevant literature. When acknowledgement and honesty are perceived as getting in the way of intelligence objectives, they will generally be forced to yield in the name of the higher good.

It is because of these realities that much of the analysis that follows goes to considerable lengths to establish facts and propositions that might otherwise be taken for granted by those working on these issues in the media or the blogosphere. The problems are further compounded by the fact that much of the scholarly literature has tended to address these issues in the abstract, rather than grappling with facts that might be difficult to marshal given the misinformation and duplicity that is seen to be unavoidable if the intelligence community is to achieve its goal of protecting national security. Instead of challenging these assumptions and probing beneath the surface, too many of those writing about targeted killings lamely accept that there is insufficient information in the public domain to enable existing policies and practices to be meaningfully assessed against rule of law standards. But the default approach of presuming probity, good faith, constant self-discipline, and deference to formally

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(Feb. 2, 2011), http://www.pakistantoday.com.pk/pakistan-news/Karachi/02-Feb-2011/Hidden-realities-behind-targeted-killings-must-be-exposed-Sindh-governor#.

accepted legal limits on the part of officials acting in secrecy undermines basic democratic principles, defies experience, and mocks the notion of human rights accountability.

We turn now to examine the normative framework established by international law in relation to targeted killings.

## II. The Relevant International Legal Framework

In recent years, there has been considerable controversy over various aspects of the legality of targeted killings. This Article, however, focuses only on one rather specific dimension of the overall debate: the obligation of states to account to the international community in cases of targeted killings in order to enable an assessment of whether the applicable international legal obligations have been respected or not. But before examining that dimension it is necessary to provide a brief sketch of the overall normative framework.

### *A. The Overall Framework*

Whether or not a specific targeted killing is legal depends on the context in which it is conducted: in armed conflict, outside armed conflict, or in relation to the use of force.[47] In what follows, I briefly lay out the basic legal rules applicable to targeted killings in each of these contexts.

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[47] The International Covenant on Civil and Political Rights (ICCPR) and other international human rights instruments provide that the right to life is absolute and non-derogable in both times of war and of peace, and individuals may not be deprived of that right arbitrarily. International Covenant on Civil and Political Rights art. 6, *opened for signature* Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) [hereinafter ICCPR]. *See also* Universal Declaration of Human Rights art. 3, G.A. Res. 217A, (Dec. 10, 1948); African Charter on Human and Peoples' Rights art. 4, *adopted* June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986); American Convention on Human Rights art. 4(1), *adopted* Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978). The European Convention for the Protection of Human Rights specifies that the right to life will not be violated when force is "absolutely necessary" and used "in defense of any person from unlawful violence." European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter ECHR] arts. 2, 15. The ECHR allows for derogation for "lawful acts of war," but no state has yet so derogated. For a detailed discussion of what constitutes "arbitrary" deprivation under international human rights law, see Report of the Special Rapporteur

1. In the Context of Armed Conflict

Both IHL and IHRL apply in the context of armed conflict; whether a particular killing is legal is determined by the applicable *lex specialis*.[48] To the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from IHRL.[49]

Under the rules of IHL, reprisal or punitive attacks on civilians are prohibited,[50] and targeted killing is only lawful when the target is a "combatant" or "fighter"[51] or, in the case of a civilian, only for such time as the person "directly participates in hostilities."[52] In addition, the killing

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on extrajudicial, summary, or arbitrary executions, Philip Alston, U.N. Doc. A/61/311 (Sept. 5, 2006) ¶¶ 33–45.

[48] Human rights law and IHL apply coextensively and simultaneously unless there is a conflict between them. In situations that do not involve the conduct of hostilities—e.g., law enforcement operations during non-international armed conflict—the lex generalis of human rights law would apply.

[49] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 216 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J 226, ¶ 26 (July 8); G.A. Res. 61/173, U.N. Doc. A/RES/61/173 (Mar. 1, 2007); CHR Res. 2005/34 (Apr. 19, 2005); U.N. Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted March 29, 2004, CCPR/C/21/Rev.1/Add.13 ¶ 11 (May 26, 2004) [hereinafter *General Comment No. 31*].

[50] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51 (2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; INTERNATIONAL HUMANITARIAN LAW RESEARCH INITIATIVE, HARVARD UNIVERSITY PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, HPCR MANUAL AND COMMENTARY ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE § D.18 (2009), *available at* http://www.ihlresearch.org/amw/manual [hereinafter HPCR COMMENTARY].

[51] MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT Rule 2 (2006) [hereinafter NIAC MANUAL].

[52] The principle of distinction permits only the armed forces of a party to the conflict to be attacked, and prohibits attacks on civilians (defined as all persons who are not members of the armed forces of a party to the conflict), unless they take a direct part in hostilities, for such time as they participate. 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 Geneva Convention I]; Geneva Convention for the

must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity,[53] and everything feasible must be done to prevent mistakes and minimize collateral harm to civilians.[54] These

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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 Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. (For the remainder of this Article, these articles collectively will be referred to as "Common Article 3.") Additional Protocol I, *supra* note 50, arts. 51 & 52(1)–(2); I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS [ICRC], CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I; RULES (2005) [hereinafter ICRC RULES], RULES 1 AND 5–6. In case of doubt, the person must be considered a civilian. Additional Protocol I, *supra*, art. 50(1); HPCR COMMENTARY, *supra* note 49, § D.12.(a). Distinction is part of *jus cogens*, applicable in both international and non-international armed conflict. *Nuclear Weapons*, 1996 I.C.J. ¶ 78. U.N. Int'l L. Comm'n [ILC], *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 40, cmt. 5, U.N. Doc. A/56/10(SUPP) (2001) [hereinafter ILC Draft Articles on State Responsibility]; Additional Protocol I, *supra*, art. 51(4); HPCR COMMENTARY, *supra* note 49, § C.13. ICRC RULES, *supra*, Rules 11–13. *See also* NIAC MANUAL, *supra* note 51, Rule 2; UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.32 (2004) [hereinafter UK MANUAL]; U.S. NAVY, MARINE CORPS & COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A ¶ 8 (2007) [hereinafter U.S. COMMANDER'S HANDBOOK].

[53] Proportionality requires an assessment whether an attack that is expected to cause incidental loss of civilian life or injury to civilians would be excessive in relation to the anticipated concrete and direct military advantage. Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90; Additional Protocol I, *supra* note 50, arts. 51(5)(b), 57, 85; HPCR COMMENTARY, *supra* note 52, § D.14; ICRC RULES, *supra* note 52, Rule 14; UK MANUAL, *supra* note 52, ¶¶ 2.6–2.8; U.S. COMMANDER'S HANDBOOK, *supra* note 52, ¶ 8.3;.

[54] Precaution requires that, before every attack, armed forces must do everything feasible to: i) verify the target is legitimate, (ii) determine what the collateral damage would be and assess necessity and proportionality, and (iii) minimize the collateral loss of lives and/or property. Additional Protocol I, *supra* note 49, art. 57; Prosecutor v. Kupreskic, Case No. IT-95-16-T-14, Judgement, ¶ 524 (Jan. 14, 2000); HPCR COMMENTARY, *supra* note 49, § G.30; ICRC RULES, *supra* note 52, Rules 15–21; UK MANUAL, *supra* note 52, ¶ 5.32; U.S. COMMANDER'S HANDBOOK, *supra* note 52, ¶ 8.3.1. "Everything feasible" means precautions that are "practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENVEVA CONVENTIONS OF 12 AUGUST 1949 *Protocol 1*, art. 51 (Yves Sandoz et al. eds.,

standards apply regardless of whether the armed conflict is between states (an international armed conflict) or between a state and a non-state armed group (non-international armed conflict), including alleged terrorists. It is also important to add, in light of the circumstances under which Osama bin Laden was killed, that IHL also restrains the use of force even against legitimate targets. This is made clear by the ICRC in its analysis of the rules governing direct participation in hostilities, in the context of which it states that "the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."[55]

2. Outside the Context of Armed Conflict

The legality of a killing outside the context of armed conflict is governed by human rights standards, especially those concerning the use of lethal force. Although these standards are sometimes referred to as the "law enforcement" model, they do not in fact apply only to police forces or in times of peace. The "law enforcement officials" who may use lethal force include all government officials who exercise police powers, including a state's military and security forces, operating in contexts where violence exists, but falls short of the threshold for armed conflict.[56]

Under IHRL a state killing is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life (making lethal force *necessary*).[57] The proportionality requirement limits the

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1987) [hereinafter AP COMMENTARY]; ICRC RULES, *supra* note 5252, Rule 15; MELZER, *supra* note 43, at 365, citing the Protocols to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (1980).

[55] INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 77 (2009).

[56] *See* Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth U.N. Congress on Prevention of Crime and Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, preamble; Code of Conduct for Law Enforcement Officials, GA Res. 34/169 (Dec. 17, 1979) [hereinafter Code of Conduct] art. 1, cmts. (a)-(b).

[57] Inter-Am. C. H. R. [IACHR], *Report on Terrorism and Human Rights*, IACHR Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002); U.N. Doc. A/61/311, *supra* note 47, ¶¶

permissible level of force based on the threat posed by the suspect to others.[58] The necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate through, for example, the use of warnings, restraint, and capture.[59]

This means that under IHRL, a targeted killing in the sense of an intentional, premeditated, and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation. Thus, for example, a "shoot-to-kill" policy violates IHRL.[60] This is not to imply, as some erroneously do, that law enforcement is incapable of meeting the threats posed by terrorists and, in particular, suicide bombers. Such an argument is predicated on a misconception of IHRL, which does not require states to choose between letting people be killed and letting their law enforcement officials use lethal force to prevent such killings. In fact, under IHRL, states' duty to respect and to ensure the right to life[61] entails an obligation to exercise "due diligence" to protect the lives of individuals from attacks by criminals, including terrorists.[62] Lethal force under IHRL is legal if it is strictly and directly necessary to save life.

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33–45. *See also* Basic Principles, *supra* note 56, art. 9; U.N. Human Rights Committee, General Comment No. 6 (1982), ¶ 3; Code of Conduct, *supra* note 56, art. 3.

[58] U.N. Doc. A/61/311, *supra* note 47, ¶¶ 42–44.

[59] Suárez de Guerrero v. Colombia, Human Rights Comm., ¶ 13.2 (Mar. 31, 1982) ("the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions"). Basic Principles, *supra* note 56, Principle 10 ("In the circumstances provided for under Principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."); U.N. Doc. A/61/311, *supra* note 47, ¶ 41 (discussing gradual escalation steps that may be taken).

[60] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. E/CN.4/2006/53 44–54 (March 8, 2006) (by Philip Alston).

[61] ICCPR, *supra* note 47, art. (2)(1).

[62] Jiménez Vaca v. Colombia, Human Rights Committee, ¶ 7.3 (Mar. 25, 2002) (T]he Committee points out that article 6 of the Covenant implies an obligation on the part of the state party to protect the right to life of every person within its territory and under its jurisdiction.").

Some commentators have railed against the "restrictive and out-of-place international rules supplied by IHRL" and their inappropriateness in the "unique circumstances of the 'war on terror.'"[63] As a result, they predict that IHRL norms will suffer from much lower rates of compliance than IHL norms, because of the former's essentially non-reciprocal nature.[64] They don't explain how they evaluate levels of compliance, nor do they mention the fact that international mechanisms for exacting compliance with IHL norms are both under-developed and under-utilized, whereas those relating to IHRL are beginning to have some bite.

3. In Relation to the Use of Force

Targeted killings conducted in the territory of other states raise sovereignty concerns.[65] Under Article 2(4) of the UN Charter, states are forbidden from using force in the territory of another state.[66] When a state conducts a targeted killing in the territory of another state with which it is

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[63] Robert J. Delahunty & John Yoo, *What is the Role of International Human Rights in the War on Terror?*, 59 DEPAUL L. REV 301, 347–49.

[64] *Id.* at 346–48. Blum has echoed this analysis by suggesting that "reciprocity has effectively been eliminated as an organizing principle of IHL as a matter of both law and practice." Gabriella Blum, *Re-envisaging the International Law of Internal Armed Conflict: A Reply to Sandesh Sivakumaran*, 22 EUR. J. INT'L L. 265, 270 (2011). Others, however, insist that it remains crucial to IHL. Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict: A Rejoinder to Gabriella Blum*, 22 EUR. J. INT'L L. 273, 275 (2011). In any event, reciprocity is by no means the sole reason to respect IHL. *See* MARK OSIEL, THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR (2009).

[65] For example, in April 1988, the Security Council condemned as an act of illegal aggression Israel's killing in Tunisia of Khalil al-Wazir, also known as Abu Jihad. S.C. Res. 611, U.N. Doc. S/RES/611 (Apr. 25, 1988). The killing was also said to have violated Tunisia's sovereignty and territorial integrity. Al-Wazir, a leader in Fatah, the military arm of the Palestine Liberation Organization, was accused by Israel of conducting military operations in Israeli territory that left dozens of civilians dead. Jill Smolowe, Ron Ben-Yishai, & Dean Fischer, *Middle East* [sic] *Gunned Down in Tunis*, TIME (Apr. 25, 1988), http://www.time.com/time/magazine/article/0,9171,967236-1,00.html. He was allegedly killed by a commando unit of the Israeli Defense Forces while in the study of his home. *Id.* The killing was also condemned by the US State Department as "an act of political assassination". Robert Pear, *US Assails P.L.O. Aide's Killing As 'Act of Political Assassination*, N.Y. TIMES (Apr. 18, 1988), http://www.nytimes.com/1988/04/19/world/us-assails-plo-aide-s-killing-as-act-of-political-assassination.html.

[66] U.N. Charter art. 2(4) ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .").

not in armed conflict, whether the first state violates the sovereignty of the second is determined by the law applicable to the use of inter-state force, while the question of whether the specific killing of the particular individual(s) is legal is governed by IHL and/or IHRL.

A targeted killing conducted by one state in the territory of a second does not violate the latter's sovereignty if either (a) the second state consents, or (b) the first, targeting, state has a right under international law to use force in self-defense under Article 51 of the UN Charter,[67] because (i) the second state is responsible for an armed attack against the first state, or (ii) the second state is unwilling or unable to stop armed attacks against the first state launched from its territory. International law permits the use of lethal force in self-defense in response to an "armed attack" as long as that force is necessary and proportionate.[68]

The *jus ad bellum* requirement of proportionality, which has been recognized by the International Court of Justice, conditions the defensive actions.[69] Proportionality requires that a state acting defensively employ no more force than reasonably required to overcome the threat. In the context of cross-border operations, this limitation means that the scale and nature of the force employed cannot exceed that which is necessary. For instance, if targeted air strikes against terrorist camps would suffice to tamp down further attacks, it would be unlawful to mount large-scale ground operations. The limitation is equally geographical. It would, for example, be unlawful to deploy forces where the terrorists are not located. Finally, such operations are temporally limited in the sense that withdrawal or cessation is required once the threat has been extinguished.

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[67] U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

[68] *Id.*; Military and Paramilitary Activities in and Against Nicaragua (Nicar. vs. US), Merits, 1986 I.C.J. 14, ¶ 194 (June 27); *see also* O. Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633–34 (1984). In the context of self-defence, force is proportionate only if it used defensively and if it is confined to the objective.

[69] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, at ¶ 147 (Dec. 19); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, at 183 ¶43, 196–98 ¶76 (Nov. 6); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at ¶ 41 (July 8); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 194 (June 27).

While the basic rules are not controversial, questions relating to which framework governs in a particular setting and to the interpretation and application of the relevant rules have been the subject of extensive debate. Among the most controversial questions are how to determine whether or not an armed conflict exists and how to delimit its scope; determining who may lawfully be targeted in such a setting, and on what basis; deciding who is permitted to carry out such a killing; and determining the extent to which less-than-lethal measures are required to be used. In addition, when a state claims that it is permitted to use force, a range of complex questions arise including the legal basis for the claim, whether in treaty or customary law; the circumstances in which consent is required from the state on whose territory the force is to be used; whether a right to self-defense applies against non-state actors in analogous terms to the rules governing inter-state force; whether anticipatory and/or pre-emptive strikes are permissible; and what the consequences are for IHL and IHRL of the invocation of the right to self-defense.

Apart from the fact that there is now a burgeoning literature addressing these issues, my own views have been clearly spelt out in the various reports that I presented to the UN Human Rights Council in my capacity as Special Rapporteur in which I argued that various existing targeted killing practices violate applicable legal rules.[70] In response to one of these, the *Wall Street Journal* sought to assure its readers that this was not the case, at least as far as the United States was concerned:

> As for Mr. Alston's concerns, the legal case for drones is instructive. President Bush approved their use under his Constitutional authority as Commander in Chief, buttressed by Congress's Authorization for the Use of Military Force against al Qaeda and its affiliates after 9/11. Gerald Ford's executive order that forbids American intelligence from assassinating anyone doesn't apply to enemies in wartime.[71]

Leaving aside the somewhat contentious nature of some of these claims, the statement neatly encapsulates the problematic relationship between

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[70] *See* Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6 (May 26, 2010) (by Philip Alston).

[71] *Editorial: The Drone Wars*, WALL ST. J., Jan. 9, 2010, at A12.

international and domestic law. In responding to my analysis, which was written from the perspective of international law, the *Wall Street Journal* focused instead on the provisions of United States domestic law. It thus bears emphasizing in the present context that the focus is on the extent to which the United States is complying with its international law obligations, and in particular, with its obligation to account for its program of targeted killings.

In addition, it should be emphasized that this Article is not premised on any particular legal analysis as to the applicability of IHL or IHRL to the targeted killings in question. It is assumed for the purposes of analysis that there will be some such killings that take place solely under the rubric of IHL, some under the rubric of IHRL, and others that might warrant the application of a mixed regime. While such arguments will be of the utmost importance in analyzing the legality or otherwise under international law of any specific killing,[72] the characterization of the applicable legal regime does not *per se* affect the general argument that an appropriate level of accountability and thus transparency is required to be observed. What is appropriate will, in turn, be affected by the applicable regime. The argument here, however, is confined to the proposition that there are many targeted killings for which no relevant standard of accountability is being met.

### *B. Transparency and Accountability Obligations*

The concept that government agencies should be accountable is generally taken for granted in liberal democracies, and transparency has been considered to be an indispensable element in promoting morality in government and popular legitimacy in almost all variants of democratic theory.[73] The centrality of the concept of accountability in international relations contexts is now also widely accepted. Grant and Keohane have defined it as a process in which "some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they

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[72] *See*, *for example* Chesney's systematic consideration of the applicable law in Robert Chesney, *Who May Be Killed? Anwar Al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 YB. INT'L HUMANIT. L 3 (2010).

[73] *See* Mark A. Chinen, *Secrecy and Democratic Decisions*, 27 QUINNIPIAC L. REV. 1 (2009); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

determine that these responsibilities have not been met."[74] The concept "implies that the actors being held accountable have obligations to act in ways that are consistent with accepted standards of behavior."[75] There is now a burgeoning literature dealing with international accountability mechanisms,[76] but it is the international law dimensions of governmental accountability for the extraterritorial activities of their intelligence agencies that is of principal concern here.

As the UN Secretary General's expert panel on Sri Lanka noted in its 2011 report, accountability for serious violations of both IHRL and IHL "is not a matter of choice or policy; it is a duty under domestic and international law."[77] While the substantive norms, such as the right to life or the right to be free of torture, are of crucial importance, the real value-added in many contexts is the requirement to establish procedures and institutional arrangements at the domestic level in order to demonstrate compliance with the relevant norms. It is for this reason that the role of international mechanisms is a subsidiary and complementary one. In general, the latter role remains a relatively passive one except in situations in which there is good reason to believe that domestic accountability mechanisms are not working effectively.

In this section I first recall the different provisions of IHL and IHRL that require transparency and accountability, I then look at objections that might be made to applying such principles in relation to counter-terrorism activities, and finally consider the approach that the United States has consistently taken on these issues in relation to other governments.

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[74] Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29-30 (2005).

[75] *Id.* For an alternative, but closely related, approach see Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L. J. 447, 447, 450 (2007) (defining accountability as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.").

[76] For a comprehensive review of these approaches and mechanisms see Philip Alston, *Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?*, 52 HARV. INT'L L. J. 563 (2011).

[77] REPORT OF THE SECRETARY-GENERAL'S PANEL OF EXPERTS ON ACCOUNTABILITY IN SRI LANKA 115, ¶ 425 (Mar. 31, 2011), *available at* http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.

In IHL, the starting point is Common Article 1 of the four Geneva Conventions, which provides that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." The obligation to respect requires states to implement the Conventions within their legal systems and to ensure that the relevant standards are respected by all state organs as well as by all private individuals within their jurisdiction. The obligation "to ensure respect" has been interpreted more expansively as requiring states to "do everything in their power to induce transgressor states to abide by the Conventions."[78]

In addition to this general obligation, IHL spells out a range of specific procedural safeguards states must take with respect to targeted killings in armed conflict. They include:

- To ensure that forces and agents have access to reliable information to support the targeting decision,[79] including an appropriate command and control structure,[80] as well as safeguards against faulty or unverifiable evidence.[81]

- To ensure adequate intelligence on the "effects of the weapons that are to be used . . . the number of civilians that are likely to be present in the target area at the particular time; and whether they have any possibility to take cover before the attack takes place."[82]

- To assess the proportionality of an attack in relation to each individual strike.[83]

- To ensure that when an error is apparent, those conducting a targeted killing are able to abort or suspend the attack. [84]

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[78] Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 EUR. J. INT'L L. 125, 127 (2010).
[79] HPCR COMMENTARY, *supra* note 50, § G.32(a).
[80] *Id.*
[81] *Id.* §§ G.32(a) –(c), G.39.
[82] *Id.* § G.32(c).
[83] Additional Protocol I, *supra* note 50, art. 57; AP COMMENTARY, *supra* note 54. *See also* Pub. Comm. Against Torture in Israel v. Gov't of Israel, IsrSC 57(6) at 285.
[84] In this regard, the United Kingdom's Manual on the Law of Armed Conflict is particularly instructive:

While the Geneva Conventions do not specify a general duty to investigate alleged breaches, the grave breaches provisions of the Fourth Convention, which applies *inter alia* to "wilful killing," require that effective penal sanctions be in place to punish those found to have committed such breaches.[85] These obligations would be hollow, if not illusory, if the state was not also required to demonstrate in practice that it is in compliance by investigating any alleged grave breach related to a targeted killing. These specific obligations also come together in the ICRC's formulation of the position under customary international law:

> States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.[86]

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> Those who plan or decide upon attacks are the planners and commanders and they have a duty to verify targets, take precautions to reduce incidental damage, and refrain from attacks that offend the proportionality principle. Whether a person will have this responsibility will depend on whether he has any discretion in the way the attack is carried out and so the responsibility will range from commanders-in-chief and their planning staff to single soldiers opening fire on their own initiative. Those who do not have this discretion but merely carry out orders for an attack also have a responsibility: to cancel or suspend the attack if it turns out that the object to be attacked is going to be such that the proportionality rule would be breached.

U.K. MANUAL, *supra* note 52, ¶ 5.32.9; *see also* HPCR COMMENTARY, *supra* note 50, § G.34 (citing U.K. Manual), G.35.

[85] Additional Protocol I, *supra* note 50, arts. 11, 85 (grave breaches), 87(3); Geneva Conventions I–IV, *supra* note 52, arts. 1, 50, 51, 130, & 147. Additional Protocol I, Article 85 classifies a number of acts as grave breaches "when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health", including "(a) Making the civilian population or individual civilians the object of attack; (b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) . . . . (e) Making a person the object of attack in the knowledge that he is "hors de combat."

[86] ICRC RULES, *supra* note 52, Rule 158.

Thus governments must specifically disclose the measures that they have put in place to ensure respect for their obligations, to investigate alleged unlawful targeted killings, and either to identify and prosecute perpetrators, or to extradite them to another state that has made out a *prima facie* case for the unlawfulness of a targeted killing.[87]

It might be argued in response by the United States that the standard of accountability required is lower in relation to non-international armed conflicts, which is how the conflicts in Afghanistan and Pakistan would be categorized by most observers. This lower standard might be said to be evidenced by the fact that states are not obligated to give full access to the International Committee of the Red Cross ("ICRC") in such conflicts. But the ICRC's review of customary law makes it abundantly clear that the obligation to ensure accountability applies fully in both international and non-international armed conflicts. This is based on military manuals, including that of the United States, explicit state practice, requirements imposed by the Security Council, and norms endorsed by a range of other international bodies.[88]

For its part, IHRL, developed by a wide range of international and regional institutions, and reflected in customary law principles, places a particular emphasis on the obligation of states to investigate, prosecute, and punish any alleged violation of the norms banning extrajudicial executions. United States officials, as well as some American commentators, have tended to assume that the duty to investigate alleged violations of the right to life, a duty that has been elaborated upon at length in the jurisprudence of bodies such as the Human Rights Committee[89] and the European Court

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[87] Geneva Conventions I–IV, *supra* note 52, arts. 49, 50, 129, & 146; Geneva Convention IV, *supra* note 52, arts. 3–4. Note the broader substantive reach of the prohibition of wilful killing. Additional Protocol I, *supra* note 50, art. 75; Common Article 3, *supra* note 52. These provisions reflect customary international law. Common Article 3, *supra* note 52. For an expansive reading of the resulting duty to investigate violations of IHL see Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, 88 INT'L REV. RED CROSS 881, 889 (2006).

[88] ICRC RULES, *supra* note 52, at 608–09.

[89] *General Comment No. 6*, *supra* note 57; *see also* Kaya v. Turkey, 65 Eur. Ct. H.R. 297 (1998); Neira Alegría Case, Inter-Am. Ct. H.R. (ser. C) No. 20 (Jan. 19, 1995); McCann v. United Kingdom, 324 Eur. Ct. H. R. (ser. A) at 140 (1995); Suárez de Guerrero v. Colombia, Communication No. R.11/45 (Feb. 5, 1979), UN Doc. Supp. No. 40 (A/37/40) at 137 (1982). *See also General Comment No. 31*, *supra* note 47, ¶ 15. States party to the ICCPR can be held responsible for violations of the rights under the Covenant when

of Human Rights, flows only from specific treaty obligations.[90] By noting that the United States is not a party to the European Convention, and by arguing that the ICCPR does not obligate the United States extraterritorially,[91] they assume that the well-developed jurisprudence emanating from these two bodies has no relevance in determining the United States' obligations in relation to a practice such as extraterritorial targeted killings. Leaving aside the contentious debates over the extraterritorial nature of ICCPR obligations, this approach incorrectly assumes that the duty to investigate killings has no existence in customary international law, independent of treaty obligations. The right to life has long been acknowledged as part of custom,[92] and a duty to investigate has long been assumed to be a central part of that norm,[93] not least by the United States when it consistently calls upon other governments to investigate killings without invoking any specific treaty-based obligations binding upon the governments concerned.[94]

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the violations are perpetrated by authorized agents of the State, including on foreign territory. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 108–11 (July 9) (ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"); *Lopez v. Uruguay*, Communication No. 52/1979, CCPR/C/OP/1 at 88 (1984), ¶¶ 12.1–12.3.

[90] Brendan Groves, *Civil-Military Cooperation In Civilian Casualty Investigations: Lessons Learned From The Azizabad Attack*, 65 ARMED FORCES L. REV. 1 (2010). ("Because … the duty to investigate is tied to treaty law, it only applies when and where the relevant treaty applies." *Id.* at 40. Other commentators have acknowledged that customary law might apply, but have argued with no convincing justification that this would be the case only in relation to a *jus cogens* norm. Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict,* 194 MIL. L. REV. 1, 33 (2007).

[91] The United States informed the Human Rights Committee in 2006 that it "did not consider questions concerning the war on terrorism, and detention and interrogation outside United States territory to fall within the scope of the Covenant." Second and Third Periodic Reports of the United States of America, 18 July 2006, U.N. Doc. CCPR/C/SR.2380 ¶ 2 (July 27, 2006) (statement by Mr. Waxman).

[92] *See generally* NIGEL S. RODLEY & MATT POLLARD, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 250 (3d ed. 2009).

[93] *See, for example*, the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ECOSOC Res. 1989/65, Annex, U.N. Doc. E/RES/1989/65 (May 24, 1989), Principle 9 of which requires "a thorough, prompt and impartial investigation of all suspected cases of extra-legal, summary and arbitrary executions."

[94] For example, the United States was a principal sponsor of General Assembly Res 65/208 (Dec. 21, 2010), paragraph 3 of which reiterates "the obligation of all States to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial,

Customary and treaty-based obligations to investigate alleged violations of the right to life can only be met if states accept the need for a degree of transparency which makes it possible to satisfy the obligations to ensure accountability. In explaining what human rights law requires, the European Court of Human Rights has long insisted that "[t]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts."[95] In the same context, the Court has made it clear that there is no single formula by which this is to be achieved, by acknowledging that "[t]he degree of public scrutiny required may well vary from case to case."[96]

There is thus compelling evidence that both applicable bodies of law require transparency and accountability. Nevertheless, in view of the tendency of those advocating the use of targeted killings to suggest that counter-terrorism requires different rules or that intelligence agencies must operate on a different basis, it is appropriate to consider whether there are circumstances that would warrant the adoption of significantly less demanding standards of accountability. In relation to terrorism, it is often argued that there are unavoidable tradeoffs between security and respect for human rights as well as between security and transparency. In other words, secrecy and limits on rights are part of the price that must be paid for security in a world subject to terrorist threats. While these claims have been thoroughly canvassed in other contexts[97] they call for two particular responses in the present setting. The first is to acknowledge that, in relation

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summary or arbitrary executions, to identify and bring to justice those responsible, … and to adopt all necessary measures, including legal and judicial measures, to put an end to impunity and to prevent the further occurrence of such executions."

[95] Anguelova v. Bulgaria, 2002-IV Eur. Ct. H.R., 355, ¶ 140. In applying these principles to a case of death in custody, the Court relied explicitly on a series of cases involving Turkey some of which dealt with alleged civilian deaths at the hands of the Turkish military. *See* Gül v. Turkey, 34 Eur. H.R. Rep. 28 (2000); Tanrıkulu v. Turkey [GC], 1999-IV Eur. Ct. H.R. 488; Oğur v. Turkey [GC], 1999-III, Eur. Ct. H.R. 551; Ergi v. Turkey, judgment of 28 July 1998, Reports 1998-IV, pp. 1778-79; Güleç v. Turkey, 1998-IV Eur. Ct. H.R. 1733.

[96] *Id.*

[97] *Cf.* DAVID SHIPLER, THE RIGHTS OF THE PEOPLE: HOW OUR SEARCH FOR SAFETY INVADES OUR LIBERTIES (2011); BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2009).

to targeted killing operations, there are major security and effectiveness concerns that require a strong element of secrecy, rather than disclosure. For example, disclosing the identity of an intelligence source or putting an informant at risk of retaliation will limit the extent to which the information justifying a given targeting decision can be publicly divulged. Similarly, it might be argued that significant disclosure would eliminate the fear or uncertainty factor that is designed to constrain the activities of groups who might conclude from published criteria that they were unlikely to be subject to drone attacks.[98] There will thus be certain limits as to how much transparency can be required.

The second response to the argument about necessary tradeoffs is that "security" in this context must be interpreted not only as a goal in itself, but also as a means by which to protect the fundamental values of human rights and democracy.[99] There can thus be no question of simply trading off one value against the other, or of assuming that constraining freedoms increases security. In rejecting what he evocatively describes as the "hydraulic liberty-security metaphor,"[100] Stephen Holmes argues that there are in fact many ways in which respect for liberty contributes to enhanced security. While others have also stressed the importance of empirical justifications favoring a degree of transparency on the part of the CIA and other intelligence actors,[101] Holmes invokes what are essentially prudential and efficiency based reasons in support of what he terms "rule-governed counterterrorism." They include the efficiency-enhancing effect of being forced to give reasons for decisions, the greater likelihood that visceral and punitive reactions—which can generally be assumed to be inefficient—will be constrained by following accepted guidelines, the need

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[98] A journalist held captive by the Taliban reported that the activities of those holding him were greatly affected by the threat of drone strikes David Rohde, *Held by the Taliban, Part 4: A Drone Strike and Dwindling Hope*, N.Y. TIMES (Oct. 20, 2009). http://www.nytimes.com/2009/10/21/world/asia/21hostage.html.

[99] As Stiglitz has argued, secrecy exacerbates mistrust. Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, *in* GLOBALIZING RIGHTS: THE OXFORD AMNESTY LECTURES 1999, 115–16 (Matthew J. Gibney ed., 2003).

[100] Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 327 (2009).

[101] *See generally* Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV 1049 (2008); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post 9/11 World*, 94 CALIF. L. REV. 1655 (2006).

to expose groups of like-minded decision-makers to counter-arguments coming from other perspectives, and the need to deter official reliance on claims of an emergency in order to avoid scrutiny.[102]

The other argument that suggests the appropriateness of less demanding standards of accountability relates to the special situation of intelligence agencies. In response, it is appropriate to acknowledge the deep tensions between the need for accountability and the inherent bias of such agencies towards unaccountability. It is clearly paradoxical to be seeking transparency and encouraging information sharing from agents whose very existence is premised on secrecy and absolute discretion. The need for intelligence services to be accountable has always been strong simply because of the power that they exercise and the otherwise unlimited potential for abuse of that power. But over the past decade the importance of accountability has grown dramatically for various reasons. Reaction to the events of 9/11 placed intelligence agencies at the forefront of efforts to combat terrorism and put a premium on rapid action, efficiency, and the exercise of only very loosely constrained agency discretion, often at the expense of transparency, respect for human rights, and meaningful congressional consultation. Agency personnel numbers and budgets increased greatly, special operations became far more common, and double-hatting served to make scrutiny more difficult. In addition, joint operations as well as intelligence-sharing with foreign counterpart agencies, often working for authoritarian regimes, became widespread and increased the likelihood of human rights abuses occurring.[103]

But the challenges to accountability have also multiplied since 9/11. In an age of enhanced global terror operations the structural predisposition to secrecy on the part of intelligence officials has only been strengthened. The heterogeneity and geographical spread of actual and potential terrorist groups, the reality of homegrown terror, and the potential for large-scale acts of terrorism, have all contributed to support for secrecy. This goes beyond the mere need to ensure operational secrecy. Intelligence agencies cannot operate in a traditional hierarchical fashion for fear that a leak at one point in the chain of command will undermine the entire operation. Individual officers are thus given considerable discretion and even relative

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[102] Holmes, *supra* note 100, at 354.

[103] For an excellent overview of the perils involved in these practices see Elizabeth Sepper, *Democracy, Human Rights, and Intelligence Sharing*, 46 TEXAS INT'L L.J. 151 (2010).

autonomy according to the circumstances. Moreover, the centrality of the notion of "plausible deniability" means that such agencies are often required to act in ways that not only leave no fingerprints, but also leave (almost) no internal paper trail. These factors in turn make the agency less disposed towards, and less accessible to, either internal or external oversight. But the response is not to reinforce these pathological tendencies, but rather to reassert the primacy of IHRL and IHL standards and thus the need for appropriate levels of transparency and accountability, albeit tailored to reflect the legitimate exigencies faced by such actors.

Before moving to consider the Obama administration's approach to these issues, it is important to underscore the fact that we are talking about two different levels of accountability. The first is that national procedures must meet certain standards of transparency and accountability in order to meet existing international obligations. The second is that the national procedures must themselves be sufficiently transparent to international bodies as to permit the latter to make their own assessment of the extent to which the state concerned is in compliance with its obligations. In other words, even in situations in which states argue that they put in place highly impartial and reliable accountability mechanisms, the international community cannot be expected to take such assurances on the basis of faith rather than of convincing information. Assurances offered by other states accused of transgressing international standards would not be accepted by the United States in the absence of sufficient information upon the basis of which some form of verification is feasible. Since the 1980s, the phrase "trust but verify"[104] has been something of a mantra in the arms control field, but it is equally applicable in relation to IHL and IHRL. The United States has consistently demanded of other states that they demonstrate to the international community the extent of their compliance with international standards. A great many examples could be cited, not only from the annual State Department reports on the human rights practices of other states, but also from a range of statements by the President and the Secretary of State in relation to countries like Egypt, Libya, and Syria in the context of the Arab Spring of 2011.

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[104] This "was a signature phrase adopted and made famous by U.S. president Ronald Reagan" who used it often in relation to relations with the Soviet Union and especially when discussing approaches to superpower arms control agreements. *Trust, but Verify*, WIKIPEDIA, http://en.wikipedia.org/wiki/Trust,_but_verify (last visited Dec. 1, 2011).

Since I began this section of the Article by citing the emphasis on accountability adopted by the UN report on Sri Lanka, it is appropriate to conclude by reference to the position taken by the United States in that regard. Sri Lanka argued that it had undertaken its own national inquiry into alleged violations of international law committed in the final phases of its civil war and that such an inquiry satisfied whatever accountability obligations the government had. In August 2011, however, the United States called upon Sri Lanka to submit the report of that national inquiry directly to the UN Human Rights Council so that it could be scrutinized by the international community and demonstrate that it "meets international standards."[105] In other words, the two levels of accountability are ultimately separate, and national insistence on the adequacy of domestic procedures can never be considered a substitute for the degree of transparency required to enable the international community to discharge its separate monitoring obligations.

We turn now to take note of the position taken in terms of the applicable international law by the Obama administration.

*C. The Obama Administration and International Law*

The United States has consistently affirmed its commitment to the general principles of transparency and accountability and its broader commitment to comply with all of its international obligations. The Army Field Manual, for example, highlights the need for the United States to respect the rule of law in its military activities:

> Law and policy govern the actions of the U.S. forces in all military operations, including counterinsurgency. For U.S. forces to conduct operations, a legal basis must exist. This legal basis profoundly influences many aspects of the operation. It affects the rules of engagement, how U.S. forces organize and train foreign forces, the authority to spend

[105] This was the phrase used by the State Department spokesperson, Victoria Nuland. *See* Amantha Perera, *Sri Lanka Ducks International Probe*, INTERPRESS SERVICE (Aug. 20, 2011), http://www.ipsterraviva.net/UN/news.asp?idnews=104837.

> funds to benefit the host nation, and the authority of U.S. forces to detain and interrogate.[106]

This commitment clearly includes international law. In his Nobel Prize acceptance speech, President Obama asserted that "the United States of America must remain a standard bearer in the conduct of war," and this rallying cry has since been taken up by the State Department Legal Adviser who has clearly asserted that "U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."[107] This statement has since been supplemented by an explicit commitment in relation to IHRL. The United States officially informed the UN Human Rights Council that "[t]o the extent that human rights law may apply in armed conflict or national actions taken in self-defense, in all cases, the United States works to ensure that its actions are lawful."[108]

Many other affirmations of this commitment to comply with international standards could be cited.[109] For example, in relation to the rules concerning civilian casualties, the chairman of the Joint Chiefs of Staff has argued that:

> [C]ivilian casualty incidents such as those we've recently seen in Afghanistan will hurt us more in the long run than any tactical success we may achieve against the enemy. People expect more from us. They have every right to expect more from us.

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[106] ARMY FIELD MANUAL NO. 3-24 AND MARINE CORPS WARFIGHTING PUBLICATION NO. 3-33.5, COUNTERINSURGENCY, D-1, app. D (Dec. 15 2006), *available at* http://www.fas.org/irp/doddir/army/fm3-24.pdf. [hereinafter COUNTERINSURGENCY].

[107] Harold Hongju Koh, Keynote Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (March 24, 2010) (hereinafter "Koh ASIL speech"), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

[108] Report of the Working Group on the Universal Periodic Review: United States of America, U.N. Doc. A/HRC/16/11 ¶ 53 (Jan. 4, 2011).

[109] It should be noted in passing that the obligation of the United States to account to the international community for its compliance with these applicable international standards is not to be confused with the entirely domestic question of whether alleged violations of those standards are, or should be, justiciable in domestic courts. For a discussion of this dimension see Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV 405, 422–28 (2009).

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. . . We protect the innocent. It's who we are.[110]

And, from time to time, the importance of transparency has also been acknowledged, at least in principle. Thus, for example, in 2010 General McChrystal directed that night raids should be "as transparent as possible."[111] While the phrase "as possible" clearly constitutes a major potential escape clause, a good faith interpretation would assume that there must be at least reasonable transparency.

The most broad-ranging affirmation of its commitment to international law came in March 2010 when the Obama administration offered a detailed justification of its policies across a range of controversial issues, including targeted killings and the use of drones for that purpose. Its policy statement came in the form of a lengthy speech by the State Department's Legal Adviser, Harold Hongju Koh, to the American Society of International Law.[112] The speech was unquestionably significant because governments all too rarely lay out the legal justifications underpinning especially controversial policies, let alone seek to systematically engage with their critics in legal terms. Its content is noteworthy in four principal respects. First, it emphasized the importance of legality and insisted several times over that the United States is in full compliance with international law: "U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war." He added that all targeting operations "are conducted consistently with law of war principles" and that the relevant principles "are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law."[113] No data of any sort was provided, no mechanisms by which to promote the integrity of any such procedures were cited, no statistics were given as to the number of killings or the

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[110] *Use Of Force And Arms Control: JCS Chief Calls for "Precise and Principled" Use of Force*, 104 AM. J. INT'L L. 295, 297 (2010) (quoting Admiral Mike Mullen).

[111] Press Release, International Security Assistance Force, ISAF Issues Guidance on Night Raids in Afghanistan (Mar. 5, 2010), *available at* http://isaf-live.webdrivenhq.com/article/isaf-releases/isaf-issues-guidance-on-night-raids-in-afghanistan.html.

[112] Koh ASIL speech, *supra* note 107.

[113] *Id.*

number of civilian casualties, and the challenge of accountability in such operations was not addressed at all.

Second, the Legal Adviser's speech sought to rise to the challenge of identifying the legal basis upon which the killings are conducted. He invoked the law of armed conflict, on the basis that "the United States is in an armed conflict with al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks" and he added that in this context the United States "may use force consistent with its inherent right to self-defense under international law."[114] These broad and open-ended claims were not, however, disaggregated in any way, thus leaving almost all of the controversial questions that arise in this context unaddressed. For example, is the conflict an international or a non-international one, does it extend beyond the confines of Afghanistan and Pakistan, and if so, does it cover all countries in the world where the relevant forces might be found? And what are the parameters of the right to self-defense that has been claimed? If Russia or China were attacked by external non-state actors, can they too claim a right to self-defense that is not limited in time or in territorial scope, and thus undertake attacks on their enemies around the world?

Third, the Legal Adviser acknowledged that various "legal objections [had] been raised against U.S. targeting practices." He insisted, however, that his speech was "not the occasion for a detailed legal opinion" and opted to briefly address only four such objections. One of the four concerned the ban on assassinations contained in U.S. law, which, although relevant, is beyond the scope of this Article.[115] The remaining three objections were not attributed to any particular source and each was promptly rebutted. Unfortunately, all were straw man arguments that took as their point of departure extreme positions that were presented as though they reflected mainstream concerns that had been expressed. The first was that "the very act of targeting a particular leader of an enemy force in an armed conflict must violate the laws of war."[116] I am not aware of any reputable author who might have made such an argument and the proposition, as stated, is clearly without foundation. The second addressed the argument that the use of UAVs for lethal operations is inherently

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[114] *Id.*

[115] *See generally* Pines, *supra* note 7.

[116] Koh ASIL speech, *supra* note 107.

illegal. While it is true that Lord Bingham made such a suggestion, as noted above,[117] none of the mainstream literature on targeted killings by drones has put forward such an argument. And the third was that individuals targeted "in an armed conflict or in legitimate self-defense" must be provided "with legal process before the state may use lethal force." Again, it is not clear who could have made such a sweeping claim, but that did not stop the Legal Adviser from forcefully rebutting it.[118]

Fourth, the speech carefully avoided any reference to the CIA. It thus remains unclear whether the Legal Adviser was asserting that all of its programs also comply with the applicable law, or whether the fact that the CIA operates off the radar screen is to be taken as meaning that the Legal Adviser either has no role or no ability to speak on their behalf. The ambiguity was almost certainly intentional and certainly consistent with the Agency's own policy of neither confirming nor denying the existence of any such programs. Commentators, however, have argued that, "Koh obviously intended for his analysis to apply across all government agencies."[119]

For present purposes, the main significance of the speech is in its unqualified affirmation that "U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law." Once we have ascertained the actual practice of the United States, which is dealt with in Part C below, we will return in Parts D and E to examine the questions relating to obligations of accountability that are clearly a crucial part of the "applicable law" to which the Legal Adviser referred. Unless they are adequately complied with, the international community is deprived of the principal, and perhaps only, mechanism through which it could assess the legality of the relevant policies and practices of the United States.

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[117] *See supra* text accompanying notes 123–125.

[118] While the allusion was probably to arguments that have been made in relation to the proposed targeted killing of Anwar al-Aulaqi, see *infra* n.194, those arguments were premised on his United States citizenship and grounded in concepts of American constitutional law. They do not translate into a generalized proposition of the type cited hypothetically by the Legal Adviser.

[119] Afsheen Radsan and Richard Murphy, Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing 21 (2010) (draft), *available at* http://ssrn.com/abstract=1625829.

## III. An Overview of Relevant U.S. Practice

The United States has long engaged in practices that scholars have characterized as targeted killings,[120] but the situation has changed significantly over the past decade. While there has been extensive media coverage of certain aspects of U.S. targeted killings programs, there have been very few attempts to marshal all of the relevant information in a systematic manner. This part of the Article seeks to bring together all of the publicly available information on the use of drone strikes and kill/capture raids.[121] I shall use these terms despite the fact that some defenders of the programs have sought to sanitize them by using rather more detached or neutral terminology such as "intelligence-driven uses of force."[122] In addition, because both the U.S. military and the CIA have, separately and sometimes jointly, employed each of these techniques, the final section of this Part seeks to understand the division of responsibilities among the various actors engaged in these operations.

### *A. Drone Strikes*

What is so special about drones? At one level—that of the applicable law—the answer is "not much." At another level, the use of drones for targeted killings has the potential to transform many of the assumptions underpinning the application of IHL. Before looking at the transformative dimensions, we should dispose of one major recent critique that called for drones to be singled out and treated differently from other weapons systems in terms of evaluating the legality of killings that are undertaken with their assistance. Lord Bingham, one of Britain's most senior judges, argued that the use of UAVs for killing is intolerable. Referring to weapons that "have been thought to be so cruel as to be beyond the pale of human tolerance," among which he included cluster

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[120] Melzer, *supra* note 43, 37–38.

[121] The two techniques are linked. In a 2011 interview the CIA's former acting Legal Counsel described the CIA's targeting list for 'lethal operations' as "… basically a hit list. … The Predator is the weapon of choice, but it could also be someone putting a bullet in your head." McKelvey, *infra* note 128.

[122] Kenneth Anderson, A Tension Between Efficiencies of Jus in Bello and Jus Ad Bellum In the Practice of Targeted Killing Through Drone Warfare 1 (Apr. 12, 2011) (draft), *available at* http://www.law.upenn.edu/academics/institutes/ilp/targetedkilling_papers/AndersonPaper.pdf.

bombs and landmines, he suggested "that unmanned drones that fall on a house full of civilians [are weapons] the international community should decide should not be used."[123] While it is not entirely clear exactly whether Lord Bingham was objecting to the use of drones for weapons delivery purposes or the bombing of targets that include significant numbers of civilians, his comments were widely reported as suggesting that drones should be banned.[124] But it seems clear that, as the law of armed conflict stands, there is no legally relevant distinction between a killing carried out by a drone, a helicopter, or a plane. Bingham says he objects to bombing a house full of civilians, but such an act is already clearly prohibited under international law, assuming the house is literally full of civilians and is not immediately adjacent to a legitimate military target. Even in the latter case, there would be strict limits.

An effort to make Bingham's critique more compelling might lead us to invoke two more specific arguments. The first is indiscriminacy. The characteristic shared by the analogous weapons mentioned by Lord Bingham—cluster bombs and landmines—is their indiscriminate impact resulting in significant civilian deaths.[125] But far from being used in an indiscriminate manner, drones can, as their proponents go to considerable lengths to point out, deliver weapons with ever-increasing precision. The second possible argument is that the unmanned nature of the drone distinguishes it from other weapons delivery systems. While this is true, it is a matter of degree, and defenders of drones would argue that dropping a bomb from an aircraft at 15,000 feet above a target (an act that is not

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[123] Interview by Joshua Rozenberg with Lord Bingham (2009) *available at* http://www.biicl.org/files/4422_bingham_int_transcript.pdf.

[124] Robert Verkaik, *"Top Judge: 'Use of Drones Intolerable': Unmanned Weapons are Condemned by Lord Bingham as 'Beyond the Pale'"*, THE INDEPENDENT (July 6, 2009), *available at* http://www.independent.co.uk/news/uk/home-news/top-judge-use-of-drones-intolerable-1732756.html.

[125] Customary IHL and provisions of particular treaties place limits on the weapons states may use. Weapons that are, for example, inherently indiscriminate (such as biological weapons) or that cause unnecessary suffering or superfluous injury are prohibited. The general prohibition is against weapons that violate the customary law prohibitions against indiscriminate weapons or weapons that cause unnecessary suffering. Additional Protocol I, *supra* note 50, arts. 51.4(b)–(c), 35.2; ICRC RULES, *supra* note 52, at 237 (Rule 70), 244 (Rule 71). Specifically prohibited weapons include: biological weapons; chemical weapons; lasers specifically designed to cause blindness; poison or poisoned weapons; small arms projectiles that explode on contact; and, weapons that cause injury by fragments that cannot be detected by x-rays. *See* HPCR COMMENTARY, *supra* note 50, § C.52.

prohibited) involves comparable reliance upon information provided by distant sources. Moreover, the "pilot" of a drone, even if located thousands of miles from the UAV, is likely to have a clear video-fed picture of the target and surroundings, whereas the pilot of a high-altitude bomber will be able to see far less. Thus while killings carried out from UAVs might indeed be problematic in various respects, it is difficult to argue that they are somehow qualitatively different and should be governed by a distinctive legal regime.

But while it is true that drones are not fundamentally different in terms of the applicable law, this must not be permitted to obscure the extent to which they have fundamentally changed the nature of the game. The arguments supporting this characterization break down into two categories: reasons intrinsic to the nature of the weapon and reasons specific to the situation of their main user, the United States. In terms of the weapon itself, drone operators by definition cannot capture but must decide either to be content with surveillance or to opt to fire and presumably to kill. This clearly distinguishes them from land-based capture or kill expeditions, but not from other aerial systems. But the ability of drones to track a particular target patiently and over a lengthy time period, to pinpoint the target's location with great accuracy, and to fire a precision-guided missile designed to minimize collateral damage while maximizing the firepower of an individual hit, is unequalled. At the same time, the risk of death or injury to those involved on the side of the attacker is entirely eliminated. As a result of these characteristics, the drone has changed the nature of warfare. In an era when much has been made of asymmetries in warfare, it is the ultimate asymmetrical weapon. The "battlefield" has been expanded exponentially in terms of both time and space. Individuals are no longer targeted solely on the basis of their status as combatants, but of their individual profiles. And a state can wage war not only through its combatants in the field, but also through skilled computer operators based many thousands of miles away.[126]

[126] This arguably constitutes a qualitative difference even, for example, from cruise missiles sent from a ship in international waters toward distant targets, and computer guided missiles fired from airplanes 15,000 feet above the ground, in the sense that the operators in these cases are still in some sense vulnerable and operating in a theatre of war, albeit broadly defined.

Another distinctive aspect of the use of drones is the extent to which the use of force against or within the territory of another state can be undertaken in an almost casual, and potentially largely unnoticed, way. Sending a squadron of bombers on a mission in or over a foreign land is an act that clearly violates both fundamental norms of international law and broader assumptions rooted in respect for state sovereignty, while floating a drone casually and quietly over a border, might go under the radar screen both literally and metaphorically. And finally, drones are of particular interest because the rapid spread of UAV technology to other states means that the implications of the United States' policy in this area are of potentially major significance in the future in relation to the legal framework that will be applied to the actions of those other states.

In terms of the specific profile of the United States, there are several reasons for emphasizing the distinctiveness of drones. First, the United States is already very heavily dependent upon UAVs in key conflict areas in order to carry out its objectives. The Director of the Central Intelligence Agency observed in 2009 in relation to the use of drones in Pakistan: "Very frankly, it's the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership . . . ."[127] It is now widely acknowledged that the use of UAVs has become an "integral part of U.S. counterterrorism strategy."[128]

Second, in the future, drones will be used with even greater frequency because the United States' global military strategy is increasingly reliant upon them to perform a very wide range of tasks. The proposed budget for fiscal year 2012 for the Department of Defense includes $4.8 billion for UAVs, said to be designed to enhance intelligence, surveillance, and reconnaissance capabilities.[129] But over half of that amount—$2.5 billion—is devoted to the Predator and Reaper systems, both of which are

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[127] *U.S. Airstrikes in Pakistan Called 'Very Effective'*, CNN (May 18, 2009), http://articles.cnn.com/2009-05-18/politics/cia.pakistan.airstrikes_1_qaeda-pakistani-airstrikes?_s=PM:POLITICS.

[128] Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK (Feb. 13, 2011), http://www.newsweek.com/2011/02/13/inside-the-killing-machine.html.

[129] U.S. DEP'T OF DEFENSE, SUMMARY OF THE DOD FISCAL 2012 BUDGET PROPOSAL (2011), *available at* http://www.defense.gov/pdf/SUMMARY_OF_THE_DOD_FISCAL_2012_BUDGET_PROPOSAL_(3).pdf.

armed and capable of carrying out targeted killings.[130] That part of the budget has increased by over 50 percent since 2010.[131]

Third, while UAVs with a lethal capacity have primarily been used in conflict situations, it is increasingly likely that they will be used more broadly in the future. They will thus be weapons of choice for targeted killings across a range of situations, including what Melzer,[132] following Kretzmer,[133] has referred to as the "hostilities paradigm" and the "law enforcement paradigm," as well as in connection with the use of force in international law. While much of the public debate over the use of UAVs to carry out targeted killings has focused on Pakistan, drone strikes have also been conducted in at least five other countries: Afghanistan, Iraq, Libya, Somalia, and Yemen,[134] and consideration was apparently given to using them in situations such as the fight against drug traffickers in Mexico.[135]

And fourth, the Obama administration has signaled that it does not regard the deployment of drones to a foreign country for the purposes of killing to require congressional approval unless the strikes reached an unspecified but clearly high threshold such as if "we were carpet-bombing a country using Predators."[136] Drones thus become an especially attractive

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[130] In terms of weaponry, the Predator is limited in its carrying capacity, while the Reaper can deliver laser-guided 500-lb. bombs as well as Hellfire missiles. Bobby Ghosh & Mark Thompson, *The CIA's Silent War in Pakistan*, TIME (June 1, 2009), http://www.time.com/time/magazine/article/0,9171,1900248,00.html.

[131] *US Budget Recognises Value of Helicopters, Unmanned Systems*, SHEPARD (Feb. 15, 2011), http://www.shephard.co.uk/news/8336/.

[132] *See* Melzer, *supra* note 43, chap. XV.

[133] David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005).

[134] Greg Jaffe & Karen DeYoung, *U.S. Drone Target Two Leaders of Somali Group Allied With al-Qaeda, Official Says*, WASH. POST (June 29, 2011), http://www.washingtonpost.com/national/national-security/us-drones-target-two-leaders-of-somali-group-allied-with-al-qaeda/2011/06/29/AGJFxZrH_story.html?hpid=z1.

[135] Adam Entous, *Special Report: How the White House Learned to Love the Drone*, REUTERS (May 18, 2010), http://www.reuters.com/article/2010/05/18/us-pakistan-drones-idUSTRE64H5SL20100518?feedType=RSS&feedName=topNews.

[136] *Libya and War Powers: Hearing Before the S. Foreign Relations Comm.*, 112th Cong. (June 28, 2011) (Testimony by Legal Adviser Harold Hongju Koh, U.S. Department of State) [hereinafter Testimony]. This comment was made in response to questioning and reported in William Saletan, *Koh Is My God Pilot*, SLATE (June 30, 2011),

way for a President to undertake lethal operations in various countries without seeking the sort of authorization that might provoke a sustained and structured public debate.

I turn now to exploring what is publicly known about the actual usage of drone strikes to date. Both the military and the CIA have made use of them for targeted killings in the armed conflicts in Afghanistan and Iraq. While the United States military does not provide any systematic information as to the operations undertaken and the results achieved, it has demonstrated at least some degree of transparency and given clear indications that it seeks to comply with the central requirements of IHL. The partial transparency results from the combination of several factors. First, the formal aspects of the targeting process for military operations are generally governed by publicly available military documents, such as the U.S. Air Force's manual on targeting doctrine, which include an emphasis on adherence to IHL requirements.[137] But the substantive criteria for who is actually targeted remains largely secret. Second, the evolution of the military's counterinsurgency policy has placed a strong emphasis on approaches that do not rely entirely on killing the enemy to attain the declared objectives[138] and that recognize that killing will sometimes be counter-productive.[139] Policies to minimize civilian casualties have also been given far greater prominence by the military leadership in the past year or so. Third, the military has been compelled by public opinion, both Afghan and international, as well as by its understanding of the strategic importance of reducing civilian casualties, to engage in a process of review and evaluation of operations in relation to which significant numbers of civilian deaths have been alleged. And the fourth factor is the extent of external scrutiny provided both by civil society groups on the ground, such

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http://www.slate.com/id/2298116/. In his written testimony Koh stated that "limited strikes by Predator unmanned aerial vehicles against discrete targets" would not per se constitute involvement in hostilities. Testimony, *supra*, at 11.

[137] TARGETING, *infra* note 158. *See especially* Appendix A entitled "Targeting and Legal Considerations." *Id.* at 88.

[138] "[K]illing insurgents—while necessary, especially with respect to extremists—by itself cannot defeat an insurgency . . . . Victory is achieved when the populace consents to the government's legitimacy and stops actively and passively supporting the insurgency." COUNTERINSURGENCY, *supra* note 106, ¶ 1-14.

[139] "Clearly, killing or capturing insurgents will be necessary . . . . However, killing every insurgent is normally impossible. Attempting to do so can also be counterproductive in some cases; it risks generating popular resentment, creating martyrs that motivate new recruits, and producing cycles of revenge." *Id.* ¶1-128.

as the Afghanistan Independent Human Rights Commission,[140] and by the reporting of the human rights component of the UN field mission, the UN Assistance Mission in Afghanistan (UNAMA).[141] But despite the military's responsiveness in certain settings, it specifically affirmed in December 2010 that it does not compile statistics on civilian casualties caused by drone strikes.[142]

The CIA has also carried out drone strikes on a significant scale in Pakistan. This development was facilitated by the installation of weapons systems in UAVs in 2000 and the post 9/11 adoption of what was originally a secret policy pursuant to which the government has engaged in targeted killings in the territory of other States. The "secret" program is conducted by the CIA using Predator or Reaper UAVs. It began with a drone strike in Yemen in November 2002, but the program has expanded greatly, especially in Pakistan, under the Obama administration. The CIA reportedly controls its fleet of drones from its headquarters in Langley, Virginia, and operators based at Creech Air Force Base, near Las Vegas,[143] while personnel near hidden airfields in Afghanistan and Pakistan handle takeoffs and landings. The fleet is said to be flown by civilians, including both intelligence officers and private contractors (often retired military personnel), and controlled by the agency's Counterterrorism Center, which makes up about ten percent of the agency's staff. And twenty percent of the agency's analysts are now employed as "targeters" to carry out the work of identifying individuals to be recruited, arrested, or killed.[144] Since the

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[140] *See, for example*, Press Release, Afghan Independent Human Rights Commission, 63 Civilians Killed in Afghanistan in the Last Two Weeks, Kabul (Feb. 23, 2010), *available at* http://www.aihrc.org.af/English/Eng_pages/Press_releases_eng/2010/Pre_23_Feb_2010.pdf.

[141] *See, for example*, UNAMA, AFGHANISTAN: MID YEAR REPORT ON PROTECTION OF CIVILIANS IN ARMED CONFLICT 2010, (Aug. 2010), *available at* http://unama.unmissions.org/Portals/UNAMA/Publication/August102010_MID-YEAR%20REPORT%202010_Protection%20of%20Civilians%20in%20Armed%20Conflict.pdf.

[142] Letter from Mark H. Herrington, Associate Deputy General Counsel, Office of Litigation Counsel, Department of Defense, to Jonathan Manes, National Security Project, ACLU (Dec. 30, 2010), *available at* http://www.aclu.org/files/assets/Herrington_ltr_30_Dec_10_re_civ_deaths_-_to_be_resent_march_16_2011.pdf.

[143] Ghosh & Thompson, *supra* note 130.

[144] Miller & Tate, *supra* note 4.

publicly-known details of these operations have been recounted at length elsewhere, the information need not be repeated here.[145]

An important insight into the scale of the operation in Pakistan was revealed in April 2011 when the head of Pakistan's intelligence agency, the Inter Services Intelligence (ISI), followed up on a demand by the Chief of Staff of the Pakistani Army, General Ashfaq Kayani, that the United States should reduce its clandestine activities in Pakistan. The *New York Times* reported that 335 American personnel had been asked to leave the country and it noted that these included CIA officers, Special Operations forces, and private contractors. At another point in the article Pakistani officials are said to have requested a 25 to 40 percent cutback in Special Operations forces, but the information is not specific enough to enable a calculation of the total number of personnel in Pakistan.[146]

What do we know about casualties? Before answering this question, the starting point is to note that precise information about almost all aspects of how the CIA's drone program actually functions are available only from journalistic sources, which in turn are dependent almost entirely on information leaked selectively by officials involved in the program. In the absence of any official statistics, estimates of the number of strikes undertaken, the total numbers killed in those strikes, and the number of civilians amongst the casualties, have diverged widely. Three different sources seek to provide systematic and transparent accounts of the relevant drone attacks and killings. Perhaps the most frequently cited is a database run by Peter Bergen and Katherine Tiedemann at the New America Foundation. As of November 15, 2011, the database, which draws its information from selected international and Pakistani media sources, had recorded 283 drone strikes in northwest Pakistan since 2004. The estimated numbers killed were between 1,717 and 2,680, of whom between 1,424 and 2,209 were counted as militants. On that basis, they estimated a "non-militant" or civilian fatality of around 17 percent between 2004 and 2011.

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[145] O'Connell, *supra* note 6, at 3–11; Bill Roggio & Alexander Mayer, *Analysis: US Air Campaign in Pakistan Heats Up*, THE LONG WAR JOURNAL, (Jan. 5, 2010), http://www.longwarjournal.org/archives/2010/01/analysis_us_air_camp.php.

[146] Jane Perlez and Ismail Khan, *Pakistan Tells U.S. It Must Sharply Cut C.I.A. Activities*, N.Y. TIMES (Apr. 11, 2011), http://www.nytimes.com/2011/04/12/world/asia/12pakistan.html.

But they also estimate that improved accuracy and other factors led to a civilian rate of only around six percent since 2010.[147]

The second database is provided by the *Long War Journal* (LWJ) and is also based on media reports. It documents 279 strikes since 2004, of which 269 have occurred since January 2008. Since 2006, the LWJ has counted the killing of 2,150 "leaders and operatives from Taliban, Al Qaeda, and allied extremist groups," compared with only 138 civilians killed. The ratios have also dropped dramatically since 2010 with 801 militants killed and only 14 civilians. For 2011, through November 17, the killing of 405 militants and 30 civilians are recorded.[148]

The third, and most recent, database is that published by the United Kingdom-based Bureau of Investigative Journalism. It estimates higher overall figures including a higher level of civilian deaths. Their report states that 291 drone strikes have taken place since 2004, leading to the death of between 2,292 and 2,863 persons, including between 385 and 775 civilians, of whom 164 were children.[149] While the Bureau suggests that they have conducted significant on the ground follow-up in order to report on the outcome of drone strikes, it is not entirely clear how much original research has been undertaken and how much they end up relying on a comparable range of media sources used in the other databases.[150] The Bureau claims, unsurprisingly, that the CIA has gone to some lengths to discredit the report, primarily by suggesting that one of their key collaborators in Pakistan has been linked to Pakistan's powerful intelligence agency, the ISI.[151]

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[147] *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2011*, NEW AMERICA FOUNDATION (Nov. 16, 2011), http://counterterrorism.newamerica.net/drones.

[148] Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004–2011*, THE LONG WAR JOURNAL (Nov. 17, 2011) http://www.longwarjournal.org/pakistan-strikes.php.

[149] Chris Woods, *Drone War Exposed—The Complete Picture of CIA Strikes in Pakistan*, BUREAU OF INVESTIGATIVE JOURNALISM (Aug. 24, 2011), http://www.thebureauinvestigates.com/2011/08/24/cia-drone-strikes/.

[150] Chris Woods, *Pakistan Drone Strikes—Our Methodology*, BUREAU OF INVESTIGATIVE JOURNALISM (Aug. 10, 2011), http://www.thebureauinvestigates.com/2011/08/10/pakistan-drone-strikes-the-methodology2/.

[151] Chris Woods, *Attacking the Messenger: How the CIA Tried to Undermine Drone Study*, BUREAU OF INVESTIGATIVE JOURNALISM, (Aug. 12, 2011),

Official Pakistani figures introduce further disparities in the counting. They suggest, for example, that only 103 strikes took place in 2010 (the New America Foundation study lists 118), and that they killed 423 militants (compared to the New America Foundation's average of 748).[152]

Other commentators, however, present very different statistics. Two leading counter-terrorism experts noted in 2009 that, according to press reports, drone strikes over the preceding three years had killed about 14 terrorist leaders. They observed, however, that Pakistani sources had estimated some 700 civilian deaths during the same period, which would add up to "50 civilians for every militant killed, a hit rate of 2 percent." While acknowledging the likely under-count of militants in this data, they argued that the ratio was still far too high.[153]

Another source, the U.S.-based Campaign for Innocent Victims in Conflict (CIVIC), has produced a report that suggests significantly higher levels of civilian casualties than the New America Foundation database would indicate. While CIVIC does not provide an overall figure, it records interviews with drone victims and others from affected areas that suggest significant civilian casualty rates.[154] The report noted that the discrepancy is largely due to differing definitions of a 'civilian':

> For example, are family members that provide support to militants acceptable targets? What about a tribal elder that provides political support? As so few high-value targets are killed relative to the number of strikes, it is undoubtedly the

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http://www.thebureauinvestigates.com/2011/08/12/attacking-the-messenger-how-the-cia-tried-to-undermine-drone-study/.

[152] *Pakistani General, in Twist, Credits Drone Strikes*, NY TIMES (Mar. 9, 2011), http://www.nytimes.com/2011/03/10/world/asia/10drones.html?_r=1&scp=1&sq=pakistani%20general%20credits%20u%20s%20drone%20strikes&st=cse.

[153] David Kilcullen & Andrew Mcdonald Exum, *Death From Above, Outrage Down Below*, N.Y. TIMES (May 16, 2009), http://www.nytimes.com/2009/05/17/opinion/17exum.html.

[154] "CIVIC uncovered more than 30 alleged civilian deaths in only nine cases investigated, all of which took place since January 2009." CIVIC, CIVILIANS IN ARMED CONFLICT: CIVILIAN HARM AND CONFLICT IN NORTHWEST PAKISTAN 15 (2010), *available at* http://www.civicworldwide.org/storage/civicdev/documents/civic%20pakistan%202010%20final.pdf.

> case that the majority of combatants killed are deemed low-level militants.[155]

Finally, an in-depth report by Reuters news agency contrasted a CIA estimate that 5 percent of those killed were civilians with an estimate of 20 percent by an informed Pakistani intelligence officer, and even higher estimates by a former senior legal adviser to the U.S. Army Special Forces.[156]

This impressive array of disparate and inconsistent statistics leads to several conclusions. First, we simply don't know how many people have been killed in drone strikes and how many of those killed have been civilians. Second, we have far more information to support claims that the numbers of civilian deaths have been significant and thus legally problematic than we do to support any of the unsubstantiated claims put forward by CIA officials that such casualties have been minimal. And third, there is strong evidence to contradict the assumption that drone strikes are principally used to kill high-level leaders. The available information indicates that only one of every seven CIA strikes in Pakistan has killed a "leader" and that the great majority of those killed are low-level fighters. A recent estimate indicates that "less than two percent of those killed by U.S. drone strikes in Pakistan have been described in reliable press accounts as leaders of Al Qaeda or allied groups."[157]

We turn now to look at the other main form of targeted killings carried out by United States forces, particularly in Afghanistan.

*B. Kill/Capture Operations*

These operations might be thought of as the military equivalent of search and seizure exercises. The principal difference, of course, is that lethality appears to be a prominent ingredient in the military version, and there is no reason to believe that killings are strictly confined to situations involving self-defense, although in the absence of detailed data no ironclad conclusions can be drawn in this regard. Kill/capture operations are based

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[155] *Id.*

[156] Entous, *supra* note 135.

[157] Peter Bergen and Katherine Tiedemann, *Washington's Phantom War Subtitle: The Effects of the U.S. Drone Program in Pakistan*, FOR. AFF. July-Aug. 2011, 12, at 12.

on target lists drawn up after more or less systematic analysis of intelligence. The technical term reflected in the U.S. Air Force's Targeting manual is a "joint integrated prioritized collection list,"[158] but in the broader military context the terms used more commonly are "joint prioritized effects list," "joint effects list," or more colloquially "kill list."[159] In Afghanistan, these operations have generally taken the form of "night raids," which refers to kill/capture operations undertaken under the cover of darkness and involving the invasion of private homes or compounds. They have become especially controversial after a number of high-profile cases involving alleged, and sometimes acknowledged, mistakes in terms of the individuals killed. These Afghanistan operations are part of a broader program carried out by United States Special Operations Forces (SOF) around the world, 85 percent of whose activities occur within the Central Command's region, which includes primarily Afghanistan and Iraq.[160]

The focus in this Article on civilian casualties resulting from night raids is largely a function of two factors. Firstly, they are the most visible and reported-upon manifestations of a broader program of targeted killings carried out by SOF. Secondly, they have been strangely absent from almost all of the general analysis of targeted killings, despite the fact that they are governed by the same rules, have long been a source of major tension and criticism in Afghanistan, have led to a significant number of casualties, and highlight the deeper problems of lack of accountability. Indeed, a question well worth pursuing, but beyond the scope of the present Article, is why such enormous amounts of attention have been lavished on the United States' practices of using torture and of carrying out killings by drones, while a practice that involves a large number of violent killings remained almost invisible, at least until the killing of Osama bin Laden in May 2011.

The official NATO/ISAF (North Atlantic Treaty Organization/ International Security Assistance Force) description of a "night raid" is

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[158] UNITED STATES AIR FORCE, TARGETING: AIR FORCE DOCTRINE DOCUMENT 2-1.9, (June 8, 2006), *available at* http://www.fas.org/irp/doddir/usaf/afdd2-1.9.pdf.

[159] *See Glossary of Military Acronyms*, GUARDIAN (July 25, 2010), http://www.guardian.co.uk/world/datablog/2010/jul/25/wikileaks-afghanistan-war-logs-glossary.

[160] *Posture Statement of Admiral Eric T. Olson, USN Commander, United States Special Operations Command* Before the S. Armed Services Comm., 112th Cong. 4 (Mar. 1, 2011), *available at* http://armed-services.senate.gov/statemnt/2011/03%20March/Olson%2003-01-11.pdf (statement of Admiral Eric T. Olson).

rather anodyne: "any offensive operation involving entry into a compound, residence, building or structure that occurs in the period between nautical twilight and nautical dawn."[161] Perhaps the real flavor of such operations is better captured by the *New York Times*:

> More than a dozen times each night, teams of American and allied Special Operations forces and Afghan troops surround houses or compounds across the country. In some cases helicopters hover overhead. Using bullhorns, the Afghans demand occupants come out or be met with violence. In the majority of cases—about 80 percent, according to NATO statistics—the occupants are captured rather than killed.[162]

These operations are controversial. In early 2010, the then NATO/ISAF Commander, General McChrystal, observed that "nearly every Afghan I talk to mentions [night raids] as the greatest single irritant."[163] And in public statements as well as diplomatic exchanges, Afghan President Hamid Karzai has frequently expressed deep displeasure with the raids.[164] Three much-publicized examples of lethal raids provide an illustration of some of the reasons for their prominence in the debate.

In the first incident, in March 2011, ISAF launched a raid on a person responsible for distributing explosive devices. Its media release indicated that it had "captured a Taliban leader, killed one armed individual and detained several suspected insurgents during security operations in Kandahar City."[165] The release made no mention of the timing of the raid or of which ISAF forces were involved. But by the following day the media reported the incident as "a major intelligence failure." It turned out that the night raid had targeted a family home in a

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[161] ISAF Guidance, *supra* note 111.
[162] Thom Shanker, Elizabeth Bumiller, & Rod Nordland, *Despite Gains, Night Raids Split U.S. and Karzai*, N.Y. TIMES (Nov. 15, 2010), http://www.nytimes.com/2010/11/16/world/asia/16night.html.
[163] ISAF Guidance, *supra* note 111.
[164] Jon Boone, *WikiLeaks Cables: Karzai Pushed Nato to End Afghanistan Night Raids*, THE GUARDIAN (Dec. 3, 2010), http://www.guardian.co.uk/world/2010/dec/03/wikileaks-cables-afghanistan-night-raids.
[165] ISAF JOINT COMMAND MORNING OPERATIONAL UPDATE MARCH 10, 2011 (2011-03-S-028) (Mar. 10, 2011), at http://www.isaf.nato.int/article/isaf-releases/isaf-joint-command-morning-operational-update-march-10-2011.html.

relatively peaceful, reportedly Taliban-free, area. Carried out by U.S. Special Forces, it had mistakenly killed Haji Yar Mohammad Karzai, a 63 year-old tribal leader who was President Karzai's second cousin. The captured "Taliban leader" was his son, against whom there was no evidence of any wrongdoing. The media speculated that their names might well have been put on ISAF's kill list by someone in the family keen to get revenge against the tribal leader for an incident that happened 30 years earlier. ISAF subsequently corrected the story and the major remaining discrepancy between the two versions of events was ISAF's claim that Haji Yar Mohammad had been seen holding an AK-47 and was shot because he was seen as a threat, compared to eyewitness accounts that he had been taken out of the building by ISAF forces and shot.[166]

The second incident took place in February 2010 and was widely reported in the Western media. The following account was typical:

> Four people found dead in a southeastern Afghan compound appear to be victims of an honor killing . . . . The bodies were discovered during an operation by Afghan and NATO-led forces in Paktia province . . . . [ISAF] said the bodies of two men and two women were found, with the women bound and gagged, and . . . shot "execution-style. . . . It has the earmarks of a traditional honor killing," said the official, who added the Taliban could be responsible.
> . . . .
>
> The operation unfolded when Afghan and international forces went to the compound, which was thought to be a site of militant activity. A firefight ensued and several insurgents died, several people left the compound, and eight others were detained.[167]

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[166] Jon Boone, *US Troops' Killing of Hamid Karzai's Cousin Brings Claim of 'Deep Conspiracy*', THE GUARDIAN, (Mar. 10, 2011), http://www.guardian.co.uk/world/2011/mar/10/hamid-karzai-cousin-nato-death-conspiracy-afghanistan.

[167] *Bodies Found Gagged, Bound After Afghan 'Honor Killing'*, CNN (Feb. 12, 2010), http://www.cnn.com/2010/WORLD/asiapcf/02/12/afghanistan.bodies/index.html#.

After complaints by Afghan officials, a rather different story emerged. The household had been celebrating the arrival of a newborn when troops arrived. Two men—a local police chief and a prosecutor—came out to protect the families and were shot and killed. Inside the house, troops killed a pregnant mother of ten, a pregnant mother of six, and a teenage female.

Afghan investigators alleged that U.S. Special Forces soldiers had "dug bullets out of their victims' bodies, . . . then washed the wounds with alcohol before lying to their superiors about what happened."[168] In April, ISAF acknowledged that the women had in fact been killed by the Special Forces, but indicated that it happened when they were firing at the men. The story about "honor killings" was explained in singularly unconvincing terms:

> [T]he releases issued shortly after the operation were based on a lack of cultural understanding by the joint force and the chain of command. The statement noted the women had been bound and gagged, but this information was taken from an initial report by the international members of the joint force who were not familiar with Islamic burial customs.[169]

ISAF subsequently issued an apology and paid compensation to the families.[170]

The third incident is now the best known of all. The killing of Osama bin Laden in May 2011 was, as noted above, a classic example of a kill/capture raid. It is of added importance in the present context because of the allegation that there was "never any intention of detaining or capturing him" according to one of those involved in the mission.[171]

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[168] Jerome Starkey, *US Special Forces 'Tried to Cover-up' Botched Khataba Raid in Afghanistan*, THE TIMES (LONDON), (Apr. 5, 2010), http://www.timesonline.co.uk/tol/news/world/afghanistan/article7087637.ece.

[169] Press Release, International Security Assistance Force, Gardez Investigation Concludes, Head Quarters News Release2010-04-CA-005 (Apr. 4, 2010), *available at* http://www.isaf.nato.int/article/isaf-releases/gardez-investigation-concludes.html.

[170] *Id.*

[171] Schmidle, *supra* note 55, at 43.

While individual incidents of this type are clearly not the norm, nor are they particularly unusual, and they serve to underscore the importance of knowing how frequently civilians have in fact been killed in night raids, and under what circumstances. Despite the enormous public controversy over the raids, accurate figures remain highly elusive. Concern over the implications of civilian killings led ISAF Commander General McChrystal to issue a Tactical Directive on Night Raids in February 2010 (although, of course, the CIA was not subject to this directive). Publicly "releasable portions" of the Directive indicated that henceforth members of the Afghanistan National Security Forces "should be the first force seen and the first voices heard by the occupants of any compound entered," females would be searched by females, and property seized or damaged would be recorded. But the overall message was much more ambiguous. It insisted that night raids were essential and often decisive, actually reduced civilian casualties compared to other available techniques, and, when correctly carried out, remained "a viable and advantageous option." The Directive recognized, however, that the raids were deeply unpopular with the very people whose support needed to be garnered, but this was presented as being largely a public relations matter. For McChrystal, the "myths, distortions and propaganda arising out of night raids often have little to do with the reality."[172] He ended by calling for night raids to be conducted "with even greater care, additional constraints, and standardization throughout Afghanistan."[173] Unfortunately the Gardez incident described above took place three weeks before the new Directive was issued.[174] Journalists have also noted that McChrystal's new policy was hard to reconcile with his approach in Iraq when he had run the JSOC as "a killing machine," and that many of the troops in Afghanistan consider the new rules to be deeply problematic.[175]

Detailed information on civilian deaths caused by night raids, along with most other information on these operations, remains sparse. Reports

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[172] ISAF Guidance, supra note 111.
[173] *Id.*
[174] Erica Gaston, *The Problems of Night Raids*, THE AFPAK CHANNEL, FOREIGN POLICY (Apr. 8, 2010), http://afpak.foreignpolicy.com/posts/2010/04/08/the_problems_of_night_raids.
[175] Michael Hastings, *The Runaway General*, ROLLING STONE, (July 8–22, 2010), http://www.rollingstone.com/politics/news/the-runaway-general-20100622 ("McChrystal's new marching orders have caused an intense backlash among his own troops. Being told to hold their fire, soldiers complain, puts them in greater danger.").

of any official investigations into specific incidents are never released, even if public statements sometimes summarize particular findings.[176] Recently, however, NATO has provided two closed-door briefings apparently intended for media consumption to demonstrate the effectiveness of the dramatically expanded Special Forces activities in Afghanistan. In August 2010 *Der Spiegel* reported a briefing by General Petraeus that indicated that in the previous three months "at least 365 high-ranking and mid-level insurgent commanders" had been killed, mostly by Special Forces, and 1,395 people had been arrested. These figures presumably covered the period May through July 2010.[177] In November 2010, the *New York Times* cited NATO figures (without indicating any source) covering what seems likely to be the subsequent three month period, ending November 11, 2010, in which Special Forces had averaged 17 missions a night, or a little over 520 night raids each month.[178] The results cited were "368 insurgent leaders killed or captured, and 968 lower-level insurgents killed and 2,477 captured."[179] The same source indicated that killings occur in only 20 percent of night raids. The figures are unclear, insofar as they lump together kills and captures of the leaders. It is not impossible that the figure of 368 was designed to indicate kills in which case the ratio would be 1:2, or one killed for every two captured. This would be extremely high given that a significant proportion of the raids would seem to be difficult to justify on the grounds that they are targeting a legitimate military objective. Where this is not the case, IHRL would often govern the situation.[180]

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[176] The initial report on the Gardez incident, as well as the investigative report, remain classified documents. Gareth Porter & Ahmad Walid Fazly, *McChrystal Probe of SOF Killings Excluded Key Eyewitnesses*, INTER PRESS SERVICE (July 6, 2010), http://ipsnews.net/news.asp?idnews=52063.

[177] Matthias Gebauer, *Special Forces Ratchet Up Fight Against Taliban*, SPIEGEL ONLINE (Aug. 26, 2010), http://www.spiegel.de/international/world/0,1518,714016,00.html.

[178] Shanker, Bumiller, & Nordland, *supra* note 162.

[179] *Id.*

[180] If the raid is targeting a legitimate military objective, such as a combatant, then it is primarily governed by the same rules of IHL that govern other attacks, including those pertaining to verification of the target, proportionality, precautions in attack, and military necessity. *See generally* ICRC RULES, *supra* note 52. Thus, for example, when the International Military Forces plan a raid, "everything feasible" must be done "to verify" that the target is a military objective. *Id.*, Rule 16. And, in choosing the means and methods of conducting a military raid or detaining a combatant, the forces must "take all feasible precautions" with a "view to avoiding, and in any event to minimizing, incidental loss of civilian life," *id.* Rule 17, and must "do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.*, Rule 18. If the

The leaked NATO figures cited by the *New York Times* provide no explicit indication as to how many civilians were also killed or captured, or whether subsequent evaluations revealed any doubt as to the status of those initially listed as insurgents. The *Der Spiegel* account, however, does provide a figure. It reports that in the relevant three-month period civilians "only died in 1 per cent of the special forces actions." Although intended to be reassuring, this is a rather slippery figure. If, as reported by the *New York Times*, there were 1,572 raids in three months, we can deduce that there were at least 15-16 civilians killed. But that assumes that only one civilian was killed in each of the relevant raids. If say four were killed on average that would make it upwards of 60 civilian deaths in three months. All of these calculations are of course entirely speculative—the point is simply that we do not really know what is going on and the figures provided from time to time do little to change that situation.

A report by UNAMA and the AIHRC on deaths in 2010 counted 80 civilian casualties caused by night raids, which represented a significant decrease from the previous year.[181] These figures were subsequently challenged by commentators who argued that the report had only dealt with 13 out of a total of 73 reported night raids by Special Forces. The authors of this claim suggested, on the basis of extrapolation, that the total number killed might be closer to 420.[182] There are, however, no data available to confirm the accuracy of the latter figure and a simple extrapolation would seem unlikely to yield a reliable figure given the

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raid's target is not a legitimate military objective—for example, if the target is a civilian who is not directly participating in hostilities—the operation is governed by international human rights law. In a law enforcement context, lethal force may be used only when it is clear that an individual is about to kill someone (making lethal force proportionate) and there is no other available means of detaining him or her (making lethal force necessary). *See* U.N. Doc. A/61/311, *supra* note 47, ¶¶ 33–45; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth U.N. Congress on Prevention of Crime and Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, Principle 9; Code of Conduct for Law Enforcement Officials art. 3, GA Res. 34/169 (Dec. 17, 1979) [hereinafter Code of Conduct].

[181] *See* UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN, AFGHANISTAN ANNUAL REPORT ON PROTECTION OF CIVILIANS IN ARMED CONFLICT, MID YEAR REPORT 2010 17 (Aug. 2010), *available at* http://www.unhcr.org/refworld/docid/4c6120382.html [hereinafter MID YEAR REPORT 2010].

[182] Gareth Porter & Shah Noori, U.N. Reported Only a Fraction of Civilian Deaths from U.S. Raids, Inter Press Service, March 18, 2011, at http://www.ipsterraviva.net/UN/news.asp?idnews=54883.

circumstances. It should be noted, however, that UNAMA has insisted that it applies rigorous criteria in counting civilian casualties. Where doubt exists, casualties are not assumed to be non-combatants or the case is closed and does not figure in the statistics.[183]

The next question that arises in terms of understanding United States practice is which parts of the overall military or intelligence operations are responsible for which actions and what is the relationship between them.

*C. Sorting Out Who is Doing What*

General McChrystal's 2010 Tactical Directive on Night Raids states explicitly that in order to prevent information about such raids being distorted and manipulated by the enemy, night raids should be "as transparent as possible."[184] The reality, however, remains very different. Policy continues to be characterized primarily by secrecy and opacity, combined with occasional leaking of figures that are not explained in any detail and that generate more questions than they answer. *Der Spiegel* described General Petraeus' confidential August 2010 briefing as "the first time in the history of the nine-year war in Afghanistan [that] concrete figures about the deployments—which neither NATO nor the U.S. military speaks about publicly—have been named."[185] But as the same journalist also notes, the program continues to be characterized by "a great deal of silence and a cloud of assumptions." In the absence of transparency, the only option for trying to understand both the *modus operandi* of the system of kill/capture raids and its magnitude is to rely on the relatively disparate glimpses that emerge from relevant publicly available information sources. Three such sources or glimpses are of particular relevance in the present context.

The first is an account of evidence provided by two U.S. generals based in Afghanistan to the staff of the Senate Foreign Relations Committee in 2009. The generals disclosed that the military's kill/capture list included drug traffickers with proven links to the insurgency. According to the report, "[t]he military places no restrictions on the use of force with

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[183] MID YEAR REPORT 2010, *supra* note 181.
[184] ISAF Guidance, *supra* note 111.
[185] *Special Forces Ratchet Up Fight Against Taliban*, *supra* note 177.

these selected targets, which means they can be killed or captured on the battlefield; it does not, however, authorize targeted assassinations away from the battlefield." The report notes that individuals are put on the list on the basis of "two verifiable human sources and substantial additional evidence,"[186] but it has never been indicated how this works in practice or what type of information is considered adequate. The Pentagon subsequently clarified that the targets are "terrorists with links to the drug trade, rather than . . . drug traffickers with links to terrorism."[187] One of the generals noted that there is a list of 367 kill/capture targets, including 50 who are linked to drugs and insurgency.[188]

A second glimpse was provided in February 2011 by John Rizzo, the CIA's former Acting Legal Counsel. His insights are of particular interest given the extent to which defenders of the CIA targeted killings program have suggested that it has to pass a much higher bar than the DOD in order to get authorization to kill.[189] He spoke to *Newsweek* about his role in authorizing the inclusion of names on the so-called "target" or "neutralization" list. Rizzo describes the previously unreported "process of determining who should be hunted down and 'blown to bits.'" He indicates that he, rather than the President or the CIA Director, had final sign-off authority, and that requests for inclusion in the list are written by staff lawyers who make the case that an individual poses a grave threat to the United States. Such requests seem to be from two to five pages long, with attachments. While lawyers are said to have assessed some requests to have been inadequately supported, no information is provided as to how often this happened and what the consequences were. Rizzo stated that, "at any

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[186] S. COMM. ON FOREIGN RELATIONS, 111TH CONG., REP. ON AFGHANISTAN'S NARCO WAR: BREAKING THE LINK BETWEEN DRUG TRAFFICKERS AND INSURGENTS 15–16 (Comm. Print Aug. 10, 2009), *available at* http://www.humansecuritygateway.com/documents/USGOV_AfghanistansNarcoWar_BreakingLink_DrugTraffickersInsurgents.pdf [hereinafter AFGHANISTAN'S NARCO WAR].

[187] James Risen, *U.S. to Hunt Down Afghan Drug Lords Tied to Taliban*, N.Y. TIMES (Aug. 10, 2009), http://www.nytimes.com/2009/08/10/world/asia/10afghan.html.

[188] AFGHANISTAN'S NARCO WAR, *supra* note 186, at 16.

[189] *See, for example*, Kenneth Anderson, *Drones and the CIA and Charlie Savage's NYT Article*, OPINIO JURIS (May 28, 2010), http://opiniojuris.org/2010/05/28/drones-and-the-cia-and-charlie-savages-nyt-article/, arguing that the Secretary of Defence" "is not passing on [in the sense of authorizing] military strikes the way [CIA Director] Panetta and [President] Obama and the Congressional oversight committes have to pass on things."

given time there were roughly 30 individuals who were targeted."[190] At no point in the interview does he mention the word "capture."

The third and most detailed glimpse comes from the cache of leaked diplomatic cables published by Wikileaks and reported in the media. In particular, they provide considerable detail about an American unit operating in Afghanistan under the label of Joint Special Operations Command (JSOC) Task Force 373. This unit, which has since been re-named, maintained a list that apparently named well over 2,000 individuals to be killed or captured. The leaked cables provide detail of a wide range of missions undertaken, but three in particular are relevant for present purposes.

On June 11, 2007, TF 373 launched an operation to capture or kill a Taliban commander in a valley near Jalalabad. As the task force approached in darkness, a torch was shone on them and fire was exchanged which led the force to call for assistance. A helicopter gunship then came in and shot up the area. The mission reported the outcome as follows: "The original mission was aborted and TF 373 broke contact and returned to base. Follow-up Report: 7 x ANP KIA, 4 x WIA." It turned out that seven members of the Afghan National Police (ANP) had been killed in action and four others wounded. The involvement of TF 373 in this incident was not revealed at any stage.

The second incident involved TF 373's use of a pod of six missiles mounted on the back of a small truck to capture or kill a notorious Libyan fighter. They fired on the village where the fighter was believed to have been hiding. He was not there, but six Taliban were killed, along with seven children. A press release indicated that the Taliban had used them as a shield and suggested that the compound had been attacked because of "nefarious activity" within, when in fact the five rockets had been sent into the madrasa before anyone had fired on TF 373. There was thus no effort

[190] McKelvey, *supra* note 128. A British human rights group, Reprieve, subsequently filed a legal complaint in Pakistan "accusing Rizzo of murder and war crimes" on the basis of these revelations. *See* Tara McKelvey, *Arrest Warrant Sought for CIA Lawyer*, THE DAILY BEAST (July 28, 2011), http://www.thedailybeast.com/articles/2011/07/28/john-rizzo-case-human-rights-group-seeks-arrest-warrant-for-cia-lawyer.html.

to capture, but rather an apparent decision to kill whoever was there at the time.[191]

Four months later, not far from the previous incident, TF 373 approached a house from which fighters had been firing and called in heavy air support to bomb it. Based on the encounter, ISAF subsequently reported that it had killed several militants and made no reference to any civilian deaths. A later update reported that, "several non-combatants were found dead and several others wounded," but no further details were provided. But the story that emerges from the leaked cables is that the Taliban had fled the house before the task force arrived. The actual casualties were: "12 US wounded, two teenage girls and a 10-year-old boy wounded, one girl killed, one woman killed, four civilian men killed, one donkey killed, one dog killed, several chickens killed, no enemy killed, no enemy wounded, no enemy detained."[192]

These three incidents are relevant not because they show a murderous hit squad at work. They don't. But what they do highlight is the significant risk of inadequate or compromised intelligence, the tendency in some situations to make no effort to capture and instead to opt to kill, the myriad situations in which significant civilian casualties can result, and the strength of the human temptation to conceal as many details as possible about raids that end badly. In other words, transparency is absolutely essential if we are to know what is really going on, and both formal press releases as well as earnest assurances that the relevant laws are being complied with will often ring hollow when more detailed and authoritative accounts are available.

Other leaked cables provide insights into the role played by the German contingent responsible for Regional Command North and a base from which TF 373 operated. The cables describe the role of the Germans in adding individuals to the NATO JPEL, or kill/capture list. But they also indicate that the German forces themselves refused to participate in the TF 373 operations because they involved targeted killings. Of particular importance is the observation contained in the cables that there "are now

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[191] Nick Davies, *Afghanistan War Logs: Task Force 373—Special Forces Hunting Top Taliban*, THE GUARDIAN (July 25, 2010), http://www.guardian.co.uk/world/2010/jul/25/task-force-373-secret-afghanistan-taliban.
[192] *Id.*

six lists containing the names of targets."[193] In other words, the NATO list is but one of six and is separate from those maintained by JSOC and by the CIA, not to mention three others the nature of which has not been publicly disclosed. The existence of some such lists was widely publicized in 2010 as a result of a lawsuit brought by the Center for Constitutional Rights and the American Civil Liberties Union that challenged the inclusion of a U.S. citizen, Anwar Al-Aulaqi, on kill lists they alleged to have been maintained by the CIA and JSOC, but the complainants clearly lacked any intimate knowledge of the process followed, or the precise nature of the list on which their client had been included.[194]

This latter revelation—that there are six different lists—is significant because it highlights the importance of understanding who are the actors seeking to carry out targeted killings. In terms of assessing responsibility on the part of the United States, the key issue concerns the relationship between JSOC and the CIA. Because of the largely secretive nature of their roles and relationships, only a rough picture can be painted in this regard. By the same token, the extent to which counter-insurgency and counterterrorism policies now rely upon targeted killings by these two groups makes it imperative to seek to understand the division of labor.

JSOC's origins are relatively straightforward. Clandestine operations have always been part of warfare and American Special Forces have a long history, closely linked in origin to the British Special Air Service (SAS) that emerged during World War II.[195] They were especially active in the Vietnam War, but were subsequently radically downsized to the point where their funding was reduced to 0.1 percent of the United States defense budget in 1975.[196] But the disastrously unsuccessful attempt in April 1980 to rescue American hostages held in Teheran since November 1979, the failure of which was attributed in part to poor

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[193] *Germany Gave Names to Secret Taliban Hit List*, SPIEGEL ONLINE (Aug. 2, 2010), http://www.spiegel.de/international/germany/0,1518,709625,00.html.

[194] Complaint for Declaratory and Injunctive Relief (Violation of Constitutional Rights and International Law—Targeted Killing), Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-1469 (JDB)), *available at* http://ccrjustice.org/files/Al-Aulaqi%20v.%20Obama%20Complaint.pdf.

[195] J. PAUL DE B. TAILLON, THE EVOLUTION OF SPECIAL FORCES IN COUNTER-TERRORISM: THE BRITISH AND AMERICAN EXPERIENCES (2000).

[196] TONY GERAGHTY, BLACK OPS: THE RISE OF SPECIAL FORCES IN THE CIA, THE SAS, AND MOSSAD, xlvii (2010).

coordination among the different armed services, provoked a major strategic rethinking. The Holloway inquiry, which reviewed the causes of the failure and sought lessons from it, recommended the creation of a "Counterterrorist Joint Task Force," reporting directly to the Joint Chiefs of Staff, but comprised of personnel from all units of the armed forces, and overseen in part by a Special Operations Advisory Panel.[197]

As a result of these recommendations, the Army, Air Force, Navy and Marines now all have Special Forces units which operate under the umbrella of the Special Operations Command (SOCOM). It carries out both "black" (covert and clandestine) and "white" operations and reports directly to the Secretary of Defense, thus bypassing the usual obligatory consultations with other parts of DOD.[198] The seed that was planted in 1981 grew in fits and starts until, by 2011, US SOF personnel had reached close to 60,000 people and the Department of Defense had requested a SOF budget of $10.5 billion for Fiscal Year 2012.[199] Testifying before Congress in March 2011 in support of that request, the head of SOCOM, Admiral Eric T. Olson, referred to the SOF as *inter alia* "the most lethal hunter-killers . . . that any nation has to offer."[200] SOCOM's Special Forces, characterized as "a clandestine Pentagon power elite waging a secret war in all corners of the world," is estimated to have a presence in 120 countries by the end of 2011.[201]

Within SOCOM, the overall command and control of Special Forces is undertaken by the Joint Special Operations Command (JSOC). Its obscurity is said to be one of its hallmarks, a characteristic that is promoted by the practice of its officers not wearing uniforms when working in U.S. embassies overseas, and its troops wearing neither name tags nor rank identifiers in combat.[202] It also has no publicly available website.

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[197] U.S. NAVY DEP'T LIBRARY, [IRAN HOSTAGE] RESCUE MISSION REPORT 61 (1980), *available at* http://www.history.navy.mil/library/online/hollowayrpt.htm#conclusions
[198] Jennifer D. Kibbe, *Covert Action and the Pentagon*, 22 INTELLIGENCE AND NATIONAL SECURITY 57, 60 (2007).
[199] Parrish, *supra* note 1.
[200] *Id.*
[201] Nick Turse, *The Secret War in 120 Countries*, THE NATION (Aug. 4, 2011), http://www.thenation.com/print/article/162566/secret-war-120-countries.
[202] Dana Priest & William M. Arkin, *'Top Secret America': A Look at the Military's Joint Special Operations Command*, WASH. POST (Sept. 2, 2011),

Consistent with this profile, Congress was told as recently as 2010 that neither the Department of Defense nor SOCOM officially acknowledged JSOC's existence.[203]

The agility of the CIA in moving into Afghanistan immediately after the 9/11 attacks in 2001 was one of the factors that led the DoD to give its own clandestine forces a key role in the December 2001 effort to capture bin Laden in Tora Bora. Initially JSOC task forces operated in Afghanistan under the code name of Task Force 11, although they subsequently took on different identities including but not limited to Task Force 373,[204] and Task Force 3-10.[205] In September 2003, JSOC was authorized to undertake counterterrorism activities in a range of countries, although in some cases specific authorization had to be obtained from either the Secretary of Defense or the President. Apart from Afghanistan and Iraq, the countries included Algeria, Iran, Malaysia, Mali, Nigeria, Pakistan, the Philippines, Somalia, and Syria.[206]

By September 2010, JSOC had 5,000 personnel in Afghanistan, a number that is certain to have grown significantly in the meantime.[207] In September 2011, it was reported to have 25,000 troops at its disposal, as well as its own intelligence division and its own drones, reconnaissance planes, and satellites.[208] It has also built a large Targeting and Analysis Center in Rosslyn, Virginia, which is focused essentially on targeted killings, or what the JSOC would call kinetic counterterrorism operations.[209]

Investigative journalist Seymour Hersh has described JSOC as an "executive assassination ring," over which "Congress has no oversight."

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http://www.washingtonpost.com/world/national-security/top-secret-america-a-look-at-the-militarys-joint-special-operations-command/2011/08/30/gIQAvYuAxJ_story.html.

[203] ANDREW FEICKERT & THOMAS K. LIVINGSTON, CONG. RESEARCH SERV., U.S. SPECIAL OPERATIONS FORCES (SOF): BACKGROUND AND ISSUES FOR CONGRESS 5 (Dec. 3, 2010), *available at* http://www.au.af.mil/au/awc/awcgate/crs/rs21048.pdf.

[204] Sean D. Naylor, *JSOC Task Force Battles Haqqani Militants*, ARMY TIMES (Sept. 13, 2010), http://www.armytimes.com/news/2010/09/army-haqqani-092010w/.

[205] *Germany Gave Names to Secret Taliban Hit List*, *supra* note 193.

[206] Priest & Arkin, *supra* note 202.

[207] Naylor, *supra* note 204.

[208] Priest & Arkin, *supra* note 202.

[209] Marc Ambinder, *The Secret Team That Killed bin Laden*, NAT'L J. (May 3, 2011), http://nationaljournal.com/whitehouse/the-secret-team-that-killed-bin-laden-20110502.

"[T]hey've been going into countries, not talking to the ambassador or the CIA station chief, and finding people on a list and executing them and leaving."[210] Other commentators have described JSOC as "a clandestine sub-command whose primary mission is tracking and killing suspected terrorists" and as the President's "private assassination squad."[211] This is underscored by reports that JSOC has presidential authorization to kill rather than capture those on its kill/capture list.[212]

In addition to the JSOC Special Forces, there are CIA operated Special Forces, about which even less is known publicly. Their origins go back at least to the Counter-Terror Teams and their successors, the Provincial Reconnaissance Units, used by the CIA to fight against the Viet Cong. Both incarnations were commonly characterized as assassination teams,[213] but the goals of the latter were more sophisticated and some commentators have even suggested that much can be learned from the successes of the Phoenix Program by American policy-makers in relation to current operations in Afghanistan.[214] These operations have given rise to a substantial literature on the importance of "manhunting" activities carried out by the CIA and other SOF.[215] But the CIA's reputation as an

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[210] Eric Black, *Investigative Reporter Seymour Hersh Describes 'Executive Assassination Ring'*, MINNPOST.COM (Mar. 11, 2009), http://www.minnpost.com/ericblackblog/2009/03/11/7310/.

[211] Turse, *supra* note 201. Emphasizing the accountability deficit, Turse concludes by noting that "Americans have yet to grapple with what it means to have a 'special' force this large, this active, and this secret—and they are unlikely to begin to do so until more information is available." *Id.*

[212] Priest & Arkin, *supra* note 202.

[213] The more critical assessments of the Phoenix Program 'credit' it with upwards of 25,000 assassinations. Valentine, using the military jargon, suggests this number and argues that it went from a "rifle shot attack against the 'organizational hierarchy' into a shotgun method of population control." In other words, a policy of carefully targeted assassinations evolved into a large-scale killing campaign. *See* DOUGLAS VALENTINE, THE PHOENIX PROGRAM 420 (1990).

[214] WILLIAM ROSENAU & AUSTIN LONG, THE PHOENIX PROGRAM AND CONTEMPORARY COUNTERINSURGENCY 23-24 (2009), *available at* http://www.rand.org/content/dam/rand/pubs/occasional_papers/2009/RAND_OP258.pdf.

[215] For a sober proposal see STEVEN MARKS, THOMAS MEER, & MATTHEW NILSON, MANHUNTING: A METHODOLOGY FOR FINDING PERSONS OF NATIONAL INTEREST (2005). For a rather more enthusiastic approach see GEORGE A. CRAWFORD, MANHUNTING: COUNTER-NETWORK ORGANIZATION FOR IRREGULAR WARFARE, JOINT SPECIAL OPERATIONS UNIVERSITY REPORT 09-7 1 (2009), *available at*

operational agency was not enhanced by its work in Vietnam and, by the 1990s, its Special Operations Group was very small and largely focused on intelligence gathering.[216] In 1997, George Tenet was appointed CIA Director and set about building up the agency's special operations capacity to deal with Al Qaeda and other threats to U.S. security. The events of 9/11 led to a considerable acceleration of those efforts, and by 2003, the CIA's SOG was reported to number several hundred officers.[217] SOG forces were dispatched to Afghanistan immediately after 9/11, and several published accounts describe their multiple involvements,[218] but it goes without saying that no official information of any kind is available to indicate their activities.[219]

These CIA special forces, or Counterterror Pursuit Teams, have operated in Afghanistan by assembling local militias who carry out the goals set by the CIA. This has clearly involved a significant number of targeted killings.[220]

While the exact nature of the relationship between SOCOM and CIA special forces remains a subject of speculation, it is increasingly clear that there has been a concerted effort to interweave the activities of the two in various contexts. Writing as early as 2003, Colonel Kathryn Stone tracked the emergence of an "operationally-driven *ad hoc* relationship between CIA paramilitary operatives and SOF on the ground in

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http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA514554&Location=U2&doc=GetTRDoc.pdf (defining manhunting as "the deliberate concentration of national power to find, influence, capture, or when necessary kill an individual to disrupt a human network" and proposing that it "could become an important element of our future national security policy, as highly trained teams disrupt or disintegrate human networks. Formally adopting manhunting capabilities would allow the United States to interdict threats without resorting to the expense and turbulence associated with deployment of major military formations.").

[216] The 9/11 Commission considered 1995 to be the nadir for the Clandestine Service because it appointed only 25 new officers that year. The 9/11 Commission Report, *supra* note 3, at 90.

[217] Douglas Waller, *The CIA's Secret Army: The CIA's Secret Army*, TIME (Feb. 3, 2003), http://www.time.com/time/magazine/article/0,9171,1004145,00.html.

[218] *See especially* ANTHONY SHAFFER, OPERATION DARK HEART: SPYCRAFT AND SPECIAL OPS ON THE FRONTLINES OF AFGHANISTAN—AND THE PATH TO VICTORY (2010).

[219] Pratap Chatterjee, *The Secret Killers: Assassination in Afghanistan and Task Force 373*, TOM DISPATCH (Aug. 19, 2010), http://www.tomdispatch.com/archive/175287/.

[220] Miller & Tate, *supra* note 4 (quoting a former senior U.S. military official as observing that the objectives of these CIA-led teams were "'more kill-capture' than capture-kill").

Afghanistan."[221] While supportive of the policy, she was concerned that that this trend blurred important organizational boundaries and, "for policy reasons, legal protections, and operational effectiveness", called for new procedures to clarify the relationship. In particular, she proposed a unified command in which the CIA operatives would be "responsible to the [DOD] combatant commander in some organized and formal shape or form."[222] The problem of overlapping responsibilities was subsequently addressed by the national commission appointed to investigate the 9/11 attacks. It recommended that the CIA should continue to be responsible for clandestine and covert operations, including "propaganda, renditions, and nonmilitary disruption." But it urged that "[l]ead responsibility for directing and executing paramilitary operations, whether clandestine or covert, should shift to the Defense Department." The rationale was that the United States could not afford "two separate capabilities for carrying out secret military operations, secretly operating standoff missiles, and secretly training foreign military or paramilitary forces." Instead it called upon each of the agencies to concentrate on its comparative advantage, but it did not recommend any specific formula, nor did it consider the question of bifurcated oversight which we address below.[223] Less than a year later, the media reported that the White House had rejected these recommendations.[224]

In 2008, Robert Martinage, the former Principal Deputy Assistant Secretary of Defense for Special Operations, lamented in a lengthy study that, outside of Iraq and Afghanistan, the United States could only operate in other countries through either the State Department or the CIA. That meant that DOD special forces-type capabilities could not be brought to bear in such situations, thus limiting the available options to "pre-9/11 modes of thinking and ways of operating." His solution was to urge a closer relationship between SOCOM and the CIA that would integrate the two special forces operations and would entail the "leveraging [of] the CIA's

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[221] KATHRYN STONE, "ALL NECESSARY MEANS"—EMPLOYING CIA OPERATIVES IN A WARFIGHTING ROLE ALONGSIDE SPECIAL OPERATIONS FORCES 4 (2003), *available at* http://www.fas.org/irp/eprint/stone.pdf.
[222] *Id.* at 24.
[223] THE 9/11 COMMISSION REPORT, *supra* note 3, at 415–16.
[224] Douglas Jehl & Joel Brinkley, *White House Is Said to Reject Panel's Call for a Greater Pentagon Role in Covert Operation*s, N.Y. TIMES, June 28, 2005, at A1.

Title 50[225] foreign-intelligence authority for SOF operations through the flexible detailing of SOF personnel to the Agency." In this setting, "SOF and CIA personnel should . . . be able to move back and forth from assignments in CIA stations and SOF ground units."[226]

If the scenario that he called for in 2008 had not, in fact, already been achieved by that time, it certainly has been since then. A profile written early in 2011 noted that "[t]he military and the CIA often pursue the same targets . . . Sometimes they team up—or even exchange jobs."[227] This was confirmed by reports that emerged after an American citizen, Raymond Davis, was arrested and charged by the Pakistani authorities with murder. It subsequently emerged that he was a senior CIA official and conflicting reports emerged as to whether he had been working with JSOC Special Forces or solely with CIA operatives and private contractors.[228] But the most dramatic illustration of this intertwining of the two groups came with the May 2011 killing of Osama bin Laden. The mission was "plotted at C.I.A. headquarters and authorized under C.I.A. legal statutes" but carried out by SEALS operating within the Naval Special Warfare Development Group (DEVGRU) under the auspices of JSOC. In other words, it was officially a CIA covert operation.[229]

The significance of this fluidity between CIA and DOD personnel, especially in terms of legal authority and accountability, is considered below.[230]

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[225] Title 50 of the United States Code deals with the intelligence services, whereas Title 10 deals with the armed forces.

[226] ROBERT MARTINAGE, SPECIAL OPERATIONS FORCES: FUTURE CHALLENGES AND OPPORTUNITIES 45 (2008), *available at* http://www.csbaonline.org/wp-content/uploads/2011/02/2008.11.17-Special-Operation-Forces.pdf.

[227] McKelvey, *supra* note 128.

[228] *American Held in Pakistan Worked With C.I.A.*, N.Y. TIMES (Feb. 21, 2011), http://www.nytimes.com/2011/02/22/world/asia/22pakistan.html?_r=1 ("An American and a Pakistani official said in interviews that operatives from the Pentagon's Joint Special Operations Command had been assigned to the group to help with the surveillance missions. Other American officials, however, said that no military personnel were involved with the team.").

[229] Schmidle, *supra* note 5, at 38–39.

[230] *See* text accompanying *infra* notes 242–249.

## IV. Evaluating Transparency

The principal elements that would enable the international community to evaluate the legality of the relevant programs include some understanding or knowledge of the precise legal basis justifying the killings, knowledge as to which agency has operational responsibility in specific contexts, the identity of those responsible for authorizing killings and the processes to which they must adhere, and the criteria used in determining who will be placed on a kill list. In addition, a degree of transparency in relation to the impact will be essential if there is to be an assessment of the extent to which measures to minimize civilian casualties have been taken, as will an indication of the nature and extent of any post facto investigations of alleged violations. The availability of information in relation to each of these categories will now be considered.

### *A. Transparency as to the Legal Basis*

This issue has two very separate dimensions. The first concerns the legal basis in domestic law for the activities of particular agencies operating outside of the United States. This aspect is dealt with in the following section. The second dimension concerns the basis in international law upon which the United States is claiming to be entitled to act in the territory of another state. As noted earlier, it makes a considerable difference in relation to the nature of the legal rules that apply whether the United States is acting in any given context under the umbrella of IHRL or of IHL. Successive administrations, however, have gone out of their way to avoid providing any details as to the specific legal basis upon which any given program of targeted killing is being conducted. This applies to the extensive program of drone killings in Pakistan, as much as to the reported activities in other countries such as Yemen and Somalia.[231] The Obama administration has asserted that it is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces and that it is exercising an inherent right of self-defense. As the preceding analysis has demonstrated, this blanket assertion leaves a great many questions of major importance entirely unaddressed. In particular, it ensures that endless contestation can occur in response to efforts to identify the applicable legal framework, and thus the relevant rules, in terms of IHL and/or IHRL.

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[231] Mark Mazzetti, *Drone Strike in Yemen Was Aimed at Awlaki*, N.Y. TIMES (May 6, 2011), http://www.nytimes.com/2011/05/07/world/middleeast/07yemen.html?_r=1&hp.

### *B. Transparency as to Legal Authority and Operational Responsibility: The Old "Double-Hatting" Trick*

A degree of transparency in relation to operational responsibility is essential both in terms of facilitating public or political accountability and establishing whether operations are being conducted with the necessary legal authority under domestic law. If one does not know which agency is responsible, it is impossible to know to whom questions should be directed. The division of labor between the DOD and the CIA, both in relation to drone killings and night-raid killings, is thus central to the present inquiry. In the earlier section examining "who is doing what" in relation to night raids, we saw that there is now extensive fluidity between the JSOC (DOD) special forces and their CIA counterparts, to the point where it is virtually impossible for anyone outside the two agencies to know who is in fact responsible in a given context.[232] Many terms have been used to describe the resulting situation—leveraging, comingling, fungibility, double-hatting—but there has been almost no sustained analysis of the legal implications of this intentional blurring of what were once generally considered to be legally mandated hard and fast distinctions.

In brief, the law relating to the armed forces is found in Title 10 of the United States Code, while that dealing with the intelligence services is located in Title 50. The forms of oversight of the two sets of agencies are very different, reflecting the different assumptions as to their functions, their appropriate *modus operandi*, and the methods by which they are to be held to public account. When Congress has perceived that the functional distinctions between the two were becoming blurred, as was the case during both the Vietnam War and the Iran-Contra affair, it has acted to reinforce the separateness of the relevant regulatory regimes.

Covert intelligence activities take place under Title 50. The term "covert" was defined by statute in 1991 to embrace activities designed "to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be

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[232] Miller & Tate, *supra* note 4. "Their comingling at remote bases is so complete that U.S. officials ranging from Congressional staffers to high-ranking CIA officers said they often find it difficult to distinguish agency from military personnel."

apparent or acknowledged publicly . . . ."[233] The very existence of covert action is thus intended to be denied. Covert action is governed by a strict legal regime beginning with the need for a "presidential finding" declaring that the activity is necessary to "support identifiable foreign policy objectives" and "is important to the national security of the United States."[234] This is followed by an obligation to report all such actions to the congressional intelligence committees. While advance notification can be avoided if the President determines there are "extraordinary circumstances affecting vital interests of the United States," there are detailed arrangements designed to ensure appropriate notification at the very least to the Gang of Eight. The congressional intelligence committees are then empowered to conduct oversight of the relevant covert actions.

By contrast, "traditional military activities" are subjected to an entirely different regime. They take place under Title 10 and require neither a presidential finding, nor congressional notification. General oversight is undertaken not by the intelligence committees, but by the Armed Services committees of the two houses of Congress. "Military" action can thus be initiated much more readily and will be subject to little if any specific congressional review, assuming that it does not cross the threshold of engagement in hostilities. On the other hand, covert action, while requiring specific approval and notification, is not then subject to the sort of constraints, either territorially or jurisdictionally, that would apply to a military operation. Viewed in this light, it is not difficult to see the attractions from the perspective of the executive of a "mixed" regime.

But the key questions are how to define "traditional military activities" and who gets to make that judgment. The Congressional drafters of the 1991 statute sought to provide guidance in the conference committee report by indicating that the phrase included activities "preceding and related to hostilities which are either anticipated . . . to involve U.S. military forces, or where such hostilities involving United States military forces are ongoing, and, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly."[235] The key word in

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[233] National Security Act of 1947, Sec. 503(e), 50 U.S.C. § 413b(e).
[234] Intelligence Authorization Act for FY 1991, P.L. 102-88, Title VI, Sec. 602 (a) (2), 50 U.S.C. § 413b (a).
[235] H. REP. NO. 102-166 (July 25, 1991) (Conf. Rep.), *available at* http://www.fas.org/irp/congress/1991_cr/h910725-ia.htm.

this definition is "anticipated.'" DOD has long used the terms "preparation of the battlespace" or "operational preparation of the environment" (OPE) to describe what it considers to be legal anticipatory activities. Various interpretive techniques have served to arrive at a rather flexible and open-ended definition of what is anticipatory. Thus, for example, the activities might take place years before any actual involvement in hostilities and counterterrorism operations might be deemed to be "continuous military operations."[236] In the absence of meaningful criteria and without any detailed statement being required of DOD it has become commonplace for effectively covert military operations to be classified as clandestine. In 2009 the House Permanent Select Committee on Intelligence expressed concern at DOD's "propensity to apply the OPE label where the slightest nexus of a theoretical, distant military operation might one day exist."[237]

This blurring of the distinction between intelligence and military and covert and clandestine has serious consequences in terms of oversight. In the same report, the House Committee noted that the misleadingly characterized DOD activities then "often escape the scrutiny of the intelligence committees, and the congressional defense committees cannot be expected to exercise oversight outside of their jurisdiction."[238] A recent Congressional Research Service analysis noted the lack of clarity in terms of "[t]he lines defining missions and authorities with regard to covert action" and diplomatically asked whether "the Pentagon [is] trying to avoid the statutory requirements governing covert action."[239] For many observers the outcome is not in doubt; the result is that JSOC "has escaped significant congressional scrutiny and has operated largely with impunity since 9/11."[240] The most prominent example is the killing of bin Laden, in relation to which there remains considerable and no doubt fully intended

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[236] For a very insightful analysis of the issue see Kibbe, *supra* note 198, at 63.

[237] *See* H. REP. NO. 111-186 (June 26, 2009). In particular, see "Committee Statement and Views, D., Areas of Special Interest," Oversight of Intelligence Activities. *Id.* at 44–45.

[238] *Id.*

[239] ALFRED CUMMING, COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS 9 (Apr. 6, 2011), *available at* http://www.fas.org/sgp/crs/intel/RL33715.pdf.

[240] Ambinder, *supra* note 209. *See also* Miller & Tate, *supra* note 4 ("congressional intelligence and armed services committees rarely get a comprehensive view"); Priest & Arkin, *supra* note 202 ("Under President George W. Bush, JSOC's operations were rarely briefed to Congress in advance—and usually not afterward." The practice is reported to have changed under President Obama, in that the Gang of Eight is briefed in relation to sensitive missions undertaken by JSOC.).

uncertainty as to the legal rubric under which the CIA-led JSOC mission was conducted.[241]

Curiously, many of the commentators in the legal literature continue to portray a situation in which lines of authority remain relatively clear and uncomplicated. In relation to drones, for example, Radsan and Murphy note that: "[t]he Air Force controls [drone] operations in the clear war zones of Afghanistan and Iraq. Elsewhere, in Northwest Pakistan, Yemen, and Somalia, the CIA controls operations."[242] But this also is far too neat a characterization of the real division of labor. Seymour Hersh has reported a former senior intelligence officer as saying that the program in Pakistan involves a range of United States government actors: "The N.S.A. [National Security Agency], the C.I.A., and the D.I.A.[Defense Intelligence Agency] are right in there with the [DOD] Special Forces . . . ."[243] In addition, it is also clear that private contractors employed by the CIA play an important role, thus further complicating an already very murky accountability equation.

Peter Singer has colorfully characterized the situation as "double-hatting around the law," a process he describes as morphing the roles of warrior, spy, and civilian actors.[244] Different commentators have expressed different concerns at these developments. Some worry that the CIA's managers are not trained to handle the specialist operational responsibilities that accumulate to it as a result of the double-hatting.[245] Others have argued that DOD forces should not run the risk of being involved in operations that involve violations of international law, whereas "CIA operatives accept this possibility when they accept their missions."[246]

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[241] *See, e.g.*, David Axe, *Bin Laden killing in legal gray zone*, POLITICO (May 6, 2011), http://www.politico.com/news/stories/0511/54382.html#ixzz1LpWnckpV.
[242] Radsan & Murphy, *supra* note 119, at 2.
[243] Seymour M. Hersh, *Preparing the Battlefield*, THE NEW YORKER (July 7, 2008), http://www.newyorker.com/reporting/2008/07/07/080707fa_fact_hersh.
[244] P. W. Singer, *Double-hatting Around the Law: The Problem with Morphing Warrior, Spy and Civilian Roles*, ARMED FORCES J. (June 1, 2010), http://www.armedforcesjournal.com/2010/06/4605658/.
[245] *Id.*
[246] Michael McAndrew, *Wrangling in the Shadows: The Use of United States Special Forces in Covert Military Operations in the War on Terror*, 29 B.C. INT'L & COMP. L. REV. 153, 164 (2006).

But the most significant problem by far with double-hatting is its impact in terms of accountability. Already in 2003, Colonel Kathryn Stone had noted that "[w]hen the CIA and SOF operate together on the battlefield, the legal distinctions regarding operating authorities and procedures, and accountability, can become blurred."[247] In Singer's view one of the motivations for the practice was to avoid accountability. He argues that the CIA was given operational responsibilities because "no one wanted to have a public debate about the use of force in a third country" and this could be avoided by secretly using the CIA instead. The result, he says, is to flout "the intent, if not the letter, of the most important legal codes that originally divided out roles in realms of policy and war."[248] A recent Congressional study also concludes that one of the actual objectives of the "unprecedented use of U.S. SOF in clandestine and covert roles as well as being assigned to the CIA" is precisely to blur the boundaries of responsibility and accountability.[249] This deliberate undermining of the distinction between intelligence gathering and operational activities has grave implications in terms of both domestic and international accountability. Domestically, DOD and especially JSOC foreign killing operations are subject to virtually no meaningful accountability, and the same applies to the CIA.

### *C. Transparency as to Authority, Criteria, and Process*

To determine whether the relevant processes incorporate appropriate safeguards, it is important to know who has the authority to approve killings. Press reports indicate that President Bush delegated that authority to the CIA Director soon after 9/11, but according to some reports the latter in turn delegated it to the director of the CIA's Counterterrorist Center.[250] In late 2010, the *New York Times*, in an editorial, reported private assurances given by government officials that "no C.I.A. drone strike takes place without the approval of the United States ambassador to the target country, the chief of the C.I.A. station, a deputy at the agency, and the agency's director."[251] This would make for a rather

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[247] Stone, *supra* note 221, at 15.
[248] Singer, *supra* note 244.
[249] Feickert & Livingston, *supra* note 203, at 10.
[250] Murphy & Radsan, *supra* note 109, at 413.
[251] *Lethal Force Under Law*, N.Y. TIMES (Oct. 9, 2010), http://www.nytimes.com/2010/10/10/opinion/10sun1.html?ref=global.

cumbersome procedure if taken seriously in every case, given the number of strikes now occurring. It also stands in marked contrast to information given in 2011 by a former senior CIA official that targeting for lethal operations is given by the CIA's Legal Counsel.[252] A related issue is who is carrying out the order once it is approved. As noted earlier, there seems to be a consensus that all of the operations in Pakistan, if not also some elsewhere, are run by the CIA. But it has also been widely reported that both the CIA and the Department of Defense are using private contractors to play important roles in the overall killing operations.[253] While some commentators have dismissed this as a largely irrelevant detail,[254] it is of particular significance in the context of accountability, given that the CIA itself is barely accountable and private contractors have to date been held only minimally accountable in terms of IHL and IHRL.

These concerns lead to the issue of the procedures and criteria used by the CIA in drawing up its targeting list and carrying out the resulting killings. Its silence on the question of the procedures its operatives must follow in this regard stands in marked contrast to the detailed rules that are required to be followed when the U.S. Air Force conducts such missions. The latter's targeting manual provides a good illustration of the complexity and level of detail of the issues that should be addressed before any strike takes place. It spells out five separate phases of the process.[255] The first is "target analysis," effectively the research phase, while the second is "target vetting" designed to "verify the accuracy and fidelity of the intelligence" as well as compliance with IHL.[256] The third phase involves "target validation" and requires consideration of: whether the target meets official objectives and other criteria; whether it is consistent with IHL and the rules of engagement (ROE); whether the target is "politically or culturally 'sensitive'"; the risks in terms of collateral damage; and the consequences of not attacking the target.[257] The fourth phase involves "target nomination"

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[252] McKelvey, *supra* note 128.
[253] Singer, *supra* note 244.
[254] Chris Jenks, *Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649, 670 (2009) ("The significance of the [issue] has been overblown. . . . [T]o the extent contractors are involved at the behest of either the DoD or CIA, they follow the process and procedures of those agencies, including applying [IHL].").
[255] TARGETING, *supra* note 158, at 32.
[256] *Id.* at 34.
[257] *Id.* at 35.

which involves approval by the appropriate hierarch. The final phase is to identify the "collection and exploitation requirements" and results in the adoption of a "joint integrated prioritized target list", colloquially known as the "kill list," and a "joint integrated prioritized collection list."[258] In addition, the process involves the compilation of a "no strike list" of "geographic areas, complexes, installations, forces, equipment, capabilities, functions, individuals, groups, systems, or behaviors that will not have action planned against them."[259] One basis for inclusion in this list is that attacking the target would be inconsistent with IHL.

While the Air Force's rules are clearly demanding, they illustrate the extent to which the appropriate IHL precautions have been officially embraced by DOD. In contrast, as noted, the CIA remains silent as to the rules it follows. Available press reports suggest that the rules are far less stringent. Thus after one of the first drone killings, intelligence experts were quoted as saying that the targeting process used by the CIA "is quicker, more fluid and involves fewer decision-makers in its 'trigger-pulling' chain of command than even the nimblest military operation . . . ."[260]

The question of who is targeted also suffers from a marked lack of transparency. The mainstream view is reflected in Kenneth Anderson's comment that drone-based killing "is most important in uses of force that are intelligence-driven [and] narrowly targeted against high value targets . . . ."[261] In fact, however, there are carefully researched reports suggesting that the vast majority of those killed by drone strikes in Pakistan have been "just foot soldiers." If this is correct, it raises serious questions as to the justification for taking such extraordinary measures in the territory of a foreign country. Thus a former U.S. intelligence official is quoted as

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[258] *Id.* at 37.

[259] *Id.*

[260] Dana Priest, *CIA Killed U.S. Citizen In Yemen Missile Strike*, WASH. POST, Nov. 8, 2002, at A1, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A25630-2002Nov7&notFound=true.

[261] Kenneth Anderson, Imagining a Fully Realized Regime of Targeted Killing through Drone Warfare and Its Moral Expression in Necessity, Distinction, Discrimination, and Proportionality 5 (paper presented at Conference on "The Enduring Legacy of Just and Unjust Wars—35 Years Later", New York University, November 2010), *available at* http://www.nyutikvah.org/events/docs/papers/Anderson.pdf ("[T]argeted killing using drones as we describe it here is most important in uses of force that are intelligence-driven, narrowly targeted against high value targets").

warning that if the drone strikes do in fact target the lower level Taliban, "it degrades the notion we're going after serious threats to the United States. It's a slippery slope."[262]

Another key concern relates to the existence of safeguards to prevent abuses by operations staff who might be tempted to take short cuts or to adopt interpretations that are at best difficult to reconcile with the formal rules that are applicable. In the Air Force context, this is secured in part through the active participation of military lawyers from the office of the Judge Advocate. Thus the Targeting Manual notes that "[l]egal advice and counsel is necessary to the development, interpretation, modification, and proper implementation" of the ROE. In order to ensure the availability of such advice, the manual requires that Judge Advocates "should be trained, operationally oriented, and readily accessible to assist planners and operators with international legal considerations and ROE or related issues."[263]

A former member of the CIA's Directorate of Operations has written that CIA agents "lack detailed rules of engagement, standing orders, and international conventions to define limits of behavior."[264] In contrast, Radsan and Murphy, the former of whom was previously a CIA legal adviser, write somewhat coyly that "we safely bet . . . that the CIA has developed internal procedures on targeted killing it hopes will withstand scrutiny; and that the agency has presented these procedures to the Justice Department's Office of Legal Counsel for approval."[265] But none of this presupposed legality helps in a context in which past abuses have been rife and the devil is in the details (which must remain secret).

*D. Transparency as to Impact*

I am unaware of any estimates having been given for the number of individuals killed by the CIA in kill/capture raids or other such direct hits. But the information available in relation to civilian casualties resulting from drone strikes is illuminating. Again, no official figures have ever been

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[262] Entous, *supra* note 135 (quotations omitted).
[263] TARGETING, *supra* note 158, at 95.
[264] James M. Olson, *Intelligence and the War on Terror: How Dirty Are We Willing to Get Our Hands?,* 28 SAIS REV INT'L AFF. 37, 44 (2008).
[265] Radsan & Murphy, *supra* note 119, at 36.

published, but the briefing of journalists on a confidential but authoritative basis is a common practice.

In December 2009, the *New York Times* reported an anonymous government official as saying that "the number of civilian casualties is just over 20, and those were people who were either at the side of major terrorists or were at facilities used by terrorists."[266] As the report noted, this estimate "was strikingly lower" than other estimates. In May 2010, a highly informed *Reuters* report quoted U.S. intelligence estimates that "no more than 30 non-combatants" had been killed.[267] The following month, the *Los Angeles Times* attributed a figure of "fewer than 50" to an official who added that "[n]ot even the terrorists can credibly claim—let alone prove—that [the drones] cause large numbers of innocent casualties. They don't."[268] Miraculously, by February 2011, a lower number was reported: "by the CIA's count, a total of 30 civilians have been killed . . . including the wives and children of militants. Officials say that tally is based on video and images of each attack and its aftermath, along with other intelligence."[269] Four months later, the figure was still listed as 30.[270] The latter figure can be compared with the estimate of the same number of civilian casualties (30) recorded for 2011 alone by one of the most reliable of the United States based drone strike monitoring groups.[271] The denial of civilian casualties was subsequently taken to a whole new level in June 2011 when the Assistant to the President for Homeland Security announced that there had not been a single civilian death in the preceding twelve months,

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[266] Scott Shane, *"C.I.A. to Expand Use of Drones in Pakistan"*, N.Y. TIMES (Dec. 3, 2009), http://www.nytimes.com/2009/12/04/world/asia/04drones.html.
[267] Entous, *supra* note 135.
[268] David S. Cloud, *U.N. Report Faults Prolific Use of Drone Strikes by U.S.*, L.A. TIMES (June 3, 2010), http://articles.latimes.com/2010/jun/03/world/la-fg-cia-drones-20100603/3 (quotations omitted).
[269] Ken Dilanian, *CIA Drones May be Avoiding Pakistani Civilians*, L.A. TIMES (Feb. 22, 2011), http://articles.latimes.com/2011/feb/22/world/la-fg-drone-strikes-20110222.
[270] Adam Entous, Siobhan Gorman, & Matthew Rosenberg, *Drone Attacks Split U.S. Officials*, WALL ST. J, June 4, 2011, at A1, *available at* http://online.wsj.com/article/SB10001424052702304563104576363812217915914.html .
[271] Roggio & Mayer, *supra* note 148.

"because of the exceptional proficiency, precision of the capabilities we've been able to develop."[272]

There are various problems with these figures. First, they are not substantiated in any way at all. Second, they appear to be quite inconsistent with one another, thus raising serious doubts about their credibility. Third, they are radically lower than all independent estimates. And fourth, given the overall number of strikes and the conditions in which they take place, they appear remarkably low given the propensity for mistakes to happen, even assuming total good faith and compliance with appropriate laws. In brief, based on the information provided to the public by the CIA, we are unable to arrive at any convincing estimate as to the likely number of civilians killed in drone strikes.

*E. Investigations of Alleged Violations*

Two vital dimensions of any program that intentionally takes human life are the need to undertake systematic and independent evaluations of the probity and accuracy of the assumptions on which the program is based and they need to conduct a full investigation of any case in which the program is suspected of having killed the wrong people. Because the CIA does not acknowledge that it is involved in any targeted killings activities, it cannot provide any details of any such evaluations or investigations that might have been undertaken. Indeed, it cannot be said with any certainty that any such investigations have in fact occurred.

Nothing underscores more dramatically the need for such investigations than the experience of DOD, about which we do know a considerable amount. Without wishing to hold it up as a paragon of virtue in this regard, it is important to acknowledge that in-depth investigations have been undertaken in response to at least some reports of significant civilian casualties. This is an absolutely essential component of any drone-based killing program for the simple reason, as acknowledged by a former National Security Council official, that "while drones with GPS or laser-

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[272] 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. The author quotes a range of experts challenging the plausibility of the CIA's claim.

guided munitions are among the most precise weapons in the history of warfare, targeting errors and loss of innocent life are certain."[273]

The starting point is to recognize that mistakes can and do take place, whether because of faulty information, changes of circumstances, poor translation of data into the operational environment, or other forms of human error. This can be illustrated by two recent incidents in which mistakes were acknowledged, and a third in which no error was admitted.

The first occurred in Uruzgan Province of Afghanistan in February 2010. Up to 23 civilians were killed when three minibuses were mistaken for a convoy carrying insurgent fighters and hit by drone-fired missiles. A subsequent investigation found that crucial information as to the character of the convoy "was ignored or downplayed by the Predator crew." Moreover, the relevant operations centers "failed to analyze the readily available information and communicate effectively" with the relevant commander.[274] It was subsequently reported that six officers had been officially reprimanded as a result.[275] The incident gave rise to extensive reporting on the problem of information overload that afflicts those operating drones, given the highly sophisticated technology and the relevance of multiple sources of information all reporting in real time.[276]

A second incident, in March 2011, also underscored the vulnerability of targeted killing operations to misinformation or human

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[273] Brett H. McGurk, *Lawyers: A Predator Drone's Achilles Heel?*, HARV. NAT'L SECURITY J. (Mar. 11, 2011), http://harvardnsj.org/2010/03/lawyers-a-predator-drones-achilles-heel/.

[274] MAJOR GENERAL TIMOTHY P. MCHALE, DEPUTY COMMANDER, SUPPORT—U.S. FORCES AFGHANISTAN, MEMORANDUM FOR COMMANDER, UNITED STATES FORCES – AFGHANISTAN/INTERNATIONAL SECURITY ASSISTANCE FORCE, AFGHANISTAN: EXECUTIVE SUMMARY FOR AR 15-6 INVESTIGATION, 21 FEBRUARY 2010 CIVCAS INCIDENT IN URUZGAN PROVINCE, ¶ 3 (2010), *available at* http://www.isaf.nato.int/images/stories/File/April2010-Dari/May2010Revised/Uruzgan%20investigation%20findings.pdf.

[275] Alan Cullison & Matthew Rosenberg, *Afghan Deaths Spur U.S. Reprimands*, WALL ST. J. (May 31, 2010), http://online.wsj.com/article/SB10001424052748704254004575273723253952254.html.

[276] *E.g.*, Thom Shanker & Matt Richtel, *In New Military, Data Overload Can be Deadly*, N.Y. TIMES, Jan. 17, 2011, at A1, *available at* http://www.nytimes.com/2011/01/17/technology/17brain.html?pagewanted=all.

error. Nine boys gathering wood were mistaken for insurgents and killed in a helicopter strike. ISAF's official apology attributed the deaths to "an error in the hand-off between identifying the location of the insurgents and the attack helicopters that carried out subsequent operations."[277] While neither of these two incidents may have amounted to targeted killings, they serve to illustrate the problems of reliability of information and accuracy of targeting that characterize many targeted killings.

The third incident is both more problematic and more instructive in the present context. It involved U.S. Special Forces operations in Takhar province. On September 2, 2010, a targeted killing directed at a Taliban deputy governor travelling in a convoy of cars killed ten people. ISAF claimed that the victims were the deputy governor and his bodyguard. But in-depth field investigations by the Afghanistan Analysts Network (AAN) subsequently provided very strong evidence that the person targeted had been mistaken for another man. The person killed was actually a former commander who had been travelling with a group of election campaign workers promoting the election campaign, and the deputy governor was alive and well in Pakistan where he was interviewed well after the incident.[278] The AAN report argues that the problem arose because the target was chosen on the basis of signals intelligence combined with social network analysis, when even minimal cross-checking with other sources would have rapidly revealed the error. Indeed, AAN claims that the flaws in intelligence collection and evaluation were so egregious that they might constitute a violation of the IHL obligation to take appropriate precautions in targeting.[279] According to the author, both ISAF and U.S. Special Forces have subsequently insisted, in the face of strong evidence to the contrary which they did not seek to refute, that they made no mistake.[280]

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[277] Press Release, International Security Assistance Force, ISAF Apologizes, Accepts Responsibility for Civilian Casualties, ISAF Media release 2011-02-CA-014 (Mar. 2, 2011), *available at* http://www.isaf.nato.int/article/isaf-releases/international-security-assistance-force-apologizes-accepts-responsibility-for-civilian-casualties.html.
[278] *See* Michael Semple, *Caught in the Crossfire*, FOREIGN POL'Y (May 16, 2011), http://afpak.foreignpolicy.com/posts/2011/05/16/caught_in_the_crossfire.
[279] KATE CLARK, THE TAKHAR ATTACK: TARGETED KILLINGS AND THE PARALLEL WORLDS OF US INTELLIGENCE AND AFGHANISTAN 2 (May 2011), *available at* http://aan-afghanistan.com/uploads/20110511KClark_Takhar-attack_final.pdf.
[280] Kate Clark, *Kill or Capture 1: Owning up to Civilian Casualties*, AFGHANISTAN ANALYSTS NETWORK (May 17, 2011), http://aan-afghanistan.com/index.asp?id=1721.

Such incidents and the reflections they provoke serve to underscore the central importance of conducting systematic investigations into the processes followed and the results generated by drone strikes. It has long been acknowledged in other contexts where killings take place that in the absence of investigations, security personnel can all too easily allege without foundation that they were acting on the assumption that lethal force was necessary because they were facing imminent attack or can fabricate evidence that the rebels died in crossfire.[281] In order to reduce the opportunity for such abuses, independent investigations are necessary, in which not only security personnel can be heard but also witnesses on the ground including individuals linked to the victims or their families.[282]

Not only is there no evidence to indicate that the CIA ever undertakes such investigations, but by definition, there is no information to suggest that its procedures have ever been changed in response to problems identified, that any personnel have ever been disciplined or charged as a result of errors or negligence, or that compensation has ever been provided to any innocent victims of CIA strikes. In other words, the CIA simply cannot comply with the essential rules concerning the need to respond to alleged violations of international norms.

## V. Evaluating Accountability

The starting point in examining the accountability of those actors who carry out targeted killings on behalf of the United States is the oft-made claim that both the DOD and the CIA are already held systematically to account through appropriate and effectively functioning domestic mechanisms. According to this argument it follows that no international scrutiny is needed. The latter claim was dealt with above when I noted that the international community has no reason to trust U.S. assurances any more than those given by any other state, and that forms of verification will be required regardless of how strong and trustworthy domestic mechanisms are claimed to be. It is then the first claim that warrants a systematic examination at this point. The central question then

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[281] Mark Boal, *The Kill Team*, ROLLING STONE (Mar. 27, 2011), http://www.rollingstone.com/politics/news/the-kill-team-20110327?page=2.

[282] Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT'L REV OF RED CROSS 501, 541–42 (Sept. 2008), *available at* http://www.icrc.org/eng/assets/files/other/irrc-871-droege1.pdf.

becomes whether the relevant domestic oversight arrangements really are effective and adequate.

The DOD is clearly subject to extensive scrutiny, but questions still arise as to whether its involvement in the various forms of targeted killing addressed in this Article are scrutinized effectively, or whether they could be given the obstacles introduced by the practice of double-hatting. The question of CIA accountability, on the other hand, raises a range of additional questions. The CIA itself has given assurances that its "operations take place in a framework of both law and government oversight," [283] and in this regard has emphasized the importance of the oversight exercised by both the White House and Congress. For these reasons, "[i]t would be wrong to suggest the C.I.A. is not accountable."[284] In a separate media report, another official was quoted as stating that counterterrorism operations, including the CIA's, "are conducted in strict accordance with American law and are governed by legal guidance provided by the Department of Justice."[285]

We turn now to consider the relationship between the CIA and international legal constraints and the adequacy or otherwise of U.S. domestic accountability mechanisms. Thereafter, we examine the extent to which the United States has cooperated with the relevant international mechanisms.

*A. The CIA and International Law*

An in-depth report on "Legal Standards and Best Practice for Oversight of Intelligence Agencies," drawn up in 2005 for the Norwegian Parliament, recommends that "no action shall be taken or approved by any official as part of a covert action programme which would violate international human rights."[286] In considering the relationship between the

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[283] Charlie Savage, *U.N. Official to Ask U.S. to End C.I.A. Drone Strikes*, NY TIMES (May 27, 2010), http://www.nytimes.com/2010/05/28/world/asia/28drones.html (quoting CIA spokeswoman Paula Weiss).
[284] *Id.*
[285] McKelvey, *supra* note 128.
[286] HANS BORN & IAN LEIGH, MAKING INTELLIGENCE ACCOUNTABLE: LEGAL STANDARDS AND BEST PRACTICE FOR OVERSIGHT OF INTELLIGENCE AGENCIES 63 (2005), *available at* http://www.dcaf.ch/DCAF-Migration/KMS/Publications/Making-Intelligence-Accountable.

CIA and international law, we need to take account of three dimensions: the facts, the *de jure* legal situation, and the *de facto* legal situation.

In terms of the facts, the most telling characteristics of our knowledge of the CIA's targeted killing programs is that it derives very largely from self-serving leaks to journalists. The result is that while the government can deny the accuracy of any given leak, it can also rely generally upon those sources to ensure that sufficient information makes its way into the public domain in order to placate those who would otherwise be concerned that such programs were being run in complete secrecy and in order to counter the spread of false information. The result of this curious blend of policy considerations is well illustrated by the position on targeted killings consistently taken by the CIA: it cannot comment on whether any such policies or programs exist, let alone on the nature and extent of any casualties that might have occurred. In a May 2009 speech, Leon Panetta, the Director of the CIA, said of the drone program: "I'm not going to talk about anything operational, and I'm not confirming or denying how any of this happens, we're not getting into that." But he immediately went on to describe airstrikes aimed at al Qaeda leaders in Pakistan as "very effective" and as having convinced those leaders that the targeted regions could be considered "neither safe nor a haven." He added, however, in response to criticisms of civilian casualties, "I can assure you that [the targeting] is very precise and is very limited in terms of collateral damage."[287] Panetta's approach reflects a formula that has been used consistently by the CIA. It involves (i) neither confirming nor denying, (ii) insisting that civilian casualties have been low, and (iii) trumpeting the successful targeting of "senior Al Qaeda members", by leaking full details as to the names, rank, and locations of those killed.[288] More recently, this formula has been supplemented by a fourth component, which is to leak information that the CIA has deliberately withheld strikes against agreed targets when it has determined that excessive civilian casualties would result,[289] thus demonstrating that the Agency is "very punctilious" about

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[287] *See supra* note 127.

[288] *See, e.g.*, David S. Cloud, *U.N. Report Faults Prolific Use of Drone Strikes by U.S.*, L.A. TIMES (June 03, 2010), http://articles.latimes.com/2010/jun/03/world/la-fg-cia-drones-20100603/3.

[289] Dilanian, *supra* note 265 ("A chance to kill a powerful militant was reportedly passed up last year because women and children were nearby, reflecting a possible increase in concern over such casualties.").

minimizing "collateral damage."[290] The implication at least is that the agency is concerned to meet the requirements of international law in this regard.

In terms of the *de jure* legal situation, one can begin with the proposition that the CIA is obligated to respect United States law, and thus to comply with international law to the extent that it is reflected in the former. But various authors, especially those with links to the government, have also noted that there are no statutory requirements in U.S. law requiring the CIA to comply with international law,[291] and international law does not explicitly prohibit covert operations.[292] In an oft-quoted anecdote, a former CIA Director, Admiral Stansfield Turner, remarked that, "The FBI agent's first reaction when given a job is, 'How do I do this within the law?' The CIA agent's first reaction when given a job is, 'How do I do this regardless of the law of the country in which I am operating?'"[293] Others have noted, albeit not in relation to targeted killings, that "[b]y definition, it is the job of [the CIA] to break the laws of other countries."[294] It can reasonably be inferred that international law is not going to provide any significant constraint upon the Agency's determination to do its job unless two conditions are satisfied. The first is that the relevant international law standard is clearly and explicitly part of domestic United States law. And the second is that there is a system of domestic oversight ensuring that such international norms are factored into the overall equation of domestic accountability. We will consider that second element below.

Perhaps the most interesting question about the CIA and international law concerns the *de facto* legal situation, or the actual practice. The reality, of course, is that the foreign operations of the intelligence agencies of all countries by definition take place below the radar screen, and many, if not most, of their activities will violate the laws of the third

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[290] McKelvey, *supra* note 128 (quotations omitted).
[291] Stone, *supra* note 221, at 15.
[292] Adam R. Pearlman, Paradigm Choice and Targeted Killings in Counterterrorism Operations 11 (draft manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1583985.
[293] Benjamin Wittes, *Blurring the Line Between Cops and Spies*, LEGAL TIMES, Sept. 9, 1996, at 20.
[294] RONALD KESSLER, INSIDE THE CIA: REVEALING THE SECRETS OF THE WORLD'S MOST POWERFUL SPY AGENCY 4 (1992).

countries in which they operate, as well as perhaps violating international law norms. This applies as much to Russian agents operating in the United States as it does to U.S. intelligence operatives in Pakistan.[295] But if this is the case and if there seem to be very few instances in which states make a fuss about the activities of foreign intelligence agencies, does it really matter if they are *de jure* illegal? As Michael Reisman has noted, covert action takes place under "a much more complex operational code than formal statements of prohibition would lead one to anticipate."[296] Thus even verbal condemnation on the part of an affected government will often cloak *de facto* acquiescence. This proposition has been taken even further by Colonel Kathryn Stone with her assertion that "[m]ost of the world has come to look at CIA de facto wars as a way of life because most powers benefit from their own CIA-equivalents operating in foreign countries . . . ."[297] The question then is what limits apply. Intelligence gathering is apparently very widely tolerated, economic espionage perhaps less so, but what about targeted killings by intelligence agents? Because of the clandestine and sometimes covert nature of intelligence activities, and the responses to them, relatively little is publicly known in terms of state practice. But four variables would seem to be of particular importance in predicting when a passive or restrained response will be forthcoming from an affected state. They are the status of the individual agent, the nature of the covert action, power relations, and the independence of the judicial system.

In terms of the first variable, the practice is that intelligence operatives are often accorded diplomatic status by the sending country. In other words, they actually are or are represented to be diplomats and are thus entitled to diplomatic privileges and immunities, including immunity from host state prosecution. When such agents are caught, and depending on the nature of their actions, some diplomatic displeasure might be shown by the host country, or they might be publicly expelled, but only if the home state waives immunity can they be criminally prosecuted in the host state. In most such cases there will be neither shock nor outrage, partly

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[295] As the *New York Times* recently observed in a very matter-of-fact manner, "Russian, Chinese and American espionage agents wage unacknowledged wars to steal the other's technology." Michael Wines, *Chinese State Media, in a Show of Openness, Print Jet Photos*, N.Y. TIMES, Apr. 26, 2011, at A4, *available at* http://www.nytimes.com/2011/04/26/world/asia/26fighter.html.

[296] W. Michael Reisman, *Covert Action*, 20 YALE J. INT'L L. 419, 419 (1995).

[297] Stone, *supra* note 221, at 12.

because it was always assumed that some such activity was taking place and partly because of considerations of reciprocity. This is not to say that covert action is desirable, legal or legitimate per se, but simply that it is a reality and will continue to be so. Indeed, the extent to which brazenness has become standard in the face of such allegations is illustrated by the extent to which states engage in reciprocal expulsions when a diplomat of one of the states is caught in the act. The unstated assumption is that "while our person was caught, you are no doubt doing it as well, so if you punish us we can legitimately reciprocate."

But CIA operatives involved in targeted killings will often not enjoy accredited status as diplomats. Reasons include the fact that there are too many of them, that their activities are difficult if not impossible to "camouflage," or that the host state will not provide accreditation for whatever reason. In the jargon of the intelligence community, they must then operate on the basis of "nonofficial cover" (NOC), which is never supposed to involve jobs in the clergy or the Peace Corps, but might involve journalism, private contracting, or many other guises.[298] The case of Raymond Davis, the CIA operative charged with two murders in Pakistan in early 2011, provides a clear illustration of the problem. Davis asserted that he fired defensively at two potential robbers, although the circumstances in which he acted remain highly contested. He initially claimed to be a contractor, but the U.S. Government quickly asserted that he was employed in some sort of diplomatic function, and the story continued to change over time. Eventually, it was acknowledged that he was a CIA employee and it is likely that his activities were related in some respects to the drone program. While the United States persisted in the claim that he enjoyed diplomatic immunity, this claim was not endorsed by the Government of Pakistan despite immense pressure being brought to bear. While the facts have not been definitively established, there would seem to be good reason to believe that Davis had not been operating under regular diplomatic status, in part because the United States had not wanted to declare to the host government the number of CIA personnel operating in various capacities within Pakistan. For its part, the Pakistani Government was compromised by the extent to which it had tolerated or even acquiesced in a major CIA operation, but neither public opinion nor the justice system would permit it to issue the diplomatic free pass demanded by American officials. The case was eventually resolved, in

[298] MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY 98 (4th ed. 2009).

dubious circumstances, through the payment of compensation to the families of the deceased and the release of Davis.

The second variable is the nature of the activity involved. In particular, we have to explain why there seems to be a relatively high tolerance for some forms of covert action despite the violation of sovereignty and other forms of illegality involved. Covert action crosses a broad spectrum of activities from propaganda and information manipulation at one end through economic manipulation or sabotage, the training or even equipping of dissident or subversive elements, to the mounting of paramilitary actions involving the use of force. It appears on the basis of practice that the first few of these activities, while never appreciated, are generally tolerated by states as a result of which their response to infractions will be relatively mild and orderly. As we move along the spectrum, it can be assumed that the reaction will become increasingly severe and sustained. By the time we reach paramilitary action, there can be no presumption of tolerance or of turning a blind eye. It will almost always be considered unacceptable, which is why the notion of "plausible deniability" is such an important dimension of covert activities.[299] Because states feel that they could not justifiably defend such actions, they need to be able simply to deny all knowledge of the activities if its operatives are caught. A prominent recent example of outrage is reflected in the conviction *in absentia* by an Italian court of 22 CIA officials and a U.S. Air Force Colonel in a case in which a Muslim cleric was kidnapped on the streets of Milan and smuggled to Egypt where he was tortured. Although the significance of the case was qualified by the ambivalence of the Italian Government and a decision by the Italian Constitutional Court blocking charges against the CIA's Italian counterparts on the grounds of state secrecy, the case was nevertheless described in the United States media as a "huge symbolic victory" and human rights groups hoped that it would act as a deterrent to comparable illegal acts by foreign intelligence operatives.[300]

The third variable consists of power disparities between the countries involved in a given incident. The most difficult situation will be when the two states have an openly antagonistic relationship and the one

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[299] *Id.* at 173.

[300] Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions*, N.Y. TIMES (Nov. 5, 2009), http://www.nytimes.com/2009/11/05/world/europe/05italy.html.

that captures the agent resolves to use the occasion to discredit the other state rather than to do a deal. But it more often be the case that a powerful state will be able to protect any of its intelligence agents apprehended by a third state either by negotiating prisoner exchanges or through bringing overwhelming economic and political pressure to bear upon the other state, as apparently occurred in the Raymond Davis case in Pakistan. Another, more complex example, has been used to suggest that targeted killings in foreign states might be considered routine. The case involved Mahmoud al-Mabhouh, a senior Hamas military commander who, according to almost all observers, is very likely to have been killed by the Israeli intelligence agency, Mossad, in a hotel room in Dubai in January 2010. The incident is said to have involved 27 operatives from a specialist unit called Caesarea, which is alleged to have been responsible for a variety of other targeted killings in a range of Arab countries.[301] The Dubai authorities protested strongly and posted on the Internet a 27-minute video showing the alleged Mossad agents at work.[302] All but one of the agents carried forged passports, which led the United Kingdom, Ireland, France, and Australia to lodge diplomatic protests, and in two cases to expel an Israeli diplomat. But the United States Government refused a request for cooperation in the case from the United Arab Emirates and all of the other Western governments involved confined their protests to the issue of passport forgery rather than the targeted killing.[303] Israel neither confirmed nor denied any involvement. Robert Grenier, a former director of the CIA's Counterterrorism Center subsequently wrote that "[t]he simple, cruel truth is that in the end, no one—and here I would include all the governments concerned . . . —is really going to care all that much, or for all that long . . ." about this killing.[304] Since his prediction has more or less been vindicated, the question is whether this incident can be taken as evidence that such killings will continue to pass largely unremarked in the future. Alleged targeted killings of several individuals involved with the Iranian nuclear program would also seem to fall into the same category.[305] Grenier

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[301] Ronen Bergman, *The Dubai Job*, GQ (Jan. 2011), http://www.gq.com/news-politics/big-issues/201101/the-dubai-job-mossad-assassination-hamas?printable=true.
[302] Kim Zetter, *Alleged Assassins Caught on Dubai Surveillance Tape*, WIRED (Feb. 17, 2010), http://www.wired.com/threatlevel/2010/02/alleged-assassins-caught-on-tape/.
[303] *Mahmoud al-Mabhouh*, WIKIPEDIA, http://en.wikipedia.org/wiki/Mahmoud_al-Mabhouh#Western_government_reactions (last visited Dec. 1, 2011).
[304] Robert Grenier, *Israel's Cost-Benefit Calculation*, AL JAZEERA (Mar. 1, 2010), http://english.aljazeera.net/focus/2010/03/20103191732842915.html.
[305] Bergman, *supra* note 301.

himself offers several explanations that would seem to distinguish these Israeli killings from comparable killings that might be undertaken by the intelligence agencies of other states. One is that different rules apply in the Arab-Israeli context than anywhere else. Another is that "[s]o long as [Israel's] relations with the Americans are unaffected, they can afford to be fundamentally indifferent" to public opinion or the protests of other states.[306] But while it would seem reasonable to conclude that Israel has been able to operate under different rules, the potentially very negative impact of these precedents on the broader norms of the international community should not be lightly dismissed. In any event, the CIA would seem to be in a very different situation, both as a result of domestic legal and political constraints, and of the particular sensitivity of most states to any such actions on the part of the United States.

The fourth variable is the degree of independence of prosecutors and judges from the executive within a state. Where the judicial system is generally deferential to the executive, it is much less likely to prosecute an intelligence-related case if the government would prefer to maintain good relations with the state concerned. But where the judiciary enjoys significant independence, it is much more likely that a meaningful investigation will be undertaken and a prosecution pursued.[307] This is borne out clearly by the instances in which the CIA has been taken to task judicially in countries such as Germany and Italy. These cases are discussed below.[308]

Overall, it seems reasonable to conclude on the basis of consistent anecdotal evidence,[309] and in the absence of any explicit statement by the CIA itself that it seeks to comply with international law, that this is not a high priority for the agency. That gives rise to the question to which we now turn, which is whether executive and/or congressional oversight is

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[306] Grenier, *supra* note 304.

[307] This variable also affects a range of other situations, such as the preparedness to exercise universal jurisdiction. *See* Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 43 (2011).

[308] See *infra* text accompanying notes 599–604.

[309] In the Italian rendition case the former CIA base chief in Milan is reported to have said "Of course it was an illegal operation. But that's our job. We're at war against terrorism." Donadio, *supra* note 300.

effective by its own measure and whether it could or would ever flag violations of international law.

### *B. The Effectiveness of Domestic Oversight Mechanisms*

As noted earlier, the principal line of defense used by CIA spokespersons when accountability concerns are raised is that the Agency is fully accountable both to the executive branch and to the Congress. A comprehensive assessment of the reality of this accountability is clearly beyond the scope of the present Article, but a general survey is essential in order to establish whether the relevant structures and procedures that are in place function effectively in order to exact meaningful oversight, or to enable meaningful oversight to be attempted by others, in relation to targeted killings abroad by United States agencies or forces.

In theory, the arrangements in place within the United States for overseeing the work of intelligence agencies, including their role in targeted killings, are impressive.[310] In practice, however, it is far from clear that they function effectively, at least in relation to an issue such as targeted killings. For analytical purposes, we will look briefly at each of the five principal levels at which scrutiny takes place: internal control, executive oversight, congressional oversight, judicial review, and external oversight by civil society and the media.[311]

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[310] For an enthusiastic account, which offers all too little authority in support see SANDY AFRICA, WELL-KEPT SECRETS: THE RIGHT OF ACCESS TO INFORMATION AND THE SOUTH AFRICAN INTELLIGENCE SERVICES 2 (2009), *available at* http://library.fes.de/pdf-files/bueros/suedafrika/07162.pdf. "The United States' intelligence services are subject to extensive and public scrutiny, which ensures a significant degree of transparency." *Id.* at 139.

[311] In this approach I am following the framework identified by the GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES, PARLIAMENTARY OVERSIGHT OF INTELLIGENCE SERVICES, (Mar. 2006), *available at* se2.dcaf.ch/serviceengine/Files/.../bg_Intel%20Oversight_ENG.pdf. The frameworks used by other authors differ somewhat but ultimately cover the same range of actors. *See, for example*, Hans Born, *Towards Effective Democratic Oversight of Intelligence Services: Lessons Learned from Comparing National Practices*, 3 THE Q.J. 1, 4 (2004), *available at* http://www.pfpconsortium.org/file/1645/view suggesting a five-fold classification consisting of executive control, parliamentary oversight, judicial review, internal control, and independent scrutiny. Caparini identifies three levels of accountability: vertical (primarily within the executive), horizontal (primarily congressional), and a third dimension of international actors and NGOs. *See* MARINA CAPARINI, CONTROLLING AND OVERSEEING INTELLIGENCE SERVICES IN DEMOCRATIC STATES, IN DEMOCRATIC

1. Internal Control

The CIA has a number of internal control arrangements that, in theory, could critically scrutinize the legality of targeted killings. In examining the performance of any such arrangements, the problem is that those on the inside believe that they alone can understand what really goes on, [312] while outsiders tend to assume that the insiders' objectivity is inevitably deeply compromised.

Following strong criticism of the CIA's role in the 1990s in working with alleged human rights violators in Guatemala, the Agency under Director John Deutch adopted guidelines in February 1996 for dealing with serious human rights violations or crimes of violence by CIA assets and liaison services.[313] There was considerable resistance within the agency to this initiative and the guidelines were said to have been abandoned after 9/11.[314] I am not aware of any existing set of internal guidelines that require the agency to take account of human rights standards. The question then becomes whether there are effective internal mechanisms or procedures that apply human rights-related checks or controls.[315]

In operational terms, one might expect to find some sort of human rights or even ethical guidelines governing the work of the National

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CONTROL OF INTELLIGENCE SERVICES: CONTAINING ROGUE ELEPHANTS 3, 10–17 (Hans Born & Marina Caparini eds., 2007), *available at* http://www.ssrnetwork.net/uploaded_files/3961.pdf.

[312] A. John Radsan, *Sed Quis Custodiet Ipsos Custodes: The CIA's Office of General Counsel?*, 2 J. NAT'L SEC L. & POL'Y 201, 203 (2008) ("[A] scholar without inside access is at a severe disadvantage.").

[313] The 'guidance' "generally bars such relationships, but it permits senior CIA officials to authorize them in special cases when national interests so warrant." INTELLIGENCE OVERSIGHT BOARD, REPORT ON THE GUATEMALA REVIEW 23 (June 28, 1996), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB27/04-01.htm.

[314] LOWENTHAL, *supra* note 298, at 283.

[315] There is, for example, a position of Civil Liberties Protection Officer within the Office of the Director of National Intelligence. The Officer's responsibilities give him the task of ensuring that "the protection of civil liberties and privacy is appropriately incorporated in the policies and procedures . . . implemented by the . . . elements of the intelligence community." National Security Act of 1947, 50 U.S.C. § 403-3d(b). The CIA's website provides the name of the Officer but no details as to what he has done. *See Mr. Alexander W. Joel*, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE http://www.dni.gov/joel_bio.htm (last visited Dec. 1, 2011). Press reports are few and far between, although there seems to be a strong emphasis on privacy issues.

Clandestine Service (formerly the Directorate of Operations), but there is no publicly available information that would lead to the conclusion that any such guidelines exist, or if they do, that they have made any difference. The next level of control would be the Office of General Counsel. While former officials have sought to suggest that this office could play such a role,[316] disclosures by a recent head of the office provides little if any indication that this has happened in practice.[317] Finally, there is the office of CIA Inspector-General. Most major federal government agencies have such an office, and its functions usually include ensuring legality and effectiveness in the agency's operations, and identifying any activities that are unlawful, criminal, or wasteful. The CIA has had an Inspector-General since 1952,[318] but it was only in 1989, after the Iran-Contra scandal, that it was given legislative recognition.[319] Congress sought to ensure genuine independence for the Inspector-General, both from senior management in the CIA and from the executive branch. The nominee must be confirmed by the Senate, reports directly to the Director, has extensive oversight powers that can only be restricted if the Director notifies both congressional oversight committees, and can only be removed by the President who must provide congress with a reasoned statement supporting his action.[320] John Helgerson, who was CIA Inspector-General from 2002 to 2009, produced a wide range of reports. Three of the handful of these reports that were eventually made public are of direct relevance in the present context. The first was an investigation of the CIA's detention and interrogation practices in the two years immediately following 9/11. The report was critical of the

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[316] LOWENTHAL, *supra* note 298, at 283. Such optimism stands in stark contrast to assessments made of the likelihood of critical, ethically-informed advice emanating from equivalent sources, such as the Department of Justice's Office of Legal Counsel. One review recently concluded that the latter's "structure tilts so heavily in favor of secrecy, centralized control, partisan appointment and removal, and political accountability that there is almost no support for even the most modest and uncontroversial form of professional independence - not moral rectitude, not civic republican defense of the rule of law, but simply telling the client that her intended course of action is illegal or of doubtful legality." Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 445 (2011).

[317] McKelvey, *supra* note 128.

[318] *Inspector-General, History*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/offices-of-cia/inspector-general/history.html (last visited Dec. 1, 2011).

[319] L. Britt Snider, *Creating a Statutory Inspector General at the CIA*, 10 STUD. IN INTELLIGENCE 15 (2001).

[320] *See generally* 50 U.S.C. § 403q (2005).

program, noting that although the Department of Justice had provided a legal opinion endorsing the legality of various practices, the program "diverges sharply from previous Agency policy and practice, rules that govern interrogations by U.S. military and law enforcement officers, statements of U.S. policy by the Department of State, and public statements by very senior U.S. officials, including the President . . . ."[321] After the report was publicly released and he had retired from the Agency, Helgerson told *Der Spiegel* that the report was compiled by a team of 12 investigators, working for over a year, and based on over 100 interviews and the review of 38,000 documents,[322] thus indicating the seriousness of the process. In the redacted version that was made public, all of the recommendations were deleted, which means that we have no way of knowing how wide-ranging or potentially meaningful they were or whether they were acted upon in any way.

A second report dealt with the alleged role of the CIA in the downing of a light aircraft carrying American missionaries flying between Brazil and Peru. The plane was mistakenly identified by the CIA as carrying drugs and was shot down by the Peruvian air force at the CIA's instigation. The Inspector-General concluded that the CIA had systematically violated the established procedures in relation to all 15 shootdowns in which it participated over a six year period. [323] It "did not fulfill its legal obligation to keep Congress and the NSC [National Security Council] fully informed" of the programs, and it denied access to the findings of its internal inquiries to Congress, the NSC, and the Department of Justice. Finally, because incriminating information was suppressed, the CIA Director, George Tenet, "gave incomplete and misleading testimony to Congress."[324] In accordance with the Inspector-General's

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[321] CENTRAL INTELLIGENCE AGENCY, INSPECTOR-GENERAL, SPECIAL REVIEW, COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001–OCTOBER 2003)(2003-7123-IG),101–02, ¶ 255 (May 7, 2004), *available at* http://graphics8.nytimes.com/packages/pdf/politics/20090825-DETAIN/2004CIAIG.pdf.

[322] *Ex-CIA Inspector General on Interrogation Report: 'The Agency Went over Bounds and Outside the Rules'*, SPIEGEL ONLINE (Aug. 31, 2009), http://www.spiegel.de/international/world/0,1518,646010,00.html.

[323] CENTRAL INTELLIGENCE AGENCY, INSPECTOR-GENERAL, REPORT OF INVESTIGATION, PROCEDURES USED IN NARCOTICS AIRBRIDGE DENIAL PROGRAM IN PERU, 1995–2001, 267, ¶ 538, (Aug. 25, 2008), *available* at http://www.fas.org/irp/cia/product/ig-airbridge.pdf (approved for release Nov. 1 2010).

[324] *Id.* at 273–74, ¶¶ 552, 554.

recommendation,[325] an Agency Accountability Board was convened. While its findings were not released, the CIA issued a press statement indicating that it had "found no evidence of a cover-up." After reviewing the Board's report, CIA Director Panetta sanctioned 16 individuals, including current and former Agency officials, for "shortcomings in reporting and supervision." The Board effectively repudiated the Inspector-General's findings by determining that "reasonable suspicion" had existed in relation to 14 of the 15 shootdowns and "that no CIA officer acted inappropriately with respect to the 2001 shootdown" of the missionaries plane. The official press statement then added for good measure:

> Any talk of a cover-up, let alone improper attempts to persuade the Department of Justice not to pursue prosecutions, is flat wrong. This was a tragic episode that the Agency has dealt with in a professional and thorough manner. Unfortunately, some have been willing to twist facts to imply otherwise. In so doing, they do a tremendous disservice to CIA officers, serving and retired, who have risked their lives for America's national security.[326]

A member of the House Intelligence Committee who represented the district in which the missionaries had lived subsequently condemned the CIA's actions as being "tantamount to obstruction of justice."[327]

The third report that has been released evaluated the agency's performance in the lead-up to 9/11. It was highly critical of senior staff including the Director and identified systemic problems of a major kind.[328]

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[325] *Id.* at 287, ¶ 1.

[326] *Statement from CIA's Office of Public Affairs on the 2001 Peru Shootdown*, ABC NEWS (Feb. 3, 2010), http://abcnews.go.com/Blotter/cia-statement-2001-peru-shootdown/story?id=9738624.

[327] Joby Warrick, *CIA Withheld Details On Downing, IG Says*, WASH. POST, Nov. 21, 2008, at A1; *see also 'Justice Denied' in CIA Shootdown of Missionaries*, ABC NEWS (Feb. 10, 2010), http://abcnews.go.com/Blotter/justice-denied-cia-shootdown-missionaries/story?id=9737718.

[328] OFFICE OF THE INSPECTOR GENERAL, EXECUTIVE SUMMARY, OIG REPORT ON CIA ACCOUNTABILITY WITH RESPECT TO THE 9/11 ATTACKS (June 2005) (released Aug 2007), *available at* http://www.foia.cia.gov/docs/DOC_0001499482/DOC_0001499482.pdf. For a highly critical evaluation by a former CIA official see Catherine Lotrionte, *The Fault, Dear Brutus,*

The CIA Director at the time, in 2005, stated that he would not act upon the recommendations.[329] Instead, in 2007, a new CIA Director turned the spotlight on the Inspector-General himself by launching an inquiry into the quality of his work. After considerable acrimony, this led to a compromise involving the appointment of an ombudsman to oversee the Inspector-General's work and of a quality control officer to ensure that the Inspector-General takes due account of exculpatory and mitigating information.[330] This move was widely viewed as a backlash against the Inspector-General and as a successful bid to rein in his independence and constrain his preparedness to be critical.

This brief overview of the role of the CIA Inspector-General reveals an office vested with extensive powers and important protections for its independence, but also one which, as far as can be publicly ascertained, has not succeeded in bringing about significant changes in CIA policy or practice, even in cases that seem to disclose major breaches of the applicable law. It is against this background that one must evaluate proposals that have been put forward, including by former CIA officials, that the Inspector-General should review all of the agency's targeted killings to ensure "reasoned decision making."[331] It has been suggested that he could review the agency's procedures on targeting and executing attacks, and could recommend compensation, disciplinary measures, or even criminal prosecution in appropriate cases involving targeted killings. "To enhance accountability, the [Inspector-General] could prepare public reports."[332] These suggestions have been taken even further in a later analysis suggesting that there could be "a categorical requirement that all

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*is not in Individuals, but in Our System: CIA's Inspector General Seeks to Find Individuals Accountable for 9/11 and Misses an Opportunity for Effective Intelligence Reform*, 28 SAIS REV. 109 (2008).

[329] After opining that the report "unveiled no mysteries", the Director observed that about half of the CIA officers named in the report had retired and that "those who are still with us are amongst the finest we have." He accordingly declined to follow the Inspector-General's recommendation to convene an accountability board, but added reassuringly that he had "talked to each of the named current employees and am familiar with their abilities and dedication to our mission." Press Release, Central Intelligence Agency, CIA Director Porter J. Goss Statement on CIA Office of the Inspector General Report, "CIA Accountability with Respect to the 9/11 Attacks" (Oct. 5, 2005), *available at* https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2005/pr10052005.html.

[330] *See generally* LOWENTHAL, *supra* note 298, at 204–05.

[331] Radsan & Murphy, *supra* note 119, at 1235.

[332] *Id.* at 1237.

CIA targeted killings be subject to IG review" supported by review teams in the Clandestine Service and support from the Office of General Counsel.[333] While such proposals might seem attractive in theory, the suggestion that they would or could be implemented in an independent or meaningful manner would seem to contradict virtually everything that is publicly known about the dispositions of any of the relevant institutional actors.[334]

2. Executive Oversight

The CIA identifies three executive oversight bodies examining its activities: the National Security Council (NSC), the Intelligence Oversight Board (IOB), and the President's Intelligence Advisory Board (PIAB).[335] The complex relationship between the NSC and the CIA goes well beyond the scope of the present Article. Moreover, almost all information on such oversight remains confidential.[336] Since 1993, the IOB has been a standing body under the PIAB.

The PIAB has existed in various guises, since 1956. Despite its longevity, there is relatively little publicly available information about its activities.[337] It has been suggested that this has resulted mainly from the very high level of access to intelligence that its members receive, which assures a low level of transparency, and from the fact that it is exempt from the declassification of documents regime that would otherwise have

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[333] Murphy & Radsan, *supra* note 109, at 448.

[334] Even more surprising is the subsequent assessment by one of the authors of the weaknesses of the Inspector-General's past operations. Thus Check and Radsan, in remarking on the Inspector-General's limited ability to ferret out information and to act with total independence, note that unless things change the Office "will be nothing more than expensive and elaborate window dressing." They also argue that his "apparent lack of boldness . . . has undermined the office's role" and that he seems "diminished in preventing and detecting misconduct at the CIA." Ryan M. Check & Afsheen John Radsan, *One Lantern in the Darkest Night: The CIA's Inspector General*, 4 J. NAT'L SECURITY L. & POL'Y 247, at 291, 293 (2010).

[335] *Executive Oversight of Intelligence*, CENTRAL INTELLIGENCE AGENCY (Dec. 30, 2011), https://www.cia.gov/library/publications/additional-publications/the-work-of-a-nation/intelligence-oversight/executive-oversight-of-intelligence.html.

[336] On the NSC's role in relation to the CIA see generally LOWENTHAL, *supra* note 298, at 32–33.

[337] Kenneth M. Absher, Michael C. Desch, & Roman Popadiuk, *The President's Foreign Intelligence Advisory Board*, in THE OXFORD HANDBOOK, *supra* note 11, at 173 (its personnel have "gone to great lengths to maintain a shroud of secrecy surrounding the board").

exposed it to some scrutiny after a lengthy time interval. But its low profile might also be ascribed to its marginality, at least during certain presidencies. President Carter virtually abolished it, other presidents are said to have paid scant attention to it, and it has often been rather quiescent. Scholars have suggested that it has focused its work in three main areas: the impact of new technologies on intelligence, analyzing the significance of foreign political developments, and evaluating crisis management responses.[338] In other words, oversight in a critical sense has apparently not been high on its agenda.

In general the Board has been extensively criticized for duplicating the functions performed by other bodies, for having an undue number of appointees whose main qualification is being owed a favor by the President of the day, for a shortage of expertise, and for pursuing the agenda of the intelligence community rather than seeking to exact serious oversight. Its strongest defenders point mainly to its apparent potential rather than to its accomplishments.[339] President Obama revitalized the Board in 2009 and issued an Executive Order restoring some of the powers removed from the Board by his predecessor, in particular the requirement that the Board notify the Attorney General whenever it learns of "intelligence activities that involve possible violations of Federal criminal laws."[340] While his appointees to the Board appear to be well qualified, his stated "commitment to transparency and open government, even, when appropriate, on matters of national security and intelligence,"[341] made on the occasion of his first meeting with the Board, has yielded no discernible results.

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[338] *See, e.g.*, *id.* at 172–73.

[339] *See, e.g.*, Kenneth Michael Absher, Michael C. Desch, & Roman Popadiuk, *Getting on Board: How an Obscure Panel Could Fix the U.S. Intelligence Community*, FOREIGN AFF. (Sept. 17, 2009), http://www.foreignaffairs.com/articles/65415/kenneth-michael-absher-michael-c-desch-and-roman-popadiuk/getting-on-board ("The PIAB is a unique presidential asset that, if properly employed, could help identify and meet the intelligence challenges that future presidents will face."); *see also* PAT M. HOLT, SECRET INTELLIGENCE AND PUBLIC POLICY: A DILEMMA OF DEMOCRACY 202–05 (1995).

[340] Exec. Order No. 13516, ¶ d, (Nov. 2, 2009).

[341] President Barack Obama, *President Obama delivers remarks before a meeting with the National Intelligence Advisory Board*, WASH. POST (Oct. 28, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/10/28/AR2009102803068_pf.html.

In sum, there is little in the historical record,[342] nor any recent information, which would suggest that the PIAB is at all likely to be in the business of seeking to exact accountability from the intelligence agencies in relation to an activity such as targeted killings. And even if the Board were to bestir itself in this area, its outputs would almost certainly remain entirely secret.

The Intelligence Oversight Board (IOB) is composed of four members of the PIAB, appointed by the chairman of the latter body. Its task is to oversee the intelligence community's compliance with the Constitution and applicable laws, Executive Orders, and Presidential Directives. In particular it is charged with advising the President on intelligence activities that it believes may be inconsistent with the law and that are not being appropriately dealt with by the relevant substantive agency heads.[343] Again, very little is known of the IOB's work, although it did make one in-depth report on a human rights-related issue, which was subsequently released. It investigated allegations that CIA assets or contacts in Guatemala were closely involved with serious human rights violations, including the murder of an American citizen and the spouse of another, and it was highly critical of the conduct of some Agency officials.[344] The report led to the firing of some officers, which in turn caused deep resentment on the part of the clandestine service towards the Director.[345]

The administration of President George W. Bush took two years to appoint the members of the IOB and the Board took no action on any alleged violations referred to it arising out of the war on terror until 2007.[346] And in 2008, President Bush significantly reduced its role in this

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[342] For an argument that the Board's role has been "low-key and lacklustre" see Christine E. Hinrichs, *Flying Under the Radar or an Unnecessary Intelligence Watchdog: A Review of the President's Foreign Intelligence Advisory Board*, 35 WM. MITCHELL L. REV. 5109, 5117 (2009).
[343] Exec. Order No. 13462 § 6 (Feb. 29, 2008); LOWENTHAL, *supra* note 298, at 202.
[344] Report on the Guatemala Review, *supra* note 313.
[345] According to Weiner, the announcement of the dismissals "was the moment when the director and the clandestine service washed their hands of one another. It sealed [the Director's] fate at the CIA." TIM WEINER, LEGACY OF ASHES: THE HISTORY OF THE CIA 460 (2007).
[346] John Solomon, *In Intelligence World, A Mute Watchdog*, WASH. POST (July 15, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071400862.html.

regard,[347] although, as already noted, this rollback was largely countermanded by President Obama.[348] Nevertheless, the membership of the IOB, if any, has not been disclosed by the Obama administration.[349] A recent review of the Board's role in supervising reported intelligence violations by officers of the Federal Bureau of Investigation concluded that, "it seems unlikely that the IOB diligently fulfilled its intelligence oversight responsibilities for most of the past decade."[350] There is thus no reason to conclude that the IOB has been, or is likely to be, in the business of providing meaningful oversight of the targeted killings programs undertaken by U.S. intelligence agencies.[351]

In addition to the PIAB and IOB, one additional body should be mentioned. It is the Privacy and Civil Liberties Oversight Board (PCLOB) which was established on the basis of the 9/11 Commission's recommendations.[352] Its task is to scrutinize privacy and civil liberties issues raised by national security policies and programs. It was established by Congress in 2004, but was poorly structured and under-resourced. In 2007 it was made independent of the White House, given a bipartisan composition, and given a subpoena power.[353] Since then it has languished. President Bush nominated some members, but confirmation hearings never took place.[354] Despite strong urging by key officials and civil liberties

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[347] Charlie Savage, *President Weakens Espionage Oversight*, BOSTON GLOBE (Mar. 14, 2008), http://www.boston.com/news/nation/washington/articles/2008/03/14/president_weakens_espionage_oversight/?page=full.

[348] Exec. Order No. 13516, *supra* note 340.

[349] ELECTRONIC FRONTIER FOUNDATION, PATTERNS OF MISCONDUCT: FBI INTELLIGENCE VIOLATIONS FROM 2001–2008, 4 (Jan. 2011), *available at* http://www.eff.org/files/EFF%20IOB%20Report_0_0.pdf.

[350] *Id.*

[351] Michael P. Weinbeck, *Watching the Watchmen: Lessons for Federal Law Enforcement from America's Cities*, 36 WM MITCHELL L. REV 1306, at 1328–29 (2010) (The Board "has largely operated as window dressing; . . . even at the zenith of its authority, [it] commanded little respect.").

[352] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 109-13, § 1061, 118 Stat. 3638, 3684 (codified at 5 U.S.C. § 601 (2006)).

[353] Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 801.

[354] Ginny Sloan, *The Privacy and Civil Liberties Oversight Board: In Need of Attention*, THE HUFFINGTON POST (Oct. 15, 2009), http://www.huffingtonpost.com/ginny-sloan/the-privacy-and-civil-lib_b_322527.html.

groups,[355] President Obama made no nominations to the Board until late in 2011.[356] It is highly likely that, if ever activated, the PCLOB will concern itself with domestic civil liberties rather than with the international human rights implications of national security policies. While such a focus could still result in actions that would impinge on targeted killings policy, the principal relevance of this initiative in the present context is to highlight the reluctance of successive administrations to establish meaningful human rights counterweights to the activities of the intelligence community.

The picture that emerges from this review of executive oversight bodies with the potential to exercise some genuine scrutiny of a greatly increased and rapidly expanding targeted killings program is far from encouraging. Near-complete secrecy characterizes the operations of the two principal bodies, the PIAB and the IOB. What little is known—such as in relation to the IOB's inactivity, reluctance and tardiness—would seem to suggest that the relevant agencies are largely captured by the very bureaucracies they are supposed to scrutinize. Their role seems to be that of promoting efficiency, and there is nothing to indicate that they will scrutinize the design or application of vaguely formulated policies and practices that give the intelligence community ever-greater leeway to kill those whom they deem to be terrorists or otherwise deserving of being included on kill/capture lists. The one encouraging exception cited above—concerning the CIA's operations in Guatemala—is entirely atypical because it involved the killing of an American and, probably even more relevantly, a self-destructive but ultimately public feud between the CIA and the U.S. Ambassador in the country.[357] Apart from the fact that these oversight agencies seem determined to provide no convincing evidence pointing to the effectiveness of the oversight they purport to exercise, it is also noteworthy that their structures and compositions reflect all too few of the characteristics that have generally been effective in

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[355] *See, e.g.*, Alan Charles Raul, *Privacy and Civil Liberties: Where's the Watchdog?*, WASH. POST (Oct. 23, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/10/22/AR2009102203802.html.

[356] These nominations were reported by the 9/11 Commission in its 2011 update. *See* NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, TENTH ANNIVERSARY REPORT CARD: THE STATUS OF THE 9/11 COMMISSION RECOMMENDATIONS 15 (Sept. 2011).

[357] *Cf.* Weiner, *supra* note 345, at 458–60.

ensuring independent oversight in comparable contexts.[358] Thus, the activation of the relevant bodies remains at the discretion of the President, there is no obligation to make appointments within any apparent time limit, there is almost no public disclosure of information, the principal expertise of many of the overseers is political rather than technical, and there is no evidence of any sort to indicate that human rights-related oversight has been exercised in any way for the past decade or more.

3. Congressional Oversight

The United States was one of the first countries to institutionalize congressional oversight, driven initially by revelations relating to domestic abuses by the Federal Bureau of Investigation.[359] By comparison with other democratic states, [360] the system of Congressional oversight in the United States is, in theory, relatively strong. The relevant committees have wide-ranging mandates, are empowered to examine both policy and operational issues, and have certain proactive as well as various reactive powers.[361] It is perhaps not surprising then that defenders of the CIA's targeted killings program have placed great store in the effectiveness of Congressional oversight.[362]

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[358] *Cf.* Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum: Study on Police Oversight Mechanisms*, U.N. Doc. A/HRC/14/24/Add.8 (May 28, 2010) (by Philip Alston); David Brereton, *Evaluating the Performance of External Oversight Bodies*, *in* CIVILIAN OVERSIGHT OF POLICING: GOVERNANCE, DEMOCRACY AND HUMAN RIGHTS 105 (Andrew Goldsmith & Colleen Lewis eds., 2000); Weinbeck, *supra* note 351, at 1328–31.

[359] *See* S. REP. NO. 94-755 (May 1976) (Final Report, Select Committee to Study Governmental Operations with respect to Intelligence Activities ("The Church Commission")).

[360] For comparative studies, see WHO'S WATCHING THE SPIES? ESTABLISHING INTELLIGENCE SERVICE ACCOUNTABILITY, (Hans Born, Loch Johnson, & Ian Leigh eds., 2005); MAKING INTELLIGENCE ACCOUNTABLE, *supra* note 286.

[361] For a description of the system see ERIC ROSENBACH & AKI J. PERITZ, CONFRONTATION OR COLLABORATION?: CONGRESS AND THE INTELLIGENCE COMMUNITY (2009), *available at* http://belfercenter.ksg.harvard.edu/files/IC-book-finalasof12JUNE.pdf.

[362] *See, e.g.*, Anderson, *supra* note 189, who emphasizes the importance of Congressional oversight. In addition, he argues that "the presumption that the CIA is less, rather than more, rigorous in its legal review of targeting seems to me as likely an automatic prejudice against the CIA as anything else. It might be true, but it should not be assumed; the political oversight mechanisms are in fact stronger." *Id.*

There is, however, remarkably little either in the public record, or in leaked information, which would sustain such confidence. In general, it is widely acknowledged that the oversight system has suffered from extensive shortcomings and the relationship between the CIA and Congress has been poor for many years.[363] The 9/11 Commission concluded in 2004 that Congressional oversight of intelligence and counter-terrorism activities was "dysfunctional,"[364] and it called for "dramatic change."[365]. A study by a former CIA Inspector-General, published by the CIA, describes relations with the Congress through 2004 in the following terms:

> Rather than a constructive collaboration to tackle genuine, long-term problems, oversight became a means of shifting political blame . . . either to the incumbent administration or away from it.
>
> When any intelligence agency perceives this is happening, communications will suffer. No longer confident how the committees will use the information they are provided, agencies become more wary of what they share with them.[366]

In 2007, Tim Weiner concluded that "congressional oversight of the [CIA] had collapsed."[367] He argued that the intelligence committees had not engaged the CIA on key issues for many years, and described their dismal legacy as consisting of "an occasional public whipping and a patchwork of quick-fixes . . . ."[368] Loch Johnson similarly characterizes congressional oversight as involving "sporadic patrolling and ad hoc responses to fire alarms."[369] In 2009, the Speaker of the House of

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[363] For a history of the early years see DAVID M. BARRETT, THE CIA AND CONGRESS: THE UNTOLD STORY FROM TRUMAN TO KENNEDY (2005).
[364] 9/11 COMMISSION REPORT, *supra* note 3, at 420.
[365] *Id.* at xvi.
[366] L. BRITT SNIDER, THE AGENCY AND THE HILL: CIA'S RELATIONSHIP WITH CONGRESS, 1946–2004, 90 (Center for the Study of Intelligence, Central Intelligence Agency, 2008), *available at* http://www.fas.org/irp/cia/product/snider.pdf.
[367] WEINER, *supra* note 345, at 511.
[368] *Id.* at 500–01.
[369] LOCH K. JOHNSON, SECRET SPY AGENCIES AND A SHOCK THEORY OF ACCOUNTABILITY 11 (2006), *available at* http://www.uga.edu/intl/Johnson%20occasional%20paper.pdf.

Representatives, Nancy Pelosi, charged that, "the CIA was misleading the Congress" and added, for good measure, that "they mislead us all the time."[370] Speaker Pelosi was responding to the agency's alleged failure to have adequately informed Congress about its use of waterboarding to extract information from detainees. That controversy was exacerbated by the CIA's subsequent destruction of videotapes showing such interrogations.[371] Many other incidents have also involved allegations that the CIA withheld information from Congress.[372] These include, in particular, the wiretapping program managed by the National Security Agency,[373] and a targeted killings plan that Vice President Cheney allegedly ordered the CIA to keep secret from Congress over an eight-year period.[374]

The principal shortcomings of the relationship between Congress and the intelligence community were identified in the report of the 9/11

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[370] Massimo Calabresi, *Pelosi Faces Off with Obama on CIA Oversight*, TIME (June 25, 2010), http://www.time.com/time/nation/article/0,8599,1999599,00.html.

[371] Ninety-two videotapes filmed in 2002 and showing the interrogation, including waterboarding, of two al-Qaeda leaders at a CIA prison in Thailand, were destroyed without their existence having been disclosed either to the FBI or to the 9/11 Commission. The CIA claimed that a few select members of Congress had been briefed but, following closed-door hearings, the Chairman of the House Permanent Select Committee on Intelligence opined that the failure to fully inform had been unacceptable. Walter Pincus & Joby Warrick, *House Panel Criticizes CIA Tape Destruction*, WASH. POST (Jan. 17, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/01/16/AR2008011604031.html. Another member spoke of a "thread of unaccountability in the spy culture" and criticized "parts of the intelligence community that don't believe they are accountable to Congress and may not be accountable to their own superiors." *CIA official acted on his own, House panel hears*, USA TODAY (Jan. 17, 2008), http://www.usatoday.com/printedition/news/20080117/a_cia17.art.htm.

[372] The Report on the Guatemala Review, *supra* note 313. ("The CIA failed to provide enough information on this subject to policy-makers and the Congress to permit proper policy and Congressional oversight.")

[373] *See* OFFICES OF INSPECTORS GENERAL OF THE DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, CENTRAL INTELLIGENCE AGENCY, NATIONAL SECURITY AGENCY, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM (July 10, 2009), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/IGreport_071109.pdf.

[374] Siobhan Gorman, *CIA Had Secret Al Qaeda Plan*, WALL ST. J. (July 13, 2009), http://online.wsj.com/article/SB124736381913627661.html; Shane Harris, *The Most Important Questions To Ask About the CIA's Targeted Killing Program*, SLATE (July 15, 2009), http://www.slate.com/id/2222934/.

Commission whose analysis has succeeded in framing much of the subsequent debate. The Commission focused especially on the need to reduce the number of congressional bodies responsible for oversight and to promote greater centralization of responsibility through the creation of either a single joint committee of the Senate and House or a single committee in each chamber dealing with both authorization and appropriation. While various cosmetic changes followed, not a great deal has changed in practice. The Commission also sought to promote greater expertise on the part of members, in part by reducing the size of the committees to between seven and nine members each. Today, the House Permanent Select Committee on Intelligence consists of 22 members while the Senate Select Committee on Intelligence is comprised of 15 Senators.

The rules governing if, when, and how Congress will be informed or consulted by the executive are of particular relevance in the present context. The 1947 National Security Act provides that Congress must be kept "fully informed" of significant intelligence activities, thus setting a very different standard from that which applies to military operations. In 1980, after the executive failed to inform Congress in advance of the Iran hostages mission, this was amended to provide that in the case of sensitive covert actions it would suffice in such future situations if only the so-called "Gang of Eight" were notified (the Senate and House Majority and Minority Leaders, and the Chairs and ranking members of the House and Senate Intelligence Committees). This procedure sought to achieve a balance between democratic oversight on one hand and the need for operational secrecy in covert activities on the other. In 1991, in reaction to the Reagan administration's concealment from Congress of its Iran-Contra dealings, Congress sought to limit the use of that procedure by calling for it to be applied only in cases involving "extraordinary sensitivity or risk to life."[375]

The Gang of Eight procedure has been strongly criticized for being overused, providing too little information, generating no significant records, providing members with no real opportunity for input, and amounting to a formality. A member of the House Committee complained that such notifications are not conducive to effective oversight because members

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[375] ALFRED CUMMING, CONG. RESEARCH SERV., SENSITIVE COVERT ACTION NOTIFICATIONS: OVERSIGHT OPTIONS FOR CONGRESS 2 (2011) (quoting CONF. REP. NO. 102-166, at 28 (1991).

"cannot take notes, seek the advice of their counsel, or even discuss the issues raised with their committee colleagues."[376] Indeed, the most extraordinary fact about the congressional notification procedures is how little is known, even by those very close to, but not actually engaged in the process. Thus in a 2011 report, the Congressional Research Service highlighted just how little is known about the extent to which the executive has complied with the relevant legal provisions. The questions they identified and to which they claim no answers are known include the criteria actually applied by the executive in determining whether and how to notify Congress, whether explanations have been furnished, as required by law, to congressional leaders in cases where a restrictive (Gang of Eight) notification approach has been adopted, whether the executive has ever briefed the intelligence committees after the event in relation to actions that were not notified to the Gang of Eight, whether the latter has ever determined that it should alert the intelligence committees to a matter of which it has been informed by the executive, and whether the committees have ever sought to develop procedures for dealing with the many issues that arise in this grey zone.[377]

In the debates preceding the FY2010 Intelligence Authorization Act, House negotiators sought major changes in these arrangements, including provisions to limit the use of the technique, to require at least some briefing to all intelligence committee members, and to require stronger written procedures. A threatened Presidential veto led to the substantial watering down of those changes.[378]

The Act provides that the intelligence committees may request information as to the legal authority under which particular intelligence activities, including covert actions, are being conducted. But a letter from the General Counsel of the Office of the Director of National Intelligence, which was included in the Congressional Record, seeks to limit this information to what seems like a generic explanation which "would not require disclosure of any privileged information or disclosure of

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[376] *Id.* at 7 (quoting Letter from Representative Jane Harman to President George W. Bush, Jan. 4, 2006).
[377] *Id.* at 1–8.
[378] *See generally* Kathleen Clark, *"A New Era of Openness?": Disclosing Intelligence to Congress Under Obama*, 26 CONST. COMMENTARY 313 (2010).

information in any particular form."[379] This approach would seem to preclude the committees from insisting upon seeing detailed legal analyses provided by relevant officials, including the Office of Legal Counsel.[380]

Much has been written about the type of reforms that might have enhanced congressional oversight of the intelligence community. The most striking aspect is the extent to which they are predicated upon a belief that the situation can be radically improved through adjustments to the institutional design of the oversight arrangements. But various authors have exposed the fallacy of this approach,[381] and it is difficult to disagree with Johnson who has consistently made the point that structural or design factors are less important than the motivations of those who are asked to conduct the oversight.[382] It should be added that examples from other jurisdictions are more encouraging, but hardly inspiring, in this regard.[383] The difference, however, between those other jurisdictions and the United States is that in the case of the latter the stakes are much higher, especially in human rights terms, since what is in need of oversight is a rapidly expanding global program of state-directed killings.

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[379] 156 CONG. REC. S7500 (daily ed. Sept. 27, 2010) (Letter to Hon. Dianne Feinstein from Robert S. Litt), *available at* http:/www.fas.org/irp/congress/2010_cr/sen-fy10auth.html.

[380] Robert Chesney, *Key Points to the FY2010 Intelligence Authorization Act*, LAWFARE BLOG, (Sept. 29, 2010), http://www.lawfareblog.com/2010/09/key-points-in-the-fy2010-intelligence-authorization-act/.

[381] For a strong analysis of the inherent complexity of identifying arrangements which reflect a balanced equilibrium between security and oversight concerns see EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), REPORT ON THE DEMOCRATIC OVERSIGHT OF THE SECURITY SERVICES, DOC. CDL-AD(2007)016, STUDY NO. 388 / 2006 (June 11, 2007), *available at* http://www.venice.coe.int/docs/2007/CDL-AD(2007)016-e.asp. In terms of the arguments for and against specific proposals for reform in the United States congressional context, see especially O'Connell, *supra* note 101.

[382] *See* LOCH K. JOHNSON, AMERICA'S SECRET POWER: THE CIA IN A DEMOCRATIC SOCIETY 211 (1989); Loch K. Johnson, *Intelligence Oversight in the United States*, *in* INTELLIGENCE AND HUMAN RIGHTS IN THE ERA OF GLOBAL TERRORISM 54, 63 (Steve Tsang ed., 2008).

[383] *See* Caparini, *supra* note 311.

4. Judicial Review

In June 2009, the *New York Times* ran a story with the headline "Lawsuits Force Disclosure by C.I.A."[384] Although the story dealt specifically with challenges to the CIA's interrogation program, it suggested more generally that in situations in which the executive and Congress were reluctant to probe the CIA, the best prospect of compelling accountability was offered by the courts. If this were the case, the situation would comport with IHRL requirements that, in the words of the ICCPR, any person whose rights "are violated shall have an effective remedy."[385] While additional considerations clearly apply in relation to matters involving national security, the practice of the vast majority of liberal democracies is to provide for a significant role for the judiciary, and sometimes for other specially designed administrative recourse bodies, in situations in which it is alleged that human rights obligations are being breached in the name of national security.[386] This does not mean that judicial oversight is either routine or straightforward, but it does mean that there is a firm commitment to ensuring that the power of intelligence agencies is not exercised arbitrarily, thus undermining the rule of law.[387] For example, the Israeli Supreme Court has ruled on the conditions under which targeted killings can take place within the law and held that there must be a retroactive and independent investigation of each instance in which the power has been invoked.[388] In the European context, the European Court of Human Rights has established a reasonably extensive jurisprudence relating to the need for judicial review or other effective forms of individualized redress when human rights are violated by security agencies.[389] If these principles were applied to the practice of governmentally authorized targeted killings, the law might be expected to provide legal recourse to challenge the inclusion of a person's name on a

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[384] Scott Shane, *Lawsuits Force Disclosures by C.I.A.*, N.Y. TIMES (June 10, 2009), http://www.nytimes.com/2009/06/10/us/politics/10intel.html.
[385] ICCPR, *supra* note 47, art. 2(3)(a).
[386] For a detailed survey see REPORT ON THE DEMOCRATIC OVERSIGHT OF THE SECURITY SERVICES, *supra* note 381, at ¶¶ 195–250.
[387] HANS BORN & IAN LEIGH, DEMOCRATIC ACCOUNTABILITY OF INTELLIGENCE SERVICES, GENEVA CENTER FOR THE DEMOCRATIC CONTROL OF ARMED FORCES, POLICY PAPER NO. 19 14 (2007).
[388] *See* text accompanying *infra* notes 468–469.
[389] *See* REPORT ON THE DEMOCRATIC OVERSIGHT OF THE SECURITY SERVICES, *supra* note 381, at ¶¶ 195–201.

kill/capture list, to challenge the legality of such killings ex post facto, to require the disclosure of information justifying the decision to kill, or to prosecute individuals accused of having killed in circumstances not permitted by the law.

But whatever the theory, in practice such judicial protection is not generally available in United States courts. Individuals and, *a fortiori*, interest groups seeking to challenge the legality of intelligence agency actions have a range of largely insurmountable obstacles to overcome. To begin with, binding international treaties have been rendered non-self-executing and thus unenforceable in U.S. courts.[390] In terms of domestic law, military actions are generally excluded from the purview of the Administrative Procedure Act, which also exempts rulemaking related to foreign relations from notice and comment requirements.[391] In order to get to court, complainants must satisfy strict standing requirements, establish that the action does not fall foul of the political question doctrine, show that the case can be made without impinging upon the state secrets privilege, and must finally convince a court not to exercise its "equitable discretion" to decline to rule on sensitive matters. In other words, there is a veritable thicket of procedural and substantive rules designed to uphold a policy of general deference to the executive in matters dealing with foreign relations in general, and with foreign intelligence matters in particular.[392]

The contrast with the approach adopted in other comparable jurisdictions is well illustrated by the case of Maher Arar.[393] In 2002 Arar, a Canadian resident and citizen, with joint Syrian citizenship, was taken into U.S. custody at John F. Kennedy Airport in New York, questioned about suspected involvement with al Qaeda, and subsequently rendered to Syria where he was allegedly tortured and interrogated for ten months. In the United States, Arar's civil action against the government was dismissed in

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390 Thus, for example, both the ICCPR and the Geneva Conventions have been held not to create obligations enforceable in the federal courts as a result of their non-self-executing status. In relation to the ICCPR see Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004); and in relation to the Geneva Conventions see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808–09 (D.C. Cir. 1984).

391 5 U.S.C. §§ 551 (1)(G), 553 (a)(1) (2006).

392 *See generally* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783 (2011).

393 For a detailed comparison of approaches see Erin E. Langley, *The Loss of American Values in the Case of Erroneous Irregular Rendition*, 98 GEO. L.J. 1441 (2010).

2009 by the Second Circuit primarily on the grounds that an appropriate remedy did not exist. More importantly, however, the majority made clear that this was not the type of situation in which the courts should intervene. Chief Judge Jacobs expressed deep concern at the prospect that a court might be involved in "an inquiry into the work of foreign governments and several federal agencies, the nature of certain classified information, and the extent of secret diplomatic relationships."[394] Such efforts might embarrass the government, through the disclosure of secret information, raise grave concerns about the separation of powers, and involve matters beyond "the decidedly limited experience and knowledge of the federal judiciary."[395] The long list of concerns identified by the court did not include the obligation of the government or the judiciary to protect human rights or to provide an appropriate remedy when they have been violated.

In dramatic contrast, the Government of Canada appointed an independent commission of inquiry to investigate Arar's case. It questioned over 70 Canadian government officials as witnesses, some in public session and others *in camera*, and reviewed 21,500 government documents, just under a third of which were formally submitted as exhibits. In deference to foreign relations and national security concerns, the Commissioner prepared two versions of his factual report. The first includes a summary of all of the evidence, including that considered confidential for reasons of national security. It was not made public. The second reflects a great deal of the overall evidence and was published in a volume of almost 400 pages. All of the Commissioner's conclusions and recommendations were published.[396] Following publication of the report, the Prime Minister issued a formal apology, wide-ranging recommendations designed to avoid repetitions were endorsed, and compensation of C$10.5 million, plus legal fees, were paid to Arar.[397]

But if the Arar case seems to paint a discouraging picture of the prospects for judicial review in relation to national security issues, an even clearer indication of the effective non-justiciability of extraterritorial

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[394] Arar v. Ashcroft, 585 F.3d 559, 578 (2d Cir. 2009).
[395] *Id.*
[396] COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 10–11 (2006), *available at* http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf.
[397] *See* Langley, *supra* note 393, at 1443.

targeted killings in United States courts came with the 2010 decision in *Al-Aulaqi v. Obama*.[398] The case involved the alleged inclusion of Anwar Al-Aulaqi on a CIA/JSOC kill list, a fact neither confirmed nor denied by the government. Al-Aulaqi is a joint United States-Yemeni citizen, residing in Yemen, who is alleged to have been playing "an increasingly operational role" in a designated terrorist group, al Qaeda in the Arabian Peninsula (AQAP). As a result of his statements calling for jihad against the West and other activities, the U.S. Treasury Department has listed him as a "Specially Designated Global Terrorist." The U.S. District Court for the District of Columbia dismissed the case primarily on the grounds that there was no convincing basis upon which Al-Aulaqi's father could establish standing to bring the case on behalf of his son. But perhaps out of concern that some future targeted individual might be able to establish standing in different circumstances, Judge Bates also adduced strong arguments as to why the political question doctrine would in any event prevent the consideration of such cases.

While acknowledging powerful judicial and scholarly critiques of the way in which the doctrine has been interpreted and applied, Judge Bates nevertheless cited with approval earlier findings that the courts are ill-equipped "to assess the nature of battlefield decisions"[399] or "to define the standard for the government's use of covert operations in conjunction with political turmoil in another country."[400] In elaborating upon the reasons for the judiciary's lack of competence in such matters, he noted that judicially manageable standards are absent both in relation to an assessment of "the President's interpretation of military intelligence and his resulting decision—based on that intelligence—whether to use military force against a terrorist target overseas," and to a determination of "the nature and magnitude of the national security threat posed by a particular individual."[401] Turning to the case at hand, the judge asserted that responding to the plaintiff would require the court to decide:

> (1) the precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of

[398] 727 F. Supp. 2d at 1.
[399] *Id.* at 118, citing DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973).
[400] *Id.*, citing Schneider v. Kissinger, 412 F.3d 190, 197 (D.C. Cir. 2005).
[401] *Id.* at 123–24.

> Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether . . . Al-Aulaqi's alleged terrorist activity renders him a "concrete, specific, and imminent threat to life or physical safety," . . .; and (4) whether there are "means short of lethal force" that the United States could "reasonably" employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests.[402]

But this already lengthy and intimidating list of issues on which he claimed the court would have to decide was not to be the end of the matter. Instead, Judge Bates further ratcheted up the stakes by implicitly endorsing the government's claim that seeking to answer these questions would, in turn, require the court to understand and assess:

> the capabilities of the [alleged] terrorist operative to carry out a threatened attack, what response would be sufficient to address that threat, possible diplomatic considerations that may bear on such responses, the vulnerability of potential targets that the [alleged] terrorist[] may strike, the availability of military and non-military options, and the risks to military and nonmilitary personnel in attempting application of non-lethal force.[403]

But Judge Bates was still not quite finished. He went on to note that, in order to rule on the application, the court would also need "to elucidate the . . . standards that are to guide a President when he evaluates the veracity of military intelligence."[404]

Any claim for judicial relief would surely stumble and collapse under the weight of such wide-ranging and demanding questions. If this case did not encapsulate judicial unmanageability, whatever could? The problem, however, is that the great majority of these questions were not

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[402] *Id.* at 120.
[403] *Id.* at 121.
[404] *Id.* at 70, quoting El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1365 (Fed. Cir. 2004).

posed by the plaintiff[405] and nor would they need to be addressed, let alone resolved, if the court had been at all willing to engage with the core issue stated in the plaintiffs first prayer for relief, seeking a declaration that "outside of armed conflict, the Constitution prohibits Defendants from carrying out the targeted killing of U.S. citizens, . . . except in circumstances in which they present concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats."[406] It would have been entirely open to the court to take this question at face value which would, at a minimum, have required the Government to affirm that it considered Al-Aulaqi to be in a situation governed by IHL, thus rendering inapplicable the IHRL standard identified in the question posed to the court.

Unsurprisingly, it seems that the two organizations behind the suit—the Center for Constitutional Rights and the American Civil Liberties Union—concluded that it would be unwise to appeal the decision and risk locking in an interpretation that they characterized as affirming "the government's claim of unreviewable authority to carry out the targeted killing of any American, anywhere, whom the president deems to be a threat to the nation."[407]

While these cases illustrate the extent to which the standing and political privilege doctrines constitute major barriers to litigation over

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[405] *See* Kevin Jon Heller, *Rebuttal by Kevin Jon Heller: Judge Bates's Infernal Machine, in Targeted Killing: The Case of Anwar Al-Aulaqi*, *in* PENNUMBRA (2011), *available at* http://www.pennumbra.com/debates/debate.php?did=40.

[406] *Al-Aulaqi*, 727 F. Supp. 2d at 12 (citing Compl., Prayer for Relief (a); *id.* ¶ 6; Pl.'s Mem. at 39–40) (internal quotation marks omitted).

[407] *See* Benjamin Wittes, *No Appeal in Al-Aulaqi*, LAWFARE BLOG, (Feb. 22, 2011), http://www.lawfareblog.com/2011/02/no-appeal-in-al-aulaqi/. The CCR and ACLU went on to add that "[t]he executive's claimed right to act as prosecutor, judge and executioner dangerously undermines the rule of law and the protection of human rights here and abroad" and to affirm what they viewed as the judiciary's crucial role in relation to such issues. Judge Bates, for his part, had explicitly rebutted the claim that the decision affirmed the government's "unreviewable authority" by insisting that the Court had "only conclude[d] that it lacks the capacity to determine whether a specific individual in hiding overseas, whom the Director of National Intelligence has stated is an 'operational' member of AQAP presents such a threat to national security that the United States may authorize the use of lethal force against him." *Al-Aulaqi*, 727 F. Supp. 2d at 52 (internal citations omitted).

targeted killings policy, the most watertight defense of all in such cases is likely to be the state secrets privilege.[408] This privilege, grounded in federal law through the 1953 Supreme Court decision in *United States v. Reynolds*,[409] a case which in which ironically the "secrets" invoked by the government were later shown to have involved neither classified nor national security-related information,[410] has been used very extensively in the post 9/11 era. Critics accused the Bush administration of making vastly excessive use of the defense,[411] although such claims need to be balanced against the absence of any comprehensive database of cases in which the privilege has been invoked.[412] While the Obama Administration has sought to institute a policy that requires more rigorous internal justification before the Department of Justice will assert the privilege in litigation,[413] this policy has been criticized as soft and "largely hortatory" and, in any event, as providing no externally verifiable assurances that reasonable standards are being enforced.[414]

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[408] This doctrine was touched upon but not applied by Judge Bates in *Al-Aulaqi v. Obama*. He noted that the state secrets defense should be used only sparingly and need not be addressed in this case since the action clearly failed on standing and political question grounds. *Al-Aulaqi*, 727 F. Supp. 2d at 54. But this did not stop him from including obiter dicta explaining why the claimed privilege would almost certainly have been upheld had it been necessary to do so. *Id.* at 144 n.16, 145 n.17.

[409] 345 U.S. 1 (1953).

[410] William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q 85, 99 (2005) (Based on information released on the basis of Freedom of Information Act requests, they conclude that the government's goal in claiming the privilege was "to avoid liability and embarrassment").

[411] *See* PATRICE MCDERMOTT & AMY FULLER, SECRECY REPORT CARD 2008, 20 (2008), *available at* http:// www.openthegovernment.org/otg/SecrecyReportCard08.pdf; Richard Abel, *Forecasting Civil Litigation*, 58 DEPAUL L. REV. 425, 436 (2009); Laura Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 213–16 (2010); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939–40 (2007); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 153 (2006); D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499, 522–27 (2007).

[412] Robert Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1301–02 (2008).

[413] ERIC HOLDER, MEMORANDUM FROM THE ATTORNEY GEN. TO THE HEADS OF EXECUTIVE DEP'TS AND AGENCIES ON POLICIES AND PROCEDURES GOVERNING INVOCATION OF THE STATE SECRETS PRIVILEGE (Sept. 23, 2009), *available at* http://www.justice.gov/opa/documents/state-secret-privileges.pdf.

[414] Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENTARY 625, 644–46 (2010).

The extent of the state secrets privilege and of its almost certain ability to preclude any suits relating to the CIA and its targeted killings program is well illustrated by the Ninth Circuit's rejection of a lawsuit filed by five individual victims of the CIA's secret renditions program. They alleged that a subsidiary of Boeing, Jeppesen DataPlan, Inc., provided flight planning and logistical support services to the CIA, knowing that they were being used for rendition purposes.[415] The government offered an expansive definition of the scope of the privilege, asserting that it covered

> [1] information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with clandestine intelligence activities; [2] information about whether any foreign government cooperated with the CIA in clandestine intelligence activities; [3] information about the scope or operation of the CIA terrorist detention and interrogation program; [or 4] any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods. [416]

Having reviewed much of the secret information, the court concluded that the relevant secrets fell within one of more of these four categories, but could not provide more detail because of the secret nature of the information.[417] The majority concluded that the renditions could not be litigated without risking divulgence of state secrets.[418]

One of the most revealing aspects of the majority opinion is its recognition of the unsatisfactory implications of such a restrictive approach. Thus, after noting that "[d]enial of a judicial forum based on the state secrets doctrine poses concerns at both individual and structural levels," primarily because it ends the possibility of judicial review of the alleged misconduct, the majority made a major effort to identify other possible remedies that might be open to the complainants.[419] They discussed four possibilities: (1) the government, in order to honor "the fundamental

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[415] Mohamed v. Jeppesen Dataplan, Inc., 614 F. 3d 1070, 1075 (9th Cir. 2010).
[416] *Id.* at 1086.
[417] *Id.*
[418] *Id.* at 1087.
[419] *Id.* at 1091.

principles of justice" could voluntarily provide reparations; (2) Congress could investigate alleged wrongdoing, either through its own means, or by reliance on the CIA Inspector-General; (3) Congress could enact a private bill in order to provide a remedy; and (4) Congress could "enact remedial legislation authorizing appropriate causes of action and procedures to address claims like those presented here."[420]

Although the majority acknowledged that, "each of these options brings with it its own set of concerns and uncertainties,"[421] they were clearly keen to refute concern that they had created a remedial vacuum in which government misconduct would go effectively unchecked. The minority, however, were scathing about both the utility and propriety of these suggested remedies. Suggesting voluntary reparations, for example, was dismissed as elevating "the impractical to the point of absurdity."[422]

But the very high barrier to ever getting the CIA into court in a civil suit that was confirmed by *Mohamed v. Jeppesen Dataplan, Inc.* should not have come as a surprise. Even before the Supreme Court denied certiorari review of the judgment,[423] both the critics and supporters of renditions and comparable policies had concluded that judicial remedies for any such actions were highly unlikely ever to succeed in U.S. courts. After a lengthy review of the law and policy, Daniel Pines, a CIA Assistant General Counsel, noted that government officials "face few legal restrictions on rendition operations," a conclusion that he interpreted as undermining claims that such operations violate U.S. law as well as suggestions that officials responsible should be prosecuted.[424] George Brown, on the other hand, initially argues that civil tort claims brought by those who claim to be victims of the war on terror provide "the most likely source of accountability."[425] Nonetheless, after a thorough review of the actual results achieved, he concludes that the likely result of such suits is "[d]ismissal at or near the threshold."[426] He concludes that, instead of looking to Congress or

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[420] *Id.* at 1091–92.
[421] *Id.* at 1091.
[422] *Id*. at 1101 (Hawkings, J. dissenting).
[423] Mohamed v. Jeppesen Dataplan, Inc., 131 S. Ct. 2442 (2011) (mem.).
[424] Daniel L. Pines, *Rendition Operations: Does U.S. Law Impose Any Restrictions?*, 42 LOY. U. CHI. L.J. 523, 582 (2011).
[425] George D. Brown, *Accountability, Liability, and the War on Terror-Constitutional Tort Suits as Truth And Reconciliation Vehicles*, 63 FLA. L. REV. 193, 248 (2011).
[426] *Id.*

to the courts for accountability the best way forward is to establish a commission of inquiry on a "generalized, non-retributive model."[427] In other words, forget about prosecution or meaningful individual or collective accountability, and focus instead on policy recommendations designed to draw lessons from the past.

Many scholars have proposed amendments to the state secrets doctrine, with a view to making their application less expansive and less suffocating in terms of enabling the courts to undertake at least a preliminary review of the material which is asserted to be privileged.[428] The State Secrets Protection Act, designed to achieve such various important reforms, has languished, at the time of this writing, for a couple years in Congress and seems highly unlikely to be adopted.[429]

Three conclusions can be drawn from this survey of potential judicial remedies for CIA misconduct or illegality in relation to targeted killings. The first is that a virtual consensus seems to be shared by the executive branch, Congress, and the courts that alleged misconduct by the CIA should almost never be subjected to domestic legal adjudication. The second is that by dint of various judicially created doctrines, such as the state secrets privilege, U.S. courts have abdicated responsibility in situations in which the courts in countries like Israel, the United Kingdom, Canada, and Australia, and the European Court of Human Rights (monitoring the situation in 47 European states), have all chosen to declare to be justiciable at least in part. The third conclusion is that each branch tends to assume that the other holds open at least some remedial possibilities, while remaining steadfast in not providing it themselves. Congress looks to the courts, the courts look to Congress, and the CIA invokes Congressional oversight in its defense.

The final link in this vicious circle is that the CIA itself will go to great lengths to avoid any criminal prosecution of its personnel. This was clearly illustrated when Attorney General Eric Holder appointed a prosecutor to examine whether those involved in the CIA's interrogations

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[427] *Id.*

[428] Louis Fisher, *Rethinking the State Secrets Privilege*, *in* OXFORD HANDBOOK OF NATIONAL SECURITY INTELLIGENCE, *supra* note 11, at 657; Chesney, *supra* note 412, at 308–14.

[429] State Secret Protection Act of 2009, H.R. 984, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h111-984.

program had committed any criminal offences. Almost immediately, seven former CIA Directors requested the President to terminate the inquiry on various grounds. They included the need for "permanence in the legal rules" governing the measures taken by such personnel, the risk that the disclosure of information would assist al Qaeda, that foreign intelligence agencies would in future be reluctant to cooperate with the CIA, and that the nation's ability to protect itself would be seriously damaged.[430] The former Attorney General called the investigation "absolutely outrageous" and "unconscionable" and added that "it's going to do no good and demoralize [the CIA] for a long time."[431] After two years, the Attorney General announced that all but two of the almost 100 cases referred to the prosecutor had been closed.[432] In response, the chair of the House Intelligence Committee noted that "an undeserved cloud of doubt and suspicion" had finally been lifted from the CIA and expressed the hope that the CIA could henceforth "move forward with their critical work free from the chilling effect of further investigation,"[433] while the ranking member of the Senate Judiciary Committee expressed relief that "our intelligence professionals in the field can stop looking over their shoulders" and

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[430] Peter Baker, *C.I.A. Chiefs Ask Obama To Abandon Abuse Inquiry*, N.Y. TIMES (Sept. 19, 2009), http://query.nytimes.com/gst/fullpage.html?res=9407E5DB1439F93AA2575AC0A96F9.C8B63&ref=rjameswoolsey. Even the CIA Inspector-General whose detailed report had exposed serious violations of the relevant rules by some interrogators expressed the view that no CIA personnel should be prosecuted, primarily because of what he described as "the clear absence of any criminal intent." *Ex-CIA Inspector General on Interrogation Report*, *supra* note 322.

[431] Allen McDuffee, *Mukasey to Holder: 'Absolutely Outrageous' to Pursue CIA Employees on Interrogation Techniques*, WASH. POST (May 31, 2011), http://www.washingtonpost.com/blogs/think-tanked/post/mukasey-to-holder-absolutely-outrageous-to-pursue-cia-employees-on-interrogation-techniques/2011/05/31/AGhoLbFH_blog.html.

[432] Eric Lichtblau & Eric Schmitt, *U.S. Widens Inquiries Into 2 Jail Deaths*, N.Y. TIMES (June 30, 2011), http://www.nytimes.com/2011/07/01/us/politics/01DETAIN.html?_r=1&hp.

[433] U.S. House of Representatives, Permanent Select Committee on Intelligence, Chairman Rogers Praises Vindication of CIA Interrogators (June 30, 2011), *available at* http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/063011StatementDetaineeInterrogations.pdf.

suggested that the Attorney General should "quit armchair quarterbacking intelligence decisions in the field."[434]

5. External Oversight

Civil society and the media both exercise a highly contingent element of oversight in relation to the intelligence community. Unlike the previous four types of oversight, it is not formally mandated and remains very much at the mercy of events. To the extent that it is formally recognized, it is through the provisions of the Freedom of Information Act (FOIA) which, along with the Foreign Intelligence Surveillance Act (FISA), has been accurately described as "the closest thing we have to a constitutional amendment on state secrecy."[435] The CIA is subject to the provisions of FOIA, although the operational records maintained by its National Clandestine Service, its Directorate of Science and Technology, and its Office of Security are all exempted from FOIA's search, review, and disclosure provisions.[436]

Unsurprisingly, various civil society groups have been at the forefront of efforts to obtain disclosure by the CIA of documentation relating to its targeted killings policies and programs. In January 2010, the ACLU filed a FOIA request asking all of the relevant government agencies, including the CIA and DOD, to disclose the legal basis for drone-based targeted killings overseas, as well as information on when, where, and against whom drone strikes can be authorized, the number and rate of civilian casualties, and a range of other issues.[437]

But while the mere fact that FOIA requests can be filed in an effort to obtain information about the CIA's targeted killings policies and programs is impressive, the reality is much less so. In February 2011, National Security Counselors, a civil society group with considerable expertise in submitting FOIA requests, filed three lawsuits against the CIA

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[434] Press Release, Sen. Charles Grassley, Grassley Comments on Justice Department Intelligence Community Investigations (June 30, 2011), *available at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=35778.
[435] Pozen, *supra* note 73, at 314.
[436] CIA Information Act, 50 U.S.C. § 431.
[437] AMERICAN C.L. UNION, ACLU REQUEST UNDER FREEDOM OF INFORMATION ACT, (Jan. 13, 2010), *available at* http://www.aclu.org/files/assets/2010-1-13-PredatorDroneFOIARequest.pdf.

accusing it of serious violations of the letter and spirit of the Act.[438] In particular, its litany of allegations focused on the lack of transparency in the process used by the CIA to assess FOIA claims.[439] It also drew attention to alleged abusive invocation of the "Glomar response".[440] While this technique has been in use since the 1970s, it has been invoked with increasing frequency since 9/11.[441] Its nature is best illustrated by a concrete example. In its 2010 response to a request for information relating to any plans to assassinate Julian Assange, the spokesperson for Wikileaks, the Agency wrote that it "can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure . . . ."[442] In other words, the very act of acknowledging that any pertinent records exist would violate disclosure rules. The perfect circularity of this response has been a subject of considerable scholarly criticism, but the rule remains firmly intact.[443]

In September 2011, the District Court for the District of Columbia upheld the validity of the CIA's rejection of the ACLU's FOIA request on the basis of a Glomar response.[444] It noted that although the then-CIA Director had spoken extensively about CIA drone strikes, he never referred to any records documenting such a program and the agency could thus not be compelled to declare whether or not any such records exist. As the Court put it, in somewhat Orwellian terms, "only by inference from [the

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[438] *Litigation*, NATIONAL SECURITY COUNSELORS, http://nationalsecuritylaw.org/litigation.html (last visited Nov. 15, 2011).

[439] *See* First Amended Complaint at 3–4, National Security Counselors v. Central Intelligence Agency, et al. (No. 1:11-cv-0445-BAH).

[440] *Id.* at 14–15.

[441] Nathan Freed Wessler, *"[We] Can Neither Confirm Nor Deny the Existence or Nonexistence of Records Responsive to Your Request": Reforming the Glomar Response Under FOIA*, 85 N.Y. SCH. L. REV. 1381, 1382, & 1395 (2010).

[442] *See* Letter from Scott Koch, Acting Information and Privacy Coordinator, CIA (Nov. 12, 2010), *available at* http://www.scribd.com/doc/41241585/CIA-Response-to-Assange-Assassination-FOIA-duplication-via-twitter-wikileaks.

[443] *See* Wessler, *supra* note 436, at 1415 (calling for vigorous regulation and oversight in order to "prevent the Glomar response from continuing to be an exception that swallows the rule.").

[444] American Civil Liberties Union v. Department of Justice, No. 10-0436, slip op. at 1 (RMC), (D.D.C. Sept. 9, 2011), *available at* http://www.politico.com/static/PPM229_110909_acludrones.html.

Director's] statements might one conclude that the CIA might have some kind(s) of documentation somewhere."[445]

The bottom line is that civil society groups, confronted with the systematic application of such freedom of information restrictions, and the use of an array of other delaying and avoidance tactics, have little prospect of being able to obtain meaningful information about extraterritorial targeted killings activities. This helps to explain their interest in exploring the possibilities that might be available through actions taken in foreign courts.

The role of the media in relation to targeted killings has been of major importance, as illustrated by the fact that much of the detail in this Article describing the contours of the drone-based targeting and the kill and capture raids is sourced from the media. By the same token, the media is far from being an unalloyed accountability mechanism. The *New York Times*, for example, delayed for almost a year the publication of information about the warrantless wiretapping program of the NSA.[446] And they will be under increased pressure in the future in relation to such exposes as conservative commentators condemn "tell-all-and-damn-the-consequences journalism"[447] and argue that First Amendment law needs to be adapted in order to defend society from journalists "who would subvert democracy by placing themselves above the law."[448]

Strategic leaks purveyed by the media have also played a powerful role in legitimizing the targeted killings program by trumpeting the killing of senior militants and disseminating the CIA's entirely unsubstantiated accounts of the number of civilian casualties. Much of this information appears to have been leaked in a manner that is not entirely arbitrary, but it is also clear that the available information is far from comprehensive, not

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[445] *Id.* at 24.

[446] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all. For a strong critique of congressional inaction in response to this program, see Tara M. Sugiyama & Marisa Perry, *The NSA Domestic Surveillance Program: An Analysis of Congressional Oversight During an Era of One-Party Rule*, 40 U. MICH. J.L. REFORM 149 (2006).

[447] GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW 12 (2010).

[448] *See id.* at 275.

necessarily reliable given internal contradictions, and in any event largely unverifiable. At the end of the day, it is difficult to disagree with Pozen's conclusion that "leaks are not an adequate or attractive substitute for prophylactic measures. Leaks have proven too unreliable, partial, and belated, and they are too destructive in their own right; they may also be criminal offenses."[449]

6. Drawing conclusions

Despite the existence of a multiplicity of techniques by which the CIA might be held to account at the domestic level, the foregoing survey demonstrates that there is no evidence to conclude that any of them has functioned effectively in relation to the expanding practices involving targeted killings. The CIA Inspector General's Office has been unable to exact accountability and proposals to expand or strengthen his role run counter to almost all official actions taken in relation to his work. The President's Intelligence Oversight Board and the President's Foreign Intelligence Advisory Board are lauded by some for their potential, but there is no indication that they scrutinize activities such as targeted killings policy or practice, and many indications that they view their role as being to support rather than monitor the intelligence community. The Privacy and Civil Liberties Oversight Board remains dormant. Congressional oversight has been seriously deficient and far from manifesting an appetite to scrutinize the CIA's targeted killings policies, a range of senior members of congress are on record as favoring a hands-off policy. And a combination of the political question doctrine, the state secrets privilege, and a reluctance to prosecute, ensure that the courts have indeed allowed the CIA to fall into a convenient legal grey hole. Finally, civil society has been largely stymied by the executive and the courts in their efforts to make effective use of freedom of information laws. All that remains is the media, and most of what they obtain through leaks come from government sources that are deliberately "spinning" the story in their own favor. Similar conclusions have been reached in closely related contexts. Thus, for example, Kitrosser's survey of official responses to the warrantless wiretapping initiated after 9/11 led her to conclude that it was a shell

[449] Pozen, *supra* note 73, at 329.

game, involving "an indefinite bi-partisan, cross-administration, cross-institutional pattern of accountability-avoidance."[450]

In brief, at least in relation to targeted killings, the CIA enjoys almost complete impunity and is not subject to any form of meaningful internal or external accountability. Whether from the perspective of democratic theory or of international accountability for violations of the right to life, this is deeply problematic. One solution to this that has been suggested by some commentators is to follow the precedent set by Israel in its efforts to ensure legal oversight of its target killings programs. We turn now to examine the feasibility and desirability of pursuing such an option.

## VI. Assessing the Relevance of the Israeli Precedent

Much of the discourse surrounding existing and proposed American targeted killing policies, and especially the legal discourse, has sought to draw lessons, by way of analogy, from the legal framework and practices in this area pioneered by Israel.[451] Proponents of a permissive approach by the United States often point to Israel's experience arguing both that it has been both consistent with international law and highly effective in terms of the results achieved. For Michael Gross, targeted killings are "the paradigmatic 'smart' weapon: identify your prey, hunt him down, and kill him."[452] It is thus a practice held to be worthy of emulation. Similarly,

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[450] Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENTARY 483, 501 (2010) ("The key feature of the game is that at times, one accountability mechanism is thwarted … with assurances that alternative mechanisms lie ahead, only for the alternative mechanisms to be thwarted later by similar reasoning." *Id.* at 501–02.). On the same question see also Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 B.Y.U.L. REV 357, 406–07 (2010). (Concluding that there has yet to be "a thorough, transparent, and independent evaluation" of the program. *Id.* at 407.).

[451] The Jerusalem Post for example urged the West to adopt Israeli techniques including targeted killings. It noted that "[o]f course, this would mean disregarding the whinging of the UN Human Rights Council's Philip Alston, who this week took the Obama administration to task for its policy of targeted assassinations of terrorist chieftains." *The Week in Blood-It's Been Another Dreadful Week in the War of Civilizations*, JERUSALEM POST (Oct. 30, 2009), *reprinted at* http://www.freerepublic.com/focus/f-news/2374465/posts. The relevant parts of this editorial were included in a cable sent to the State Department by the US Embassy in Israel, and subsequently leaked.

[452] Michael L. Gross, *Assassination: Killing in the Shadow of Self-Defense*, *in* WAR AND VIRTUAL WAR: THE CHALLENGES TO COMMUNITIES 99, 99 (Jones Irwin ed., 2004).

Daniel Byman has praised Israel's use of targeted killings to combat terrorism and has urged the United States to follow its approach, including its openness about the policy and its procedures for authorizing killings but also provide for some form of legal review of relevant decision-making.[453] It is thus very important in the present context to understand how Israel's policy works in practice and to get a sense of the extent to which its experience would counsel the adoption of similar policies by other states,[454] and especially by the United States. It is of particular relevance in the present context because of the emphasis that has been placed upon legal accountability in the Israeli context, which raises the question of whether the United States should or could also follow that dimension of the precedent.

In the 1990s, Israel insisted that it did not engage in targeted killings. When accused of doing so, the Israel Defense Forces (IDF) "wholeheartedly" rejected the accusation, stating that "[t]here suspects . . .has never been, nor will there ever be an IDF policy of intentional killing of wanted fugitives . . . [t]he sanctity of life is a basic IDF value."[455] In November 2000, however, the Israeli Government confirmed the existence of a policy pursuant to which it justified targeted killings in self-defence and under IHL because the Palestinian Authority was failing to prevent, investigate, and prosecute terrorism and, especially, suicide attacks directed at Israel.[456] This was reinforced by a 2002 legal opinion by the Israeli Defense Force Judge Advocate General examining the conditions under which targeted killings could be considered to be legal.[457]

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[453] Daniel Byman, *Do Targeted Killings Work?*, FOREIGN AFF., March/April 2006, 95 at 110–11.

[454] Anthony Dworkin, *Israel's High Court on Targeted Killing: A Model for the War on Terror*, CRIMES OF WAR PROJECT (Dec. 15, 2006), http://www.crimesofwar.org/onnews/news-highcourt.html.

[455] NA'AMA YASHUVI, B'TSELEM, ACTIVITY OF THE UNDERCOVER UNITS IN THE OCCUPIED TERRITORIES app. E, 81 (1992), *available at* http://www.btselem.org/Download/199205_Undercover_Units_Eng.doc.

[456] *See, e.g.*, Press Briefing by Colonel Daniel Reisner, IDF Legal Division, Nov. 15, 2000, *available at* http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/11/Press%20Briefing%20by%20Colonel%20Daniel%20Reisner-%20Head%20of.

[457] Gideon Alon & Amos Harel, *IDF Lawyers Set 'Conditions' for Assassination Policy*, HAARETZ (Feb. 2, 2002), http://www.haaretz.com/print-edition/news/idf-lawyers-set-conditions-for-assassination-policy-1.53911 ("[1.] There must be well-supported information showing the terrorist will plan or carry out a terror attack in the near future. [2.] The policy can be

Many of the authors who have advocated that the United States should adopt a full-fledged targeted killings policy have either been inspired by or drawn heavily upon the experience of the Israeli-Palestinian conflict. As Walzer notes in relation to IHL more generally, "the Israeli war in Gaza in 2008 … is probably the sort of case most people have in mind when they challenge the current rules of war."[458] Guiora, for example, argues that, "international laws explicitly providing for active self-defense should be formed out of what has been learned from Israel's struggle with terrorism."[459] The tendency to extrapolate from Israel's experience in order to arrive at policy prescriptions for the United States is well illustrated by the title and subtitle of a later article by the same author: "License to Kill: When I advised the Israel Defense Forces, here's how we decided if targeted kills were legal—or not."[460] In it he urges the United States to adopt a strong permissive policy on targeted killings, or what he describes as an "[a]ggressive operational counterterrorism" approach.[461] Similarly, Gross criticizes the inflexibility of international humanitarian lawyers who are not prepared to "reconsider the merits" of targeted killings, chemical warfare, and attacks on currently protected groups of civilians.[462] While his book contains occasional references to other "asymmetrical conflicts" in order to justify his call for a comprehensive rethinking of IHL, almost all of the factual information and case studies are drawn from Israel's policies.

Blum and Heymann's permissive proposals for a mixed legal regime to govern targeted killing are also based predominantly on their review of the Israeli experience. Along with Gross and other commentators, they also suggest that there is already an identity of interest and indeed even a degree

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enacted only after appeals to the Palestinian Authority calling for the terrorist's arrest have been ignored. [3.] Attempts to arrest the suspect by use of IDF troops have failed. [4.] The assassination is not to be carried out in retribution for events of the past. Instead it can only be done to prevent attacks in the future which are liable to toll multiple casualties."). Only some parts of the legal opinion, however, have been made public.

[458] Michael Walzer, Can the Good Guys Win?, 14 (paper presented to the IILJ International Legal Theory Colloquium, New York University, Feb. 16, 2011), *available at* http://www.iilj.org/courses/documents/2011Colloquium.Walzer.pdf.

[459] Guiora, *supra* note 17, at 334.

[460] Amos Guiora, *License to Kill: When I Advised the Israel Defense Forces, Here's How we Decided if Targeted Kills Were Legal—or Not*, FOREIGN POL'Y (July 13, 2009), http://www.foreignpolicy.com/articles/2009/07/13/licence_to_kill?page=0,1.

[461] *Id.*

[462] Gross, *supra* note 16, at 252.

of symmetry in terms of both law and policy between Israeli and American approaches. Thus they note that both countries have made targeted killings "an essential part of their counterterrorism strategy" and that both have found them to be "an inevitable means of frustrating the activities of terrorists who are directly involved in plotting and instigating attacks from outside their territory."[463]

But these analogies between the two states are potentially problematic. American policies remain far less institutionalized than their Israeli counterparts and U.S. courts have not yet agreed to pronounce on the legality of the relevant policies, unlike the Israeli Supreme Court. Moreover, formal analyses of Israel's policies invariably focus primarily on that Court's nuanced and somewhat restrictive approach to targeted killings rather than on actual Israeli practice subsequent to the Court decision. It is therefore important to look at both Israel's legal framework and its practice.

The legal framework for the targeted killings policies was elaborated and formalized by the Israeli Supreme Court in a judgment in December 2006.[464] The court did not interpret the law to either prohibit or permit targeted killings *per se* by the IDF. Instead, the thrust of its decision was that the lawfulness of each killing must be determined individually.[465] It decided, on the basis of a very limited discussion, that the customary law of international armed conflict was the applicable law, and it thus did not explore the applicability of IHRL as the appropriate regime or the IHL of non-international armed conflict.[466] Instead it effectively adopted a mixed

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[463] Blum & Heymann, *supra* note 20, at 147.

[464] Pub. Comm. Against Torture in Israel IsrSC 57(6) at 285. The decision is controversial for, among other reasons, its expansive definition of "direct participation in hostilities" that would subject civilians to targeted killing. *Id.* ¶¶ 31–40.

[465] *See id.* ¶ 60. *See also id.* (Beinisch, President concurring) (emphasizing that "it cannot be determined in advance that every targeted killing is prohibited according to customary international law" and "the legality of each individual such act must be determined in light of [customary international law]").

[466] *Id.* ¶ 16. Application of the law of non-international armed conflict would have resulted in the imposition of fewer constraints than followed from the choice of the law governing international armed conflicts. The Court appears to have followed a legal opinion provided by the petitioners and written by Antonio Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law*, at http://www.stoptorture.org.il/eng/images/uploaded/publications/64.pdf. For critical analyses of this aspect, see Helen Keller & Magdalena Forowicz, *A Tightrope Walk between*

regime, that enabled it to avoid choosing between the two extremes of the law of belligerent occupation, with appropriate human rights protections on the one hand, and the law of armed conflict on the other, which the Government argued should lead at most to minimal scrutiny by the court. It rejected the Government's contention that terrorists were "unlawful combatants" subject to attack at all times.[467] Instead, it held that the applicable law permitted the targeted killing of civilians for such time as they "directly participat[ed] in hostilities"[468] as long as four cumulative conditions are met:

- Targeting forces carry the burden of verifying the identity of the target as well as the factual basis for meeting the "direct participation" standard.
- Even if the target is legally and factually identified by the Government as legitimate, state forces may not kill the person if less harmful means are available.
- After each targeted killing, there must be a retroactive and independent investigation of the "identification of the target and the circumstances of the attack"; and
- Any collateral harm to civilians must meet the IHL requirement of proportionality.[469]

Although various aspects of the decision have been criticized by commentators,[470] it nonetheless represents a very significant development in terms of regulating and seeking to impose demanding constraints upon the practice of targeted killings. Because the first three conditions are drawn essentially from domestic and international human rights law rather than from IHL,[471] the result is a very progressive one in an armed conflict context. This explains why various commentators have suggested that it is

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*Legality and Legitimacy: An Analysis of the Israeli Supreme Court's Judgment on Targeted Killing*, 21 LEIDEN J. INT'L L. 185, 190-98 (2008); Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing* Hamdan *and the Israeli* Targeted Killings *Case*, 89 INT'L REV. RED CROSS 373, 381-86 (June 2007).

[467] *See* Pub. Comm. Against Torture in Israel v. Gov't of Israel, IsrSC 57(6) at ¶¶ 27–28, 31–32.

[468] *Id.* ¶¶ 31–40 (detailed discussion of direct participation).

[469] *Id.* ¶¶ 40, 60.

[470] *See* Keller & Forowicz, *supra* note 466.

[471] Although it might be argued that the second condition reflects the approach to IHL taken in the ICRC's Interpretive Guidance, *supra* note 55, at 1041–44.

an appropriate starting point for the formulation of American policies on this subject. As Radsan and Murphy put it: If Israel, "a small country quite vulnerable to terrorism . . . can create and manage a system of accountability for targeted killing, then . . . the United States should be able to do so as well."[472] They thus propose a comprehensive policy framework for the United States built on the approach of the Israeli Supreme Court.[473] However, a major problem in this regard lies in the gap that separates that court's normative framework from the practice that has followed in supposedly implementing it.

Many of the proponents of targeted killings have suggested that civilian casualties have not been a problem in practice. Michael Gross, for example, acknowledges that there is a significant risk of error in accurately identifying "named" individuals.[474] But he is satisfied that there has not in fact been such a problem[475] and confirms this assumption by noting that there has been "little concern about mistaken identity among watchdog human rights organizations."[476] But, contrary to his interpretation, this is not in fact the conclusion suggested by the available information. The majority of Israeli targeted killings have reportedly taken place in "Area A," a part of the West Bank under the control of the Palestinian Authority.[477] The targets have included members of various groups, including Fatah, Hamas, and Islamic Jihad, who, Israeli authorities claimed, were involved in planning and carrying out attacks against Israeli civilians.[478] Means used for targeted killings include drones, planted explosives, snipers, missiles shot from helicopters, Special Forces strikes, and shelling by tanks.[479] One study by a respected human rights group found that between late September 2000 and September 2011 at least 425 Palestinians were killed as a result of targeted killing operations. Of these, 251 were the targets, while the

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[472] Radsan & Murphy, *supra* note 119, at 1234.
[473] *Id.* at 1234–37.
[474] Gross, *supra* note 16, at 118–19.
[475] *See id.* at 119.
[476] *Id.*
[477] Naftali & Michaeli, *supra* note **Error! Bookmark not defined.**, at 247.
[478] *Id.* at 247–50.
[479] *Palestinians Killed During the Course of a Targeted Killing in the West Bank, 29.9.2000 - 31.1.2011*, B'TSELEM, http://www.btselem.org/ENGLISH/statistics/Casualties_Data.asp?Category=17&region=WB (last visited Dec. 15, 2011).

remainder were collateral casualties.[480] There have thus been a significant number of civilian casualties caught up in the program, and the number may well be excessive, in IHL terms, in a number of the attacks.

The next key question concerns the extent to which the practice of the IDF has conformed to the conditions laid down by the Supreme Court. The first condition was designed to limit the range of targets to those who were directly participating in the hostilities. While the Court adopted an expansive interpretation of this criterion, it is doubtful that it envisaged that the target list would extend to political leaders. Some of the most enthusiastic proponents of the practice have certainly hoped that it would not.[481] Various Israeli commentators have acknowledged that a significant proportion of those targeted have been senior political, rather than military, leaders. Kober, for example, concludes that while the targeting of military leaders and operatives was ineffective, much more effective was what he terms the "decapitation of Hamas's political and spiritual leaders" through targeted killings during the second *intifada*. His argument is based in part on Hamas's subsequent "readiness to suspend hostilities against Israel."[482] Another study at about the same time employed sophisticated social science techniques in order to classify those targeted between September 2000 and April 2004. The study found that, even when using the most demanding or restrictive criteria to decide who was a political rather than a military leader, a significant number of political leaders were targeted.[483] In an intriguing aside, the study also found that when the latter were assassinated the stock market fell, reflecting expectations that future

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[480] *Statistics Related to Israel-Palestinian Conflict Post-2000*, B'TSELEM, http://www.btselem.org/english/statistics/casualties.asp (last visited Nov. 15, 2011).

[481] *E.g.*, Steven R. David, *Israel's Policy of Targeted Killing*, 17 ETHICS & INT'L AFFS. 111, 126 (2003). Thus, having called upon Israel to be "open and unapologetic" about targeted killing which is a "legitimate and moral response to terrorist attacks," David proposes several limitations, one of which is that "Israel must refrain from killing political leaders." *Id*.

[482] Kober, *supra* note 37, at 88 ("The correlation between TK [targeted killings] of Palestinian political and spiritual leaders and the end of the second intifada speaks for itself.").

[483] *See* Asaf Zussman & Noam Zussman, *Assassinations: Evaluating the Effectiveness of an Israeli Counterterrorism Policy Using Stock Market Data*, 20 J. ECON. PERSPECTIVES 193, 198 (2006). Political leaders were defined as those "primarily responsible for political and spiritual guidance." *Id.* at 197.

levels of terrorist attacks would increase as a result. On the other hand, the killing of senior military leaders led to a rise in the stock market.[484]

More recent studies have reinforced the point about who was being targeted and killed. On the basis of a thorough survey of the actual practice, Gazit and Brym also found that a non-negligible number of those killed were political leaders and not individuals participating in hostilities.[485] They went further than the other studies, however, in documenting the fact that whereas the killings of fighters correlated with suicide bombings and other such acts, the political killings either occurred in times of relative tranquility or against individuals not directly associated with any trigger events for which there was retaliation.[486] Nor were the targeted killings of political leaders restricted to Hamas or the most radical of the other Palestinian leaders.[487] Gazit and Brym thus conclude that the political assassinations were designed to "erode the Palestinian leadership and maintain instability in the Palestinian polity."[488] If this is correct, the conditions precedent identified by the Supreme Court would not have been met in relation to this range of cases. It would also mean that United States adoption of Israel's approach would get it into the business of carrying out political assassinations.[489]

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[484] *Id*. at 204.

[485] *See* Nir Gazit & Robert J. Brym, *State-Directed Political Assassination in Israel: A Political Hypothesis*, 26 INT'L SOCIOLOGY 862, 863 (2011).

[486] *Id.* at 868 tbl.1, 872.

[487] *Id.* at 871.

[488] *Id.* at 872.

[489] This is not the place to review the much debated question of whether this would violate Executive Order 12333 prohibiting assassination. It does highlight the concern that if the United States were to adopt Israel's approach, it would be carrying out political assassinations raises questions as to whether this is really the precedent that the United States ought to be following. Perhaps the most frequently cited official analysis is W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW. 4, 7–8 (Dec. 1989) (Assassinations should be deemed compatible with the Executive Order "if U.S. military forces were employed against the combatant forces of another nation, a guerrilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States."). His permissive approach has found significant support in the literature. *See* Jeffrey F. Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 769, 773 (2003); Jonathan Ulrich, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1035–36, 1062-63 (2005). Other commentators have adopted a more critical approach. *See, e.g.*, Stephen Knoepfler, *Dead or Alive: The Future of U.S. Assassination Policy Under a Just War Tradition*, 5 NYU J.L. & LIBERTY 457, 498 (2010); Gary Solis, *Targeted Killing and the Law of*

The Court's second condition was that the government should not kill the targeted individual if less harmful means were available. While data is absent on this issue, classified documents leaked to the press in November 2008 were reported to indicate that senior military officials, in authorizing the arrest of militants belonging to the Palestinian Islamic Jihad, had also given advance permission to kill any of three leaders of the group in the event that they were encountered in the course of the operations.[490] The documents were obtained by Anat Kam during her military service. She was subsequently charged with espionage,[491] and the investigation of the journalist who reported the story led to his spending a year in exile in London and Berlin before returning to face questioning.[492] An official IDF statement called the allegations "outrageous and misleading" and rejected claims that the Court's conditions had been violated by arguing that they had been based on "a partial understating of the situation and a misunderstanding of the limitations set by the High Court."[493]

The third condition called for an independent retroactive investigation of each killing. In October 2010 B'Tselem reported that such investigations actually occur relatively rarely, and then only after extensive delays.[494] The report noted that "from the beginning of the first Intifada, in December 1987, to the outbreak of the second Intifada, in September 2000, the Military Police Investigation Unit (MPIU) investigated almost

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*Armed Conflict*, 60 NAVAL WAR C. REV. 127, 134–35 (2007) ("Without an ongoing armed conflict the targeted killing of a civilian, terrorist or not, would be assassination – a homicide and a domestic crime".).

[490] Uri Blau, *IDF Killed Wanted Palestinians Despite Court Guidelines, Documents Show*, HAARETZ (Nov. 26, 2008), *available at* http://www.commondreams.org/headline/2008/11/26-4.

[491] Ofra Edelman, *Ex-Soldier Charged with Espionage for Leaking Documents to Haaretz*, HAARETZ (Apr. 9, 2010), http://www.haaretz.com/print-edition/news/ex-soldier-charged-with-espionage-for-leaking-documents-to-haaretz-1.753; Isabel Kershner, *Israel Lifts Order of Silence in Spying Case*, NY TIMES (Apr. 8, 2010), http://www.nytimes.com/2010/04/09/world/middleeast/09israel.html.

[492] Ofra Edelman, *Haaretz Writer Uri Blau Returns to Israel for Questioning by Shin Bet*, HAARETZ (Oct. 25, 2010), http://www.haaretz.com/print-edition/news/haaretz-writer-uri-blau-returns-to-israel-for-questioning-by-shin-bet-1.320970.

[493] *IDF: Uri Blau's allegations of army misconduct 'outrageous'*, HAARETZ (Apr. 11, 2010), http://www.haaretz.com/news/idf-uri-blau-s-allegations-of-army-misconduct-outrageous-1.284055.

[494] B'TSELEM, VOID OF RESPONSIBILITY: ISRAEL MILITARY POLICY NOT TO INVESTIGATE KILLINGS OF PALESTINIANS BY SOLDIERS 5, 47 (Oct. 2010), *available at* http://www.btselem.org/Download/201009_Void_of_Responsibility_Eng.pdf.

every casein which Palestinian's not taking part in hostilities were killed."[495] Since that time, however, the situation in the Palestinian Territories as a whole had been classified as an armed conflict and every act carried out by the IDF has been treated as a combat action, even in cases bearing the clear hallmarks of a policing action.[496] As a result, the number of investigations has dropped significantly.[497]

Between 2006 and 2009, B'Tselem requested an MPIU investigation in 148 cases, but only 22 of those were taken up by the Judge Advocate General's Office, and one-third of that smaller number took at least one year from the time of the incident to be opened.[498] According to B'Tselem, investigations were refused even in cases "in which there was a serious suspicion of clear breach of international humanitarian law."[499] In addition, it claimed that the resulting fact-finding "is based solely on the results of the operational inquiry and the testimonies of the soldiers, and not on other eyewitness testimony and evidence that conflicts with the soldiers' description of the incident."[500] The report concluded that these practices effectively grant immunity to IDF forces in cases in which Palestinian civilians have been killed.[501] The conclusion to be drawn from this study would seem to be that the third condition laid down by the Supreme Court in order to minimize abuses of the targeted killings policy is working poorly, at best.

The fourth and final condition specified by the court emphasized the importance of respecting the proportionality principle. This issue has been explored recently in one especially prominent case. A Special Investigatory Commission, with no powers of subpoena, was appointed pursuant to a petition to the Supreme Court, to investigate the targeted killing of Salah Shehadeh on July 22, 2002.[502] Shehadeh was the head of

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[495] *Id.* at 5.
[496] *Id.* at 13–14.
[497] *Id.* at 5.
[498] *Id*. at 19–20.
[499] *Id.* at 6.
[500] *Id.*
[501] *See id.* at 5–6.
[502] *Salah Shehadeh—Special Investigatory Commission*, ISRAEL MINISTRY OF FOREIGN AFF. ¶¶ 1–2 (Feb. 27, 2011), http://www.mfa.gov.il/MFA/Government/Law/Legal%20Issues%20and%20Rulings/S

the Operational Branch of Hamas in Gaza and was accused by Israel of having killed large numbers of Israeli military personnel and civilians. He was killed by means of a one-ton bomb dropped on a house in Gaza City, which also killed his wife, his assistant, his child, and a total of 13 civilians, including women and children, as well as injuring 150 civilians.[503] Blum and Heymann identify it as a paradigmatic case, and argue that in a traditional war context the killing could be considered "proportionate collateral damage." In their view, the killing became problematic only because "public opinion could not disentangle the proportionality question from the broader political context of the Israeli-Palestinian relationship."[504] Yet the report of the Commission, which essentially exonerated all of those involved in the killing in all other respects,[505] nevertheless found that the strike was disproportionate in the circumstances, a fact that they indicated was subsequently acknowledged by the great majority of the senior officials involved in the operation.[506] The Commission attributed the mistakes made to an intelligence failure caused by "incorrect assessments and mistaken judgment."[507] Unfortunately, the actual report of the Shehadeh Commission has not been made public, and the Israeli media have questioned whether the six-page summary that was released was written by the Commission itself or by the Prime Minister's office.[508]

Thus, on the available evidence, it would seem that while the Supreme Court's conditions have been lauded by lawyers and extolled by those urging the United States to adopt Israel's targeted killing policy, the celebrated constraints have made all too little impact on the actual practice of the IDF. It also remains the case that Israel has not disclosed in detail the guidelines it uses to make its targeted killings decisions, the evidentiary or other intelligence requirements that would justify any killing, or the results of any internal follow-up review of the conformity of such operations with applicable norms.

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alah_Shehadeh-Special_Investigatory_Commission_27-Feb-2011.htm [hereinafter *Shehadeh Commission Report*].

[503] *Id.* ¶ 1.

[504] Blum & Heymann, *supra* note 20, at 54.

[505] *Shehadeh Commission Report*, *supra* note 502, ¶ 14.

[506] *Id.* ¶ 10.

[507] *Id.* ¶ 12.

[508] Barak Ravid, *Civilian Deaths in Shehadeh Hit Unintentional, Committee Says*, HAARETZ (Mar. 1, 2011), http://www.haaretz.com/print-edition/news/civilian-deaths-in-shehadeh-hit-unintentional-committee-says-1.346338.

The final question that needs to be considered by U.S. policy-makers contemplating the adoption of Israel's approach is the legal basis on which such a policy can be justified. The Israeli situation is highly unusual in that it is grounded in a finding by the Supreme Court that the rules applicable are those governing international armed conflicts. For reasons explored above, this rationale is not available to the United States in relation to most of the situations in which it currently undertakes targeted killings. Thus proponents of a United States embrace of targeted killings often tend to rely upon the need for a significant departure from existing law and emphasize the need to reconsider or reconfigure it—to rearticulate it as Guiora says,[509] or to avoid dogmatism and be flexible, as Gross puts it.[510] This often results in a loosely articulated "mix and match" approach that blurs the distinction between different bodies of law. The implication is that such selectivity can take place without undermining the fundamental integrity of the relevant rules. The nature of this process of decontextualizing the norms is well captured by Blum and Heymann's proposal that:

> [T]argeted killings must be justified and accounted for under a set of norms that may not correspond perfectly to either peacetime or wartime paradigms, but is nevertheless respectful of the values and considerations espoused by both.[511]

Radsan and Murphy also proclaim themselves "avid proponents of hybrids and transplants."[512] In contrast, those who have adopted a close legal analysis of the relevant international law, such as David Kretzmer, have arrived at a much less permissive and more nuanced position that would tolerate targeted killings only in narrowly defined circumstances.[513] Kretzmer has argued that the impetus behind the legal arguments used to justify Israel's targeted killings was essentially to liberate the government from the need to comply with the law enforcement or human rights law

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[509] Guiora, *supra* note 460.
[510] Gross, *supra* note 16, at 252.
[511] Blum & Heymann, *supra* note 20, at 148. They describe their model as being "a more constrained war paradigm and a more lax law enforcement paradigm." *Id.* at 164.
[512] Radsan & Murphy, *supra* note 119, at 43.
[513] Kretzmer, *supra* note 133.

model, while at the same time denying the status of combatants to those who were being targeted. He thus proposes a set of principles on the basis of which it would be feasible to move away from the IHL model in certain non-international armed conflicts and to hew more closely to the human rights regime.[514]

In concluding this analysis of the transferability of the Israeli template, three final observations are called for. The first is that a great deal of the relevant literature is based on the assumption that those who will be targeted are "terrorists" who, it is argued, must be treated as the equivalent of combatants in a regular war because of the nature of their activities. As Statman puts it, "if one accepts the moral legitimacy of the large-scale killing of combatants in conventional wars, one cannot object on moral grounds to the targeted killing of members of terrorist organizations in wars against terror."[515] But this attempt to analogize combatants in conventional wars with terrorists overlooks fundamental distinctions between the two, the most important of which is that the definition of who constitutes a "terrorist" for these purposes is very often, and some might argue inevitably, open-ended and highly subjective. Even if not intended to do so, drawing such an analogy invites governments to exploit a virtual carte blanche in determining who among their "enemies" they will target and kill.

The second observation is that it is hardly surprising that the seemingly intractable nature of the Israeli-Palestinian conflict has led some observers to argue that the basic rules of the game need to be changed in order to facilitate what they see as a just outcome. That tendency is, of course, not limited to this conflict alone. When called upon to investigate alleged war crimes committed by Sri Lankan forces, President Mahinda Rajapaksa told the UN General Assembly that the "asymmetrical nature of conflicts initiated by non-state actors" meant IHL needed to be revised and he called upon the international community to do so.[516] But, even beyond this dimension, there are strong reasons to suggest that policy proposals

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[514] David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISR. L. REV. 8, 44–45 (2009).
[515] Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES IN L. 179, 197 (2004).
[516] President of Sri Lanka Mahinda Rajapakse, President's Speech at UN (Sept. 27, 2010), *available at* http://www.slmission.com/statements/18-statements-by-heads-of-delegation-of-sri-lanka/477-presidents-speech-at-un.html.

based largely on the particular circumstances in Israel and Palestine will often not travel easily or well into very different contexts. As Kenneth Anderson has suggested in relation to a different, but related, proposal put forward by Gabriela Blum:

> [O]ne could imagine that [such an approach could work] in the very special circumstances of the Israeli-Palestine conflict . . . . But I do not believe that can be applicable to the US conflicts, now or in the future, or many other situations in the world. The fact of living cheek by jowl, a conflict going on for generations, a relatively enormous amount of intelligence available for purposes of making meaningful determinations in a limited geographic space on a limited population—it is all fantastically sui generis, and I believe quite inapplicable and irreplicable elsewhere.[517]

The third observation is that United States' legal system is highly unlikely to ever evolve in such a way that Israel's approach to targeted killings could be meaningfully replicated. The approach of U.S. courts to matters of standing, justiciability, political question exceptions, and the degree of overall deference to the executive in foreign relations issues are all very different from that of the Israeli Supreme Court.[518]

In addition to these various reasons why the Israeli precedent could not meaningfully be adopted by the United States, the main conclusion to be drawn is that the Israeli case exemplifies the difficulty of adequately supervising any state-sponsored program of lethal force, and it highlights the need for more intrusive mechanisms of supervision rather than a more permissive environment in which discretions are protected.

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[517] Kenneth Anderson, *The Shift from Proportionality to Necessity and an Indirect Comment on Gaby Blum's Article*, OPINIO JURIS (Feb. 12, 2011), http://opiniojuris.org/2011/02/12/the-shift-from-proportionality-to-necessity-and-an-indirect-comment-on-gaby-blums-article/.

[518] *See* Galit Raguan, *Adjudicating Armed Conflict in Domestic Courts: The Experience of Israel's Supreme Court*, 13 Y.B. INT'L HUMANITARIAN L. 61 (2011). Although Raguan argues that Israel's legal approach to terrorism issues should be looked at very carefully by other jurisdictions, she acknowledges not only its rather limited receptiveness to comparative law arguments but also the basic structural differences between the two systems, despite their shared common law attributes. *Id.* at 91–92.

Having argued that there are strong reasons why the United States should not view Israeli law and policy on targeted killings as an appropriate template for its own approach, we turn now to consider how officials, scholars, and commentators in the United States have sought to justify a situation in which there is clearly no accountability on the part of the CIA and no possibility of adopting the Israeli approach to providing any such accountability.

## VII. Can the Accountability Deficit be Justified: "Legal Grey Holes"

There have been four types of responses to concerns that there is a transparency and accountability deficit: (i) there is no deficit; (ii) there is a deficit, and it can be remedied through specific reforms; (iii) there is a deficit, but any response will inevitably have to remain secret; and (iv) there is a deficit, but it is justifiable and inevitable, and thus must be accepted. The first of these is the official response which denies that there is any vacuum. Some statements of this type, like Harold Koh's ASIL speech, simply ask the listener to accept the government's assurance that it is fully in compliance with the law and must be trusted. Other statements suggest that there is full accountability, including appropriate internal checks, effective congressional oversight, and the possibility of judicial remedies. As I have shown, these responses are simply not consistent with the available evidence.

The second response is to accept that there is a deficit, at least in terms of transparency if not also in accountability, but to argue that it can be remedied through the adoption of relatively straightforward reforms. These include suggestions that: the role of the CIA's Inspector General should be expanded and public reports issued,[519] the Privacy and Civil Liberties Board should be revitalized, new congressional sub-committees should be established,[520] there needs to be more openness about the fact that the policy is being pursued and a careful vetting process must be ensured before names are placed on kill/capture lists,[521] and in order to achieve the necessary "public legitimacy," the executive should articulate more clearly the basis for its legal arguments (while not revealing "secret

[519] *See supra* text accompanying notes 331–333.
[520] O'Connell, *supra* note 101.
[521] Byman, *supra* note 453, at 110.

facts, programs, activities, and other things that ought to remain secret").[522] But none of these suggestions has been taken seriously in any of the relevant quarters and, in any event, none has the potential to make the slightest difference in the absence of a fundamental change of policy on the part of the CIA and its executive masters.

The third response is to accept that there is a deficit and to lament the fact, but to conclude that the degree of national security sensitivity involved means there is no alternative but to address any such concerns in secret. Thus, for Robert Chesney, the power to assess compliance "lies with the government itself, for good or ill." The key is for the government to make sure it develops effective internal procedures, even if these must remain secret. But maximizing transparency is also desirable, "if only by providing better information to the public about the abstract nature" of the standards followed.[523] Kenneth Anderson goes marginally further by conceding that there is a "good moral argument" for strengthening congressional oversight, particularly when American citizens are being targeted. But his bottom line is that "the public cannot be made part of the debate" and that there is no alternative but to rely on "our political leadership to act as stewards and fiduciaries on our behalf."[524] But investing such blind faith in the executive flies in the face of all experience of such matters, as illustrated by the survey of past CIA accountability undertaken above.

But it is the fourth response with which we most need to engage because it is held by many of the most influential conservative thinkers writing on these issues in the United States today. It holds that any accountability deficit is not just unavoidable, but may also be appropriate, and while the judiciary should not be excluded from considering any challenges it should almost always defer to the executive. This response is illustrated by Benjamin Wittes' reaction to allegations of torture (which he terms "highly coercive interrogation"). In his view, the United States needs

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[522] Kenneth Anderson, *Targeted Killing is Legitimate and Defensible*, THE WEEKLY STANDARD (June 6, 2011), http://www.weeklystandard.com/articles/law-and-order_571630.html.
[523] Chesney, *supra* note 72, at 57.
[524] Anderson, *supra* note 261, at 15. *Cf.* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1275–76 (2009) (arguing that politicians are unlikely to be held accountable in any meaningful way for most such policy choices). For an understanding of the implications of such a fiduciary arrangement that differs radically from Anderson's see Criddle, *supra* note 29.

to retain the option to torture, but it should not say so publicly, nor make it legal. When torture is used, the best approach is to insulate judges from having to rule on it, thus facilitating "a kind of constructive hypocrisy that allows us more restrictive rules than we could probably otherwise afford."[525] Adrian Vermeule's characterization of American administrative law post 9/11 as Schmittian achieves a similar outcome,[526] but does so on the basis of a more sophisticated set of arguments.

I will focus on Vermeule's account because it is the most elaborate and fully articulated justification that has been offered for upholding and validating a system of law that is premised upon the existence of legal grey holes of the type that effectively give the CIA a free pass in relation to targeted killings undertaken in the name of national security.[527] He dismisses the aspiration to apply anything other than a very thin notion of rule by law, as distinguished from the rule of law, as "hopelessly utopian."[528] In response, I challenge Vermeule's grounding of his argument in the jurisprudence of Carl Schmitt and emphasize Vermeule's highly problematic conflation of empirical and normative arguments.

I turn first to Vermeule's explicit grounding of his argument in the thought of the German jurist Carl Schmitt. Schmitt's thought is controversial, not least because he joined the Nazi party soon after its rise to power in Germany, and for a period (before he fell from favor) he actively sought to position himself as an influential legal advisor within the party.[529] His Nazi-era writings are characterized by sophisticated apologia for the Nazi dismantling of the German *rechtsstaat* and an endorsement of the desirability of the *Fuhrer's* extra-legal powers.[530] However, Vermeule

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[525] WITTES, *supra* note 97, at 122.

[526] Indeed Vermeule echoes Wittes when he argues that "[c]andor is not always desirable, and hypocritical lip service to the rule of law may even be best for the (thick) rule of law in the long run". Vermeule, *supra* note 28, at 1132.

[527] *Id.* at 1097.

[528] *Id.*

[529] *See* GOPAL BALAKRISHNAN, THE ENEMY: AN INTELLECTUAL PORTRAIT OF CARL SCHMITT, Chaps. 13–15 (2000). Schmitt joined the Party on 1 May, 1933.

[530] However, by 1936 Schmitt had fallen from favor and despite a desperate attempt to prove his anti-Semitic and Nazi credentials, he was marginalized and forced to resign from influential party positions. He remained a member of the Party until the end of World War II, and benefited from the racially-motivated expulsion of Jewish faculty from leading German universities. Until the end of the War, he occupied Hermann Heller's chair at the

relies mostly on Schmitt's pre-Nazi writings, composed during the political and legal tumult of the Weimar Republic.[531] In *Political Theology*, Schmitt rehearses what was then a common critique of liberal positivism among German conservative theorists by insisting, contra Hans Kelsen, that legal norms cannot contain within them a complete set of criteria for their own application, and instead inevitably require a concrete, human authority who can decide how a general norm is to be applied in a particular situation. This decisionist critique of *rechtsstaat* liberal legalism would be radicalized[532] into argument that the grounds of law itself is ultimately established through moments of sovereign decision, most clearly visible at times of emergency (civil strife, state of war, etc). Schmitt's concern was that by maintaining an idealizing conception of law as containing within it the basis for its own realization and application, liberalism was incapable of recognizing the limits of law and the political—rather than legal—foundations of sovereignty and political community. This incapacity takes on special weight during an emergency that threatens the life of the political community, as it may result in a failure to embrace the steps necessary to preserve the community in the face of an existential threat.

Schmitt's key argument of relevance here is that liberal legalism was inherently incapable of dealing with emergency situations, because the circumstances of an emergency cannot be anticipated by law and responses to emergency cannot be regulated *a priori* through the formal application of legal norms that codify all possible options for responding to the exception. At the very least, the sovereign retains the residual power to determine whether or not the exception exists and how to apply the relevant norms, and this decision must be made by some decision-maker—who at the moment of making this decision is unconditioned by legal norms. Hence his famous line that "sovereign is he who decides on the exception."[533] As David Dyzenhaus notes, Schmitt believed that the theoretical assumptions held by liberal legalists could not accommodate a state of exception:

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Law Faculty of the University of Berlin. Heller had been forced to resign due to his Jewish origins, and died in exile in Spain.

[531] Specifically, POLITICAL THEOLOGY (1922) and THE CONCEPT OF THE POLITICAL (1927).

[532] This radicalization over the 1920s is traced by Sylvie Delacroix, *Schmitt's Critique of Kelsenian Normativism*, 18 RATIO JURIS 30–45 (2005).

[533] POLITICAL THEOLOGY Chaps. 1–2 (1922).

> On his account, liberalism, to remain consistent, must refuse to countenance an extra-legal measures model. As a result, when a liberal state responds to existential threats, protections for individual liberty associated with the rule of law will become ever more attenuated, until the point where the rule of law is reduced to the executive's claim that it has a valid or purely formal authorization for its actions. At that point, liberal legalism ceases to be liberal, and becomes a purely formal mode of legitimizing state conduct. . . . This vacuous understanding of legality does more than legitimate the use of law for illiberal ends; it also, in Schmitt's view, permits political factions hostile to liberalism to capture politics from within.[534]

Schmitt thus moves from his observation that the political sovereign is the one who decides when an emergency exists and what the response to it should be, to the proposition "that no liberal sovereign can admit to this openly, given that liberals must adopt the view that a condition of the legitimacy of a political decision is that it is authorized by law." But the problem is that sovereignty understood in this way "hollows out legality, with the result that the fact of political sovereignty prevails under the guise of legality." Thus the sovereign's actions in relation to an emergency are "constitutive of rather than reliant on social values, because the very fact that there is an emergency exposes the lack of the political homogeneity Schmitt thinks is required to sustain normal order."[535]

David Luban has tracked the exponential growth of interest in Schmitt by American legal scholars over the past decade or so.[536] This surge of interest is partly due to what many commentators have suggested are important analogies between Schmitt's philosophy of law and the approach adopted by the Bush administration post-9/11.[537] Schmitt's writings attach great importance to the friend/enemy distinction, an approach that President Bush echoed so closely when he told Congress on

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[534] David Dyzenhaus, *Emergency, Liberalism, and the State*, 9 PERSP. ON POL. 69, 72 (2011).
[535] *Id*. at 73.
[536] David Luban, *Beyond Traditional Concepts of Lawfare: Carl Schmitt and the Critique of Lawfare*, 43 CASE W. INT'L L. REV 457 (2011).
[537] *See generally* William E. Scheuerman, *Presidentialism and Emergency Government*, *in* EMERGENCIES AND THE LIMITS OF LEGALITY 258 (Victor V. Ramraj, ed. 2008); Andrew Arato, *The Bush Tribunals and the Specter of Dictatorship*, 9 CONSTELLATIONS 458 (2002).

September 20, 2011, that "[e]very nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists."[538]

But the question remains whether Schmitt's theory of emergencies really does the work that Vermeule would like it do in justifying "grey holes," such as those that effectively exempt the CIA from meaningful legal scrutiny in crucial areas of its activity. It is not at all clear that it does. In characterizing post-9/11 American administrative law as Schmittian, Vermeule insists that his own argument requires only "a modest version of Schmitt." To reach that point, he strips off the "layers of interpretive dross and continental conceptualisms" leaving only the "largely institutional or empirical insights" that he is happy to embrace.[539] He adopted the same approach in an earlier work co-authored with Eric Posner, in which they characterize Schmitt as a "Nazi fellow-traveler" but go on to note that they will ignore the "conceptual analysis with which Schmitt embroiders" his ideas because it is "largely unhelpful."[540] They describe their approach as one involving the extraction of "the marrow from Schmitt and then throw[ing] away the bones for the professional exegetes to gnaw."[541] In particular, what they find appealing are Schmitt's arguments about the indispensability of strong emergency powers for the executive and his dismissal of what they term the addiction of liberal legalists to process at the expense of considering the "opportunity costs of foregone government action in emergencies."[542]

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[538] President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.

[539] Vermeule, *supra* note 28, at 1100.

[540] ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 39 (2007) [hereinafter TERROR IN THE BALANCE]. Posner and Vermeule adopt the same strategy in advocating a Schmittian approach also to economic emergencies, such as the 2008 financial crisis: "We do not need, and will dispense with, some of Schmitt's more jurisprudential and abstract claims and concerns, such as his critique of legal positivism." Instead, they render his work "in suitably pragmatic terms" in order to derive essential insights into crisis management. Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1640 (2009).

[541] TERROR IN THE BALANCE, *supra* note 540, at 38.

[542] *Id.* at 39.

The issue is not whether relying on Schmitt's theories will "produce another Hitler."[543] Rather it is whether Schmitt's diagnosis of the inevitability of liberal legal paralysis in the face of crisis necessarily leads to the conclusion that efforts to legally regulate "exceptional" measures (such as military operations) are futile and must leave almost everything to the discretion of the executive. It is well known that Schmitt maintained deep theoretical and political objections to parliamentary democracy and liberalism, and his highly stylized claims about the inherent tendency of these normative political commitments reflected a desire to discredit them. As Ulrich Preuss has shrewdly observed, Schmitt's rhetorical technique results is a heightened sense of opposition between ideas and institutions, in which ideas never get a second chance. [544]

In focusing on the indeterminacy of law, Schmitt was in accord with a diverse range of thinkers, including realists and others. But, unlike them, Schmitt drew from this the message that the source or apex of the normative chain retained not only a special power to infuse the chain with meaning but also, just because it was not beholden to any higher normative authority, an extraordinary power to dispense with or opt out of the normative chain entirely.[545] Schmitt's sovereign was thus in a position both to fix meaning inside the command of the law and, as sovereign, to fix and stand outside the boundaries of legal meaning. His theory thus starts from the exception and envisages "the complete destruction of the normal by the exception."[546]

To accept a moment of discretion inherent in the application of any norm need not lead to the conclusion that the line between the normal and the exceptional cannot be drawn, or that any measure classified as "exceptional" cannot be scrutinized against principled criteria. Of course, the question remains, who should decide the application of these criteria? But to assert, *a priori*, that only the executive can and should do so, is simply

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[543] *Id.*

[544] Ulrich K. Preuss, *The Critique of German Liberalism: Reply to Kennedy*, 71 TELOS 97, 102–03 (1987).

[545] *See* William E. Scheuerman, *Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt*, 17 HIST. OF POL. THOUGHT 571, 589 (1996) (arguing that "[i]f legal indeterminacy is a truly ubiquitous facet of legal experience, then dictatorship similarly must take something close to an omnipresent, even permanent form.").

[546] Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy*, 21 CARDOZO L. REV. 1825, 1829 (2000).

to beg the question of whether and why the values of transparency, legality, and publicity should be regarded as always and necessarily incompatible with effective responses to emergencies.[547] Indeed, the opposite may well be true—that an executive not effectively constrained and supervised during an emergency becomes reckless and thus endangers the state further.[548]

The point is simply that we know in advance what Schmitt's conclusions may be on this question, but his sharp-eyed diagnosis of the difficulties of liberal states facing emergencies does not necessarily compel the conclusion that the absolute exclusion of liberal legalist principles is the answer.[549] But a too-ready acceptance of this conclusion merely excuses us from careful contextual analysis of what the exigencies of the situation really require. As Dyzenhaus points out, we might well acknowledge the validity of Schmitt's paradox without retreating from the position that liberal legalism is capable of meeting the challenge. When judges call the executive to account for excesses such as those undertaken post 9/11 they are:

> making creative, interpretive decisions about how best to understand their mandate. These decisions are not determined by law, if what one means by that phrase is that the officials simply transmit the determinate content of settled law to those subject to it. But in a looser sense of determination—one that requires all the reasons for a decision to be legal ones, and these reasons to be marshaled so as to display the best account available of the decision's legality—the decisions are as determined as any normative decision can be. Such decisions are contested, for example, by those who have positivistic inclinations, and by those who reject liberal legalism. But that contest takes place within a political and legal space that . . . Schmitt did not acknowledge.
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[547] For a strong argument to the contrary, see STEPHEN HOLMES, THE MATADOR'S CAPE: AMERICA'S RECKLESS RESPONSE TO TERROR (2007).

[548] *Id.*

[549] Scheuerman argues that Schmitt's approach is premised upon the surrender of the fundamental tenets of legal liberalism. William E. Scheuerman, *Exception and Emergency Powers: the Economic State of Emergency*, 21 CARDOZO L. REV. 1869, 1888 (2000).

> [I]n making that critique from inside the legal-political space of liberal-democratic politics, it is important to keep in mind that our engagement with "law" is not only with the content of positive laws, but also with the idea and practice of legality.[550]

In this process, liberal legality "creates a process of deliberation and argument in which only a limited class of reasons is deemed acceptable: those supported by the legal record of the political community."[551]

Reflecting perhaps an uncritical acceptance of Schmitt's absolutist position, Vermeule never really defines with any precision what he understands by an emergency or whether degrees of emergency may require differentiated responses.[552] At one point he suggests that emergencies can be "understood as extreme crises, with 9/11 as the paradigmatic security emergency,"[553] but the opening sentence of his article indicates that he is concerned with a much broader spectrum since he refers to "real or perceived emergencies."[554] In this respect, his understanding of what constitutes an emergency differs very significantly from Schmitt's.[555] As a result, his justification for legal black and grey holes relies not upon any emergency measures that the sovereign needed to take in urgent response to the actual attacks on 9/11, but to a wide array of diverse security and other measures taken for years thereafter. In other

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[550] Dyzenhaus, *supra* note 534, at 76.

[551] *Id.*

[552] Commentators have taken diverse positions on when an emergency can be said to exist. *See generally* Kim Lane Scheppele, *Legal and Extra-Legal Emergencies*, *in* OXFORD HANDBOOK OF LAW AND POLITICS 174 (Keith E. Whittington, R. Daniel Kelemen, & Gregory A. Caldeira eds., 2008). For an interesting attempt to move beyond the normal/exceptional binary, see Michel Rosenfeld, *Should Constitutional Democracies Redefine Emergencies and the Legal Regimes Suitable for Them?*, *in* SOVEREIGNTY, EMERGENCY, LEGALITY 240 (Austin Sarat ed., 2010) (inserting "conditions of stress" as a third category between normalcy and emergency).

[553] *Id.* at 1105.

[554] Vermeule, *supra* note 28, at 1096.

[555] For Schmitt, a sovereign will confront many emergency situations, but most of them will not amount to a state of exception. The latter situation will only arise on a truly exceptional basis and when it does it will necessitate unlimited authority being vested in the sovereign, alongside the suspension of what Schmitt describes as "the entire existing order." CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 12 (George Schwab trans., 2005).

words, Vermeule adopts a relatively low threshold for a state of exception, but then rather than openly vesting complete authority in the President or suspending the entire legal order, he seeks to justify a highly selective range of powers that are to be removed from effective judicial scrutiny and advocates that it be done on the basis of stealth rather than any overt acknowledgement that the relevant powers have been seized. And rather than the courts being expected to recognize that they have been formally pre-empted by the exercise of executive power, they are expected to continue the charade of judicial review while in fact endorsing whatever the executive has done.[556]

Vermeule's open-ended and highly permissive theory of determined if unacknowledged judicial and legislative deference to presidential powers exercised in ways that bypass the law of the land in a broadly defined range of both minor and major self-proclaimed emergency situations would seem more Schmittian than Schmitt himself, and exacerbates in its prescriptions the latter's ideological and absolute hostility to the viability of liberal legalism in the face of crisis. For Schmitt, liberalism was the enemy, which led him to relentlessly reject the possibilities for its adaptability to emergencies—it became a zero sum choice between liberalism and survival. Vermeule seems to have replicated this zeal. There is no doubt that Schmitt was an astute critic of the vulnerabilities of liberalism, but his "preferred cure turned out to be infinitely worse than the disease."[557] So too does Vermeule's theory of grey holes.

The second problem with Vermeule's approach is the extent to which it blurs empirical conclusions with normative arguments. While he never actually states that black or grey holes are normatively desirable, he simply concludes that they are "inevitable" or "unavoidable", and that "decrying their existence is pointless."[558] He situates himself as a realist who is merely observing the reluctance of judges and legislators to scrutinize executive responses to emergencies. The legislators, he says, are "best

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[556] *See* Dyzenhaus, supra note 534, at 70 noting that "a liberal democratic state must adopt a liberal-legalist approach to emergencies, one which requires not only that all executive action be authorized by law, but also that all executive action is subject to the control of the rule of law."

[557] Lars Vinx, *Carl Schmitt*, THE STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., Fall 2010 ed.), at http://plato.stanford.edu/archives/fall2010/entries/schmitt/

[558] Vermeule, *supra* note 28, at 1097.

understood as Schmittian lawmakers,"[559] while the judges are prudent in not being prepared to shoulder the responsibility of extending the rule of law to emergency situations, even those very broadly defined.[560] Scholars, it seems, are also realists, or at least are equally pusillanimous, since only a handful of them "takes seriously a model of 'global due process.'"[561]. But it is done with an air of resignation and pragmatism rather than arguing, as Schmitt would, that it is both inevitable *and* normatively desirable for the sovereign to enjoy unfettered, dictatorial, powers. It is important to note that the empirical foundation upon which Vermeule bases his analysis is not only rather slight, but also ignores or downplays important examples of cases in which the courts have in fact pushed back significantly against the executive in relation to conditions of detention and the use of torture.[562] The results are far from perfect, but they hardly justify the conclusion that black and grey holes are necessarily inevitable.

Vermeule seeks to buttress his reliance on this empirical fatalism and his dismissal of "the aspiration to extend legality everywhere . . . [as] hopelessly utopian,"[563] by asserting that there is unanimous support among the legal and political elites in the United States that the executive must be able to act illegally:

> There are too many domains affecting national security in which official opinion holds unanimously, across institutions and partisan lines and throughout the modern era, that executive action must proceed untrammeled by even the threat of legal regulation and judicial review . . . .[564]

This amounts to a normative argument, but because it is intertwined so carefully with the empirical argument he avoids tackling it head on. Thus, Dyzenhaus's argument for both the importance and feasibility of a common law constitutionalism that upholds the rule of law in the thick sense of vindicating fundamental constitutive principles is never really engaged with directly. Instead, claims of principle are refuted on the basis

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[559] *Id.* at 1131.
[560] *Id.* at 1133.
[561] *Id.*
[562] Criddle, *supra* note 29.
[563] *Id.* at 1097.
[564] *Id.* at 1133.

of pragmatic arguments in favor of "hypocritical lip-service" which enables a "veil of decency"[565] to conceal the violations of the law that are being perpetrated and subsequently either overlooked or upheld by the courts. Vermeule concedes that judges could insist upon compliance with the rule of law, but asserts that it is "institutionally impossible for them to do so."[566]

While Vermeule assiduously avoids any reference to or engagement with either international or foreign law, he invites such engagement when he argues that legal black and grey holes are not a peculiarly American response to the post-9/11 emergency, but rather are "integral to the administrative state," and hence "no legal order governing a massive and massively diverse administrative state can hope to dispense with them."[567] In other words, the United States should not be considered exceptional in this regard. The reality, however, is that almost all of the principal common law jurisdictions with which the United States can be reasonably be compared (such as Canada, the United Kingdom, and Australia) have, within reasonable limits, respected the rule of law in emergency situations. Roach has surveyed the extent to which this has been achieved and highlights the crucial role of the right given to states under domestic and international human rights law to derogate from certain rights in the case of emergency.[568] But the difference between Vermeule's approach and the derogation approach is that the latter compels governments to be explicit and open about the derogations, to demonstrate that they fall within specified limits, and to accept that the legality of any derogations is subject to judicial review. The need to spell out the derogation, to notify it publicly, and to be able and prepared to justify it against pre-determined criteria also ensure that the public will be much more involved in the process.

This brings us to the question of the role that the international community might or should play in response to a failure of accountability at the domestic level.

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[565] *Id.* at 1132.
[566] *Id.* at 1135.
[567] Vermeule, *supra* note 28, at 1149.
[568] Kent Roach, *The Ordinary Law of Emergencies and Democratic Derogation from Rights*, *in* EMERGENCIES AND THE LIMITS OF LEGALITY 229 (Victor V. Ramraj ed., 2008).

## VIII. The Role of International Accountability

If we accept that the policy of targeted killings being carried out in different parts of the world by the CIA, often in conjunction with Special Operations Forces, is of questionable legality, the issue then becomes what could and should be done about it by the international institutions that are mandated to monitor compliance with international law. As noted earlier, international accountability assumes particular and even critical importance when domestic mechanisms do not function effectively.[569] In this Part of the Article, I note the nature of the United States' engagement to date with the relevant bodies, examine the arguments for and against a more robust engagement, and consider the consequences of a continuing failure by international bodies to devote adequate attention to the problems associated with the practice of targeted killings by states in general.

### *A. The Response of United Nations Bodies to Targeted Killings*

In recent years, the United States has engaged in a relatively systematic way with the key United Nations human rights monitoring bodies. This is not the place for a detailed review of that engagement, but only to consider whether the issue of targeted killings has been raised and addressed. As a party to the International Covenant on Civil and Political Rights, the United States is obligated to report on a roughly five-year basis to the Human Rights Committee. Its most recent appearance before the Committee was in 2006. Although it insisted on its formal position to the effect that the Covenant has no application outside the territory of the United States,[570] its delegation nonetheless agreed to respond to a series of questions concerning the human rights compatibility of a range of activities taking place outside its territory. But issues of torture and renditions dominated the relevant part of the questioning and the issue of targeted killings was not addressed.[571] The United States has recently indicated, however, that it is in the process of preparing its next report to the

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[569] *See supra* text accompanying notes 104–105.

[570] Third Periodic Reports of States Parties Due in 2003, United States of America, U.N. Doc. CCPR/C/USA/3 109, Annex I (Nov. 28 2005).

[571] *See* Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

Committee[572] and there is every reason to expect that the Committee will raise the issue in that context, even if the government's report does not.

The second broad context in which the United States has defended its general human rights record is the Universal Periodic Review process of the Human Rights Council in which each state presents a detailed report and then responds to recommendations suggested by other states within the Council. The report submitted by the United States did not deal with any issues of direct relevance to targeted killings, but several of the 228 recommendations in response to it addressed such concerns. Egypt called for "credible independent investigations [of] reliable allegations" of violations by American forces in Iraq, including extrajudicial killings.[573] Apart from this comment, the issue was only taken up by governments with a long history of opposition to the United States. Thus, Iran called for an end to serious violations of IHRL and IHL "including covert external operations by the CIA, carried out on the pretext of combating terrorism,"[574] North Korea called for measures to address civilian killings in Afghanistan and Iraq,[575] Cuba called for an end to the "killings of innocent civilians,"[576] Nicaragua deplored the "war crimes and massacres against unarmed civilians,"[577] and Venezuela called for an end to "selective assassinations committed by contractors."[578] The United States took all of this in stride, and diplomatically characterized the process as "a useful tool to assess how our country can continue to improve in achieving its own human rights goals."[579] But its main response was to reject the

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[572] Further Information Received From the United States of America on the Implementation of the Concluding Observations of the Human Rights Committee, U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.2 2 (Sept. 24, 2009).
[573] Report of the Working Group on the Universal Periodic Review: United States of America, U.N. Doc. A/HRC/16/11 23, ¶ 92.138 (Jan. 4, 2011).
[574] *Id.* at 28, ¶ 92.217.
[575] *Id.* at 22, ¶ 92.136.
[576] *Id.* at 22, ¶ 92.140.
[577] *Id.* at 22, ¶ 92.141.
[578] *Id.* at 22, ¶ 92.142.
[579] Harold Hongju Koh, Legal Adviser, U.S. Department of State, Statement Upon Adoption of Universal Periodic Review Report, United Nations Human Rights Council, Geneva (Mar. 18, 2011), *available at* http://geneva.usmission.gov/2011/03/18/us-upr-adoption/.

recommendations cited above, most of which it characterized as "unsubstantiated accusations of ongoing serious violations."[580]

Although most of the comments were vague and non-specific and almost all came from long-term opponents of the United States, it would be a mistake to dismiss the process as irrelevant. At the very least, it indicates the issues on which the United States is most vulnerable in the eyes of those who are keenest to show it in a bad light. It also reflects the extent to which the UPR process is driven by inter-state solidarity rather than objective assessments. In other words, the silence of other countries on the issue of targeted killings says less about the international community's view of the practice than it does about the fact that countries allied to the United States were either preoccupied with older issues such as torture or renditions, or were not prepared to challenge the United States on its targeted killings policy. Since several of them actively cooperate with it in night raids and drone strikes in Afghanistan, that is perhaps not surprising. This mini-case study also serves to underscore the challenges that must be met if the UPR is to be seen as an effective form of accountability.[581]

The third potential site for accountability in the United Nations context is reporting by individual experts appointed by the Human Rights Council to monitor states' conduct in relation to specific issues. The present author, in his former capacity as Special Rapporteur on extrajudicial executions, presented one major[582] and several minor reports[583] raising

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[580] Report of the Working Group on the Universal Periodic Review, United States of America, Addendum, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review, U.N. Doc. A/HRC/16/11/Add.1 5, ¶ 14 (Mar. 8, 2011).

[581] For assessments of the strengths and weaknesses of the UPR system, see Christian Tomuschat, *Universal Periodic Review: A New System of International Law with Specific Ground Rules?*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 609 (Ulrich Fastenrath et al. eds., 2011) (noting the peculiar nature of a procedure in which "the legal assessments as well as the inferences to be drawn therefrom are left entirely to the discretion of the obligated party." *Id.* at 628.).

[582] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston).

[583] On the subject of night raids, see Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Mission to Afghanistan,* U.N. Doc. A/HRC/11/2/Add.4, 8–10, ¶¶ 10–13 (May 4, 2009) (by Philip Alston); Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Mission to the United States of America*, UN

questions as to the conformity of targeted killings with the applicable bodies of international law. While the official position of the United States is that it "will work closely together with member States to advance human rights and to remain in an open dialogue with the special procedures mandate-holders,"[584] it chose to engage only in the most perfunctory way with the substance of these reports. For its part, the Council refrained from taking any steps to promote compliance. Nonetheless, the report dealing with lethal drone strikes received extensive media coverage and was most likely a key factor in provoking the official statement by Harold Koh justifying United States counter-terrorism policies from the point of view of international law.[585]

Two questions emerge from this overview. The first is how to explain the Council's failure to act. In part, it is (lamentably) normal practice for it to take note of such reports but not to take any further specific action on its own part. The charitable explanation is that it lets the report itself do the talking and the work. Other explanations include the complex legal nature of the issues raised, a reluctance on the part of Council members to tackle the United States, and the assumption that the practice is confined to conflict zones and is justified by IHL. The second question is whether the Council should make a more concerted effort in the future to address this issue. The thrust of this Article is that it clearly should do so for several reasons. The first is that it has so far barely acknowledged the seriousness of the threat posed to the international human rights regime by the rapid growth of targeted killings policies on the part of states. These policies go to the very heart of the challenge of upholding the right to life and the Council's silence represents a significant abdication of responsibility. The technologies available for carrying out extraterritorial targeted killings are becoming rapidly more sophisticated and will be increasingly widely accessible in the years ahead. Unless the Council begins now to spell out its understanding of the obligations of states using kill/capture raids or using lethal drone strikes in the territory of other states

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Doc. A/HRC/11/2/Add.5 23–24, ¶ 47 (May 28, 2009). On drones see *id.* at 31–32, ¶¶ 71–73.

584 U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.2, *supra* note 572.

585 *See, e.g.*, the *Wall Street Journal* editorial linking the two statements. *Editorial: A Defense of Drones*, WALL ST. J., Apr. 2, 2010, A16. It described Koh's speech as "a useful riposte to the growing chatter from the anti-antiterror left. U.N. human-rights investigator Philip Alston made headlines last fall by suggesting drone strikes might violate international law. Leftist groups in the U.S. joined the chorus."

it will soon be too late to put the genie back in the bottle, and the international regime governing the right to life will have suffered a dramatic setback.

The second reason for the Council to act is that the United States is not the only state actively involved in using kill/capture raids and drones to carry out targeted killings. In addition to Israel, there is now a considerable amount of evidence implicating the United Kingdom,[586] Australia,[587] and Germany[588] in drone-based killings. While their involvement may ultimately turn out to be in compliance with the requirements of international law, it will not be possible to reach such a conclusion until the states concerned are prepared to divulge the details of their operations. It is hardly surprising that their present opaqueness in this respect mirrors the approach adopted by the United States. As argued below, the precedent being created by this approach is problematic.

The third reason why the Human Rights Council should take these issues more seriously is the growing chasm between its approach and that of other international human rights bodies. This is particularly marked in relation to the European Court of Human Rights, as illustrated by its Grand Chamber judgment of July 2011 in the case of *Al-Skeini and Others v. the United Kingdom*.[589] The court held that "[t]he general legal prohibition of

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[586] It has been reported that between June 2008 and December 2010, at least 124 people were killed in Afghanistan by British drones, but no details of the number of civilian casualties are available. Efforts under freedom of information legislation to obtain more information have either been ignored or rejected as being "prejudicial to the defence of our armed forces". Chris Cole, *We Mustn't Ignore the Fact that British Drones Kill Too*, THE GUARDIAN (May 13, 2011), http://www.guardian.co.uk/commentisfree/2011/may/13/britains-military-open-people-killed-drones.

[587] "The ADF [Australian Defence Forces] won't release detailed rules of engagement, methods used to compile target lists, or details of drone strikes, but says its operations comply with international law" *Revealed: Australians at the console of Kill TV, when drone strikes take out Afghan targets*, SYDNEY MORNING HERALD (Sept. 5, 2011), http://www.smh.com.au/world/revealed-australians-at-the-console-of-kill-tv-when-drone-strikes-take-out-afghan-targets-20110904-1jslm.html.

[588] *Germany Gave Names to Secret Taliban Hit List*, SPIEGEL ONLINE (Aug. 2, 2010), http://www.spiegel.de/international/germany/0,1518,709625,00.html.

[589] Al-Skeini and Others v. The United Kingdom, App. No. 55721/07 Eur. Ct. H.R. (Judgment of July 7, 2011). The court held that the rights of the families of four Iraqis killed by British forces had been violated by the United Kingdom's failure to independently investigate the deaths, and thus rejected the Government's position that

arbitrary killing by 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,"[590] and that the relevant procedural obligation "continues to apply in difficult security conditions, including in a context of armed conflict."[591] This judgment is going to be highly significant in determining the obligations of the 47 Contracting States to the European Convention for the Protection of Human Rights and Fundamental Freedoms, including all of the United States' European allies in the North Atlantic Treaty Organization, in conjunction with whom it is conducting various of the operations under consideration in this Article. While the United States will properly insist that it is not a party to, and is thus not bound by, the European Convention, the court's jurisprudence drew upon analyses of the general position under international human rights law to which the United States is subject. The likelihood that there will be a significant flow-on effect of such jurisprudence raises the question as to whether, and if so why, the United States should take this body of law more seriously.

### *B. Why should the United States Take Seriously International Law on Targeted Killings?*

Kenneth Anderson, a strong proponent of U.S. targeted killing operations, has offered the following reason for engaging with international law in this area:

> These 'intelligence-driven' covert operations are not going away. . . . The United States will conduct such operations more frequently and more visibly than anyone else. A consistent and unapologetic public stance on the basic principles of their legality . . . is an important mechanism to defend their legitimacy within this country and abroad . . . .[592]

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human rights law did not apply to the acts of its forces committed overseas, even when it was an occupying force and controlled the security situation, as was the case at the time in Iraq.

[590] *Id.* ¶ 163.

[591] *Id.* ¶ 164. In doing so the Grand Chamber relied significantly on the analysis of the present author, in his capacity as Special Rapporteur. *See id.* ¶¶ 93, 164.

[592] Anderson, *supra* note 522.

But he also argues that justifications offered by the United States need only meet a plausibility standard, rather than being likely to convince others. This is the case partly because its views matter more than those of any others, including for example "those of Bolivia or Tajikistan, or subcommittees of the United Nations, or congeries of NGOs," and partly because repeated articulation, even of views that others find unconvincing, will eventually win the day. In addition, he argues that the United States should not "engage with the U.N., its special rapporteurs, or the Human Rights Council on this issue." For Anderson, this refusal to engage international institutions is justified both because the "international law community will never be satisfied" anyway, and because the United States should not be seeking anyone's permission to do as it wishes in this area.[593]

When boiled down, his argument is little more than a call to engage rhetorically in a public relations exercise. It is the foreign relations equivalent of Vermeule's reliance on grey holes as a technique to enable the United States to do what it wishes while invoking a veneer of legality, no matter how patently transparent and unconvincing the veneer might be. Leaving aside for this purpose the obvious arguments derived from morality, human rights, and good international citizenship, I would identify three pragmatic or self-interested reasons why the United States should engage in a more authentic and robust manner with international law in this area.

1. Credibility

This argument can be succinctly stated. If the United States firmly believes, as the State Department's Legal Adviser insists it does, that it is acting in full compliance with international law, it should not hesitate to provide the evidence thereof. Because its dealings with other states regularly reflect a "trust, but verify" approach,[594] it can hardly expect that it will be held to a lower standard. Similarly, the United States attaches great importance in its overall foreign policy to the promotion of the rule of law. Thus the 2010 National Security Strategy commits it to "working to strengthen national justice systems" around the world, especially because "[t]hose who intentionally target innocent civilians must be held

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593 *Id.*

594 *See supra* note 104.

accountable."[595] Civil society groups have also called for the United States government to play a leading role in helping other countries to develop national-level accountability mechanisms.[596] Similarly, in specific cases, such as the alleged killing of a journalist by Pakistan's Inter-Services Intelligence (ISI), the United States[597] and American media outlets have called for transparency and accountability and effective civilian oversight in the ISI's activities.[598] While the human rights violations of which the CIA and its Pakistani counterpart have been accused are very different in nature, it is difficult not to note the parallels in the resistance met by such calls. The CIA would greatly enhance its own credibility and that of the United States if it were to follow the advice given by the United States to the intelligence agencies of other countries.

2. Addressing Pressures from Foreign Courts

A more pragmatic reason is that judicial action against CIA personnel is certain to increase in the years ahead as the agency becomes more actively engaged at an operational level in targeted killings. The United States would be better placed to counter such actions if it could demonstrate that it is acting in compliance with the applicable international law.

Recent years have seen high-profile prosecutions in several countries in which the CIA has been operating. As noted above, Raymond Davis, a CIA official widely reported to have been involved in drone-based targeted killing operations, was accused in 2011 of two murders in Lahore. The United States indicated that diplomatic and other relations between the two countries would suffer greatly unless he was released. Although the local court system had insisted on proceeding to trial, blood money (*diyya)* was paid to the families of the two deceased and the case was closed, amid

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595 THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 48 (2010).
596 DAVID A. KAYE, JUSTICE BEYOND THE HAGUE: SUPPORTING THE PROSECUTION OF INTERNATIONAL CRIMES IN NATIONAL COURTS, COUNCIL ON FOREIGN RELATIONS SPECIAL REPORT NO. 61, 22 (June 2011).
597 Elisabeth Bumiller, *U.S. Admiral Ties Pakistan to Killing of Journalist*, N.Y. TIMES (July 7, 2011), http://www.nytimes.com/2011/07/08/world/asia/08mullen.html.
598 *Editorial: A Pakistani Journalist's Murder*, N.Y. TIMES (July 7, 2011), http://www.nytimes.com/2011/07/08/opinion/08fri2.html.

allegations of coercion and bribery.[599] In 2007 courts in both Germany and Italy opened prosecutions against CIA agents. In Italy, an Egyptian cleric named Abu Omar was kidnapped on the streets of Milan, rendered to Egypt, and tortured and interrogated. Italian prosecutors charged 22 CIA officials.[600] In Germany, a Lebanese-born German national named Khaled el-Masri was seized in Macedonia and rendered to a CIA prison in Afghanistan where he was interrogated and tortured. Prosecutors issued arrest warrants for 13 CIA officers alleged to have been responsible. In both the German and Italian cases, United States diplomatic cables reveal strong and determined high-level lobbying by U.S. officials who warned their counterparts of extremely serious repercussions if the prosecutions went forward. In the German case, they were abandoned,[601] and in the Italian case the courts went ahead and convicted the CIA officers *in absentia*, but the Italian Government, responding to representations by the U.S. Secretary of Defense to the Italian Prime Minister, refrained from taking the steps necessary to pursue the convictions internationally.[602]

In all known cases the United States has applied immense diplomatic and perhaps other pressure in order to ensure that CIA agents have not had to answer for alleged violations of the law of the states concerned. But these responses have come at a high price in terms of the public standing of the United States in the countries concerned and future prosecutions are likely. At present the German Federal Prosecutor's Office is examining the possibility of bringing charges over the killing of a German citizen by a drone attack in Pakistan in October 2010,[603] and in July 2011, a complaint was filed in Pakistan against a former CIA official for his involvement in drone strikes.[604]

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[599] Issam Ahmed, *CIA Contractor Raymond Davis Freed From Pakistan Jail on 'Blood Money'*, CHRISTIAN SCIENCE MONITOR (Mar. 16, 2011), http://www.csmonitor.com/World/Asia-South-Central/2011/0316/CIA-contractor-Raymond-Davis-freed-from-Pakistan-jail-on-blood-money.

[600] *See* Donadio, *supra* note 300.

[601] Matthias Gebauer & John Goetz, *Cables Show Germany Caved to Pressure from Washington*, SPIEGEL ONLINE (Dec. 9, 2010), http://www.spiegel.de/international/germany/0,1518,733860,00.html.

[602] John Goetz & Matthias Gebauer, *US Pressured Italy to Influence Judiciary*, SPIEGEL ONLINE (Dec. 17, 2010), http://www.spiegel.de/international/europe/0,1518,735268,00.html.

[603] Holger Stark, *Germany Limits Information Exchange with US Intelligence*, SPIEGEL ONLINE (May 17, 2011), http://www.spiegel.de/international/germany/0,1518,762873,00.html.

[604] *See* McKelvey, *Arrest Warrant Sought for CIA Lawyer*, *supra* note 190.

3. Self-interest: Setting Prudent Precedents for Others

Because the United States inevitably contributes disproportionately to the shaping of global regime rules, and because it is making more extensive overt use of targeted killings than other states, its approach will heavily influence emerging global norms. This is of particular relevance in relation to the use of drones. There are strong reasons to believe that a permissive policy on drone-fired targeted killings will come back to haunt the United States in a wide range of potential situations in the not too distant future.

In 2011, a senior official noted that while for the past two decades the United States and its allies had enjoyed "relatively exclusive access to sophisticated precision-strike technologies," that monopoly will soon come to an end.[605] In fact, in the case of drones, some 40 countries already possess the basic technology. Many of them, including Israel, Russia, Turkey, China, India, Iran, the United Kingdom, and France either have or are seeking drones that also have the capability to shoot laser-guided missiles. Overall, the United States accounts for less than one-third of worldwide investment in UAVs.[606] On "Defense Industry Day," August 22, 2010, the Iranian President unveiled a new drone with a range of 1,000 kilometers (620 miles) and capable of carrying four cruise missiles.[607] He referred to the drones as a "messenger of honor and human generosity and a saviour of mankind," but warned ominously that it can also be "a messenger of death for enemies of mankind."[608]

To date, the United States has opted to maintain a relatively flexible and open-ended legal regime in relation to drones, in large part to

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[605] William J. Lynn, III, Deputy Secretary of Defense, The Future of War: Keynote Address at the CSIS Global Security Forum 2011, Washington, D.C. (June 8, 2011), *available at* http://www.defense.gov/speeches/speech.aspx?speechid=1580.
[606] Peter Singer, *Defending Against Drones: How Our New Favorite Weapon in the War on Terror Could Soon be Turned Against Us*, NEWSWEEK (Feb. 25, 2010), http://www.newsweek.com/2010/02/25/defending-against-drones.html#.
[607] William Yong & Robert F. Worth, *Iran's President Unveils New Long-range Drone Aircraft*, N.Y. TIMES (Aug. 22, 2010), http://www.nytimes.com/2010/08/23/world/middleeast/23iran.html.
[608] *Iran Unveils First Bomber Drone*, BBC (Aug. 22, 2010), http://www.bbc.co.uk/news/world-middle-east-11052023.

avoid setting precedents and restricting its own freedom of action.[609] But this policy seems to assume that other states will not acquire lethal drone technology, will not use it, or will not be able to rely upon the justifications invoked by the United States. These assumptions seem questionable. American commentators favoring a permissive approach to targeted killings abroad are generally very careful to add that such killings would under no circumstances be permitted within the United States.[610]

Thus when the United States argues that targeted killings are legitimate when used in response to a transnational campaign of terror directed at it, it needs to bear in mind that other states can also claim to be so afflicted, even if the breadth of the respective terrorist threats is not comparable. Take Russia, for example, in relation to terrorists from the Caucasus. It has characterized its military operations in Chechnya since 1999 as a counter-terrorism operation and has deployed "seek and destroy" groups of army commandoes to "hunt down groups of insurgents."[611] It has been argued that the targeted killings that have resulted are justified because they are necessary to Russia's fight against terrorism.[612] Although

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[609] Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L. L. 244, 281 (2011).

[610] *See, for example* PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 21 (2005) "Even when these conditions are met [which would justify killings anywhere else in the world], there shall be no targeted killing of: a U.S. person [or] any person found in the United States." For a critique of these proposals see Melzer, *supra* note 43, at 67–70.

[611] Simon Saradzhyan, *Russia's System to Combat Terrorism and Its Application in Chechnya*, *in* R.W. ORTTUNG AND A. MAKARYCHEV, NATIONAL COUNTER-TERRORISM STRATEGIES 183 (2006).

[612] *See, e.g.*, *Chechen Rebel Basayev Dies*, BBC (July 10, 2006), http://news.bbc.co.uk/2/hi/5165456.stm (alleged killing by Russian special forces of Chechen rebel leader Shamil Basayev). The use of the term 'terrorism' in this particular context is especially problematic because large parts of the population have been labeled as terrorists. *See, e.g.,* Anna Le Huerou and Amandine Regamey, *Russia's War in Chechnya*, *in* SAMY COHEN, DEMOCRACIES AT WAR AGAINST TERRORISM 222 (2008) ("[During the Second Chechen War] the inhabitants of Grozny were given an ultimatum: if they did not leave the city, they would be regarded as terrorists and eliminated. On January 11, 2000, [Russian] General Kazantsev declared that in Chechnya "only children up to the age of ten, men over 65 and women will henceforth be regarded as refugees." All other males were classed as combatants, and therefore as potential terrorists […] On February 11, 2003, [the Russian President] stated that those remaining in Chechnya were simply "people and isolated groups who commit terrorist acts…Our current task is to eliminate them.'").

there are credible reports of targeted killings conducted outside of Chechnya, Russia has refused to acknowledge responsibility for, or otherwise justify, such killings. It has also refused to cooperate with any investigation or prosecution.[613]

In 2006, the Russian Parliament passed a law permitting the Federal Security Service (FSB) to kill alleged terrorists overseas, if authorized to do so by the President.[614] The law defines terrorism and terrorist activity extremely broadly, including "practices of influencing the decisions of government, local self-government or international organizations by terrorizing the population or through other forms of illegal violent action," and also any "ideology of violence."[615]

Under the law, there appears to be no restriction on the use of military force "to suppress international terrorist activity outside the Russian Federation."[616] The law requires the President to seek the endorsement of the Federation Council to use regular armed forces outside Russia, but the President may deploy FSB security forces at his own discretion. According to press accounts, at the time of the law's passage, "Russian legislators stressed that the law was designed to target terrorists hiding in failed States and that in other situations the security services would work with foreign intelligence services to pursue their goals."[617] There is no publicly available information about any procedural safeguards to ensure Russian targeted killings are lawful, the criteria for those who may be targeted, or accountability mechanisms for review of targeting operations. In adopting the legislation, Russian parliamentarians claimed that, "they were emulating Israeli and US actions in adopting a law

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[613] *See, e.g.*, Saradzhyan, *supra* note 611, at 185 (denial by Russia of alleged killing, with a car bomb, of Chechan separatist leader Zelimkhan Yandarbiyev in Qatar in 2004). Qatar accused Russia of carrying out the killing and tried and imprisoned two Russian agents for the murder. Andrew McGregor, *The Assassination Of Zelimkhan Yandarbiyev: Implications For The War On Terrorism*, TERRORISM MONITOR (July 14, 2004), http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=30107..

[614] Federal Law No. 35-FZ on Counteracting Terrorism (2006), *available at* http://www.legislationline.org/topics/country/7/topic/5.

[615] *Id.* art. 3.

[616] *Id.* art. 6.

[617] Peter Finn, *In Russia, A Secretive Force Widens*, WASH. POST (Dec. 12, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/12/11/AR2006121101434.html.

allowing the use of military and special forces outside the country's borders against external threats."[618]

China is another case in point. It has consistently characterized unrest among its Uighur population as being driven by terrorist separatists. But Uighur activists living outside China are not so classified by other states. That means that China could invoke American policies on targeted killing to carry out a lethal attack against a Uighur activist living in Europe or the United States. The Chinese Foreign Ministry welcomed the killing of Osama bin Laden as "a milestone and a positive development for the international anti-terrorism efforts," adding ominously in reference to the Uighur situation that, "China has also been a victim of terrorism."[619] When a journalist asked how American practice in Pakistan compared to possible Chinese external action against a Uighur to a senior United States counter-terrorism official, the latter distinguished the situations from one another on the unconvincing grounds of Pakistan's special relationship with the United States.[620]

A more realistic note was struck by Anne-Marie Slaughter after bin Laden's killing when she observed that "having a list of leaders that you are going to take out is very troubling morally, legally and in terms of precedent. If other countries decide to apply that principle to us, we're in trouble."[621] The conclusion to be drawn is that the United States might, in the not too distant future, need to rely on international legal norms to delegitimize the behavior of other states using lethal drone strikes. For that reason alone, it would seem prudent today to be contributing to the construction of a regime that strictly limits the circumstances in which one state can seek to kill an individual in another state without the latter's consent and without complying with the applicable rules of international

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[618] Steven Eke, *Russia Law on Killing Extremists Abroad*, BBC (Nov. 27, 2006), http://news.bbc.co.uk/2/hi/europe/6188658.stm.

[619] Antoaneta Becker, *After Osama, China Fears the Next Target*, INTERPRESS SERVICE (May 9, 2011), http://www.ipsterraviva.net/UN/news.asp?idnews=55519.

[620] Michael E. Leiter, the former Director of the National Counterterrorism Center, replied that the most important difference between the situation of the United States in Pakistan and that of China and a Uighur terrorist in the West is the "relations that we have with the host government," meaning Pakistan. Ken Dilanian, *Counter-terrorism Official Defends U.S. Campaign of Targeted Killings*, L.A. TIMES (July 1, 2010), http://articles.latimes.com/2010/jul/01/world/la-fg-drones-leiter-20100701.

[621] Anne-Marie Slaughter quoted in *supra* note 22.

law. To the extent that the United States genuinely believes it is currently acting within the scope of those rules it needs to provide the evidence.

## IX. Conclusion

This Article has not sought to spell out the options open to the United States in order to bring its conduct within the law. The bottom line is that intelligence agencies—particularly those that are effectively unaccountable—should not be conducting lethal operations abroad. Beyond that proposition, there is a great deal that the CIA could do if it so wished, including making public its commitment to comply with both IHL and IHRL, disclosing the legal basis on which it is operating in different situations involving potential killings, providing information on when, where, and against whom drone strikes can be authorized, and publishing its estimates on the number and rate of civilian casualties. Full transparency is neither sought nor expected, but basic compliance with the standards applied by the U.S. military, and both consistently and insistently demanded of other countries by the United States, is indispensable.

Examining the CIA's transparency and accountability in relation to targeted killings also sheds light on a range of other issues that international human rights law needs to tackle in a more systematic and convincing manner. They include the approach adopted by international law to the activities of intelligence agencies, the (in)effectiveness of existing monitoring mechanisms in relation to killings governed by a mixed IHL/IHRL regime, and the techniques needed to monitor effectively human rights violations associated with new technologies such as unmanned drones and robotics. International human rights institutions need to respond more robustly to the growing chorus of proposals that targeted killings be liberated from the hard-fought legal restraints that apply to them. There is a great deal at stake and these crucial issues have been avoided for too long.

The principal focus of this Article has been on the question of CIA accountability for targeted killings, under both U.S. law and international law. As the CIA, often in conjunction with DOD Special Operations Forces, becomes ever more deeply involved in carrying out extraterritorial targeted killings both through kill/capture missions and drone-based missile strikes in a range of countries, the question of its compliance with the relevant legal standards becomes even more urgent. Assertions by Obama administration officials, as well as by many scholars, that these operations

comply with international standards are undermined by the total absence of any forms of credible transparency or verifiable accountability. The CIA's internal control mechanisms, including its Inspector General, have had no discernible impact; executive control mechanisms have either not been activated at all or have ignored the issue; congressional oversight has given a "free pass" to the CIA in this area; judicial review has been effectively precluded; and external oversight has been reduced to media coverage which is all too often dependent on information leaked by the CIA itself. As a result, there is no meaningful domestic accountability for a burgeoning program of international killing. This in turn means that the United States cannot possibly satisfy its obligations under international law to ensure accountability for its use of lethal force, either under IHRL or IHL. The result is the steady undermining of the international rule of law, and the setting of legal precedents which will inevitably come back to haunt the United States before long when invoked by other states with highly problematic agendas.