

MEASURE TWICE, SHOOT ONCE: HIGHER CARE FOR CIA-TARGETED KILLING

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For almost a decade, the United States has deployed unmanned aerial vehicles, or “drones,” to kill targeted members of Al Qaeda and the Taliban. Central Intelligence Agency (CIA) drone strikes in Pakistan have, in particular, stirred strong debates over the legality of such actions. Some commentators insist that these strikes are legal under international humanitarian law (IHL) or as a matter of self-defense. Others insist that the United States’ targeted killing amounts to murder.

It is critical for the law to determine how to control killer drones and the future of warfare. As technology evolves, drones will develop sharper senses and become more precise and lethal. The power to use drones to find and kill specific human targets—and states’ temptation to use (and abuse) that power—will grow over time. On other fronts, drones may become fully automated, and their use in surveillance may spread along the borders with Canada and Mexico and into the U.S. heartland.

To rein in the killer drones, this Article looks to foundational IHL principles to develop limits on the CIA’s campaign in Pakistan and on the possible extension of that campaign to other countries outside the United States. In particular, this Article argues that IHL’s requirements of distinction and military necessity generally require the CIA to achieve a very high level of certainty that a targeted person is a legitimate object of attack before carrying out a drone strike. To capture this level of certainty, one might borrow the “beyond reasonable doubt” standard from the criminal law, the “clear and convincing” standard from civil law, or create some new phrase. Also, to honor

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the principle of precaution, the CIA's Inspector General must review every CIA drone strike, including the agency's compliance with a checklist of standards and procedures for the drone program. The results of these reviews should be made as public as consonant with national security. These controls are, in the language of IHL, "feasible precautions" for the remote-control weapons of the new century.

The Article closes by considering whether targeting of U.S. citizens by the U.S. government should be subject to stricter due process controls than targeting of non-Americans—a point that also has stirred controversy. The Article concludes that, if the controls on targeted killing are not good enough for U.S. targets, they are not good enough for Pakistanis, Yemenis, Somalis, and others. The law can develop a set of standards to ensure that states use targeted killing, whether as part of an armed conflict or in self-defense, only against legitimate targets—no matter their citizenship.

I. INTRODUCTION

[CIA] sharpshooters killed eight people suspected of being militants of the Taliban and Al Qaeda . . . in a compound that was said to be used for terrorist training. Then, the job in North Waziristan done, the C.I.A. officers could head home from the agency's Langley, Va., headquarters, facing only the hazards of the area's famously snarled suburban traffic.¹

The CIA officers of the preceding media account fired missiles from the belly of a remote-controlled drone to kill suspected militants.² The use of drones to target and kill leaders of Al Qaeda and the Taliban (collectively, AQ/T) began under the Bush administration.³ The Air Force has controlled these operations in the clear war zones of Afghanistan and Iraq.⁴ Elsewhere, in northwest Pakistan, Yemen, and Somalia, the CIA controls operations.⁵ The number of CIA drone strikes has soared since the Obama administration took office, making targeted killing a key to the administration's counterterrorism efforts.⁶ The Obama administra-

1. Scott Shane, *C.I.A. Drone Use Is Set to Expand Inside Pakistan*, N.Y. TIMES, Dec. 4, 2009 (Late Edition), at A1.

2. *Id.*

3. Eric Schmitt & Mark Mazzetti, *Bush Said to Give Orders Allowing Raids in Pakistan*, N.Y. TIMES, Sept. 11, 2008 (Late Edition), at A1 (reporting that, by 2008, the CIA Predator campaign in Pakistan had been proceeding for several years).

4. Christopher Drew, *For U.S., Drones Are Weapons of Choice in Fighting Qaeda*, N.Y. TIMES, Mar. 17, 2009 (Late Edition), at A1.

5. Peter Baker, *Stopping the Next One: Obama's War over Terror*, N.Y. TIMES, Jan. 17, 2010 (Magazine), at 30, 39 (reporting that President Obama authorized doubling the number of drones in the Pakistan border area as well as increased use over Yemen and Somalia); Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, at 36, 37 ("The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based.").

6. See Drew, *supra* note 4 (reporting several dozen CIA Predator attacks preceding March 2010); see also Christopher Drew, *For Spying and Attacks, Drones Play a Growing Role in Afghanis-*

tion, signaling its resolve, has gone so far as to add a U.S. citizen residing in Yemen to the hit list.⁷

Drones represent a summit in long-distance killing. From the Neolithic spear, to the bow and arrow, to artillery, to the airplane, to the cruise missile, advances in weaponry over the millennia have made it easier and safer to kill from great distances. Drones, combined with suitable missiles, have taken this process to its logical extreme.

Drones also represent a profound leap in intelligence gathering. A small drone—unburdened by a pilot who must protect himself from enemy fire—can hover unseen above a potential target for many hours.⁸ The drone's powerful cameras gather ground information that is instantly beamed to the United States for assessment.⁹ Plus, infrared and other sensors may add to the drone's capabilities.

The drone's capabilities will increase as military and intelligence agencies invest more in this marvelous tool.¹⁰ Vision will become sharper as cameras grow stronger,¹¹ and missiles will become more accurate and smaller. The endpoint may be the nano-drone that sniffs out the head of Al Qaeda, buzzes into his bedroom, kills him in his sleep, and dissolves into the Pakistani mist.¹²

tan, N.Y. TIMES, Feb. 20, 2010 (Late Edition), at A6 (reporting the conclusion of independent researchers that the CIA conducted sixty-nine drone attacks in Pakistan during 2009 and the beginning of 2010).

7. Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Tied to Domestic Terror Suspects*, N.Y. TIMES, Apr. 7, 2010 (Late Edition), at A12 (reporting that al-Awlaki, who resides in Yemen, was approved for targeted killing because he was a recruiter for Al Qaeda plots in the Arabian Peninsula).

8. See Mayer, *supra* note 5, at 36, 44 (reporting forty-hour figure).

9. *Id.* at 36. For video of the drone's camera capabilities as of 2009—or as much as the Air Force was willing to reveal on television, see *America's New Air Force* (CBS television broadcast May 10, 2009), available at <http://www.cbsnews.com/video/watch/?id=5245555n&tag=mnco1;1st;1> (showing, at 5:43 mark, video footage captured by drone operating at 10,000 feet over the 60 Minutes crew on an Air Force base runway; showing, at 6:25 mark, nighttime, infrared video of a person carrying a “hot gun” just fired at U.S. forces and also showing missile strike on this person).

10. See Peter W. Singer, *Attack of the Military Drones*, BROOKINGS (June 27, 2009), http://www.brookings.edu/opinions/2009/0627_drones_singer.aspx.

One US Air Force general has predicted that conflicts in the near future will involve “tens of thousands” of robots—and not the robots of today. The current Packbots and Predators are just the first generation of battlefield robots; they are like the Model T Ford or the Wright brothers' Flyer when compared to the prototypes already under development.

Id.

11. See Christopher Drew, *Drone Flights Leave Military Awash in Data*, N.Y. TIMES, Jan. 11, 2010 (Late Edition), at A1 (“Reaper drones, which are newer and larger than the Predators, will soon be able to record video in 10 directions at once. By 2011, that will increase to 30 directions with plans for as many as 65 after that.”).

12. Cf. Christopher Drew, *Air Force Report Envisions a Broader Use of Drones*, N.Y. TIMES, July 24, 2009 (Late Edition), at B3 (reporting that the Air Force plans to develop “drone swarms” to attack enemy targets); David Hambling, *Air Force Completes Killer Micro-Drone Project*, WIRED (Jan. 5, 2010, 7:00 AM), <http://www.wired.com/dangerroom/2010/01/killer-micro-drone> (“[M]ilitary budget documents note that Air Force engineers were successful in ‘develop[ing] a Micro-Air Vehicle (MAV) with innovative seeker/tracking sensor algorithms that can engage maneuvering high-value targets.’”); see also John Markoff, *Ay Robot! Scientists Worry Machines May Outsmart Man*, N.Y. TIMES, July 26, 2009 (Late Edition), at A1 (listing self-recharging robots, unstoppable computer viruses, and autonomous drones as things to worry about as machines get smarter than we are); *Droning On: How to*

Killer drones are the future of warfare. Viewed from one angle, this development has few legal implications insofar as drones merely provide another tool for the longstanding military practice of killing enemies from the air. But the drone's extraordinary capabilities have greatly expanded the government's range for finding, tracking, and killing human targets.¹³ Given the drone's ever-increasing power, it is inevitable that they will be used in ways that challenge traditional legal paradigms; targeted killing, whether conducted by the CIA or anyone else, has become controversial. Proponents contend it is legal to kill identified enemies in self-defense or as part of an armed conflict under the laws of war—otherwise known as international humanitarian law (IHL). Critics decry targeted killing as extrajudicial assassination.

A growing literature examines the legal issues presented by targeted killing—whether by drone or other means.¹⁴ One issue underlying much

Build Ethical Understanding into Pilotless War Planes, *ECONOMIST*, Apr. 3, 2010, at 82 (discussing proposal to use advanced software to endow drones with a “conscience” of sorts to minimize collateral damage).

13. See Philip Alston, *United Nations Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Study on Targeted Killings*, ¶ 80, U.N. Doc. A/HRC/14/12/Add.6 (May 28, 2010) (“[B]ecause [drones] make it easier to kill without risk to a State’s forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively.”).

14. For an important judicial discussion of targeted killing of terrorists, see the Israeli Supreme Court’s opinion in HCJ 769/02, Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. (PCATI) [Dec. 11, 2005], slip op. para. 2, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (concluding that an Israeli campaign of targeted killing could be conducted legally if subject to identified procedural and substantive controls). For a recent and magisterial survey of targeted killing under the laws of war authored by the Legal Adviser for the International Committee for the Red Cross (ICRC), see generally NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 442–44 (2008).

For other recent commentary on targeted killing, see, for example, Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in *LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM* 346, 370 (Benjamin Wittes ed., 2009) (contending that the United States has, and should vigorously assert, a right to self-defense that authorizes targeted killing of terrorists and that does not depend on the existence of an armed conflict within the meaning of IHL); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 749 (2003) (concluding that the current U.S. legal framework “leave[s] the nasty business of targeted killing where it should lie, as a permissible but tightly managed and fully accountable weapon of national self-defense in an era of horrific terrorist attacks on the United States and its people”); Orna Ben-Naftali & Keren R. 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, 289 (2003) (contending that, in armed conflicts, human rights law should control where IHL fails to provide clear guidance); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki As a Case Study in the International Regulation of Lethal Force*, 13 Y.B. INT’L HUMANITARIAN L. (forthcoming 2011) (assessing the legality of the United States’ targeting of al-Awlaki, a dual Yemeni-American citizen, under the United Nations Charter, IHL, and international human rights law); Kristen E. Eichensehr, Comment, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873, 1878–79 (2007) (contending that the Israeli decision in the PCATI case adopted standards that improperly allow civilian deaths); W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT’L L. 711, 733–34, 741–42 (2007) (contending that, given technological, political, and social developments, a legal norm permitting targeted killing in contexts such as the war on terror will evolve); Amos Guiora, *Targeted Killing As Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 334 (2004) (concluding, based on Israeli experience, that “targeted killing is a legitimate and effective form of active self-defense”); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Ex-*

of the debate is whether IHL can apply to a conflict between a state and a terrorist group (e.g., to the conflict between the United States and Al Qaeda). This determination is critical because states have broader authority to kill under IHL than under human rights law that generally controls outside armed conflicts.

To lay a foundation, this Article first explains why it is reasonable to conclude that IHL can apply to targeted killing of hardened members of terrorist groups. The Obama administration shares this conclusion wholeheartedly.¹⁵ It is possible that years from now a consensus of commentators, perhaps backed up by some court claiming universal jurisdiction, will brand President Obama a war criminal because of drone strikes.¹⁶ This outcome seems unlikely on the face of the matter (although lower-level officials, unprotected by head-of-state status, may face greater risks). If no combination of political and legal forces stops states (including the United States) from targeted killing of suspected terrorists, states will continue this practice. Over time, a consensus will likely evolve that targeted killing of suspected terrorists under some circumstances is legal under IHL.¹⁷

ecutions or Legitimate Means of Defense?, 16 EUR. J. INT'L L. 171, 171, 202–03 (2005) (concluding that targeted killing of terrorists can be legal under the laws of war, but that these laws should incorporate elements of international human rights law to provide greater protection against improper targeting); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 437 (2009) (suggesting a due process framework for limiting use of killer drones); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming 2011) (concluding that drone attacks conducted by CIA officials in Pakistan without that government's express permission are illegal); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 279–80 (2010) (concluding that targeted killings of nonstate actors directly involved in armed attacks can be permissible as part of a "lawful self-defense response"); Tom Ruys, *License to Kill? State-Sponsored Assassination Under International Law*, 44 MIL. LAW & L. WAR REV. 13, 29–30, 39 (2005) (conceding that IHL permits targeted killing of combatants and civilians taking direct part in hostilities but insisting on a narrow interpretation of "direct participation"); Gary Solis, *Targeted Killing and the Law of Armed Conflict*, NAVAL WAR C. REV., Spring 2007, at 127, 134–36 (concluding that targeted killing can be legal under IHL subject to conditions including: (1) the target is a civilian directly participating in hostilities, and (2) the attack was authorized by a senior military commander); AMNESTY INT'L, AI INDEX MDE 15/056/2003, ISRAEL AND THE OCCUPIED TERRITORIES: ISRAEL MUST END ITS POLICY OF ASSASSINATIONS 1 (2003), available at <http://www.amnesty.org/en/library/info/MDE15/056/2003> (follow "PDF" hyperlink) (condemning Israeli policy of targeted killing as an illegal scheme of "extrajudicial executions").

15. See Press Release, Am. Soc'y of Int'l Law, U.S. State Dept. Legal Adviser Lays out Obama Administration Position on Engagement, "Law of 9/11" (Mar. 25, 2010), <http://www.asil.org/pdfs/pressreleases/pr100325.pdf> (supplying a partial transcript of public remarks of Harold H. Koh, State Department Legal Adviser, who stated that, as part of its armed conflict with Al Qaeda, the United States "has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level [A] Qaeda leaders who are planning attacks").

16. See Shane Harris, *Are Drone Strikes Murder?*, NAT'L J., Jan. 9, 2010, at 24 (discussing the possibility that "CIA employees or others involved in Predator strikes could conceivably face legal scrutiny and prosecution" by, inter alia, the International Criminal Court).

17. For predictions that international law will allow targeted killing under limited circumstances, see MELZER, *supra* note 14, at 9 ("Today, targeted killing is in the process of escaping the shadowy realm of half-legality and non-accountability, and of gradually gaining legitimacy as a method of coun-

If this is the likely evolution of the law, it is all the more important to determine *how* IHL, assuming it applies, should regulate targeted killing. To provide a factual context for this determination, this Article focuses on CIA drone strikes in northwest Pakistan.¹⁸ Our analysis may, in turn, be used for targeted killing by other means, by other agencies, and in other places.

This Article notes, but does not focus on, the implications of having a civilian agency involved in a lethal program. Some might insist that the Defense Department be given an exclusive role in U.S. targeted killing. Professor O'Connell, for instance, says the CIA drone campaign is illegal in part because CIA officers cannot operate as "lawful combatants" in an armed conflict: they are not part of a military chain of command, do not wear uniforms, and are not trained in the laws of war.¹⁹ But the CIA must take for granted that its operatives captured by AQ/T will not receive Prisoner of War (POW) status or other benefits of lawful belligerency. Independent of such concerns, CIA officials must carry out drone strikes consistent with IHL.

Several principles of IHL should play a major role in targeted killing. (Similar principles would also apply if the legal justification for a drone strike is self-defense separate from an armed conflict.) First, IHL requires *distinction*, separating combatants from civilians and precluding the targeting of peaceful civilians.²⁰ Second, IHL insists that *military necessity* justify all attacks: an attack should reasonably be expected to create a concrete and direct military advantage.²¹ Third, IHL requires *proportionality*: attacks must not cause excessive "collateral damage."²² To give effect to these principles, IHL also speaks of *precaution*, which

ter-terrorism and 'surgical' warfare." See also Fisher, *supra* note 14 (contending that technological changes and the nature of counter-terrorism are contributing to the legitimacy of targeted killing). *But cf.* Anderson, *supra* note 14, at 21, 37 (contending that the United States should publicly insist that it has the right to engage in targeted killing as self-defense in order to prevent development of a "soft law" consensus that targeted killings outside of armed conflicts are criminal).

18. To use the traditional nomenclature, this Article focuses on the drone campaign's *jus in bello* (principles governing how military force may be used) rather than on *jus ad bellum* (principles governing resort to force). This Article therefore does not consider issues such as whether the CIA drone campaign violates IHL because the Pakistani government has not given sufficiently express consent. *Cf.* O'Connell, *supra* note 14, at 18–19 (contending that, because the Pakistani government has not given express consent to the CIA's drone strikes, it could claim the United States has acted unlawfully and could seek compensation).

19. O'Connell, *supra* note 14, at 7. Note, however, that the CIA operates under the Commander-in-Chief, nothing stops drone operators from wearing uniforms, and nothing stops the CIA from training its officers in the laws of war. *Cf.* MELZER, *supra* note 14, at 317 (observing that in either international or noninternational armed conflicts, police forces, intelligence agents, and border guards may be regarded as "armed forces" of a state for the purpose of IHL even if they are not recognized as such under domestic law). Moreover, the concept that "lawful combatants" are immune from prosecution under civil law for lawful acts of war does not apply in noninternational conflicts. MELZER, *supra* note 14, at 323; see also *infra* notes 47–50 and accompanying text (explaining that the United States' conflicts with Al Qaeda and the Taliban are noninternational in character).

20. See *infra* text accompanying notes 52–63.

21. See *infra* text accompanying notes 64–67.

22. See *infra* text accompanying notes 68–71.

requires armed forces to take all feasible measures to minimize harm to peaceful civilians and property.²³

This Article makes two primary claims about how IHL's core principles should apply to the CIA drone campaign. *First*, because of superior sources of intelligence and because the drone operator is not at risk of attack by AQ/T, the CIA must, absent exceptional circumstances, identify its targets with a very high level of certainty. For ease of reference, this Article will refer to the standard of certainty as "beyond reasonable doubt." Some, however, might regard this standard as too freighted with criminal law baggage to be transported to the IHL setting. A person who takes this view might instead borrow from the civil law and impose a "clear and convincing" standard of certainty. The particular phrase one uses is less important than the core idea of precaution. If the CIA justifies its role in the drone campaign by saying that it is better than the Defense Department at coordinating information and maintaining secrecy, it should live up to those high expectations on targeting and operations.

Second, to ensure compliance with a heightened standard of certainty, all CIA targeted killings should receive an independent review that is as public as national security permits.²⁴ More specifically, "hard look" review by the CIA's Inspector General at all of the agency's drone strikes would help ensure that they occur only after careful, reasoned consideration of all reasonably available and relevant information.²⁵

After advancing these two claims, this Article closes by briefly considering the implications of targeted killing of U.S. citizens by the U.S. government. As noted, the Obama administration's placing of a U.S. citizen on the list of targets has sparked controversy.²⁶ This controversy is misdirected. The problem with targeted killing is not that the U.S. government might kill a U.S. citizen who is demonstrably an enemy combatant without first giving him or her a trial. The problem is that the U.S. government—or any other government that uses drones—might fire missiles inaccurately or without legal justification. The solution does not lie in distinguishing the killing of Americans from less fortunate creatures. The solution lies in developing careful standards and procedures that apply regardless of citizenship. These standards protect against mistakes

23. See *infra* text accompanying notes 72–74.

24. In an earlier piece, we contended that constitutional due process, understood in light of the Supreme Court's major war on terror decisions, requires independent review of the legality of targeted killings. See Murphy & Radsan, *supra* note 14, at 445–50. In this Article, we put U.S. due process to one side and show how this same duty of independent review can be derived directly from IHL principles.

25. See *infra* text accompanying notes 169–73.

26. See, e.g., Glenn Greenwald, *Confirmed: Obama Authorizes Assassination of U.S. Citizen*, SALON (Apr. 7, 2010, 7:08 AM), http://www.salon.com/news/opinion/glenn_greenwald/2010/04/07/assassinations (referencing the "extreme dangers and lawlessness of allowing the Executive Branch the power to murder U.S. citizens far away from a battlefield . . . and with no due process of any kind" and describing this practice as "Orwellian and tyrannical" (emphasis omitted)).

resulting in unnecessary deaths while still respecting the government's authority (and duty) to deal with terrorists that seek to commit mass murder. The duties described—of certainty in targeting and independent review—are necessary steps toward development of a due process for the age of terror.

II. FOUNDATIONAL IHL

Analyzing the legality of targeted killing can be difficult because this practice falls between the two dominant legal models that generally are understood to control the state's use of force: human rights law and IHL.²⁷ Human rights law controls civil law enforcement, sharply limiting state authority to kill—outside the full process of a trial—to situations where the target poses an imminent risk of death or serious injury to others.²⁸ IHL, by contrast, controls killing in an armed conflict and grants broad authority to kill opposing combatants (as well as civilians directly taking part in hostilities).²⁹ These two models overlap when applied to targeting a person who is an imminent and direct threat. For instance, either model would permit killing an Al Qaeda leader shooting on a crowd of civilians at a soccer game. Human rights law would not, however, permit targeting this person if he were unarmed and far away from any armed hostilities. IHL likely would.³⁰

27. The simple, two-model dichotomy between human rights law and IHL is under pressure from two different directions. First, the dichotomy may be blurring as policing and war become more like each other. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008); see also John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 767 (2007) (“[W]ar has changed in its functions, to become more like policing, [and] that policing too has changed, to become more like war.”).

Second, and more to the present point, some scholars contend that the two models do not exhaust all the possibilities. Some contend that targeted killing can be legal as a matter of “self-defense” even in the absence of an “armed conflict” in which there are fewer restrictions on killing. See Anderson, *supra* note 14, at 17–18; Paust, *supra* note 14, at 259. Others insist self-defense regulates only interstate relations, and “that, even if justified under the law of interstate force, the international lawfulness of a particular targeted killing additionally depends on the law protecting individuals from arbitrary deprivation of life, namely human rights law and, in the case of armed conflict, IHL.” MELZER, *supra* note 14, at 52.

For the most part, this Article avoids this debate about self-defense and does not dwell on the policing/war dichotomy. We choose to explore how distinction, military necessity, and other IHL principles limit targeted killing; these core principles apply even where targeted killing is characterized as self-defense. See, e.g., Paust, *supra* note 14, at 268–69 (observing that self-defense must comply with core IHL requirements including military necessity and proportionality).

28. See, e.g., MELZER, *supra* note 14, at 59 (“It is generally found that, under human rights law, targeted killings are permitted only in the most extreme circumstances, such as to prevent a concrete and immediate danger of death or serious physical injury . . .”).

29. See, e.g., Geoffrey Corn, *Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, Al Qaeda and the Limits of the Associated Militia Concept*, 84 INT’L L. STUD., 2009, at 181, 202 (observing that, whereas use of deadly force must be a measure of last resort during law enforcement, “use of deadly force against a military objective is a legitimate measure of first resort during armed conflict”).

30. Cf. *supra* note 27 (noting arguments that targeted killing may also be legal as a matter of self-defense).

IHL is a compilation of treaties, case law, and customary international law that seeks to prevent unjustified death, destruction, and suffering in war.³¹ Ideas about limiting the horrors of war are as old as humanity itself.³² The codification of IHL, however, began in earnest around the turn of the nineteenth century with the Hague Conventions in 1899 and 1907, when world powers met to write down the laws and customs of war.³³

The Geneva Conventions adopted in 1949 form the modern bedrock of IHL.³⁴ As their titles attest, all four conventions seek to protect people who are not functioning as combatants, either because they have withdrawn from the fight or because they are peaceful civilians who never took part in it.³⁵ Prior to World War II, international treaties to protect civilians were not thought necessary because of the “cardinal principle” that civilian populations should enjoy complete immunity from armed conflict.³⁶ After World War II proved this rule horribly wrong in practice, the Fourth Geneva Convention aimed at protecting civilians from attack “to the extent consistent with the economic and efficient use of armed force.”³⁷ Today this aspiration is close to universal. According to the International Committee for the Red Cross (ICRC), 194 countries have signed the Geneva Conventions, making them applicable to armed conflicts around the world.³⁸

For IHL to apply, an “armed conflict,” which is something more than sporadic violence, must exist.³⁹ Armed conflicts can be either “international” or “noninternational.” The former governs wars among nation-states.⁴⁰ The latter, a less developed category, was originally in-

31. See, e.g., WHAT IS INTERNATIONAL HUMANITARIAN LAW?, ICRC 1 (July 2004), http://www.icrc.org/eng/assests/files/other/what_is_ihl.pdf (“[IHL is] a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.”).

32. See LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 15 (2d ed. 2000) (explaining views of war from the fourth century BCE and biblical times).

33. *Id.* at 17.

34. See ICRC, *supra* note 31, at 1 (“A major part of international humanitarian law is contained in the four Geneva Conventions of 1949. Nearly every State in the world has agreed to be bound by them.”).

35. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

36. OSCAR M. UHLER ET AL., COMMENTARY: IV GENEVA CONVENTION, RELATIVE TO THE PROTECTION OF CIVILIANS IN TIME OF WAR 3 (Jean S. Pictet ed., 1958).

37. GREEN, *supra* note 32, at 348.

38. *The Geneva Conventions of 1949 and Their Additional Protocols*, INT’L ICRC, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp> (last visited May 22, 2011).

39. MELZER, *supra* note 14, at 245.

40. See Dinah PoKempner, *The “New” Non-State Actors in International Humanitarian Law*, 38 GEO. WASH. INT’L L. REV. 551, 554 (2006).

tended to govern intrastate civil wars.⁴¹ Decades after adoption of the four Geneva Conventions, most nations adopted Additional Protocols I and II to increase protections.⁴² Protocol I applies to international conflicts; Protocol II applies to noninternational conflicts.⁴³ Given their shared purpose of protecting victims of armed conflict, both protocols are instructive on targeting. Although the United States has not ratified these additional protocols,⁴⁴ it regards almost all of Protocol II and much of Protocol I as customary international law.⁴⁵ It is also U.S. policy to comply with both protocols whenever feasible.⁴⁶

The United States' conflict with Al Qaeda does not fit neatly into either a framework for armed conflicts between nation-states on the one hand ("international armed conflicts") or into a framework for intrastate civil wars on the other hand ("noninternational armed conflicts").⁴⁷ Exploiting this difficulty, the Bush administration concluded that the conflict with Al Qaeda fell into neither category and was therefore not subject to the Geneva Conventions.⁴⁸ The Supreme Court eventually blocked this move in *Hamdan v. Rumsfeld*, which held that the conflict with Al Qaeda should be regarded as "noninternational" because the conflict was not between states even though it spills over international borders.⁴⁹ By extension, the U.S. conflict with the Taliban should also be regarded as noninternational since the Taliban no longer controls the government of Afghanistan.⁵⁰

41. See Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 308 (2007) (tracing the view that the category of noninternational armed conflict was limited to intrastate civil wars).

42. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

43. See Protocol I, *supra* note 42; Protocol II, *supra* note 42.

44. The United States has ratified all four Geneva Conventions, but has only signed, and not ratified, Protocols I and II. See *United Nations Treaty Collection*, UNITED NATIONS, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3586> (last visited May 22, 2011) (listing nations that have ratified or signed Protocol I) [hereinafter *United Nations Treaty Collection I*]; *United Nations Treaty Collection*, UNITED NATIONS, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3cb8> (last visited May 22, 2011) (listing nations that have ratified or signed Protocol II) [hereinafter *United Nations Treaty Collection II*].

45. JEFF A. BOVARNICK ET AL., INT'L & OPERATIONAL L. DEP'T, LAW OF WAR DESKBOOK 23 (Brian J. Bill ed., 2010), <http://www.fas.org/irp/doddir/army/deskbook.pdf>.

46. See *id.*

47. For an argument that IHL should respond to this conceptual gap by recognizing a category of "transnational armed conflicts" to which all basic law of war principles apply, see generally Corn, *supra* note 41.

48. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–30 (2006) (explaining the government's position that the conflict with Al Qaeda was: (1) not an international conflict because Al Qaeda was not a nation signatory to the Geneva Conventions, and (2) not a noninternational conflict because the conflict was "international in scope").

49. *Id.* at 630.

50. See, e.g., Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRIT. Y.B. INT'L L. 71, 82 (2004) (explaining that the conflict between the United States and the Taliban became an "internationalized" kind of "non-international armed conflict" after an Afghan govern-

Whether the relevant conflict is international or noninternational, the United States, in prosecuting a war with Al Qaeda and the Taliban, must honor the IHL principles of distinction, military necessity, proportionality, and precaution.⁵¹ Both types of armed conflict lead to the same general conclusions.

The principle of *distinction* separates people and objects into two categories: those legally subject to direct attack and those not. In the context of international conflicts, Article 48 of Protocol I states:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁵²

Although parallel language does not appear in Protocol II, the principle of distinction applies in noninternational conflicts as a matter of customary international law.⁵³

During armed conflict, members of armed forces and civilians are subject to quite different default rules. Armed forces may not directly attack civilians “unless and for such time as they take a direct part in hostilities.”⁵⁴ By contrast, members of “armed forces” or “armed groups” are subject to direct attack provided they are not *hors de combat* or functioning as medical or religious personnel.⁵⁵

The ICRC, elaborating on the concept of “armed forces,” has concluded that, as a matter of customary law:

The armed forces of a party to the conflict consist of all organized armed forces, groups, and units that are under a command responsible to that party for the conduct of its subordinates.⁵⁶

To qualify as an “armed group” subject to attack under this definition, a rebel group need not attain the level of organization and hierarchical control associated with state-controlled military forces. Rather, to qualify, a fighting force need only be:

ment was established by loya jirga in June 2002); DEREK JINKS, INT’L HUMANITARIAN RESEARCH INITIATIVE THE TEMPORAL SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW IN CONTEMPORARY CONFLICTS 9 (JAN. 27–29, 2003), http://ihl.ihlresearch.org/_data/n_0002/resources/live/Session3.pdf (observing that the conflict in Afghanistan prior to 9/11 was a noninternational conflict between the Taliban and the Northern Alliance, that the conflict became international after the United States intervened, and that the conflict “may well have reverted” to noninternational status after the Taliban lost control of the government).

51. See Corn, *supra* note 29, at 25, 42 (contending that, regardless of how an “armed conflict” is pigeonholed, fundamental rules of the law of war should apply to it; these principles include military necessity, humanity, distinction, and proportionality).

52. Protocol I, *supra* note 42, art. 48.

53. See MELZER, *supra* note 14, at 311.

54. Protocol I, *supra* note 42, art. 51(3).

55. MELZER, *supra* note 14, at 313.

56. *Id.* at 318 (quoting JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 14–17 (2005)(explaining and summarizing ICRC Rule 4)).

capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority.⁵⁷

These IHL principles suggest two possibilities for characterizing AQ/T members as legitimate targets of direct attack. The first possibility is to characterize them as civilians who directly participate in hostilities. Critics of applying this direct-participation model to hardened terrorists have noted, however, that it can create a revolving door that allows a person to function as a baker by day and as a terrorist by night.⁵⁸

One way to shut the revolving door is to adopt a very broad construction of “direct participation,” as the Israeli Supreme Court did in its important discussion of targeted killing in *The Public Committee Against Torture in Israel v. The Government of Israel*.⁵⁹ According to the Court, a civilian loses immunity from attack while “preparing” for hostilities, planning a hostile act, or participating in a “chain of hostilities” as an active member of a terrorist group.⁶⁰ This interpretation would presumably allow the United States to kill the head of Al Qaeda in his sleep because he is participating in a “chain of hostilities.” This interpretation, however, drains close to all meaning from “direct” participation.

A more straightforward and honest way of closing the revolving door and justifying direct attacks on AQ/T is to characterize their hardened operatives as members of an “armed group.”⁶¹ According to the ICRC’s recent *Interpretive Guidance*, a person becomes a member of an “armed group” by adopting “a continuous function for the group involving his or her direct participation in hostilities.”⁶² Elaborating on this theme, the ICRC explains:

Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State par-

57. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977: *Commentary*, ICRC, available at <http://www.icrc.org/ihl.nsf/COM/475-760004> (last visited May 22, 2011).

58. See, e.g., Kretzmer, *supra* note 14, at 193 (observing that strict construction of “direct participation” in hostilities would allow terrorists to “enjoy the best of both worlds—they can remain civilians most of the time and only endanger their protection as civilians while actually in the process of carrying out a terrorist act”).

59. PCATI at para. 40.

60. *Id.* at para. 33, 37, 39.

61. For discussion of this “membership” model for characterizing legitimate objects of direct attack in noninternational conflicts, see especially Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L REV. RED CROSS 991 (2008), <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf>. See also MELZER, *supra* note 14, at 327 (“[U]nder customary IHL applicable in non-international armed conflict, functional ‘combatancy’ denotes the assumption by members of the armed forces of a State or non-State party to the conflict of a continuous function involving his or her direct participation in hostilities on a regular basis.”); Kretzmer, *supra* note 14, at 198 (“The logical conclusion of the definition of a non-international armed conflict as one between the armed forces of a state and an organized armed group is that members of both the armed forces and the organized armed group are combatants.”). *But see* Eichensehr, *supra* note 14, at 1877 (criticizing the “membership-based model” for determining when civilians may be directly targeted).

62. Melzer, *supra* note 61, at 1007.

ty to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.⁶³

In choosing between the Israeli (direct participation) and the ICRC (membership) models, one can place the conclusion before the analysis: the U.S. government, if it gets a clean shot, should be able to kill the head of Al Qaeda in his sleep. This is undoubtedly the official U.S. position under the law. To justify targeting him as a “civilian,” one must pretend that, even while sleeping, he is “directly participating” in hostilities. That stretches belief for many. By contrast, regarding Osama Bin Laden or his replacement as a functional combatant as a result of his leadership and his membership in an organized armed group is forthright and intuitive, leaving room for a narrower interpretation of “direct participation” in other contexts. Plus, the ICRC’s “lasting integration” requirement prevents targeting persons with only casual connections to Al Qaeda and other armed groups.

Neither the Israeli model nor the ICRC model grants *carte blanche* to attack AQ/T members under any and all circumstances. To start, whether the CIA or the Air Force is pulling the trigger on the drone, *military necessity* requires a legitimate purpose. To be slightly more specific, the U.S. Army Field Manual explains “‘military necessity’ . . . has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”⁶⁴ The Field Manual also warns that, to protect both civilians and combatants from unnecessary suffering, the laws of war prohibit “employing any kind or degree of violence which is not actually necessary for military purposes.”⁶⁵ This stands true for both Predator strikes from the sky and for Special Forces shots from the ground. Given the inherent uncertainties of armed conflict, a later review of whether military necessity was present must provide fair deference to a commander based on the limited information available at the time of the attack.⁶⁶ The Army Field Manual does, however, forbid violence where an attack could not reasonably be expected

63. *Id.*

64. U.S. DEP’T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE 4 para. 3 (1956), www.loc.gov/tr/frd/Military_Law/pdf/law_warfare_1956.pdf [hereinafter FIELD MANUAL].

65. *Id.*

66. See MELZER, *supra* note 14, at 296–97 (discussing tolerance for honest errors in judgment regarding military necessity).

to lead to any concrete military advantage at all.⁶⁷ That is an extreme and easy case.

All attacks must also satisfy the principle of *proportionality*. This principle precludes any attack expected to cause excessive damage to peaceful civilians and property in light of the “concrete and direct military advantage” the attack is expected to create.⁶⁸ This is the roughest sort of cost-benefit analysis. Since there is no bright line to define “excessive,” the inquiry is a crude balancing between the military goal and the civilian costs.⁶⁹ Even so, the principle of proportionality places some targets off-limits because the costs of attack to surrounding civilians would be too severe. An urban nuclear generator, for example, might seem a valid target, but the resulting release of radiation and the catastrophic casualties would make a military attack disproportionate.⁷⁰ As with military necessity, a later review of whether an attack was proportional must leave room for commanders, in the heat of battle, to make honest (and imperfect) assessments of the costs and benefits to an attack.⁷¹

To ensure that the principles of distinction, military necessity, and proportionality are implemented, IHL imposes an additional requirement of *precaution*: attackers must take all “feasible” steps to ensure that attacks are directed at legitimate military targets and to minimize collateral damage to peaceful civilians.⁷² The key and vague term here is

67. FIELD MANUAL, *supra* note 64, at app. A-1.

68. Protocol I, *supra* note 42, art. 51(5)(b); FIELD MANUAL, *supra* note 64, at 19 para. 41 (“[L]oss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.”); MELZER, *supra* note 14, at 46 (quoting HENCKAERTS & DOSWALD-BEUK, *supra* note 56, at 46 (“Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”)).

69. PETER LANG, THE CONCEPTS OF PROPORTIONALITY AND STATE CRIMES IN INTERNATIONAL LAW 31 (Christian Wicker trans., 2006).

70. Cf. Protocol I, *supra* note 42, art. 56(1) (“Works or installations containing dangerous forces . . . [such as] nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.”).

71. GREEN, *supra* note 32, at 351; *see also* MELZER, *supra* note 14, at 361 (“[I]n order for an attack to become unlawful on grounds of proportionality, the excessiveness of the expected collateral damage should be relatively obvious to the responsible military commander. Indeed, there seems to be agreement that the determination to be made is necessarily a subjective one, albeit based on an honest and diligent bona fide assessment in light of the circumstances prevailing at the time . . .”).

72. In this regard, Article 57(2)(a) of Protocol I provides:

- (a) Those who plan or decide upon an attack shall:
 - (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
 - (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

“feasible.” Commentators have put some gloss on this term that seems almost as vague: feasible measures are those that are “practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”⁷³ At bottom, precaution calls for the rule of reason.⁷⁴

In sum for this Part, it is accepted that the United States is in a non-international armed conflict with some AQ/T forces. For this reason, the United States may kill the committed members of these groups who do the fighting or plan the fighting. Depending on the circumstances, a wide range of weapons can be used to kill suspected terrorists. Whatever the weapon, the attack must honor the requirements of distinction, military necessity, and proportionality. To fulfill these requirements, the United States must also honor the overarching principle of precaution.

III. DRONES OVER PAKISTAN

Figuring out all the relevant facts bearing on the legality of the CIA’s targeted-killing-by-drone campaign is not possible because of governmental secrecy, geographic inaccessibility, and the unreliability of reports from the region. Indeed, the CIA, to repeat, will neither confirm nor deny that it is involved in this campaign at all. Even so, enough information has leaked into the public record to give us something to begin legal analysis. Again, we rely on the media to provide us with a version of reality at the CIA.

The CIA’s drone attacks in Pakistan began in 2004 with one strike.⁷⁵ The next several years saw few attacks—one additional drone strike in

(iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Protocol I, *supra* note 42, art. 57(2)(a); *see also* FIELD MANUAL, *supra* note 64, at 5 para. 41 (“Those who plan or decide upon an attack . . . must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places within the meaning of the preceding paragraph but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.”).

73. *See* MELZER, *supra* note 14, at 365 (contending that there is “general agreement” supporting this “practicable or practically possible” gloss on feasibility).

74. *See, e.g.*, Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT’L REV. RED CROSS 445, 461 (2005) (“[W]hat would a reasonable attacker do in the same or similar circumstances?”).

75. The figures in this paragraph are taken from reports prepared by *The Long War Journal* and the New America Foundation, a Washington think tank. *See* Peter Bergen & Katherine Tiedemann, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2010*, NEW AM. FOUND. (Feb. 24, 2010), http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergen_tiedemann2.pdf; Bill Roggio & Alexander Mayer, *Analysis: US Air Campaign in Pakistan Heats Up*, LONG WAR J. (Jan. 5, 2010), http://www.longwarjournal.org/archives/2010/01/analysis_us_air_campaign.php. In reaching its totals, *The Long War Journal* states that it relies upon “publicly available data.” Bill Roggio & Alexander Mayer, *US Predator Strikes in Pakistan: Observations*, LONG WAR J. (July 21, 2009), http://www.longwarjournal.org/archives/2009/07/us_predator_strikes_3.php. The New America Foundation states that its figures draw “only on accounts from reliable media organizations

2005, three in 2006, and five in 2007. During 2008, the last year of the Bush administration, drone strikes rose sharply to thirty-six. Next came President Obama. Keeping his campaign promise to take the fight against terrorists into Pakistan, drone strikes increased still more in 2009 to a total of fifty-three; in 2010, they soared to one hundred eighteen.

The Predator and Reaper drones come armed with missiles. Additionally, Reapers carry five hundred-pound guided bombs.⁷⁶ Both types of drones can stay in the air for dozens of hours at a time—all the while beaming video, in real time, to analysts in the United States.⁷⁷ CIA teams in Afghanistan and Pakistan handle takeoffs and landings; after takeoff, control flips to other CIA teams.⁷⁸ Given the likely number of drones in the air at any time, intelligence officers must be watching and assessing thousands of hours of drone video per month.⁷⁹

Although drones are valuable tools, they cannot, by themselves, provide the right kind of intelligence for determining whom to target. Nor, given that northwest Pakistan is a big and rugged place, can a drone find a premeditated target without other sources of intelligence. The particular sources and methods that U.S. officials use are secret. Still, it is logical to assume that the CIA is gathering intelligence through all means at its disposal to support the drone program.

The means include both human and technical sources. Human sources include both U.S. intelligence officers and liaison officers in the region who pass along information from various sources they develop. This information may include tips about the identities and future locations of AQ/T members. Those relying on the intelligence, of course, always face the problem of determining who and what is trustworthy. The CIA's attempted recruitment of an Al Qaeda member who later killed

with deep reporting capabilities in Pakistan," which include, inter alia, the *New York Times*, Reuters, BBC, leading Pakistani English language newspapers, and Geo TV, the largest independent Pakistani television network. Bergen & Tiedemann, *supra* note 75, at 2.

The Long War Journal, in particular, has a pedigree that is not likely to engender trust among critics of Predator strikes. It is a publication of Public Multimedia, Inc., which draws extensive support from the neoconservative Foundation for Defense of Democracies. See *The Editors*, LONG WAR J., <http://www.longwarjournal.org/staff.php> (last visited May 22, 2011) (stating biographical information for the staff of *The Long War Journal* and indicating close ties to the neoconservative Foundation for Defense of Democracies). The New America Foundation is more difficult to pigeonhole; it draws its board members from a cast of extremely prominent authors, politicians, and businesspersons—for example, Fareed Zakaria, James Fallows, and Eric Schmidt (CEO of Google). See *About New America*, NEW AM. FOUND., <http://www.newamerica.net/about> (last visited May 22, 2011) (self-identifying the New America Foundation as a “nonpartisan public policy institute” that emphasizes “big ideas, impartial analysis, and pragmatic solutions”). At all odds, given the ideological charge of the CIA's drone campaign, it is somewhat reassuring that two very different organizations arrived at almost identical figures.

76. Drew, *supra* note 6.

77. *Id.*

78. Mayer, *supra* note 5, at 38.

79. *Cf. id.* (citing a statement of former counter terrorism official stating that the CIA has multiple drones flying over Pakistan and searching for targets at any given time).

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seven CIA officers in a suicide bombing in Khost, Afghanistan serves as a stark reminder of how difficult this job can be.⁸⁰

Not all sources of information are, or will be regarded as equal. A CIA analyst may trust sources that come from within his or her own service more than sources from sister agencies such as the Air Force. As to liaison sources, the CIA analyst may trust Afghan and Pakistani sources less than British sources because of differences in tradecraft, motivations, and reliability.

Information concerning the identity and expected locations of AQ/T members enables the CIA to determine where to fly its drones. Once a drone arrives at the location of a suspected target (or, more accurately, thousands of feet above the target), there remains the crucial task of confirming that the person in the cross hairs is, in fact, the person whom the CIA wishes to kill. Human sources may play a role in confirming the target. As for technical sources, the National Security Agency provides information about targets by intercepting electronic communications and matching them to samples in the agency's databases.⁸¹ The samples for Osama Bin Laden, for example, must be extensive. Other technical means for gathering intelligence surely exist, but those who know the most about this subject are not allowed to speak to the public.

Drones operate in a virtual space in which the vast resources of the U.S. intelligence community are directed toward creating an accurate picture of targets on the ground.⁸² Assuming that the CIA goes about the drone program with the same diligence it applies to other intelligence functions, the process for targeted killing demands, receives, and digests a great deal of information from many sources. Some sources may be open. Many others are secret.

As befits a bureaucratic organization, the CIA has put in place standards and procedures for assessing and acting upon information relevant to target selection and execution.⁸³ The CIA is accustomed to checking off the boxes in its paperwork. Mindful of their potential legal exposure on targeted killing, CIA officials no doubt worked very closely with their "inside" lawyers in the CIA's Office of General Counsel to develop these standards and procedures, which, as bureaucratic logic dic-

80. See Joby Warrick & Peter Finn, *Bomber of CIA Post Was Trusted Informant*, WASH. POST, Jan. 5, 2010, at A1 (reporting that a trusted Jordanian operative whom the CIA thought was infiltrating Al Qaeda on the agency's behalf was in fact an Al Qaeda mole).

81. Mayer, *supra* note 5, at 38 (reporting that the NSA provides "signal intelligence" to the CIA to confirm target identification).

82. Regarding drones as part of an integrated campaign to gather intelligence and kill targets, former State Department and CIA official Henry Crumpton remarked:

You have to know where to put the bird to begin with . . . It's a dynamic process. . . . Once you have a strike, you have disruptions and you have more intelligence to collect. It's a wonderful cycle that involves all-source collection and analysis, and the Predator is only part of it.

Peter Finn & Joby Warrick, *Under Panetta, a More Aggressive CIA*, WASH. POST, Mar. 21, 2010, at A8.

83. See Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK.COM (Feb. 13, 2011), <http://www.newsweek.com/2011/02/13/inside-the-killing-machine.html> (interviewing former Acting General Counsel of the CIA, John Rizzo, on the procedures governing CIA drone strikes).

tates, apparently have the blessing of the “outside” lawyers of the Department of Justice.⁸⁴ Observers outside the government, including the American Civil Liberties Union and the United Nations Special Rapporteur, have asked the CIA to reveal its standards and procedures for targeted killing, as well as its legal justifications.⁸⁵ The CIA, to no one’s surprise, has declined to do so.⁸⁶ Why reveal anything about a program that the CIA will neither confirm nor deny?

Not all agencies, though, are as secretive as the CIA. Harold H. Koh, the current Legal Adviser to the State Department, offered the following assurances in remarks to the American Society of International Law:

Our procedures and practices for identifying lawful targets are *extremely robust*, and advanced technologies have helped to make our targeting *even more precise*. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meeting [sic]. They are *implemented rigorously* throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.⁸⁷

During the speech, Koh never mentioned the CIA by name. This is not surprising because that part of the drone campaign, if any, is ostensibly a secret. Nonetheless, Koh intended for his analysis to apply across all government agencies. At least for the moment, the Obama administration’s statement about standards and procedures boils down to a few words—Trust us: We are good at target identification, and we try very hard to do a good job. That is all there is to the official account.

Media accounts are a little more detailed than Koh. They state that the White House has delegated trigger authority to the CIA.⁸⁸ At the CIA, lawyers draft “cables” based on available intelligence to justify targeting an individual for “lethal operation.”⁸⁹ Emphasizing intense concern to ensure “legality,” these cables include a signature line for the CIA’s general counsel.⁹⁰ CIA Director Leon Panetta approves each strike, “sometimes reversing his decision or reauthorizing a target if the

84. *Id.* (reporting an unnamed Obama administration official’s claim that the CIA’s drone strikes “are conducted in strict accordance with American law and are governed by legal guidance provided by the Department of Justice”).

85. See, e.g., Scott Shane & Eric Schmitt, *C.I.A. Deaths Prompt Surge in Drone War*, N.Y. TIMES, Jan. 23, 2010 (Late Edition), at A3 (reporting that the American Civil Liberties Union filed a Freedom of Information Act request in January 2010 for “government documents revealing procedures for approving targets and legal justifications for killings”).

86. Mayer, *supra* note 5, at 37 (“[The CIA] 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.”).

87. Press Release, Am. Soc’y of Int’l Law, *supra* note 15, at 3 (emphasis added).

88. Mayer, *supra* note 5, at 38.

89. See McKelvey, *supra* note 83 (discussing the role of CIA attorneys in targeting).

90. See *id.* (noting that targeting “cables” include a signature line for general counsel).

situation on the ground changes.”⁹¹ During the Bush administration, informed observers believed the director of the CIA had, in turn, delegated trigger authority to the chief of the Counterterrorist Center.⁹² So, in a change under Obama, the decision to kill or not to kill comes from a senior official subjected to Senate confirmation.

If the CIA has actually learned from the military’s extensive experience, then one can infer a great deal more. The military’s “Joint Targeting Cycle” requires: (1) identification of the military objective of an operation, (2) target development and prioritization, (3) capabilities analysis (or choosing your weapon), (4) commander’s decision and force assignment, (5) mission planning and force execution, and (6) assessment.⁹³ The military, like the CIA, speaks in jargon.

Of particular note, target development includes both target “vetting” and target “validation.” Vetting requires a combatant command to “engage the intelligence community (IC) and other organizations subject-matter experts (SMEs) to establish a reasonable level of confidence in a candidate target’s functional characterization based on a review of the supporting intelligence.”⁹⁴ This culminates in a formal vote among intelligence community subject-matter experts (IC SMEs) on the “validity of the target intelligence and any identified intelligence gain/loss concerns.”⁹⁵ An attack may go forward without unanimity among the IC SMEs, but commanders are told to regard lack of consensus as “indications of evaluated operational and strategic risk.”⁹⁶ Presumably, the CIA has some similar process in place for validating its targets—and if it does not, it should.

Validation determines whether an attack on a target would comply with the Laws of Armed Conflict (LOAC) and any applicable Rules of Engagement (ROE).⁹⁷ In light of the complexity of applicable law, a Staff Judge Advocate “must be immediately available and should be consulted at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations.”⁹⁸ Just like the military, the CIA has lawyers who can and should be consulted on target validation.

91. Finn & Warrick, *supra* note 82.

92. See Dana Priest, *Covert CIA Program Withstands New Furor*, WASH. POST, Dec. 30, 2005 (Final Edition), at A1 (“[A]ccording to half a dozen former intelligence officials, [CIA Director Tenet] delegated most of the decision making on lethal action to the CIA’s Counterterrorist Center.”); see also Mayer, *supra* note 5, at 38 (reporting delegation to “C.I.A. officials, including the head of the Counter-Terrorist Center”).

93. JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING II-3 (2007), [http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60\(07\).pdf](http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60(07).pdf).

94. *Id.* at II-7.

95. *Id.* at app. D-6.

96. *Id.* at app. D-7.

97. *Id.*

98. *Id.* at app. E-6.

For the military, collateral damage estimation (CDE) is part of the validation process, but also extends through target execution.⁹⁹ The military conducts CDEs according to a process laid out in a classified document.¹⁰⁰ (The CIA is not the only U.S. agency that keeps secrets.) Where collateral damage may be expected to exceed “established national-level notification thresholds,” a classified sensitive target approval and review process applies, which requires reference to the secretary of defense or the president.¹⁰¹

The joint targeting process also requires continuous assessment designed “to measure progress of the joint force toward mission accomplishment.”¹⁰² At the “combat assessment” level, this process requires assessing all available sources of the “battle damage” caused by a strike.¹⁰³ These sources include anything that might be able to record video of the strike: drones, aircraft, or weapons systems.¹⁰⁴ They also include any available human sources, open sources, and signals intelligence.¹⁰⁵ In short, the goal is to collect all information reasonably available to determine if a strike did what it was supposed to do.

The press has revealed other details about the military’s procedures for targeting persons in Afghanistan. The names of these targets appear on the Joint Integrated Prioritized Target List, which, as of August 2009, had 367 names on it.¹⁰⁶ No person is supposed to become a target until his or her enemy status is confirmed by “two verifiable human sources” and “substantial additional evidence.”¹⁰⁷ Some targets may be killed on sight; some require additional authorization.¹⁰⁸ Also, a target’s location near a school, hospital, or mosque weighs against carrying out an attack.¹⁰⁹

The CIA, in fashioning its own standards and procedures, has presumably relied on the military.¹¹⁰ Whatever these standards and procedures may be, they are not capable of perfection. Both the CIA and the military are pursuing enemies that do not wear uniforms and that embed

99. *Id.* at II-10.

100. *Id.* at II-10, app. G-1 (noting the detailed CDE process contained within the Chairman of the Joint Chiefs of Staff Manual (CJCSM) 3160.01A, entitled Joint Methodology for Estimating Collateral Damage and Casualties for Conventional Weapons: Precision, Unguided, and Cluster); *see also* U.S. JOINT FORCES COMMAND, JOINT FIRES AND TARGETING HANDBOOK III-77 (2007), http://www.dtic.mil/doctrine/doctrine/jwfc/jntfiretar_hdbk.pdf.

101. *Id.* at II-10–II-11, app. G-2 (citing Chairman of the Joint Chiefs of Staff Manual CJCSM 3122.06B, entitled Sensitive Target Approval and Review (STAR) Process).

102. *Id.* at app. C-1.

103. *See id.* at app. C-4.

104. *Id.* at app. C-5.

105. *Id.*

106. James Risen, *Drug Chieftains Tied to Taliban Are U.S. Targets*, N.Y. TIMES, Aug. 10, 2009 (Late Edition), at A1.

107. Mayer, *supra* note 5, at 43 (referencing the Senate Foreign Relations Committee report).

108. *See id.*

109. *See id.*

110. *See* McKelvey, *supra* note 83 (discussing the high degree of CIA-military cooperation for drone strikes).

themselves in the civilian population. No matter what the CIA or the military does, mistakes are going to occur. Osama Bin Laden was a tall man who wore robes; in February 2002, a Predator in Afghanistan killed a tall man in robes who turned out to be a villager gathering scrap metal.¹¹¹ Even so, the impossibility of attaining perfection does not excuse the CIA, the Air Force, or other agencies from doing their best to get things right on targeted killings.

During the Obama administration, critics have complained that drone strikes are killing far too many civilians.¹¹² Using the language of IHL, they question whether strikes are proportional. Of course, complaints about collateral damage are not unique to the CIA's drone campaign, and they are not limited to the CIA's role in pulling triggers. For example, during an armed conflict about a decade ago, the Air Force in 1999 bombed the Chinese embassy in Belgrade based on faulty intelligence from—none other than—the CIA.¹¹³

Assessments of collateral damage from CIA drone strikes vary wildly. At the high end of assessments about civilian damage, Professor Mary Ellen O'Connell contends that the strikes are killing about fifty civilians for every intended target.¹¹⁴ If this remarkable figure is true, then the CIA's use of armed drones amounts to a serious war crime. O'Connell's sources, however, seem more circumspect. For instance, O'Connell relies on counterinsurgency experts David Kilcullen and Andrew Exum, who write:

Press reports suggest that over the last three years drone strikes have killed about 14 terrorist leaders. But, according to Pakistani sources, they have also killed some 700 civilians. This is 50 civilians for every militant killed, a hit rate of 2 percent—hardly “precision.” American officials vehemently dispute these figures, and *it is likely that more militants and fewer civilians have been killed than is reported by the press in Pakistan.*¹¹⁵

For further support, O'Connell cites Peter Bergen and Katherine Tiedemann of the New America Foundation to show that eighty-two drone strikes have killed 750 to 1000 people of whom a mere twenty were lead-

111. John F. Burns, *A Nation Challenged: The Manhunt; U.S. Leapt Before Looking, Angry Villagers Say*, N.Y. TIMES, Feb. 17, 2002 (Sunday Edition), at 18.

112. See, e.g., O'Connell, *supra* note 14, at 7, 9–10 (discussing the inaccuracy of drone attacks and claiming a very high rate of collateral damage).

113. See generally George Tenet, Dir., Cent. Intelligence Agency, DCI Statement on the Belgrade Chinese Embassy Bombing, Address Before the House Permanent Select Committee on Intelligence Open Hearing (July 22, 1999), available at https://www.cia.gov/news-information/speeches-testimony/1999/dci_speech_072299.html (“[A] series of errors led to the unintended bombing of the Chinese Embassy in Belgrade.”).

114. See O'Connell, *supra* note 14, at 1 (arguing that, by October 2009, drones had killed an estimated ratio of about 20 leaders to 750–1000 unintended victims).

115. David Kilcullen & Andrew McDonald Exum, *Death from Above, Outrage down Below*, N.Y. TIMES, May 17, 2009 (Sunday Edition), at 13 (emphasis added).

ers of AQ/T.¹¹⁶ Bergen and Tiedemann, however, have concluded that the overall civilian fatality rate for CIA drone strikes in Pakistan since 2004 has been thirty-two percent and that this figure declined to twenty-four percent during 2009 and to six percent during 2010.¹¹⁷ They therefore see great progress in reducing collateral damage. Government officials go further, claiming that drone strikes have killed about twenty “enemy fighters” for every peaceful civilian.¹¹⁸ Depending on the source, the kill ratio of illegitimate to legitimate targets is anywhere from 50:1 to 1:20.

The thousand-fold gulf that separates these figures can be attributed in part to the difficulty of obtaining reliable data from Afghanistan and Pakistan. Further complicating matters, persons who are hostile to the United States have an obvious motive to exaggerate civilian deaths and injury; U.S. officials have a contrary motive to minimize them. In any case, much of the disparity stems from the difficulty of categorizing deaths near a targeted AQ/T leader. O’Connell makes the categorical assumption that these people are civilians and thus collateral damage.¹¹⁹ More realistically, Bergen and Tiedemann say “reliable press accounts” show that about two-thirds of those killed were “militants.”¹²⁰ The government’s extremely low figures on collateral damage might be based on sound intelligence concerning the target’s companions, or these figures might be tainted by the government’s obvious interest in justifying its conduct. Until the veil of secrecy is pulled back on targeted killing, common sense suggests that the truth is somewhere between O’Connell’s figure, which is unjustifiably high, and official figures, which may be influenced by some wishful thinking.

There is also widespread disagreement about the military efficacy of drone strikes. Officials claim that drones have killed off much of Al Qaeda’s senior leadership.¹²¹ Killing leadership must, to some extent,

116. O’Connell, *supra* note 14, at 1 n.6 (citing Peter Bergen & Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, NEW AM. FOUND. (Oct. 19, 2009), available at http://newamerica.net/publications/policy/revenge_of_the_drones).

117. See Bergen & Tiedemann, *supra* note 75, at 2, 3 tbl.2 (reporting figures through early 2010 based on analysis of media sources with “deep reporting capabilities” in Pakistan); see also O’Connell, *supra* note 14, at 1 (concluding that drone strikes in Pakistan in 2010 killed between 80 and 140 militants).

118. See Shane, *supra* note 1 (reporting a claim of an anonymous government official that “80 missile attacks from drones in less than two years have killed ‘more than 400’ enemy fighters,” but had killed “just over 20” civilians, all of whom were “either at the side of major terrorists or were at facilities used by terrorists”); see also Roggio & Mayer, *supra* note 75 (estimating that “only 9.5 percent of the casualties reported [from CIA drone strikes in Pakistan] have been identified as civilians,” but conceding that this estimate is rough and undoubtedly low).

119. O’Connell, *supra* note 14, at 2 n.6 (“[T]he most accurate way to characterize the persons killed as a result of U.S. drone attacks is to refer to the list of persons the U.S. intended to kill and the numbers of those who the U.S. did not intend to kill.”).

120. See Bergen & Tiedemann, *supra* note 75, at 1, 3.

121. Mayer, *supra* note 5, at 40 (“Counterterrorism officials credit drones with having killed more than a dozen senior Al Qaeda leaders and their allies in the past year, eliminating more than half of the C.I.A.’s twenty most wanted ‘high value’ targets.”).

disrupt planning both by eliminating the people who make the plans and by discouraging others from taking their places.¹²² A *New York Times* reporter who survived harrowing captivity by the Taliban reported that his captors lived in constant fear of drone strikes.¹²³ Obsessive about their safety, militants “communicate only with elaborate secrecy and . . . leave their squalid hideouts only at night.”¹²⁴ While the agency’s official position is neither to confirm nor deny a CIA role in targeted killing, CIA Director Leon Panetta described the drone campaign as “the only game in town” against Al Qaeda.¹²⁵

Critics of the CIA’s targeted killing, contrary to Panetta, say the program does more harm than good to U.S. interests. Kilcullen and Exum, for instance, concede that killing terrorists, viewed in a vacuum, creates positive military effects.¹²⁶ But they also contend that the overall costs outweigh their benefits because: (1) drone strikes create a counterproductive “siege mentality” among the local populace of Northwest Pakistan, solidifying extremists in that area; (2) they cause public outrage across Pakistan; and (3) the drones, deployed without a sound understanding of their effects, substitute a “piece of technology” for strategy.¹²⁷

Assessing the Kilcullen and Exum critique is not a mathematical exercise—rather, it requires nuanced political and military judgments based on incomplete, uncertain facts. Still, the U.S. military’s own policies demonstrate that it agrees with critics that controlling collateral damage and maintaining local support are crucial. In this regard, the objectives of law and policy overlap. The U.S. Army’s *Counterinsurgency Manual* advises that “[p]olitical power is the central issue in insurgencies and counterinsurgencies; each side aims to get the people to accept its governance or authority as legitimate.”¹²⁸ It adds, “[a]n operation that kills five insurgents is counterproductive if collateral damage leads to recruitment of fifty more insurgents.”¹²⁹ For this reason, the U.S. military

122. To put the disruptions of the drone strikes into some perspective, consider that, according to Juan Zarate, a Bush counterterrorism adviser, there are only about fifty members of Al Qaeda’s senior leadership. *Id.* at 42. If Zarate is correct, and if the CIA has not exaggerated its success, then drones have killed about a quarter of Al Qaeda’s senior leadership over the past year. *See id.* at 41.

123. David Rohde, *Held by the Taliban: A Drone Strike and Dwindling Hope*, N.Y. TIMES, Oct. 21, 2009 (Late Edition), at A1 (“[F]or months the drones had been a terrifying presence. . . . We knew we could be immolated without warning. . . . The strikes . . . created a paranoia among the Taliban. They believed that a network of local informants guided the missiles. Innocent civilians were rounded up, accused of working as American spies and then executed.”).

124. Mayer, *supra* note 5, at 42.

125. *Id.* at 40.

126. Kilcullen & Exum, *supra* note 115, at 13.

127. *Id.*

128. *See* U.S. DEP’T OF THE ARMY, FIELD MANUAL NO. 3-24, COUNTERINSURGENCY 1-3 (2006), http://usacac.army.mil/cac2/coin/repository/FM_3-24.pdf.

129. *Id.* at 1-41.

has applied extremely restrictive rules of engagement in Afghanistan to bring down civilian casualties.¹³⁰

To summarize this Part: if this Article's assumptions are correct, the CIA's use of armed drones in Pakistan combines a marvelous new weapon with an intense intelligence effort to find and kill leaders of AQ/T. Not much is publicly known about the standards and the procedures the CIA uses for its strikes. For reasons of policy and law, we hope these standards and procedures draw heavily from the military's policies on targeting since the military naturally hews to IHL. While the Obama administration says very little about targeted killing, there is widespread disagreement about the CIA's success in minimizing collateral damage and in achieving military objectives.

IV. CONTROLLING THE CIA'S DRONES

The CIA must have detailed standards and procedures for identifying its targets and for carrying out its drone strikes. But the agency has not seen fit to share these standards and procedures to those without security clearances and a "need to know." As the CIA's *actual* standards and procedures cannot be critiqued, this Article focuses on what these standards and procedures *should be* to comply with IHL. This leads to two primary claims.

First, the agency should impose a very high standard in identifying targets. Except in extraordinary circumstances, the agency may strike only if satisfied *beyond a reasonable doubt* that its target is a combatant-member of AQ/T. Those who believe that this reasonable doubt standard carries too much baggage from criminal law or that it inappropriately mixes criminal justice with war should substitute some other label for a very high level of certainty. This alternative label could be *clear and convincing evidence* or some other similar formulation. The idea, however labeled, is for the drone operator to be really sure before pulling the trigger on a lethal missile. Drone strikes, after all, are executions without any appeals in the courts.

Second, as part of a system to ensure the interrelated goals of accuracy, legality, and accountability, all CIA targeted killings should be subject to *independent review* by the CIA's Inspector General that is as public as national security permits.¹³¹

130. See Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, in 85 INT'L L. STUD., THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS 307, 315–17 (Michael N. Schmitt ed., 2009) (discussing the U.S. military's restrictive ROEs in Afghanistan).

131. In an earlier piece, we explained how a requirement of independent executive review could be derived from the due process clause of the U.S. Constitution, which we argued should apply to targeted killing abroad of noncitizens under *Boumediene v. Bush*, 553 U.S. 723 (2008). See Murphy & Radsan, *supra* note 14, at 429–37, 445–50. Recognizing that not every reader will be persuaded by our due-process argument, we derive in this piece a requirement of independent executive review from IHL's requirement of precaution.

A. *Certainty and Distinction*

Imagine two U.S. fighters: a Marine on the ground in the Helmand Province of Afghanistan and a drone pilot thousands of miles away in the United States. These two Americans, soldier and pilot, are both on the watch for bad guys, for Taliban and Al Qaeda forces arrayed against them. The two Americans try their best to follow the rules—which include IHL and any ROEs produced back at the Pentagon and the CIA. In particular, both strive to honor the principle of distinction, killing only legitimate targets.

They must, of course, apply this principle of distinction in very different circumstances. The soldier on the ground must often make lightning-fast decisions based on inadequate information. The practice of the Taliban and Al Qaeda of hiding among peaceful civilians makes it quite difficult for U.S. fighters to determine who is a legal target—especially when many civilians carry weapons for protection against thieves, bandits, and insurgents.¹³² In Helmand Province, what does the Marine do about a man walking down the street with an AK-47? “When in doubt,” one not-so-imaginary Marine said about this situation, “empty the magazine.”¹³³ This response is wrong as a matter of law, but it highlights sentiments and circumstances that must be considered in any realistic assessment of the soldier’s legal obligations in a very dangerous situation.

A drone pilot, armed with the latest technology, the best intelligence, and many miles from the enemy, must be more circumspect. The pilot’s instructions to kill come through an intense intelligence effort and deliberative process.¹³⁴ Once the drone is in location, the pilot and a team of analysts may be able to spend hours studying the ground to confirm the target’s identity. If the target is having dinner with his wife, children, and extended family, the pilot is able to hover overhead and wait until the target “drives back to work” before firing the missile. Precise technology, consistent with distinction, gets the job done and saves everyone else back at the dinner party.

Because the soldier and the pilot operate in different circumstances, the law should not expect them to apply the principle of distinction in the same way. When the pilot operates with the most advanced technology and from a safe distance, the law should demand greater certainty from

132. See Schmitt, *supra* note 130, at 313 (“Enemy forces wore no uniforms or other distinctive clothing that allowed immediate visual identification. Merely being armed was an insufficient indicator, as Afghans in remote areas often carry weapons for protection . . .”). See also Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT’L L. 683, 751 (2009) (discussing the practice of insurgent and terrorist groups blending into civilian populations to take advantage of civilian immunity from direct attack).

133. Email from [name withheld by request], Retired Sergeant, U.S. Marine Corps, to Christopher Proczko, student, William Mitchell Coll. of Law (Sept. 22, 2009, 09:47 CST) (on file with author).

134. See *supra* text accompanying notes 80–82 (noting that drone attacks are the product of a complex system of intelligence gathering).

the pilot than from the soldier on the ground.¹³⁵ Because precise technology increases the CIA's ability to control its force, IHL imposes a corresponding duty to do so.¹³⁶ Still, no matter how precise the technology, requiring perfection is quixotic because every weapon is only as good as the intelligence guiding it—and humans are imperfect.

In a general way, IHL does demand more from the drone pilot. Article 50(1) of Additional Protocol I declares that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”¹³⁷ The ICRC's commentary on Protocol II for noninternational conflicts maintains this presumption as well.¹³⁸ At one level, this presumption of civilian status is a noncontroversial matter of common sense. An attacker should conclude a target is proper under IHL before pulling the trigger. Yet this presumption does not generally require an attacker to resolve *all* legitimate doubts in favor of civilian status.¹³⁹ For the soldier taking fire in the field, the level of certainty required by distinction must, to some degree, take into account the soldier's dangerous situation and the range and quality of information available to him.

The ICRC, not known for a cramped view of IHL protections for civilians, acknowledged this realism in a guidance document issued after a discussion among IHL experts.¹⁴⁰ This guidance on distinction says:

Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal proceedings but rather must reflect the level of certainty that *can reasonably be achieved in the circumstances*. In practice, this determination will have to take into account, *inter alia*, [(1)] the intelligence available to the decision maker, [(2)] the urgency of the situation, and [(3)] the harm likely to result to the operating forces or [(4)] to persons and objects protected against direct attack from an erroneous decision.¹⁴¹

135. Cf. Schmitt, *supra* note 74, at 455 (“[T]hose with advanced [intelligence, surveillance, and reconnaissance] will have a much more difficult time convincing others that an attack striking civilians and civilian objects was a case of mistaken identity rather than an indiscriminate act of recklessness (or intent).”).

136. Dakota S. Rudesill, Note, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT'L L. 517, 532 (2007).

137. Protocol I, *supra* note 42, art. 50(1).

138. See Junod, *supra* note 57, § 4789 (“[I]n case of doubt regarding the status of an individual, he is presumed to be a civilian.”).

139. See, e.g., Schmitt, *supra* note 130, at 320 (“Obviously, [Article 50(1) of Additional Protocol I] does not rule out doubt altogether.”).

140. Melzer, *supra* note 61, at 992 (explaining that *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* was the result of several years of examination by “legal experts” of the concept of direct participation in hostilities).

141. *Id.* at 1039 (emphasis added); see also Matthew C. Waxman, *Detention As Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1389 (2008) (“While it is impossible to pin down a precise formula for calculating reasonableness, factors such as time constraints, risks, technology, and resource costs emerge over time as key considerations in the legal analysis.”).

The ICRC thus acknowledges that the level of acceptable doubt is based on all relevant circumstances.¹⁴² How could the ICRC have reached any other conclusion that applies across the entire range of situations within armed conflict? Vagueness and abstraction are the costs of offering guidance on distinction capable of covering actions by either the soldier on the ground or the drone pilot in a remote facility.

Applied to the generic facts of drone strikes, the ICRC guidance on distinction calls for a higher level of certainty in targeting from the drone pilot than from the soldier on the ground. After all, drone operators should generally have better intelligence available, and no one is shooting at them. But just telling the drone pilot that he or she must be more careful with his or her missiles than the soldier must be with his or her gun is not enough. A more precise instruction is necessary: targeted killing by a drone may go forward only where it is clear to a high degree of certainty that the target is legitimate under the facts and the law. As applied to the CIA's campaign, this instruction says the drone operator (or whoever else gives the order to kill) must be sure, before firing a missile, that the target is a combatant member of AQ/T who plans, commands, or carries out attacks.¹⁴³ The intelligence, at a high level of certainty, must support placing the target into this legal category. And, to do all this, the commander probably needs legal advice from inside or outside the agency.

Fortunately for us (and most fortunately for those who are potential false positives of drone strikes), a high level of certainty in pulling the trigger seems consistent with the United States's official stance. In his public defense of drone attacks, Harold Koh remarked:

In U.S. operations against [A]l Qaeda and its associated forces—including lethal operations conducted with the use of unmanned aerial vehicles—great care is taken to adhere to these principles [of distinction and proportionality] in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.¹⁴⁴

Strictly speaking, Koh's remark did not address the level of certainty required for targeted killing by CIA drones. Yet he tried his best to reassure a skeptical audience that the CIA and military forces are quite confident of their facts before they fire missiles on U.S. enemies.

142. *Id.* at 316 (quoting unclassified summary of rules of engagement for Operation Iraqi Freedom that stated that "PID [positive identification of the enemy] is a reasonable certainty that the proposed target is a legitimate military target"); *see also* Schmitt, *supra* note 130, at 319 ("States have tended to mandate the only level of certainty that is practicable in the fog of war—would a reasonable warfighter in the same circumstances hesitate to act?"); Waxman, *supra* note 141, at 1391 (observing that IHL should not impose too strict a standard for target identification—namely beyond reasonable doubt—because to do so "would expose an attacking party to unacceptable risks and delays, and would mean refraining from many attacks where such verification is impractical").

143. *See supra* text accompanying notes 61–63 (explaining that persons functioning as combatant members of AQ/T are legitimate objects of attack under IHL).

144. Press Release, Am. Soc'y of Int'l Law, *supra* note 15, at 2 (emphasis added).

Our proposal that CIA drone strikes require a high level of certainty in targeting may, at first blush, seem contrary to IHL's generous rule that targeting be reasonable based on the totality of known circumstances.¹⁴⁵ Viewed from the correct angle, however, our proposal is just an application of IHL's rule of reason to the generic facts of drone strikes at premeditated targets. Factored into the equation are the multiple sources of intelligence, the time for deliberations, and the relative safety of the drone pilot. Absent exceptional circumstances, a reasonable commander should demand—and thus IHL should demand—a very high level of certainty before striking.

To help justify our claim, recall that the core purpose of IHL is to minimize suffering while allowing legitimate military objectives to be achieved in an armed conflict.¹⁴⁶ In light of this purpose, the principle of military necessity condemns an attack if it will cause suffering not reasonably necessary to achieve a concrete and direct military advantage.¹⁴⁷ In combat, one can gain a military advantage either by protecting one's forces or by degrading opposing forces; in simple terms, it is good to keep the enemy from shooting at you, and it is good to wear the enemy down. For targeted killing by drone, however, immediate force protection is largely irrelevant because the air vessels are unmanned (which is not to say that the drones themselves are valueless—just that they are not people). Therefore, broadly speaking, targeted killing by this new weapon satisfies military necessity only if it causes sufficient military harm to the enemy.

On a case-by-case basis, one might question whether killing any enemy combatant creates a military advantage. In a large conflict with thousands of fighters, the effect of killing one fighter might be *de minimis*, and opposing forces could easily find someone to fill the shoes of anyone killed. Ever practical, IHL does not generally require an individualized analysis of military effects of killing a particular combatant. Rather, IHL takes as given (or at least strongly presumes) that killing an enemy combatant (who is not *hors de combat*) degrades opposing forces enough to justify killing that combatant.¹⁴⁸

As to U.S. targeted killing, the CIA is said to be decapitating AQ/T's leadership, and independent reports confirm that the drone

145. See *supra* notes 140–42 and accompanying text (explaining that IHL contemplates that combatants will make judgments concerning positive identification of enemy forces based on reasonable assessment of the totality of the circumstances).

146. See *supra* notes 31–38 and accompanying text (identifying humanitarian aims of IHL).

147. See *supra* text accompanying notes 64–67 (discussing the concept of “military necessity”).

148. See MELZER, *supra* note 14, at 288 (noting that many “powerful States and authors appear to believe” that IHL authorizes the killing of enemy combatants at any time and any place provided they are not *hors de combat*; contending, to the contrary, that there is, at most, a “strong presumption” that attacking enemy combatants who are not *hors de combat* satisfies the requirement of military necessity, but that this presumption should not hold where enemy combatants can be taken by nonlethal means without additional risk).

strikes have hampered terrorist activities.¹⁴⁹ These tangible effects help demonstrate that drone strikes satisfy IHL's requirement of military necessity so long as they are carefully limited to people who are AQ/T combatant members.

These effects do not, however, necessarily justify drone attacks where the identities of targets are less than certain. Allowing action based on a lesser standard of certainty decreases false negatives and increases false positives. In more concrete terms, allowing the CIA to kill based on a lesser standard means killing more bad guys, but also killing more good guys. The key question under IHL is whether killing off the latter group to enable killing off the former group is justified—as a matter of both military necessity and proportionality.

If other considerations are ignored, it is easy to conclude that the United States is better off killing more AQ/T combatant members. Each kill causes some damage to AQ/T, degrading operations and demoralizing members. The incremental benefits from each strike, however, are very difficult to measure. If government assurances are true that the procedures are “extremely robust” and “rigorous,”¹⁵⁰ then targets that are highest on the CIA's list should be able to satisfy very strict requirements of distinction and target identification. These strikes should disrupt AQ/T operations by killing leaders, by making members fear the skies, and by creating anxiety that there are informants within AQ/T ranks helping call in the strikes. Yet, as with most things in nature, the law of diminishing returns might apply to additional attacks against less-certain and less-important targets: killing the fiftieth most important target will probably cause much less disruption than the twentieth. As the strikes move down the AQ/T “organizational charts,” the targets presumably become less certain and more replaceable. While there was only one Osama Bin Laden, the eleventh-in-command can probably replace the tenth-in-command.

An obvious disadvantage of applying a laxer level of certainty to CIA targeting is a greater number of possible deaths and injuries to peaceful civilians. This is a self-evident humanitarian harm that enters the calculations of proportionality. Moreover, these deaths (or the perception of unnecessary deaths) will affect the political and military situation on the ground in Afghanistan or Pakistan, changing the calculations of military necessity. Again, the U.S. military insists that winning over the local population is vital to counterinsurgency,¹⁵¹ and, to this end, the Pentagon has attempted to minimize civilian casualties in Afghanistan

149. See *supra* text accompanying notes 121–125 (discussing damage caused to AQ/T by CIA drone strikes).

150. See *supra* text accompanying note 87 (quoting State Department Legal Adviser Harold H. Koh's public remarks defending drone strikes).

151. See U.S. DEP'T OF ARMY, *supra* note 128, at 1–3 (“Political power is the central issue in insurgencies and counterinsurgencies; each side aims to get the people to accept its governance or authority as legitimate.”).

through strict ROE.¹⁵² Local politics, in this way, may loop back into an application of IHL. The strict ROE for Afghanistan may become more than just cautious policy.

The expected military utility of killing an AQ/T combatant member must be balanced against the expected military disutility of killing a peaceful civilian. Military necessity will justify an attack only where the net gain amounts to a concrete and direct military advantage. (The net gain is also relevant to assessing proportionality, because the smaller the gain from a drone strike, the less collateral damage can be justified.) In keeping with counterinsurgency's stress on winning "hearts and minds," generally speaking, one cannot say with any certainty that the net expected utility of a strike that runs a substantial risk of targeting an "innocent" person will amount to a concrete and direct military advantage. So, in general, drone strikes should involve a high level of certainty in targeting (i.e., distinction) to satisfy military necessity.

In keeping with IHL's flexible, fact-sensitive approach, our rule of heightened certainty may not apply in truly exceptional circumstances. For example, the target may play an irreplaceable role in AQ/T. Osama Bin Laden, to name one person, was beyond doubt a legitimate target; he was probably number one on the CIA's target list—and on the Defense Department's list. At some point, a drone operator might have seen on the screen a person who, based on all available information, was probably Osama Bin Laden—but not Osama Bin Laden beyond any doubt. The military advantage of killing Osama Bin Laden, compared to a mid-level AQ/T member, would have justified the additional risk of mistakenly harming a peaceful civilian. Targeting the person at the top, it turns out, does not have to be as certain. Yet the relevant agency (whether the CIA or the Air Force) should bear the burden of justifying any departure from the default rule of heightened certainty in targeting. Part of the government's burden should be to explain why trying to kill the head of Al Qaeda today justifies the risk of killing another "tall man" hunting for scrap metal.¹⁵³

B. *Precaution and Independent, Ex Post Review*

As to "precaution," IHL insists that attackers take all feasible measures to ensure that they attack only legitimate targets, that they minimize collateral damage, and that they avoid excessive collateral damage.¹⁵⁴ As discussed, the U.S. military takes great efforts to satisfy its duty of precaution; extensive, written instructions relate to validating and

152. Schmitt, *supra* note 130, at 315–17.

153. See *supra* text accompanying note 111 (recounting how the CIA killed a tall man in robes because the agency thought he might be Osama Bin Laden).

154. See *supra* note 72 and accompanying text.

vetting targets, to executing attacks, and to assessing their effects.¹⁵⁵ Presumably, the CIA takes its duty of precaution no less seriously.

Notwithstanding the agency's reputation for playing fast and loose with the law, CIA officials have strong reasons to ensure compliance with IHL. One reason is that someday the CIA's targeted killings by drone, like other embarrassing "family jewels," will become public.¹⁵⁶ A stronger reason is that CIA officials must be acutely aware that, for many members of the United States and international public, targeted killings come close to prohibited acts of assassination. To stay on the safe side on controversial programs, CIA officials seek both political and legal cover.¹⁵⁷ From past lessons on other covert actions, CIA officials have learned to obtain presidential authorization in writing, to brief the oversight committees, and to obtain legal opinions. It is safe to bet that President Obama has blessed the CIA drone strikes; that the oversight committees have not been kept completely in the dark; 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.¹⁵⁸

Because the concept of precaution is so vague, the procedures to fulfill this duty might reasonably take many forms. Moreover, those procedures should depend in large part on detailed studies from the field. If experience from the classified setting shows that particular procedures result in too much collateral damage, then the CIA must adopt stricter procedures. This is the sort of feedback loop the Defense Department is accustomed to in its "after-action" studies from prior bombing campaigns. The CIA must do the same.

The duty of precaution requires the CIA, in general, to adopt procedures reasonably expected to improve accuracy and to curb abuse without excessive military or humanitarian costs. It is a delicate balance. As part of this balance, the CIA's targeted killing should be subject to as much independent, public, ex post review as national security reasonably permits.

Whatever the CIA's standards and procedures, they can do little good unless they are enforced. Long experience teaches that standards and procedures are much more likely to be enforced when the decision

155. See *supra* text accompanying notes 93–109 (summarizing the U.S. military requirements on targeting).

156. *A Glimpse into the CIA's 'Family Jewels,'* N.Y. TIMES, June 26, 2007, available at <http://www.nytimes.com/2007/06/26/world/americas/26iht-cia.5.6349602.html> (discussing the release of CIA documents detailing assassination plots and secret testing of LSD on unwitting subjects).

157. Cf. Scott Shane, *In Legal Cases, C.I.A. Workers Turn to Insurance Firm in Virginia*, N.Y. TIMES, Jan. 20, 2008 (Sunday Edition), at 31 (discussing a niche insurer that pays legal bills of federal officials for investigations and litigation relating to their work, and observing that business has thrived since September 11, 2001).

158. Cf. Mark Mazzetti & Scott Shane, *Memos Spell out Brutal C.I.A. Mode of Interrogation*, N.Y. TIMES, Apr. 17, 2009, at A1 (citing President Obama's assurance that CIA officers "who were acting on the Justice Department's legal advice would not be prosecuted" for abuse of detainees).

maker must explain his or her decision to an independent authority at a later time. This is the basic interest in accountability. For CIA drone strikes, the interest in accountability is acute given the veil of secrecy over CIA activities and the specter that targeted killing could become distorted into arbitrary acts of murder. At the same time, the CIA has an interest in protecting the sources and methods of intelligence for national security. The question, in reconciling democracy with secrecy, becomes what model of accountability best balances these interests.

Answering that question for the CIA requires a leap from the usual IHL model of accountability. The military model is distinct for several reasons: (1) a traditional armed conflict may require hundreds or thousands of people to make decisions—often under stress, fatigue, and danger—regarding whether to kill people or to destroy property; (2) many of these decisions are straightforward under the principles of distinction and proportionality because the enemy is easy to identify (e.g., it is obviously legal for a soldier to shoot at an enemy tank with no civilians near it); (3) much of the information needed to second-guess these decisions is covered in the rubble of war; and (4) the self-evident boundaries to the conflict allay concerns that supposed combatants will be killed anywhere in the world in the name of national security.

For traditional armed conflicts, it is not realistic or desirable for authorities to invest significant resources into *ex post* investigation of the legality of *every* decision made. Too many things occur on the battlefield. Outside IHL, this is also true in civilian life: prosecutors do not follow us around to check on the legality of every decision we make. Instead, in both the military and civilian settings, the relevant authorities usually wait until they have grounds for believing a serious violation has occurred. Once they have these grounds, they investigate, and those investigations can lead to civil, administrative, or criminal penalties through some form of adjudication.

The CIA's drone campaign, to repeat, differs from traditional armed conflict. First, as long as the number of strikes stays below some manageable figure (e.g., in the low hundreds per year), it is practicable to subject every strike to an independent investigation. Second, all strikes are intended to have lethal consequences by definition, and the danger from a misfired missile is much higher than the danger from a misfired pistol. Third, the information needed to evaluate these strikes stays available. The images from the drone's camera are recorded. The intelligence for selecting the target is contained in cables and other documents. The communications between the drone operator and the other decision makers are also recorded. All of this information can enable meaningful *ex post* review.

Fourth, and most important, because the CIA is given more leeway than the military to operate in the shadows, a countervailing check is needed. Even if the Obama administration carries out targeted killing

accurately and wisely in the moment, the potential for abuse is frightening. How many countries are within the killing field? How many more countries are to come? Will Predator strikes ever be used on U.S. territory? As a check against abuses, IHL requires feasible precautions.¹⁵⁹ While ensuring that drone missiles do not kill innocent civilians today, these precautions should also protect civilians tomorrow. No matter which agency is pulling the trigger, strong and careful controls are needed on the government's power to kill "enemies of the state."

Scrutiny of the CIA can take many forms. Some might be too weak to do any good; others might be so strong as to unduly expose intelligence sources and methods or to cause decision makers to become unduly risk averse. Once again, we confront the Goldilocks problem of selecting a model that is "just right" for balancing competing concerns.

The Israeli Supreme Court's analysis of targeted killing provides a useful starting point for this model.¹⁶⁰ Recall that the Court concluded that Palestinians engaged in terrorist activities could be targeted as civilians directly participating in hostilities.¹⁶¹ To solve the revolving-door problem, the Court declared a definition of direct participation in hostilities that allows targeting of persons who plan or command attacks.¹⁶² This broad definition, however, tends to increase the risk to peaceful civilians. For balance, the Court developed limits on targeted killing through a mix of IHL and human rights law. These limits include: (1) independent, ex post investigation by executive authorities "regarding the precision of the identification of the target and the circumstances of the attack," and, even more remarkable from a U.S. perspective; (2) independent judicial review of those executive investigations.¹⁶³

As legal authority for independent intraexecutive review, the Court relied in part on precedents from the European Court of Human Rights (ECHR) governing the use of force in counterterrorism operations.¹⁶⁴ Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms declares that "[e]veryone's right to life shall be protected by law," but it adds that a killing does not violate this right if it results from the "use of force which is no more than absolutely necessary . . . in defense of any person from unlawful violence

159. See *supra* note 72 and accompanying text.

160. See generally H CJ 769/02, Pub. Comm. Against Torture in Isr. v. Gov't of Isr. (*PCATI*) [Dec. 11, 2005], slip op.

161. *Id.* at para. 61 (concluding that preventative strikes (i.e., targeted killings) are legal under some circumstances).

162. *Id.* at para. 37 (declaring that deciding upon or planning terrorist acts amounts to direct participation in hostilities).

163. *Id.* at para. 40 (requiring objective, ex post executive review); *id.* at para. 54 (requiring judicial review of ex post executive review in "appropriate cases").

164. *Id.* at para. 40 (citing, inter alia, *McCann v. United Kingdom*, 21 Eur. H.R. Rep. 97, paras. 161–63 (1995)); *McKerr v. United Kingdom*, 34 Eur. H.R. Rep. 553, 559 (2001).

...”¹⁶⁵ To give effect to this right, the ECHR insists that “there should be some form of effective official investigation when individuals have been killed as a result of the use of force by . . . agents of the State,” to determine whether the deadly force was justified and to punish those responsible if it was not.¹⁶⁶ The persons who conduct the investigation must be “independent from those implicated in the events.”¹⁶⁷ Moreover, there must be “a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.”¹⁶⁸ In essence, the Israeli Supreme Court took this requirement of executive review from the human rights context, in which it was developed, and transplanted it to IHL.¹⁶⁹

The Israeli Supreme Court, to ensure objectivity, added that judicial review of the ex post executive review should be allowed “in the appropriate cases.”¹⁷⁰ Parts of the opinion suggest a strict, de novo review to ensure judicial control over the interpretation and the application of IHL.¹⁷¹ Thus, it is for Israeli courts, not executive authorities, to determine what the principles of “distinction” and “proportionality” require.¹⁷² In the same breath, the Court recognized that these principles must leave room for discretion by military officials based on facts available at the time the force was used.¹⁷³

Overall, the Supreme Court of a small country quite vulnerable to terrorism in the Middle East does not fear that special scrutiny of targeted killing will result in an unbearable risk to its national security. So, if Israel can create and manage a system of accountability for targeted killing, then, on a similar balance, the United States should be able to do so as well.

Who in the United States should conduct this review of targeted killing? And what should the scope of review be? Taking the second question first, the Israeli Supreme Court is correct that ex post review must defer to some extent to reasonable military judgment and—when we travel to the U.S. context—to reasonable intelligence functions. In the United States or Israel, the reviewing entity should not substitute its judgment for the reasonable judgment of officials who decide whether to

165. *European Convention for the Protection of Human Rights and Fundamental Freedoms* art. 2, Nov. 4, 1950, E.T.S. No. 5.

166. *See, e.g., McCann v. United Kingdom*, 21 Eur. H.R. Rep. 97, para. 161.

167. *McKerr*, 34 Eur. H.R. Rep. 553, para. 112.

168. *Id.* at para. 115.

169. *See PCATI* at para. 40.

170. *Id.* at para. 54.

171. *Id.* at para. 56 (“The question which the Court must ask itself is not whether the executive branch’s understanding of the law is a reasonable understanding; the question which the Court must ask itself is whether it is the correct understanding.”).

172. *Id.* at paras. 8, 23, 58.

173. *Id.* at para. 57 (“The question is whether the decision of the military commander falls within the zone of reasonable activity on the part of the military commander.”); *id.* at para. 58 (“A zone of proportionality is created. It is the borders of that zone that the Court guards. The decision within the borders is the executive branch’s decision.”).

strike or not. Rather, the reviewing entity should police against abuses and clearly unreasonable judgments. It is review, after all, not micro-management.

To flesh out the scope of this review, U.S. administrative law is also useful. In particular, the doctrine of “reasoned decision making” (also known as “hard look” review) provides a template for reviewing CIA drone strikes. Using this template, a court examines whether an agency made its decision based on all “relevant factors” or whether the agency has made a “clear error of judgment.”¹⁷⁴ Relevant factors are those the law instructs the agency to consider in making a certain decision. For instance, Congress has instructed the Environmental Protection Agency, in setting a national ambient air quality standard, to consider what limits on pollutants are “requisite to protect the public health” with an “adequate margin of safety.”¹⁷⁵ The agency should therefore set limits based on health and safety, not on the irrelevant factor of the profitability of the coal industry.¹⁷⁶

Review for reasoned decision making is supposed to examine what an agency *actually considered* in making its decision.¹⁷⁷ To do that, the court looks to the contemporaneous explanation an agency gave for its action.¹⁷⁸ By this technique, courts prevent agencies from using post-hoc rationalizations for decisions reached on less defensible grounds.

For CIA drone strikes, this “hard look” is an especially good fit for review of target selection—i.e., identification of particular persons for targeted killing. To select a particular person as a target, the agency must seek and assess all available intelligence. This assessment should be memorialized in exhaustive findings that assess all relevant factors. Under our interpretation of IHL, those factors include: (1) all grounds for concluding the target is a combatant member of AQ/T; (2) any grounds for doubting this status; (3) whether killing the target creates a concrete and direct military advantage; (4) whether that advantage is sufficient to justify any risk of collateral damage, and, if any, how much; and (5) any military or political disadvantages that might result from a strike against the target.

Hard-look review presupposes that an agency has the time and the resources for careful deliberation before it acts. Even though a drone

174. For a seminal case discussing this point, see, for example, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

175. 42 U.S.C. § 7409(b)(1) (2006).

176. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 464–65, 471 n.4 (2001) (observing that a national ambient air quality standard should be vacated as illegal if Environmental Protection Agency (EPA) based it upon the cost of attaining compliance, which the Clean Air Act forbade EPA from considering in determining acceptable pollutant levels).

177. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”).

178. *See, e.g., Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50 (rejecting explanation proffered by agency counsel during appellate proceedings because the record indicated that the agency had not relied upon that explanation in making its decision).

can hover over a target for many hours, this form of review does not fit firing decisions; that is not the time for operators to be drafting findings. A drone operator can, however, prepare an exhaustive after-action report minutes or hours later. Those reports would include, at minimum, video feeds, audio traffic, electronic mail, and telephone logs. Reports would explain: (1) the grounds for concluding that the strike was, in fact, directed at the preselected target; and (2) grounds for concluding that any expected collateral damage was acceptable.

In sum, a variation on hard-look review could promote accountability by having the agency memorialize its decision making on drone strikes and exposing it to scrutiny. At the same time, this review would incorporate a deferential standard of clear error that respects the CIA's split-second judgments in conducting attacks.

Determining an appropriate scope of review still leaves open *who* should conduct that review of CIA drone strikes. The Israelis rely on a mix of executive and judicial actors. In the United States, federal judges have great independence because of lifetime tenure and protections of their salaries. They are obvious candidates. But using federal courts to review CIA targeted killing raises a host of problems. Few judges are military and intelligence experts, and the transparency of civilian courts goes against the secrecy necessary for some military and intelligence operations. As a compromise, one might try a national security court to keep intelligence sources and methods from unauthorized disclosure.¹⁷⁹ But, putting aside academic debates, Congress does not seem interested in a new court. Another problem with regular courts is the "standing" requirement of a plaintiff who is ready and able to bring suit. The targets of attacks, even if they survive, are unlikely to travel from Afghanistan or Pakistan to file suit, and it is not clear who else could be a proper plaintiff.¹⁸⁰

There are other candidates to conduct independent review. Executive officials, to be sure, are not as independent as federal judges. These officials have a natural impulse to avoid embarrassing the administration they work for. Moreover, if the media are correct that CIA Director Leon Panetta approves drone strikes,¹⁸¹ then this review goes toward the most senior officials in the intelligence community. Despite these challenges, there is at least one official with a measure of independence for meaningful review of CIA drone strikes.

179. Cf. Amos N. Guiora, *Where Are Terrorists to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805, 834-35 (2007) (recommending amendment of Foreign Intelligence Surveillance Act (FISA) to allow prosecution of terrorists before FISA courts, thereby ensuring civilian control while respecting security).

180. For an argument that a proper plaintiff, in theory, could bring a *Bivens* action to challenge targeted killing—coupled with a recognition that the practical force of this theoretical point is vanishingly small—see Murphy & Radsan, *supra* note 14, at 437-45.

181. See *supra* note 91 and accompanying text (noting press reports that Panetta approves drone strikes).

The CIA's Inspector General (IG) is charged with investigating the legality of CIA actions.¹⁸² He or she is experienced with protecting classified information. His or her independence is protected by a statute that permits only the president to remove the IG.¹⁸³ And he or she has a dual reporting line to the CIA Director and to the congressional oversight committees.¹⁸⁴ The CIA's IG is thus our preferred candidate.

The CIA's IG should review all the CIA's targeted killings for reasoned decision making. Based on this review, an IG could recommend internal discipline, compensation to unwarranted victims of a strike, or, in an extreme case of abuse, referral to the Department of Justice for criminal proceedings. The IG should also be involved in reviewing the CIA's internal procedures on target selection and execution of attacks. IG's due process, so to speak, substitutes for what otherwise might come from the courts. To enhance accountability, the IG could prepare public reports detailing as much information on strikes as reasonably consonant with national security. Such reports would need to balance the interests of accountability against the CIA's need to enable foreign governments to keep their role in assisting U.S. intelligence a secret. They would also need to avoid excessive revelations of sensitive sources and methods.

Given the limited number of CIA strikes, the dangers this program poses to peaceful civilians now and in the future, and the extensive data concerning each strike, it is feasible for the IG to conduct an investigation of all CIA drone strikes. These investigations will not guarantee perfection. Nothing can. But they will help ensure the accuracy and the legality of strikes, curb abuses, and provide a modicum of accountability for a shadow war. Because they are feasible under the laws of war, IHL requires them.

V. ONE PROCESS FOR ALL

Americans expect their government to kill terrorists who cannot be captured and are members of groups willing (and demonstrably able) to kill thousands of civilians. That is the reality for the age of terror. No matter what olive branches we may offer, some parts of Al Qaeda will continue to seek the United States' destruction. Even so, the government's power to kill must be carefully controlled—or it could turn into a tyranny worse than terrorism.

The traditional control of judicial trial does not work for targeted killing; only the fanciful would propose a full judicial trial in which the government and the suspected terrorist make opening statements, admit evidence, and argue the suspect's fate to the jury. In the dawning age of

182. See generally 50 U.S.C. § 403q (2006).

183. *Id.* at § 403q(b)(6).

184. 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, 268 (2010).

the drone, a new model must be developed that recognizes that fighting terrorism can be as much war as it is law enforcement. The new model can come from hybrid principles of due process, IHL, or from other sources. Whatever the source, appropriate models will increase the probability that targeted killings are directed only against members of extremely dangerous groups that cannot be countered in other ways.

Given the nature of the terrorist threat, it is not obvious why the citizenship of suspected terrorists should strongly affect the model for controlling targeted killing. Along these lines, it bears noting that IHL does not consider citizenship in distinguishing combatants from civilians. In traditional conflicts, the United States has had citizens switch to the other side. Switched, they become targets just like foreign combatants. In a nontraditional conflict, a U.S.-citizen terrorist may be just as likely to travel to and from the United States as a Pakistani citizen.

Nonetheless, news that the Obama administration placed at least one U.S. citizen on the hit list caused outrage in some quarters.¹⁸⁵ This outrage seems to stem from a mistaken intuition and a flawed legal objection.

The intuition is that there is something especially wrong about the U.S. government killing Americans. True, people tend to treat members of their own groups better than outsiders. To put someone in prison or to kill him, the labels “defendant” or “outsider” often help. Yet, at a higher morality, the U.S. government should not feel, independent of other factors, freer to kill any of the six billion non-Americans in the world than any of the three hundred million Americans. The flip side, morally speaking, is that the U.S. government has just as much standing to kill Americans as non-Americans.

The legal objection is that killing an American by drone strike violates the target’s right to due process under the U.S. Constitution.¹⁸⁶ This due process objection rests on the premise that targeted killings attempted outside the United States by the U.S. government implicate due process only if the target is a U.S. citizen. We have argued in an earlier piece that the Supreme Court’s decision in *Boumediene v. Bush* suggests

185. See, e.g., *Drones, Targeted Killings and the Fifth Amendment*, ACLU BLOG RIGHTS (Feb. 4, 2010, 4:38 PM), <http://www.aclu.org/blog/national-security/drones-targeted-killings-and-fifth-amendment> [hereinafter *Drones*] (describing as “downright scary” that the Director of National Intelligence “admitted that the Obama administration reserves the right to order the assassination of Americans abroad who are suspected of involvement in terrorism”); Glenn Greenwald, *Presidential Assassinations of U.S. Citizens*, SALON (Jan. 27, 2010, 6:28 AM), http://www.salon.com/news/opinion/glenn_greenwald/2010/01/27/yemen (“Barack Obama, like George Bush before him, has claimed the authority to order American citizens murdered . . .”).

186. See, e.g., *Drones*, *supra* note 185 (characterizing drone strikes on U.S. citizens as “assassination,” “death-before-due-process,” “extrajudicial killing,” and a violation of the Fifth Amendment right to due process); Greenwald, *supra* note 26 (decrying that U.S. targets are entitled to no charges, no trial, no ability to contest the accusations).

that this premise is mistaken.¹⁸⁷ In that case, the Supreme Court applied a multifactor test to determine that the constitutional protections of habeas corpus reach outside the United States to nonresident aliens detained at Guantanamo.¹⁸⁸ One of the factors in the Court's inquiry was indeed citizenship—i.e., the non-U.S. citizenship of the detainees weighed against having habeas corpus reach to them.¹⁸⁹ The Court nonetheless ruled in favor of the detainees in light of other factors:

- (1) the . . . status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and
- (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.¹⁹⁰

Regarding these other factors, the *Boumediene* Court noted: (1) the detainees contested their status as enemy combatants, which suggested a potential need for further process; (2) the United States exercised total control over Guantanamo; and (3) the government failed to present a credible argument that extending habeas corpus to the detainees would compromise the military mission.¹⁹¹ In light of these functional factors, the Court concluded that constitutional habeas corpus extended to the detainees *notwithstanding* their non-United States citizenship.¹⁹²

Boumediene's logic thus suggests that the U.S. Constitution should apply overseas to noncitizens where it is practicable and reasonable for it to do so.¹⁹³ Its functional approach should determine not only how habeas travels abroad but how due process travels. Of course it would be wildly impracticable to give a terrorist a full judicial trial before a targeted killing is attempted. Thus, if one were to contend that due process always requires a full trial before deadly force is used, then one could apply *Boumediene's* functionalist approach to conclude that due process does not apply to targeted killings of noncitizens outside the United States.

Due process, however, does *not* always require a judicial trial. Rather, at bottom, the right to due process is the right to fair and reasonable procedures.¹⁹⁴ And how can it be impracticable and unreasonable for the CIA or any other U.S. agency to apply internal checks and guide-

187. See Murphy & Radsan, *supra* note 14, at 433–37 (contending that, properly understood, *Boumediene v. Bush* subjects the U.S. government to due process restrictions wherever it acts in the world).

188. *Boumediene v. Bush*, 553 U.S. 723, 766–71 (2008).

189. *Id.* at 766–67, 770–71.

190. *Id.* at 766.

191. *Id.* at 766–69.

192. *Id.* at 770–71.

193. See Murphy & Radsan, *supra* note 14, at 434–36 (discussing the *Boumediene* majority's functionalist approach to the availability of habeas corpus review for detainees at Guantanamo Bay).

194. See, e.g., Gary Lawson et al., “*Oh Lord, Please Don't Let Me Be Misunderstood!*”: *Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 14 (2005) (concluding, based on an extensive survey of centuries of case law, that the touchstone of procedural due process is “a search for what procedures are fair under the circumstances of each particular case”).

lines to targeted killing? *Boumediene* therefore suggests that the U.S. government, as a matter of due process, has a constitutional obligation to apply fair and reasonable procedures when it engages in targeted killing of people abroad—whatever their citizenship.¹⁹⁵

The question thus transforms from whether due process applies at all in the targeted killing of suspected terrorists to what process is due. In considering the transformed question, it bears stressing that due process is not an all-or-nothing proposition. It is famously fact sensitive, developing different models for different contexts.¹⁹⁶ There is a due process of prisons,¹⁹⁷ a due process for discipline in schools,¹⁹⁸ and a due process for detaining U.S. citizens in the war on terror.¹⁹⁹ All these models strive for procedures that ensure fairness and accuracy while recognizing that the government must carry out its duties.

Our country must now develop a due process for targeted killing by drone. As we do so, we should not be surprised to see a convergence between the due process model and the IHL model. The IHL requirement of precaution, in particular, is closely related to due process insofar as it requires combatants to adopt all feasible measures to ensure that targets are proper objects of attack.²⁰⁰

Also, as we develop this model, we should avoid discriminating in favor of Americans. If the internal checks and guidelines on targeted killing are not good enough for killing Americans, then we should not use them for killing Pakistanis. No matter the citizenship of the target, the controls on armed drones should take all feasible steps to ensure that strikes are accurate and warranted. Due process and IHL both demand as much.

VI. CONCLUSION

International humanitarian law can be developed into specific regulations for the CIA's targeted killing of active members of Al Qaeda and the Taliban. To honor the IHL principles of distinction and military ne-

195. See Murphy & Radsan, *supra* note 14, at 437 (“[T]he executive branch has an obligation to use fair and reasonable procedures to control how it goes about depriving people of life, liberty, or property anywhere in the world.”).

196. See Lawson et al., *supra* note 194, at 9–15 (explaining that the courts have developed different procedural models to govern different types of deprivations).

197. *Sandin v. Conner*, 515 U.S. 472, 484 (1995) (holding that liberty interests protected within prison are “generally limited to freedom from restraint . . . [that] imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life”).

198. *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (holding that due process required “at least an informal give-and-take between student and disciplinarian” in connection with a short suspension of a student from public school).

199. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004) (plurality opinion) (holding that detainee had a right to notice and a fair opportunity to rebut enemy combatant status before a neutral decision maker, and intimating that the government might invoke a rebuttable presumption in favor of its evidence and might also use hearsay).

200. See *supra* notes 72–74 and accompanying text (discussing the IHL concept of “precaution”).

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cessity, CIA officers must be sure, beyond a reasonable doubt, that a target is legitimate before authorizing or pulling the trigger on a drone strike. In addition, to honor the IHL principle of precaution, the CIA's Inspector General, with sufficient independence, must review every CIA drone strike, including the agency's compliance with a checklist of standards and procedures for the drone program.

A program that establishes a high level of certainty for targeting, as well as a hard-look review after each strike, should help ensure fairness and accuracy regardless of whether the people in the crosshairs are Americans or citizens from other countries. In today's language of IHL, these are feasible precautions for the remote-control weapons of the new century.

