

# Analyzing the Legality and Effectiveness of U.S. Targeted Killing

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## INTRODUCTION

Targeted killing, “kill lists,” targeted strikes, “killer drones,” signature strikes—the language of counterterrorism in the twenty-first century includes an entire vocabulary describing, and sometimes vilifying, the deliberate use of lethal force against a designated individual or individuals, in peacetime or during conflict, who are known or believed to present a threat to national security. The United States’ use of targeted strikes against identified terrorist and insurgent operatives over the past two decades has engendered enormous debate in the legal and policy arenas.<sup>1</sup> In the legal sphere, the discourse has focused on the legality of targeted killing under international human rights law,<sup>2</sup> the international law of self-defense,<sup>3</sup> and the law of armed conflict;<sup>4</sup> on the identification of individuals as lawful targets; on the minimization and reporting of civilian casualties;<sup>5</sup> and on other core questions. From the policy and strategic perspectives, scholars and policy makers have debated the effectiveness of targeted strikes in preventing terrorist attacks, degrading or defeating terrorist or insurgent groups, or achieving other national security objectives.<sup>6</sup> The discourse and rhetoric of the past two decades demonstrates, however, that targeted killing is not *either* a legal debate *or* a

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1. See, e.g., Michael N. Schmitt, *Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing the Fog of Law*, 13 YBK. INT’L HUM. L. 311 (2010); Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LEGAL FORCE (Simon Bronitt et al eds. 2012); Rosa Brooks, *Drones and the International Rule of Law*, 28 ETH. & INT’L AFF. 83 (2014).

2. Philip Alston, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings, A/HRC/14/24.Add.6 (May 28, 2010).

3. See Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL L. REV. 1655 (2012); 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 (2010); Geoffrey S. Corn, *Self Defense Targeting: Conflict Classification or Willful Blindness?* 88 INT’L L. STUD. 12 (2012).

4. See Schmitt, *supra* note 1; Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. & POL’Y 101 (2010); Laurie R. Blank, *After “Top Gun”: How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT’L L. 675 (2012); Oren Gross, *The New Way of War: Is There a Duty to Use Drones?*, 67 FL. L. REV. 1 (2015).

5. See, e.g., Paul Lushenko, Shyam Raman & Sarah Kreps, *How to Avoid Civilian Casualties During Drone Strikes — At No Cost to National Security*, MODERN WAR INSTITUTE (Feb. 10, 2022).

6. See, e.g., Javier Jordan, *The Effectiveness of the Drone Campaign Against Al Qaeda Central: A Case Study*, 37 J. STRAT. STUD. 4-29 (2014); Max Abrahms & Jochen Mierau, *Leadership Matters: The Effects of Targeted Killings on Militant Group Tactics*, 29 TERR. & POL. VIOLENCE 830 (2017); Audrey Kurth Cronin, *Why Drones Fail; When Tactics Drive Strategy*, 92 FOR. AFF. 44 (2013).

strategic and policy question, but rather melds the two inquiries into a more complex and nuanced set of issues.

To assess the effectiveness of targeted killing, an essential first question is “effectiveness at doing what?” Beyond the common conceptions of effectiveness, which might include metrics such as eliminating, weakening, or defeating a particular terrorist group or deterring future attacks by such group, a range of other possible ways to consider effectiveness are relevant as well.<sup>7</sup> Broadening the lens of inquiry from one particular adversary group, one might consider whether targeted killing is effective in combating terrorism more generally or, even more broadly, as one instrument in protecting national security. However, the “what” and “how” of effectiveness is opaque at best. Targeted killing:

[M]ay be effective in disrupting a terrorist organization in the short term but not the long term. It may be effective in ending certain types of terrorist activities and in particular settings but not in others. It may be effective politically in the country that launches the attack but not militarily on the ground. It may be effective militarily but not diplomatically either in the land of the attack or among international alliances. It may be either more or less effective on any dimension than the available data are capable of revealing.<sup>8</sup>

But targeted killing also presents entirely separate considerations of effectiveness, such as whether the available tactic of targeted strikes is effective in enabling the use of force with lower domestic or international constraints—in other words, does targeted killing “make it easier” to use lethal force against terrorists rather than another option with less immediate effects. One might even query the effectiveness of targeted killing in the more amorphous space of messaging about national security capabilities, in effect, as a means of communicating a state’s willingness and capability to pursue enemies and threats regardless of more traditional limitations on the projection of national power. The U.S. use of “over-the-horizon” strikes in Afghanistan after its August 2021 withdrawal could—depending on one’s interpretation and acceptance of the relevant legal and policy justifications—be one such example.<sup>9</sup>

One area where targeted killing has engendered enormous debate is, of course, the law—both domestic and international law—but little if any of this debate has explored questions and assessments of effectiveness. The question of “what standards and metrics [a democracy] should . . . use to judge the propriety and effectiveness of its actions”<sup>10</sup> is central to all national security decision-making and analysis. However, most analyses and critiques of targeted killing assess legal

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7. For an extensive discussion of various methods for analyzing the effectiveness of targeted killing, see generally MITT REGAN, *DRONE STRIKE—ANALYZING THE IMPACTS OF TARGETED KILLING* (2022).

8. Brian Forst, *Targeted Killings: How Should We Assess Them?*, 16 *CRIMINOLOGY & PUB. POL’Y* 221, 221 (2017).

9. President Biden, Remarks on the End of the War in Afghanistan (Aug. 31, 2021), <https://perma.cc/JDM6-8KDL>.

10. Daniel Byman, *Do Targeted Killings Work?*, 85 *FOREIGN AFF.* 95, 96 (2006).

issues with respect to propriety and focus on tactics, strategy and policy with respect to effectiveness, leaving propriety and effectiveness as two separate inquiries. Law is relevant to effectiveness in the classical sense of whether a particular action is legal, but may not necessarily be considered beyond that in a traditional conception of effectiveness. In the sphere of targeted killing, however, the robust discourse about how to situate targeted killing in the applicable international law, and when, if, and how it is or is not lawful under those legal frameworks, highlights a host of interesting questions about effectiveness in the legal context.

This article merges questions of legality and questions of tactical or strategic effectiveness into a more comprehensive and cross-cutting analysis of the effectiveness of the United States' uses of targeted killing in order to interrogate this interplay between the two sets of considerations more thoroughly. In particular, viewing targeted killing through a lens that combines the effectiveness and legality analyses highlights the essential issue of legitimacy. The common conception of effectiveness with regard to targeted killing focuses on whether and how well it achieves a tactical, strategic, or policy objective.<sup>11</sup> Given the challenges of determining the appropriate objective and metrics and assessing the relevant data, this article introduces alternative, and equally important, questions of effectiveness that targeted killing generates. Such issues include the effectiveness of targeted killing in enabling the United States to enhance or "maximize" its compliance with the applicable law and to maintain legitimacy at home and abroad for military operations, as well as the effectiveness of the United States in maintaining and burnishing the legitimacy of targeted killing as an acceptable and even desirable tool in armed conflict and counterterrorism operations. At the most basic level, these questions of effectiveness in the legal context all point to the simple but critically important question of whether the state is able, as a legal, ethical, and policy matter, to continue taking the fight to terrorists or other adversaries using this particular instrument.

After a brief discussion of the existing discourse on the effectiveness of U.S. targeted killing and the challenges of finding any consensus on the metrics for and conclusions of such analysis in the first section, the second section presents an alternative framework for considering the effectiveness of U.S. targeted killing through the lens of law and legitimacy—the very space in which targeted killing has engendered fierce debates among wildly divergent perspectives.<sup>12</sup> At the same time that successive U.S. administrations have sought to maximize the

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11. See e.g., JENNA JORDAN, LEADERSHIP DECAPITATION: STRATEGIC TARGETING OF TERRORIST ORGANIZATION (2019); Peter Bergen & Katherine Tiedemann, *Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan*, 90 FOREIGN AFF. 12-18 (July/Aug. 2011).

12. See e.g., O'Connell, *supra* note 1; Alston, *supra* note 2; Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801 (2005). Chris Jenks, *Law From Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649 (2009); Schmitt, *supra* note 1; Blank, *supra* note 4.

impact and effectiveness of targeted strikes against terrorist and insurgent operatives from Afghanistan to Yemen to Libya, those administrations have also battled equally extensively on a second front to assert and reinforce their arguments regarding the legality and legitimacy of targeted strikes as an acceptable and desirable tool of national security and counterterrorism.<sup>13</sup> These parallel campaigns have laid bare one of the most interesting aspects of targeted killing as a tactic of counterterrorism: can targeted killing be effective in reducing threats and attacks and, at the same time, be ineffective because it generates widespread condemnation for perceived illegality or illegitimacy? Alternatively, if one views each of these two pillars differently, could targeted killing be effective in preserving the maneuver space for the state to continue to use lethal force against terrorist operatives within and outside areas of active hostilities and, at the same time, be ineffective at actually defeating or degrading the capabilities of terrorist groups in any meaningful way?

Exploring the effectiveness of targeted killing through a legal lens includes three primary considerations. The first, and perhaps most traditional, approach is to examine the effectiveness of targeted killing in enabling and ensuring compliance with the applicable law, namely the law of armed conflict. Part Two begins with this question, analyzing targeted killing in the context of the law of armed conflict and considering targeted killing as a means of enhancing or maximizing adherence to the law. Beyond classical conceptions of law compliance, however, targeted killing raises highly contested questions of legitimacy, such that any evaluation of the effectiveness of targeted killing must also explore effectiveness in the context of maintaining legitimacy domestically, with coalition partners, and with the local population and host nation in areas of military operations. Finally, the United States' use of targeted killing in active areas of armed conflict and as a tool of self-defense outside areas of active hostilities<sup>14</sup> has raised broader questions about effectiveness with regard to the definition and framing of the

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13. SPECIAL RAPPOREUR ON EXTRAJUDICIAL EXECUTIONS, *Use of Force During Armed Conflict*, in UN SPECIAL RAPPOREUR ON EXTRAJUDICIAL EXECUTIONS HANDBOOK 11 (2010) (quoting the response of the government of the United States to the letter from the Special Rapporteur, Asma Jahangir, to the Secretary of State dated November 15, 2002); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Soc'y of Int'l Law: The Obama Administration and International Law (Mar. 25, 2010) (asserting that the United States uses force, through targeted strikes for example, either because it "is engaged in an armed conflict or in legitimate self-defense"); Opposition to Plaintiff's Motion for Preliminary Injunction & Memorandum in Support of Defendants' Motion to Dismiss at 4-5, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-1469(JDB)), 2010 WL 3863135; Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 4 (2006) ("[T]he United States is engaged in a continuing armed conflict against Al Qaeda, the Taliban and other terrorist organizations supporting them, with troops on the ground in several places engaged in combat operations.").

14. The term "outside areas of active hostilities" is not a legal term of art but appears in the Obama Administration's Presidential Policy Guidance setting forth rules for targeted strikes outside of Afghanistan, Iraq and, eventually, Syria. U.S. DEP'T OF JUST., PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013) [hereinafter PRESIDENTIAL POLICY GUIDANCE].

legal paradigm governing such activities. These efforts to curate, in effect, the applicable law in the light most favorable either to the United States as the actor or to its critics at home and abroad have significant longer-term ramifications for the evolution and development of the law of armed conflict and therefore for any future use of targeted killing or similar tactics.

### I. COMMON NOTIONS OF EFFECTIVENESS AND TARGETED KILLING

Targeted killing has been the operational counterterrorism tool of choice for the United States, including strikes against the Taliban and al Qaeda in Afghanistan, al Qaeda in the Arabian Peninsula in Yemen, al-Shabaab in Somalia, and ISIS in Syria, Libya, and elsewhere. Targeted killing can be defined as “the use of lethal force attributable to a subject of international law with the intent, premeditation, and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.”<sup>15</sup> The United States has used targeted killing within armed conflict and as a means of self-defense outside of armed conflict, which has both intensified the debates about the legality, wisdom, and effectiveness of targeted killing and rendered any analyses of effectiveness more challenging.<sup>16</sup> As a starting point, defending against or deterring terrorist attacks is difficult and often simply infeasible: it is particularly difficult to defend against or deter operatives who are eager to die for their cause and unreasonable to expect that a state can predict and protect soft targets that unfortunately prove to be ideal for terrorist attacks. “In such situations, the best response to terrorism is to go on a counter-offensive, that is, to eliminate the terrorist threat *before* it can be launched [and] one of the most successful means of eliminating terrorists before they can strike is the policy of targeted killing.”<sup>17</sup>

Debates about the effectiveness of targeted killing — and of U.S. targeted killing in particular — have included both quantitative<sup>18</sup> and qualitative<sup>19</sup> metrics

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15. NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 5 (2008). Targeted killing can be distinguished from assassination, which is generally defined as “an act of murder for political purposes.” W. HAYS PARKS, *MEMORANDUM ON EXECUTIVE ORDER 12333 AND ASSASSINATION*, DEP’T OF ARMY 1 (1989). Assassination is prohibited under U.S. law by Executive Order 12333 and under international law, but must be distinguished from killings of specific individuals during wartime or in self-defense. During wartime, it is lawful to kill enemy personnel, including combatants, fighters and civilians directly participating in hostilities; the concept of assassination in wartime refers only to “treacherous” killing or the denial of quarter. Similarly, the ban on assassination does not preclude the lawful exercise of self-defense against an individual or group posing an imminent or ongoing threat to national security. *Id.* at 5, 8.

16. For an extensive discussion of the challenges presented by the United States’ reliance on both the armed conflict and self-defense arguments, see Blank, *supra* note 3.

17. Steven R. David, *Fatal Choices: Israel’s Policy of Targeted Killing*, MIDEAST SEC. AND POL’Y STUD. No. 51, Sept. 2002, at 6.

18. See, e.g., Asfandyar Mir & Dylan Moore, *Drones, Surveillance and Violence: Theory and Evidence from a US Drone Program*, 63 INT’L STUD. Q., 846-62 (2019); Patrick Johnston & Anoop Sarbahi, *The Impact of US Drone Strikes on Terrorism in Pakistan*, 60 INT’L STUD. Q., 203-19 (2016); Jordan, *supra* note 6; Abrahms & Mierau, *supra* note 6, at 830-51; Jennifer Variale Carson, *Assessing the Effectiveness of High-Profile Targeted Killings in the War on Terror*, 16 CRIMINOLOGY & PUB. POL’Y 191 (2017); Jesse Paul Lehrke & Rahel Schomaker, *Kill, Capture or Defend? The Effectiveness of*

and analyses. A first layer of analysis is to consider what effectiveness means, as noted above. Studies of U.S. targeted killing have generally focused on effectiveness in terms of eliminating or defeating a terrorist group, weakening the group, or deterring future attacks. More specifically, tactics that disrupt terrorist operations, communications and planning, deny groups the ability to recruit and build expertise, and sow distrust between and among groups can be effective counterterrorism tools. . To that end, some experts conclude that targeted killing of terrorist leaders:

[H]as historically tended to disrupt militant operations and degrade their capabilities, ultimately weakening militant organizations and shortening their lifespans. Simply put, when terrorists are afraid to poke their heads above ground, it becomes exceedingly difficult for them to communicate, coordinate, and conduct attacks — especially sophisticated ones like 9/11.<sup>20</sup>

Although terrorist attacks appear to require significantly less organizational capability, training, funding, and other resources than conventional military operations and a standing military force, the combination of killing terrorist leaders and operatives and forcing them to stay underground, has a substantial effect on a group's ability to plan and conduct operations. . “Contrary to popular myth, the number of skilled terrorists is quite limited. Bomb makers, terrorism trainers, forgers, recruiters, and terrorist leaders are scarce; they need many months, if not years, to gain enough expertise to be effective.”<sup>21</sup> Some examinations of U.S. targeted killing have highlighted such notions of effectiveness, finding at least some evidence to demonstrate that targeted killings are making some positive contributions. For example, reports on the effects of U.S. targeted strikes in Afghanistan and the Federally Administered Tribal Areas of Pakistan in the late 2000s assert that “a significant number of insurgents have been killed” and “Al Qaeda senior leaders [have been pushed] deeper into hiding, preventing their gathering together, and keeping them constantly on alert, in motion and off balance.”<sup>22</sup> On the domestic front, targeted killing enables the state to satisfy domestic demands

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*Specific and General Counterterrorism Tactics Against the Global Threats of the Post-9/11 Era*, 25 SEC. STUD. 729, 729-62 (2016); JORDAN, *supra* note 11.

19. See, e.g., David Rohde, *The Obama Doctrine*, FOREIGN POL'Y (Feb. 27, 2012), <https://perma.cc/9ESG-G53A>; INTERNATIONAL CRISIS GROUP, DRONES: MYTHS AND REALITY IN PAKISTAN (2013); Alex Wilner, *Targeted Killings in Afghanistan: Measuring Coercion and Deterrence in Counterterrorism and Counterinsurgency*, 33 STUD. CONFLICT & TERRORISM 307-29 (2010); AVERY PLAW, MATTHEW FRICKER & CARLOS R. COLON, THE DRONE DEBATE (2016); AUDREY KURTH CRONIN, HOW TERRORISM ENDS: UNDERSTANDING THE DECLINE AND DEMISE OF TERRORIST CAMPAIGNS (2009); Michael J. Boyle, *The Costs and Consequences of Drone Warfare* 89 INT'L AFF. 1 (2013); Bergen & Tiedemann, *supra* note 11.

20. Micah Zenko, *Ask the Experts: Do Targeted Killings Work?*, COUNCIL ON FOREIGN RELS. (Sept. 24, 2012), <https://perma.cc/RU2Y-8WGE>.

21. Byman, *supra* note 10, at 103-04.

22. ERIC SCHMITT AND THOM SHANKER, COUNTERSTRIKE: THE UNTOLD STORY OF AMERICA'S SECRET CAMPAIGN AGAINST AL QAEDA 241 (2011). See also Boyle, *supra* note 19, at 10-11 (“There is certainly some evidence from anecdotal reports that militants have found it harder to operate due to



for a forceful response to terrorist attacks<sup>23</sup> with a smaller commitment of resources and risk to service members.

Notwithstanding some positive conclusions, most quantitative and qualitative analyses suggest that targeted killing has either no discernable effect or even a negative effect.<sup>24</sup> Perhaps the biggest hurdle is identifying an appropriate measure of success. Most studies seem to set a rather high bar, looking for data that suggests the immediate collapse of terrorist groups, quick victories, significant decreases in the number of terrorists recruited, or substantial amounts of time with no activity from the terrorist group in question. However, “success is necessarily subjective. If terrorist organizations are plotting and attempting attacks after the decapitation of their leader, is that a sign of failure? What if these attacks are weak and ineffective? What if they fail to kill or injure anyone? Is that success? Or must all terrorist activity cease entirely?”<sup>25</sup> These definitional challenges extend to the overall strategic question of what constitutes victory in a conflict with a terrorist group and, therefore, how to assess if and how well-targeted strikes are contributing to the accomplishment of the broader mission. If, as one terrorism expert has noted, “[i]n this war, no one seems to know what winning is,”<sup>26</sup> analyzing the effectiveness of targeted killing may be limited to tactical assessments of numbers of insurgents or terrorists killed and immediate information about the group’s actions and movements, without the ability to reach more strategic determinations.

In contrast, critiques of targeted killing present substantial negative assessments of its effectiveness at the operational and strategic levels, in addition to highlighting a lack of identifiable positive effects at the tactical level. One of the main categories of critiques is that targeted killing “causes more problems than it solves”<sup>27</sup> across several areas. For example, targeted strikes and other actions create blowback in the form of increased resentment of the state taking action, greater sympathy for the terrorist group, and heightened motivations and tools for recruitment of new members. Targeted strikes create martyrs of those killed and can increase the terrorist group’s legitimacy, effectively leading to the opposite of the desired effect by helping the group burnish its image and sell itself to its

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drone attacks. In particular, the necessity to move constantly to avoid drone strikes has made it harder to train operatives and plan operations further afield.”)

23. Byman, *supra* note 10, at 102.

24. See, e.g., Mohammed M. Hafez & Joseph M. Hatfield, *Do Targeted Assassinations Work? A Multivariate Analysis of Israel’s Controversial Tactic During Al-Aqsa Uprising*, 29 *STUD. CONFLICT & TERRORISM* 359 (2006); Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leadership Decapitation*, 18 *SEC. STUD.* 719 (2009); Edward H. Kaplan, Alex Mintz & Shal Mishal Claudio Samban, *What Happened to Suicide Bombings in Israel? Insights from a Terror Stock Model*, 28 *STUD. CONFLICT & TERRORISM* 225 (2005); Aaron Mannes, *Testing the Snakehead Strategy: Does Killing or Capturing its Leaders Reduce a Terrorist Group’s Activity?*, 9 *J. INT’L POL’Y SOLS.* 40 (2008).

25. Stephanie Carvin, *The Trouble with Targeted Killing*, 21 *SEC. STUD.* 529, 549 (2012).

26. Audrey Kurth Cronin, *The ‘War on Terrorism’: What Does it Mean to Win?*, 37 *J. STRAT. STUD.* 174, 176 (2014).

27. Carvin, *supra* note 25, at 536.

own community.<sup>28</sup> Others note that arresting a terrorist operative or leader offers opportunities to gather intelligence and therefore will be more effective, and raise concerns about the unpredictability of eliminating a known leader who will be replaced by others whose patterns and goals are not as well-known and who may be more dangerous.<sup>29</sup> In addition, although targeting a leader or senior operatives “may reduce a group’s operational efficiency in the short term, . . . it may raise the stakes for members of a group to ‘prove’ their mettle by carrying out dramatic attacks.”<sup>30</sup> Attacks on leaders also drive a terrorist group to decentralize—making them harder to track and combat—and may motivate the formation of splinter groups and other allegiances. As terrorist leaders and operatives hone their skills at staying out of sight and planning operations without detection, targeted killing and other operations ultimately have to expand in response and with respect to new groups and threats.

Apart from the specific tactical and strategic effectiveness of targeted killing with respect to identified leaders and particular groups at given moments in the course of a conflict or counterterrorism campaign, targeted killing has regularly sparked significant condemnation, whether from domestic audiences, coalition partners, or the broader international community.<sup>31</sup> In an age when legitimacy is an essential component of any military operation, criticisms on moral and legal grounds raise significant questions that cannot be glossed over in any consideration of the effectiveness of targeted killing. To the extent that condemnation of targeted killing negatively affects the sustainability of multinational coalitions or forces the government to expend resources on justifying and defending the choice of targeted strikes,<sup>32</sup> such criticism can detract from the strategic flexibility to employ targeted strikes at all or in certain geographic areas. The question then arises of how to weigh the countervailing considerations of effectiveness in terms of reducing attacks and neutralizing specific groups, where identifiable, and ineffectiveness in terms of generating condemnation and negative consequences that flow as a result.

## II. EFFECTIVENESS THROUGH A LEGAL LENS: THREE WAYS

The United States’ extensive use of targeted killing for more than a decade has produced a robust and long-running legal discourse on the legality and morality

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28. Byman, *supra* note 10, at 100.

29. *Id.*

30. CRONIN, *supra* note 19, at 26. *See also* Byman, *supra* note 10, at 99-100 (noting that terrorist groups often “retaliate when their leaders are killed” and that “many terrorist groups do not operate at their full potential and can up the stakes in horrific ways when subjected to a targeted-killing campaign”).

31. *See generally* TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (Finkelstein et al eds, 2012).

32. *See, e.g.*, Jack Beard, *Law and War in the Virtual Era*, 103 Am. J. Int’l. L. 409, 422 (2009) (“Recent conflicts have continued to demonstrate to U.S. military and political leaders how allies and coalitions can be highly sensitive to perceived law-of-war and human rights violations and how such violations can undermine legitimacy, adversely affecting the ‘soft power’ on which the leadership of many international cooperative activities depends”).



of targeted killing in general, the application of specific rules of international law, and the proper policy constraints, among many other issues. Beyond the application of international law and specific legal questions that arise,<sup>33</sup> the interplay of effectiveness and legality introduces an important question of whether the way in which targeted killing is carried out, or is perceived to be implemented, should play a role in an effectiveness inquiry. In other words, are legitimacy and effectiveness comparable inquiries or, perhaps, stand-ins for each other in this context? Both the reality of how the United States adheres to international law in carrying out targeted killings and the perception of that legal compliance, or lack thereof, are critical to this discussion. Any analysis of the effectiveness of U.S. targeted killing must therefore engage with the law and “investigat[e] the moral costs and legal consequences alongside questions of effectiveness.”<sup>34</sup> Such an inquiry must examine how the use of targeted killing and the discourse accompanying it has or might change whether targeted killing is viewed as lawful and legitimate. This section explores these questions across three broad areas: the role of law compliance in understanding or affecting effectiveness, the interplay between effectiveness and legitimacy, and the United States’ efforts to shape the applicable legal paradigm as one means of enhancing the effectiveness and availability of targeted killing.

#### A. Targeted Killing and Law Compliance

Over the past two decades, the United States has launched targeted strikes against militants in the course of its armed conflicts with al Qaeda, the Taliban, ISIS and other groups. It has also launched targeted strikes in the course of counterterrorism operations and in self-defense outside the scope of these specific armed conflicts. Debates about the characterization of these operations, and the appropriate legal framework governing such actions, have continued over the past two decades.<sup>35</sup> These questions are integral to any discussion of law compliance, as discussed in greater detail in the following two sections. This section first focuses on targeted killing and law compliance in situations of armed conflict, to help set the stage for those discussions.

As in all armed conflicts, the law of armed conflict (LOAC) applies to any such targeted strikes and law compliance is now a critical touchstone for legitimacy in armed conflict in contemporary military operations.<sup>36</sup> As a result, in considering

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33. Laurie R. Blank, *Targeted Killing*, in ASHGATE RESEARCH COMPANION TO MILITARY ETHICS 227-43 (James Turner Johnson & Eric D. Patterson eds., 2015).

34. Carvin, *supra* note 25, at 555.

35. See Blank, *supra* note 3.

36. See, e.g., DEP’T OF THE ARMY, FM 3-24, COUNTERINSURGENCY 7-9 (2006) (“Lose Moral Legitimacy, Lose the War”); Brig. Gen. Mark J. Martins, Harvard Law School Dean’s Distinguished Lecture (July 5, 2011) (“The question [of rule of law in military operations] urges inquiry into how law has constrained, enabled and informed our own military operations since September 11<sup>th</sup>, 2001, even as it also causes us to mull whether and how an abstract concept we all approach with a multitude of assumptions arising from our own experiences can possibly help oppose ruthless and diverse insurgent groups halfway across the globe. The case I will briefly sketch today is this: your armed forces heed and

the effectiveness of U.S. targeted killing, the role of targeted strikes as a means of enhancing compliance with the law of armed conflict is an important consideration. Although one significant critique of U.S. targeted killing is that it amounts to “extrajudicial execution,”<sup>37</sup> the United States has consistently pointed to targeted strikes as a highly effective way to pursue its military objectives by a means that enables heightened adherence to the law.<sup>38</sup>

LOAC—also referred to as the law of war or international humanitarian law—governs the conduct of both states and individuals during armed conflict. It seeks to minimize suffering in war in two primary ways: protecting persons who are not participating in hostilities and regulating and restricting the means and methods of warfare.<sup>39</sup> Determining when and whether targeting individuals (the essence of targeted killing) and objects during armed conflict is lawful rests on the core LOAC principles of distinction, proportionality, and precautions. The principle of distinction requires that all parties to an armed conflict distinguish between those who are fighting and those who are not and only direct attacks at the former.<sup>40</sup> To comply with the principle of proportionality, parties to a conflict must refrain from launching any attack in which the expected civilian casualties are likely to be excessive in light of the anticipated military advantage to be gained.<sup>41</sup> Finally, the principle of precautions obligates all parties to an armed conflict to take all feasible precautions to protect civilians from harm during military operations, including precautions when launching attacks and precautions when defending against attacks.<sup>42</sup> As a general matter, targeted killing is an example of the implementation of the principles and methodologies of these core legal obligations.

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will continue to heed the law, take it seriously and in fact respect it for the legitimacy it bestows on their often violent and lethal — necessarily violent and lethal — actions in the field”).

37. Alston, *supra* note 2.

38. See e.g., Koh, *supra* note 13.

39. Carvin, *supra* note 25, at 555. See also *War and International Humanitarian Law*, INT’L COMM. OF THE RED CROSS (Oct. 29, 2010), <https://perma.cc/CM95-EK8K>. The law of armed conflict is set forth primarily in the four Geneva Conventions of August 14, 1949 and their Additional Protocols. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted by Conference* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted by Conference* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

40. AP I, *supra* note 39, arts. 48, 51.

41. *Id.* at arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b).

42. *Id.* at art. 57.

Distinction, the first principle, sits at the center of LOAC's seminal goal of protecting innocent civilians and persons who are *hors de combat*. As a result, the challenge of identifying who or what can be targeted is a fundamental issue in the execution of military operations and the implementation of LOAC. The principle of distinction thus mandates the identification of a lawful target as a prerequisite to the use of force during armed conflict. To be lawful, an attack must be aimed at a legitimate target: a combatant, a member of an organized armed group, a civilian directly participating in hostilities, or a military objective. In international armed conflicts – which are conflicts between two states – combatants include all members of the state's regular armed forces, who can be identified by the uniform they wear and other characteristics. During armed conflict, combatants can be attacked at all times. Unless they are *hors de combat* due to sickness, wounds or capture, they enjoy no immunity from attack. Non-international armed conflict, including conflicts pitting a state against a non-state armed group, does not include combatant status, but members of an organized armed group are legitimate targets of attack at all times.<sup>43</sup> In both international and non-international armed conflicts, civilians who take a direct part in hostilities are also legitimate targets of attack during and for such time as they engage directly in hostilities.<sup>44</sup> Although civilian immunity from attack is a central pillar of LOAC, there are certain limited circumstances in which civilians may be directly and intentionally targeted during hostilities due to their conduct. Thus, “[t]he principle of distinction acknowledges the military necessity prong of [the law’s] balancing act by suspending the protection to which civilians are entitled when they become intricately involved in a conflict.”<sup>45</sup>

Targeted killing is, by its very name and definition, the implementation of the principle of distinction. Central to the definition of targeted killing is the use of lethal force against “individually selected persons,” meaning that the attacking state identifies individuals as lawful targets and directs its attacks against those individuals specifically. LOAC requires that attacks only be launched at military objectives, whether people or objects, and prohibits as indiscriminate any attacks

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43. See NILS MELZER, INT'L COMM. RED. CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 75 (2009) (stating that organized armed groups are targetable based on status in non-international armed conflict); JIMMY GURULÉ & GEOFFREY S. CORN, PRINCIPLES OF COUNTER-TERRORISM LAW 70-76 (2011) (discussing the rules governing targeting of enemy forces in international and non-international armed conflict and noting that 1) “a member of an enemy force . . . is presumed hostile and therefore presumptively subject to attack” in international armed conflict and 2) “subjecting members of organized belligerent groups to status based targeting pursuant to the LOAC as opposed to civilians who periodically lose their protection from attack seems both logical and consistent with the practice of states engaged in non-international armed conflicts”).

44. AP I, *supra* note 39, at art. 51(3). Direct participation can be defined as acts intended to harm the adversary or the civilian population in a direct or immediate fashion. For a comprehensive analysis of direct participation, see MELZER, *supra* note 43.

45. Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 12 (2010).

that are not directed or cannot be directed at a specific military objective.<sup>46</sup> Targeted killing involves identifying a specific individual who presents a threat to the state, analyzing whether that individual meets the categories of persons who are lawful targets during armed conflict, and then frequently using a drone or other form of surveillance to confirm the person's identity, location and activity. Unmanned aerial vehicles (UAVs or "drones") are the most common weapon system used for such strikes, and "can be used to carefully monitor the potential target for extended periods before engaging it with precision weapons[, such that c]ompared to attacks by manned aircraft or groundbased systems, the result is often a significantly reduced risk of misidentifying the target [or attacking the wrong target]."<sup>47</sup> More generally, the intelligence information and extensive surveillance that are critical ingredients in targeted killing processes and determinations are key to accurate and discriminatory targeting and protection of civilians from the dangers of combat operations.

The principles of proportionality and precautions focus on minimizing incidental harm to civilians from attacks on lawful military objectives. These two principles thus establish a critical methodology aimed at mitigating the risks civilians face as a result of their proximity to lawful military operations. The principle of proportionality provides that an attack on a lawful target will nonetheless be unlawful if the expected civilian casualties will be excessive in relation to the anticipated military advantage gained. Two central ideas underpin the principle of proportionality. First, the means and methods of warfare are not unlimited — rather; the only legitimate object of war is to weaken the military forces of the adversary. Second, even though the law prohibits attacks on civilians, not all civilian deaths are automatically unlawful. As a result, the law has always tolerated "the incidence of some civilian casualties . . . as a consequence of military action,"<sup>48</sup> and seeks overall to minimize civilian suffering to the greatest extent possible, while recognizing and accepting that it cannot be eliminated entirely. In planning and executing attacks, therefore, a military commander or decision-maker must evaluate the anticipated advantage an attack offers and assess that advantage in light of the expected civilian casualties.<sup>49</sup>

An attacking party must also take all feasible precautions to protect civilians when launching an attack that may affect the civilian population.<sup>50</sup> As a starting point, Article 57(1) of Additional Protocol I mandates that "[i]n the conduct of military operations, constant care shall be taken to spare the civilian population,

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46. AP I, *supra* note 39, at art. 51(4)(a) & (b).

47. *See* Schmitt, *supra* note 1, at 320.

48. Judith Gardham, *Necessity and Proportionality in Jus ad Bellum and Jus in Bello*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 275, 283-84 (Laurence Boisson de Chazoumes & Philippe Sands eds., 1999).

49. The term "collateral damage" is often used in the media and by the public to refer to the incidental (meaning not deliberate) civilian casualties from an attack on a military target.

50. AP I, *supra* note 39, at art. 57. The law of armed conflict also obligates defending parties to take precautions, as set forth in Article 58 of Additional Protocol I, but this analysis of targeted killing and compliance with the law naturally focuses on the attacking party. AP I, *supra* note 39, at art. 58.

civilians and civilian objects.”<sup>51</sup> Article 57’s practical provisions then set forth precautions to be taken specifically when launching an attack, including: do everything feasible to verify that the target is a lawful military objective, choose the means and methods of attack with the aim of minimizing incidental civilian losses and damage, and issue an effective advance warning “of attacks which may affect the civilian population, unless circumstances do not permit.”<sup>52</sup> A critical feature of how LOAC protects civilians, precautions are particularly important in urban areas or other localities where military operations pose risks to civilians. For this reason, the failure to take precautions can make an attack unlawful, even if the target itself is lawful in accordance with the rules of distinction.

Most U.S. targeted killing operations have been carried out by drones or with surveillance from drones as an integral part of the operation. Drones’ real-time surveillance capabilities offer significant opportunities for enhanced compliance with precautions and proportionality. Key to adherence with both principles is access to and effective assessment of information in order to make a reasonable determination about the lawfulness of an attack. In planning and launching attacks, a party to a conflict must gather and assess information about the target of the attack, the area around target, and any persons and objects near the target. For any proportionality assessment, the “pattern of life” analysis is the heart of this comprehensive process of surveillance and intelligence-gathering. Drones can loiter over a target and area surrounding it for days or even longer, allowing a commander to follow movable targets and gather information about civilians and civilian infrastructure in the area and the risk of civilian casualties at specific times and in possible strike locations.

Because the drones provide high quality information about the target area in real-time (or near real-time), for extended periods and without risk to the operators, they [thus] permit more refined assessments of the likely collateral damage to civilians and civilian objects. The ability of armed drones to observe the target area for long periods before attacking means the operators are better able to verify the nature of a proposed target and strike only when the opportunity to minimize collateral damage is at its height.<sup>53</sup>

Similarly, these surveillance capabilities enable heightened attention to the obligations to take feasible precautions, such as verifying that a target is a lawful military objective and choosing the means and methods of attack so as to minimize harm to civilians.<sup>54</sup>

Considering targeted killing and LOAC through the lens of effectiveness, the opportunity to highlight that targeted killing allows for heightened compliance

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51. AP I, *supra* note 39, at art. 57(1).

52. *Id.* at art. 57(2)(c).

53. Schmitt, *supra* note 1, at 314.

54. AP I, *supra* note 39, at arts. 57(2)(a)(i) and 57(2)(a)(ii).

with the law is an important avenue for effectiveness, albeit one that is rarely examined in this light. For the past two decades, the United States has sought to sustain and expand its counterterrorism fight—to more groups and more locations.<sup>55</sup> Targeted killing allows the United States to pursue and neutralize adversaries without extensive, or perhaps even any, military forces on the ground.<sup>56</sup> Without opining on the desirability of a decades-long and geographically diverse campaign against terrorist groups and threats, one could reasonably conclude therefore that targeted killing has been enormously effective in enabling the United States to pursue and counter more threats and more adversaries than it otherwise could have. It is unlikely that the United States would have had the desire, the capability or the political support to pursue groups from Afghanistan to Yemen to Libya to Somalia to the Sahel to Syria and beyond if it needed to use more conventional military operations and gain control of territory in order to counter threats in each of these areas. In addition, notwithstanding extensive criticism of U.S. targeted strikes for causing civilian casualties, such strikes surely cause fewer civilian casualties and less destruction than conventional military operations to root out terrorist groups with ground forces. Unlike an invasion or occupation, targeted killings “do not employ large numbers of troops, bombers, artillery and other means that can cause far more destruction than they prevent.”<sup>57</sup> Beyond the inherent tragedy of any harm to civilians, civilian casualties can lead to a loss of domestic and international support for military operations.<sup>58</sup> Therefore, when the United States can choose a tactic that offers the ability to minimize harm to civilians in accordance with or even beyond what is required by the law—a characterization of targeted strikes that remains hotly contested—it also is preserving the ability to continue the operations overall.<sup>59</sup> As a result, beyond the more traditional effectiveness analyses discussed briefly in Part I above, which focus on whether targeted killing contributes to the defeat or disabling of a particular group or reduces the number of attacks or any of several other metrics, this notion of effectiveness goes more broadly to the ability of the United States to continue counterterrorism operations at all.

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55. See, e.g., Peter Bergen, David Sterman & Melissa Salyk-Virk, *America's Counterterrorism Wars: Tracking the United States' Drone Strikes and Other Operations in Pakistan, Yemen, Somalia, and Libya*, June 17, 2021, available at <https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/>.

56. See, e.g., Kenneth Anderson, *Predators Over Pakistan*, WKLY. STANDARD, Mar. 8, 2010, at 26 (explaining that “drones permit the United States to go directly after terrorists, rather than having to fight through whole countries to reach them.”).

57. Steven R. David, *Israel's Policy of Targeted Killing*, 17 ETHICS AND INT'L AFF. 111, 121 (2003).

58. Laurie R. Blank, *Military Operations and Media Coverage: The Interplay of Law and Legitimacy*, in ROUTLEDGE HANDBOOK OF MILITARY ETHICS 348, 355 (Lucas ed., 2015).

59. See, e.g., Susanne Krasmann, *Targeted Killing and its Law: On a Mutually Constitutive Relationship*, 25 LEIDEN J. INT'L L. 665, 681-82 (2012) (“[The United States] is able to employ targeted killing as a military tactic, precisely because this is accepted by the legal discourse.”).



### *B. Effectiveness and Legitimacy*

Targeted killing and compliance with the law of armed conflict is a window into a deeper issue of effectiveness, which is the question of the legitimacy of U.S. military operations and the steady efforts to demonstrate, sustain, and enhance that legitimacy. Military operations have always depended, at the most fundamental level on legitimacy — both for public support for the initiation of operations and for continuing such operations. If public support for a military campaign or war diminishes, continuing the mission in the face of such waning legitimacy poses significant challenges for political leaders. The justification for the use of force and the amount or extent of force used to achieve that objective were historically the key components of legitimacy — but now LOAC compliance is the touchstone for legitimacy. More specifically, the United States military now categorizes legitimacy as a principle of war. Principles of war provide guidance for the planning and conduct of armed conflict, offer insights into the nature and character of war, and are relevant to how the United States armed forces use combat power across a range of combat operations.<sup>60</sup> U.S. military doctrine explains that the purpose of legitimacy is “to maintain legal and moral authority in the conduct of operations” and defines legitimacy as “based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences[, which] include our national leadership and domestic population, governments, and civilian populations in the [operational area], and nations and organizations around the world.”<sup>61</sup> Legitimacy thus rests not only on actual compliance with the law but, and perhaps more importantly, on the perception of compliance with the law among different audiences. How military operations are carried out is therefore only one component; an equally critical ingredient of legitimacy is how one’s conduct is presented and understood by a range of external actors and audiences.

Many recent and current U.S. military operations highlight how and why LOAC compliance lies at the heart of legitimacy. In Kosovo, an operation driven by moral legitimacy claims rather than classical international law justifications for the use of force,<sup>62</sup> the conduct of the NATO operations against the Milosevic regime dominated the media and advocacy community’s presentation of the conflict. As a result, “collateral damage, rather than ethnic cleansing and the refugee crisis, threatened to become the central issue of the Kosovo conflict, undermining the moral credibility of, and hence public support for, the campaign.”<sup>63</sup> Similarly, in counterinsurgencies and other contemporary military operations, protection of

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60. See DEP’T OF THE ARMY, FM 3-0, OPERATIONS, APPENDIX A: PRINCIPLES OF WAR (Oct. 2022).

61. JOINT CHIEFS OF STAFF, JOINT PUBL’N 3-0, JOINT OPERATIONS at A-4 (2018).

62. See, e.g., INDEP. INT’L COMM’N ON KOS, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000) (famously describing the Kosovo intervention as “illegal but legitimate” because of the lack of international law basis for the use of force and the moral imperative for action to stop the atrocities).

63. Douglas Porch, *No Bad Stories: The American Media-Military Relationship*, 55 NAVAL WAR COLL. REV. 85, 101 (2002).

civilians is a, if not *the*, primary mission objective because counterinsurgency success rests on winning the support of the local population.<sup>64</sup> Civilian deaths, injuries, and destruction, even if they are lawful and the unintended consequence of successful operations against the insurgents, can be fatal to both legitimacy and chances for success. Civilian harm bolsters the opposition forces (whether insurgents or a state repressing its own population) and serves as an effective recruiting and public relations tool.<sup>65</sup> In addition, regardless of the actual legality of the acts that led to the civilian harm, the mere perception that the military is causing the deaths of civilians is sufficient to engender claims of war crimes and other LOAC violations. Either or both of these effects leads directly to the loss of legitimacy. When insurgents appear to be the better protectors of the civilian population, the counterinsurgent loses legitimacy, the ultimate objective in counterinsurgency.<sup>66</sup> When state forces engaged in counterinsurgency or humanitarian intervention appear to be responsible for war crimes, they lose legitimacy at home, and thus essential public support for the mission.<sup>67</sup>

The story of how the United States has implemented and characterized its use of targeted killing is, in many ways, the quintessential manifestation of the importance of and challenges of legitimacy. As a general matter, successive U.S. administrations and military leadership have presented targeted killing as a precision instrument for effective counterterrorism and counterinsurgency operations, whether against the Taliban or al Qaeda in Afghanistan, al Qaeda in the Arabian Peninsula in Yemen, or other adversaries in various locales.<sup>68</sup> Mainstream media, social media, and advocacy groups have, over the same time period, devoted extensive attention to targeted strikes and their effects on the local population, leading to progressively stronger condemnation of the United States' use of

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64. Major General Robert Neller, *Lessons Learned*, MARINE CORPS GAZETTE, Feb. 2, 2010; Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1747 (2009).

65. Luke N. Condra et al, *The Effect of Civilian Casualties in Afghanistan and Iraq*, National Bureau of Economic Research Working Paper 16152, July 2010, p. 3 (“[T]he data are consistent with the claim that civilian casualties are affecting future violence through increased recruitment into insurgent groups after a civilian casualty incident.”).

66. *Hearing to Consider the Nominations of Admiral James G. Stavridis, USN for Reappointment to the Grade of Admiral and to be Commander, U.S. European Command and Supreme Allied Commander, Europe; Lieutenant General Douglas M. Fraser, USAF to be General and Commander, U.S. Southern Command; and Lieutenant General Stanley A. McChrystal, USA to be General and Commander, International Security Assistance Force and Commander, U.S. Forces, Afghanistan Before S. Comm. on Armed Services*, 111th Cong. 11 (2009) (statement of Lt. Gen. Stanley A. McChrystal) (“I would emphasize that how we conduct operations is vital to success. . . . This is a struggle for the support of the Afghan people. Our willingness to operate in ways that minimize casualties or damage, even when doing so makes our task more difficult, is essential to our credibility.”).

67. See, e.g., Porch, *supra* note 63; Beard, *supra* note 32, at 422; David Kilcullen, *Twenty-Eight Articles: Fundamentals of Company-Level Counterinsurgency*, 91 MARINE CORPS GAZETTE 53, (2007); Blank, *supra* note 58, at 348.

68. Koh, *supra* note 13.

targeted killing and of drones in particular.<sup>69</sup> In essence, the battle over legitimacy has been drawn and operating in full force for a decade or more.

Two moments in the United States' use of and discourse about targeted killing are particularly evocative of this trend. First, in 2011, Central Intelligence Agency officials declared that United States targeted strikes in the past year had caused zero civilian casualties.<sup>70</sup> This claim was misguided and fanciful at best and unfortunately devastating to legitimacy at worst. Regardless of the extraordinary capabilities and efforts to minimize the incidental harm from any such strikes, the civilian population will never be entirely unscathed from targeted strikes against hard-to-identify militants that use that civilian population for shelter and as a base of operations. More important, however, the United States was seeking to leverage the ability of targeted strikes and drones to enable heightened compliance with the law as a means of enhancing the legitimacy of its use of targeted killing. As it faced criticism of its global approach to counterterrorism, the dangers for civilians from counterterrorism and counterinsurgency operations, and other concerns, "the United States, left with a choice between either abandoning a controversial military tactic, or trying to legitimize its actions using legal and/or normative frames, opted for the latter."<sup>71</sup> Claiming zero civilian casualties was an effort, one can assume, to present U.S. targeted strikes as not only lawful, but "hyper-lawful"—claiming, in essence, that not only did the United States abide by the basic tenets of the applicable law, but it was so careful and so precise that not a single innocent person was harmed over the course of a year. However, that framing led to two significant chinks in the hoped-for armor of legitimacy: an open invitation to search for evidence of civilian casualties as a means to counter the claims of the United States government and growing calls for transparency to the extent that transparency itself began to be a symbol of legitimacy. At that point, the United States had little hope of succeeding in the legitimacy contest. Vastly differing reports of civilian casualties created the impression that the United States was hiding something, and the suggestion of secrecy and misleading claims merely fueled additional calls for transparency and concerns about unlawful or immoral actions.<sup>72</sup>

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69. Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021); Human Rights First, *Targeted Killing*, <https://perma.cc/67GX-YAKM>; ACLU, *Frequently Asked Questions About Targeted Killing*, <https://www.aclu.org/other/frequently-asked-questions-about-targeting-killing>; AIRWARS, <https://airwars.org>.

70. Scott Shane, *C.I.A. is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 11, 2011, at A1 (reporting that in May 2011, John Brennan, President Obama's senior counterterrorism advisor, stated that "there hasn't been a single collateral death because of the exceptional proficiency, precision of the capabilities we've been able to develop").

71. Daniel R. Brunstetter & Arturo Jimenez-Bacardi, *Clashing Over Drones: The Legal and Normative Gap between the United States and the Human Rights Community*, 19 INT'L J. HUM. RTS. 176, 179 (2015).

72. See Azmat Khan & Anand Gopal, *The Uncounted*, N.Y. TIMES (Nov. 16, 2017); U.N. News, *UN Rights Experts Call for Transparency in the Use of Armed Drones, Citing Risks of Illegal Use* (Oct. 25, 2013); Laurie R. Blank, *Drones, Transparency and Legitimacy*, THE HILL (May 28, 2014).

Second, in 2013, the Obama administration enacted a comprehensive policy framework for targeted strikes outside areas of active hostilities, stating that in such situations, the United States would only target senior operational leaders or forces engaged in hostilities and only if certain conditions were met: near certainty that the target was present, near certainty of no civilian casualties, a determination that capture was not feasible, and an assessment that no reasonable alternatives to lethal action were available to address the threat.<sup>73</sup> Among the many reasons driving this policy, the Obama administration sought to address concerns about the United States operating on a “war footing” wherever al Qaeda or other terrorist groups or operatives were found, as well as concerns about civilian casualties and other collateral harm from targeted strikes. Although the United States viewed the conflict with al Qaeda as a “global non-international armed conflict” in which LOAC applied to all operations against al Qaeda wherever found, most coalition partners and international organizations took a much narrower view of the parameters of the conflict with al Qaeda.<sup>74</sup> These differing views led to deep division regarding the appropriate legal parameters for military action outside Afghanistan and Iraq, where the United States and coalition partners were engaged in sustained and active hostilities.<sup>75</sup> The Presidential Policy Guidance (PPG), as the 2013 document is known, established stricter parameters for targeted strikes in such areas, effectively narrowing the gap between the United States’ approach of treating such actions as part of an armed conflict and the perspective of most coalition partners, who viewed action in such areas as more akin to a robust law enforcement and self-defense operation, governed primarily by international human rights law.

By addressing the concerns of coalition partners and the critiques of advocacy organizations that the United States was too permissive and too expansive in its conception of an armed conflict and the accompanying authorities in many locations around the world, the PPG sought to demonstrate that the United States’ use of targeted strikes was not only lawful under LOAC, but also legitimate within the views of the many audiences and stakeholders. For some observers, “Obama’s representation of his drone programme [in this manner was] effective. It [was] harmonious with the broader image he . . . successfully cultivated . . . of a leader defined by modern legal principles.”<sup>76</sup> Those who had concerns regarding civilian casualties could point to the heightened standard of “near certainty” of no civilian casualties and those who feared an expansive global conception of armed

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73. PRESIDENTIAL POLICY GUIDANCE, *supra* note 14, at 11.

74. See INT’L COMM. RED CROSS, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 10 (2011), <https://perma.cc/7BU2-J9W5>.

75. See Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position* (Eur. Council For. Rel. Policy Brief 2013), <https://perma.cc/6D7U-TKS3>.

76. *Obama’s Targeted Killing Legacy*, MEDIUM (Oct. 17, 2016), <https://perma.cc/J869-6YRB>. The steady engagement between the advocacy community and the United States government demonstrates that “citing international law provides a sense of global legitimacy — either by affirming that state actions are in conformity with recognized behavioral norms (i.e. non-aggressive behavior) or in exerting pressure on states to conform to such norms.” Brunstetter & Jimenez-Bacardi, *supra* note 71, at 179.

conflict could find standards for the use of force more akin to the law enforcement paradigm, such as capture if feasible. The policy-driven parameters of the PPG for targeted strikes therefore set the stage for the United States to demonstrate increased legitimacy for targeted strikes and—more important—to then use these more circumscribed rules for targeted strikes as a means of demonstrating and reinforcing the legitimacy of counterterrorism operations outside of so-called “hot battlefields.” As set forth in the previous section, any assessment of the effectiveness of targeted killing should also include the extent to which it has enabled the United States to pursue continued, long-term, and geographically widespread counterterrorism operations.

At the same time, however, the persistent critique and condemnation of targeted strikes — particularly through the use of terminology such as “extrajudicial execution,” “kill lists,” and other language with unlawful or negative connotations—has produced the precise opposite effect. First, on a general level, “because targeted killings are not widely accepted as a legitimate instrument of state [action], the United States [has] risked diminishing its status as an upholder of the rule of law [by] embrac[ing] them.”<sup>77</sup> In the same vein, common references to the United States’ “drone program” or “targeted killing policy” has created a widely-held perception that the tactic of identifying individual leaders or militants and attacking them with precision weaponry is actually a broader strategy of executions. “Through its campaign criticizing U.S. lethal drone strikes and its emphasis on the need to take international human rights law seriously, the [human rights community] backed the United States into a rhetorical corner, as it were, and began to delegitimize its actions.”<sup>78</sup> As a matter of effectiveness, this characterization of U.S. counterterrorism efforts is damaging and problematic, creating the impression that the United States has little regard for the rules it imposes on everyone else and takes action based solely on might rather than right. Furthermore, once legitimacy became the measuring stick, the United States faced a paradigm in which its efforts to demonstrate and enhance the legitimacy of its targeted strikes only served to raise the bar a little more each time and to fuel calls for greater and greater transparency. Legitimacy thus posed a significant challenge for the United States: it was essential to the continued use of targeted killing as a counterterrorism tactic, particularly in multinational operations, but it also raised the stakes for any discourse or assessment of such targeted killings.

### *C. Effectiveness and Framing the Legal Paradigm*

At the core of any discussion of targeted killing and international law is the basic question — which law? The law of armed conflict, the international law of self-defense, international human rights law, or perhaps some combination of two or more of these international law regimes? Answering this question is nearly tantamount to answering the question of whether a targeted killing is lawful or

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77. Byman, *supra* note 10, at 106.

78. Brunstetter & Jimenez-Bacardi, *supra* note 71, at 183.

unlawful, because the rules for the use of force in each legal regime are starkly different.<sup>79</sup> In parallel to the objectives of defeating, degrading, and neutralizing threats from specific terrorist groups and leaders, U.S. targeted killing is also the story of a sustained campaign to affirm the applicability of self-defense and the primacy of the law of armed conflict to targeted killing. This story began with the U.S. response to a letter from a United Nations Special Rapporteur inquiring about the legal paradigm for and legality of the United States' first targeted killing outside Afghanistan – the 2002 strike against Abu Ali al-Harethi, an al Qaeda operative suspected of masterminding the attack on the U.S.S. *Cole* in October 2000. Characterizing the drone strike as an “extrajudicial execution,” the Special Rapporteur addressed the strike within the paradigm of the International Covenant on Civil and Political Rights, international human rights law more broadly, and law enforcement principles for the use of force. The United States, in contrast, responded that “inquiries related to allegations stemming from any military operations conducted during the course of an armed conflict with [al Qaeda] do not fall within the mandate of the Special Rapporteur”<sup>80</sup> — an entirely different perspective. For the United States, the Special Rapporteur had no jurisdiction with respect to the strike because it took place within an armed conflict between the United States, al Qaeda, and associated terrorist groups and therefore was governed by LOAC.

The debate between these two perspectives “capture[d] the legal contest over the ambiguity that came to characterize the drone [and targeted killing] debate”<sup>81</sup>: what law applies and, therefore, determines legality? Throughout this decade-plus debate, “human rights groups argued that targeted killings violate [international human rights law], including the most important human right of all, the right to life, while US officials argued that such killings were legitimate under [LOAC], and thus not a violation of human rights, because killing combatants in war is permitted.”<sup>82</sup> Without relinquishing its reliance on LOAC, the United States also marshalled another international law regime to, in essence, close the gap between these two perspectives.

Thus, although the United States has continued to assert that it is in an armed conflict with al Qaeda and associated forces over the past two decades,<sup>83</sup> it has

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79. See Blank, *supra* note 3.

80. Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Summary of cases transmitted to Government and replies received*, 355, U.N. Doc. A/HRC/4/20/Add.1 (Mar. 12, 2007) (quoting the response of the government of the United States to the letter from the Special Rapporteur, Asma Jahangir, to the Secretary of State dated November 15, 2002).

81. DANIEL R. BRUNSTETTER, *JUST AND UNJUST USES OF LIMITED FORCE: A MORAL ARGUMENT WITH CONTEMPORARY ILLUSTRATIONS* 74 (2021).

82. Brunstetter & Jimenez-Bacardi, *supra* note 71, at 182. The United States repeatedly defended the permissibility of targeted strikes under LOAC and under domestic law in official statements, memoranda, and white papers. See, e.g., Koh, *supra* note 13; DEP'T OF JUSTICE, *LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE* (2011), <https://perma.cc/WFG6-HJZY>.

83. All three branches of the U.S. government have demonstrated that they view the situation as an armed conflict. See Authorization to Use Military Force (“AUMF”), Pub. L. No. 107-40, 115 Stat. 224(a)



also relied on the international law right of self-defense, the *jus ad bellum*, as a justification for many targeted strikes outside areas of active hostilities. Asserting both legal justifications simultaneously, or at least contemporaneously, without carefully differentiating between when one or the other applies, is understandable for policy and legitimacy reasons, such as those noted above. However, doing so also introduces significant challenges for the application and development of the law. Policymakers will surely see greater flexibility and increased opportunity to take action in varied circumstances from the use of both legal justifications without careful delineation.<sup>84</sup> Such flexibility may well be an acceptable goal, as long as it does not affect how the relevant law is implemented or hinder how it develops and is enforced in the future, it may well be an acceptable goal. Where targeted strikes as part of armed conflict and counterterrorism operations are occurring at the same time, as is and has been the case throughout the past two decades, however, mixing the two legal justifications is and should be of significant concerns for both the current implementation and the future development of the law. The effect, over time, has been to conflate the legal frameworks for the use of force in LOAC and international human rights law, as well as to intertwine law and policy, in a manner that poses challenges for future operations and may produce long-term consequences for the law. Analyzing the effectiveness of targeted killing should therefore include a consideration of this longer-term effect on the law, because those consequences will drive the options available to the United States in a future conflict or crisis.

Broadly, conflating the two legal justifications obfuscates critical definitions and categories in both LOAC and the international law of self-defense, including the geographic parameters of armed conflict, the meaning of proportionality, and the rules regarding capture versus kill.<sup>85</sup> LOAC permits the use of lethal force on

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(2001); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (stating that the 9/11 attacks “created a state of armed conflict that requires the use of the United States Armed Forces”); Dept of Def. Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002); see also Harold Koh, Legal Adviser, Dept. of State, The Obama Administration and International Law, Keynote Address at the Annual Meeting of the American Soc’y of Int’l Law (Mar. 25, 2010) (stating that the United States is “in an armed conflict with Al Qaeda, as well as the Taliban and associated forces”); Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 4 (2006), available at <https://perma.cc/ZYT4-HB5F> (“[T]he United States is engaged in a continuing armed conflict against Al Qaeda, the Taliban and other terrorist organizations supporting them, with troops on the ground in several places engaged in combat operations.”). See also Koh, *supra* note 13, asserting the U.S. reliance on self-defense in addition as a justification for targeted strikes.

84. See, e.g., Gregory E. Maggs, *Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action*, 80 TEMP. L. REV. 661, 699 (2007) (“[G]overnments now have a great deal of discretion, after terrorist acts have occurred, to determine what law will apply to the government’s anti-terrorism responses . . . . If governments believe that rules governing law enforcement offer them an advantage, they will treat the matter as a criminal incident. But if they think that the law pertaining to military force will yield more favorable results, they will label the terrorists involved as enemy combatants and proceed accordingly.”).

85. See generally Blank, *supra* note 3, for a detailed discussion of these issues.

the basis of an individual's status and accepts incidental harm to civilians during armed conflict; in contrast, human rights law permits lethal force only as a last resort against individuals posing a direct threat and does not contemplate incidental harm at all. This stark difference means that uncertainty about if and where an armed conflict is taking place has enormous ramifications for individual security. Deeper discussion and understanding of the parameters of conflict—whether with transnational terrorist groups or other non-state actors—is essential to ensure the lawful and ethical application of these life-and-death distinctions. The need for clarity and consistency extends to the law of self-defense as well, in maintaining orderly relations among states and the ability of states to defend themselves from attacks. Although the United States' reliance on both paradigms, both as a matter of flexibility and as a tool to enhance legitimacy, is understandable, it limits the development and implementation of the law and may prove detrimental in the future when sharper delineations of the law and its parameters prove necessary.

More specifically, blurring the legal regimes has significant consequences for the law regarding the use of lethal force (such as, for example, the capture vs. kill debate) and the application of the principle of proportionality. Both of these issues highlight the risks that short-term gains in the policy and legitimacy spheres present for longer-term implementation and development of the law. As noted in Part II.B above, the stated preference for capture if feasible and the requirement of a near certainty of no civilian casualties in the Obama Administration Presidential Policy Guidance<sup>86</sup> were effective tools in bolstering the legitimacy of U.S. targeted strikes with domestic and international audiences. However, the conflation of LOAC and international human rights law rules into a policy standard that is commonly believed or understood to be actual law presents significant risks for both bodies of law, with the potential to either unduly constrain LOAC's greater permissiveness for the use of force or water down the more restrictive parameters of human rights law. Either result is problematic.

Consider the perception—based on the PPG's policy requirement—that LOAC mandates a “least harmful means” obligation for targeting during armed conflict, which it does not as a matter of law.<sup>87</sup> Such a rule would disrupt the delicate balance of military necessity and humanity and the equality of arms at the heart of LOAC. If commanders and operators have an obligation to use less harmful means, they may choose to not attack the target—which means the innocent victims of the planned terrorist attack are left unprotected—or simply disregard the law because it appears to be unrealistic and ineffective. Neither option is appealing. Refraining from attacking terrorist threats undermines the protection of innocent civilians from unlawful attack, one of LOAC's core purposes. Disregarding the law undermines the value and role of LOAC during armed

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86. PRESIDENTIAL POLICY GUIDANCE, *supra* note 14.

87. See Geoffrey S. Corn, Laurie R. Blank, Chris Jenks & Eric Talbot Jensen, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT'L L. STUD. 536 (2013).

conflict altogether, thus tossing aside a core pillar of the protection of all persons in wartime. Human rights law also faces risks. If LOAC's rules regarding capture and surrender of enemy personnel were to bleed into the law enforcement paradigm, international human rights law would similarly face risks of erosion. As the restrictions on the use of force in self-defense loosen, threatening to unravel the established framework for the protection of the right to life, both targeted individuals and innocent civilians in the area would have fewer protections. Broadening the use of force outside of armed conflict would reduce the rights of the former and subject the latter to significantly greater risk of injury and death.

Perhaps the greatest long-term risk for the effective implementation and development of the law—namely LOAC—as the result of the United States' efforts to enhance the legitimacy of targeted strikes and counterinsurgency operations more broadly is the steady morphing of LOAC's proportionality rule from a prospective methodology for mitigating civilian risk in targeting into an effects-based analysis that frames any civilian harm as a disproportionate attack. If compliance with proportionality rests on an effects-based approach, commanders have no way to know at the time they plan an attack how to determine the parameters of lawful conduct. In contrast, the effects-based approach signals to a commander that she will be judged solely based on whether the attack actually *caused* civilian casualties, not on her efforts in good faith to comply with what is an inherently contextual principle. The risk is that the very persons who must embrace and implement the law will end up perceiving it as illogical, and in many cases irrelevant. An effects-based analysis also provides the enemy with significant incentive to surround itself with civilians, generating not only ever greater civilian casualties, but also ever greater opportunities to accuse the attacking party of LOAC violations. This strategy is unfortunately one we see used to great effect in conflicts around the world. Although the conflation of law and policy in the service of legitimacy is understandable in the context of U.S. targeted killing, these longer-term effects on the interpretation of the law must be taken into account in considering the effectiveness of targeted killing writ large.

#### CONCLUDING OBSERVATIONS

Assessing the effectiveness of U.S. targeted killing is a complex task. Which metrics are appropriate for such assessment and what level of accomplishing the goals and objectives of those metrics can be considered "effective"?<sup>88</sup> In the absence of agreed conceptions of defeat and victory in conflicts with terrorist or other non-state groups, determining the contribution targeted killing makes towards broader strategic goals is difficult and identifying the effect of targeted strikes on such adversaries beyond the pure numbers of leaders and operatives killed is elusive. Outside of this security studies framework, however, considering the effectiveness of U.S. targeted killing through the lens of international law and LOAC illuminates a few interesting conclusions.

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88. See generally REGAN, *supra* note 7.

First, targeted killing offers the United States an effective means to enhance and even maximize its compliance with LOAC during military operations, where the opportunity to attack identified individuals with persistent surveillance capabilities and precision weapons is available. This first metric is a fairly straightforward measure of effectiveness, assessing targeted killing as a specific method of pursuing a military objective in the course of armed conflict. Second, at a more nuanced level, targeted killing offered the United States a few arrows in its quiver as it sought consistently to bolster and demonstrate the legitimacy of its chosen methods—i.e., targeted strikes in many cases—and its counterterrorism operations more broadly. The United States pursued these goals by highlighting targeted strikes as heightened LOAC compliance and adding an additional layer of policy constraints to align the rules for targeted strikes more closely with what some might describe as a robust law enforcement approach.<sup>89</sup> Here, U.S. targeted killing was generally effective as well. As the United States presented a consistently restrained paradigm for targeted strikes, it was able to maintain the international coalitions in Afghanistan and against ISIS and sustain enough acceptance of its actions in other areas to continue taking action against terrorist threats without losing key partners and support. Finally, however, this effectiveness in the legitimacy space may well come with a longer-term cost, as notions of zero casualties, near certainty, and least harmful means have bled into LOAC, creating the risk that LOAC will permanently evolve in a manner that is unfavorable for future military operations and for the effectiveness of LOAC itself in achieving its core goals.

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89. See Presidential Policy Guidance, *supra* note 14.