REMOTELY PILOTED AIRCRAFTS (RPAS) IN TARGETED KILLING OPERATIONS: THE UNITED STATES IS NO LONE WOLF

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> Now, make no mistake, our nation is still threatened by terrorists . . . But we have to recognize that the threat has shifted and evolved from the one that came to our shores on 9/11. With a decade of experience now to draw from, this is the moment to ask ourselves hard questions – about the nature of today's threats and how we should confront them.[1]

> Justly or not, drones have become a provocative symbol of American power, running roughshod over national sovereignty and killing innocents.[2]

I. INTRODUCTION

The extraterritorial use of Remotely Piloted Aircrafts (RPAs), more popularly known in the media as "drones,"[3] in targeted killings is rapidly

1. President Barrack Obama, Remarks at the National Defense University (May 23, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university [hereinafter President Obama Speech].

2. Jo Becker & Scott Shane, *Secret "Kill List" Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted%253Dall&_r=0.

3. Although more commonly known "drones" in the media, the use of that term implies completely autonomous robots flying around and dropping bombs without human interaction. Because that image is inaccurate and misleading, in 2010, the U.S. Air Force announced that

increasing, in the number of countries resorting to this use of force, the locations where countries conduct the operations, as well as in numbers of operations by those countries. The United States, the United Kingdom, and Israel rely on existing legal principles to justify their RPA targeted killing operations. The way these countries are interpreting and applying the legal principles will likely shape the future of RPA operations by other countries. This Article is an exploration of how the three countries interpret and apply international law to their RPA targeted killing operations, in an attempt to capture the similarities and distinctions, and to provide insight into how best to answer the criticisms levied at the operations and improve their legality.

RPAs are used for operations other than targeted killings. They can be used to collect intelligence on suspected terrorists by conducting round-the-clock surveillance on those targets.[4] They can operate in environments that the typical soldier cannot and perform assessments of the battleground both pre- and post-combat.[5] The focus of this Article, however, is on the RPAs that are used as lethal weapons, loaded with

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drones or "Unmanned Aerial Vehicles" (UAVs) will officially be called "Remotely Piloted Aircrafts." Amaani Lyle, *Air Force Officials Announce Remotely Piloted Aircraft Pilot Training Pipeline*, A.F. NEWS, June 9, 2010, http://www.af.mil/news/story.asp?id=123208561; Philip Hammond, *In Defence of Drones*, GUARDIAN, Dec. 17, 2013, http://www.theguardian.com/commentisfree/2013/dec/18/in-defence-of-drones-keep-civilians-troops-safe. This change in terminology reflects the U.S. military official recognition that the vehicles are not "unmanned," but rather piloted remotely by trained military officers. Colonel Dawn M.K. Zoldi, *Protecting Security and Privacy: An Analytical Framework for Airborne Domestic Imagery*, 70 A.F. L. REV. 1, 3 n.1 (2013). MOD officials in the United Kingdom also stress the use of the label "remotely piloted air system" instead of "drone" because "[t]hough physically unmanned, the aircraft is guided and controlled by a team of highly trained people. Pilots, sensor operators and analysts all make decisions in real time, just like the crew of a traditional aircraft." U.K. MOD, THE UK APPROACH TO UNMANNED AIRCRAFT, JOINT DOCTRINE NOTE 2/11 ¶ 203 (Mar. 2011) [hereinafter J.D.N. 2/11].

4. *See* Jane Mayer, *The Predator War*, NEW YORKER, Oct. 26, 2009, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer (noting that the Predator RPA can hover above a target for up to forty hours before refueling); Afsheen Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201, 1203 (2011).

> A small drone – unburdened by a pilot who must protect himself from enemy fire – can hover unseen above a potential target for many hours. The drone's powerful cameras gather ground information that is instantly beamed to the United States for assessment. Plus, infrared and other sensor may add to the drone's capabilities.

Id.

5. U.S. Dep't of Def., *Unmanned Systems Integrated Roadmap FY2013–2038*, Reference Number: 14-S-0553, ¶¶ 3.1, 308-10 (2013), *available at* http://www.defense.gov/pubs/DOD-USRM-2013.pdf [hereinafter *DOD 25 Year Roadmap*].

munitions flown to target and kill[6] particular terrorists. RPAs allow pilots to remotely target and kill terrorists with a precision strike, from a remote location, and ideally without having to participate in a long drawn-out combat.

When comparing how the three countries legally justify the use of RPAs in targeted killings, some interesting points come to light. First, while the U.S. RPA targeted killing program is more expansive in numbers of locations where it conducts the operations, a look at each location individually demonstrates that the United States may not be taking a stance that is any more aggressive than Israel regarding the lawfulness of the use of force in that country (*jus ad bellum*), and both countries may be taking a more aggressive position than the United Kingdom.

Second, in answering questions related to International Humanitarian Law (IHL), the countries stated public positions vary while application of the IHL principles demonstrates striking similarities in the operations. Specifically, variance is present in answers to the questions of whether armed conflicts with terrorists are international or non-international armed conflicts for purposes of the applicability of certain Geneva Conventions, as well as how to label and thus treat terrorists under IHL. The differences are based on both the situational differences in the three countries' armed conflicts with terrorists, as well as the various International Conventions to which each State is a party. However, when conducting RPA targeted killing operations against individual terrorists, all three countries apply the rules of IHL similarly, as discussed in further

6. There is no accepted definition of "targeted killing" in the literature. For example, the legal advisor for the International Committee for the Red Cross (ICRC) defines targeted killings as "[t]he 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." NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2008). Scholars have also labeled them "extra-judicial" killings, *see, e.g.*, Richard Murphy & Afsheen Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 406 (2009) (noting that some opponents of RPA operations have defined them as the "extra-judicial, premeditated killing by a state of a specifically identified person not in its custody"). *But see* Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 329–30 (2004) (distinguishing the concepts of targeted and extra-judicial killing is "critical" because while extra-judicial killing is unlawful, targeted killings are not and occur "when arrest of the individual poses an extraordinary operational risk"). For purposes of this Article, the following definition is instructive: "the intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended, who is taking a direct part in hostilities, the targeting done at the direction of the state, in the context of an international or non-international armed conflict." GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 538 (2010). This Article is limited to RPA targeted killing operations, and thus, "RPA targeted killing operations" will mean the intentional killing of a specific combatant or civilian participating in hostilities by means of an RPA, which is directed by a State, in the context of an international or non-international armed conflict.

detail below.

Beyond IHL, especially interesting is a deep dive into how each country applies certain principles from International Human Rights Law (IHRL). Although this is a separate set of rules than, and sometimes even contradictory to, the rules of IHL, all three countries look to IHRL in various ways to guide RPA targeted killing operations, in a few surprisingly similar ways, sometimes even imposing higher burdens than required by IHL. One example is the expectation of a zero civilian casualty rate by the United States and the United Kingdom in any particular operation. Even so, in order to demonstrate compliance with IHL, all three countries need to improve in the areas of transparency and accountability. In the specific area of transparency into and accountability of civilian casualties, the United States may be lagging behind the other two countries, providing the greatest area for potential improvement.

After the introduction in Part I of this Article, Part II presents background of each country's use of RPAs and what is known about the extent of their operations around the world. Part III gives an overview of the relevant legal framework and also introduces the various relevant Conventions to which each country is a party that shapes their RPA operations. While RPA targeted killing operations are governed by both international and domestic laws, this Article is limited to the application of international law by the United States, United Kingdom, and Israel. Part IV begins an in-depth look of *jus ad bellum*, or the lawfulness of the use of force, questions that arise with the use of RPAs in targeted killing operations. Part V then discusses *jus in bello* principles, or those that apply during an armed conflict to regulate the conduct of the parties, and gives further detail about how specific provisions of the Conventions introduced in Part III impact each countries' operations. After discussing the application of the principles in the United States, United Kingdom, and Israel's RPA targeted killing operations, all Parts present some observations gleaned from a comparison of the different countries and suggests areas of improvement. Part VI offers concluding thoughts and makes recommendations on how to improve accountability and transparency through the use of Individualized Threat Findings (ITFs), more extensive post-operations investigations, and the public release of limited information about RPA targeted killing operations.

II. RPA USE AROUND THE WORLD TODAY

A. *United States*

The United States first developed RPAs in the early-1960s, as a possible alternative to the manned reconnaissance aircraft, U-2s, which

were being shot down over the Soviet Union.[7] In the 1970s, military weapons development projects began to research and test arming unmanned vehicles with targeting capabilities.[8] But, the United States largely spent the funding for RPA development on intelligence-gathering capabilities rather than as weapons systems.[9]

Fast-forward to 1998, when President Bill Clinton issued the order authorizing the use of lethal force in self-defense against al-Qaeda in Afghanistan, specifically those individuals suspected of bombing the American Embassies in Kenya and Tanzania.[10] At that time, the United States used cruise missiles fired from a naval war ship rather than RPAs.[11] The cruise missiles hit the intended targets, but failed to kill Bin Laden or any other terrorist leader.[12]

Though this operation faced some criticism, government officials were already exploring the option of using RPAs to target terrorists abroad and the operation helped open the door for targeting specific terrorists with RPAs as the United States engaged in its armed conflict with terrorists. By August 2001, the National Security Council under President George Bush concluded that it was legal for the Central Intelligence Agency (CIA) to kill Bin Laden or one of his deputies with an RPA, specifically the MQ-1 Predator.[13] On September 4, 2001, President Bush's chief advisors approved a draft presidential directive to arm the Predator with missiles so that it could be used to target and kill Osama Bin Laden or his chief lieutenants.[14] Immediately following September 11, President Bush issued a presidential directive related to targeted killings that was broader than the one issued by President Clinton in terms of who could be targeted.[15] It extended to al Qaeda members other than the top leaders and went beyond the boundaries of Afghanistan.[16]

The RPA strike often cited as the first known RPA targeted killing

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7. For a detailed discussion of the history of RPAs, see Thomas Ehrhard, Michell Inst., Air Force UAVS: The Secret History (2010), http://higherlogicdownload.s3.amazonaws.com/AFA/6379b747-7730-4f82-9b45-a1c80d6c8fdb/UploadedImages/Mitchell%20Publications/Air%20Force%20UAVs.pdf.

8. *Id.* at 20–21.

9. *Id.*

10. National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report 117 (2004) [hereinafter 9/11 Comm'n Report].

11. *See id.*; Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 150 (2010).

12. *Id.*

13. Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. OF NAT'L SEC. LAW & POL'Y 539, 561 (2012).

14. 9/11 Comm'n Report, *supra* note 10, at 213.

15. Blum & Heymann, *supra* note 11, at 150.

16. *Id.*

strike took place in Yemen over a year later, in November 2002.[17] This strike is believed to have been a joint operation involving the CIA, from its headquarters located in Langley, Virginia, and the U.S. Air Force operations center in Djibouti, Africa.[18] For years, this strike did not generate much controversy.

The use of RPAs to target and kill terrorists located overseas has increased dramatically under President Barrack Obama, and into areas outside those zones of active hostilities in Iraq and Afghanistan.[19] Estimates from two government watchdog groups on the number of times the United States has used RPAs to target and kill terrorists vary anywhere between 392 and 405 in Pakistan, 72 and 204 in Yemen, and 6 and 9 in Somalia.[20] In addition to the wide variance in number of strikes provided by government watchdog groups, the number of militants and civilians killed ranges widely as well.[21] As more and more sources began reporting larger numbers of RPA targeted killing operations in the years since 2002, scrutiny and criticism of the operations grew.

Some critics argue, for example, there is no legal basis for the United States to be conducting RPA targeted killing operations outside areas of active hostilities because doing so is a violation of that nation's

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17. Chesney, *supra* note 13, at 567.

18. *Id.*; *see also* Phillip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 329 (2011) (noting that the secret CIA program is conducted by the CIA using unmanned aerial vehicles and began the strike in Yemen in November 2002 (internal quotation omitted)).

19. The U.S. government has not yet released an unclassified list of all targeted killings conducted by the United States. Therefore, in the absence of complete information about RPA operations, various media and other investigative sources have tried to collect data. For example, the New America Foundation lists strikes on an online database, see NEW AMERICA FOUNDATION, http://natsec.newamerica.net/about (last visited Jan. 2, 2015); BUREAU OF INVESTIGATIVE JOURNALISM, http://www.thebureauinvestigates.com/2014/01/29/get-the-data-pakistani-governments-secret-report-on-drone-strikes/ (listing the strikes in Pakistan) (last visited Jan. 2, 2015). However, without verification from any governmental source and since some information is gained from individuals who have potential motives for providing information damaging to the United States, it is impossible to know how much of the statistical information they publish is accurate. Scholars repeatedly comment on the difficulty in assessing legality presented by such secrecy in operations. *See, e.g.,* Gregory McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681 (2014).

20. *See* NEW AMERICA FOUNDATION, *supra* note 19; BUREAU OF INVESTIGATIVE JOURNALISM, *supra* note 19.

21. *See, e.g.*, NEW AMERICA FOUNDATION, *supra* note 19 (listing the total number individuals killed in Pakistan between 2206 and 3583, including between 258 and 307 civilians killed, and the total number individuals killed in Yemen between 820 and 1082 individuals, including between 81 and 87 civilians); BUREAU OF INVESTIGATIVE JOURNALISM, *supra* note 19 (estimating the total number individuals killed in Pakistan between 2400 and 3888, including between 416 and 959 civilians, the total number of individuals killed in Yemen anywhere between 371 and 1094, including between 64 and 151 civilians, and the total number of individuals killed in the Somalia strikes to be between 16 and 30, including 0 to 1 civilian).

sovereignty.[22] Other critics of RPA targeted killing operations cite the high numbers of civilian casualties caused by the strikes as evidence that they are not as precise as government and military officials claim. The lack of clarity regarding how many civilians inadvertently killed by RPAs aimed at terrorists provides the biggest concern to many who oppose the RPA targeted killing program. The civilian casualty rates are discussed in more detail in Part V.B below.

Some critics of RPA targeted killings operations assert that these operations cause severe psychological impacts on the civilian population.[23] Professors and law students from Stanford and New York University law schools completed a thorough study of some of the less-reported negative effects of RPA targeted killing operations on civilians in Pakistan.[24] According to the report, which included research combined with more than 130 witness interviews, current U.S. RPA operations are extremely damaging and counterproductive.[25] For example, they found that RPA strikes cause negative consequences on the economic, social, and cultural activities of local residents, as well as their mental health, educational opportunities in an area of high illiteracy rates, property damage and extensive economic hardship, and an erosion of community trust.[26]

In response to such criticisms, senior government officials began to defend the legality of the U.S. use of RPAs overseas to the public. Specifically, in his speech accepting the Nobel Peace Prize in December 2009, President Obama affirmatively stated that, while "all nations – strong and weak alike – must adhere to standards that govern the use of force, . . . I reserve the right to act unilaterally if necessary to defend [the]

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22. Rise of Drones II: Unmanned Systems and the Future of Warfare: Hearing before the U.S. House Subcommittee on National Security and Foreign Affairs, 111th Cong. 2 (Apr. 28, 2010) (written testimony of Mary Ellen O'Connell, Professor, University of Notre Dame Law School), *available at* http://oversight.house.gov/images/stories/subcommittees/NS-Subcommittee/4.28.10-Drones Il/OConnellStatement.pdf.

23. Phil Shiner & Dan Carey, Public Interest Lawyers, The Legality of the UK's Use of Armed Unmanned Aerial Vehicles 23 (2013), http://www.publicinterestlawyers.co.uk/go_files/files/ME1IAPC380F3.pdf; Chris Cole, Drone Wars UK, Submission from Drone Wars UK to the Defence Select Committee Inquiry 'Towards the Next Defence and Security Review' on the Use of Armed Unmanned Aerial Vehicles (UAVs) 9 (2013), http://dronewarsuk.files.wordpress.com/21013/04/dwuk-submission-to-dsc-april-2013.pdf.

24. *See* Stanford Law School International Human Rights and Conflict Resolution Clinic & Global Justice Clinic at NYU School of Law, Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan 74–101 (Sept. 2012), http://livingunderdrones.org/.

25. *Id.*

26. *Id. See also* Mary Dobbing & Chris Cole, Drone Wars UK, Israel and the Drone Wars, 16–17 (2014), http://dronewarsuk.files.wordpress.com/2014/01/israel-and-the-drone-wars.pdf (noting the severe psychological effects that RPA strikes have on the civilian population in the Gaza Strip, especially the children, who live under constant fear of the attacks).

nation."[27] Then, in March 2010, in a speech at the Annual Meeting of the American Society of International Law, then-Legal Advisor to the Department of State Harold Koh discussed the legal standards that the government applies to its use of RPAs for lethal operations, which are discussed throughout this Article.[28] In that speech, he did not acknowledge where the operations were taking place.

Continuing throughout 2011 and 2012, senior government officials made speeches proclaiming the legality of the President's unilateral use of force overseas.[29] A specific example is a May 2013 letter to Congress from Attorney General Eric Holder.[30] In an apparent attempt to increase transparency, he said that the President directed him to disclose certain information that was previously classified.[31] Specifically that, between September 2009 and the date of the letter, the United States targeted and killed one U.S. citizen in Yemen and killed three other citizens over that same time who were not specifically targeted by the United States.[32]

In addition to Yemen, the U.S. Government admits that operations also occur in Pakistan and Somalia. Without disclosing details about specific RPA strikes, the President first acknowledged in May 2013 that

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27. President Barack Obama, The Nobel Peace Prize 2009: Nobel Lecture (Dec. 10, 2009), *available at* http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html.

28. Harold Koh, U.S. Dep't of State Legal Advisor, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

29. *See, e.g.*, John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Harvard Law School Program on Law and Security: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an (noting that the United States "reserve[s] the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves"); Eric Holder, Attorney General, Remarks at Northwestern University School of Law (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html (articulating the test for using lethal force against a U.S. citizen located overseas who is actively engaged in planning to kill Americans); Stephen W. Preston, CIA General Counsel, Remarks at Harvard Law School: On the Rule of Law (Apr. 10, 2012), *available at* http://www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-law-april-2012/p27912 (outlining the legal authorities that give the CIA the authority to conduct RPA operations as well as the international and national laws that require compliance in execution of those operations); John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), *available at* http://www.lawfareblog.com/2012/04/brennanspeech/ (discussing that the RPA targeted killing operations are legal, ethical, wise, and subject to rigorous standards of review).

30. Letter from Eric Holder, Attorney General, to The Honorable Patrick J. Leahy, Chairman, U.S. Senate Committee on the Judiciary 1–2 (May 22, 2013), http:/www.justice.gov/slideshow/AG-letter-5-22-13.pdf [hereinafter Holder Letter].

31. *Id.*

32. *Id.*

operations have been and will continue to be carried out in Pakistan, Somalia and Yemen where terrorists hide in the "most distant and unforgiving places on Earth," the "state lacks the capacity or will to take action, . . . and it's . . . not possible for America to simply deploy a team of Special Forces to capture every terrorist."[33]

Additionally, the United States expanded its RPA intelligence-gathering capability into other African countries, including Mali, Niger, Burkina Faso, Ethiopia, and Djibouti.[34] The President specifically acknowledged that the United States provided "aid to the French-led intervention" against al Qaeda in Mali.[35] Media reports confirm that the United States operated surveillance operations in the countries listed above and did so pursuant to agreements signed with those countries in order to improve intelligence collection of terrorists operating there.[36] Some critics express concern that the agreements could open the door for armed RPAs to operate in those countries, but the understanding is that agreements between the United States and the African countries are for surveillance RPAs only.[37]

B. *United Kingdom*

The United Kingdom deployed RPAs in Iraq and Afghanistan.[38] According to publicly-available information, the U.K. military began training with U.S. forces already flying the armed RPAs around January 2004.[39] In 2007, the U.K. Royal Air Force became part of a squadron

33. President Obama Speech, *supra* note 1.

34. Paul Harris & Afua Hirsch, *US Signs Deal with Niger to Operate Military Drones in West African State*, GUARDIAN (Jan. 29, 2013), http://www.theguardian.com/world/2013/jan/29/niger-approves-american-surveillance-drones.

35. *Id.* at 3; *see also* Eric Schmitt, *Drones in Niger Reflect New U.S. Tack on Terrorism*, N.Y. TIMES (July 10, 2013), http://www.nytimes.com/2013/07/11/world/africa/drones-in-niger-reflect-new-us-approach-in-terror-fight.html?pagewanted=all&_r=0 (discussing the RPA surveillance operations being conducted from the small U.S. base in Niger that are providing intelligence to aid the French effort in Mali).

36. Harris & Hirsch, *supra* note 34.

37. *Id.*

38. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Rep. on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/68/389, ¶¶ 29–31, 37 (Sept. 18, 2013) (by Ben Emmerson) [hereinafter Special Rapporteur Report (Emmerson)]. *See also* Robert Wall, *UK Conducts First Reaper Drone Strike Controlled from Britain,* BLOOMBERG NEWS (May 1, 2013), http://www.bloomberg.com/news/2013-05-01/u-k-conducts-firsts-reaper-drone-strike-controlled-from-britain.html (discussing the first RPA piloted from Britain to support ground operations in Afghanistan and that 2150 RPA missions were conducted by the United Kingdom from a U.S. Air Force base in Nevada between October 2006 and December 31, 2012).

39. Craig Hoyle, *UK Cheers the Reaper UAV*, FLIGHTGLOBAL.COM (June 16, 2008), http://www.flightglobal.com/news/articles/uk-cheers-the-reaper-uav-224622/.

located at a U.S. Air Force base in Nevada, formed specifically to operate remotely-piloted air systems alongside U.S. Air Force squadrons.[40]

Between 2007 and December 2013, the Royal Air Force "amassed 54,000 flying hours in support of coalition forces in Afghanistan and . . . fired just 459 precision weapons," according to representatives from the Royal Air Force.[41] The first recorded U.K. participation in an RPA targeted killing operation is believed to be May 2008.[42] As with most statistics cited by government officials throughout this Article, sources dispute this number as too low.[43] For example, one source asserts that "[r]ecent figures released by the USAF and the RAF show that US and UK forces have launched over 1,400 weapons from UAVs in Afghanistan in the past five years."[44]

The United States and the United Kingdom also used RPAs during the North Atlantic Treaty Organization (NATO) operation in Libya in 2011.[45] Based on publicly-available information, the United Kingdom has not conducted any RPA targeted killing operations outside of Iraq, Afghanistan, and Libya thus far, but the United Kingdom may be aiding U.S. RPA targeted killing operations in other ways.[46] The British Ministry of Defence (MOD) was sued for providing intelligence information to the United States to help identify and locate drone targets in Pakistan.[47] Furthermore, "[a]ccording to the UN Special Rapporteur and other well-informed sources, there is serious discussion taking place within the [MOD] about deploying the British Reaper to Africa to help with the French counter-insurgency operations there."[48] MOD officials deny that there are plans to send the reapers to Africa.[49]

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40. British Embassy Washington, *Ambassador Westmacott Visits RAF Squadron in Nevada*, GOV.UK (Dec. 18, 2013), https://www.gov.uk/government/world-location-news/ambassador-westmacott-visits-raf-squadron-in-nevada.

41. *Id.*

42. Hoyle, *supra* note 39.

43. Cole, *supra* note 23 (citing Chris Woods & Alice Ross, *Revealed: US and Britain Launched 1,200 Drone Strikes in Recent Wars*, BUREAU OF INVESTIGATIVE JOURNALISM (Dec. 4, 2012), www.thebureauinvestigates.com/2012/12/04/revealed-us-and-britain-launched-1200-drone-strikes-in-recent-wars).

44. *Id.*

45. Special Rapporteur Report (Emmerson), *supra* note 38, ¶ 36.

46. *Id.*

47. Cole, *supra* note 23, at 5; *see also* Sylvia Hui, *US Drone Strikes: UK Government Sued for Assisting Covert Attacks*, HUFFINGTON POST (Mar. 12, 2012), http://www.huffingtonpost.com/2012/03/12/us-drone-strikes-uk_n_1338640.html (explaining that the suit is not based on allegations that the British military conducted the RPA targeted killing operations in Pakistan, but that they provided locational information to the United States so that it would target and kill terrorists in Pakistan).

48. Cole, *supra* note 23, at 2.

49. J.D.N. 2/11, *supra* note 3, ¶ 101.

C. *Israel*

Israel uses RPAs in its operations in Judea, Samaria, and the Gaza Strip.[50] Israel's first surveillance RPA was created in the aftermath of Israel's 1973 war with Egypt and Syria.[51] In the early 1990s, Israel again used RPAs for surveillance in operations against Hezbollah in Lebanon.[52] In late 2000, Israel officially declared targeted killings to be a part of the overall fight against terrorism.[53]

Although Israel officially acknowledges targeted killings as part of Israel's fight against terrorism, identifying the exact number of RPA targeted killing operations conducted by Israel is very difficult. Israel employs various means in its "war against terrorism," and thus, it is unclear exactly when the first targeted killing by an RPA occurred.[54] One source lists an October 2004 strike as the first reliable report of RPA targeted killing operation.[55] On its website, the Israeli Defense Forces (IDF) now readily admits RPAs are frequently used as part of its armed conflict with Hamas, but there is no information confirming or denying that October 2004 was the first strike.[56]

Additionally, whether to count a certain operation as an RPA targeted killing operations is not as easy as it seems. For example, sometimes only RPAs are used in a targeted killing operation, but in other operations, RPAs will provide surveillance which is then followed by a piloted aircraft that actually bombs the target.[57]

Similar to the United States and the United Kingdom, the Israeli Government has not provided unclassified information to the public listing where all RPA targeted killing operations have or are taking place.

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50. H.C.J. 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel 57(6) PD ¶¶ 16, 21 [2005] (Isr.) [hereinafter H.C.J. Opinion].

51. Scott Wilson, *In Gaza, Lives Shaped by Drones*, WASH. POST (Dec. 3, 2011), http://www.washingtonpost.com/world/national-security/in-gaza-lives-shaped-by-drones/2011/11/ 30/gIQAjaP6OO_print.html.

52. Dobbing & Cole, *supra* note 26, at 10.

53. Blum & Heymann, *supra* note 11, at 151; *see also* Alston, *supra* note 18, at 407 (noting that, although in the 1990s Israel rejected the accusation that its military engaged in targeted killings, in November 2002, the Israeli Government confirmed the existence of the policy justifying targeted killings in self-defense and under the laws of armed conflict).

54. H.C.J. Opinion, *supra* note 50, ¶ 2.

55. Arieh O'Sullivan & Khaled Abu Toameh, *IDF Relying on Use of Killer Drones in Gaza*, JERUSALEM POST (Oct. 26, 2004), http://www.highbeam.com/doc/1P1-101814393.html.

56. *See, e.g.*, Israeli Defense Forces, *Army of the Future: IDF's Unmanned Vehicles*, IDF BLOG (Feb. 28, 2012), http://www.idfblog.com/2012/02/28/army-future-idfs-unmanned-vehicles/.

57. *See* Israeli Defense Forces, *Israeli Air Force: Bombing Gaza or Pinpoint Strikes?*, IDF BLOG (Mar. 11, 2012), http://www.idfblog.com/2012/03/11/bombing-gaza-or-pinpoint-strikes/ (discussing that "pinpoint strikes" are carried out by both the manned F-I16 aircraft and the unmanned Delilah).

IDF only publicly admits conducting targeted killings in the Gaza Strip, Judea, and Samaria, but some sources also claim Israel is conducting RPA strikes in Sudan.[58] The available sources on any Israeli operations in Sudan are very few and, according to those sources, the IDF declined to comment on the allegations.[59]

D. *Comparing the Countries: The Future of RPA Targeted Killing Operations*

Though Israel and the United Kingdom also use RPAs, there can be no denying that the U.S. RPA targeted killing program is more expansive than the other two countries, both in locations and number of strikes.[60] Military documents from both the United States and United Kingdom highlight plans to continue to obtain and expand the use of RPAs in the future.[61] In fact, RPAs are so valuable to the military community that the U.K. Defence Department has noted that they are "one of the few capability areas to receive increased funding over the next decade."[62]

Government officials claim that the tactical success is gained at lower costs to military troops, both financially and mentally, by not sending them in harms' way.[63] Proponents of RPAs claim that not only are they tactically successful at hitting their targets, but they also are successful in causing fear among terrorists.[64] RPA operations are "decapitating the leadership of the terrorist groups" and "independent reports confirm that the strikes have hampered terrorist activities."[65] In 2009, for example, a reporter for the *New York Times* published a multi-part news article describing his experience when held in captivity by the Taliban for over

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58. *See* Dobbing & Cole, *supra* note 26, at 12 (claiming that an Israeli drone carried out an airstrike against an allegedly Gaza-bound Iranian arms convoy traveling through Sudan in 2009); Elad Benari, *Report: Israeli Drone Destroyed Weapons in Sudan Last Month*, Arutz Sheva, ISRAEL NAT'L NEWS (Oct. 26, 2012), http://www.israelnationalnews.com/News/News.aspx/161354#.U1GCdSDD9jo (describing an Israeli RPA on a convoy traveling south of the capitol of Sudan that destroyed 200 tons of munitions intended for Gaza).

59. Dobbing & Cole, *supra* note 26, at 12.

60. Interestingly, the United States initially publicly condemned Israel's targeted killings as "extrajudicial killings" and because the "[U.S.] government is very clearly on record as against targeted assassinations." *See* Mayer, *supra* note 4, at 6.

61. *See generally DOD 25 Year Roadmap*, *supra* note 5; *and* J.D.N. 2/11, *supra* note 3, ¶ 404.

62. J.D.N. 2/11, *supra* note 3, ¶ 404.

63. SOLIS, *supra* note 6, at 541 ("Even considering the predictable collateral damage, the effectiveness of [RPAs] mated with Hellfire missiles, combined with their relatively low cost and zero exposure of friendly personnel, assures their continued use.").

64. *See generally* Blum & Heymann, *supra* note 11, at 167.

65. Radsan & Murphy, *supra* note 4, at 1228–29. *See also* Blum & Heymann, *supra* note 11, at 167 (noting that the "demonstration of superiority in force and resolve may also dishearten the supporters of terrorism.").

seven months.[66] He describes how the RPA strikes have "created a paranoia among the Taliban."[67] Therefore, they moved around in secrecy and darkness and were very suspicious of locals who surrounded them.[68]

It is unavoidable that other countries have or will also eventually obtain the technology. A 2012 report from the U.S. General Accountability Office indicates that the current number of countries who have acquired some sort of unmanned aerial vehicle system might be as high as seventy-six.[69] Evidence exists that China and Iran are already developing the technology.[70]

It is also unavoidable that other countries will look to the biggest users of RPAs in targeted killing operations to inform their practices, including the United States.[71] "The United States is the first to self-consciously declare itself at war with a non-state terrorist organization that potentially spans the globe. Its actions establish a reference point for state practice that will likely be mimicked by others and inform the development of customary international law."[72]

A deep-dive into the use of RPAs by the United Kingdom and Israel in comparison to the United States throughout this Article illustrates not only how the countries look to IHL to shape the legality of their RPA targeted killing operations, but how the application of both IHL and IHRL principles works in actual operations. Conducting the operations involves a very complex process that includes reliance on historical legal precedence, as well as observations of the other countries' struggles with similar armed conflicts, while facing the practicalities of an ever-changing enemy and landscape of armed conflict surrounding that enemy.

The next Part will first outline, in general, the legal framework that

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66. David Rohde, *Held by the Taliban: 7 Months, 10 Days in Captivity*, N.Y. TIMES (Oct. 18, 2009), http://www.nytimes.com/2009/10/18/world/asia/18hostage.html?pagewanted=all.

67. *Infra* Part IV; David Rohde, *A Drone Strike and Dwindling Hope*, N.Y. TIMES (Oct. 20, 2009), http://www.nytimes.com/2009/10/21/world/asia/21hostage.html.

68. *Infra* Part IV.

69. US GOV'T ACCOUNTABILITY OFFICE, GAO-12-536, AGENCIES COULD IMPROVE INFORMATION SHARING AND END-USE MONITORING ON UNMANNED AERIAL VEHICLE EXPORTS 9 (2012).

70. Gerry Doyle, *Chinese Stealth Drone Makes First Flight*, N.Y. TIMES (Nov. 22, 2013), http://sinosphere.blogs.nytimes.com/2013/11/22/chinese-stealth-drone-makes-first-flight/?_php=true&_type=blogs&_r=0 (highlighting a 20 minute flight made by a "combat drone," but commenting that "no weapon bays were visible"); Al Jazeera, *Iran Unveils 'Biggest Missile-Equipped Drone'* (Nov. 19, 2013), http://www.aljazeera.com/news/middleeast/2013/11/iran-unveils-biggest-missile-equipped-drone-201311182223466932.html (discussing claims by Iranian military officials that the drone they now own can cover much of the Middle East, including Israel, and can "carry air-to-surface rockets for combat operations," but acknowledging that the claims cannot be independently verified).

71. Alston, *supra* note 18, at 444–45.

72. Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PENN. L. REV. 1165, 1174 (2013).

surrounds RPA targeted killing operations, and it will also address the International Law principles as they relate to the different landscapes in which the United States, the United Kingdom, and Israel are waging armed conflicts against terrorist groups.

III. RELEVANT LEGAL FRAMEWORK

To begin an overview of the relevant international law issues involving RPAs, this Part starts with *jus ad bellum* principles, or those that deal with the lawfulness of the resort to force.[73] Specifically for purposes of this Article, *jus ad bellum* shapes when countries can resort to RPAs to conduct targeted killing operations in another country's sovereign territory. *Jus ad bellum* limits a State's resort to force in another State's territory to instances where the other State gives its consent or potentially when the other State is unable or unwilling to effectively suppress the threat.[74]

For those States party to the U.N. Charter, including the United States, the United Kingdom, and Israel, article 2(4) prohibits the use of force in another country.[75] There are some exceptions to this rule. Consent by the other State is one of those exceptions. More succinctly, when responding to a terrorist threat that is resonating from another State's sovereign territory, the responding State could enter that State's territory with its consent.[76]

Additionally, under Article 51, States have the right of self-defense as an exception to the general prohibition against the threat of or use of force against another State.[77] The State's resort to self-defense in order to enter the territory of another State must meet the demands of immediacy, necessity, and proportionality.[78] Finally, as a third option, the U.N. Security Council could pass a resolution authorizing the use of force in another State's territory, essentially overriding the prohibition against the

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73. SOLIS, *supra* note 6, at xxix.

74. Daskal, *supra* note 72, at 1181.

75. U.N. Charter art. 2, para. 4.

76. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, ¶ 37, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Phillip Alston) [hereinafter Special Rapporteur Report (Alston)].

77. U.N. Charter, art. 51.

78. David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT'L L. 235, 242 (2013); *see also* U.N. Secretary-General, *A More Secure World: Our Shared Responsibility*: *Rep. of the High-level Panel on Threats, Challenges and Change*, ¶ 188, U.N. Doc. A/59/565 (Dec. 2, 2004) (noting that a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate).

use of force from an outside State.[79]

Jus in bello pertains to the law on the battlefield or, in this Article, rules regulating the use of RPAs during armed conflict.[80] The *jus in bello* principles grew out of treaties regulating some of the very first battles, such as the 1975 Treaty of Amity and Commerce between Prussian and the United States.[81] Many of the IHL principles are encapsulated in the Geneva Conventions and the Law of the Hague.[82] In addition to treaties, the other main source of regulations placed on conduct on the battlefield is custom. The entire body of treaty-based and customary international law is referred to as the Law of Armed Conflict (LOAC), or International Humanitarian Law (IHL).[83]

States have different obligations in armed conflicts depending on the status of each as a party or non-party to the Hague and the Geneva Conventions.[84] The International Court of Justice (ICJ) summed up these two complex sets of laws in one of its 1996 Advisory Opinions.[85]

> [The] Hague Law and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. . . . [T]he Geneva Law…which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system,

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79. U.N. Charter, arts. 40–42.

80. SOLIS, *supra* note 6, at xxix.

81. *Id.* at 14.

82. *Id.* at 12.

83. *Id.* at 23 (noting that LOAC and IHL, although technically different, essentially have the same meaning, particularly among academics and the International Committee of the Red Cross).

84. For a complete listing of the Hague Conferences and Geneva Conventions, see Avalon Project, Yale Law School Lillian Goldman Law Library, *available at* http://avalon.law.yale.edu/subject_menus/lawwar.asp (last viewed Jan. 2, 2015). For a quick reference guide on which States are parties to which Geneva Conventions, see ICRC Annual Report 2013, Volume I, at 610, *available at* https://www.icrc.org/eng/assets/files/annual-report/icrc-annual-report-2013.pdf (2013); and, for a listing of which States are parties to which Hague Conventions, *see* ICRC Treaties and States Parties to Such Treaties, *available at* https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByDate.xsp (last viewed Jan. 2, 2015). *See also* SOLIS, *supra* note 6, at 132 (noting that nearly thirty years after the Additional Protocols were opened for ratification, the United States has ratified neither).

85. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 66, ¶ 75, at 256 (internal quotations omitted).

known today as international humanitarian law.

The United States is a party to the Hague Conferences of 1899 and 1907 (with some reservations),[86] the 1949 Geneva Conventions, and the Geneva Conventions 2005 Additional Protocol III, but not Additional Protocols I and II.[87] Additional Protocol I focuses the vast majority of its Articles on international armed conflicts,[88] and Additional Protocol II covers rules related to non-international armed conflicts.[89] Even under the obligations of the Conventions to which the United States is a party, many gaps remain in the laws related to armed conflict. The United States thus looks to customary international rules to shape its operations, including some provisions of Additional Protocols I and II, which it considers to be customary international law.[90] Specific provisions are discussed in further detail later in this Article.

Like the United States, Israel is a party to the 1949 Geneva Conventions and the 2005 Additional Protocol III only (thus, not a party to either Additional Protocol I or II).[91] Still, Israel's obligations are somewhat different than the United States. Although similar in party status to the Geneva Conventions, Israel is conducting RPA targeted killing operations in areas which it is considered to be the occupying power.[92] Convention IV of the 1949 Geneva Conventions includes specific rules that place obligations on the occupying power.[93]

The United Kingdom is party to many legal conventions that the United States and Israel are not, and thus obligated to follow various rules that the other two countries do not. For example, in addition to many of

86. For a complete listing of all the Hague Conventions, see ICRC Treaties and States Parties to Such Treaties, *available at* https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByDate.xsp (last viewed Jan. 2, 2015).

87. *See* ICRC Annual Report 2013, *supra* note 84, at 610.

88. *See* 1977 Geneva Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50–51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

89. *See* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13, June 8, 1977, 1125 U.N.T.S. 60 [hereinafter Additional Protocol II].

90. SOLIS, *supra* note 6, at 134 (discussing that in 1987, a high-ranking legal advisor at the U.S. Department of State stated that of the 91 substantive Articles in Additional Protocol I, the United States considers 59 to be customary international law; and in the early 1990s, the Department of Defense affirmed that most of the Protocol I provisions are "binding on all" as a "codification of the customary practice of nations").

91. *See* ICRC Annual Report 2013, *supra* note 84, at 610.

92. H.C.J. Opinion, *supra* note 50, ¶ 18.

93. Geneva Convention III, *infra* note 96. The Hague IV Convention also includes rules related to belligerent occupation, but Israel is only a party to Hague Convention I, Laws of War: Pacific Settlement of International Disputes (Oct. 18, 1907). *See* Avalon Project, *supra* note 84.

the Hague Articles of 1898 and 1907 (with reservations),[94] the 1949 Geneva Conventions, and the 2005 Additional Protocol III, the United Kingdom is also a party to both of the Additional Geneva Protocols I and II of 1977.[95]

Whether the parties to the armed conflict are in an international armed conflict or a non-international armed conflict is important because different parts of the Geneva Conventions apply depending on which type of armed conflict is being fought. More specifically, more protections flow from the Conventions in the case of international armed conflicts than non-international armed conflicts.[96] In accordance with the division between Additional Protocols I and II related to international and non-international armed conflicts, IHL is divided between those rules that apply to international armed conflict and non-international armed conflict.[97] International armed conflicts are those between states. Non-international conflicts are "armed conflict[s] not of an international character occurring in the territory" of a state.[98] These internal armed conflicts include "armed uprisings, sustained insurrections, [and] civil wars."[99]

In addition to *jus ad bellum* and *jus in bello*, RPA targeted killing operations also implicate IHRL.[100] This is because IHRL is the legal regime that applies outside of armed conflicts and controls civil enforcement.[101] As an example of the difference between IHL and IHRL, IHRL limits the state's authority to kill in self-defense or immediate defense of others, in other words, situations where an individual poses an imminent risk of death or serious injury to herself or others.[102] Under

94. *See* ICRC Treaties and States Parties to Such Treaties, *supra* note 84.

95. *See* ICRC Annual Report 2013, *supra* note 84, at 610.

96. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention 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 Geneva Convention II]; 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 Geneva Convention III]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention IV].

97. SOLIS, *supra* note 6, at 23.

98. *Id.*

99. *Id.*

100. Some scholars argue that IHRL should always apply and other scholars debate whether IHRL applies at all to operations against terrorists, even outside areas of armed conflict. This Article addresses this debate in further detail below.

101. Alston, *supra* note 18, at 301–03 ("To the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from IHRL.") (citing multiple I.C.J. opinions).

102. *Id.* at 303–04; Carla Crandall, *Ready . . . Fire . . . Aim! A Case for Applying American Due Process Principles Before Engaging in Drone Strikes*, 24 FLA. J. INT'L L. 55, 66 (2012)

IHRL, states are allowed to target and kill combatants or civilians who are participating directly in hostilities.[103] Therefore, under IHRL, the authority to kill is not as broad as the authority under IHL.[104] Additionally, IHRL requires higher standards of protecting civilians as well as accounting for combatant and civilian casualties.

This Article addresses rules of IHRL and how they relate to RPA targeted killing operations in further detail in subsequent Parts. To preface that discussion, two other Conventions are of particular significance to this Article. First, the International Convention on Civil and Political Rights (ICCPR) is one of the leading Conventions in IHRL and all three countries are parties to it.[105] Although also a party, the United States does not believe that it has extraterritorial application, a position that faces some scrutiny.[106] Israel's position has similarly been that the ICCPR does not apply to the individuals within the territories it occupies because the individuals were not subject to Israel's jurisdiction.[107] However, the ICJ disagrees and asserts that the ICCPR is "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[108]

Second, the United Kingdom is also party to the European Convention

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(noting that IHRL condemns the arbitrary deprivation of life and allows a State to use lethal force against an individual "not in custody only if necessary to prevent him from posing a threat of death of serious injury to others").

103. *See* Additional Protocol I, *supra* note 88; Additional Protocol II, *supra* note 89.

104. Radsan & Murphy, *supra* note 4, at 1205.

105. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, 176.

106. Matthew Waxman, Head of U.S. Delegation, Principal Deputy Director of Policy Planning, Dep't of State, Opening Statement to the U.N. Human Rights Committee (July 17, 2006), http://2001-2009.state.gov/s/p/rem/69126.htm ("[I]t is the long-standing view of the United States that the Covenant by its very terms does not apply outside of the territory of a State Party."); *see also* Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, Naval War College International Law Studies Vol. 90-20 (2014) (discussing the history of the U.S. position that the ICCPR, along with other Human Rights treaties, does not apply extraterritorially and ultimately challenging the position); U.S. ARMY, OPERATIONAL LAW HANDBOOK, The Judge Advocate General's Legal Center and School, at 46–48 (2010) [hereinafter U.S. ARMY, OPERATION LAW HANDBOOK] (discussing that the ICCPR is "expressly non-extraterritorial" in the context of explaining how IHRL's "original focus" was only on persons living within the territory of the United States and "not to any person with whom agents of the [the U.S.] government deal outside of [U.S.] borders").

107. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 110–12 (July 9, 2004) [hereinafter I.C.J. Opinion]; *see also* Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17, 26 (2003–04) ("Although [Israel] is a party to the leading human rights treaties, consecutive Israeli governments have steadfastly objected to their application in the Occupied Territories.")

108. I.C.J. Opinion, *supra* note 107, at 111.

on Human Rights (ECHR).[109] While much of the language of the ECHR is similar to that of the ICCPR, it includes some rights that are more expansive than those in the ICCPR. Additionally, perhaps even more significant for issues specific to RPA targeted killing operations, a full body of law decided by the European Court of Human Rights that obligates the United Kingdom in the field of IHRL beyond obligations on the United States and Israel exists.

IV. APPLICATION OF *JUS AD BELLUM*

This Part focuses specifically on how the United States, United Kingdom, and Israel apply the *jus ad bellum* principles to their RPA targeted killing operations. Because the lawfulness of resorting to the use of armed force applies differently to each country in which the United States, the United Kingdom, and Israel are conducting RPA targeted killing operations, this Part is further divided into subsections by location.

A. *United States*

1. Afghanistan and Iraq

On September 12, 2001, the U.N. Security Council unanimously passed a resolution recognizing the U.S. right of self-defense to respond to the terrorist acts of September 11 and calling on all U.N. Member States to work together to bring terrorists to justice.[110] Thus, the Security Council gave direct authorization for the United States to enter Afghanistan and use force against terrorists there.

The situation in Iraq is different. Throughout the 1990s and early 2000s, the Security Council passed a number of resolutions related to Iraq, including demanding Iraq to withdraw from Kuwait and all Member States to take all necessary means to uphold and implement the

109. Parties to the European Convention on Human Rights are the Members of the Council of Europe, as stated in the Preamble of the Convention. Copy found at http://www.echr.coe.int/Documents/Convention_ENG.pdf, and Members of the Council are listed on the Council of Europe's website, found at http://www.coe.int/en/web/portal/country-profiles. Of note, while the United States is a member of the Organization of the American States, it has not ratified the American Convention nor accepted jurisdiction of the Inter-American Court of Human Rights. Thus, at this time, any obligations that may be imposed on the United States by the Inter-American Court of Human Rights are not as fully developed as those of the European Court of Human Rights on the United Kingdom, and they are not accepted as obligations by the U.S. government, unlike the United Kingdom. For a complete listing of the Member States of the OAS, as well as information about its structure, *see* http://www.oas.org/en/about/member_states.asp (last visited Jan. 2, 2015).

110. S.C. Res. 1368, ¶¶ 3–4, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

demand,[111] and giving Iraq the "final opportunity" to disarm all its biological and chemical weapons.[112] The United States attempted to get a Security Council Resolution to specifically enter Iraq in the early 2000s, but was unsuccessful.[113] The United States and coalition forces including the United Kingdom, entered Iraq in March 2003 without a U.N. Security Council Resolution due to the threat of weapons of mass destruction, as well as the Iraqi government's continuous declination to follow the demands of the Security Council and its numerous human rights abuses.[114]

After the United States and coalition forces ousted Saddam Hussein from power just two months later, the nature of the armed conflict there changed. A new Iraqi government was appointed and the United States and coalition forces remained there to assist the new government against insurgents.[115] Thus, rather than an international armed conflict between the United States and Iraq, the conflict became a non-international armed conflict between al Qaeda terrorists and the Iraqi government, assisted by the United States and coalition forces.[116]

Because the United States was engaged in armed conflicts in Iraq and Afghanistan, the issues related to consent are different than in those countries outside the zones of active hostilities. Regardless of whether one takes the position that the initial U.S. entry into Iraq was lawful, once the armed conflict became an internal non-international armed conflict between the Iraqi government, with the assistance of the United States and coalition forces, and terrorists, the question of the lawfulness of RPA targeted killing operations from the *jus ad bellum* perspective was different than for those countries where active hostilities are not ongoing. In other words, since the United States was already in an ongoing conflict there, engaging in active hostilities, the more important questions surrounding RPA targeted killing operations relate to *jus in bello* rules.

2. Yemen

The U.S. RPA operations in Yemen provide an example of the lawful use of force in another State based on that State's consent.[117] In May 2013, Attorney General Eric Holder specifically stated that RPA

111. S.C. Res. 678, ¶ 1–2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

112. S.C. Res. 1441, ¶ 2, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

113. *See President Bush Meets with Prime Minister Blair*, Remarks by the President and Prime Minister, WHITEHOUSE.GOV (Jan. 31, 2003), http://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030131-23.html [hereinafter Remarks by the President and Prime Minister].

114. *Id.*

115. SOLIS, *supra* note 6, at 218–19.

116. *Id.* at 219.

117. Blum & Heymann, *supra* note 11, at 150.

operations in Yemen since 2009 were conducted with Yemeni consent.[118] Furthermore, the Yemeni Government acknowledged that the United States sought prior consent for RPA strikes and would not conduct the strike if Yemen objected.[119]

However, that may be changing. The President of Yemen and the Yemeni House of Representatives are seemingly in disagreement on whether the strikes should continue.[120] In December 2013, the Yemeni House of Representatives passed a resolution requesting that RPA strikes be prohibited.[121] The vote was nearly unanimous for the non-binding resolution and was called a "strong warning to both the United States and the government of Yemeni President" by a Yemeni government official.[122] Despite the passage of the resolution, the United States continues to conduct RPA targeted killing operations in Yemen, such as two in April 2014, which reportedly killed at least fifteen terrorists and three civilians.[123]

3. Pakistan

Whether Pakistan consents to U.S. RPA operations there continues to be the source of debate.[124] On the one hand, Pakistani officials adamantly deny any support for the U.S. use of RPAs in their country as "counter-productive, contrary to international law, a violation of Pakistan's sovereignty and territorial integrity," and they declare that they should cease immediately.[125]

On the other hand, in late 2013, classified documents were leaked to the media evincing secret consent by Pakistani officials for years.[126] If

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118. Holder Letter, *supra* note 30, at 3.

119. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Third Report on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Human Rights Council, ¶ 29, U.N. Doc. A/HRC/25/29 (Feb. 28, 2014) (by Ben Emmerson) [hereinafter *Emmerson Third Report to H.R.C.*].

120. Hakim Almasmari, *Drone Strikes Must End, Yemen's Parliament Says*, CNN.COM (Dec. 15, 2013), http://www.cnn.com/2013/12/15/world/meast/yemen-drones/.

121. *Id.*

122. *Id.* (internal citations omitted).

123. Peter Bergen, *Obama's High-Stakes Drone War in Yemen*, CNN.COM (Apr. 21, 2014), http://www.cnn.com/2014/04/21/opinion/bergen-yemen-obama-drone-war/index.html.

124. *Id.*

125. Ben Emmerson, *Statement of the Special Rapporteur Following Meetings in Pakistan*, U.N. Human Rights Office of the High Commissioner (Mar. 14, 2013), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13146&LangID=E.

126. Greg Miller & Bob Woodward, *Secret Memos Reveal Explicit Nature of U.S., Pakistan Agreement on Drones*, WASH. POST (Oct. 23, 2013), http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html; *see also* McNeal, *supra*

true, this revelation that Pakistani government officials consented to the RPA strikes is a game-changer related to *jus ad bellum* because it means the United States relied on consent for the operations, rather than the "unable or unwilling" test discussed below. As further evidence of at least some cooperation between the U.S. and Pakistan governments, in February 2014, the United States curtailed RPA strikes at the request of the Pakistani government while Pakistan engaged in peace talks with the Pakistani Taliban.[127] However, the strikes resumed in June.[128]

Even in the absence of consent, the United States asserts that it can legally carry out operations in countries such as Pakistan when they are unable and unwilling to act.[129] The United States claims to be acting in self-defense. Rather than wait for the threat to materialize into an attack on the United States, the President is choosing to act anticipatorily under the "unable or unwilling" test, based in customary international law.[130] In other words, the United States claims the right to conduct RPA targeted killing operations in other countries, regardless of the country's consent, after concluding that "the relevant governmental authorities in the country where the action is contemplated cannot or will not effectively address the threat to the U.S. persons."[131]

The "unable or unwilling" test is not a new legal basis for entering another country's territory.[132] The United States first used the "unable or unwilling" test against the Seminole Indians in Spanish Florida in 1817-1818, and again in 1836, against the Mexican Indian tribes in Mexico.[133] The United States did not rely on the "unable or unwilling" test to justify the use of force for over one hundred and fifty years, but has relied on it

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note 19, at 697–98 (discussing the evidence that Pakistan has consented to the strikes in their territory).

127. Karen DeYoung & Greg Miller, *U.S. Said to Curtail Drone Strikes in Pakistan as Officials There Seek Peace Talks with Taliban*, WASH. POST (Feb, 4, 2014), http://www.washingtonpost.com/world/national-security/us-curtails-drone-strikes-in-pakistan-as-officials-there-seek-peace-talks-with-taliban/2014/02/04/1d63f52a-8dd8-11e3-833c-33098f9e5267_print.html.

128. *See* NEW AMERICA FOUNDATION, *supra* note 19; Ismail Khan & Declan Walsh, *Missile Strike by C.I.A. Drone Kills at Least 4, Pakistan Reports*, N.Y. TIMES, June 11, 2014, http://www.nytimes.com/2014/06/12/world/asia/missile-strike-by-cia-drone-kills-at-least-4-pakistan-reports.html?_r=0.

129. Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 485–86 (2012).

130. For an in-depth look at the history of the "unwilling or unable" doctrine, see *id.* at 483.

131. White House Press Release, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, at 2 (May 23, 2013), http://www.fas.org/irp/offdocs/ppd/ppg-fs.pdf [hereinafter White House Fact Sheet].

132. *See* Deeks, *supra* note 129, app. A.

133. *Id.*

much more frequently in recent years.[134] Specifically, according to one scholar, the United States used the "unable or unwilling" test as justification for taking action in other countries at least nine times, many of these actions taking place since 1998.[135]

Publicly, in the absence of Pakistani government officials admitting consent, the United States is relying heavily on the "unable or unwilling" doctrine to justify its actions in Pakistan.[136] The U.S. position is that terrorists who are actively planning future operations against American civilians cannot be allowed to hide within countries that lack the security and infrastructure to address the threat.[137] Thus, the United States will make a determination whether the other state is unable or unwilling to "deal effectively" with the threat before ordering the RPA operation.[138] If the state cannot, then the United States argues it is legally authorized to eliminate the threat itself.[139] In this way, some argue, "[a]ctive self-defense (in the form of targeted killing), if properly executed, not only enables the State to more effectively protect itself within a legal context but also leads to minimizing the loss of innocent civilians caught between the terrorists (who regularly violate international law by using innocents as human shields) and the State."[140]

A Department of Justice (DOJ) White Paper, leaked to the media in February 2013, gives a little further guidance regarding factors

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134. *Id.*

135. *See id.*

136. President Obama Speech, *supra* note 1 (insisting that the United States will "act against terrorists who pose a continuing and imminent threat to the American people and when there are no other governments capable of effectively addressing the threat"); McNeal, *supra* note 19, at 695–98 (noting that the U.S. reliance upon the "unable or unwilling" test has been controversial).

137. President Obama Speech, *supra* note 1 (asserting the United States will respond when "foreign governments cannot or will not effectively stop terrorism in their territory[.]").

138. Holder, *supra* note 29; s*ee also* Koh, *supra* note 28 ("whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including . . . the willingness and ability of those states to suppress the threat the target poses"); Department 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, White Paper, at 1–2, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter DOJ White Paper] (Feb. 4, 2013).

> [A] lethal operation in a foreign nation would be consistent with international legal principles of sovereignty and neutrality if it were conducted . . . with the consent of the host nation's government or after a determination that the host nation is unable or unwilling to suppress the threat posed by the individual target.

Id.

139. Holder, *supra* note 29.

140. Guiora, *supra* note 6, at 324. *See also* Deeks, *supra* note 129, at 503 ("that the test migrated into the world of non-state actors is not surprising, because the equities of the affected states are similar in each scenario").

considered when deciding whether the United States can enter a state unable or unwilling to act in order to counter a terrorist threat.[141] The DOJ advised that an RPA operation targeting the enemy can be conducted as part of the ongoing armed conflict, even if the enemy moves its base from one country to another.[142] Whether the armed conflict is ongoing is a determination based on the particular facts and circumstances in each case.[143] Thus, the fact "that transnational non-state organizations such as al-Qa'ida may have no single site serving as their base of operations" weighs in favor of an RPA operation if it "were to occur in a location where al-Qa'ida or an associated force has a significant and organized presence and from which al-Qa'ida or an associated force, including its senior operational leaders, plan attacks against U.S. persons and interests."[144] But, it should be conducted only after a determination that the individual poses an imminent threat of attack, capture is infeasible, the operation would be conducted in a manner consistent with the laws of war, and "after a determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted."[145]

4. African Countries

All indications are that the RPA operations thus far conducted in African countries have been done with the consent of the relevant country involved.[146] The exception to this may be in Somalia, where it is unclear if the United States is acting with the consent of the Somalian government against al Shabaab and al Qaeda terrorists, or whether the United States is relying on the unable or unwilling test.[147]

B. *United Kingdom*

1. Afghanistan and Iraq

The issue of consent for RPA operations in Iraq and Afghanistan is different than for other countries outside the zones of hostilities. Since the United Kingdom was involved in an armed conflict as a coalition partner to the United States and others, against terrorists in Iraq and

141. DOJ White Paper, *supra* note 138, at 1–2.
142. *Id.* at 4.
143. *Id.*
144. *Id.* at 4–5.
145. *Id.* at 1, 5.
146. *See* Harris & Hirsch, *supra* note 34.
147. *See* Bureau of Investigative Journalism, http://www.thebureau investigates.com/2012/02/22/get-the-data-somalias-hidden-war/ (giving a detailed description of the history of suspected RPA strikes in Somalia and discussions about them from U.S., U.K., and Somalia government officials).

Afghanistan, the legal questions related to RPA targeted killing operations become *jus in bello* questions, rather than *jus ad bellum*.[148]

2. Libya

In Libya, the United Kingdom and United States, as members of NATO, were operating pursuant to a U.N. Security Council Resolution authorizing Member States to "take all necessary measures" to protect civilians there against threat of attack.[149] Therefore, the two countries acted with the authorization of the Security Council and did not need to rely on another *jus ad bellum* principle for use of force there.

3. The Unable or Unwilling Test?

Although the United Kingdom has not conducted RPA targeted killing operations in other countries outside of active hostilities, the United Kingdom has historically relied on the "unable or unwilling" test being used by the United States. Perhaps the most well-known use of the unable or unwilling test was in 1837 when the United Kingdom used the test to justify action in the United States against U.S. citizens who sympathized with Canadian rebels.[150] The U.S. citizens used the *Caroline*, a private merchant ship, to provide arms and supplies to the Canadian rebels.[151] A British raiding party crossed the Niagara River into New York, where the ship was moored, set the ship on fire, and sent it over the falls, killing two Americans in the process.[152]

The United States contested the U.K. actions.[153] Former Secretary of State Daniel Webster argued that the U.K. acts did not constitute self-defense, which he said should be limited to situations where there is an actual threat, one so "instant, overwhelming, and leaving no choice of means [or] moment of deliberation," the response must be essential and proportional, and all peaceful means of resolving the dispute have been exhausted.[154] Thus, Secretary of State Webster identified the essential elements of the "unable or unwilling" test—immediacy, necessity, and proportionality.[155]

The United Kingdom has relied on the "unable or unwilling" test five

148. *See* Remarks by the President and Prime Minister, *supra* note 113, at 1–3 (providing evidence of the United States and the United Kingdom working together to fight terrorism.

149. S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

150. Deeks, *supra* note 129, at 549.

151. JAMES BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 197 (2007).

152. *Id.*

153. Deeks, *supra* note 129, at 501–02; BAKER, *supra* note 151, at 140.

154. BAKER, *supra* note 151, at 197; Guiora, *supra* note 6, at 323.

155. BAKER, *supra* note 151, at 197.

times to justify the lethal use of force in other countries.[156] All of these uses, however, were before 1940.[157] Thus, the United Kingdom has not used the "unable or unwilling" doctrine to justify action in another country since Article 51 of the U.N. Charter was ratified.

Even so, the "unable or unwilling" test is part of the current U.K. military manual on the Laws of Armed Conflict.[158] It provides that:

> Neutral states must refrain from allowing their territory to be used by belligerent states for the purposes of military operations. If a neutral state is unable or unwilling to prevent the use of its territory for the purposes of such military operations, a belligerent state may become entitled to use force in self-defence against enemy forces operating from the territory of that neutral state. Whether or not they are so entitled will depend on the ordinary rules of the *jus ad bellum*.[159]

C. *Israel*

1. Gaza Strip, Judea, Samaria

Israel operates in the Gaza strip to counter terrorist threats there based a claim of individual self-defense.[160] The Israeli High Court of Justice confirmed that the State is acting in self-defense stating that "the State of Israel is under a constant, continual, and murderous wave of terrorist attacks, directed at Israelis . . . without any discrimination between combatants and civilians or between men, women, and children."[161] Recalling the events of September 11, 2001 in the United States, the Court notes that the international community and international organizations have defined such terrorist acts as "armed conflict justifying the use of counterforce."[162]

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156. Deeks, *supra* note 129, app. A.

157. *Id.*

158. *See* THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, JOINT SERVICE PUBLICATION 383, ¶ 1.43a (2004) [hereinafter U.K. LOAC Manual], https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf [hereinafter J.S.P. 383].

159. *Id.*

160. H.C.J. Opinion, *supra* note 50, ¶ 1; State of Israel, *Operation in Gaza, 27 December 2008 – 18 January 2009: Factual and Legal Aspects* ¶ 3 (July 2009), http://www.mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf [hereinafter *Operation in Gaza*] (in justifying military action in Gaza in December 2008-January 2009, noting that "Israel has both a right and an obligation to take military action against Hamas in Gaza to stop Hamas' almost incessant rocket and mortar attacks upon thousands of Israeli civilians and its other acts of terrorism").

161. H.C.J. Opinion, *supra* note 50, ¶ 16 (internal citations omitted).

162. *Id.* (internal citations and quotations omitted).

Israel conducts the targeted killing as a necessary condition to saving lives, and only when no other alternative exists.[163] Although the ICJ rejects Israel's right to claim self-defense in the territories it occupies, the Court recognized Israel's right to act against the "numerous indiscriminate and deadly acts of violence against its civilian population."[164] The ICJ further states that it is not only Israel's right, but its duty to protect the life of its citizens.[165]

2. The Unable or Unwilling Test?

Israel has used the unable or willing test to justify use of force in other countries, though not as often as the United States.[166] Specifically, Israel has invoked the doctrine to justify the use of force in another country five times, from 1978 through 2006.[167] The 2006 operations took place in the southern part of Lebanon against Hezbollah.[168]

In July 2006, Hezbollah sent militants across the southern border of Lebanon into Israel, who then ambushed Israeli soldiers, killing three and kidnapping two others.[169] Israel promised to retaliate and fired rockets and sent ground troops into Lebanon.[170] The government also pressured Lebanon to reign in and disarm Hezbollah, but because Lebanon has "always failed" to do so, Israel decided to respond on its own and crossed into the territory of Lebanon.[171]

D. *Comparing the Countries: The Unable or Unwilling Test*

The first major point from the preceding paragraphs to be gleaned from comparing the countries is that, while the United States may be relying on the "unable and unwilling" test more frequently than the United Kingdom or Israel, it is not alone in doing so to respond to terrorist attacks originating in another country.[172] All three countries studied have historically relied on the test, and Israel as recently as 2006 in its armed

163. *Id.* ¶ 13.

164. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 141 (July 9).

165. *Id.*

166. Deeks, *supra* note 129, app. A.I.

167. *Id.*

168. *Id.* at 486.

169. Martin Fletcher, *Regional Tensions Fuel Lebanon-Israel Clashes*, NBC NEWS (July 12, 2006), http://www.nbcnews.com/id/13827858/ns/world_news-mideast_n_africa/t/regional-tensions-fuel-lebanon-israel-clashes/#.U1VAnyDD9jo.

170. *Id.*

171. *Id.*

172. Deeks, *supra* note 129, app. I.

conflict against Hezbollah.[173] The factors relied upon by both the United States and Israel to invoke the principle as a legal basis for entering another country are very similar—an ongoing armed conflict exists, one that involves constant, continual, and fatal terrorist attacks, it poses imminent threats to the country's citizens, there is no other alternative other than a targeted killing (in other words, capture is infeasible), and the nation hosting the terrorist threat is unable or unwilling to suppress the threat.[174]

The second major point is that despite the fact that all three countries have relied on the test, the United States is the biggest user.[175] The United Kingdom has not relied on the principle since the U.N. Charter came into being to govern state relations.[176] Thus, it is hard to know whether the United Kingdom no longer believes the test has any force as a legal justification for the use of force in another country. On the other hand, it is still a part of the U.K. military manual on LOAC, which indicates at least that the U.K. MOD does not want to foreclose the possibility that it may use it in the future.[177] While Israel used it to justify operations in Lebanon against Hezbollah, Israel has not conducted operations in as many other countries or as far away from its own borders as the United States.[178]

At the very least, the test has a historical basis in all three countries, and has been used recently by the United States and Israel.[179] While no set of list of factors have been established to determine when a state can use the test,[180] the factors used by the United States and Israel to invoke the test, listed above, are very similar.[181] However, the pressing question that remains is what it means to determine that a state is "unable or unwilling" to act. The inability to act could be based on a whole host of factors, including a lack of resources or the lack of political will. If the third-party is specifically providing a safe haven to or otherwise aiding the non-state actors, then the ability to respond in that state's territory is more easily justified than if the third-party state is simply not responding to the threat. Another possibility is that the State wants to combat the threat, is claiming that it has the ability to combat the threat, but is actually unable to do so.[182]

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173. *Id.*
174. *See supra* text accompanying notes 141–45 & 160–65.
175. Deeks, *supra* note 129, app. I.
176. *Id.*
177. *Id.* at 500.
178. *Id.* app. I.
179. *Id.*
180. *Id.* at 506.
181. *Id.* at 505.
182. *Id.*

Based on jurisprudence from the ICJ,[183] some argue that states can only rely on the "unwilling or unable" test to justify actions in third-party states for acts by non-state actors if the acts of the non-state actors are actually imputable to the state.[184] Special Rapporteur Alston argued that the "reality is that it will only be in very rare circumstances that a non-state actor whose activities do not engage the responsibility of any state will be able to conduct the kind of armed attack that would give rise to the right to use extraterritorial force," and thus, Security Council approval should be sought each time.[185]

Since the establishment of the U.N. Security Council, approval should be the default position every time that a state wants to use force in another state.[186] But that seemingly straight-forward requirement does not necessarily contradict the legality of the "unable or unwilling" test.[187] It does not equate getting Security Council approval for the use of force in a particular country or against a particular terrorist group with getting Security Council approval for every operation in that country or against that group. In an armed conflict, that would be impracticable. If terrorists find safe haven simply because they cross over from Afghanistan to Pakistan or Israel to Lebanon, allowing them to conduct or complete an attack that kills innocent civilians, it surely cannot be that a country must pause its operation to get Security Council approval to respond.

One key factor to determining when a state must get Security Council approval may be the imminence of the threat from the non-state actor. And, "[t]here is evidence that in drawing up the Charter many states assumed that the inherent right to self-defence includes the right to use force against an imminent attack if the conditions of the *Caroline* test are met, namely that a state is faced with the threat of an armed attack which presents a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment of deliberation."[188] In other words, the legality of the responding State interfering with the third-party state's sovereignty diminishes as the imminence of the threat from the non-state actor diminishes.[189] This factor would have to be determined on a case-

183. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9) (determining that Article 51 did not apply to Israel's self-defense claim because Israel does not claim that the acts were not imputable to a foreign state).

184. Special Rapporteur Report (Emmerson), *supra* note 38, ¶ 55; Special Rapporteur Report (Alston), *supra* note 76, ¶ 40.

185. Special Rapporteur Report (Alston), *supra* note 76, ¶ 40.

186. Kretzmer, *supra* note 78, at 247–48.

187. *Id.* at 248.

188. *Id.*

189. *Id.* at 182.

The need to use lethal force in order to prevent that violence might be immediate,

by-case basis, dependent on the non-state actor and the most current intelligence regarding his latest activities.[190]

States should not have to sit by and wait for attack before they can respond in the face of a third-party state that is unable to combat the terrorist threat itself. As an example, the acts conducted against Israel in 2006 were from terrorists located in Lebanon. The government of Lebanon has been unable to stop the terrorist threat within its borders from attacking Israel and kidnapping some of its military members.[191] Because the terrorists entered the territory of Israel, Israel responding by following them across the border back into Lebanon to counter any further attack, where Lebanon is unable to respond to the threat itself, is an example of justifiable lawful self-defense.

The situation in Israel in 2006 is a bit different than the RPA targeted killing operations by the United States in Pakistan which are done not in response to an attack, but in anticipation of an imminent threat. Again, the key may be the application of the principles of imminence of the threat of attack, necessity to respond to the attack, and proportionality in response. Of course, the situation in Pakistan is further complicated by the question of whether Pakistan is consenting to the U.S. operations there. If the state is giving its consent, surely the state with the ability to respond to the imminent threat should not be forced to wait on Security Council approval to act on the basis of that consent.

Even without Pakistani consent, United States consistently asserts that it must conduct these operations to stop an imminent attack against the United States from a significant threat, an individual that cannot be captured, and must be killed to be stopped. Assuming the intelligence gathered by the United States on particular individuals proves that this is true, the necessity principle is likely satisfied. Additionally, assuming it is true that the individual cannot be captured and is planning an imminent attack on the United States, then perhaps proportionality is satisfied as well. If the President, in deciding to target and kill an individual is saving the lives of tens or hundreds of Americans, then the strike on that one individual is proportional.

The imminence principle is harder to satisfy. Research indicates that U.S. government officials engage in a lengthy evaluation process before making the determination that a particular individual must be targeted.[192]

> since if such force is not used now it may not be possible to prevent the violence later. This may be what has been termed the last window of opportunity to frustrate further terrorist attacks.

Id.

190. *Id.*

191. *Id.*

192. McNeal, *supra* note 19, at 702 (describing in detail the process for determining who

This indicates that the United States is applying a much broader interpretation of imminence to RPA targeted killing operations than that implied by the doctrine articulated by Secretary Webster in response to the Caroline incident.[193] Secretary Webster said the attack must be so instant and overwhelming, as to leave "no choice of means and no moment of deliberation."[194] The nature of RPA operations is so different than an attack on a moored merchant vessel that perhaps Secretary Webster's description of imminence does not really apply to RPA operations. What RPA operations do provide is a much greater amount of information, through surveillance and intelligence-gathering, than what military operators had in the days of the Caroline incident.[195] They also provide the ability to abort the strike up until right before it happens.[196] But, it is still unclear what "imminence" really means from the position of the U.S. government.

Despite the unsettled nature of the definition of "imminence" as part of the "unwilling or unable" test, the nature of conflict against terrorists supports its use.[197] Particularly in those states where terrorists can find safe harbor, where terrorists can hide in regions unreachable by law enforcement, where the state's own enforcement mechanisms are unable to suppress the threat due to the lack of manpower and resources, this principle is vital to the self-defense of the respondent state.[198] "The fact that the 'unwilling or unable' test finds its roots in neutrality law anchors the test's legitimacy – even in the test's current skeletal form and, in so doing, may enhance what Franck terms its 'compliance pull.'"[199] Furthermore, advancements in technology make the "unable and willing" test apply in ways that were previously unavailable.

Therefore, despite the ICJ's decision and the United Kingdom's non-use of the doctrine since 1940, the United States, Israel, and other states will likely continue to use the "unable or unwilling" justification. But, they should do so with constraint applied by factors that should be considered each and every time before use of the RPA to target the terrorist threat, including imminence, necessity, and proportionality.

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will be added to the "kill list," how that person is found, tracked, and targeted).

193. *Id.*

194. Kretzmer, *supra* note 78, at 247–48.

195. *Compare* McNeal, *supra* note 19, at 702 (describing the detail process for RPA targeted killing operations), *with* Kretzmer, *supra* note 78, at 248 (stating the Caroline test is met when an attack is overwhelming and leaving "no choice of means and no moment of deliberation.").

196. *See* McNeal, *supra* note 19, at 704.

197. *See generally* Deeks, *supra* note 129.

198. *Id.*

199. *Id.* at 497; Kenneth Anderson, *Stop Presses: "Even Eric Posner Says Drone Strikes in Pakistan are Illegal*," LAWFARE (Oct. 9, 2012), http://www.lawfareblog.com/2012/10/stop-presses-even-eric-posner-says-drone-strikes-in-Pakistan-are-illegal/#.Uvjp_yAo5jo (discussing the longstanding U.S. position that the "unwilling or unable" test can be used in self-defense).

This last point requires further emphasis. Accepting the "unable or unwilling" test as a justification for states to overcome the limitations of sovereignty when that state wants to eliminate a threat emanating from another country merely addresses one part of the question of whether a state can use force in that country. More specifically, the "unable or unwilling" test gives rise to a right to self-defense for the United States to enter Pakistan, for example, to address a threat of a terrorist attack against it that the Government of Pakistan is unable or unwilling to address. However, in accordance with the Caroline test, decision-makers within the United States must look not only to the imminence of the attack, but also the necessity and proportionality of responding with an RPA targeted killing operation before making the decision to respond with force in Pakistan's sovereign. These two principles—necessity and proportionality—are rooted in IHL and discussed in further detail in the next Part.

V. *JUS IN BELLO* AND FILLING THE GAPS WITH IHRL

A. *IHL or IHRL?*

In addition to debates about the application of *jus ad bellum*, another set of legal criticisms of the use of RPAs in targeted killings concerns *jus in bello* principles, including which regime, IHL or IHRL applies, and the extent to which human rights law should fill any gaps in IHL.[200] IHL is divided between those rules that apply to international armed conflict and non-international armed conflict.[201] The plain language of the Geneva Conventions indicates that those provisions that apply to international armed conflicts do not apply to armed conflicts with terrorist groups, who are not parties to the Conventions.

Furthermore, the rules related to non-international armed conflicts arguably do not apply when fighting against terrorists because global fights against terrorism do not easily qualify as uprisings, insurrections,

200. Not surprisingly, scholars come down on all sides of the debate. *Compare* Radsan & Murphy, *supra* note 4, at 1205, 1208 (determining that IHL should apply because it controls killing in armed conflict and grants broad authority to kill combatants and civilians taking direct part in hostilities), *with* Kretzmer, *supra* note 78, at 189 (because both Common Article 3 of the GC and Article 1(1) of Additional Protocol II to the GC relate to conflicts occurring within the territory of a state party, "this would seem to imply that the rules and principles regarding non-international conflicts are reserved for internal domestic armed conflicts, and do not apply to a conflict between a state and a terrorist group acting from outside its territory"), *and* Crandall, *supra* note 102, at 71 (determining that RPA strikes are unlawful because terrorists qualify neither as combatants or civilians taking direct part in hostilities).

201. *See* Geneva Conventions and Additional Protocols, *supra* notes 88, 89 & 96.

and civil wars that occur in the territory of a State.[202] Thus, the first major question is whether a State's seemingly global war against terrorists qualifies as a non-international armed conflict so that IHL applies to the conflict, even outside the zones of active hostilities.[203] Because IHRL applies outside of armed conflicts, the next question is whether IHRL should govern RPA targeted killing operations, especially in those countries outside of the declared armed conflicts of Iraq and Afghanistan. Further, if the answer is yes, to what extent it should apply. On the other hand, if IHL still applies to global fights against terrorists, no matter where they are physically located, then should IHRL fill the gaps left by the rules of IHL and to what extent. This Article will now compare and contrast the ways in which the United States, United Kingdom, and Israel answer the questions related to labeling the conflict with armed terrorist groups (international or non-international), and whether IHL or IHRL applies.

1. United States

The U.S. Supreme Court has determined the conflict with al Qaeda should be treated as a non-international armed conflict for purposes of IHL.[204] Although specifically declining to decide whether the conflict with al Qaeda is one to which the full protections afforded under the Geneva Conventions apply, the justices stated that "there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories [to the Conventions]."[205] That provision is Common Article 3, which appears in all four Geneva Conventions and binds all parties to the conflict to certain provisions protecting persons who are no longer taking part in the hostilities, including individuals who have been detained.[206]

The justices note, based on the commentaries to the Geneva Conventions, that the widest scope possible should be given to the question of whether Common Article 3 applies to an armed conflict that is occurring within the territory of a signatory party rather than between parties because the purpose of the provision is to provide at least minimal

202. *See supra* text accompanying notes 96–99.

203. It cannot be assumed that the Geneva and Hague Conventions apply to the war with terrorist groups. In fact, in early 2002, under the Bush administration, the U.S. position was that the Conventions did not apply at all to the armed conflict with al Qaeda, the Taliban, and associated forces and that those combatants should be afforded no protections under the Conventions. Charles Babington & Michael Abramowitz, *U.S. Shifts Policy on Geneva Conventions*, WASH. POST (July 12, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/07/11/AR2006071100094.html.

204. Hamdan v. Rumsfeld, 548 U.S. 557, 629–30 (2006).

205. *Id.*

206. Geneva Conventions I–IV, *supra* note 96, art. 3.

protections to the parties to the conflict.[207] Those minimal protections include the obligation to treat combatants on the other side of the armed conflict humanely, meaning no cruel treatment or torture, hostage-taking, or humiliating and degrading treatment, among other things.[208] Thus, the Geneva Convention rules that apply to shape the conduct of the United States in armed conflicts between the United States and terrorist groups are limited. The Supreme Court did not answer the question of whether IHL or IHRL would apply outside the zones of active hostilities, but for the United States conducting operations in Afghanistan and Iraq, the basic principles of IHL apply.

Professor Phillip Alston posits that both IHL and IHRL apply in the context of any armed conflict and "whether a particular killing is legal is determined by the applicable *lex specialis*."[209] Therefore, in an armed conflict, IHL applies to the extent that it answers questions about the legality of certain acts, but when its rules do not, then IHRL can provide guiding principles.[210] Outside armed conflicts, Alton posits that IHRL is the *lex specialis*.[211]

An argument against Alston's position is that, in the context of terrorism threats around the world, applying IHRL to individual terrorists who happen to fall outside the zone of active hostilities may not make sense in application. As an example, at a meeting held by the International Committee of the Red Cross (ICRC) in January 2012, experts were asked about the specific case of an individual member of a non-state organized armed group, that is party to a non-international armed conflict, and who was at home sleeping with his family when the state party found him and wanted to carry out an RPA targeted killing operation against him.[212] A small majority determined that IHL applies to this situation as the *lex specialis*, outside of active hostilities, based on the *individual's status or function* because "treaty and customary IHL allow the targeting of

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207. *Hamdan*, 548 U.S. at 631.

208. Geneva Conventions I–IV, *supra* note 96, art. 3; *see also* SOLIS, *supra* note 6, at 98 (noting that while "humane treatment" is not defined directly, examples incompatible actions are provided as illustrations and such treatment will vary according to the circumstances).

209. Alston, *supra* note 18, at 301.

210. *See also* H.C.J. Opinion, *supra* note 50, ¶ 18 ("[H]umanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law" (citing multiple sources)); Kretzmer, *supra* note 78, at 185 ("The prevailing theory is that even in the conduct of hostilities, the IHRL regime applies, although in part it is superseded by the *lex specialis*, IHL. This theory was adopted by the IC in the Nuclear Weapons case.").

211. Alston, *supra* note 18, at 301.

212. Expert Meeting, International Committee of the Red Cross, Expert Meeting: The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms, 19-23 (Jan. 2012), http://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf [hereinafter ICRC Expert Meeting].

members of armed forces and fighters as well as civilians directly participating in hostilities in armed conflict situations and provide for detailed and specific rules in this regard."[213] Thus, the sleeping fighter could be attacked so long as the IHL principles are fulfilled.[214] Furthermore, according to the ICRC, state practice is consistent with this analysis.[215]

2. United Kingdom

Thus far, the United Kingdom has likely only used RPAs in areas of active hostilities, where IHL more clearly applies.[216] Even so, critics claim the United Kingdom is violating the basic principles of IHL, including proportionality, distinction, and humanity, which is discussed in detail below.[217] Even assuming *arguendo* that the United Kingdom meets the requirements of the basic principles of IHL, meeting IHL obligations may not be all that is required of that state. The United Kingdom is a party to additional conventions that impose obligations under IHRL that do not apply to operations by the United States or Israel. This includes Geneva Conventions Additional Protocol I and II of 1977, and the European Convention on Human Rights. Furthermore, the U.K. position that the ICCPR applies extraterritorially means it must meet its additional IHRL obligations.

3. Israel

For Israel, the Israeli High Court of Justice held their armed conflict

213. *Id.* at 19–20.

214. *Id.* at 19.

215. *Id.* However, a minority of experts took an opposing view, determining that the fact that the individual is not conducting hostilities at that moment, because he is sleeping with his family, and is isolated, thus rendering capture feasible, means that the IHRL regime should apply. *Id.* at 20. Those who espoused the minority view acknowledged that IHL would instead apply if the individual was sleeping in an encampment of insurgents, if he was directly participating in hostilities, or if he were an individual in the context of an international armed conflict. *Id.* at 20.

216. Shiner & Carey, *supra* note 23, at 3 (noting that there is no public information to suggest that the United Kingdom has yet used drones outside of zones of armed conflict). Still, similar to some within the United States, certain groups within the United Kingdom are concerned with the current U.K. use of RPAs, including aid to the United States. *See, e.g.*, Cole, *supra* note 23, at 5-6 (noting the lack of clarity about when and how terrorists can be targeted combined with the secrecy surrounding the exact U.K. Rules of Engagement as "troubling" and calling on MOD officials to both confirm or deny whether it has carried out targeted killings in Afghanistan, and to make clear to the United States that any intelligence provided by the United Kingdom must be in accordance with international law norms.

217. Shiner & Carey, *supra* note 23, at 4 (claiming a "strong possibility that the UK has misdirected itself as to the requirements of the IHL principles of proportionality, distinction and humanity and as to its human rights obligation to protect human life and to investigate all deaths (civilians and combatants alike) arguably caused in breach of that obligation").

with terrorist organizations that target their citizens is an international armed conflict.[218] The judges based their holding on the principle that armed conflict that occurs between an occupying power and rebel or insurgent group amounts to an international armed conflict.[219] However, that principle is "not restricted only to" those armed conflicts in the area itself, but also to an armed conflict that "crosses the borders of the state-whether or not the place in which the armed conflict occurs is subject to belligerent occupation."[220] Thus, IHL with all its protective provisions apply to the Israeli armed conflict with Hamas, Hezbollah and other terrorist groups. The Court emphasized that though IHL is the *lex specialis* which applies in the case of an armed conflict, "[w]hen there is a gap (*lacuna*) in that law, it can be supplemented by human rights law."[221]

4. Comparing the Countries

In this overview of the issues surrounding the question of whether IHL or IHRL applies to conflicts with terrorists, it may appear that the United States is applying less stringent standards when conducting RPA targeted killing operations than the United Kingdom and Israel because of the determination that the armed conflict with terrorists is a non-international armed conflict. Specifically, it may seem that the United States is less stringent in applying IHL than the United Kingdom which has not conducted RPA targeted killing operations outside those areas of active hostilities,[222] and Israel which labels its conflict with terrorists as an international armed conflict, thus applying all of the Geneva Conventions to the conflict.[223] Furthermore, while scholars and experts in the United States are still debating the issue of whether (and how much of) IHRL applies to RPA targeted killing operations in those areas outside of active hostilities, the Israel High Court determined that IHRL will supplement IHL in all operations against Hamas, Hezbollah, and other terrorist groups.[224]

The analysis cannot end there, though, because the different situations in which each country finds itself shape the answer to whether IHRL applies to the territories in which they are conducting RPA targeted killings. Because Israel is operating as an occupying power in an occupied territory, it has heightened obligations under the Geneva

218. H.C.J. Opinion, *supra* note 50, ¶ 18.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *See* Jewish Virtual Library, *infra* note 247.
224. *See generally supra* note 51.

Conventions regarding treatment of non-combatants within the occupied territory.[225] These heightened obligations include a litany of what could be considered to be policing powers, such as enforcing penal laws already in place in the occupied territory,[226] only enacting new laws if necessary to "maintain the orderly government of the territory, and to ensure the security" of its armed forces,[227] following specific restraints on imposition of the death penalty,[228] providing for the care of "protected persons," including women, minors, and those with medical problems,[229] and affording due process rights to accused persons.[230]

From these examples, it is clear that some of the policing powers allowed under IHL are contradictory to the freedoms guarantee under IHRL. On the one hand, some of these actions permitted by the law of occupation would be prohibited under IHRL as impeding human rights.[231] These include, for example, restrictions on political activity, freedom of movement, and freedom of expression.[232] This is because, while occupying powers are required to afford certain protections to the non-enemy populations within the occupied territory, the occupying power is allowed to take those actions that protect its own forces based on security and imperative military reasons.[233]

On the other hand, other IHRL rules necessary to fulfill and protect human rights would require the occupying power to undertake fundamental changes to occupied territory that are actually prohibited by the law of occupation.[234] This is because "[p]rotection of human rights requires persistent and intrusive intervention in daily life in and, oftentimes, expansive changes to, the political and economic systems of occupied territory."[235] But, the law of occupation allows for limited interference in the daily life of the civilian population within the occupied territory for reasons such as to ensure maintenance of current medical, educational, religious, and governmental services are available, but only

225. H.C.J. Opinion, *supra* note 50, ¶ 18. *See also* Grant Harris, *Forty Years After 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context*, 41 ISR. L. REV. 87, 100 (2008) (noting that because Israel has now "largely acceded to the application of occupation law" and the international community's position on the issue is also clear, "Israel may be scrutinized and judged in terms of its conformity with the law of occupation and, unlike most other occupants, may not escape the contradictory pull of human rights law and the law of occupation . . . by simply casting off and disavowing the latter.").

226. Geneva Convention IV, *supra* note 96, art. 64.

227. *Id.*

228. *Id.* art. 68.

229. *Id.* art. 76.

230. *Id.* at arts. 71–75.

231. Harris, *supra* note 225, at 117.

232. *Id.* at 118.

233. *See generally* Geneva Convention IV, *supra* note 96, arts. 47–78.

234. Harris, *supra* note 225, at 117.

235. *Id.* at 120.

so long as those services do not interfere with military necessity or its own security.[236]

In comparing how the countries work to reconcile IHL and IHRL, a parallel can be drawn between the United States and Israel. The United States claims IHL applies to its RPA operations, but still imposes some IHRL restraints not required under IHL, and Israel claims that IHL applies to its RPA operations, but applies IHRL to fill those gaps left in IHL. And, in some very specific situations, both countries have applied standards that go beyond those required under IHL and could be considered IHRL. One example is that both the United States and Israel reserve RPA targeted killing operations for exceptional circumstances. For Israel, only as an exceptional step when no alternative exists,[237] and for the United States, only when capture is infeasible.[238] These standards are higher than required by IHL, which allows for combatants to be targeted so long as minimal injury to civilians results. IHL does not require military commanders to consider all other alternatives, such as capture, before targeting a combatant. Another example from the United States and United Kingdom is that both countries require that the casualty rate for approval of any RPA targeted killing to be zero.[239] In other words, if any non-combatants are at risk of death or serious injury, the operations will not be approved and conducted. IHL does not require a zero non-combatant casualty rate. In fact, it anticipates some civilian casualties.

The IHL/IHRL debate as it relates specifically to RPA targeted killing operations wages on and includes legal issues not easily resolved. However, though operating in different legal landscapes (imposed by the various treaties and conventions to which the countries are a party), each country seems to be carefully navigating through its legal obligations and not just rejecting them as claimed by some critics. The United Kingdom likely has the most restrictive set of legal obligations, yet still is actively involved in the development and use of RPAs in targeted killing operations. The United Kingdom does not seem to be engaged in the use of RPAs in these operations in those areas that both the United States and Israel would claim the legal right to operate, those areas outside of Iraq, Afghanistan, and Libya.

In the next Part, further in-depth review of specific IHL or Law of Armed Conflict (LOAC) principles demonstrates that the United States, the United Kingdom, and Israel use remarkably similar standards to meet IHL obligations and the United States is not applying less stringent standards than the United Kingdom and Israel in most. Still, in general,

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236. Geneva Convention IV, *supra* note 96, arts. 47–78.

237. H.C.J. Opinion, *supra* note 50, ¶ 13.

238. *See infra* text accompanying notes 332–33.

239. *See infra* text accompanying notes 348–49 (discussing to U.S. information); *infra* text accompanying 383 (discussing U.K. information).

all three countries could improve transparency and accountability of the operations.

Furthermore, when looking to IHRL to fill the gaps left by IHL, while similarities exist between the three countries, the United States may be lagging behind the United Kingdom and Israel in one significant area, that of accountability of civilian casualties after an operation. Of course, the question remains as to what this means for the United States. This Article asserts below that the United States could be doing a little more in terms of civilian casualties. However, in light of the fact that the obligations on the United Kingdom are heightened compared to the United States based on the human rights conventions to which it is a party, and the obligations placed on Israel are different than the United States and the United Kingdom because they are subject to IHL's laws of occupation, the question for the United States remains whether—and to what extent—it also bears responsibility to increase accountability despite the arguably lesser legal standards imposed on it.

B. *Laws of War: Overview of the Basic LOAC Concepts*

Under IHL, certain LOAC principles apply as customary international law in both international and non-international armed conflicts.[240] These principles include distinction, military necessity, proportionality, and humanity, also known as unnecessary suffering.[241] One of the key areas of dispute in the use of RPAs in targeted killings is whether the countries that use them are fully complying with the basic IHL principles.[242]

As a starting point, the United States, United Kingdom, and Israel all firmly ground the conduct of their military members during all types of military operations and during all types of armed conflicts, even those with terrorists, within the bounds of the four basic LOAC principles.[243] As a matter of policy, all U.S. military members are required to "comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[244] By written

240. Alston, *supra* note 18, at 303; SOLIS, *supra* note 6, at 250–86 (discussing, in extensive detail, the history of all four principles that constitute the core of LOAC and how they apply to every armed conflict).

241. *See id.*

242. *See* Vogel, *infra* note 252, at 101–02.

243. *See, e.g.*, Military Commission Act of 2009, *infra* note 267; Shiner & Carey, *supra* note 23; Jewish Virtual Library, *infra* note 247.

244. DOD LAW OF WAR PROGRAM, DOD DIRECTIVE 2311.01E (May 9, 2006); *see also, e.g.*, COMPLIANCE WITH THE LAW OF ARMED CONFLICT, A.F. POL'Y DIRECTIVE 51-4 (Aug. 4, 2011) (stating that the U.S. "Air Force ensure its personnel understand, observe, and enforce LOAC and the US Government's obligations under that law. . . . [Air Force] personnel [will] comply with the LOAC during all armed conflicts, however such conflicts are characterized, and in all other military operations.").

directive, U.S. military members receive training on LOAC at least annually as well as before deployments overseas.[245] The U.K. military actions are guided by the Manual of the Law of Armed Conflict, which discusses the LOAC principles in detail, along with the other obligations imposed on U.K. military members by the Conventions.[246] Finally, for members of the Israeli Defence Forces, the IHL principles are "enshrined in IDF training, Code of Ethics and rules of engagement."[247] This Article will next explore the three countries' application of the principles to demonstrate that, while the approaches may vary, the application by all three is largely the same.

1. Distinction

Distinction is a principle at the core of IHL.[248] To be a lawful combatant means that you can engage in the conflict and be targeted in return, a rule codified in Article 13(2) of Additional Protocol II of the Geneva Conventions.[249] Specifically, under the Geneva Conventions, lawful combatants are uniformed members of armed forces, who report to a responsible chain of command, wear a distinctive insignia, carry their arms openly, and conduct their actions in compliance with the laws of war.[250]

Civilians, on the other hand, are not legitimate targets "unless and for such time as they take a direct part in hostilities."[251] Civilians who take part in the hostilities at the time of the attack lose their protected status and can be targeted, as well as face potential criminal charges for war crimes.[252] Thus, the status of the individual—whether one is a combatant

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245. *Id.*

246. *See* J.S.P. 383, *supra* note 158, ¶¶ 2.1–2.8.2.

247. *Operation in Gaza*, *supra* note 160, ¶ 6. *See also* Jewish Virtual Library, *Israel Defence Forces: Ruach Tzahal – Code of Ethics*, http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/IDF_ethics.html (last visited Apr. 21, 2014) (listing the IDF's three fundamental values and ten additional values that spring from those, including, for example, the obligation to limit injury to the extent required to accomplish the mission and the duty to limit the use of force to prevent unnecessary harm to human life).

248. *See* SOLIS, *supra* note 6, at 251 ("Distinction, sometimes referred to as discrimination, is the most significant battlefield concept a combatant must observe."); *see* Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, International Committee of the Red Cross, at 3 (2005), *available at* http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf [hereinafter *ICRC Rules*] ("The parties to the conflict must at all times distinguish between civilians and combatants . . . Attacks may not be directed against civilians.").

249. Additional Protocol I, *supra* note 88, art. 43(2); *see also* SOLIS, *supra* note 6, at 187–91 (discussing the significance of the status of lawful combatant).

250. *See* Geneva Convention IV, *supra* note 96, art. 4A(2)(a)–(d).

251. Additional Protocol I, *supra* note 88, art. 51(3).

252. Ryan Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. &

or civilian—matters in determining whether one may be targeted. In this way, IHL goes further in allowing lethal action than IHRL which would require an imminent threat posed by each individual targeted and not just based on an individual's status.[253]

Distinction also includes the prohibition against destruction of civilian objects, unless justified by military necessity,[254] as well as against intentionally attacking combatants who become unable to continue to fight due to wounds, sickness, shipwreck or parachuting from a disabled aircraft.[255]

The difficulty with applying the principle of distinction in armed conflicts with terrorists, whether they are members of al Qaeda, the Taliban, Hamas, Hezbollah, or other terrorist organizations, is that the terrorists live and hide among communities of civilians.[256] Furthermore, terrorist groups frequently use civilians and civilian objects as shields.[257] For the use of RPAs to be lawful, those that operate them must be able to distinguish between lawful combatants and civilians, as well as civilian objects.[258] Thus, countries involved in armed conflicts with terrorists struggle with the question of who can be lawfully targeted, including who qualifies as a combatant, and when individuals can be targeted, such as when civilians who directly participate in hostilities lose their protected status.[259]

Of course, even once it is determined that a particular individual can be lawfully targeted as a combatant, the attack itself must also not be indiscriminate.[260] This means that the military member performing the RPA operation must ensure, in carrying out the attack, to take measures to avoid hitting civilians and civilian objects.[261]

a. United States

Within the United States, the government has been walking the tightrope since September 11, 2001 between, on the one hand, trying to

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POL'Y 101, 124 (2010).

253. *See* Alston, *supra* note 18, at 303–04.

254. AIR FORCE JUDGE ADVOCATE GENERAL SCHOOL, AIR FORCE OPERATIONS AND THE LAW: A GUIDE FOR AIR, SPACE, AND CYBER FORCES 17 (3d ed. 2014) (2009).

255. *Id.*

256. *See* Vogel, *supra* note 252, at 118 (indicating that "the enemy intentionally fails to distinguish himself—indeed purposefully obfuscating his belligerent status by posing as a civilian").

257. *Id.*

258. *See id.* at 116–18.

259. *See, e.g.*, Kenneth Watkin, *Warriors Without Rights? Combatants Unprivileged Belligerents, and the Struggle Over Legitimacy*, HPCR Occasional Paper Series (Winter 2005).

260. *See id.* at 122.

261. *Id.*

define terrorists in a way that provides transparency about who it believes it can legally target extraterritorially and, on the other hand, not wanting to limit the Executive's power to go after individuals that it deems as imminent, dangerous threats.[262] In the immediate wake of September 11, Congress passed the Authorization for Use of Military Force (AUMF) which authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks."[263]

The Military Commissions Act of 2006 includes as "unlawful enemy combatants" those individuals, including members of the "Taliban, al Qaeda, or associated forces," who have "engaged in hostilities" or who have "purposefully and materially supported hostilities against the United States or its co-belligerents."[264] Then, in 2009, seemingly unhappy with the decision to provide habeas review to *Hamdi*,[265] Congress passed the Military Commission Act, labeling terrorists as "unprivileged enemy belligerents" rather than "enemy combatants."[266] Specifically, the "unprivileged enemy belligerent" is an individual who has "engaged in hostilities against," or "purposefully and materially supported hostilities against" the United States or its coalition partners," or who "was a part of al Qaeda at the time of the alleged offense."[267]

In addition to determining how to label the terrorists whom the United States plans to target, the other area of much debate is the extension of the AUMF to al Qaeda, the Taliban, and *associated forces*.[268] Specifically, the critique is that this very vague language does not provide enough clarification of who can be considered to be an "associated force," and there are no factors provided for an assessment to be made whether someone fits that definition.[269]

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262. *See* Vogel, *supra* note 252, at 118–19.

263. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

264. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

265. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (O'Connor, J. plurality) (holding that an American citizen detainee "seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker.").

266. *See* Alberto R. Gonzales, *Drones: The Power to Kill*, 82 GEO. WASH. U. L. REV. 1, 18 (2013).

267. Military Commission Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (codified at 10 U.S.C. §§ 948a–950t (2012)). This difference in label is significant for a different reason as well. By labeling terrorists as "unprivileged enemy belligerents," Congress is asserting its position that terrorists should receive the very minimal protections provided by the Geneva Conventions. It is a recognition that terrorists do not "play by the rules" required by IHL and, thus, should be treated neither as either civilians, who can only be targeted while directly participating in hostilities, nor combatants, who are entitled to a litany of protections during conflict and if detained.

268. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

269. *See* Daskal, *supra* note 72, at 1175–76 (noting that "[t]he conflict has exposed the gaps in the legal framework governing the conduct of armed conflict.").

b. United Kingdom

For the United Kingdom, the question of how to distinguish between combatants and civilians for their military members has been confined to the battlefields of Iraq and Afghanistan.[270] Still, this is no easy task because the terrorists, like members of the Afghanistan Taliban, for example, are members of their community and intentionally fail to distinguish themselves from civilians as required under LOAC.[271]

The U.K. MOD has not yet released information to the public regarding how they distinguish between civilians and combatants.[272] The U.K. Joint Service Manual of the LOAC gives limited guidance. It directs that any decision that civilians are taking a direct part in hostilities must be "more narrowly construed than simply making a contribution to the war effort."[273] "Thus working in a munitions factory or otherwise supplying or supporting the war effort does not justify the targeting of civilians so doing. However, munitions factories are legitimate military targets and civilians working there, though not themselves legitimate targets, are at risk if those targets are attacked."[274] This guidance is very broad and leaves much discretion with the military commanders deciding whether to conduct an operation.

Recently, the MOD made a statement to the British Parliament in response to the specific question of how military members distinguish between civilians and combatants.[275] The MOD official stated that the U.K. forces will conduct an investigation in "all circumstances where a possible civilian casualty is reported…unless it can be established that the individual was *directly involved* in *immediate attempts or plans* to threaten the lives of International Security Assistance Force personnel."[276] Thus, the MOD seems to place some importance on the requirement that the individual be "directly" involved in "immediate" hostilities. However, this is very limited information. It does not provide further guidance on what is considered "immediate attempts or plans." More specifically, a key question is whether the MOD's statement imposes a *Caroline* doctrine type of immediacy or a more anticipatory immediacy, such as the United States currently uses to justify its RPA targeted killing operations. Furthermore, the MOD statement raises the question of what actions by a civilian would constitute "attempts or

270. *See* Shiner & Carey, *supra* note 23, ¶ 4.27.
271. *Id.*
272. *Id.* ¶ 4.43.
273. J.S.P. 383, *supra* note 158, ¶ 2.5.2
274. *Id.*
275. Shiner & Carey, *supra* note 23, ¶ 4.44.
276. *Id.* (emphasis added) (citations omitted).

plans."[277]

c. Israel

Confronting the difficulty of applying the distinction principle to terrorists, the Israeli High Court of Justice held that terrorists are civilians rather than combatants, which means they can only be attacked "for such time as they take a direct part in hostilities."[278] At first blush, this determination implies that Israel may be more limited than the United States and United Kingdom in determining that someone is a combatant for purposes of targeting.

As the Court's opinion continues, however, the standard for determining someone is a combatant broadens. First, the Court determined that participating in "hostilities" can include activities outside of actual combat, such as gathering intelligence or preparing for the hostilities.[279] Second, after noting that no accepted definition of "direct" exists in the international literature, the court determined that it can include collecting intelligence, providing transportation to other unlawful combatants, supervising the operations, or providing services to them.[280]

> The Court then decided on an expansive test to apply to terrorists when determining the meaning of "for such time."
> [A] civilian who has joined a terrorist organization which has become his "home," and in the framework of his role in that organization he commits *a chain of hostilities*, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.[281]

Labeling the "terrorist" as a civilian, but applying such a broad expansion to the activities of that civilian, to include all the activities he committed as part of a "chain of hostilities" has been criticized as opening the door too widely regarding the targeting of civilians.[282] This is because applying that broad definition to the "for such time" part of the provision "threatens to drain close to all meaning from 'direct' participation."[283]

Therefore, on the one hand, Israel's definition of who qualifies as a

277. *Id.*

278. Additional Protocol I, *supra* note 88, art. 51(3); H.C.J. Opinion, *supra* note 50, ¶ 24 ("terrorist organizations . . . and their members, do not fulfill the conditions for combatants).

279. H.C.J. Opinion, *supra* note 50, ¶ 33.

280. *Id.* ¶ 35.

281. *Id.* ¶ 39 (emphasis added).

282. Radsan & Murphy, *supra* note 4, at 1212.

283. *Id.*

lawful target is broader than other countries because it allows for an assessment that once someone commits a hostile act, he loses all protection as a civilian, even if he later laid down his arms. On the other hand, by finding the individuals to be "civilians taking direct part in hostilities," the Israeli High Court ensured that the targeted individuals are afforded all of the protections of the Geneva Conventions when not participating in hostilities.[284]

d. Comparing the Countries: Individual Threat Finding

With RPAs comes the ability to target terrorists from long range and at any time, thus meeting the principle of distinction becomes extremely important. RPA operators must be able to identify targets and verify with certainty the target is the terrorist and not another civilian.

Staying true to the IHL framework, Israel decided to tackle the problem by applying the same definition of combatant for international armed conflicts to terrorists involved in non-international armed conflicts. Thus, classifying terrorists as civilians rather than combatants, who are not legitimate targets "unless and until such time as they take a direct part in hostilities."[285] This classification is consistent with its obligations as an occupying power in those territories it occupies because, under article 4 of the Geneva Conventions IV, persons within a territory and who "find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals" are protected by the Convention.[286] Israel has some heightened obligations to protect those civilians found in those occupied territories against "certain consequences of war"[287] that do not apply to RPA targeted killing operations occurring in territory not occupied.

In armed conflict, applying a strict "direct part in hostilities" (DPH) test can be difficult. The International Committee of the Red Cross (ICRC) highlights the problem with applying this rule to terrorists.

> [The rule] appears to create an imbalance between such groups and governmental armed forces. Application . . . would imply that an attack on members of armed opposition groups is only lawful for "such time as they take a direct part in hostilities" while an attack on members of governmental armed forces would be lawful at any time. Such imbalance would not exist if members of the armed opposition groups were, due to their membership, either considered to be continuously taking a direct part in hostilities or

284. Blum & Heymann, *supra* note 11, at 157–58.
285. Additional Protocol I, *supra* note 88, art. 51(3).
286. Geneva Convention IV, *supra* note 96, art. 4.
287. *Id*.

not considered to be civilians.[288]

Israel pays heed to the ICRC's guidance by classifying terrorists as civilians, but also broadening what it means to directly participate in hostilities. The Court applied a "chain of hostilities" test because, for the terrorists involved in the armed conflict, "the rest between hostilities is nothing other than preparation for the next hostility."[289] In application, the question is whether actions that may normally not be considered hostile acts become interpreted as such when an individual chooses to participate in activities with other known terrorists. The Court noted that providing transportation and other services to known terrorists may be considered hostile acts. This seems to imply that a civilian who unknowingly drives a terrorist around more than one time, like a family friend or neighbor, becomes a lawful target as "participating directly in hostilities." In this way, the test leads to concerns of over-inclusiveness.[290]

Because the Israeli model, however, labels terrorists as civilians, the High Court emphasized that requires a decision regarding whether a particular individual is "directly participating in hostilities," which means that Israeli armed forces must engage in a case-by-case specific inquiry into the individual culpability of the alleged terrorists.[291] And, the inquiry would have to be conducted every time the Israeli Defense Forces are contemplating targeting a particular individual. Thus, soldiers are required to perform a sort of individual assessment of the threat of each potential target.

The United States may also already be engaging in a sort of "individualized threat finding" (ITF), similar to the one required by the Israeli High Court's opinion.[292] The U.S. Executive Branch consistently claims that a very fact-specific and intense process is used to determine whether an individual should be put on the list of targets for lethal force.[293]

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288. *ICRC Rules*, *supra* note 248, at 21.

289. H.C.J. Opinion, *supra* note 50, ¶ 39 (emphasis added).

290. Radsan & Murphy, *supra* note 4, at 1212.

291. Blum & Heymann, *supra* note 11, at 158.

292. The U.S. process for vetting potential targets for lethal operations has of course changed over time. Specifically, in contrast to President Bush, President Obama decided to begin personally signing off on every strike in Yemen and Somalia, as well as the more complex and risky strikes in Pakistan. Becker & Shane, *supra* note 2, at 7.

293. *See, e.g.,* Brennan, *supra* note 29 (emphasizing the "rigorous standards and process of review" which the government follows when authorizing RPA strikes outside the hot battlefield of Afghanistan); White House Fact Sheet, *supra* note 131, at 1 (emphasizing that the United States "will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons."). This same recent policy guidance released by the White House provided a vague unhelpful definition of "non-combatant" as

For an individual to be considered as a legitimate target, he must be involved in the planning and coordination of operations that present a *future* threat or risk to American lives.[294] The individual must either be an operational leader of al-Qaeda or associated force, or an operative in the midst of actually training for or planning to carry out an attack against U.S. interests.[295] According to the U.S. government, included in the analysis of whether a particular individual can be lethally targeted are also: a broad analysis of an intended target's current and past role in plots threatening U.S. persons; relevant intelligence information the individual could provide; and the potential impact of the operation on ongoing terrorism plotting, on the capabilities of terrorist organizations, on its foreign relations, and on intelligence collection.[296]

Independent research supports the government's position that some form of an individualized threat finding is conducted for each person that is targeted.[297] In his case study, which included review of military documents, court filings, public statements by government officials, as well as confidential interviews with members of the military and intelligence community, Professor Gregory McNeal determined that the lists of individuals to be targeted for lethal action are "vetted through an elaborate bureaucratic process that allows for verification of intelligence information prior to the placement" on the list.[298] He uncovered an intense and rigorous process which begins with data gathering by military and intelligence community members, and continues with recommendations vetted by officials at the National Counterterrorism Center, who send those recommendations to the National Security Council and the President.[299] This is the process just to put potential names on the target list. It is then followed by another elaborate process to actually execute the targeted kill.[300]

McNeal's findings illustrate that individuals are placed on the target list based on "certain strategic objectives, which lead to targeting

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> not includ[ing] an individual who is a part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual *who is targetable in the exercise of national self-defense.* Males of military age may be non-combatants; it is *not* the case that all military-aged males in the vicinity of a target are deemed to be combatants.

Id. at 2 n.1 (emphasis added).

294. Brennan, *supra* note 29, at 5.
295. *Id.*
296. White House Fact Sheet, *supra* note 131, at 2.
297. McNeal, *supra* note 19, at 22–23.
298. *Id.*
299. *Id.*
300. *Id.* at 53–80.

decisions based on how engaging targets will impact the enemy's decision-making process and activities."[301] The in-depth analysis includes questions such as whether the individual is sufficiently tied to the core of al Qaeda, whether striking that individual will harm al Qaeda,[302] how valuable that particular individual is to al Qaeda, and the effect eliminating him will have on the enemy group's war-making or war-fighting capability.[303] Then, after being placed on the target list, the vetting process includes an assessment by top government officials, including questions such as the impact of not conducting operations against the target, whether "striking a particular individual will improve world standing and whether the strike is worth it in terms of weakening the adversary's power."[304]

So, if the United States and Israel are already engaging in an "individualized threat finding," one might ask, what is the problem? Does this Article merely articulate a request for more transparency, for example, for written guidance specifically outlining the test's factors and calling it an "individualized threat finding"? Actually, that would be the easiest and best case scenario. However, at present, based on the frequent news stories about RPA strikes in various countries outside the zones of active hostilities, the public is left wondering what makes someone a target. For example, at least one news source claims that current RPA strikes by the United States in Yemen are authorized to target "people who are displaying the behaviors of suspected militants" rather than specific known terrorists.[305] Thus, it is far from clear what standards the United States and Israel are applying to strike terrorists in the RPA strikes.

In the United States, the executive could adopt some sort of a formalized "individualized threat finding" for each RPA targeted killing operation.[306] Professor Daskal advocates for an ITF for each target

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301. *Id.* at 29.

302. *Id.* at 29–31

303. *Id.* at 36.

304. *Id.* at 46.

305. Bergen, *supra* note 123.

306. In the context of non-criminal military detention, Professor Jack Goldsmith has urged Congress to pass legislation that specifically defines the enemy who may be subject to detention because the definition that currently exists under the AUMF is too broad and indeterminate. *See* Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court* (Brookings Inst., Georgetown Univ. Law Ctr., Hoover Inst. Jt. Project, Working Paper No. 5, 2009), *available at* http://www.brookings.edu/research/papers/2009/02/09-detention-goldsmith. If Congress were to do so, this would certainly help increase transparency to the public regarding RPA targeted killing operations because the government would also need to use that legal definition as part of the ITF. However, it would not eliminate the need for the ITF because, due to the very nature of RPA targeted killings operations which foreclose all other outcomes except death—versus detention, RPA targeted killings operations can and should require a higher standard of determination of the need for the targeted killing. *Id.*

located in those zones outside of active hostilities.[307] The lethal targeting categories would include individuals engaged in the active planning or operationalization of imminent attacks, regardless of their position in the terrorist organization, and leaders who present a significant and ongoing threat, even if they are not implicated in the planning of an imminent attack.[308] Professor Daskal argues that her categories are more restrictive than those currently used by the government because no low-level or mid-level operatives could be targeted unless specifically involved in plotting or recruiting for a specific, imminent attack.[309]

Professor Daskal's "zone approach" could help answer concerns from those who advocate that IHRL only applies outside of active hostilities. Under IHRL, the definition of "imminence" is more restrictive than under IHL. By applying the zone approach, the definition of an imminent attack is more restrictive. However, others reject this zone approach as being unworkable. The vast majority of experts at the recent meeting held by the ICRC, regardless of whether they favored IHL or IHRL paradigm for areas outside of active hostilities, thought that the factor of the conflict zone should *not* be added as relevant when deciding whether someone could be targeted.[310] Specifically, they thought that the conflict zone determination was "too subjective, too open to debate and misinterpretation or disagreement."[311] Problems may include, for example, determining who would ultimately decide whether an area was considered to be in armed conflict, whether encampments further removed from the center of the battlefield would be different target zones, and whether the same procedures would apply in an area where a civilian is directly participating in hostilities but where no conflict zone has been officially identified.

Rather than establishing a new legal framework that may invite subjective inquiries about whether a zone is a conflict zone, an ITF should be conducted for *each* target that is placed on the target list. This is not to say, however, that the ITF will be conducted at the same level of intensity of review for every target. Targeting decisions regarding RPAs can be accomplished at different levels of authority. The Rules of Engagement (ROEs) for a specific armed conflict should include direction on who can authorize attacks using RPAs in that commander's Area of Responsibility

307. Daskal, *supra* note 72, at 1210; *see also* Special Rapporteur Report (Emmerson), *supra* note 38, ¶ 59 (expressing concern that, "while the United States appears to accept that resort to anticipatory self-defense is constrained by the principle of imminence, it interprets this standard as a flexible one," and one that "does not involve a requirement to have clear evidence that a specific attack will be carried out in the immediate future).

308. Daskal, *supra* note 72, at 1210.

309. *Id.* at 1211.

310. ICRC Expert Meeting, *supra* note 212, at 22.

311. *Id.*

(AOR).[312] In certain AORs, higher levels of authority can be designated than others. Of course, because the military has already withdrawn from Iraq and is withdrawing from Afghanistan,[313] RPA targeted killing operations for the foreseeable future will be limited to those outside the zones of active hostilities. This simply strengthens the argument for an ITF in *every* RPA operation moving forward, at least until the military once again enters into an armed conflict in another country. At that time, the relevant ROEs can include guidance of who has authority to conduct an ITF determination.

For Israel and the United Kingdom, the format of a required ITF for each individual targeted by an RPA is applicable as well. The Israel High Court of Justice already determined that an ITF was required to be done. By requiring ITFs for all RPA targets, the Israel Defence Force, and the U.K. and U.S. militaries could set an example for other countries to follow as they obtain the technology to be able to conduct RPA targeted killing operations.

2. Military Necessity

Military necessity legalizes the use of force that might otherwise be unlawful, even if it results in deaths or destruction, so long as it is necessary to achieve the military objective sought and conducted in accordance with the other LOAC rules.[314] No set list of factors exists to determine whether a lethal action is necessary to achieve the military objective. Based on the Hague and Geneva Conventions and state practice, the ICRC provided some elaboration on the rules regarding military necessity. For example, if the primary purpose of a particular operation is to spread terror among civilians, that act is prohibited.[315] Indiscriminate attacks, including those not directed at a specific military objective, which employ a method or means that cannot be directed at a

312. ROE are "directives issued by competent military authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue combat engagement with other forces encountered." U.S. Department of Defense, Joint Pub. 1-02, *Dictionary of Military and Associated Terms* (Nov. 8, 2010) (*as amended through* Nov. 15, 2014).

313. The United States and Afghanistan signed a Bilateral Security Agreement on September 30th that will decrease the number of U.S. troops in Afghanistan to 9800 for 2015, further decrease by about half in 2016, and just leave minimal troops in Afghanistan for basic Embassy security starting in 2017. Sudarsan Raghauan & Karen DeYoung, *United States and Afghanistan Sign Vital, Long-Delayed Security Pact*, WASH. POST, Sept. 30, 2014, http://www.washingtonpost.com/world/us-afghanistan-sign-security-pact-to-allow-american-forces-to-remain-in-country/2014/09/30/48f555ce-4879-11e4-a046-120a8a855cca_story.html.

314. *See* SOLIS, *supra* note 6, at 259 (discussing the history of military necessity and citing the post-World War II "Hostage case," during which Nazi officers were tried, which explains military necessity in more detail).

315. *ICRC Rules*, *supra* note 248, at 2.

specific military objective, or limited as required by IHL, are also prohibited.[316]

The duty to determine what constitutes military necessity falls on the commander on the battlefield.[317] Just like with the principle of distinction, the commander must conduct a case-by-case analysis before an RPA targeted killing operation that a particular strike is necessary to achieve a military objective.[318] There is no comparable principle in IHRL, which only allows the use of lethal force for imminent protection of self or others and does not legitimatize killing civilians in order to meet some other goal or objective.

a. United States

The U.S. Army Field Manual defines military necessity 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."[319] The Commander's Handbook on the Law of Naval Operations provides that "[o]nly that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied."[320] Publicly, senior U.S. government officials, including President Obama, tout the necessity of RPA targeted killing operations solely to stop an imminent terrorist threat.[321]

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316. *Id.* at 40.

317. SOLIS, *supra* note 6, at 264.

318. Vogel, *supra* note 252, at 116; *see also* AIR FORCE JUDGE ADVOCATE GENERAL SCHOOL, *supra* note 254, at 15 (noting that "commanders and others responsible for planning, deciding upon or executing military operations necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time").

319. DEP'T OF THE ARMY, FIELD MANUAL 27-10, *The Law of Land Warfare*, ¶ 3.a, at 4 (1956) (emphasis added) [hereinafter FIELD MANUAL 27-10].

320. DEP'T OF THE NAVY, COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, ¶ 5.2 (July 2007).

321. *See, e.g.*, President Obama Speech, *supra* note 1, at 4 ("America does not take strikes to punish individuals; we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat"); White House Fact Sheet, *supra* note 131, at 1–2 (emphasis added) ("[l]ethal force will be used *only* to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and *no other reasonable alternatives exist to address the threat effectively*"); Holder Letter, *supra* note 30, at 2 (lethal force will be used against one "who is actively engaged in planning to kill Americans" under certain circumstances, including after the "U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States").

b. United Kingdom

The MOD's LOAC Manual provides a definition of military necessity:

> Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.[322]

In the U.K. Manual, "partial" submission was added to the definition to recognize that armed conflict can have a limited purpose, such as the termination of the occupation of Kuwait in 1991.[323] Thus, arguably, the United Kingdom may find an operation complete, or deem the military objective met, at an earlier stage than U.S. operations since the United Kingdom permits enough force for partial submission of the enemy in some operations. On the other hand, guidance from the U.S. Naval Operations Handbook also includes partial submission as a possibility. Thus, in actual armed conflict, the fact that "partial" is left out of the Army Field Manual may not really indicate a difference between the U.S. and U.K. application of the military necessity principle.

The U.K. LOAC Manual is more detailed than the U.S. Army Field Manual because it also divides military necessity into four basic elements. First, that "force used can be and is being controlled."[324] Second, "necessity cannot excuse a departure from that law."[325] Third, "the use of force in ways which are not otherwise prohibited is legitimate if it is necessary to achieve, as quickly as possible, the complete or partial submission of the enemy."[326] Finally, "the use of force which is not necessary is unlawful, since it involves wanton killing or destruction."[327]

c. Israel

In the publicly-available materials from the Israeli Ministry of Foreign Defence, no particular definition of military necessity is provided. Instead, military necessity is discussed as being incorporated into the two principles of distinction and proportionality. For example, as explained

322. J.S.P. 383, *supra* note 158, ¶ 2.2.
323. *Id.* ¶ 2.2 n.2.
324. *Id.* ¶ 2.2.1.
325. *Id.*
326. *Id.*
327. *Id.*

by the Ministry of Foreign Defence in its paper discussing the factual and legal aspects of the 2008 Operation in Gaza,

> [t]he two critical aspects of [the *jus in bello*] limitation – the principle of distinction and the principle of proportionality – are both designed to protect civilians not taking direct part in the hostilities and civilian objects, while taking into account the military necessities and the exigencies of the situation.[328]

Further, a core proposition for the Israeli Ministry of Foreign Defence is that LOAC balances two competing considerations and its "rules comply with both military necessity and the dictates of humanity."[329]

The fact that military necessity is not specifically defined, by itself, is not problematic because the four LOAC principles are so intertwined. However, in justifying its actions in the 2008 Gaza Operation, rather than focus on whether a particular operation qualifies as meeting military necessity, the Israeli military's focus is on whether something is a "lawful military objective."[330] Although Israel is not a party to Additional Protocol I to the Geneva Conventions, the Israeli Defense Force cites the Additional Protocol in defining military objectives as those objects which "make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[331]

Whether something is a legitimate military objective is a different question than whether a particular use of force is necessary to meet a military objective. Furthermore, just because an object can be found to be a legitimate military objective does not necessarily equate its destruction to meeting the military necessity test. For example, dropping a bomb on the home of a civilian, who is not a Hamas member, where Hamas members gathered to distribute weapons may be a legitimate military objective because destroying it would eliminate the risk of those Hamas members attacking Israeli forces later with those weapons. However, destroying the home—a civilian object (as well possibly any non-Hamas civilians also inside)—may not be militarily necessary because it does not contribute to the overall objective of the submission of Hamas. In other words, it may stop those particular fighters, but the unlawfulness of striking the civilian home and civilians inside is not outweighed by the necessity of stopping those fighters based on the minimal threat they present at that time. If those same Hamas members were to gather at a different location later that presented no danger to civilians or civilian

328. *Operation in Gaza*, *supra* note 160, ¶ 89.
329. *Id*. ¶ 33.
330. *Id.* ¶ 101 (citing Additional Protocol I, *supra* note 88, art. 52(2)).
331. *Id.*

objects, the answer to the military necessity question may change.

Yet, when discussing targeted killings before the High Court of Justice, the Israel government's position was more limited than the IDF's written materials imply.[332] The government explained that targeted killings are in fact reserved for exceptional circumstances, indicating they are used only when they meet military necessity. Specifically:

> Targeted killings are performed only as an exceptional step, when there is no alternative to them. Its goal is to save lives. It is considered at the highest levels of command. . . . In the cases in which security officials are of the opinion that alternatives to targeted killing exist, such alternatives are implemented to the extent possible. At times targeted killing missions have been canceled, when it has turned out that there is no possibility of performing them without disproportionately endangering innocent persons.[333]

d. Comparing the Countries: Greater Transparency

The definitions of military necessity used by the United States and the United Kingdom are very similar, using words such as "indispensable" and "required" to meet the military objective. The two definitions are also in line with the Israeli Defence Force position on targeted killings, that they are only used as a last resort. Thus, for all three countries, the application of the principle of military necessity to RPA targeted killing operations means that, because by definition, targeted killings have foreclosed the possibility of capture, resort to them must be reserved for exceptional circumstances.

Additionally, the State conducting the RPA operation must ensure that the primary objective of the targeted killing is to prevent an imminent terrorist attack and that it is not being conducted for past activity by that individual, in other words, that it is "neither punishment nor reprisal for an act committed."[334] Before conducting an RPA targeted killing operation, it must be determined that the only way to stop the attack, in order to save lives, is to send the RPA to eliminate the individual about to commit the attack.

Accordingly, both the United States and Israel claim that the use of RPAs for targeted killings is considered at the highest levels of approval. Both countries claim that targeted killings are only used when capture is not feasible. The White House highlighted that the "policy of the United States is not to use lethal force when it is feasible to capture a terrorist

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332. H.C.J. Opinion, *supra* note 50, ¶ 13.

333. *Id.*

334. Guiora, *supra* note 6, at 331.

suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots."[335]

Despite claims by U.S. and Israeli government officials that the targeted killings thus far conducted have been necessary, the counterpoint is that the frequency with which targeted killings are occurring brings doubts to their claims. The position of the United Kingdom is also interesting to consider. The U.K. MOD claims that they do not conduct RPA targeted killing operations outside Libya, Afghanistan, and Iraq. This indicates that they have not yet found it necessary to target terrorists located outside those countries. And, this is despite the fact that, because they work in close coordination with the United States, it is very likely they share at least some intelligence information gathered by the United States. It is possible this difference is based on the heightened U.K. obligations under IHRL, but the U.K. MOD has been careful not to publicly make statements regarding this distinction or in any way publicly argue against the practices of the United States, its ally.

In sum, if a commander is ordering soldiers to take lethal action on a battlefield against a uniformed enemy combatant, the LOAC rule of military necessity works to shield that commander from any criminal charges that would normally be brought for murder. But, when a commander is ordering lethal action against enemy forces located in another sovereign, it would probably be beneficial for the government to provide more information to the public to prove military necessity than just a statement that the lethal action was necessary. If the government instead performed some sort of Individualized Threat Finding (ITF) for every individual who is the target of an RPA operation, and eventually released unclassified portions of that ITF or at least a listing of the specific factors considered to justify the action even if not specific to certain individuals, the increased transparency would enable the public to understand the military necessity of such actions.[336]

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335. White House Fact Sheet, *supra* note 131, at 1. *See also* President Obama Speech, *supra* note 1, at 4 (stating that the President would have captured Anwar Awlaki and prosecuted him if able, but capture was not possible and because Anwar was "continuously trying to kill people," the President would have been "derelict in [his] duty had [he] not authorized the strike that took him out"); Brennan, *supra* note 29, at 4 ("our unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible").

336. This is not to advocate for the release of classified information that would be related to future operations or the release of which would harm national security or risk particular operations (or the individual involved in the operations). However, the government could release information similar to information about Anwar Awlaki and the continuous threat he posed up until his death. *See* President Obama Speech, *supra* note 1, at 4. The ITF would provide a more formalized method of producing such information.

3. Proportionality

The basic rule of proportionality is that any attack must be proportional to the anticipated military advantage, or alternatively, it "requires that the losses resulting from a military action should not be excessive in relation to the expected military advantage."[337] Specifically, a violation of the proportionality principle would be "[l]aunching 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."[338]

Proportionality is defined in Additional Protocol I, which applies to international armed conflicts and to which, of the three countries discussed in this Article, only the United Kingdom is party, as noted earlier. In a study on customary international law, however, the ICRC found this principle as applied to both international and non-international armed conflicts to be part of state practice, even those states not party to the Additional Protocol.[339] Proportionality does not require that *no* civilian casualties result in armed conflict. On the contrary, it anticipates that losses of civilians or civilians' objects are a possibility, but the losses must not be excessive to the military objective.[340]

Thus, proportionality would require an assessment of the strategic benefit of eliminating the targeted individual. For example, higher risks of collateral damage might be accepted for targets of higher rank in the terrorist organization or based on that individual's capability for future harm.[341]

Proportionality also requires an assessment of the impact of the various types of weapons possible to achieve the military objective. Additional Protocol I requires legal review of new weapons.[342] "[T]he military planner . . . needs not only to assess what feasible precautions can be taken to minimize incidental loss but also to make a comparison between different methods of conducting operations, so as to be able to choose the least damaging method compatible with military success."[343] Under the Hague II Conventions, Article 23, specific types of actions are specifically prohibited, such as employing "poison or poisoned arms,"

337. J.S.P. 383, *supra* note 158, ¶ 2.6. *See also* Kretzmer, *supra* note 78, at 200 ("While this principle is as firmly entrenched in IHL as any, it is notoriously difficult to apply.").

338. *ICRC Rules*, *supra* note 248, at 46.

339. *Id*.

340. *See* SOLIS, *supra* note 6, at 273.

341. Vogel, *supra* note 252, at 126.

342. Additional Protocol I, *supra* note 88, art. 36.

343. J.S.P. 383, *supra* note 158, ¶ 2.7; *see also* Hague II (1899) art. 22 (declaring that the "right of belligerents to adopt means of injuring the enemy is not unlimited").

killing or wounding the enemy "treacherously," or employing "arms, projectiles, or material of a nature to cause superfluous injury."[344] Additionally, Article 25, prohibits the "attack or [aerial] bombardment of towns, villages, habitations or buildings which are not defended."[345] Finally, though the law is unsettled, proportionality may also include an assessment of the amount of risk faced by the attacking forces in relation to the minimization of risk to civilians.[346]

a. United States

Though not party to Additional Protocol I, the United States requires its military commanders to consider the proportionality principle in all operations.

> The principle of proportionality is considered by a commander in determining whether, in engaging in offensive or defense operations, his actions 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 by those actions.[347]

In its RPA targeted killing operations, the U.S. position is that, although some civilian casualties are "a risk that exists in every war," "before any strike is taken, there must be near-certainty that no civilians will be killed or injured."[348] While this language may not seem to offer much detail about what civilian casualty rates are acceptable, the actual planning process used by the United States to determine estimated and acceptable civilian casualty rates is very complex. The casualty rate

344. Hague Conventions II, art. 23.

345. *Id.* art. 25.

346. For further discussion on the debate regarding whether military forces must consider least harmful means, even in the face of increased risk, see Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L LAW 819 (2013) (amassing support for a least harmful means or least restrictive means test, but limiting it to those situations that would not pose any risk to the attacking force).

347. FIELD MANUAL 27-10, *supra* note 319, ¶ 41.

348. President Obama Speech, *supra* note 1, at 4; *see also* White House Fact Sheet, *supra* note 131, at 2 (noting that before a lethal action may be taken, there must be "near certainty that non-combatants will not be killed or injured"); Koh, *supra* note 28, at 8 (noting that the principle of distinction "requires that attacks be limited to military objectives and that civilians or civilian objects . . . not be the object of attack"); Brennan, *supra* note 29, at 3 (stating that the "[t]argeted strikes conform to the principle of proportionality" and "[b]y targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft").

estimate "is influenced by demographic and cultural factors such as socialized cultural norms for day and night activities within a region."[349] Upon conducting a proportionality review, the United States has decided not to strike certain military objectives in order to avoid the injury or death of innocent civilians.[350]

Although the United States is not party to Additional Protocol I, a legal review is conducted of all U.S. weapons, weapons systems, and munitions to ensure compliance with "all applicable domestic law and treaties, . . . international agreements (for arms control agreements . . .), customary international law, and the law of armed conflict. . . ."[351] This review must be conducted before the contract for development of the weapon is awarded.[352] According to the U.S. Army, the "weapons review process of the United States entitles commanders and all other personnel to assume that any weapon or munition contained in the U.S. military inventory and issued to military personnel is lawful."[353] This is an example of how the United States follows certain Geneva Conventions to which it is not party as rules of customary international law.

Regarding RPAs, senior government officials have consistently touted their legality. Specifically, RPAs are a "wise choice" as a weapon because they "strike their targets with astonishing precision," "dramatically reduce the danger to U.S. personnel, even eliminating the danger altogether," and "dramatically reduce the danger to innocent civilians, especially considered against massive ordinance that can cause injury and death far beyond its intended target."[354]

There is disagreement with the U.S. Government's position that RPAs are sufficiently minimizing civilian casualties based on the wide gap between the assessments of the U.S. government of civilian casualties and those provided by nongovernmental organizations. These numbers are worthy of further exploration.

Beginning with the conflicts in Iraq and Afghanistan, certain acceptable collateral damage rates were set by the President or the Secretary of Defense for operations in the areas of hostilities.[355] The numbers changed depending on the ongoing hostilities, but in Iraq in 2003, the number set for non-combatant casualties was thirty. [356] This

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349. McNeal, *supra* note 19, at 751.

350. Brennan, *supra* note 29, at 5.

351. Dep't of Def. Directive 5000.01, *The Defense Acquisition System*, para. E1.1.15. (May 12, 2003) (certified current as of Nov. 20, 2007).

352. *Id.*

353. U.S. ARMY, OPERATIONAL LAW HANDBOOK, *supra* note 106, at 17.

354. *Id.*; *see also* President Obama Speech, *supra* note 1 (noting that "[c]onventional airpower and missiles are far less precise than drones, and are likely to cause more civilian casualties and more local outrage").

355. McNeal, *supra* note 19, at 751.

356. *Id.* at 752.

meant that if a commander determined that an operation might result in more than thirty civilian deaths, he had to elevate his request to conduct that operation to the Commander of the entire operations in Iraq.[357] In 2009, in Afghanistan, the number for preplanned operations was one.[358] Thus, if a strike was expected to result in even one casualty, it would need to be approved by a much higher level of command authority.[359] These examples provide very limited information about the complexity of military planning that goes into an RPA targeted killing operation regarding collateral damage, but are provided merely to demonstrate that the principle of distinction in practice is much more complex than the definition implies.

The Special Rapporteur appointed by the U.N. to study RPA targeted killing operations specifically noted that "up to the end of 2012, confirmed strikes appeared to have inflicted significantly lower levels of civilian casualties than aerial attacks carried out by other air platforms."[360] However, numbers for 2013 were worse, indicating that RPA strikes accounted for "almost 40% of the total number of civilian fatalities," which represents a three-fold increase in the number of recorded civilian casualties from RPA strikes.[361]

In Yemen, the cited numbers vary between 81 and 87 civilians killed, out of a total number of between 811 and 1073 individuals killed.[362] The Special Rapporteur notes that the number of RPA strikes in Yemen increased, "resulting in a significant number of reported civilian casualties in the final weeks of 2013."[363] A news article dated April 21, 2014, claiming that another two strikes were conducted in Yemen within the previous few days, killing at least fifteen terrorists, supports that RPA strikes are still increasing in Yemen.[364]

The divergence in reported numbers of civilian casualties from RPA operations in Pakistan is almost as large as the variance among the number of operations said to have been conducted there by the United States.[365] Determining the number of civilian casualties in Pakistan is

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357. *Id*.

358. *Id.*

359. *Id.* at 753.

360. *Emmerson Third Report to H.R.C.*, *supra* note 119, ¶ 25.

361. *Id.*

362. NEW AMERICA FOUNDATION, *supra* note 19 (citing the total number individuals killed in Yemen between 820 and 1082, including between 81 and 87 civilians); BUREAU OF INVESTIGATIVE JOURNALISM, *supra* note 19 (citing the total number of individuals killed in Yemen between 371 and 1094, including between 64 and 151 civilians).

363. *Emmerson Third Report to H.R.C.*, *supra* note 119, ¶ 27.

364. *See supra* text accompanying note 123.

365. *See, e.g*., Haq Nawaz Khan & Greg Miller, *Suspected U.S. Drone Kills Six; U.S. Denies Pakistan's Claim that Seminary was Target*, WASH. POST (Nov. 21, 2013), http://www.washingtonpost.com/world/us-drone-hits-islamic-seminary-in-pakistan/2013/11/21/c8cd26d6-5

much more difficult than Iraq and Afghanistan because of the way the operations are run there, and by whom, and who is providing the casualty numbers. The existence of the RPA targeted killing program in Pakistan remained technically classified.[366] Therefore, the government continues to deny operations there, and the public information on casualty rates comes from interviews that some groups have conducted with civilians on the ground, but also from the Pakistan Taliban, who report to the Pakistani press.[367]

The available numbers on strikes in Pakistan vary anywhere between 258 and 959 civilians killed by RPA strikes, out of a total number of individuals killed between 2184 and 3559.[368] One source lists the total number of known strikes to be 344, and if correct, that would mean that somewhere between 8% and 47% of the RPA strikes in Pakistan are causing civilian casualties.[369] According to the Special Rapporteur's February 2014 report to the Human Rights Council, the number of strikes in Pakistan is decreasing. At the time of this report, there were no known strikes in 2014.[370] However, according to the New American Foundation, the strikes in Pakistan started again in June and numbered somewhere around 22 by the end of the year.[371]

RPA operations in Somalia have thus far numbered far less than in Iraq, Afghanistan, Pakistan or Yemen. The numbers provided by government watchdog groups list the total number of individuals killed in the Somalia strikes to be between 16 and 30, including 0 to 1 civilian.[372]

Many scholars, including those who advocate for the continued use of RPAs, stress that the lack of information about civilian casualties contributes to a lack of transparency and accountability that is needed in

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285-11e3-9ee6-2580086d8254_story.html (citing a specific RPA strike which Pakistan officials claim killed six people, including at least two civilians, and which American officials claim no civilian casualties).

366. Special Rapporteur Report (Emmerson), *supra* note 38, ¶ 46.

367. McNeal, *supra* note 19, at 755; *see also* Mayer, *supra* note 4 (asserting that while the "reports of fatal air strikes in Pakistan emerge every few days," the "stories are often secondhand and difficult to confirm, as the Pakistani government and the military have tried to wall off the tribal areas from journalists"); Special Rapporteur Report (Emmerson), *supra* note 38, ¶¶ 32–33 (noting the significant variation in civilian casualty rates recorded by government officials, other military officials, and the principal media monitoring organizations).

368. NEW AMERICA FOUNDATION, *supra* note 19 (listing the total number individuals killed in Pakistan between 2206 and 3583, including between 258 and 307 civilians); BUREAU OF INVESTIGATIVE JOURNALISM, *supra* note 19 (estimating the total number individuals killed in Pakistan between 2400 and 3888, including between 416 and 959 civilians)

369. McNeal, *supra* note 19, at 755.

370. *Emmerson Third Report to H.R.C.*, *supra* note 119, ¶ 26.

371. NEW AMERICA FOUNDATION, *supra* note 19.

372. BUREAU OF INVESTIGATIVE JOURNALISM, *supra* note 19.

the process.[373] Professor Phillip Alston summarizes the concern of many scholars by stating, "[f]rom the perspective of both domestic and international law, the practice of secret killings conducted outside conventional combat settings, undertaken on an institutionalized and systematic basis, and with extremely limited if any verifiable external accountability, is a deeply disturbing and regressive one."[374]

For the U.S. RPA operations, much of the problem with transparency and accountability comes from the question of who is running the targeted killing operations outside the active battlefields of Iraq and Afghanistan. Although U.S. government officials are careful to avoid referencing the CIA when addressing RPA operations in public forums and publicly released documents, it is now undisputable that the CIA is significantly involved in running operations in all countries outside of Iraq and Afghanistan.[375] Because these particular operations are run by the CIA, secrecy shrouds the operations in different ways than if the Department of Defense (DOD) ran all the operations. As stated in the *New Yorker*,

> because of the CIA program's secrecy, there is no visible system of accountability in place, despite the fact that the agency has killed many civilians inside a politically fragile, nuclear-armed country with which the U.S. is not at war. Should something go wrong in the CIA's program . . . it's unclear what the consequences would be.[376]

Whether and to what extent the CIA is conducting RPA targeted killing operations presents many complex questions about the legality of

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373. *Compare, e.g.*, Alston, *supra* note 18, at 287 (asserting that "none of the many existing oversight mechanisms have been even minimally effective in relation to targeted killings, and that the resulting legal 'grey hole' cannot be justified on national security grounds"), *and* Daskal, *supra* note 72, at 1218 (noting that there is "no public accounting, or even acknowledgement of most strikes, their success and error rates, or the extent of any collateral damage" and arguing that transparency would serve several important functions), *with* McNeal, *supra* note 19, at 758–93 (discussing the process that includes "countless bureaucrats making incremental decisions that ultimately lead to the killing of individuals on a target list" and arguing that there are extensive forms of bureaucratic, legal, political, and professional accountability mechanisms in place).

374. Alston, *supra* note 18, at 289.

375. *See, e.g.*, Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK (Feb. 13, 2011), http://www.newsweek.com/inside-killing-machine-68771 (writing about her interview with John A. Rizzo, former CIA acting general counsel, who elaborated on the CIA's procedures for targeted killing operations).

376. Mayer, *supra* note 4, at 4. *See also* Special Rapporteur Report (Emmerson), *supra* note 38, ¶ 46 (noting that "even the existence of the CIA programme in Pakistan remains technically classified . . . [a] stance [that] has become increasingly difficult to justify, especially because remotely piloted aircraft operations in Pakistan have been publicly acknowledged by the President and Secretary of State").

unprivileged belligerents conducting combat operations.[377] Due to the depth and complexity of these issues, and because there is no publicly-available evidence that anyone other than uniformed military members are performing these operations for the United Kingdom and Israel, this Article does not address these issues. Instead, this Article mentions this issue here merely to note that the use of an agency other than the U.S. Department of Defense increases the secrecy that surrounds the U.S. RPA targeted killing operations.

b. United Kingdom

For the United Kingdom, the proportionality analysis sounds very similar to that of the United States. The LOAC Manual lists factors to balance, including the importance of the military objective and any civilian death or injury that may result, and the amount of property damage or incidental casualties caused by the operation.[378] The rules for the United Kingdom also direct "canceling, suspending, or re-planning the operation if the operation "may be expected to offend the proportionality principle."[379]

Unlike the U.S. Manual, the U.K. LOAC Manual also addresses the consideration of risk to its own U.K. forces when assessing proportionality. The Manual acknowledges that a particular method of attack may increase the risk to attacking forces while minimizing risks to civilians, and that the proportionality principle does not require attackers to accept increased risk.[380] However, the Manual then indicates that the United Kingdom leans towards requiring the military force to accept increased risk if doing so would reduce collateral risks to civilians.[381] Specifically, if "alternative, practically possible methods of attack would reduce collateral risks," the U.K. forces "may have to accept the increased risk as being the only way of pursuing an attack in a proportionate

377. For a further in-depth discussion on the CIA's operations, as well as the challenge of confirming the extent of CIA involvement, see generally Alston, *supra* note 18, at 341–80 (discussing the blurring of the lines of authority between the CIA and DOD and how it can lead to less congressional oversight when it is unclear which activity falls under the armed services or intelligence congressional committees); McNeal, *supra* note 19, at 14–15 (discussing the overlapping authorizations given to the CIA and DOD to target and kill terrorists around the world, which may contribute to confusion over who runs which operations); Radsan & Murphy, *supra* note 4, at 1215–24 (addressing how the secrecy that surrounds the CIA's RPA program has led to wide disagreement on the CIA's success in minimizing collateral damage and in achieving military objectives).

378. J.S.P. 383, *supra* note 158, ¶¶ 2.6.1 & 2.6.3.

379. *Id*.

380. *Id.* ¶ 2.7.1.

381. *Id.*

way."[382]

Because the U.K. operations are run in coordination with the United States, it is very difficult to determine the U.K. civilian casualty rates. According to the U.K. MOD, the acceptable civilian casualty rate for purposes of RPA operations in Afghanistan is zero.[383] In other words, their policy is that weapons will not be discharged unless there is "zero expectation of civilian casualties, and that any individual or location should be presumed to be civilian in nature unless there is clear evidence to the contrary."[384]

U.K. Government officials claim only one civilian incident as a result of an RPA operation by the United Kingdom in Afghanistan.[385] During this incident, two insurgents and four civilians were killed, and two other civilians injured.[386] Similar to critics of the U.S. RPA program, critics of the U.K. RPA operations believe the numbers of civilian casualties are higher than the government admits.[387] Specifically, one critic claims the numbers should be higher based on the overall number of strikes that have been reported, as well as media reports of other casualties, but his requests to obtain detailed information through the Freedom of Information Act have been blocked.[388]

Regarding the operations in Libya, the U.N. Special Rapporteur appointed to research the RPA targeted killing operations conducted a study in September of 2013, and determined that the campaign was "highly precise . . . with determination to avoid civilian casualties."[389] Some civilian deaths were reported, and an investigation was recommended, but the precise number of civilian casualties is still unknown.[390] The U.K. MOD conducted its own investigations into the few reported civilian casualties and determined that none of the reported incidents involved a British RPA operation, thus implying fault on behalf of the United States, though the investigation report remains classified.[391]

In addition to disputing civilian casualty rates provided by the Government, critics of the U.K. program claim it is shrouded in secrecy.[392] Not unexpectedly, this claim is roundly rejected by the U.K. Secretary of Defence, Philip Hammond, who asserted that "[t]he MOD is

382. *Id.*
383. Special Rapporteur Report (Emmerson), *supra* note 38, ¶ 75.
384. *Id.*
385. Shiner & Carey, *supra* note 23, ¶ 2.3.
386. *Id.*
387. *Id.* ¶ 2.2.
388. *Id.*
389. *Id.* ¶ 36.
390. *Id.*
391. *Id.*
392. *See id.*; *see also* Cole, *supra* note 23, ¶ 23 (listing examples of personally being denied requested information).

just as open about its use of unmanned aircraft as it is of its many other air assets."[393] In an effort to increase transparency, the MOD hosted journalists at an Air Force base, RAF Waddington, to introduce them to the military members working on the RPAs there and show them the work of the operators.[394]

Also, related to proportionality, the U.K. LOAC Manual addresses "modern, smart weaponry" and posits that the military planner "needs not only to assess what feasible precautions can be taken to minimize incidental loss but also to make a comparison between different methods of conducting operations, so as to be able to choose the least damaging method compatible with military success."[395] For RPAs, the U.K. MOD positions a legal team at its Development, Concepts, and Doctrine Centre that conducts the review of new weapons prior to using them in military operations, as required by the Geneva Conventions.[396] The team reviews the various unmanned systems that the United Kingdom has and will be acquiring.[397]

c. Israel

In Israel, the IDF must apply the principle of proportionality to every case in which they want to use force in their armed conflict against terrorists.[398] Proportionality requires a difficult balancing test between the "state's duty to protect the lives of its soldiers and civilians" and "its duty to protect the lives of innocent civilians harmed during attacks on terrorists."[399] While acknowledging that the hardest cases are those between two extreme samples, the High Court of Justice gives some guidance as to what those extremes would be:

> Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed.[400]

The Court also stressed that the military advantage of the operation must be "direct and anticipated" to justify harm to civilians or civilian

393. Hammond, *supra* note 3.
394. *See* Hammond, *supra* note 3.
395. U.K. LOAC Manual, *supra* note 158.
396. J.D.N. 2/11, *supra* note 3, ¶¶ 503–10.
397. *Id*.
398. H.C.J. Opinion, *supra* note 50, ¶¶ 41–46.
399. *Id.* ¶ 46.
400. *Id.*

objects.[401]

Similar to the United Kingdom, Israel may require the military forces to consider accepting some risk of harm to themselves in order to lessen harm to the civilians, even those taking part in the hostilities. The Court notes that, while it is "not required" that soldiers take on greater risk in order to capture someone, rather than kill or injure them, soldiers should choose to employ "the means whose harm to the human rights of the harmed person is smallest," and must always consider the "possibility" that could mean higher risk to the soldier.[402] The Court's reference to human rights of the targeted individual, even if that person is participating in hostilities, likely reflects the difference between engaging in armed combat and the police powers of the belligerent occupying another's territory.

On the other hand, unlike the United Kingdom, the IDF refuses to accept the zero civilian casualty rate on its operations.[403] Israel objects to the imposition of the standard because it "goes beyond the mandatory requirements of international humanitarian law and would remain unattainable whilst legitimate military targets, particularly in Gaza, use civilian institutions as a base for military operations."[404]

The IDF try to limit civilian casualties instead by taking certain operational measures to limit casualties.[405] Before sending RPAs into Gaza to conduct a strike, the IDF will warn the civilian population of an impending attack by sending phone calls and text messages, or dropping leaflets.[406] The IDF also practices aborting airstrikes when civilians are spotted in the area, and "roof knocking" (in other words, dropping loud but non-lethal bombs, giving civilians time to leave the area).[407] In the 2008 Operation in Gaza, for example, IDF gave regional warnings to alert civilians to leave specific areas before operations commenced, dropped more than 2.5 million leaflets, and made more than 165,000 phone calls warning civilians to distance themselves from military targets.[408]

Despite these efforts, since 2006, Israel may have killed as many as 825 individuals with RPAs.[409] It is unclear how many of the strikes are

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401. *Id.*

402. *Id.* ¶ 40.

403. *Emmerson Third Report to H.R.C.*, *supra* note 119, ¶ 30.

404. *Id.*

405. *Id.*

406. Israeli Defense Forces, *Hamas' Goal is to Kill Israeli Civilians*, IDF BLOG (Nov. 21, 2012), http://www.idfblog.com/2012/11/22/operation-pillar-of-defense-summary-of-events/checklistinfographic/.

407. Israel Defense Force, *How is the IDF Minimizing Harm to Civilians in Gaza?*, IDF Blog (July 16, 2014), http://www.idfblog.com/blog/2014/07/16/idf-done-minimize-harm-civilians-gaza/.

408. *Operation in Gaza*, *supra* note 160, ¶ 8.

409. Scott Wilson, *In Gaza, Lives Shaped by Drones*, WASH. POST (Dec. 3, 2011),

attributable to RPAs or the result of Apache helicopter strikes or F-16 missions, aided by drone surveillance.[410] Like both the United States and United Kingdom, Israel's RPA targeted killing operations are facing criticism due to the secrecy surrounding the operations.[411] Although Israel admits to conducting RPA strikes and that targeted killings are part of its war against Hamas, the IDF has not publicly released numbers of RPA targeted killings operations conducted, militants killed, or civilian casualties.[412] The failure to release information leads to government watchdog groups attempting to assess numbers based on the groups' own research. Thus, for example, the Palestinian Center for Human Rights estimates that of the 825 Palestinians killed by RPA strikes in Gaza, most have been "civilians mistakenly targeted or caught in the 'deadly shrapnel shower' of an RPA strike."[413]

d. Comparing the Countries: Transparency and Accountability

Some major lessons are learned from comparing the application of the proportionality principle by the three countries. First, based on the proportionality principle, assuming that RPAs are at least as precise as other types of weapons, there is no reason that RPAs cannot be used to target terrorists. They may, in fact, offer benefits over other lethal options assuming they are more precise than other types of weapons by reducing danger not only to military personnel who can operate them from a distance, but also to civilians who are not the target of the strike.[414] According to government officials from each of the three countries, senior level individuals have performed weapons reviews on the RPAs and determined that, in principle, there is no reason that RPAs must be categorically excluded as an available weapon. As noted above, the United Kingdom lists the specific office that performs its weapons reviews and the United States indicated that senior government officials performed this type of review before ever using RPAs.

Second, as evident from a review of all three countries, it is very difficult to assess whether RPAs are as precise as claimed due to the secrecy that surrounds the operations. All three countries—not just the United States—have refused to publish specific numbers of strikes and civilian casualties involved in those strikes. Thus, nongovernmental organizations are stepping up to try to fill the vacuum of information

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http://www.washingtonpost.com/world/national-security/in-gaza-lives-shaped-by-drones/2011/11/30/gIQAjaP6OO_print.html.

410. *Id.*

411. *Id.*

412. *Emmerson Third Report to H.R.C.*, *supra* note 119, ¶¶ 63–69.

413. Dobbing & Cole, *supra* note 26, at 16.

414. Brennan, *supra* note 29.

publicly available, and it is highly unlikely that the numbers are accurate based on where these groups must obtain their information.

The "task of describing the government's policies in detail should not fall to anonymous sources, confidential interviews, and selective leaks."[415] A better method is for the government itself to defend the process it uses to conduct the proportionality review by publishing unclassified information. The governments could publish information about how they perform the proportionality test for using RPAs in each operation, including acceptable numbers of civilian casualties. This number will vary depending on the circumstances of the particular conflict.[416] Information excluded from public release would be any classified information about future operations or even information from past operations that may endanger future operations or the lives of people involved in the operations.

Part of the government's proportionality test should include a balancing test that must be done each time an RPA targeted killing operation during the planning phase, including an assessment of whether any potential collateral damage will be excessive in relation to the particular military objective of that strike. More specifically, the balancing must be the importance of taking out that particular individual against *any* civilian casualties, not only to the civilians themselves but also to civilian objects. Thus, not only who is targeted, but where and when also becomes important under proportionality.

Another part of the proportionality analysis that is carried out by the United Kingdom and Israel, but potentially not by the United States, is an assessment of whether military members must consider accepting risk to themselves before conducting an operation. Both the United Kingdom and Israel require their military members to at least consider the possibility that, in order to employ the less harmful means, it may require the soldier to accept more risk. Not one of the three countries requires their military members to actually accept the risk, but the United Kingdom and Israel to require them to consider accepting more risk in order to capture or otherwise stop the combatant or civilian taking part in hostilities rather than use lethal force against them.

It is unclear if this "risk to forces" obligation considered by the United Kingdom and Israel has to do with the fact that the U.K. obligations under

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415. McNeal, *supra* note 19, at 791.

416. The United States at one point used an acceptable casualty rate of thirty in Iraq, whereas the acceptable rate in Afghanistan was one. The United Kingdom claimed the acceptable civilian casualty rate was zero for Afghanistan, which is interesting considering its operations were conducted in coordination with the United States. Israel roundly rejects zero as an acceptable civilian casualty rate in its operations. This Article does not advocate for a specific rate, which will change based on the operation, but merely that the rate be made publicly available at some point, even if that point is after the conclusion of the operation.

IHRL are greater than the United States and Israel, or due to Israel's status as an occupying power. Regardless, under its current legal obligations, the United States would not have to change its practice and accept this principle in order to meet its legal obligations under IHL.

One final point in this Part is that, although Israel rejects zero as an acceptable civilian casualty rate, the IDF attempts to warn the local civilian population of an impending strike, including pamphlet drops, sending text messages and phone calls, and "roof-knocking."[417] In doing so, Israel is imposing an additional legal obligation upon itself not required under the 1949 Geneva Conventions to which it is party. It is a requirement under Article 57(2)(c) of Geneva Convention Additional Protocol I.[418] Specifically, under that article, parties to a conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.[419] There is no indication that either the United States or the United Kingdom engages in this kind of warning system for any of their RPA strikes. Of course, the legal obligation to warn in advance of attacks is a legal obligation on the United Kingdom, as a party to Additional Protocol I, but not Israel or the United States, as non-parties. One might also argue that this obligation is imposed on Israel as an occupying power, under the basic premise that Israel has a heightened responsibility of protection for non-combatants who live in the occupied territory.

In practice, sending an advance warning of an impending RPA targeted strike is not a reasonable operational measure. Although warning the civilian population, it would also serve as a warning to a target, likely causing him to go into hiding, and ruin the operation. In most operations, it is likely that circumstances would not permit advance warning to the civilian population of the strike because targets do not stay static. Because the targets are terrorists who are aware that States, such as the United States, have the capability to target them with RPAs, they are likely already very cautious about their movements and work to minimize the risk of being successfully targeted. The alternative argument is that for any operation in which circumstances would permit (particularly in those zones outside of active hostilities) sending a general warning that particular individuals are dangerous and could be targeted by the United States or the United Kingdom could help avoid civilian casualties by urging civilians to stay away. If the RPA has been maintaining surveillance of the target for days beforehand, the warning could be timed such that the RPA could maintain that surveillance on the target, ensuring fidelity that the correct individual is being targeted and in a location that

417. Israel Defense Force, *supra* note 407.

418. Additional Protocol I, *supra* note 88, art. 57(2)(c).

419. *ICRC Rules*, *supra* note 248, at 62.

is safest for civilians. Yet, if RPA targeted killing operations are executed correctly, the advance warning would not be needed for the United States and the United Kingdom. Because both countries accept a zero civilian casualty rate, then the individuals targeted would only be subject to a strike when outside the presence of civilians.

4. Humanity

The principle of humanity forbids the infliction of suffering, injury, or destruction unnecessary for or disproportionate to accomplishment of the military objective.[420] It is also sometimes referred to as the principle against unnecessary suffering.[421] This principle is focused on the unnecessary suffering of combatants, not civilians, since other rules apply to the avoidance of any harm to civilians.[422] For example, this principle serves as the basis for the prohibition against certain weapons being used, such as poison and explosive bullets, which increase suffering of the combatant without increasing the military advantage.[423]

a. United States

In the United States, the Air Force Operational Law Book emphasizes that the unnecessary suffering principle is used "in an objective rather than subjective sense."[424] That means "the measurement is not that of the victim affected by the means, but rather in the sense of the design of a particular weapon or in the employment of weapons."[425] The determination of whether a weapon or weapons system violates the unnecessary suffering principle is made at the national level in the United States, thereby "permitting commanders to assume that weapons . . . issued to them for battlefield use do not violate this aspect of the prohibition on unnecessary suffering."[426]

In public speeches, senior administration officials have made passing references to the humanity principle, without detailing how the United

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420. J.S.P. 383, *supra* note 158, ¶ 2.4; *see also* SOLIS, *supra* note 6, at 269–72.

421. AIR FORCE JUDGE ADVOCATE GENERAL SCHOOL, *supra* note 254, at 15–16.

422. SOLIS, *supra* note 6, at 270.

423. *Id.*

424. AIR FORCE JUDGE ADVOCATE GENERAL SCHOOL, *supra* note 254, at 14.

425. *Id.*

426. THE DEFENSE ACQUISITION SYSTEM, DOD DIRECTIVE 5000.1 (Oct. 30, 2002). It is interesting that the United States conducts its weapons assessment under the humanity principle, while the United Kingdom asserts the weapons assessment is tied more to proportionality. This is likely a distinction without a difference, so long as both countries are performing the weapons assessment to determine whether the weapon being assessed will cause the least amount of damage or injury necessary to meet the military objective. AIR FORCE JUDGE ADVOCATE GENERAL SCHOOL, *supra* note 254, at 16.

States applies the principle when contemplating use of RPAs overseas.[427] However, use of RPAs has been approved and if precise, RPAs would cause death without causing any suffering. Additionally, senior government officials also repeatedly assert that an individual will not be targeted by an RPA strike if that individual can be captured. This standard is one that is higher than IHL, which does not require an attempt to capture your enemy before using lethal action against that enemy.[428]

b. United Kingdom

For members of the U.K. military, the LOAC Manual states that the "principle of humanity is based on the notion that once a military purpose has been achieved, the further infliction of suffering is unnecessary."[429] Thus, "if an enemy combatant has been put out of action by being wounded or captured, there is no military purpose to be achieved by continuing to attack him."[430] The principle of humanity when applied to RPA targeted killing operations seems to mean something similar for the United Kingdom than the United States, that it only contemplate conducting an RPA strike if capture is impossible.[431]

c. Israel

Similar to the other two countries, the IDF asserts that targeted killings are an exceptional step taken when no other alternative exists.[432] By requiring a sort of "less harmful means" test, the High Court of Justice also conditioned a targeted killing on the inability of that individual to be captured or otherwise disabled.[433] Specifically, the Court imposed on soldiers the obligation to "choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed."[434]

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427. *See, e.g.*, Brennan, *supra* note 29 (noting that "targeted strikes conform to the principle of humanity which requires us to use weapons that will not inflict unnecessary suffering"); Holder, *supra* note 29 (asserting that "any such use of lethal force by the United States will comply with the four fundamental law of war principles governing use of force. . . . [including,] the principle of humanity"); DOJ White Paper, *supra* note 138, at 8 (citing the four fundamental principles and stating that "it is a premise here that any such lethal operations by the United States would comply with the four fundamental law-of-war principles").

428. Blum & Heymann, *supra* note 11, at 158.

429. J.S.P. 383, *supra* note 158, ¶ 2.4.1

430. *Id.*

431. *See supra* text accompanying note 145.

432. *See supra* text accompanying notes 332–43; H.C.J. Opinion, *supra* note 50, ¶ 13.

433. H.C.J. Opinion, *supra* note 50, ¶ 40.

434. *Id.*

d. Comparing the Countries: IHRL Standard?

The major lesson gleaned from comparing the three countries' application of the humanity principle is that all three may be going further than actually required by IHL before conducting an RPA targeted strike operation. Each government claims that no other means of force, other than lethal force, can eliminate the threat, and that is the burden that government officials will determine is met before launching an RPA targeted killing operation.[435] This implies the governments are considering all other methods and determining none other than the option of lethal force are adequate. This high burden, which seems to be accepted by all three countries, is a "depart[ure] from the traditional armed conflict" and "more easily situated within a law enforcement model of regular policing operations."[436] At least with regard to this one principle of IHL, the three countries using RPAs to target and kill terrorists are placing upon themselves a higher standard than required by IHL, one drawn from IHRL.

Other than the assertions that RPA targeted killing operations are used only as exceptional measures, there is really no further information on how the governments are making the determination that capture is infeasible.[437] In military operations, this assertion by government officials may be the only information available and further information cannot be shared with the public at the time of the operation. The assessment of the operational environment in an area of active hostilities or a location where an imminent threat resonates is an assessment that should only be made by military commanders familiar with the available intelligence. For the United States, the President has been heavily involved in deciding whether a particular RPA operation will be conducted.

> [I]t is generally understood that the President's Commander in Chief powers under Article II [of the Constitution] cloak him with the power to make tactical decisions on the battlefield. Arguably, this is the source of the President's power to direct the battlefield tactic of using drones to kill enemy combatants.[438]

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435. *See supra* notes 332 & 431; H.C.J. Opinion, *supra* note 50.

436. Blum & Heymann, *supra* note 11, at 158.

437. *See, e.g.*, Peter Grier, *Can Drone Strikes Target US Citizens? Critics say Rules are Vague*, CHRISTIAN SCI. MONITOR, Feb. 5, 2013, http://www.csmonitor.com/USA/DC-Decoder/2013/0205/Can-drone-strikes-target-US-citizens-Critics-say-rules-are-vague.

438. Gonzales, *supra* note 266, at 27.

C. *Accountability for Casualties (Under IHL and IHRL)*

Beyond overall transparency in certain aspects of RPA targeted killing operations, in which all three countries could improve, there is one area of accountability in which Israel and the United Kingdom seem to be doing more than the United States, at least in law and stated policy if not yet completely in practice. That area is accounting for civilian casualties post-operation and making that information publicly available at some point.

There is no obligation under IHL to conduct a full and complete investigation into every civilian death. To impose an obligation on men and women engaged in an armed conflict to return to a battlefield post-conflict and try to determine all the casualties on the other side of the conflict would be completely unreasonable and impractical. There are obligations under customary international law, however, to take "feasible measures" to try to account for missing persons,[439] and to try to account for and identify the dead.[440]

Specifically, the ICRC has collected evidence that a duty to "search for, collect and evacuate the dead without adverse distinction" exists in both international and non-international armed conflicts.[441] This duty applies to each party to the conflict, but includes many qualifiers including "[w]henever circumstances permit," "particularly after an engagement," and that the parties must "without delay, take all possible measures."[442] Thus, the duty is recognized as one of means that will not be available in every circumstance. The ICRC also gathered evidence of state practice that "[w]ith a view to the identification of the dead, each party to the conflict must record all available information prior to disposal."[443]

According to the U.N. Special Rapporteur, Ben Emmerson, because countries have a duty to protect civilians in an armed conflict "in any case in which there have been, or appear to have been, civilian casualties that were not anticipated when the attack was planned, the [country must] conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation of the results."[444] The obligation is "triggered whenever there is a plausible indication from any apparently reliable source that unintended civilian casualties may have been sustained, including where the facts are unclear or the information is partial or circumstantial," and regardless of "whether the attack was [by

439. *ICRC Rules*, *supra* note 248, at 421.
440. *Id.* at 417.
441. *Id.* at 406.
442. *Id.*
443. *Id.* at 417.
444. *Emmerson Third Report to H.R.C.*, *supra* note 119, ¶ 32.

an RPA] or other means. . . ."[445]

Under IHRL, when a death occurs at the hands of the government, the government is obligated to account for the death.[446] The government must conduct an investigation and it must be an independent investigation.[447] The "investigation should be designed to determine whether the use of deadly force was justified and should lead to identification and punishment of those responsible if the use of force was illegal."[448] There should also be a "sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory."[449]

1. United States

Indications are that the United States conducts some sort of post-operation investigation, although the United States has not published detailed information regarding the investigations. The U.S. Army partially declassified and released one post-operation investigation of a 2010 RPA operation in Afghanistan.[450] The report found fault with some of the actions of the military members and recommended administrative and disciplinary sanctions.[451] The U.N. Special Rapporteur called the investigation report "a model of accountability and transparency" and suggests that it "sets a benchmark to be followed in other cases."[452]

Of the potentially hundreds of other RPA operations, the United States has not released information regarding post-operation investigations.[453] Following some operations, when pressed by outside sources, the United States later admitted to civilian casualties it initially denied. As an example, following one RPA operation in Afghanistan, the U.S. and Afghan military forces initially denied any civilian casualties until asked to investigate further by the U.N. Mission in Afghanistan (UNAMA), and

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445. *Id.*

446. *See* Murphy & Radsan, *supra* note 6, at 447–48 (discussing cases that "root[] the duty to investigate in an express right to life").

447. Al-Skeini v. United Kingdom, 2011 Eur. Ct. H.R. 589, ¶ 164, at 656.

448. Murphy & Radsan, *supra* note 6, at 447.

449. *Id.* (quoting McKerr v. United Kingdom, 2011-III Eur. Ct. H.R., ¶¶ 111–15).

450. *Emmerson Third Report to H.R.C.*, *supra* note 119, ¶ 37; *Poorly Functioning Command and Operational Reporting Led to Feb. Airstrike that Killed 23 Afghan Civilians*, BNO NEWS (May 29, 2010), http://bnonews.com/urgent/3425/poorly-functioning-command-and-operational-reporting-led-to-feb-airstrike-that-killed-23-afghan-civilians/ (noting that the Army General in charge said the civilian casualties resulted from a combination of poorly functioning command posts in Afghanistan and inaccurate and unprofessional reporting from the RPA crew operating out of an Air Force base in Nevada).

451. *Emmerson Third Report to H.R.C.*, *supra* note 119, ¶ 37.

452. *Id*.

453. *See id.* ¶¶ 40–62 (listing multiple operations where civilians have reportedly been killed in Afghanistan, Pakistan, Yemen, and Somalia, and calling on the United States to investigate the incidents and release information about them).

later confirmed some civilian casualties.[454]

2. United Kingdom

In the United Kingdom, the MOD set up a specific internal review process for every discharge of a weapon from an RPA in Afghanistan.[455] Specifically, after any operation where an RPA is used, the most senior military officer at the operations center and his or her legal advisor must review the operation and prepare a report, including video footage and communications reports.[456] When allegations of any civilian casualties are made, an investigation must be conducted by authorities into those deaths.[457] The investigation is conducted by the Joint Incident Assessment Team, "whose personnel are independent of the chain of command involved in any strike."[458]

The U.K. obligations seem directly related to the heightened responsibilities under IHRL. In *Al-Skeini and Others v. the United Kingdom*, the European Court of Human Rights extended the IHRL obligation to investigate civilian casualties to the British military in Iraq.[459] The Court noted that, even in an armed conflict in the territory of another state where

> obstacles may be placed in the way of investigators and . . . concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed, . . . the obligation to safeguard life entails that . . . all reasonable steps must be taken to ensure that an effective, independent investigation is conducted.[460]

The effectiveness of the investigation will depend on whether it leads "to a determination of whether the force used was . . . justified in the circumstances and to the identification and punishment of those responsible."[461] The Court also required that the authorities take "reasonable steps available to them to secure the evidence concerning the

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454. *Id.* ¶ 46.

455. Special Rapporteur Report (Emmerson), *supra* note 38, ¶ 49; *see also* Al-Skeini v. United Kingdom, 2011 Eur. Ct. H.R. 589, ¶ 29, at 605 (discussing the various entities that were charged with investigation Iraqi civilian casualties at the hands of British military members and finding violations of IHRL where investigations were not conducted by independent investigators).

456. Special Rapporteur Report (Emmerson), *supra* note 38, ¶ 49.

457. *Id. Al-Skeini*, 2011 Eur. Ct. H.R. 589, ¶ 27, at 604–05.

458. Special Rapporteur Report (Emmerson), *supra* note 38, ¶ 49.

459. *Al-Skeini*, 2011 Eur. Ct. H.R. 589, ¶¶ 168–69, at 656–58.

460. *Id.* ¶ 164, at 656.

461. *Id.* ¶ 166, at 657.

incident, including *inter alia*, eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death."[462]

The United Kingdom may not be fully meeting its obligations to investigate every operation. The U.N. Special Rapporteur specifically requested that the United Kingdom declassify and publish results of an investigation into an RPA operation in March 2011 in Afghanistan where four women and children, who were not participating in hostilities, may have been killed.[463]

In light of the Special Rapporteur's report, on February 25, 2014, the European Parliament passed a resolution, by 534 votes to 49, on the use of armed drones.[464] The resolution specifically called for States, in the face of information that civilian casualties resulted from an RPA strike, to "conduct prompt, independent investigations and, if the allegations are proved correct, to proceed to public attribution of responsibility, punishment of those responsible and provision of access to redress, including payment of compensation to the families of victims."[465] The European Parliament also called on the European Union to "promote greater transparency and accountability on the part of third countries . . . to allow for judicial review of drone strikes and to ensure that victims of unlawful drone strikes have effective access to remedies."[466]

3. Israel

Citing cases from the European Court of Human Rights, the Israeli High Court of Justice determined that IDF are required to perform an investigation on the lawfulness of the lethal force whenever civilian deaths occur.[467] Specifically, "after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively)."[468] As with the United Kingdom, the investigation performed by the IDF must be independent.[469] Furthermore, the Israeli High Court emphasized the importance of the record of the procedure by which the targeted

462. *Id.*

463. *Emmerson Third Report to H.R.C.*, *supra* note 119, ¶ 39.

464. European Parliament Resolution on the use of armed drones, 2014/2567 (RSP) (Feb. 25, 2014), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P7-RC-2014-0201+0+DOC+XML+V0//EN&language=en.

465. *Id.*

466. *Id.* ¶ C.

467. H.C.J. Opinion, *supra* note 50, ¶ 40.

468. *Id.*

469. *Id.*

killing operated was considered and approved as well as the assessment of collateral damage post-operation.[470]

According to reports from the U.N. Special Rapporteur, evidence suggests that "competent Israeli authorities" conducted investigations into the RPA operations and specifically into the deaths of civilians in the operations.[471] The Israeli government released some information on the investigations, including when no evidence warrants criminal charges, but the details of the investigations, including reasons for the findings, were not publicly released.[472]

4. Comparing the Countries: Post-Operation Investigation

Both the United Kingdom and Israel impose on their military members an obligation to investigate civilian deaths after any operation. Of course, the United States is not obligated to follow the law of the European Court of Human Rights, the Israel High Court of Justice, or the European Union Parliament.[473] Although the United States does not apply the ICCPR extraterritorially, the fact that there is state practice, as well as international jurisprudence, supporting the collection and identification of the dead, regardless of which party that person belongs to, demonstrates that the United States may be lagging behind the other countries in its current RPA targeted killing operations to account for the dead.

In their law review article, Murphy and Radsan argue that, "[a]fter using deadly force in counterterrorism operations, executive authorities should conduct an independent, impartial, prompt, and (presumptively) public investigation of its legality."[474] They base their arguments on the Fifth Amendment to the Constitution as well as U.S. Supreme Court jurisprudence related to detention of an American citizen in *Hamdi v. Rumsfeld*,[475] and regarding the habeas corpus rights of detainees in

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470. *Id.* ¶ 46 (emphasis added); *see also* Blum & Heymann, *supra* note 11, at 159 (noting that the H.C.J. Opinion "placed an emphasis on the procedure by which the targeted killing operation was considered and approved and on the postfactum debriefing of operations, all in an effort to improve the record on collateral harm").

471. *Emmerson Third Report to H.R.C.*, *supra* note 119, ¶¶ 63–69.

472. *Id.*

473. *See* Alston, *supra* note 18, at 437 (noting that, although the United States properly notes it is not a party to the European Conventions, the [European Court of Human Rights'] opinion does directly bind all of the U.S. European allies in the North Atlantic Treaty Organization and will likely cause a flow-on effect on operations of the United States).

474. Murphy & Radsan, *supra* note 6, at 446; s*ee also* Kretzmer, *supra* note 78, at 204 ("Applying human rights standards in cases of an armed conflict with terrorist groups means that every case of targeted killings must be subjected to a thorough and credible legal investigation.").

475. Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that American citizens held as enemy combatants were entitled to due process protections).

Boumediene v. Bush.[476] Although the Supreme Court cases address detention of combatants and not whether an investigation is required into combatant deaths overseas, Murphy and Radsan use the due process standards set in those cases to argue that the due process requirements extend to such operations, stating "[i]f due process controls whom the executive may detain in the war on terror, then surely due process controls whom and how the executive may *kill*."[477]

The reality of the U.S. RPA targeted killing operations—particularly those in countries outside of Iraq and Afghanistan—would seemingly provide opportunity for at least a limited post-operation investigation and legal review. First, to target an individual, an attacker must ensure that he or she can positively identify, with at least reasonable certainty, that the person to be killed is a legitimate military target.[478] This means, the identity of the person must be verified by collecting intelligence on that person, including surveillance of the patterns of behavior of that person (also called the pattern of life analysis).[479] The activities and movements of the targeted individual are tracked, which includes "persistent collection" of information such as "overnight locations, daily routes, visitations, and trustworthy associates."[480] The significance of this intelligence collection is that it presents the opportunity for records to be generated about the particular target, records that may be in the form of documents or video recordings, and which extend over a certain amount of time.

Second, even after the constant monitoring, a decision must be made at the appropriate level of authority about whether that individual will be targeted. "When all reasonable and known mitigation techniques . . . have been exhausted and collateral damage appears unavoidable . . . final authorization for strikes are entrusted to a pre-determined approval authority."[481] The approval authority can vary from the President, the Secretary of Defense, the Director of the CIA, or a General Officer in the military.[482] The proportionality analysis required under IHL and conducted by the approval authority[483] provides another opportunity for the generation of records that is not available in the situation of active hostilities on the battlefield. And, these important information gathering

476. Boumediene v. Bush, 128 S. Ct. 2229 (2008) (holding that non-citizen detainees at Guantanamo Bay had a constitutional right to seek habeas corpus review in federal courts and that due process principles would shape the contours of the review).

477. Murphy & Radsan, *supra* note 6, at 409–10.

478. McNeal, *supra* note 19, at 733.

479. *Id.* at 734.

480. *Id.* at 735 (citing U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 3-60, THE TARGETING PROCESS (2010), at B-3 (internal quotations omitted)).

481. *Id.* at 750.

482. *Id.*

483. *See id.*

and decision-making functions all occur before the RPA operation is conducted.

After the operation, the investigation would include the maintenance and review of the video feed from the RPA. And, if possible, but only if circumstances permit, it should include an on-the-ground investigation by investigators independent of the RPA operators, to include interview of witnesses and collection of evidence at the scene. Probably, in most situations, an on-the-ground investigation would be impracticable. The whole point of the RPA operation in the first place is that capture of the individual is infeasible. Assuming that to be the case, then it is not reasonable to then send in a team to investigate the post-operation area for civilian casualties. They would be at extreme risk. But, the beauty of RPA operations is that the strike is being recorded as it is occurring. Thus, valuable information from this feed could be included in the investigation.

The post-operation investigation would include the review by an independent investigator, who was not a part of any step in the process of planning that operation, of all the available video and documents, including all information that was part of the pre-strike targeting and decision-making processes. The reviewer should be tasked to answer questions, such as whether the use of lethal force was justified, whether the targeted individual was in fact the one killed in the operation, whether civilians were also killed, and whether the appropriate level of approval authority authorized the operation.[484] All of these questions will not be able to be answered in every situation. But, the investigation should be conducted with an aim to answer them and with the goal of publicly releasing information that can be unclassified about the operation.

Murphy and Radsan go on to suggest that perhaps the CIA's Investigator General could conduct the investigation and that some sort of judicial review could be included, such as a "special national security court designed along the lines of the Foreign Intelligence Surveillance Court" (FISA).[485] Crandall argues for an *ex-ante process*, a pre-strike review tribunal.[486] She asserts that the tribunal could be entirely within the executive, and would include someone such as "an ombudsman or personal representative with advocacy responsibilities" for each potential RPA target.[487]

President Obama has specifically addressed this point and dismissed it. In his speech at the National Defense University, he comments on

484. *See also* Murphy & Radsan, *supra* note 6, at 447 (listing factors suggested by the European Court of Human Rights in *McKerr v. United Kingdom*, 2001-III Eur. Ct. H.R. 475, for state agents investigating deaths that occur under their responsibility).

485. *Id.* at 448–49.

486. Crandall, *supra* note 102.

487. *Id.* at 87.

options that have been presented:

> Each option has its virtues in theory, but poses difficulties in practice. For example, the establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial authority. Another idea that's been suggested – the establishment of an independent oversight board in the executive branch – avoids those problems, but may introduce a layer of bureaucracy into national security decision-making, without inspiring additional public confidence in the process.[488]

Setting up an entirely separate *ex ante* review process, such as a court or oversight board, is not necessary. There should not be any process that is before a strike that might interfere with the Commander-in-Chief's decision that someone must be killed in order to prevent a terrorist act against the United States. Judges are not the right individuals to make the decisions on military targets.[489] Military commanders, who serve at the discretion of the civilian Secretary of Defense and the civilian Commander-in-Chief, are the ones who have the expertise and training to make those decisions. Furthermore, a secret court would do little to calm the critics of the program who would assume that the court was a rubber stamp for the RPA operations, a critique which would go unanswered in the face of the court's secrecy.[490]

However, a post-operation investigation would increase accountability for the operations by publicly releasing the basic results of the investigation, and there is a way to conduct them without implicating national security concerns. Military members with the appropriate security clearance and who have the legal experience to be able to perform these investigations are already in place. Specifically, members of the Judge Advocate General (JAG) Corps of each service could fulfill this role. JAGs perform legal reviews of all other types of military operations, including weapons, targeting, and LOAC issues.[491] JAGs,

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488. President Obama Speech, *supra* note 1, at 5.

489. McNeal, *supra* note 19, at 126–27 (noting the problems with ex ante judicial review are numerous, including practical as well as constitutional concerns); *see also* Scott Shane, *Debating a Court to Vet Drone Strikes*, N.Y. TIMES (Feb. 8, 2013), http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html?pagewanted=all&_r=0; *see also* Editors, *Why a "Drone Court" Won't Work*, BLOOMBERG (Feb. 18, 2013) (noting that "[g]iven the ticking-time-bomb nature of drone strikes, seeking judicial approval for an individual strike is impractical").

490. Shane, *supra* note 489 (noting that "few outraged Pakistanis would be assuaged by the distinction of judicial scrutiny, and civil libertarians would point out that the target is never given the chance to make a case before the judge").

491. AIR FORCE JUDGE ADVOCATE GENERAL SCHOOL, *supra* note 254, at 289–90 (noting that

with the appropriate security clearance level, from a different chain of command from the RPA operators could be designated to review the operations.

Then, once reviewed by the JAG, multiple levels of senior officers within the military, all the way up to the Secretary of Defense, would get the opportunity to comment on the report before public release. The President or his delegate would be the final authority to sign off on the investigation and release unclassified information to the public. Of course, separate time tables can be imposed on, first, the investigation process and, second, on the review process, to ensure delivery to the public in a relatively timely manner.

Critics of this approach may claim that because JAGs are military officers, they are not independent. This was also the concern of European Court of Human Rights in *Al-Skeini*. The Court found that the Special Investigation Branch was not independent at the time it performed its investigation, even though they had a separate chain of command from the soldiers they were investigating, based on the factual circumstances surrounding the procedures used.[492] Specifically, the chain of command of the implicated soldiers was the authority to decide whether to call in the investigating authorities, the investigating authorities were not free to decide when to start and stop an investigation and they had to report to the military chain of command of the implicated soldiers rather than the Army Prosecuting Authority.[493]

Applied to U.S. JAGs, a lack of independence claims show an inaccurate understanding of JAG's mission in the U.S. military. JAGs are commissioned as military officers to ensure that other members of the military are following the law, they advise commanders about those times that they are in danger of violating the law, and they prosecute the offenders. Appropriate procedures could be established for the post-operations and legal reviews to ensure independence, such as separate chains of command for the JAG officers appointed to conduct the investigation than the operators who conducted the strike. The appointed JAGs would need investigative support from teams of interpreters and military criminal investigators, and they would require the support of top leadership to ensure independence.

JAG advisors "ensure a thorough legal analysis is conducted for selected targets, weaponeering, and assignment of forces," and they also provide legal counsel on LOAC and Rules of Engagement).

492. *See* Al-Skeini v. United Kingdom, 2011 Eur. Ct. H.R. 589, ¶¶ 171–74.

493. *Id.* ¶ 172.

VI. CONCLUSION

By comparing how the United States, the United Kingdom, and Israel are interpreting and applying the principles of international law to RPA targeted killing operations, this Article attempts to add to the literature on RPA targeted killing operations and contribute to the debate on the legality of such operations. The most challenging aspect of this attempt was a feature common the operations of all three countries—the secrecy that surrounds the operations.

All three countries have made some efforts at transparency. The United States has released multiple documents that explain the legal basis for the RPA operations. Israel's High Court has weighed in on the issue, releasing a detailed opinion on targeted killings, and Israel's Defence Forces publish some documents on its website explaining how they apply the law to their operations. Finally, the United Kingdom conducted investigations into some of its operations and worked with the United Nations to release some details. The fact is, however, that many details of the operations, including how many operations have been conducted, whether civilian casualties resulted (and how many) from those operations, and what accountability occurs for civilian deaths or injury, including injury to civilian objects, remain shrouded in secrecy. Thus, all three countries need to increase transparency.

One way the United States could achieve increased transparency would be to publish specific procedural rules that describe the legal framework for RPA targeted killing operations. This can be done, without releasing classified details, in a white paper or an executive order similar to Executive Order 12,333 which sets out rules for covert action. While the government has released some information, in speeches and documents discussed throughout this Article, the information provided is piecemeal, indefinite, and, while purporting to establish some legal guidelines, is vague. The better route would be to publish a white paper or an executive order outlining the legal framework for future RPA targeted killing operations. This would provide transparency and better accountability, and would also help to shape future U.S. operations within those legal bounds.

All three countries should engage in at least limited individualized threat findings for those targeted by the RPAs. In some ways, both the United States and Israel have indicated they may already be engaging in a sort of ITF. Israel's High Court requires it and the United States indicates that it engages in a very robust deliberative and vetting process before conducting an RPA operation against a particular individual. Additionally, since the United Kingdom conducts operations with the United States, it is reasonable to assume that its military officers also engage in some sort of ITF before targeting a specific individual.

What are missing are the specifics of how these ITFs are performed. The countries should precisely define, to the extent possible, the parameters of and factors included in the ITFs, and publish this information to the public. This is not an attempt to overburden the process, but rather a recommendation to declassify some information so that the public can understand why certain individuals must be and are targeted. And, part of the ITF is already being done since an assessment that capture is infeasible is already an obligation the countries follow.

All three countries should also publicly acknowledging most, if not all, of the RPA strikes made and the known and estimated number of enemy combatants and civilians killed. To emphasize, this is not to advocate for a disclosure of the all the details of the operation either before or after the operation. But, publication of some basic statistics regarding RPA operations would quiet much criticism. On the one hand, publishing this information would disprove the widely speculative and grossly overestimated numbers of civilian casualties being provided by groups with interests that do not align with those of the governments, such as other terrorist groups, citizens, or critics who are opposed to the program. On the other hand, publishing these numbers would show that the countries are holding themselves personally responsible for mistakes, which would increase the credibility of the program. Publishing the numbers would also evince some type of investigative process into civilian casualties. Finally, rather than treating the results of the RPA targeted killing program as something to hide behind, the countries should hold it out to be the unique and promising technology that it is and should welcome ways to improve its use in times of armed conflict.

As a final recommendation, international law imposes an obligation to account for casualties in armed conflict. The United Kingdom and Israel seem to be further along in accepting and trying to meet this obligation than the United States. Although the United States is neither a party to the Additional Protocols nor a belligerent occupying power, the nature of RPA operations opens up the possibility that at least a minimal investigation in every operation can occur because RPA operations involve an elaborate process of identifying and conducting surveillance on the target before the operation, which means that information is already being gathered on the target. Thus, even in operations where it would be impossible to send in an investigative team after the strike, a more limited investigation or review of the operation can still happen. It is entirely possible (and probable) that the United States is already conducting some sort of post-operation investigation, but information of such investigation is not being released to the public. The United Kingdom and Israel are conducting some post-operation investigations, but they are not releasing sufficient information to the public following the investigations. In this way, the governments are actually opening

themselves up to more criticism by not allowing the public to understand the necessity of conducting the RPA targeted killing operations.