

**RETHINKING TARGETED KILLING POLICY:
REDUCING UNCERTAINTY, PROTECTING CIVILIANS FROM THE
RAVAGES OF BOTH TERRORISM AND COUNTERTERRORISM**

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ABSTRACT

Targeted killing is a lethal and irreversible counter-terrorism measure. Its use is governed by ambiguous legal norms and controlled by security-oriented decision-making processes. Oversight is inherently limited, as most of the relevant information is top secret. Under these circumstances, attempts to assess the legality of targeted killing operations raise challenging, yet often undecided, questions, including: how should the relevant legal norms be interpreted? How unequivocal and updated must the evidence be? And, given the inherent limitations of intelligence information, how should doubt and uncertainty be treated?

Based on risk analysis, organizational culture and biased cognition theories, as well as on recently-released primary documents (including the U.S. Department of Justice Drone Memos and the Report of the Israeli Special Investigatory Commission on the targeted killing of Salah Shehadeh) and a comprehensive analysis of hundreds of conflicting legal sources (including judicial decisions, law review articles and books), this article offers new answers to some of these old and taunting questions.

It clearly defines legal terms such as ‘military necessity’ and ‘feasible precaution;’ it develops a clear-cut activity-based test for determinations on direct participation in hostilities; it designs an independent ex post review mechanism for targeting decisions; and it calls for governmental transparency concerning kill-lists and targeting decision-making processes. Most importantly, it identifies uncertainty, in law and in practice, as an important challenge to any targeted killing regime. Based on analysis of interdisciplinary studies and lessons from the experience of both the U.S. and Israel, it advocates a transparent, straightforward and unambiguous interpretation of targeted-killing law; interpretation that can reduce uncertainty and, if adopted, protect civilians from the ravages of both terrorism and counter-terrorism.

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A. INTRODUCTION

On August 13, 2015, a U.S. airstrike outside Raqqa, Syria, targeted 21-year-old Junaid Hussain, a hacker from Birmingham, England, who tapped into American military networks and was a central figure in the Islamic State militant group's online recruitment campaign. Months later, on January 29, 2016, U.S. Central Command admitted that instead of killing Hussain, the airstrike resulted in the death of three civilians and that five more were injured.¹ Hussain was eventually killed in another U.S. airstrike that took place 11 days later.²

The U.S. Central Command press release specifically mentioned that this information is made public “as part of our commitment to transparency.”³ Nonetheless, the brief press release, which devoted only 32 words to an airstrike that killed 3 civilians and injured 5, left most of the relevant information in the dark: what was the criteria according to which a hacker was added to a kill-list? How powerful and updated was the evidence against Hussain? What precautions were taken to prevent harming civilians? And lastly, who were the victims of the attack, who

¹ U.S. Central Command, *Jan. 29: U.S. Central Command releases results of Iraq and Syria civilian casualty assessments*, RELEASE NUMBER 20160129-05 (2016), (hereinafter: *Central Command press release*), available at: <http://www.centcom.mil/en/news/articles/jan.-29-u.s.-central-command-releases-results-of-iraq-and-syria-civilian-ca>.

² Terri Moon Cronk, *Iraq Progresses in ISIL Fight, Key Extremist Confirmed Dead*, U.S. DEPARTMENT OF DEFENSE (2015), Available at: <http://www.defense.gov/News-Article-View/Article/615305/iraq-progresses-in-isil-fight-key-extremist-confirmed-dead?source=GovDelivery>; See, also: Kimiko De Freytas-Tamura, *Junaid Hussain, ISIS Recruiter, Reported Killed in Airstrike*, August 27, 2015, NEW YORK TIMES. Available at: <http://www.nytimes.com/2015/08/28/world/middleeast/junaid-hussain-islamic-state-recruiter-killed.html>.

³ *Central Command press release*, *supra* note 1.

were killed or injured simply because they happened to be in the wrong place at the wrong time?

Central Command partial transparency concerning civilian casualties, together with other recently released documents, such as the U.S. Department of Justice White Paper on targeted killings of US citizens, the U.S. Department of Justice Drone memo on the targeted killing of Anwar Al-Aulaqi,⁴ and the report of the Israeli special investigatory commission on the targeted killing of Salah Shehadeh,⁵ provide important information for the public debate on targeted killings. At the same time, the relatively small amount of information released underscores the thick veil of secrecy that still surrounds the discussions in this field.⁶ Moreover, it demonstrates some of the main weaknesses of targeted killings law and policy: the ambiguous nature of the relevant law; its security-oriented implementation; and the inadequacy of current oversight mechanisms.

⁴ The white paper, obtained by an NBC News reporter, Michael Isikoff, is available at: <http://msnbcmedia.msn.com>; the Justice Department's Office of Legal Counsel memo that signed off on the effort to target Anwar Al-Awlaki was released in June 2014 as a result of Freedom of Information Act lawsuits brought by the New York Times and the American Civil Liberties Union. It is available here: <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/06/23/National-Security/Graphics/memodrones.pdf>.

⁵ Ido Rosenzweig and Yuval Shany, *Special Investigatory Commission Publishes Report on Targeted Killing of Shehadeh*, 27 IDI TERRORISM AND DEMOCRACY NEWSLETTER (2011).

⁶ In contrast to President Obama's rhetoric promising transparency on the US drone program, the Obama administration has been fighting in courts requests made by the New York Times and ACLU under FOIA to release information about the government's targeted killing program, including the Presidential Policy Guidance under which the program likely now operates, and details on who the government has killed and why. For more information on the legal proceedings, see: [https://www.aclu.org/search/%20?f\[0\]=field_issues%3A140&f\[1\]=type%3Acase](https://www.aclu.org/search/%20?f[0]=field_issues%3A140&f[1]=type%3Acase)

In a recent article, Gregory McNeal presented a comprehensive description of the U.S. targeted killing process, arguing that many of the existing critiques of targeted killings rest upon poorly conceived understandings of the process. He concluded by promoting several minor reform recommendations to ‘enhance the already robust accountability mechanisms embedded in current practice.’⁷ However, McNeal’s account, which is based on official documents and interviews with anonymous U.S. decision-makers, cannot and does not account for the systemic biases which are inherent to decision-making generally, and particularly concerning national security matters such as targeted killings.

Indeed, in another recent article, Sitaraman and Zionts identified the implications of errors, biases, and failures – including the illusion of transparency - on war-powers decision-making processes.⁸ They ended their article calling lawyers, scholars and decision-makers to pay increasing attention to “behavioral war powers.”

This article responds to their call. By focusing on targeted killing law and policy, it offers an interdisciplinary, comparative, analysis of a very sensitive, secretive and lethal decision-making process. This detailed analysis of targeted killing decision-making processes sheds light on yet another behavioral aspect of war powers decision-making, which was not addressed by McNeal or by Sitaraman and Zionts: the treatment of doubt and uncertainty.

⁷ Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L. J. 681, 750 (2014).

⁸ Ganesh Sitaraman and David Zionts, *Behavioral War Powers*, 90(2) NEW YORK UNIVERSITY LAW REVIEW 516 (2015).

Uncertainty dominates almost every aspect of targeted killing law and policy: from the relevant body of law to be applied, to the interpretation of specific norms, to the strength and breadth of evidence required, and to making factual determinations based on uncertain intelligence.

To disperse this fog of uncertainty, the article begins, in sections B and C, with an overview of the current uncertainties and ambiguity in targeted killing law. Section D complements the legal uncertainty with an interdisciplinary analysis of the uncertainty regarding various aspects of implementing these laws. The studies surveyed in this section include literature on organizational culture in the intelligence community, biased risk assessments and misjudgments of facts. Section E then illustrates some of these unwarranted dynamics using the report of the Israeli Special Investigatory Commission on the Targeted Killing of Salah Shehadeh. Based on analysis of interdisciplinary studies and lessons from the experience of both the U.S. and Israel, section F designs a new model for interpreting and implementing targeting law; a model that can reduce uncertainty and, if adopted, protect civilians from the ravages of both terrorism and counter-terrorism.

B. LEGAL UNCERTAINTY

The term ‘targeted killing’ refers to intentional and pre-meditated use of lethal force by state actors against suspected terrorists specifically identified in advance by the perpetrator.⁹ About a decade ago, the question of the general legality of targeted killings sparked intense legal, moral, philosophical and political debates.¹⁰ Can we decide to kill a specific individual without trial? Outside of a recognized battlefield? In her home? The very idea that wartime killing can be a premeditated attack against a specific individual, outside of any recognized battlefield, was revolutionary and encountered many dissenting voices.¹¹

In recent years, with the rise of the so-called ‘war on terror’ and its counter-terrorism policies, this general question lost most of its importance. Current debates no longer focus on the legality of targeted killing operations in general, but rather on the specific conditions under

⁹ Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN HUMAN RIGHTS COUNCIL, A/HRC/14/24/Add.6, 2010 [hereinafter: UN Special Rapporteur on Extrajudicial Killings], p. 5. For other definitions, see: NILS MELZER, *TARGETED KILLINGS IN INTERNATIONAL LAW* 4-5 (2008); Chris Downs, ‘*Targeted Killings*’ in *An Age of Terror: The Legality of the Yemen Strike*, 9(2) J. CONFLICT AND SECURITY L. 280 (2004); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16(2) THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 171, 176 (2005).

¹⁰ Kretzmer, *id.*

¹¹Georg Nolte, *Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order*, 5(1) THEORETICAL INQUIRIES IN LAW 111 (2004); Gross, Michael L., *Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?*, 23(3) JOURNAL OF APPLIED PHILOSOPHY 323 (2006); Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of US Foreign Policy*, DUKE LAW JOURNAL 677 (2005); Ward Thomas, *Norms and security: The case of international assassination*, 25(1) INTERNATIONAL SECURITY 105 (2000).

which targeted killing operations are permissible.¹² Unfortunately, these conditions and their application are ambiguous and open to different interpretations.¹³ First, there is disagreement concerning the body of law to be applied, whether international human rights law or international humanitarian law.¹⁴ Second, a substantial gap exists between permissive and restrictive legal interpretations of the substantive norms: who constitutes a legitimate target? Does ‘direct participation’ include membership in a terror organization? Or does it necessitates involvement in certain activities? Is it lawful to target a suspected terrorist at any time and place? Or are there any temporal or geographical restrictions to targeted killing operations?¹⁵

For obvious reasons, Government lawyers, human rights organizations and scholars provide different answers to these questions and others. Eyal Benvenisti argued that the content of international humanitarian law (or law of armed conflict) depends on the identity of the interpreting body – whether it is a Government involved in transnational

¹² See, for example, Gabriela Blum and Philip Heymann, *Law and Policy of Targeted Killings*, 1 HARV. NAT’L SECURITY J. 160 (2010)

¹³ Michael N. Schmitt, *Extraterritorial lethal targeting: deconstructing the logic of International Law*, 52 COLUM. J. TRANSNAT’L L. 77, 78 (2013) (arguing that “in particular, pundits often ask the wrong questions or answer the right ones by reference to the wrong body of law. The result is growing confusion, as analytical errors persist and multiply.”); and see, also, Robert Chesney, *Who may be killed? Anwar al-Awlaki as a case study in the international legal regulation of lethal force*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW-2010 5 (2011) (arguing that “The use of lethal force in response to terrorism... has been the subject of extensive scholarship, advocacy, and litigation over the past decade... Yet we remain far from consensus.”).

¹⁴ Chesney, *id.*, at 29-38; Sylvain Vité, *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*, 873 IRRC 69 (2009).

¹⁵ Chesney, *id.*, at p. 44. These and many other disagreements concerning the meaning of the substantive norms on targeting are elaborated upon in *section C* below.

armed conflict or an international organization.¹⁶ With regard to targeted killings law, the gap between restrictive and permissive interpretations have recently reached new peaks, when William C. Bradford, then an international law professor at West Point, went as far as interpreting international law to include academics criticizing the U.S. policies in the permissible targets list.¹⁷ But even within the legitimate spectrum of interpretation, there are fundamental disagreements between those promoting a permissive interpretation of targeting law and those advocating a restrictive interpretation of the same legal norms.¹⁸

In the Israeli context, during the latest hostilities between Israelis and Palestinians in Gaza, international law professors published - in real time - contrasting legal opinions interpreting IHL to allow or prohibit certain military actions,¹⁹ and the Israeli media went as far as naming those lawyers defending IDF actions as “legal iron dome.”²⁰ Unfortunately,

¹⁶ Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 358-359 (2009).

¹⁷ Arguing that such legal scholars may be defined as ‘unlawful combatants,’ who can be targeted at any time and place, including “law school facilities, scholars’ home offices, and media outlets where they give interviews.” William C. Bradford, *Trahsion des Professeurs: The Critical Law of Armed Conflict Academy as an Islamist Fifth Column*, 3 NATIONAL SECURITY LAW JOURNAL 278, 450 (2015).

¹⁸ For an elaborated analysis of these disagreements and legal disputes see *section C* below. See, also, Richard B. Bilder and Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98(4) AMERICAN JOURNAL OF INTERNATIONAL LAW 689, 690-692 (2004) and the references cited at footnotes 13-15.

¹⁹ Avi Bell, *Israel may stop supplying water and electricity to Gaza*, available at: http://kohelet.org.il/uploads/file/Israel%20May%20Stop%20%20Supplying%20Water%20and%20%20Electricity%20to%20Gaza%20-%20a%20Legal%20Opinion%20by%20Prof_%20Avi%20Bell.pdf; Yuval Shany et. al., *Legal Opinion Concerning Supply of Electricity and Water to the Gaza Strip*, available at: <http://gisha.org/UserFiles/File/publications/letters/letter-en-20-7-14.pdf>.

²⁰ ‘Iron Dome’ is the missile defense system that protects Israeli cities from Palestinian rockets. See: Gilad Grossman, *Legal Iron Dome*, WALLA NEWS, 18 November 2012 (available at: <http://news.walla.co.il/?w=1/2587639>).

these disagreements on the content of international law erode its credibility as a clear set of rules which guide behavior during wartime. Moreover, it increases uncertainty in a field already fueled with uncertainties. Targeted decisions are based, primarily, on uncertain intelligence; this uncertain, limited, information, is interpreted by security-oriented decision-makers; guided by internal decision-making processes that cannot fully address doubt in their highly sophisticated algorithms.

C. TARGETED KILLING OPERATIONS DURING ARMED CONFLICTS: PRESSING UNCERTAINTIES

Two alternative normative frameworks may apply to targeted killing operations: the law enforcement framework and the armed conflict framework. The former controls law enforcement operations generally, while the latter controls military operations conducted within the context of a specific armed conflict. Much of the controversy over targeted killings relates to the applicable legal framework and to the legal norms governing such operations. In order to focus the discussion on the main controversies and uncertainties concerning targeting law, the following section analyzes the main areas of disagreement concerning targeted killings under the law of armed conflict.

1. The existence of an armed conflict: what are the threshold for and territorial boundaries of LOAC?

1.1. *International v. non-international armed conflict*

While some acts of terrorism constitute domestic or international crimes, which should be prosecuted and dealt with by means of law enforcement, other acts of terrorism may rise to the level of ‘protracted armed violence,’ thereby constituting an armed conflict.²¹ An *international armed conflict* includes conflicts between two states or more ‘leading to the intervention of members of the armed forces’.²² When terrorist activities against state A can be attributed to state B, IHL norms governing international armed conflicts will apply to the conduct of hostilities between states A and B. For example, the hostilities between the US and Afghanistan, immediately following the terror attacks of 9/11, constituted an international armed conflict.²³

Nonetheless, other armed conflicts between states and terrorist organizations do not involve more than one state and therefore cannot be considered international armed conflicts. In such cases, when the intensity

²¹ Prosecutor v. Tadic, ICTY, Case No. IT-94-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

²² Jean S. Pictet (ed.), THE GENEVA CONVENTIONS OF 12 AUGUST 1949; COMMENTARY 23 (1958). This definition was reaffirmed later on by the ICTY in the Delalic case (judgment of 16 November, 1998), para. 184, 208. See also: YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 14-16 (2004); Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (merits), ICJ judgment of 27 June 1986, para. 14, 114.

²³ DINSTEIN, *id.*, at 16; Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153(2) U. PA. L. REV. 675, 713–714 (2004).

and gravity of the terrorist organization activities reach a high level, a *non-international armed conflict* may arise between the state and the terrorist organization. A non-international armed conflict includes all situations of sufficiently intense or protracted armed violence between identifiable and organized armed groups, regardless of where they occur, as long as they do not involve more than one state.²⁴ It should be emphasized that not every act of violence constitutes a non-international armed conflict. Normally, the use of force among private individuals, and between private individuals and public authorities, is governed by domestic criminal law and the paradigm of law enforcement.²⁵ In order to qualify as a non-international armed conflict, ‘protracted armed violence’ is required,²⁶ and the use of force must go beyond the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.²⁷

When the hostilities or violence caused by terror organizations constitute an ‘armed conflict’ (whether an international or non-international armed conflict), the prevailing normative regime is the law of armed conflict (or IHL).²⁸ While an international armed conflict is governed by the IHL regime as a whole, a non-international armed conflict triggers only a small part of these laws, mainly common article 3 of the

²⁴ MELZER, *supra* note 9, at 261.

²⁵ MELZER, *Id.*, at 256.

²⁶ Prosecutor v. Tadic, *supra* note 21, para. 70; Rome Statute of the International Criminal Court, 1998 [hereinafter: Rome Statute], article 8(2)(f).

²⁷ Additional Protocol II to the 1949 Geneva Conventions, 1977, article 1(2) [hereinafter: APII].

²⁸ Yuval Shany, *The International Struggle Against Terrorism – The Law Enforcement Paradigm and the Armed Conflict Paradigm*, PARLIAMENT, IDI (2008).

Geneva Conventions and Protocol II Additional to the 1949 Geneva Conventions.²⁹ Nonetheless, while IHL is the *lex specialis* during an armed conflict, it is not the only applicable set of rules. In the past decade or so it was gradually established that even in the conduct of hostilities, the international human rights regime still applies, although in part it is superseded by the *lex specialis*, IHL.³⁰ As part of the *lex specialis* of war, IHL grants the state broad authority to kill enemy combatants as well as civilians who directly participate in the hostilities. However, it also imposes significant limitations on states' power, as well as minimum standards of humane treatment of individuals.³¹ In the following sections we shall discuss the exact limitations on this General authority to kill.

1.2. Zones of active hostilities v. areas outside of 'hot battlefields'

When the hostilities or violence caused by terror organizations constitute an 'armed conflict' (whether an international or non-international armed conflict), the prevailing normative regime is the law

²⁹ LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* (2002), at 1. It should be noted, however, that APII only applies to non-international armed conflicts taking place in the territory of a state, between its own armed forces and non-state actors. And see, also: Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.) *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949* (1987), para. 4453 [hereinafter: *ICRC Commentary*].

³⁰ Kretzmer, *supra* note 8, p. 185; Theodor Meron, *The Humanization of Humanitarian Law*, 94 *AJIL* (2000) 239. This theory was adopted by the ICJ in the Nuclear Weapons case back in 1996 (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996 [1996] ICJ Rep 226 [hereinafter: Nuclear Weapons case]) and was repeated later on in several cases, including the Wall Advisory Opinion, *supra* note **Error! Bookmark not defined.**

³¹ *Murphy and Radsan*, *supra* note **Error! Bookmark not defined.**

of armed conflict (or IHL).³² But does the law of armed conflict have geographical boundaries? On the one hand, the United States and its supporters argue that the conflict between the U.S. and Al-Qaida, for example, extends to wherever the alleged enemy is found.³³ On the other hand, European states, human rights groups and scholars, counter that the armed conflict should be geographically limited to the ‘hot battlefields’ or ‘active hostilities’ areas in Afghanistan and possibly northwest Pakistan.³⁴ Based on this view, while state actions within hot battlefields are subject to the laws of armed conflict, state actions outside these areas should generally be governed by the law enforcement model.³⁵ Interestingly, this approach recently received some support from the U.S. itself: in the Drone Memo, the U.S. Department of Justice emphasized that “...according to the facts related to us, AQAP has a significant and organized presence,

³² Yuval Shany, *The International Struggle Against Terrorism – The Law Enforcement Paradigm and the Armed Conflict Paradigm*, PARLIAMENT, IDI (2008).

³³ See, for example, the remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, at the Harvard Law School Program on Law and Security: “An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to “hot” battlefields like Afghanistan.” *Strengthening our Security by Adhering to our Values and Laws*, available at: www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

³⁴ See, e.g., UN Special Rapporteur on Extrajudicial Killings, *supra* note 9, at 18; Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT AND SECURITY L. 245, 266 (2010); Jennifer C. Daskal, *The Geography of the Battlefield: a Framework for Detention and Targeting Outside the “Hot” Conflict Zone* 161(5) U. PA. L. REV. 1170 (2013) (and see citations in footnote 10.)

³⁵ Daskal argues that the rules for targeted killings ought to distinguish between ‘hot battlefield’ and elsewhere (zones outside of active hostilities). According to her view, lethal targeting outside a zone of active hostilities should be focused on those threats that are clearly tied to the zone of active hostilities and other significant and ongoing threats that cannot be adequately addressed through other means. Daskal, *id.*, p. 1208.

and from which AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States.”³⁶ Prof. Goodman argues that by confining the use of lethal force to areas with a significant presence of enemy forces, from where attacks against the U.S. are launched, the memo injects a limiting principle for the geographic scope of the conflict with Al Qaeda.³⁷

Similarly, Daskal suggests that zones of active hostilities should be geographically limited to areas in which there is actual fighting, a significant possibility of fighting, or preparation for fighting.³⁸ In the context of terrorist activity, such areas would include those places in which active, organized terrorists are planning or organizing attacks, even if they are only in their preliminary planning stages, as well as places from which such attacks are launched. This approach is consistent with international law, which limits the scope of non-international armed conflicts to ‘protracted armed violence’ involving ‘organized armed groups.’³⁹ Nonetheless, such terrorist activities could extend the territorial boundaries of the armed conflict only so long as there exists sufficient convincing information that a concrete terror attack is in fact underway, and so long as such an attack is clearly tied to the active hostilities. This means that the mere presence of Al-Qaeda members in Yemen, for

³⁶ David J. Barron, Acting Assistant Attorney General, *Memorandum for the Attorney General: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE LEGAL COUNSEL, July 16, 2010 [hereinafter: the Drone Memo], p. 27.

³⁷ Ryan Goodman, *The OLC’s Drone Memo and International Law’s Ascendance*, JUST SECURITY, June 24, 2014.

³⁸ *Id.*

³⁹ *Prosecutor v. Tadic*, ICTY, Case No. IT-94-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

example, does not necessarily expand the armed conflict regime to those areas, and any such individuals should generally be governed by the law enforcement model, unless they present a concrete threat which is tied to the active zone of hostilities.

1.3. State sovereignty and jurisdiction

While some targeted killing operations take place within the targeting state's own territory⁴⁰ or in areas under its effective control,⁴¹ others are conducted in third parties' territories,⁴² including failed or quasi states.⁴³ The former two cases—where the operation is conducted in a territory controlled by the relevant state—raise, mainly, questions relating to the legality of the relevant operation, under the law enforcement or the armed conflict models (depending on the proximity to a zone of active hostilities). The latter case—where the operation is conducted in the territory of another country—triggers, in addition to IHRL and IHL (*jus in bello*), the international law governing the use of force (*jus ad bellum*). Issues concerning the use of force norms governing targeted killing operations are the subject of intensive scholarly writing and are beyond the scope of this article. Nonetheless, the following paragraphs briefly mention a few central issues that add to the legal uncertainty surrounding targeted killing operations.

It is a basic principle of international law that a country is prohibited from engaging in law enforcement operations in the territory of another

⁴⁰ Such as the Russian targeted killing operations against Chechen rebels.

⁴¹ Such as the Israeli targeted killing operations in the West Bank.

⁴² Such as the US targeted killing operations in Yemen or Pakistan.

⁴³ Possibly such as Israeli targeted killing operations in Gaza after the disengagement.

country. This prohibition carries particular weight when such law enforcement operations involve killing a person. Deadly attacks by air strikes or drones clearly violate the international prohibition on the use of force between states.⁴⁴

Under the norms governing use of force, a targeted killing operation may be based on a self-defense exception to the international law prohibition on the use of force. A successful self-defense argument must be based on attribution of the terror attack to the relevant state, as well as on the gravity of the attack.⁴⁵ International law permits the use of lethal force in self-defense in response to an ‘armed attack’ as long as that force is necessary and proportionate.⁴⁶

If the terror attack cannot be attributed to a state, a targeted killing operation on the territory of a neutral state should consider the principle of sovereignty, and must be based either on the consent of that state or on its inability or unwillingness to interdict the terrorists.⁴⁷ As both issues of attribution and state consent are subject to secrecy and limited or uncertain information, this adds to the difficulties in making conclusive legal determinations.

⁴⁴ *Blum and Heymann, supra note Error! Bookmark not defined.*, at 161.

⁴⁵ NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 25–63 (2010) (discussing the norms and limitations regulating a ‘self-defense’ operation).

⁴⁶ Military and Paramilitary Activities in and against Nicaragua (Nicar. vs. US), 1986 I.C.J. 14, para. 194.

⁴⁷ *Blum and Heymann, supra note Error! Bookmark not defined.*, at 164; LUBELL, *upra note 45*, at 43, 70; Downes adds that the armed forces may be invited to assist a state in maintaining order, for example, through law enforcement and the suppression of the rebels. Chris Downes, ‘Targeted Killings’ in an Age of Terror: The Legality of the Yemen Strike, 9(2) JOURNAL OF CONFLICT AND SECURITY LAW 280 (2004).

2. Military necessity: what justifies the use of lethal force?

One of the fundamental - and yet elusive - principles of IHL is the principle of military necessity.⁴⁸ According to the Department of Defense Law of War Manual, military necessity is so difficult to define and apply, that different people often assess military necessity differently.⁴⁹ According to the Law of War Manual, necessity depends closely on the specific facts and circumstances of a given situation, as well as those interpreting and giving meaning to these facts and circumstances. This task becomes even more challenging due to the “limited and unreliable nature of information available during war.”⁵⁰

Indeed, there are two main approaches to military necessity – a restrictive approach and a permissive approach. According to the permissive approach, military necessity justifies the use of *all* measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.⁵¹ Based on this understanding of military necessity, the principle is almost never invoked in the context of targeted killing, as it is assumed that the use of lethal force against members of terrorist organizations is justified under this standard.

A different, more restrictive, approach to military necessity adopts a limiting, rather than justifying, interpretation of military necessity.

⁴⁸ Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50(4) VA. J. INT’L L. 795, 796 (2010); Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213 (1998).

⁴⁹ LAW OF WAR MANUAL, Department of defense 56 (June 2015). Available at: <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>

⁵⁰ LAW OF WAR MANUAL, *id.*

⁵¹ LAW OF WAR MANUAL, *id.*, at 52.

According to the restrictive approach, military necessity requires that the kind and degree of force resorted to would be necessary for the achievement of a concrete and legitimate military advantage, and that it must not otherwise be prohibited under IHL.⁵² In order for considerations of military necessity to override humanitarian considerations, the military necessity must be “concrete, direct and definite,”⁵³ and the operation must be likely to contribute effectively to the achievement of a concrete and direct military advantage.⁵⁴ According to the restrictive approach to military necessity, this principle also forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.⁵⁵ This means, that there is an obligation to attempt an arrest rather than to kill when the circumstances indicate a reasonable probability of success without undue risk. While this approach has been criticized by some,⁵⁶ it gets support from a historical analysis of this principle. Tracing the historical origins of the military necessity principle, Carnahan argued that the Lieber Code's greatest theoretical contribution to the modern law of war was its identification of military necessity as a general legal principle to limit violence.⁵⁷

⁵² MELZER, *supra* note 9, at 286.

⁵³ MELZER, *id.*, at 292–293.

⁵⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Geneva, 8 June 1977, 1125 UNTS 3 [hereinafter: API], article 52(2); President Obama’s national security speech, May 23, 2013.

⁵⁵ MELZER, *supra* note 9, pp. 108-109.

⁵⁶ See, e.g., Hays Parks, *Part IX of the ICRC ‘direct participation in hostilities’ study: no mandate, no expertise, and legally incorrect*, 42 NYUJ INT’L L. & POL. 769 (2009).

⁵⁷ Carnahan, *supra* note 48, at 231.

The context of counterterrorism operations - and specifically those involving the use of lethal force - presents a perfect opportunity to reestablish the limiting nature of military necessity. In traditional warfare, any combatant (who is not *hors de combat*) is a legitimate military target, whose killing is considered to meet the test of military necessity. As members of terror organizations are not combatants, targeting them could be justified by military necessity if their death generates a *concrete, direct and definite* military advantage. Hence, determining that it is necessary to kill a suspected terrorist requires concrete and updated evidence to this effect.

This is the declared policy of the current U.S. administration. In his speech at Northwestern University School of Law in March 2012, Attorney General Eric Holder stated that targeted killings are only lawful and legitimate when the targeted individual poses an imminent threat of violent attack against the United States;⁵⁸ and in his 2013 annual national security speech, President Obama stated that “we act against terrorists who pose a continuing and imminent threat to the American people.”⁵⁹ Similarly, the killing of Anwar Al-Awlaqi was justified by U.S. policymakers as a necessary mean to respond to a ‘continued and

⁵⁸ Attorney General Eric Holder, speech at Northwestern University School of Law regarding targeted killing, March 5, 2012 [hereinafter: Holder’s Speech]. And see, also, the Department of Justice White Paper, *supra* note 4, at 6. Nonetheless, the white paper demonstrates the need to carefully interpret such a requirement. While the white paper requires the existence of an ‘imminent threat of violent attack’, it later explains that such an imminent threat does not require the United States to have clear evidence that a specific attack will take place in the immediate future. *Id.*, at 7.

⁵⁹ REMARKS BY THE PRESIDENT AT THE NATIONAL DEFENSE UNIVERSITY, Fort McNair Washington, D.C. May 23, 2013. Available at: <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

imminent' threat.⁶⁰ Unfortunately, it left open important questions concerning how this determination was made, the level of proof required and the quantity and quality of the required evidence to make such a determination. Most importantly, it is unclear how a necessity requirement based on the existence of a concrete and imminent threat could be determined about 14 months before the actual use of lethal force.⁶¹

3. The Principle of Distinction: who can be targeted?

3.1. The basic rule

In an armed conflict paradigm, the lawfulness of an intentional killing operation depends, predominantly, on the distinction between legitimate military targets and protected civilians.⁶² As a general rule, the principle of distinction permits direct attacks only against the armed forces of the parties to the conflict, while the peaceful civilian population must be spared and protected from the effects of the hostilities.⁶³ Nevertheless, this general rule has several important exceptions. *First*, combatants cannot be targeted while they are 'hors de combat' (i.e., have surrendered, are wounded or are otherwise incapable of fighting). *Second*, civilians are not always protected against direct attack: they are legitimate targets while directly participating in the hostilities.⁶⁴ Therefore, the category of persons

⁶⁰ The Drone Memo, *supra* note 36.

⁶¹ For further discussion of these issues, see: Jennifer Daskal, *Reflections on What the Drone Memo Does and Does Not Say*, JUST SECURITY, June 24, 2014.

⁶² API, *supra* note 54, article 48.

⁶³ MELZER, *supra* note 9, at 300–301; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996 [1996] ICJ Rep 226 [hereinafter: *Nuclear Weapons case*]), para. 78.

⁶⁴ API, *supra* note 54, article 51(3); Additional Protocol II to the 1949 Geneva Conventions, 1977, article 1(2) [hereinafter: *APII*], article 13(3). For a thorough

who do not benefit from immunity against direct attack includes not only combatants, but also civilians directly participating in the hostilities, as well as medical, religious, and civil defense personnel of the armed forces or persons hors de combat who commit hostile acts despite the special protection afforded to them.⁶⁵

3.2. *Distinction and Suspected terrorists*

Applying the principle of distinction to attacks directed against suspected terrorists poses a new challenge, as it is unclear to which of the above-mentioned categories suspected terrorists belong. In recent years, state practice, as well as academic literature, characterize suspected terrorists differently: as civilians (who sometimes or constantly directly participate in the hostilities), or as combatants (or more frequently, ‘unlawful combatants.’) Numerous legal documents and articles have been written on this topic, claiming that international law dictates one characterization or another.⁶⁶ The significance of this characterization lies

normative and practical interpretation of the meaning of ‘direct participation,’ see section 2.3.3. *infra*.

⁶⁵ Geneva Convention I for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 1949 [hereinafter: Geneva Convention I], article 24; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 [hereinafter: Geneva Convention II], article 26; API, *supra* note 54, articles 12(1), 41(1), 41(2), 67(1). While this terminology and these references relate to international armed conflict, the same basic distinctions and protections against direct attacks apply to non-international armed conflict as well. See: APII, *supra* note 64, articles 4(1), 7(1), 9(1), 13; common article 3 of the Geneva Conventions, 1949. See also, MELZER, *supra* note 9, at 314.

⁶⁶ See, for example, Knut Dormann, *The Legal Situation of ‘Unlawful/Unprivileged’ Combatants*, 849 IRRC 45 (2003); Gerald L. Neuman, *Humanitarian Law and Counterterrorist Force*, 14 EJIL 283 (2003); Georg Nolte, *Preventative Use of Force and Preventative Killings: Moves into a Different Legal Order*, 5 THEORETICAL INQUIRIES IN LAW 111 (2004); Kenneth Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle over Legitimacy*, 11 HARVARD PROGRAM ON HUMANITARIAN

in its normative implications: the Third Geneva Convention applies to combatants; the Fourth Geneva Convention applies to civilians; and only the third common article to the Geneva Conventions (along with the “Martens Clause”) applies to ‘unlawful combatants.’⁶⁷

The US Supreme Court, as well as the Israeli High Court of Justice [hereinafter: HCJ], have determined that terrorists cannot be characterized as ‘combatants, as they typically do not fulfill the requirements specified in article 4 of the Third Geneva Convention.’⁶⁸ Nonetheless, the two courts reached different conclusions: the Israeli Court, on the one hand, concluded that suspected terrorists should be treated as civilians, who may lose their protections while directly participating in the hostilities;⁶⁹ and the US Supreme Court, on the other hand, concluded that suspected terrorists should be treated as ‘unlawful combatants’⁷⁰ – a term that does not appear in any of the Geneva or Hague conventions, regulations and protocols – and therefore enjoy only the limited protections accorded by common article 3 of the Geneva Conventions. While the difference

POLICY AND CONFLICT RESEARCH (2005); Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025 (2004); Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 CASE W. RES. J. INT’L L. 227 (2002); Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?*, 38 ILR 378 (2005).

⁶⁷ Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

⁶⁸ In its Targeted Killing Case, the Israeli High Court of Justice held that members of terrorist organizations have the status of civilians, whose protections under international law applies as long as they do not directly participate in the hostilities. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr., 57(6) Isr SC 285 [2005] [hereinafter: the Targeted Killing Case], paras. 25–28.

⁶⁹ Targeted Killing case, *id.*

⁷⁰ Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, *supra* note **Error! oookmark not defined.**

between these approaches may seem significant, it largely depends upon the meaning and interpretation of direct participation in hostilities (DPH). When interpreted loosely, the DPH approach can lead to similar outcomes and limited protections as the ‘unlawful combatant’ approach.

3.3. ‘Direct Participation in Hostilities’

Legal scholars, judges and policymakers around the world have been grappling with this question for many years without reaching an agreed-upon solution. While the ICRC Commentary on the notion of DPH equates it to “acts of war which by their nature or purpose are likely to cause actual harm,”⁷¹ others support more liberal interpretations of the term. Schmitt, for example, argues that grey areas should be interpreted liberally, i.e., in favor of finding direct participation. In his view, suggesting that civilians retain their immunity even when they are intricately involved in a conflict will only engender disrespect for the law by combatants endangered by such civilian involvement.⁷² Moreover, Schmitt argues that only a more *liberal interpretation* of direct participation will provide the necessary incentive for civilians to remain as distant from the conflict as possible.⁷³

⁷¹ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.) COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987), para. 4453 [hereinafter: *ICRC Protocols Commentary*], para 1944, discussing commentary on article 51 of API.

⁷² Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in H. Fischer (ed.), CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION (2004), at 505–509.

⁷³ *Id.*, at 509.

Against this view, many consider such a liberal interpretation to be an unacceptable erosion of civilian protection,⁷⁴ and they advocate a *restrictive approach* to the term direct participation.⁷⁵ Melzer concludes that ‘direct participation in hostilities’ includes “any hostile act that is specifically designed to support one party to an armed conflict by directly causing—on its own or as an integral part of a concrete and coordinated military operation—harm to the military operations or military capacity of another party, or death, injury or destruction to persons or objects protected against direct attack.”⁷⁶

Watkin, following the restrictive ICRC approach to direct participation, emphasizes three cumulative criteria necessary to meet the requirement of direct participation in hostilities: (1) threshold of harm; (2) direct causation; and (3) belligerent nexus.⁷⁷ The threshold of harm test is met “by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected from direct attack.”⁷⁸ The materialization of the harm is based on an objective likelihood or a threshold of harm “which may reasonably be expected to result from an act in the prevailing circumstances.”⁷⁹ The ICRC Interpretive Guidance significantly narrows the definition of activities that might constitute DPH based on the requirement of a direct causal link

⁷⁴ MELZER, *supra* note 9, at 341.

⁷⁵ ICRC Protocols Commentary, *supra* note 71, para 1945; Watkin, *supra* note 66, at 657–660; NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, (ICRC, 2009) [hereinafter: ICRC DPH Guidance].

⁷⁶ MELZER, *supra* note 9, at 343.

⁷⁷ Watkin, *supra* note 66, at 657.

⁷⁸ ICRC DPH Guidance, *supra* note 75, at 47.

⁷⁹ ICRC DPH Guidance, *Id.*, at 47.

between the specific act and the likelihood of harm. It does this by introducing the concept of “one causal step,”⁸⁰ meaning that anything which simply builds up the capacity of a party to inflict harm “is excluded from the concept of direct participation in hostilities.”⁸¹ The Interpretive Guidance excludes the production and transport of weapons and equipment unless those acts are carried out as an integral part of a particular military operation specifically designed to directly cross the threshold of harm.⁸² Similarly, recruitment, training and planning activities will meet this criterion only if such activities are specifically conducted to enable the execution of a concrete operation.⁸³ The final criterion is the belligerent nexus, where an act must not only be linked to the first two criteria, but also be specifically designed to support a party to the conflict.⁸⁴

In its judgment on the legality of targeted killings, the HCJ adopted a broader and less restrictive *test of functionality* in order to determine the directness of the part taken in the hostilities. According to this test, a civilian directly participates in the hostilities when he performs the functions of a combatant. By applying the test of functionality, the Court therefore held that the following cases constitute direct participation: a person who collects intelligence on the army, “whether on issues regarding the hostilities... or beyond those issues”;⁸⁵ a person who transports unlawful combatants to or from the place where the hostilities are taking

⁸⁰ ICRC DPH Guidance, *Id.*, at 53.

⁸¹ ICRC DPH Guidance, *Id.*

⁸² Watkin, *supra* note 66, at 658.

⁸³ Watkin, *Id.*

⁸⁴ Watkin, *Id.*; ICRC DPH Guidance, *supra* note 75, at 63.

⁸⁵ Targeted Killing Case, *supra* note 68, para. 35.

place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, regardless of the distance from the battlefield. The Court went on to decide that civilians serving as ‘human shields’ for terrorists taking direct part in the hostilities, of their own free will, out of support for the terrorist organization, should be seen as persons taking a direct part in the hostilities.⁸⁶ Furthermore, the Court determined that the directness of participation should not be restricted merely to the person committing the physical act of attack: “Those who have sent him, as well, take ‘a direct part.’ The same goes for the person who decided upon the act, and the person who planned it.”⁸⁷ With regard to persons who sell food or medicine to an unlawful combatant; persons who aid the unlawful combatants by general strategic analysis and provide them with logistic or general support, including monetary aid; or persons who distribute propaganda supporting those unlawful combatants—the Court determined that they take an indirect part in the hostilities.⁸⁸

The UN report also adopted a test of functionality. Nonetheless, it interpreted this test narrowly, determining that direct participation may include only “conduct close to that of a fighter or conduct that directly supports combat.”⁸⁹ More attenuated acts, such as providing financial support, advocacy, supplying food or shelter, economic support and propaganda or other non-combat aid, do not constitute direct

⁸⁶ Targeted Killing Case, *id.*, para. 36.

⁸⁷ Targeted Killing Case, *id.*, para. 37.

⁸⁸ Targeted Killing Case, *id.*, para. 35.

⁸⁹ UN Special Rapporteur on Extrajudicial Killings, *supra* note 9, p. 19.

participation.⁹⁰ While the obvious cases—such as violent and active combat operations—do not raise many difficulties, there is still much room left for debate with regard to the many grey areas, which include various preparatory or supporting measures, such as gathering intelligence information, planning of hostilities or other violent activities, recruitment of personnel, transmission of fighters or weapons to the battlefield, and voluntarily serving as ‘human shields’ for terrorists taking a direct part in the hostilities. Moreover, it seems that the main difference between the ICRC causality approach and the HCJ functionality approach is that the former focuses on concrete terrorist attacks which are under way, while the latter focuses on the general combat role within the organization (which is not necessarily linked to a concrete terrorist attack.)

The use of human shields can serve to illustrate the differences between these two approaches. The HCJ’s test of functionality treats voluntary human shields as legitimate targets under all circumstances. In contrast, the ICRC nuanced approach examines their exact activity, and the way in which they in fact participate in the hostilities, and allows treating them as legitimate targets only if by their activity they pose a physical obstacle to military operations (i.e., blocking the soldiers with their bodies and interfering with their activities), while treating them as protected persons if their presence on site only poses a legal (and not physical) obstacle (i.e., shifts the proportionality calculations).⁹¹ The focus of this test is not *activity based* but rather *status based*, and therefore deviates from the language, purpose and framework of article 51(3) of

⁹⁰UN Special Rapporteur on Extrajudicial Killings, *id.*

⁹¹ ICRC DPH Guidance, *supra* note 75, at 56–57.

API, which sets an *activity-based norm*. Using this mixed activity-based and causality-oriented test serves several goals: it sets a practical and clear limitations on targeted killings; it satisfies the prevention purpose of targeted killing operations; it distinguishes suspected criminals (who should be caught and prosecuted) from individuals who are currently in the midst of planning or executing a concrete attack; and it enables making this distinction *ex ante*, since it narrows obscure grey areas.

3.4. 'For such time'

Civilians lose their protections only 'for such time' as they directly participate in the hostilities.⁹² The ICRC DPH Guidance distinguishes between *temporary, activity-based loss of protection* (discussed in section 3.3. above), and *continuous status or function-based loss of protection* (due to combatant status or continuous combat function).⁹³ According to *the first, activity-based-category*, the loss of civilian protections applies to the immediate execution phase of a specific act meeting the three criteria of *threshold of harm, direct causation* and *belligerent nexus*, as well as to measures preparatory to the execution of such an act or deployment to and return from the location of its execution, where they constitute an integral part of such a specific act or operation.⁹⁴ *The second category—a 'continuous combat function'*—requires lasting integration into an organized armed group acting as the armed forces of a non-state party to

⁹² API, *supra* note 54, article 51(3); APII, *supra* note 64, article 13(3). The ICRC Customary IHL study considers the rule to be of customary nature for both types of conflicts. JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Vol I: Rules (2005), Rule 6.

⁹³ ICRC DPH Guidance, *supra* note 75, at 43–44.

⁹⁴ ICRC DPH Guidance, *id.*, at 65.

an armed conflict.⁹⁵ Thus, individuals, whose continuous functions involve the preparation, execution, or command of acts or operations amounting to DPH, are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act. Nonetheless, recruiters, trainers, financiers and propagandists, as well as those purchasing, smuggling, manufacturing and maintaining weapons and other equipment outside specific military operations, or collecting intelligence other than of a tactical nature, are not considered members of an organized armed group.⁹⁶ The ICRC DPH Guidance emphasizes that a ‘continuous combat function’ may be openly expressed through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behavior, for example, where a person has on repeated occasions directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.⁹⁷

The HCJ has made a somewhat similar distinction between civilians taking a direct part in hostilities on a one-time basis or sporadically, and those who continuously perform combat functions and commit a chain of hostilities, with short periods of rest between them. The

⁹⁵ ICRC DPH Guidance, *id.*, at 34.

⁹⁶ ICRC DPH Guidance, *id.*, at 34–35.

⁹⁷ ICRC DPH Guidance, *id.*, at 35.

Court determined that those belonging to the first group are entitled to resume their civilian protections once they have detached themselves from that sporadic activity, while those belonging to the second group lose their civilian protections completely, as of the time they join the terror organization. To support this decision, the Court raised the need to avoid the ‘revolving door’ phenomenon, with each terrorist having a ‘city of refuge’ to flee to, in order to rest and prepare themselves for the next combat activity.⁹⁸ The Court further discussed the ‘grey area’ cases, in between these two extreme scenarios, and determined that each case must be examined according to its specific circumstances.⁹⁹

While the HCJ approach is less nuanced and less restrictive than the ICRC approach, both resemble one another in that they recognize, implicitly, a third category not included in the Geneva Conventions, of individuals whose direct participation in the hostilities is indefinite. While the ICRC Interpretative Guidance significantly narrows the substantive scope of civilians who fall under this category, it deprives them of their civilian status altogether. Eliminating the ‘for such time’ requirement from the definition of DPH will result in creating a group of civilians who are constant targets based on limited intelligence information. As with the substantive scope of DPH, the definition of its temporal scope also leaves many grey areas and unanswered questions, including: How many activities does it take for a civilian to indefinitely lose their protections, and for how long are those protections lost? How much time can pass

⁹⁸ Targeted Killing Case, *supra* note 68, at para. 40.

⁹⁹ Targeted Killing Case, *id.*

between one activity and the next? And, how can a person reverse such a classification? Since membership in a terrorist organization is often vague, voluntary and less organized or constructed than military or even guerrilla forces, such an approach suffers from inherent difficulties in terms of proving membership (or lack thereof).

Therefore, the temporal scope of ‘direct participation’ (the ‘for such time’ requirement) should only include individuals who actively and directly participate in any preparatory or executional stage of a concrete attack. This is not to say that combatant-like terrorists are protected: they can always be targeted on the battlefields, carrying out operations or even outside of hot battlefields, while planning a concrete attack which is underway. But, they cannot be targeted at all times, while sleeping in their beds at home, next to their children, when they are not involved with the planning or executing of a concrete attack. To clarify, states should not be required to provide evidence regarding the *thoughts* of suspected terrorists at any given moment, and attack them only when they are *thinking* about a concrete terror attack; nor should they be required to present visual evidence of an imminent danger. States should be required, however, to present clear and convincing information according to which a killing target is indeed currently *involved* in an ongoing attack. If that is the case, that person can be targeted *at any time* while this plot is underway. This requirement is consistent with the preventive rationale that justifies targeted killing operations to begin with: the notion that it is intended to frustrate a future attack.

The HCJ's 'revolving door' rationale should similarly be rejected: since DPH status is activity-based, the fact that an individual can only be targeted at a time and place where they engage in combatant-activities does not constitute a 'city of refuge,' but rather limits the legal justifications for targeting and killing this person to the time and place where they actually engage in such activities. The question here is not whether suspected terrorists are immune from state actions, but rather *when* is it lawful to kill them, outside of 'hot battlefields,' without warning, and without due process.

4. Proportionality: how many civilians can lawfully be killed?

The principle of proportionality is part of customary IHL applicable both in international and in non-international armed conflicts.¹⁰⁰ A targeted killing operation which is militarily necessary and is directed against an individual representing a legitimate military objective, must additionally comply with the principle of proportionality. According to the principle of proportionality, launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.¹⁰¹ In contrast to the proportionality assessment under the law enforcement paradigm, the main focus of the principle of proportionality during the conduct of hostilities is not the damage or harm

¹⁰⁰ HENCKAERTS AND DOSWALD-BECK, *supra* note 92, Rule 14, at 46.

¹⁰¹ HENCKAERTS AND DOSWALD-BECK, *id.*

caused to those persons who are the target of the operation, but the ‘collateral damage’ inflicted on peaceful bystanders.¹⁰²

In the Targeted Killing Case, (then) Supreme Court President Aharon Barak held that the principle of proportionality applies to targeted killing operations on two distinct levels: *first*, it is necessary that the anticipated collateral damage (i.e., harm to innocent civilians and bystanders) will not be excessive as compared to the anticipated military advantage; and *second*, with regard to the intentional targets, the Court determined that lethal force should not be used if other, less harmful means, are available.¹⁰³

The determination that the principle of proportionality requires states to use lethal force only as a last resort was criticized in the literature.¹⁰⁴ Nonetheless, Attorney General Eric Holder has stated that targeted killings are only lawful and legitimate when capture is not feasible,¹⁰⁵ and the U.S. Drone Memo suggests that targeted killings would violate the Fourth Amendment if capture *was* feasible.¹⁰⁶ The inclusion of a ‘last resort’ requirement as a part of the proportionality principle is especially important, as the principle of proportionality *stricto sensu* has no agreed-upon content, and is open to conflicting interpretations. One

¹⁰² MELZER, *supra* note 9 at 359. And, *see also* Rome Statute of the International Criminal Court, 1998 [hereinafter: Rome Statute], article 8(2)(b)(iv).

¹⁰³ Targeted Killing Case, *supra* note 68, para. 40.

¹⁰⁴ Amichai Cohen and Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5(2) J. INT’L CRIM. JUSTICE 315 (2007).

¹⁰⁵ Holder’s speech, *supra* note 58.

¹⁰⁶ Drone Memo, *supra* note 36, p. 41. Nonetheless, it is still silent with regard to how feasibility will be determined, and how could such decisions be reviewed.

commentator, who had previously served as a military lawyer for 20 years, stated that “a human rights lawyer and an experienced combat commander would probably not assign the same relative values to military advantage and to injury to noncombatants.”¹⁰⁷ Since this test is normally applied by military personnel, and not by human rights activists, this assessment demonstrates how the vagueness of the principle of proportionality is likely to dictate its actual implementation.

5. Precaution: how feasible should alternative measures be?

The principle of precaution in attack, which is considered to be of customary nature both in international and in non-international armed conflicts,¹⁰⁸ aims to prevent erroneous targeting and to minimize incidental harm to civilians during the conduct of hostilities.¹⁰⁹ According to the International Committee of the Red Cross Customary International Humanitarian Law project [hereinafter: ICRC IHL project], the principle of precaution contains several distinct obligations for those planning and deciding upon an attack, and for those responsible for its actual conduct. These obligations include: (a) the duty to do everything feasible to verify

¹⁰⁷ William J. Fenrick, *Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives*, 27 WINDSOR Y.B. ACCESS JUST. 271 (2009); Schmitt emphasizes the case-by-case analysis required by the application of this principle: “Multiple civilian casualties may not be excessive when attacking a senior leader of the enemy forces, but even a single civilian casualty may be excessive if the enemy soldiers killed are of little importance or pose no threat.” Michael N. Schmitt, *Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate*, 30 B.U. INT’L L. J. 595, 616; *see, also*: Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L. J. 681, 750 (2014).

¹⁰⁸ HENCKAERTS AND DOSWALD-BECK, *supra* note 92, Rules 15–21, at 51.

¹⁰⁹ API, *supra* note 54, article 57.

that the objectives to be attacked are legitimate military objectives;¹¹⁰ (b) the duty to take all feasible precautions in the choice of the means and methods to be used in the attack, in order to avoid, or at least minimize, incidental harm to civilians;¹¹¹ (c) the duty to do everything feasible to assess whether the attack may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated, and if so, refrain from deciding to launch that attack;¹¹² and (d) the duty to do everything feasible to cancel or suspend the attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause excessive collateral damage.¹¹³ ‘Feasible precautions’ are defined as “precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”¹¹⁴

The efforts to provide substantive content and practical tests to the principle of precaution are valuable. Nonetheless, it still relies heavily on vague definitions, to be interpreted by the security authorities in real time.

6. Transparency and Accountability: how much we still don’t know?

¹¹⁰ HENCKAERTS AND DOSWALD-BECK, *supra* note 92, Rule 16; API, *id.*, article 57(2)(a)(i).

¹¹¹ HENCKAERTS AND DOSWALD-BECK, *id.*, Rule 17; API, *id.*, article 57(2)(a)(ii).

¹¹² HENCKAERTS AND DOSWALD-BECK, *id.*, Rule 18; API, *id.*, Article 57(2)(a)(iii).

¹¹³ HENCKAERTS AND DOSWALD-BECK, *id.*, Rule 19; API, *id.*, article 57(2)(b).

¹¹⁴ Convention on Certain Conventional Weapons, 1980, Protocol II, article 4. And see, also: Jean-Francois Que’guiner, *Precautions under the Law Governing the Conduct of Hostilities*, 88 INT’L REV. OF THE RED CROSS 864 (2006).

Both human rights norms and IHL obligate states to effectively investigate any alleged violations of the right to life.¹¹⁵ Effective investigations necessitate, among other things, a meaningful degree of transparency.¹¹⁶ Indeed, the European Court of Human Rights has long insisted that “[t]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities’ adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.”¹¹⁷ Transparency in this regard relates to all aspects of targeted killing operations: from the relevant normative standards (national and international), to the decision-making process, to the operational responsibility,¹¹⁸ and finally to the investigations of alleged violations. The importance of such transparency is emphasized by a former member of the CIA’s Directorate of Operations, who stressed that CIA agents “lack detailed rules of engagement, standing orders, and international conventions to define limits of behavior.”¹¹⁹

National investigatory procedures must meet two different levels of accountability. The first is that national procedures must meet certain standards of transparency and accountability in order to comply with

¹¹⁵ Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 1949 [hereinafter: Geneva Convention IV], article 146; International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1996), article 2 [hereinafter: ICCPR], article 2.

¹¹⁶ Alston, *supra* note 9, at 23.

¹¹⁷ *Anguelova v. Bulgaria*, ECHR, Application no. 38361/97, 13 June 2002, p.140.

¹¹⁸ A degree of transparency in relation to operational responsibility is essential both in terms of facilitating public or political accountability, and of establishing whether operations are being conducted with the necessary legal authority under domestic law. Alston, *supra* note 9, p. 51.

¹¹⁹ James M. Olson, *Intelligence and the War on Terror: How Dirty Are We Willing to Get Our Hands?*, 28 THE SAIS REV. INT’L AFF. 37, 44 (2008).

existing international obligations. The second is that the national procedures must *themselves* be sufficiently transparent to international bodies as to permit the latter to make their own assessment of the extent to which the state concerned is in compliance with its obligations.¹²⁰ Effective accountability may have various dimensions, including: (1) internal control (within the relevant security agencies); (2) executive oversight over the relevant security agencies; (3) parliamentary oversight over the relevant security agencies; (4) judicial review, which is able to independently and effectively review alleged violations—including those committed by decision-makers from the highest political level; and (5) external oversight, which includes civil society and the media.¹²¹

When it comes to targeted killing operations, each of these accountability mechanisms faces difficulties. The reliance on secret intelligence information poses a significant challenge to legal, political and external accountability: “increased secrecy has impacted upon the legislative and judiciary branches’ ability to oversee and review intelligence activities”.¹²² The UN report on targeted killings concluded that “the failure of States to disclose their criteria for direct participation

¹²⁰ Alston, *supra* note 9, at 25–26.

¹²¹ *Id.*, at 86. For a criticism of media oversight concerning state secrets, see: GABRIEL SCHOENFELD, *NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW* (2010).

¹²² Damien Van Puyvelde, *Intelligence Accountability and the Role of Public Interest Groups in the United States*, 1 *INTELLIGENCE AND NAT’L SECURITY* 9 (2012) (citing PHILIP B. HEYMANN, *TERRORISM, FREEDOM AND SECURITY: WINNING WITHOUT WAR* (2003)).

in hostilities is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing.¹²³

In addition to lack of information, both legal and political oversight mechanisms suffer from an expertise problem.¹²⁴ The executive branch simply knows more about how they conduct targeted killings than the legislature which oversees it. As American scholars have noted with respect to congressional oversight of the executive branch, this expertise advantage enables the executive branch to shield certain activities from oversight because Congress is comparatively disadvantaged with regard to the knowledge necessary to ask the right questions.¹²⁵ Amy Zegart points out that Congress is not designed to oversee intelligence agencies well, since the congressional intelligence committees have been traditionally conducting oversight with limited expertise and weak budgetary authority.¹²⁶

As for internal and executive oversight, these, too, are inherently compromised by secrecy, the high-risk nature of the threat and the bureaucratic nature of the decision-making process with respect to targeted killing operations. These conditions contribute to the development of groupthink dynamics,¹²⁷ which can lead to suboptimal

¹²³ UN Special Rapporteur on Extrajudicial Killings, *supra* note 9, at 21.

¹²⁴ McNeal, *supra* note 107, at 774.

¹²⁵ *Id.*, at 102–3.

¹²⁶ Amy Zegart, *The Domestic Politics of Irrational Intelligence Oversight*, 126 POL. SCI. Q. 1, 4 (2011).

¹²⁷ A phenomenon defined by Irving as “a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members’ strivings for unanimity override their motivation to realistically appraise alternative courses of action.” IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 9 (1982).

decision-making. Groupthink fosters excessive optimism, lack of vigilance, and stereotypical thinking about out-groups, and at the same time causes members to ignore negative information by viewing messengers of bad news as people who ‘don’t get it.’¹²⁸ Under groupthink conditions it may be difficult to stop a targeted killing operation once it has begun. As Klaidman notes:

The military was a juggernaut. They had overwhelmed the session with their sheer numbers, their impenetrable jargon, and their ability to create an atmosphere of do-or-die urgency. How could anybody, let alone a humanitarian law professor, resist such powerful momentum? Koh was no wallflower when it came to expressing his views; normally he relished battling it out with his bureaucratic rivals. But on this occasion he’d felt powerless. *Trying to stop a targeted killing “would be like pulling a lever to stop a massive freight train barreling down the tracks”* he confided to a friend.¹²⁹ [emphasis added – S.K.]

Moreover, “the collectivity itself may have caused an error while the public has no individual to hold to account.”¹³⁰

The importance of identifying an effective accountability mechanism for targeted killing operations motivated the HCJ to introduce a legal requirement of ex post review, which is subject to judicial supervision.¹³¹ Byman has urged the United States to follow the Israeli targeted killing policy, including its openness about the policy, its

¹²⁸ Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1258 (2003).

¹²⁹ Daniel Klaidman, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 202* (2012).

¹³⁰ McNeal, *supra* note 107, at 783.

¹³¹ Targeted Killing Case, *supra* note 68, para. 54.

procedures for authorizing killings, and its provision of some form of legal review over the decision-making process.¹³² Unfortunately, a detailed analysis of such an Israeli ex-post investigatory mechanism - the Shehadeh Commission - demonstrates the weaknesses of state-sponsored investigations of targeted killing operations, and casts a shadow over their potential to meaningfully challenge the security agencies' position.¹³³

D. TARGETING DECISIONS AND UNCERTAINTY

Thus far we have established the uncertainty that currently exists regarding crucial aspects of targeted killing law. Government officials, military personnel and legal scholars adopt different interpretations of the relevant norms and thus reach conflicting conclusions regarding the legality of targeted killing operations. This section will analyze another source of confusion regarding the legality of targeted killing operations, this time with a focus on the decision-making processes and the implementation of the relevant law. The main argument is that the centrality of intelligence information and schemes of secrecy increases the risk of error and inherently jeopardizes civilians.

1. Intelligence and the risk of error

When successful, a targeted killing operation is an irreversible measure. Unlike detention regimes, it is designed to kill, not capture. The legality of this deadly measure depends on the concrete circumstances of

¹³² Daniel Byman, *Do Targeted Killings Work?*, 85(2) FOREIGN AFFAIRS 110-111 (2006).

¹³³ See section E, *infra*.

each case, and rests, mainly, on the availability of intelligence information concerning the severity of the security threat, the activities of the targeted individual, the existence or inexistence of feasible less harmful measures, and the anticipated collateral damage. It is not the ‘heat of the battle’ or immediate eye-sight evidence that drive the killing decision-making process, but rather a rational and calculated bureaucratic decision-making process, which is based on secret information that the targeted individual cannot challenge.

Therefore, the legality of a targeted killing operation is heavily dependent upon the quality, breadth and reliability of the intelligence on which it is based.¹³⁴ How well that information is documented, how closely that information is scrutinized, and by whom are key factors in any assessment of targeted killing operations.¹³⁵ Social-psychology studies have long ago demonstrated that individuals tend to search and absorb information that is in line with their core social beliefs, while omitting or distorting contradictory information.¹³⁶ The construction and evaluation of

¹³⁴ UN Special Rapporteur on Extrajudicial Killings, *supra* note 9, at 25; *and see*, The Report of the Special Investigatory Commission on the targeted killing of Salah Shehadeh [in Hebrew, hereinafter: *the Shehadeh Commission Report*], February 27, 2011.

¹³⁵ McNeal, *supra* note 107, at 720. See, also: Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT’L SEC. J. 283 (2011), p. 316.

¹³⁶ Among the various psychological mechanisms which contribute to biased assimilation of information are: cognitive consistency and confirmation bias (Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, in Mark P. Zanna and James M. Olson, eds., *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 255, 263-264 (Vol. 27, 1995)); motivated cognition (Dan Kahan, *Foreword: Neutral Principles, Motivated Cognition, and some Problems for Constitutional Law*, 125 HARVARD LAW REVIEW 1, 19 (2012)); and threatened social identities (Terrell A. Northrup, *The Dynamics of Identity in Personal and Social Conflict*, in Louis Kriesberg, Terrell A. Northrup, Stuart J. Thorson, eds. ed., *INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION* 55-82 (1989); Anne Maass and Mark Schaller, *Intergroup Biases*

information in social settings is influenced by the prior beliefs, ideologies and interests,¹³⁷ as well as their group identities and commitments.¹³⁸ Those tasked with preventing catastrophic terror attacks would therefore interpret associated risk differently than those tasked with preserving personal liberties. Slovic et al. find that subjective judgments are a major component of any risk assessment, whether these are made by experts or lay people.¹³⁹ They specifically point out the problem of *overconfidence*, finding that experts think they can estimate failure rates with much greater precision than is actually the case.¹⁴⁰

Some common ways in which experts misjudge factual information and associated risks are (i) failure to consider the ways in which human errors can influence technological systems; (ii) failure to anticipate human response to safety measures; and (iii) insensitivity to

and the Cognitive Dynamics of Stereotype Formation 2(1) EUROPEAN REVIEW OF SOCIAL PSYCHOLOGY 189 (1991); Daniel Bar-Tal, *Sociopsychological Foundations of Intractable Conflicts*, 50 AMERICAN BEHAVIORAL SCIENTIST 1430-1453, 1445-1446 (2007)).

¹³⁷ Ifat Maoz et al., *Reactive Devaluation of an "Israeli" vs. "Palestinian" Peace Proposal*, 46 JOURNAL OF CONFLICT RESOLUTION 515, 543 (2002). And see, also: Roy F. Baumeister & Stephen Hastings, *Distortions of Collective Memory: How Groups Flatter and Deceive Themselves*, in James W. Pennebaker, Dario Paez, & Bernard Rimé eds., *COLLECTIVE MEMORY OF POLITICAL EVENTS: SOCIAL PSYCHOLOGICAL PERSPECTIVES* 277-294, 287 (1997). Chan, Burtis and Bereiter's study on knowledge construction, found that individuals distort and twist information to make it fit with prior beliefs. Carol Chan, Jud Burtis & Carl Bereiter, *Knowledge Building as a Mediator of Conflict in Conceptual Change*, 15 COGNITION AND INSTRUCTION 1, 5 (1997).

¹³⁸ Dan M. Kahan et al., *They saw a protest: Cognitive illiberalism and the speech-conduct distinction*, 64 STAN. L. REV. 851, 859 (2012).

¹³⁹ Paul Slovic, Baruch Fischhoff, and Sarah Lichtenstein, *Facts and Fears: Understanding Perceived Risk*, in *SOCIETAL RISK ASSESSMENT* 181-216 (1980).

¹⁴⁰ *Id.* See, also, Sitaraman and Zions, *supra* note 8, at 534-535, discussing 'fundamental attribution error.'

how technological systems function as a whole.¹⁴¹ While analyzing the intelligence failure with regard to the Iraqi weapons of mass destruction, Robert Jervis found that many of the intelligence community's judgments were stated with overconfidence: while the preponderance of evidence indicated that Iraq had weapons of mass destruction, it was not sufficient to prove it beyond reasonable doubt.¹⁴² Assumptions were insufficiently examined, and assessments were based on previous judgments without carrying forward the uncertainties.¹⁴³

Legal evaluations of risks associated with targeted killings (such as collateral damage assessments) are, too, prone to expert bias, on two levels: first, by intelligence agents, as they collect and analyze information; and, second, by lawyers, as they evaluate the intelligence information presented to them.

Overconfidence becomes an even greater problem in the counterterrorism context, due to people's extreme aversion of the risks associated with terrorism.¹⁴⁴ As Jervis pointed out, states are prone to exaggerate the reasonableness of their own positions and the hostile intent of others.¹⁴⁵ Similarly, Kahana, while analyzing Israeli intelligence failures, emphasized the inherent problem of *overestimation of threats*.¹⁴⁶

¹⁴¹ Slovic et al, *supra* note 139, at 187.

¹⁴² Robert Jervis, *Reports, politics, and intelligence failures: The case of Iraq*, 29(1) THE JOURNAL OF STRATEGIC STUDIES 3, 14 (2006).

¹⁴³ *Id.*, at 22.

¹⁴⁴ Leonie Huddy et al, *Threat, anxiety, and support of antiterrorism policies*, 49(3) AMERICAN JOURNAL OF POLITICAL SCIENCE 593 (2005).

¹⁴⁵ Robert Jervis, *War and misperception*, JOURNAL OF INTERDISCIPLINARY HISTORY 675, 688 (1988).

¹⁴⁶ Kahana lists many Israeli intelligence failures that occurred during the years, and calls the academic community to focus their attention and resources on the inherent

The urgency of many targeted killing decisions, the danger associated with non-action, and the cohesiveness of the intelligence community, add to the risks of individual and institutional biased interpretation of information.¹⁴⁷

1.1. Risk of error assessing potential risk to civilians:

President Obama declared that “before any strike is taken, there must be near-certainty that no civilians will be killed or injured - the highest standard we can set.”¹⁴⁸ Indeed, it is well accepted that “every effort must be made to minimize collateral damage.”¹⁴⁹ But how is the anticipated collateral damage being assessed? McNeal describes, lengthily, a highly sophisticated and automated process, using software (FAST-CD) that allows to predict the anticipated effects of a weapon on certain targets. The weapons-effect data contained in FAST-CD are based on empirical data gathered in field tests, probability, historical observations from weapons employed on the battlefield, and physics-based computerized models for collateral damage estimates.¹⁵⁰ Casualty estimates are also predicted based on standardized methods, including the Population Density Reference Table, which lists data from the intelligence

problem of overestimation of threats. Ephraim Kahana, *Analyzing Israel's Intelligence Failures*, 18(2) INTERNATIONAL JOURNAL OF INTELLIGENCE AND COUNTERINTELLIGENCE 262, 274 (2005).

¹⁴⁷ Dina Badie, *Groupthink, Iraq, and the war on terror: explaining US policy shift toward Iraq*, 6(4) FOREIGN POLICY ANALYSIS 277 (2010). For a different explanation, see McNeal, *supra* note 107, at 755-758.

¹⁴⁸ REMARKS BY THE PRESIDENT AT THE NATIONAL DEFENSE UNIVERSITY, *id.*

¹⁴⁹ Amos N. Guiora, *Determining a Legitimate Target: The Dilemma of the Decision Maker*, 47 TEX. INT'L L. J. 14 (2011).

¹⁵⁰ McNeal, *supra* note 107, at 741.

community and allows for estimates of the population density during day, night, and special events.¹⁵¹

While these methods help to standardized the targeted killing decision making process and to minimize certain types of human error, they are nonetheless imperfect, and even prone to different kinds of errors. First, the data is limited by the quantity and reliability of the intelligence information *collected*.¹⁵² Naturally, security agencies spend time, efforts and resources on collecting intelligence on their targets and their whereabouts. However, with regard to collecting intelligence on the anticipated collateral damage, it seems that most of the effort focuses on algorithm-based assessments, which are inherently limited as it cannot take account of changes in the operational environment or the reliability of intelligence data.¹⁵³ The accuracy and reliability of such information is further challenged by the fact that suspected terrorists tend to change their location frequently, making it harder to collect reliable intelligence on the anticipated collateral damage in real time.

Second, this highly sophisticated collateral damage calculation creates the illusion of robustness, while masking the big picture and discouraging decision-makers from exercising their common sense. Since so many individuals are involved in collecting and feeding data into these sophisticated, technology-based, calculations, the outlook on the events changes dramatically, and flesh and blood people are reduced to

¹⁵¹ *Id.*, at 751.

¹⁵² *Id.*, at 742.

¹⁵³ *Id.*, at 740-745. See also section E *infra*.

meaningless numbers (McNeal mentions that on average each drone strike in Pakistan seems to have killed between 0.8 and 2.5 civilians.)¹⁵⁴

1.2. Risk of error assessing means to prevent harming civilians:

Similarly to collateral damage calculations, the existence of ‘feasible’ precautions depends on the availability of intelligence information about the target and its surroundings.¹⁵⁵ Determining whether the targeting state did everything possible to ensure a correct identification of the target, to choose appropriate means and to carefully assess the anticipated collateral damage necessitates a careful examination of the intelligence information concerning risk assessments. There are several challenges concerning precaution assessments in the targeted killing decision-making process. First, limited intelligence: the existence of alternatives to targeted killings or to the specific course of action in a given case is dependent upon availability of information. As intelligence information is inherently limited, assessments of the alternatives are also limited. Second, biased risk assessments: when alternatives are considered, risks to one’s soldiers or civilians dominate the decision-making process and influence the risk assessment process. Third, the treatment of uncertainty: intelligence is always uncertain. Information is limited in scope, is open to competing interpretations and there are gaps to be filled by one’s subjective interpretation. In the context of counter-terrorism, risk aversion may fill these gaps with false assumptions, and overconfidence may contribute to misjudgments of actual risks. Fourth, secretive processes and limited oversight: it is impossible to assess

¹⁵⁴ *Id.*, at 755.

¹⁵⁵ MELZER, *supra* note 9, at 365.

whether precaution measures were sufficiently taken without access to the information on the decision-making process, the relevant intelligence and the existing alternatives, which are typically secret.

1.3. Intelligence, institutions and inescapable errors:

In her book “Spying Blind,” Amy Zegart points out that while attributing failure to individuals is understandable, it is also dangerous, as it misses the institutional constraints and forces that make it likely talented people will make poor decisions.¹⁵⁶ She finds, that institutional weaknesses in both the CIA and FBI were at the heart of the intelligence failure concerning the 9/11 attack. But can these weaknesses be resolved using appropriate institutional reform?

Analyzing the intelligence failure concerning Iraqi weapons of mass destruction, and the reports that investigated this failure, Robert Jervis concluded that intelligence errors are inescapable.¹⁵⁷ Focusing on inherent biases and social structures in the intelligence community, he argued that while these reports convey a great deal of useful information, they are not satisfactory either intellectually or for improving intelligence: “I think we can be certain that the future will see serious intelligence failures, some of which will be followed by reports like these. Reforms can only reduce and not eliminate intelligence errors, and in any event there is no reason to expect that the appropriate reforms will be put in place. Perhaps a later scholar will write a review like this one as well.”¹⁵⁸

¹⁵⁶ Amy B. Zegart, *SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11* 6-7 (2009) 6-7.

¹⁵⁷ Jervis, *supra* note 142, at 48. See, also, Kahana, *supra* note 146, at 274.

¹⁵⁸ Jervis, *id.*, at 48.

2. Inherent risks for civilians

The ‘bureaucracy of killing’ described above entails many risks to innocent civilians, which are intensified by the very nature of terrorism. Being ‘the weapon of the weak,’¹⁵⁹ terrorism challenges the principle of distinction, and thus put civilians at risk, in four distinct ways: *first*, by definition, terrorists target civilians and direct their attacks at random individuals. This deliberate victimization of innocent civilians create a public outcry for revenge and promote political receptiveness to measures that may put enemy civilians at risk.¹⁶⁰

Second, terrorist organizations act in clandestine and find shelter in loosely governed civilian areas.¹⁶¹ To escape accountability, they do not wear uniform, and make efforts blending in with the civilian population. Therefore, any counterterrorism measure faces difficulties in avoiding collateral damage and protecting innocent bystanders.¹⁶²

Third, as terrorists hide among civilians, the risk of failed or mistaken identification increases. In fact, McNeal found, according to interviews he conducted with military officials, that 70% of unintended civilian casualties in targeted killing operations in Afghanistan and Iraq was attributable to mistaken identification.¹⁶³ This means, that terrorism

¹⁵⁹ Martha Crenshaw, *The Long View of Terrorism*, 113 CURRENT HISTORY 40 (2014).

¹⁶⁰ Max Abrahms, *Why terrorism does not work*, 31(2) INTERNATIONAL SECURITY 42 (2006).

¹⁶¹ Crenshaw, *supra* note 159.

¹⁶² McNeal, *supra* note 7, at 714.

¹⁶³ McNeal, *id.*, at 738.

tactics, together with the limitations of intelligence information, increases the risk to innocent civilians from targeted killing operations.

Fourth, identifying an individual as a terrorist in itself is a challenging task. While legal categorizations demand a clear ‘yes’ or ‘no’ answer, in reality, terrorism is rather a spectrum of activities and engagement, and individuals’ involvement can change with time and move from one point to another on this spectrum.¹⁶⁴ The overly sophisticated bureaucracy of creating kill-list is designed to accommodate a simple binary categorization and fails to recognize this type of variation.

3. Uncertain outcomes: (in)effectiveness of targeted killings as a counterterrorism measure

Lastly, targeted killings have been used as a military method based on assumptions of efficacy. Mainly, it is believed to disrupt the operations of terror organizations and to decrease the number of successful deadly attacks. However, for over a decade scholars have failed to provide conclusive empirical data that demonstrate the effectiveness of targeted killing operations. While some scholars find targeted killing (or decapitation) to have some positive outcomes, such as reducing violence, increasing terror organization’s mortality or contributing to tactical advantages, other have found the complete opposite.

¹⁶⁴ Pedahzur, Ami, and Arie Perliger. "The changing nature of suicide attacks: a social network perspective." *Social forces* 84.4 (2006): 1987-2008. With regard to Al Qaeda, McNeal states that it can best be understood as a decentralized social network, and is therefore notably resistant to the loss of any one node. Gregory S. McNeal "Targeted Killing and Accountability," 102 *GEORGETOWN LAW JOURNAL* 68, 719(2014).

For example, based on a database of 207 terrorist groups from 1970 to 2008, Price found that leadership decapitation (by killing or capturing the organization's leader) increases the mortality rate of terrorist groups, at least with regard to young organizations.¹⁶⁵ Somewhat similarly, Johnston found positive outcomes of decapitation with regard to various metrics of counterterrorism effectiveness;¹⁶⁶ and Kurth-Cronin concluded that leadership decapitation has often hastened the decline or collapse of a terrorist organization.¹⁶⁷

However, other studies reached very different conclusions. For example, Jordan found that decapitation is not an effective counterterrorism strategy and might even have counterproductive effects, especially in larger, older, religious, and separatist organizations;¹⁶⁸ Hafez and Hatfield found that targeted killings have no significant impact, in

¹⁶⁵ Bryan C. Price, *Targeting top terrorists: How leadership decapitation contributes to counterterrorism*, 26(4) INTERNATIONAL SECURITY 9 (2012).

¹⁶⁶ Nonetheless, he concluded that decapitation is more likely to help states achieve their objectives as an operational component within an integrated campaign strategy than as a stand-alone strategy against insurgent and terrorist organizations. Patrick B. Johnston, *Does decapitation work? Assessing the effectiveness of leadership targeting in counterinsurgency campaigns*, 36(4) INTERNATIONAL SECURITY 47 (2012). Note, that Johnson analyzes decapitation with regard to insurgency and militant organizations, and not necessarily terror organizations.

¹⁶⁷ Audrey Kurth Cronin, *No Silver Bullets: Explaining Research on How Terrorism Ends*, 3(4) CTC SENTINEL 16 (2010).

¹⁶⁸ Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leadership Decapitation*, 18 SECURITY STUD. 719 (2009). In a recent study, Jordan explains why targeting al-Qaida's leadership was not proven to be an effective counterterrorism strategy and is likely counterproductive. Jenna Jordan, *Attacking the Leader, Missing the Mark: Why Terrorist Groups Survive Decapitation Strikes*, 38(4) INTERNATIONAL SECURITY 7 (2014). See, also: MARTHA CRENSHAW, EXPLAINING TERRORISM: CAUSES, PROCESSES AND CONSEQUENCES 93 (2011); JACOB N. SHAPIRO, THE TERRORIST'S DILEMMA: MANAGING VIOLENT COVERT ORGANIZATIONS (2013); Keith Patrick Dear, *Beheading the Hydra? Does Killing Terrorist or Insurgent Leaders Work?*, 13(3) DEFENCE STUDIES (2013).

either the short or long term, on rates of terror attacks;¹⁶⁹ and another study concluded that the U.S. drone strike policy leads to death and injury of civilians, causes considerable harm to the daily lives of civilians, and undermines respect for the rule of law and international law.¹⁷⁰ In his recent book, “Objective Troy,” Scott Shane documented evidence on the blowback from drone strikes,¹⁷¹ and concluded that targeted killings fuel the central narrative of Al Qaeda and the Islamic State: that the United States is at war with Islam, that it is killing Muslims and that the obligatory religious response is armed jihad.¹⁷²

While this breadth of information is inconclusive, it does suggest that under some circumstances targeted killing operations have some

¹⁶⁹ Mohammed M. Hafez and Joseph M. Hatfield, *Do Targeted Assassinations Work? A Multivariate Analysis of Israel's Controversial Tactic during Al-Aqsa Uprising*, 29 *STUD. CONFLICT AND TERRORISM* 359 (2006). Similarly, David found that the effectiveness of the Israeli targeted killing policy is called into doubt because it has not prevented—and may have contributed to—record numbers of Israeli civilians being killed, and because it resulted in informers being revealed, intelligence resources diverted, potential negotiating partners eliminated. At the same time, it had several benefits, including impeding the effectiveness of terrorist operations, keeping terrorists on the run, and deterring some attacks. Steven R. David, *Israel's policy of targeted killing*, 17(1) *ETHICS & INTERNATIONAL AFFAIRS* 111 (2003).

¹⁷⁰ International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law, *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN* (2012);

¹⁷¹ Among other things, he mentions the backlash in Yemen against the unintended deaths of civilians; interviews with suspected terrorists confessing to being motivated by drone strikes; and statements by high-ranking security officials claiming it is a ‘failed strategy.’ SCOTT SHANE, *OBJECTIVE TROY: A TERRORIST, A PRESIDENT, AND THE RISE OF THE DRONE* (2015). Some of these findings are also summarized at: Scott Shane, *The Lessons of Anwar Al-Awlaki*, *NEW YORK TIMES*, 27 August 2015 (last accessed: 10.15.2015), available at: http://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html?_r=0

¹⁷² Shane, *id.*

counter-productive outcomes.¹⁷³ What is certain, is the uncertainty about the effects of targeted killing operations.

The following section will demonstrate these inherent uncertainties in targeted killing law, decision-making processes and outcomes, and illustrate the core role uncertainty plays in diminishing the legal constraints.

E. THE ISRAELI COMMISSION OF INQUIRY ON THE TARGETED KILLING OF SALAH SHEHADEH

Salah Shehadeh was head of the Operational Branch of Hamas in Gaza and was accused by Israel of having killed large numbers of Israeli military personnel and civilians. On July 22, 2002, the Israeli Air Force dropped a one-ton bomb on Shehadeh's house in Gaza City, killing Shehadeh himself, his assistant, Zaher Saleh Nassar, his wife, Laila Khamis Shahadeh and Shehadeh's 15-year-old daughter, Iman Salah Shahadeh. Eleven other civilians were also killed in the attack: 27-year-old Iman Hassan Matar was killed in one of the nearby tin shacks, together with her five children – 11-year-old Alaa Muhammad Matar, 5-year-old Dunia Rami Matar, 4-year-old Muhammad Raed Matar, 2-year-old Aiman Raed Matar and Dina Raed Matar, not even a year old when she died. 22-

¹⁷³ Additionally, targeted killing (as opposed to capturing) prevent the use of interrogations as an important source of information to prevent future attacks; it encourages, at least potentially, acts of revenge, and might create martyrs; and it may trigger backlash in the targeted societies, which may increase hatred and motivate others to adopt violent tactics. For a more elaborate discussion of these issues, see: Byman, *supra* note 132, at 99–100.

year-old Muna Fahmi al-Huti was killed in the nearby ‘garage house,’ together with her two children – 5-year-old Subhi Mahmoud al-Huti and 3-year-old Muhammad Mahmoud al-Huti. 42-year-old Yusef Subhi 'Ali a-Shawa was also killed in one of the tin shacks, and 67-year-old Khader Muhammad a-Sa'idi, who was walking in the street, was fatally wounded (he later died of his wounds). 150 civilian bystanders were injured.¹⁷⁴

1. The establishment of the Commission

Due to the severe outcomes of this operation and the extensive collateral damage, the IDF conducted internal investigations of the incident. Eventually, the IDF Military Advocate General [hereinafter: MAG] decided not to initiate any criminal investigations concerning this incident. In response, several human rights organizations and individuals submitted a petition to the Israeli Supreme Court, sitting as the HCJ, demanding to reverse the MAG’s decision and to open a criminal investigation. During the Court hearings, the State accepted the Court’s suggestion to establish an independent and objective investigatory commission to investigate the circumstances of the operation and the severe collateral damage inflicted on innocent civilians.

On January 23, 2008, then Prime Minister Ehud Olmert appointed the special investigatory commission to examine the targeted killing operation directed against Shehadeh. The Commission was instructed to review the circumstances of the attack and the availability of an effective alternative. It was also authorized to recommend administrative measures,

¹⁷⁴ Ariel Meyerstein, *Case Study: The Israeli Strike Against Hamas Leader Salah Shehadeh*, CRIMES OF WAR, Sept. 19, 2002.

disciplinary measures, or the initiating of criminal proceedings against the relevant actors.

The Commission was composed of three members: As head of the Commission, the Prime Minister appointed Adv. Zvi Inbar, the former MAG and the Legal Advisor of the Knesset (the Israeli Parliament). The other two members of the Commission were Major General (retired) Yitzhak Eitan, former Commander of the IDF Central Command, and Mr. Yitzhak Dar, the former head of the Operations Department at the Israel Security Agency [hereinafter: ISA].

Soon after the announcement of the appointment of the Commission members, the petitioners submitted new arguments, opposing the decision to appoint only members with military and security experience. On August 23, 2008, the HCJ finally rejected the petition, holding that there was no defect in the appointment and formation of the Commission.¹⁷⁵ The Court emphasized that none of the Commission members were at the time serving in any of the State's security or military agencies. The Court further stated that the skepticism regarding the objectivity of the Commission was completely unfounded, especially "*at this preliminary stage, in which the Commission did not yet finish its job and did not reach any conclusions.*"¹⁷⁶ On August 31, 2009, the Commission's chairperson, Adv. Inbar, passed away, and was replaced by retired Supreme Court Justice Tova Strasberg-Cohen.

¹⁷⁵ HCJ 8794/03 *Hess v. Military Advocate General* (not published, 12.23.08) [hereinafter: the Shehadeh Case].

¹⁷⁶ *Id.*, para. 13.

2. The report

On February 27, 2011, the Commission published its final report. It begins with an analysis of the security situation that existed between the beginning of the Second Intifada (September 2000) and the targeted killing of Shehadeh on July 22, 2002. The Commission characterized this period as an ‘armed conflict’ and noted that during these two years, many Palestinian terror attacks took place within Israel, causing the death of 474 Israelis and injuring 2,649.

The report then describes the role that each governmental authority plays in a targeted killing operation. The ISA, as the authority that initiates targeted killing operations, is responsible for gathering the relevant intelligence and for mapping the surroundings of the target area in order to facilitate evaluation of anticipated collateral damage (i.e., uninvolved civilians and civilian objects that might be damaged from the attack). The IDF is the authority that usually executes the attack. The IDF’s Operations Department is responsible for ensuring that the intended target is a legitimate target and for exploring the feasibility of detaining the targeted individual or using a less lethal measure that would attain the same goal of preventing the intended target from continuing their terror activity. After receiving all the necessary authorizations to implement the operation, the method of attack is chosen in a way that will ensure the operation’s success while minimizing the anticipated collateral damage (which must remain non-excessive). Apart from authorization from the head of the ISA and the IDF’s Chief of General Staff, the operation must

also be approved by two senior politicians: the Prime Minister and the Minister of Defense.

With regard to the normative framework, the Commission stipulated that IHL is the relevant legal framework, and that it allows attacking military targets or combatants and civilians taking a direct part in hostilities, provided that the attack also meets the requirements of distinction and proportionality. The opinion referred to several additional principles that should be considered when ordering a targeted killing operation: the exceptionality of the measure; the use of this measure only against persons who are either committing terror attacks or ordering the commission of such attacks; basing the operation on solid, accurate, and reliable intelligence that indicates that the designated target takes direct part in terror attacks and will probably continue to take part in such actions unless neutralized; using this measure as a preventive measure only, rather than as a punitive measure; using this measure only where there is no less lethal alternative; minimizing the damage to uninvolved civilians and applying the principle of proportionality; and using this measure only in areas in which the IDF does not have actual control. The report further stressed four requirements stemming from the Israeli Supreme Court's landmark case concerning the legality of targeted killings: (a) accurate and reliable information should be gathered about the identity and classification of the civilians who take direct part in the hostilities; (b) all feasible efforts to use less lethal measures should be made; (c) the principle of proportionality must be observed and the harm to uninvolved civilians must not be excessive; and (d) an investigatory committee should

be established in order to investigate operations that resulted in exceptional outcomes.

Applying the normative legal framework to the specific circumstances of this operation, the Commission determined that Shehadeh was indeed a legitimate target, as a civilian who directly participated in the hostilities. The Commission also found that there were no lesser means—such as detaining him—available, since Shehadeh took shelter in a very densely populated refugee camp in Gaza and any operation to detain him would have endangered the lives of IDF soldiers.

The report then elaborates on the internal processes and the role that each military or security authority played in preparing the targeted killing of Shehadeh. The ISA was in charge of surveillance of Shehadeh and was responsible for planning the operation. All the information was brought to Yuval Diskin, the Deputy Head of the ISA, who was the ISA authority responsible for targeted killings. Diskin's recommendation to approve Shehadeh as a legitimate target was submitted to Avi Dichter, the Head of the ISA, and was then presented to Moshe Yaalon, then Chief of General Staff, who consulted with the IDF authority responsible for targeted killings, the Deputy Chief of General Staff, Gabi Ashkenazi, and with the highest political echelons: then Minister of Defense, Benjamin Ben-Eliezer, and then Prime Minister, Ariel Sharon. After receiving all of the relevant authorizations, the ISA began tracking Shehadeh's location. Knowing he was wanted by the Israeli authorities, Shehadeh used seven hideouts and kept moving between them. Throughout this time, several alternative plans to target Shehadeh were abandoned, due to a low-success

assessment and high risk to IDF soldiers and civilians in the area (twice due to positive information concerning the presence of Shehadeh's daughter). According to the report, Israel security services cancel operations when there is positive information about the presence of children who might be affected by the attack.

A few days before the operation, Shehadeh was located in an apartment in a two-story building in a densely populated refugee camp in northern Gaza. According to the information available at the time, the first floor was used as a warehouse and the second floor was used as a residence. The method of attack chosen was the dropping of a one-ton bomb from the air. According to the report, this method of attack was chosen for two reasons – high probability of success and low risk to IDF forces. The Commission also noted that the alternative of using two half-ton bombs had been considered but was rejected because the probability of success was too low and because there was a higher risk that one of the bombs would miss the target and kill many uninvolved civilians.

Ultimately, the Commission concluded that the decision to approve the implementation of the operation, the risk of harming Shehadeh's daughter notwithstanding, was a legitimate decision. With regard to Shehadeh's assistant, Zahar Natzer, the Commission found him to be a legitimate target on his own, and the anticipated death of Shehadeh's wife was considered proportionate collateral damage. The Commission nonetheless concluded that the death of Shehadeh's daughter, as well as the other 11 civilian fatalities, was disproportional and excessive, even though Shehadeh himself was a high-risk target. However,

the Commission accepted the Israeli authorities' claims that this disproportionate outcome was not anticipated, and that had such an outcome been anticipated, the operation would not have been carried out. The Commission examined the information gathering process that led to the belief that the collateral damage would be less extensive than it was, and concluded that the intelligence that was presented before the decision-makers was incomplete. It also found that at one point in the process, the absence of information as to the presence of people in the vicinity of the house was presented as information to the effect that there were no people in that area. The Commission determined that the failure of intelligence with respect to the presence of uninvolved civilians in close proximity to Shehadeh stemmed from two main factors: (a) the resources that were devoted to discovering his whereabouts (and not the surroundings of this area); and (b) the concern that if Israeli intelligence agencies were to attempt to retrieve information regarding others in the area, Shehadeh would understand that his hideout was not secure. Therefore, it concluded that the balance between military necessity and protection of uninvolved civilians was inappropriate, and this led to a disproportionate (yet unanticipated) outcome.

Based on its analysis, the Commission found no reason to suspect that a crime (or any violation of relevant IHL or Israeli law) was committed by any of the persons involved in the planning, authorization, and implementation of the targeted killing operation. The Commission emphasized that the mere fact that civilians were inadvertently killed does not render the operation unlawful or a war crime, and that the reasonableness and legality of the operation should be considered on the

basis of the available ex ante information, even if it turned out that the information was false. The Commission was therefore satisfied with the fact that all of the relevant State bodies conducted internal inquiries and that the process was subsequently improved in order to avoid outcomes of this nature in the future.

In its recommendations, the Commission suggested that the rules of IHL be better embedded within the work of the security services, that the principle of proportionality be observed, and that written guidelines on the use of targeted killing in accordance with IHL be formulated by the IDF. Moreover, it expressed the opinion that the ISA should strengthen its intelligence efforts with regard to collateral damage to the uninvolved civilian population. The Commission also recommended that all relevant interactions, communications, and decisions preceding a targeted killing operation be documented and that the relevant documentation be preserved for future investigation, if needed. While this article raises meaningful reservations concerning the work and conclusions of the Commission, it acknowledges its important contribution to advancing transparency of targeted killing operations. The Commission's general recommendations to the security authorities are of significant value, as they highlight some procedural aspects that should - and can - be improved.

3. Uncertainty, intelligence and risk of error:

3.1. Deference to the security agencies

The Commission's report was based on the information that was submitted to it by the IDF, ISA and the Air Force. The information provided by these bodies—in spite of being interested parties in this investigation—was accepted by the Commission in its entirety. The Commission did not find any of their testimony unconvincing – even when parts of the testimony were inherently inconsistent. The Commission did not critically challenge any of the positions presented by the security agencies. In some instances, the complete and overwhelming acceptance of the security agencies' position stands in stark contradiction to plain logic or to other pieces of evidence. For example, while elaborating on Shehadeh's terrorist activity—a description that could be a 'cut and paste' from the information provided by the relevant security agencies—the Commission accepts as fact the assertion that Shehadeh was personally responsible for all of the Israeli terror casualties who were killed or injured from July 2001 till Shehadeh's death in July 2002.¹⁷⁷ Incidents are not specified, details are not presented, and no other, external, sources are mentioned; nor is there any reference to the fragmentation in Hamas leadership or to other terror organizations that were operating in Gaza at the time. Another example can be found in the Commission's acceptance of the IDF's claim that the method of dropping a one-ton bomb on Shehadeh's house was chosen, among other reasons, to reduce collateral damage (while mentioning the alternative that was considered—and

¹⁷⁷ The Shehadeh Commission Report, *supra* note 134, at 21, 55–59.

rejected—to use two half-ton bombs instead).¹⁷⁸ To support this finding, the Commission added that indeed, the one-ton bomb was accurate in hitting Shehadeh’s house, and that the damage to the surroundings was caused not by the impact of the bomb itself, but rather by its shock wave (as if that was not a natural anticipated outcome of the hit).¹⁷⁹ The Commission also accepted as an uncontested fact the claim that the operation was conducted at night in order to minimize risk to civilians. This claim stood in stark contradiction to other pieces of information, suggesting that people were actually living in the tin shacks, and thus would most probably be sleeping in their beds at such time (the evidence also suggested that the tin shacks would sustain the most severe collateral damage).

3.2. ‘Failure is an orphan’

While acknowledging that the disproportionate outcome resulted from severe intelligence failures (including misrepresentation of existing information), the Commission concluded that the targeted killing of Shehadeh was completely lawful. It determined that the operation was a legitimate attack against a person who participated directly in the hostilities, and that the ‘unfortunate harm’ caused by the attack was *unintentional* and *unpredictable*, and was not the result of disrespect for human life. The Commission therefore determined that none of the involved security and political decision-makers violated either Israeli or international criminal law, and exonerated all of those involved in the

¹⁷⁸ *Id.*, at 63–64.

¹⁷⁹ The Shehadeh Commission Report, *supra* note 134, at 65.

attack from any criminal, administrative or even ethical responsibility. The ‘mistakes’ made were attributed to an isolated *intelligence failure* caused by “*incorrect assessments and mistaken judgments*” [emphasis added—S. K.].¹⁸⁰ The Commission refrained from attributing these ‘failures,’ ‘incorrect assessments’ and ‘mistakes’ to any of the relevant decision-makers, and no one was held responsible for any of it.

While it certainly could be the case that no specific individual was criminally responsible for committing international or domestic crimes, it is nonetheless possible - a possibility that was not examined by the Commission - that international law (in this case, the principle of proportionality or the principle of precaution) was violated. Unfortunately, the Commission did not separate between the relevant facts, the deviation from the applicable legal norms and the possible legal implications of such a deviation.

3.3. *The requirement of “positive information”*

In dealing with the death of Shehadeh’s 14-year-old daughter in the attack, the Commission adopted the State’s position that her death was not anticipated by any of the relevant decision makers.¹⁸¹ In adopting this view, the Commission completely ignored the testimony of the Deputy Head of ISA, who objected to carrying out the operation as planned, based on his concrete concerns that Shehadeh’s daughter was with Shehadeh. In

¹⁸⁰ *Salah Shehadeh – Special Investigatory Commission*, English summary prepared by the ministry of Foreign Affairs. Available at: www.mfa.gov.il/MFA/Government/Law/Legal%20Issues%20and%20Rulings/Salah_Shehadeh-Special_Investigatory_Commission_27-Feb-2011.htm [hereinafter: Shehadeh Report summary].

¹⁸¹ The Shehadeh Commission Report, *supra* note 134, at 67.

dismissing this information, the Commission stated that without positive information that the child was actually present in the house, it was legitimate to assume she wasn't there and to carry on with the operation.¹⁸² The combination of this determination (the need for positive information as to the presence of civilians), together with the acceptance of the intelligence decision not to focus its efforts on investigating the surroundings of the target, lead to an unacceptable outcome. It empties the principle of precaution from any substance, and encourages states to shoot with their eyes closed: without positive intelligence information determining that innocent civilians are present—anything is permissible. This 'don't ask don't tell' policy creates a fictional reality, shaped by the information that intelligence and security agencies choose to collect. Naturally, these agencies prefer to focus their efforts on security threats rather than on humanitarian interests. The result is that a 14-year-old girl, as well as eight other children, were killed, simply because no one chose to collect and provide *positive information* confirming their presence.

3.4. Structured decision-making processes and common sense:

The Commission concluded that there was 'no positive information' affirming the presence of civilian residents in the tin shacks located next to Shehadeh's house. The Commission did acknowledge the already common knowledge that this area is densely populated, and the several air force photos clearly showing water tanks and TV satellite dishes on the roofs of these tin shacks. It also mentioned the air force estimations concerning severe collateral damage to the tin shacks and

¹⁸² The Shehadeh Commission Report, *id.*, at 69.

their inhabitants. Nonetheless, it did not view this information as sufficiently ‘positive’ evidence to arrive at a conclusion that people were actually living in the shacks and that precautions should be taken to protect their lives.¹⁸³ The Commission decided to treat this information, instead, as ‘speculative’ and ‘unclear.’

3.5. *The treatment of internal disagreements:*

The decision to carry out the operation, despite the evidence that suggested that innocent civilians might be hurt, was not a unanimous decision. On July 19, 2002, the Deputy Director of the ISA held a meeting of both ISA and Air Force personnel concerning the planned operation. In the meeting, the intelligence information was presented, and various scenarios were discussed. In the discussion, the Air Force representatives estimated that the surroundings would suffer severe damage, and that the greatest damage—even if the attack hits the target precisely as planned—would be caused to the tin shacks and to a nearby garage house. While the garage house was believed to be empty at night, the assessment indicated there would be at least several wounded and dead in the tin shacks.¹⁸⁴ At this point, two senior ISA members advocated two opposing options: the Head of Operations Division suggested a different course of action, in order to minimize collateral damage and to prevent the anticipated harm to uninvolved civilians; while the Head of the Southern Region insisted that the operation should proceed as planned (and stated that attacking at night would minimize the harm to uninvolved civilians). At the end of that

¹⁸³ The Shehadeh Commission Report, *supra* note 134, at 78.

¹⁸⁴ *Id.*, at 73.

meeting, the Deputy Head of the ISA decided not to proceed with the operation as planned, and to continue gathering intelligence in order to come up with an alternative ground operation that would better protect innocent civilians.¹⁸⁵ Immediately afterwards, the Head of the Southern Region appealed this decision to the Director of the ISA. The Director of the ISA upheld the appeal and reversed the decision, determining that the operation would be carried out as planned. His decision was based on several considerations, all focused on state security: (1) the scope, frequency and severity of terror attacks against Israel had increased; (2) the probability of finding a practical alternative was low and the discussions that would have to be conducted with regard to the potential new plan might thwart the killing of the target altogether.¹⁸⁶ Later that day, the IDF Head of Operations Branch held a meeting, where the ISA representatives presented the planned operation. At the end of this meeting, the IDF Head of Operations Branch recommended postponing the operation until the tin shacks were evacuated. Then, the final meeting was held at the IDF Chief of Staff's office. The discussion focused on the potential harm to residents of the tin shacks. The Deputy Chief of Staff, as well as the Head of the IDF Operations Branch, objected to the proposed plan and recommended waiting and, in the meantime, gathering more information. The Head of the ISA recommended carrying on with the operation as planned. At the end of this meeting, the IDF Chief of Staff decided to approve the operation as planned. His decision was based on the assumption that the garage house would be empty, and that the risk of killing a few civilian bystanders is

¹⁸⁵ The Shehadeh Commission Report, *supra* note 134, at 74.

¹⁸⁶ *Id.*, at 74–75.

proportional to the enormous damage anticipated from the continuing terrorist attacks planned by Shehadeh.¹⁸⁷ Between July 19 (when the final decision to carry out the operation was made) and July 22 (when the attack took place), the operation was postponed several times due to conclusive evidence concerning the presence of Shehadeh's daughter and other children in the vicinity.¹⁸⁸ These internal deliberations demonstrate the different approaches to precaution: One approach would be to err on the side of caution and to treat uncertainty as evidence that civilians will be harmed, unless conclusively proven otherwise. This approach motivates the state to conduct the necessary investigations to clarify the situation and to positively find out the possible implications of an attack. This was indeed the approach adopted by the Deputy Head of the ISA and by the IDF Head of Operations Branch. A different approach would be to ignore uncertainty and to consider only 'positive information' that the relevant agencies came across in deciding the appropriate course of action. This approach reduces the state's burden to investigate to a minimum, and contradicts the very concept of precaution. Nonetheless, this was the approach adopted by the Head of the ISA and the IDF Chief of Staff, as well as, later on, by the Shehadeh Commission. By adopting such a narrow approach to precaution, the Shehadeh Commission paved the way for decision makers to ignore inconclusive information that does not coincide with their agenda, without the need to investigate further and obtain more information. And more than that: According to the testimony before the Commission, the security agencies and decision-makers in this case had, in fact, positive information

¹⁸⁷ The Shehadeh Commission Report, *supra* note 134, at 76.

¹⁸⁸ *Id.*

affirming the presence of civilians in the vicinity of the targeted area. Nonetheless, they chose to ignore this information, probably due to their strong motivation to carry out the targeted killing operation.

3.6. Political oversight:

Lastly, political oversight of the military and security agencies is crucial for maintaining and upholding the principle of precaution. While security agencies are focused on narrow security considerations, the political leadership considers a wider range of considerations, including foreign affairs and diplomatic interests, economic interests and humanitarian interests. The report of the Shehadeh Commission revealed a troubling deference to the security experts on the part of the political leaders. The responsible minister—the Minister of Defense—testified that he largely left the decision to his military secretary and that he trusted the ISA and military experts. In fact, the Minister of Defense was abroad, and did not personally participate in any of the relevant meetings. He was briefed by his military secretary by phone, and approved the operation. The brief did not include information on the existence of alternatives, the danger to residents of the tin shacks and the disagreements between senior officials of the ISA and IDF.¹⁸⁹ The Prime Minister could not testify due to his medical condition.

These examples demonstrate the various ways in which uncertainty can certainly endanger civilians' lives. First, it underscores the weaknesses of the legal regime, which fails to provide a clear guidance to states engaging in counterterrorism. Second, it reveals the difficulties

¹⁸⁹ The Shehadeh Commission Report, *supra* note 134, at 82–83.

security agencies face when attempting to implement these norms in actual cases. Third, it exposes the inherent limitations of state-sponsored investigatory mechanisms, which may frustrate domestic attempts at effective oversight of targeted killing operations. Lastly, and most importantly, it demonstrate the urgent need to reduce uncertainty in targeted killing law and processes.

F. REDUCING UNCERTAINTY: A NEW MODEL FOR INTERPRETING AND IMPLEMENTING TARGETED KILLING LAW

International law governing targeted killings is skewed with uncertainty. In fact, uncertainty surrounds every aspect of targeted killing law: the relevant body of law to be applied, the interpretation of the relevant norms and the implementation of these norms, including identification of ‘targetable’ individuals and determinations concerning the anticipated collateral damage and feasible precautions. Targeted decisions are based, primarily, on uncertain intelligence; this uncertain, limited, information, is interpreted by security-oriented decision-makers; guided by obscure legal definitions. The previous sections of this article demonstrated how the relevant international law, and internal processes adopted to implement it, intensify the inherent uncertainties in current targeting schemes. This section proposes several recommendations to reduce this uncertainty. As uncertainty is inherent to targeting decisions, reducing uncertainty necessitates restricting targeting decisions and construing a clear and unambiguous interpretation of core concepts.

1. Military necessity as a limiting test:

Targeted killings are lawful only when killing the targeted individual is necessary to prevent them from committing a concrete violent act that is underway. It will only be considered necessary to kill a suspected terrorist if the threat they pose is concrete and imminent. The emphasis should be on the preventive purpose of targeted killings: such operations should never be used as a punishment for past actions, but only as a narrowly construed preventative measure.

2. Activity-based test to DPH:

An activity-based test (“acts of war which by their nature or purpose are likely to cause actual harm,”) which includes three cumulative criteria—(1) threshold of harm; (2) direct causation; and (3) belligerent nexus. DPH should be understood as a temporary, activity-based loss of protection, which starts with the planning and preparatory measures for a concrete attack that satisfies the three previous criteria and lasts until the return from the location of its execution. The criteria for direct participation should be clear, transparent and leave no room for ‘grey areas’ or interpretation. Most importantly: It should be clear that when the categorization is unclear or doubtful—the civilian protections should remain in place.

3. Proportionality: targeted killings as a last resort

Targeted killing should only be used as a last resort, when other means (such as capture and detention) are unavailable. As a general rule, less harmful means, such as capture and detention, are almost always

available in a territory under the (de facto) jurisdiction of the targeting state. When calculating the collateral damage, civilian lives from both sides should be equally respected and protected.

4. Precaution as a state of mind:

Shifting the focus from automated algorithms and check lists to common sense, with a duty to err on the side of caution. Before executing a targeted killing operation, all relevant information (including potential collateral damage) should be thoroughly gathered and carefully analyzed by the responsible individuals, and common sense should complement automated computerized systems. ‘Inconclusive’ or doubtful information necessitates conducting further investigation and information gathering.

5. Transparent internal processes and political oversight:

Each country that employs targeted killings should make public its policies concerning targeted killings - what are the criteria for targeting individuals, what are the policies concerning collateral damage, what is considered sufficient evidence to justify targeted killing, and what is the internal process for approval of a targeted killing operation. It should be clear that the final responsibility lies with the political leadership, who must exercise meaningful oversight over the security agencies.

6. Independent ex post review:

A rigorous and independent committee, capable of challenging the security agencies and of conducting effective ex post review, should be established. The committee should be permanent and independent, and should be empowered to review, ex post, the decision to target an

individual, the processes that were undergone, and the design and execution of the actual operation. The committee should include members from various backgrounds, such as individuals who have served in the public defender's office or civil society organizations, and not only former military officials or security experts. The committee must be authorized to review not only the security agencies' decisions, but also the policies and oversight of the political leadership. While conducting an ex post review of targeted killing operations, the independent committee should be empowered to recommend initiating criminal investigations in appropriate cases; to determine whether international or national law concerning targeted killing were violated; and to determine whether reparations should be paid by the state in appropriate cases.

G. CONCLUSION

Governments around the world have been targeting and killing individuals to prevent them from committing terror attacks or other atrocities. They use this method secretly, sometimes without even taking responsibility for such operations, and without making most of the relevant information public: what are the criteria for targeting individuals, what is the amount and strength of evidence required to make targeting decisions, what are the procedures adopted to identify mistakes and avoid misuse of this method, and how should uncertainty concerning the law or the facts be treated. Addressing the increasing use of drones (including for targeted killing operations), President Obama stated that

[T]his new technology raises profound questions – about who is targeted, and why; about civilian casualties, and the risk of creating new enemies; about the legality of such strikes under U.S. and international law; about accountability and morality.¹⁹⁰

This article offers new answers to some of these old and taunting questions. It clearly defines legal terms such as ‘military necessity’ and ‘feasible precaution;’ it develops a clear-cut activity-based test for determinations on direct participation in hostilities; it designs an independent ex post review mechanism for targeting decisions; and it calls for governmental transparency concerning kill-lists and targeting decision-making processes. Most importantly, it identifies uncertainty, in law and in practice, as an important challenge to any targeted killing regime. Based on analysis of interdisciplinary studies and lessons from the experience of both the U.S. and Israel, it advocates a transparent, straightforward and unambiguous interpretation of targeted-killing law; interpretation that can reduce uncertainty and, if adopted, protect civilians from the ravages of both terrorism and counter-terrorism.

Finally, beyond the practical and normative implications of this study, it sheds light on a more general and basic problem of uncertainty in assessing risk to ‘enemy’ civilians and property. The Israeli Shehadeh Commission illustrates how domestic investigatory bodies might be held captive by their national narrative and interpret information accordingly. In stark contradiction to the many paragraphs and elaboration on the suffering of the Israeli population as a result of terror attacks, the

¹⁹⁰ President Obama’s speech, *supra* note 64.

information regarding the concrete damage to Palestinian civilians and to their properties caused by the attack was short and laconic, containing only two figures - the numbers of civilians killed and the number of those injured. The description of the poor and densely populated refugee camp, where the attack took place, was limited to the potential security threats it created for IDF soldiers; the damage to nearby houses and civilian properties was not mentioned at all; and the names of the innocent bystanders who were killed in the street or trapped under the ruins of their homes were completely absent; to the commission, they were nothing more than unanticipated ‘collateral damage.’