

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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I. 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 three civilians and injured five, 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 that were killed or injured simply because they happened to be in the wrong place at the wrong time?

Central Command's 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 U.S. 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 in-

1. U.S. CENTRAL COMMAND, RELEASE NUMBER 20160129-05, JAN. 29: U.S. CENTRAL COMMAND RELEASES RESULTS OF IRAQ AND SYRIA CIVILIAN CASUALTY ASSESSMENTS (2016), (hereinafter CENTRAL COMMAND PRESS RELEASE), <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/904489/jan-29-us-central-command-releases-results-of-iraq-and-syria-civilian-casualty/>.

2. *Iraq Progresses in ISIL Fight, Key Extremist Confirmed Dead*, U.S. DEP'T DEF. (Aug. 15, 2015), <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*, N.Y. TIMES (Aug. 27, 2015), <https://www.nytimes.com/2015/08/28/world/middleeast/junaid-hussain-islamic-state-recruiter-killed.html>.

3. CENTRAL COMMAND PRESS RELEASE, *supra* note 1.

4. U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE

vestigatory commission on the targeted killing of Salach 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.

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 promoted 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—particularly concerning national security matters such as targeted killings.

Indeed, in another recent article, Ganesh Sitaraman and David Zionts identified the implications of errors, biases, and failures—including the illusion of transparency—on war-powers decision-

1 (2013) http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter DOJ WHITE PAPER]. The U.S. 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 the Freedom of Information Act lawsuits brought by the New York Times and the American Civil Liberties Union. U.S. DEP’T OF JUSTICE, Memorandum of the Attorney General, APPLICABILITY OF FEDERAL CRIMINAL LAWS AND THE CONSTITUTION TO CONTEMPLATED LETHAL OPERATIONS AGAINST SHAYKH ANWAR AL-AULAQI, 21 (2010) [hereinafter THE DRONE MEMO], https://www.aclu.org/files/assets/2014-06-23_barron-memorandum.pdf.

5. Ido Rosenzweig and Yuval Shany, *Special Investigatory Commission Publishes Report on Targeted Killing of Shehadeh*, 27 ISR. DEMOCRATIC INS. TERRORISM & DEMOCRACY NEWSL. (2011).

6. In contrast to President Obama’s rhetoric promising transparency on the U.S. 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. See, for example, Am. Civil Liberties Union, *ACLU v. DOJ-FOIA Case Relating to Targeted Killing Law, Policy, and Casualties*, AM. C.L. UNION (Jan. 5, 2017) <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; see also Am. Civil Liberties Union v. U.S. Dep’t of Justice, 90 F. Supp. 3d 201 (S.D.N.Y. 2015); *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014) (granting motion to dismiss).

7. Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 793 (2014).

making processes; and, they concluded their article by calling lawyers, scholars, and decision-makers to pay increasing attention to “behavioral war powers.”⁸

This Article responds to that 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 Zions: the treatment of doubt and uncertainty.

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.

II. 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,

8. Ganesh Sitaraman & David Zions, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516 (2015).

9. Philip Alston (Special Rapporteur), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. doc A/HRC/14/24/Add.6, 5 (May 28, 2010) [hereinafter UN Special Rapporteur on Extrajudicial Killings]; see also NILS MELZER, TARGETED KILLINGS IN INTERNATIONAL LAW 4-5 (2008) (offering alternative definitions of “targeted killing”); Chris Downes, *‘Targeted Killings’ in an Age of Terror: The Legality of the Yemen Strike*, 9 J. CONFLICT & SEC. L. 277, 280 (2004); David Kretzmer, *Targeted Killing of*

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 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 on whether international human rights law or international humanitarian law (IHL) applies.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 necessitate involvement in certain activities? Is it lawful to target a suspect-

Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?, 16 EUR. J. INT'L L. 171, 176 (2005).

10. Kretzmer, *supra* note 9.

11. See Georg Nolte, *Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order*, 5(1) THEORETICAL INQUIRIES L. 111 (2004); Michael L. Gross, *Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?*, 23(3) J. APPLIED PHIL. 323 (2006); Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 DUKE L. J. 677 (2005); Ward Thomas, *Norms and Security: The Case of International Assassination*, 25 INT'L SEC. 105 (2000).

12. See, e.g., Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. 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 “[i]n 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.”); see also Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 4 (2010) (arguing that “[t]he 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, *supra* note 13, at 29-38; Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 No. 873 INT'L REV. RED CROSS 69 (2009).

ed 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. 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 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. In fact, 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 The Israeli media even went as far as naming those lawyers defending Israeli Defense Force (IDF) actions as “legal iron dome.”²⁰ Unfortunately, the disagreements on the content of international law erode its credibility as a clear set of rules

15. Chesney, *supra* note 13, at 44. These and many other disagreements concerning the meaning of the substantive norms on targeting are elaborated upon in Section C, below.

16. Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 358-59 (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 NAT'L SEC. L. J. 278, 450 (2015).

18. See *infra* section C (an elaborated analysis of these disagreements and legal disputes); see also Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 690-92 (2004); see also *infra* notes 13-15 and accompanying text.

19. AVI BELL, ISRAEL MAY STOP SUPPLYING WATER AND ELECTRICITY TO GAZA: A LEGAL OPINION (2014), <http://en.kohelet.org.il/publication/a-legal-opinion-israel-may-stop-supplying-electricity-and-water-to-gaza>; Yuval Shany et. al., LEGAL OPINION CONCERNING SUPPLY OF ELECTRICITY AND WATER TO THE GAZA STRIP (2014), <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 (Nov. 18, 2012), <http://news.walla.co.il/?w=1/2587639>.

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.

III. 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.

A. The Existence of an Armed Conflict: What is the Threshold for, and Territorial Boundaries of, LOAC?

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 U.S. and Afghanistan immediately follow-

21. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

22. JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949 COMMENTARY 20 (1958). This definition was reaffirmed later on by the ICTY in the Delalić case. Prosecutor v. Deliać, Case No. IT-96-21-T, Judgement, ¶¶ 184, 208 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 6, 1998); see also YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 14-16 (2004); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) (merits), Judgment, 1986 I.C.J. Rep. 14, ¶ 114.

ing 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 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 Geneva Conventions and Protocol II Additional to the 1949 Geneva Conventions.²⁹ While IHL is the *lex specialis* during an armed

23. DINSTEIN, *supra* note 22, at 14-16; Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 713-14 (2004).

24. MELZER, *supra* note 9, at 261.

25. MELZER, *supra* note 9, at 256.

26. Prosecutor v. Tadić Case No. IT-94-1-I, ¶ 70; Rome Statute of the International Criminal Court, July 17, 1988, 2187 U.N.T.S. 90, art. 8(2)(f) [hereinafter Rome Statute].

27. Additional Protocol II to the 1949 Geneva Conventions, June 8, 1977, 1125 U.N.T.S. 609, art. 1(2) [hereinafter APII].

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

29. See LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT 1-2* (2002). However, it should be noted 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. See also YVES SANDOZ, CHRISTOPHE SWINARSKI & BRUNO ZIMMERMANN, *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949* (1987), ¶ 4453 [hereinafter ICRC COMMENTARY].

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 and civilians who directly participate in the hostilities. However, it also imposes significant limitations on states’ power and minimum standards of humane treatment of individuals.³¹ In the following sections I shall discuss the exact limitations on this general authority to kill.

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 of armed conflict (or IHL).³² But does the law of armed conflict have geographical boundaries? On the one hand, the U.S. 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

30. Kretzmer, *supra* note 9, at 185; Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239. (2000). This theory was adopted by the ICJ in the Nuclear Weapons case back in 1996, and was repeated later on in several cases, including the Wall Advisory Opinion. Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case), Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion), Advisory Opinion, 2004 I.C.J. Rep. 131 (July 9).

31. Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 Cardozo L. Rev. 405, 408 (2009).

32. Shany, *supra* note 28.

33. See, e.g., John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Harvard Law School Program on Law and Security, Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an (“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.”).

34. See, e.g., UN Special Rapporteur on Extrajudicial Killings, *supra* note 9, at ¶ 53, 68; Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SEC. L. 245, 266 (2010); Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone* 161 U. PA. L. REV. 1165, 1170 n.10 (2013).

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, 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 Ryan 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, Jennifer Daskal suggests that zones of active hostilities should be geographically limited to areas where 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 example, does not necessarily expand the armed conflict regime to those areas. 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.

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. See Daskal, *supra* note 34, at 1208.

36. THE DRONE MEMO, *supra* note 4, at 27.

37. Ryan Goodman, *The OLC's Drone Memo and International Law's Ascendance*, JUST SECURITY (June 24, 2014), <https://www.justsecurity.org/12142/olc-memo-drones-international-law-goodman/>.

38. 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).

39. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

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—including⁴² failed or quasi-states.⁴³ The former two cases—where the operation is conducted in a territory controlled by the relevant state—raise questions, mainly, 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 that govern targeted killing operations are the subject of intensive scholarly writing and are beyond the scope of this Article. Nonetheless, the following paragraphs will 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 country.⁴⁴ 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.⁴⁵

Under the norms governing use of force, a targeted killing operation may be based on self-defense—an 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.⁴⁶ 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.⁴⁷

If the terror attack cannot be attributed to a state, a targeted killing operation on the territory of a neutral state should consider the

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.

44. *See generally*, U.N. Charter art. 2, ¶¶4, 7.

45. Blum & Heymann, *supra* note 12, at 161.

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

47. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (merits), Judgment, 1986 I.C.J. Rep. 14, ¶ 194.

principle of sovereignty and must be based either on the consent of that state, or on its inability or unwillingness to interdict the terrorists.⁴⁸

B. Military Necessity: What Justifies the Use of Lethal Force?

One of the fundamental—yet elusive—principles of IHL is military necessity.⁴⁹ 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.⁵⁰ 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.”⁵¹

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.⁵² 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. According to the restrictive approach, military necessity requires the kind and degree of force resorted to be necessary for the achievement of a concrete and legitimate military advantage, and that it must not otherwise be prohibited under IHL.⁵³ In order for considerations of military necessity to override humanitarian consid-

48. Blum & Heymann, *supra* note 12, at 164; LUBELL, *supra* note 46, at 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. See Chris Downes, ‘Targeted Killings’ in an Age of Terror: The Legality of the Yemen Strike, 9 J. CONFLICT & SEC. L. 277, 280 (2004).

49. Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 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).

50. U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL 56 (June 2015) <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>.

51. *Id.*

52. *Id.* at 52.

53. MELZER, *supra* note 9, at 286.

erations, the military necessity must be “concrete, direct and definite,”⁵⁴ and the operation must be likely to contribute effectively to the achievement of a concrete and direct military advantage.⁵⁵ The restrictive approach to military necessity also forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes.⁵⁶ This means, that there is an obligation to attempt an arrest rather than to kill if the circumstances indicate a reasonable probability of success without undue risk. While this approach has been criticized by some,⁵⁷ it gets support from a historical analysis of this principle. Tracing the historical origins of the military necessity principle, Burrus 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.⁵⁸

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;⁵⁹ and, in his

54. *Id.* at 292-93.

55. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8 1977, 1125 U.N.T.S. 3, art. 52(2) [hereinafter API]; Barrack Obama, President of the United States, Speech at National Defense University in Washington, D.C.: National Security (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

56. MELZER, *supra* note 9, at 108-09.

57. See, e.g., W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 771-72 (2009).

58. Carnahan, *supra* note 49, at 230.

59. Eric Holder, Attorney General, Speech at Northwestern University School of Law: Targeted Killing (March 5, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> [hereinafter Holder’s Speech]; see also, DOJ WHITE PAPER, *supra* note 4, at 6-7. Nonetheless, the white paper demonstrates the need to carefully interpret such a requirement. While the white paper requires the exist-

2013 annual national security speech, President Obama stated that “we act against terrorists who pose a continuing and imminent threat to the American people.”⁶⁰ Similarly, the killing of Anwar Al-Awlaqi was justified by U.S. policymakers as a necessary mean to respond to a “continued and imminent” threat.⁶¹ 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.⁶²

C. *The Principle of Distinction: Who Can be Targeted?*

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.⁶³ 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.⁶⁴ 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

ence 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.*

60. Barrack Obama, President of the United States, Speech at National Defense University in Washington, D.C.: National Security (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

61. THE DRONE MEMO, *supra* note 4.

62. For further discussion of these issues, see Jennifer Daskal, *Reflections on What the Drone Memo Does and Doesn't Say*, JUST SECURITY (June 24, 2014, 9:00 AM), <https://www.justsecurity.org/12104/reflections-drone-memo/>.

63. API, *supra* note 55, at art. 48.

64. MELZER, *supra* note 9, at 300-01; Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case), Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 78 (July 8).

in the hostilities.⁶⁵ Therefore, the category of persons 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.⁶⁶

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.⁶⁷ The significance of this characterization lies 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.”⁶⁸

The U.S. Supreme Court, as well as the Israeli High Court of Justice (HCJ) have determined that terrorists cannot be characterized as

65. API, *supra* note 55, at art. 51(3); APII, *supra* note 27, at arts. 1(2), 13(3). See *infra* Section 2.3.3, for a thorough normative and practical interpretation of the meaning of “direct participation.”

66. Geneva Convention I for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, 43 (art. 24); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, 75 U.N.T.S. 85, 102 (art. 26); API, *supra* note 55, at arts. 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 27, at arts. 4(1), 7(1), 9(1), 13; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Common Article III), 1949, 6.3 U.S.T.I.A.; see also, MELZER, *supra* note 9, at 314.

67. See, e.g., Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged” Combatants*, 849 INT’L COMMITTEE RED CROSS 45 (2003); Gerald L. Neuman, *Humanitarian Law and Counterterrorist Force*, 14 EURO J. INT’L L. 283 (2003); Georg Nolte, *Preventative Use of Force and Preventative Killings: Moves into a Different Legal Order*, 5 THEORETICAL INQUIRIES L. 111 (2004); Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, 11 HARV. PROGRAM ON HUMANITARIAN POL’Y & CONFLICT RES. (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 ISR. L. REV. 378 (2005).

68. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 (2006).

“combatants”, as they typically do not fulfill the requirements specified in article 4 of the Third Geneva Convention.⁶⁹ 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;⁷⁰ and the U.S. Supreme Court, on the other hand, concluded that suspected terrorists should be treated as “unlawful combatants”⁷¹—a term that does not appear in any of the Geneva or Hague conventions, regulations and protocols. Therefore, they enjoy only the limited protections accorded by common article 3 of the Geneva Conventions. While the difference 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. “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 International Committee of the Red Cross (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[,]”⁷² others support more liberal interpretations of the term. Michael Schmitt, for example, argues that “[g]ray 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.⁷³ Moreover, Schmitt argues that only a more *liberal inter-*

69. 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. See HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't. of Isr. (Targeted Killing Case), 57(6) Isr. SC 285, ¶¶25-28 (2005), available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

70. *Id.*

71. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); *Hamdan*, 548 U.S. at 557.

72. ICRC COMMENTARY, *supra* note 29, ¶ 1944 (discussing commentary on article 51 of API).

73. Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 505-09 (H. Fischer, 2004).

pretation of direct participation will provide the necessary incentive for civilians to remain as distant from the conflict as possible.⁷⁴

Against this view, many consider such a liberal interpretation to be an unacceptable erosion of civilian protection,⁷⁵ and they advocate a *restrictive approach* to the term direct participation.⁷⁶ Nils 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.”⁷⁷

Kenneth 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.⁷⁸ 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.”⁷⁹ 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.”⁸⁰ The ICRC Interpretive Guidance significantly narrows the definition of activities that might constitute DPH based on the requirement of a direct causal link between the specific act and the likelihood of harm. It does this by introducing the concept of “one causal step,”⁸¹ meaning that anything that simply builds up the capacity of a party to inflict harm “is excluded from the concept of direct participation in hostilities.”⁸² 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.⁸³ Similarly, recruitment,

74. *Id.* at 509.

75. MELZER, *supra* note 9, at 341.

76. ICRC COMMENTARY, *supra* note 29, ¶ 1945; Watkin, *supra* note 67, at 657-60; NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, (ICRC, 2009) [hereinafter ICRC DPH GUIDANCE].

77. MELZER, *supra* note 9, at 343.

78. Watkin, *supra* note 67, at 31-33.

79. ICRC DPH GUIDANCE, *supra* note 76, at 47.

80. *Id.*

81. *Id.* at 53.

82. *Id.*

83. Watkin, *supra* note 67, at 658.

training, and planning activities will meet this criterion only if such activities are specifically conducted to enable the execution of a concrete operation.⁸⁴ 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.⁸⁵

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[;]”⁸⁶ a person who transports unlawful combatants to or from the place where the hostilities are taking place; and 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.⁸⁷ 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.”⁸⁸ 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.⁸⁹

The U.N. 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

84. *Id.*

85. *Id.* ICRC DPH GUIDANCE, *supra* note 76, at 63.

86. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t. of Isr. (Targeted Killing Case), 57(6) Isr. SC 285, ¶¶25-28 (2005), http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

87. *Id.* ¶ 36.

88. *Id.* ¶ 37.

89. *Id.* ¶ 35.

that directly supports combat.”⁹⁰ 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 participation.⁹¹ 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. These areas 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 participate in the hostilities. Specifically, the ICRC’s approach treats voluntary human shields 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). In contrast, the ICRC’s approach treats voluntary human shields as protected persons if their presence on site only poses a legal (and not physical) obstacle (i.e., shifts the proportionality calculations).⁹² 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 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.

90. UN Special Rapporteur on Extrajudicial Killings, *supra* note 9, ¶ 60.

91. *Id.* ¶61.

92. ICRC DPH GUIDANCE, *supra* note 76, at 56-57.

4. “For Such Time”

Civilians lose their protections only “for such time” as they directly participate in the hostilities.⁹³ 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).⁹⁴ 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 for direct participation in hostilities 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.⁹⁵ 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 an armed conflict.⁹⁶ 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.⁹⁷ 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

93. API, *supra* note 55, art. 51(3); APII, *supra* note 27, art. 13(3). The ICRC Customary IHL study considers the rule to be of customary nature for both types of conflicts. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Volume I: Rules 19 (2005) (Rule 6).

94. ICRC DPH GUIDANCE, *supra* note 76, at 43-44.

95. *Id.* at 65.

96. *Id.* at 34.

97. *Id.* at 34-35.

function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.⁹⁸

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 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.⁹⁹ 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.¹⁰⁰

While the HCJ approach is less nuanced and less restrictive than the ICRC approach, both resemble one another in that they implicitly recognize a third category not included in the Geneva Conventions—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 the following: 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 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).

98. *Id.* at 35.

99. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't. of Isr. (Targeted Killing Case), 57(6) Isr. SC 285, ¶40 (2005), http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

100. *Id.*

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. For example, 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.

D. 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.¹⁰¹ 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.¹⁰² In contrast to the propor-

101. HENCKAERTS & DOSWALD-BECK, *supra* note 93, at 46 (Rule 14).

102. *Id.*

tionality 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 caused to those persons who are the target of the operation, but the “collateral damage” inflicted on peaceful bystanders.¹⁰³

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. *Second*, with regard to the intentional targets, the court determined that lethal force should not be used if other, less harmful means, are available.¹⁰⁴

The determination that the principle of proportionality requires states to use lethal force only as a last resort was criticized in the literature.¹⁰⁵ Nonetheless, Attorney General Eric Holder has stated that targeted killings are only lawful and legitimate when capture is not feasible,¹⁰⁶ and the U.S. Drone Memo suggests that targeted killings would violate the Fourth Amendment if capture *was* feasible.¹⁰⁷ 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 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.”¹⁰⁸ Since this test is normally applied by military personnel,

103. MELZER, *supra* note 9, at 359; *see also* Rome Statute, *supra* note 26, at art. 8(2)(b)(iv).

104. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't. of Isr. (Targeted Killing Case), 57(6) Isr. SC 285, ¶40 (2005), http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

105. Amichai Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT'L CRIM. JUST. 310, 315 (2007).

106. Holder's speech, *supra* note 59.

107. THE DRONE MEMO, *supra* note 4, at 41. Nonetheless, it is still silent with regard to how feasibility will be determined, and how such decisions could be reviewed.

108. William J. Fenrick, *Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives*, 27 WINDSOR Y. B. ACCESS JUST. 271, 279 (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* McNeal, *supra* note 7, at 750.

and not by human rights activists, this assessment demonstrates how the vagueness of the principle of proportionality is likely to dictate its actual implementation.

E. 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,¹⁰⁹ aims to prevent erroneous targeting and to minimize incidental harm to civilians during the conduct of hostilities.¹¹⁰ According to the International Committee of the Red Cross Customary International Humanitarian Law project (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 that the objectives to be attacked are legitimate military objectives;¹¹¹ (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;¹¹² (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;¹¹³ 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.¹¹⁴ “Feasible precautions” are “precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”¹¹⁵

The efforts to provide substantive content and practical tests to the principle of precaution are valuable. Nonetheless, it still relies

109. HENCKAERTS & DOSWALD-BECK, *supra* note 93, at 51 (Rules 15-21).

110. API, *supra* note 55, art. 57.

111. HENCKAERTS & DOSWALD-BECK, *supra* note 93, at 55 (Rule 16); API, *supra* note 55, art. 57(2)(a)(i).

112. HENCKAERTS & DOSWALD-BECK, *supra* note 93, at 56 (Rule 17); API, *supra* note 55, art. 57(2)(a)(ii).

113. HENCKAERTS & DOSWALD-BECK, *supra* note 93, at 58 (Rule 18); API, *supra* note 55, art. 57(2)(a)(iii).

114. HENCKAERTS & DOSWALD-BECK, *supra* note 93, at 60 (Rule 19); API, *supra* note 55, art. 57(2)(b).

115. Convention on Certain Conventional Weapons Protocol II, art. 3, Oct. 10, 1981, 1342 U.N.T.S. 137; *see also*, Jean-Francois Que'guiner, *Precautions under the Law Governing the Conduct of Hostilities*, 88 INT'L REV. RED CROSS 864 (2006).

heavily on vague definitions, to be interpreted by the security authorities in real time.

F. Transparency and Accountability: How Much We Still Don't Know?

Both human rights norms and IHL obligate states to effectively investigate any alleged violations of the right to life.¹¹⁶ No need to keep the redundant 'hereinafter', but it is the *Fourth* Geneva Convention that I am referring to here... Effective investigations necessitate, among other things, a meaningful degree of transparency.¹¹⁷ 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."¹¹⁸ 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,¹¹⁹ 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."¹²⁰

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 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.¹²¹ Effective accountability may have various dimen-

116. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; International Covenant on Civil and Political Rights art. 2, Dec. 16, 1996, 999 U.N.T.S. 171 [hereinafter ICCPR].

117. UN Special Rapporteur on Extrajudicial Killings, *supra* note 9, ¶¶ 88, 90.

118. *Anguelova v. Bulgaria*, Eur. Ct. H.R. App. No. 38361/97, ¶ 140 (2002).

119. 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. UN Special Rapporteur on Extrajudicial Killings, *supra* note 9, ¶¶ 91, 92.

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

121. UN Special Rapporteur on Extrajudicial Killings, *supra* note 9, ¶¶ 88-91.

sions, 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.¹²²

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.”¹²³ The U.N. report on targeted killings concluded that “[t]he failure of States to disclose their criteria for [direct participation in hostilities] is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing.”¹²⁴

In addition to lack of information, both legal and political oversight mechanisms suffer from an expertise problem.¹²⁵ 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.¹²⁶ 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.¹²⁷

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

122. UN Special Rapporteur on Extrajudicial Killings, *supra* note 9, ¶¶ 88-91. For a criticism of media oversight concerning state secrets, see GABRIEL SCHOENFELD, *NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW* (2010).

123. Damien Van Puyvelde, *Intelligence Accountability and the Role of Public Interest Groups in the United States*, 128 *INTELLIGENCE & NAT'L SEC.* 139, 140 (2012) (citing PHILIP B. HEYMANN, *TERRORISM, FREEDOM AND SECURITY: WINNING WITHOUT WAR* (2003)).

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

125. McNeal, *supra* note 7, at 774.

126. McNeal, *supra* note 7, at 774.

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

targeted killing operations. These conditions contribute to the development of groupthink dynamics,¹²⁸ which can lead to suboptimal 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.’”¹²⁹ 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.¹³⁰

Moreover, “the collectivity itself may have caused an error while the public has no individual to hold to account.”¹³¹

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.¹³² Daniel Byman has urged the U.S. to follow the Israeli targeted killing policy, including its openness about the policy, its procedures for authorizing killings, and its provision of some form of legal review over the decision-making process.¹³³ 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

128. 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).

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

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

131. McNeal, *supra* note 7, at 783.

132. HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t. of Isr. (Targeted Killing Case)*, 57(6) Isr. SC 285, ¶¶25-28 (2005), http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

133. Daniel Byman, *Do Targeted Killings Work?*, 85 FOREIGN AFF. 110-11 (2006).

shadow over their potential to meaningfully challenge the position of the security agencies.¹³⁴

IV. TARGETING DECISIONS AND UNCERTAINTY

Thus far, this Article has 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.

A. *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 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.¹³⁵ How well that information is documented, how closely that information is scrutinized, and by whom that information is documented and scrutinized by are key factors in any assessment of targeted killing operations.¹³⁶ Social-psychology studies long ago demonstrated that individuals tend to search and absorb information that is in line with their core social beliefs, while omit-

134. See *infra* Section E.

135. UN Special Rapporteur on Extrajudicial Killings, *supra* note 9, ¶¶ 83-86; see also The Report of the Special Investigatory Commission on the targeted killing of Salah Shehadeh [in Hebrew, hereinafter The Shehadeh Commission Report], Feb. 27, 2011.

136. McNeal, *supra* note 7, at 720; see also Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 316 (2011).

ting or distorting contradictory information.¹³⁷ The construction and evaluation of information in social settings is influenced by their prior beliefs, ideologies and interests,¹³⁸ as well as their group identities and commitments.¹³⁹ Those tasked with preventing catastrophic terror attacks would therefore interpret associated risk differently than those tasked with preserving personal liberties. Paul Slovic and his coauthors found that subjective judgments are a major component of any risk assessment, regardless of whether these assessments are made by experts or lay people.¹⁴⁰ 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.¹⁴¹

Some common ways in which experts misjudge factual information and associated risks include the following: (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 how technological systems function as a whole.¹⁴² 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

137. Among the various psychological mechanisms which contribute to biased assimilation of information are: cognitive consistency and confirmation bias. See Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 255, 263-64 (Vol. 27, 1995); Dan Kahan, *Foreward: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 *HARV. L. REV.* 1, 19 (2011); Terrell A. Northrup, *The Dynamics of Identity in Personal and Social Conflict*, in *INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION* 55-82 (1989); Anne Maass & Mark Schaller, *Intergroup Biases and the Cognitive Dynamics of Stereotype Formation* 2 *EUR. REV. SOC. PSYCHOL.* 189 (1991); Daniel Bar-Tal, *Sociopsychological Foundations of Intractable Conflicts*, 50 *AM. BEHAV. SCIENTIST* 1430, 1445-46 (2007).

138. Ifat Maoz, et. al., *Reactive Devaluation of an "Israeli" vs. "Palestinian" Peace Proposal*, 46 *J. CONFLICT RESOL.* 515, 543 (2002); see also Roy F. Baumeister & Stephen Hastings, *Distortions of Collective Memory: How Groups Flatter and Deceive Themselves*, in *COLLECTIVE MEMORY OF POLITICAL EVENTS: SOCIAL PSYCHOLOGICAL PERSPECTIVES* 277, 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 et al., *Knowledge Building as a Mediator of Conflict in Conceptual Change*, 15 *COGNITION & INSTRUCTION* 1, 5 (1997).

139. Dan M. Kahan et al., *They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 *STAN. L. REV.* 851, 859 (2012).

140. Paul Slovic et al, *Facts and Fears: Understanding Perceived Risk*, in *SOCIETAL RISK ASSESSMENT* 181-216 (1980).

141. *Id.*; see also Sitaraman & Zions, *supra* note 8, at 534-35 (discussing "fundamental attribution error").

142. Slovic et al, *supra* note 140, at 187.

doubt.¹⁴³ Assumptions were insufficiently examined, and assessments were based on previous judgments without carrying forward the uncertainties.¹⁴⁴

Legal evaluations of risks associated with targeted killings (such as collateral damage assessments) are 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.¹⁴⁵ As Jervis pointed out, states are prone to exaggerate the reasonableness of their own positions and the hostile intent of others.¹⁴⁶ Similarly, Ephraim Kahana, while analyzing Israeli intelligence failures, emphasized the inherent problem of *overestimation of threats*.¹⁴⁷ 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.¹⁴⁸

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."¹⁴⁹ Indeed, it is well accepted that "every effort must be made to minimize collateral damage."¹⁵⁰ But how is the

143. Robert Jervis, *Reports, Politics, and Intelligence Failures: The Case of Iraq*, 29 J. STRATEGIC STUD. 3, 14 (2006).

144. *Id.* at 22.

145. Leonie Huddy et al., *Threat, Anxiety, and Support of Antiterrorism Policies*, 49 AM. J. POL. SCI. 593 (2005).

146. Robert Jervis, *War and Misperception*, 18 J. INTERDISCIPLINARY HISTORY 675, 688 (1988).

147. 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 problem of overestimation of threats. Ephraim Kahana, *Analyzing Israel's Intelligence Failures*, 18 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 262, 274 (2005).

148. Dina Badie, *Groupthink, Iraq, and the War on Terror: Explaining US Policy Shift Toward Iraq*, 6 FOREIGN POL'Y ANALYSIS 277 (2010). For a different explanation, see McNeal, *supra* note 7, at 755-758.

149. Barrack Obama, President of the United States, Speech at National Defense University in Washington, D.C.: National Security WHITE HOUSE (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

150. Amos N. Guiora, *Determining a Legitimate Target: The Dilemma of the Decision Maker*, 47 TEX. INT'L L. J. 315, 331 (2011).

anticipated collateral damage being assessed? McNeal describes, lengthily, a highly sophisticated and automated process, using software (FAST-CD) that allows us 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 from field tests, probability, historical observations from weapons employed on the battlefield, and physics-based computerized models for collateral damage estimates.¹⁵¹ Casualty estimates are also predicted based on standardized methods, including the Population Density Reference Table, which lists data from the intelligence community and allows for estimates of the population density during day, night, and special events.¹⁵²

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 are even prone to different kinds of errors. First, the data is limited by the quantity and reliability of the intelligence information *collected*.¹⁵³ 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.¹⁵⁴ 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 meaningless numbers.¹⁵⁵

151. McNeal, *supra* note 108, at 741.

152. *Id.* at 751.

153. *Id.* at 742.

154. *Id.* at 740-45; *see also infra* Section E.

155. For example, McNeal mentions that on average each drone strike in Pakistan seems to have killed between 0.8 and 2.5 civilians. McNeal, *supra* note 108, at 755.

2. *Risk of Error Assessing Means to Prevent Harming Civilians*

Similar to collateral damage calculations, the existence of “feasible” precautions depends on the availability of intelligence information about the target and its surroundings.¹⁵⁶ 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 counterterrorism, 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 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.

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.¹⁵⁷ 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 Iraq’s weapons of mass destruction and the reports that investigated this failure, Robert Jervis concluded that intelligence errors are inescapable.¹⁵⁸ Focus-

156. MELZER, *supra* note 9, at 365.

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

158. Jervis, *supra* note 143, at 48; so Kahana, *supra* note 147, at 274.

ing 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.¹⁵⁹

B. *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,”¹⁶⁰ terrorism challenges the principle of distinction, and thus puts 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 creates a public outcry for revenge and promotes political receptiveness to measures that may put enemy civilians at risk.¹⁶¹

Second, terrorist organizations act in clandestine ways and find shelter in loosely governed civilian areas.¹⁶² To escape accountability, they do not wear uniforms, and make efforts blending in with the civilian population. Therefore, any counterterrorism measure faces difficulties in avoiding collateral damage and protecting innocent bystanders.¹⁶³

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 percent of unintended civilian casualties in targeted killing operations in Afghanistan and Iraq were attributable to mistaken identification.¹⁶⁴ This means that terrorism 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 and of itself is a challenging task. While legal categorizations demand a clear “yes” or

159. Jervis, *supra* note 143, at 48.

160. Martha Crenshaw, *The Long View of Terrorism*, 113 CURRENT HISTORY 40, 41 (2014).

161. Max Abrahms, *Why Terrorism Does Not Work*, 31 INT'L SECURITY 42 (2006).

162. Crenshaw, *supra* note 160.

163. McNeal, *supra* note 7, at 714.

164. *Id.* at 738.

“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.¹⁶⁵ The overly sophisticated bureaucracy of creating kill-list is designed to accommodate a simple binary categorization and fails to recognize this type of variation.

C. 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 demonstrates 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, others have found the complete opposite.

For example, based on a database of 207 terrorist groups from 1970 to 2008, Bryan 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.¹⁶⁶ Somewhat similarly, Patrick Johnston found positive outcomes of decapitation with regard to various metrics of counter-militancy effectiveness.¹⁶⁷ Likewise, Audrey Kurth Cronin concluded that leadership decapitation has often hastened the decline or collapse of a terrorist organization.¹⁶⁸

However, other studies reached very different conclusions. For example, Jenna Jordan found that decapitation is not an effective

165. Ami Pedahzur & Arie Perliger, *The Changing Nature of Suicide Attacks - A Social Network Perspective*, 84 SOC. FORCES 1987, 1989 (2006). 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. McNeal, *supra* note 7, at 719.

166. Bryan C. Price, *Targeting Top Terrorists: How Leadership Decapitation Contributes to Counterterrorism*, 36 INT’L SEC. 9, 37 (2012).

167. 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 INT’L SEC. 47, 50 (2012). Note, that Johnson analyzes decapitation with regard to insurgency and militant organizations, and not necessarily terror organizations.

168. Audrey Kurth Cronin, *No Silver Bullets: Explaining Research on How Terrorism Ends*, 34 CTC SENTINEL 16, 16 (2010).

counterterrorism strategy and might even have counterproductive effects—especially in larger, older, religious, and separatist organizations.¹⁶⁹ Similarly, Mohammed Hafez and Joseph Hatfield found that targeted killings have no significant impact, in either the short- or long-term, on rates of terror attacks.¹⁷⁰ 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.¹⁷¹ In his recent book, “Objective Troy,” Scott Shane documented evidence on the blowback from drone strikes,¹⁷² and concluded that targeted killings fuel the central narrative of Al Qaeda and the Islamic State (according to this narrative, the United States is at war with Islam, continuously killing Muslims, and therefore the obligatory religious response is armed jihad.)¹⁷³

While this breadth of information is inconclusive, it does suggest that under some circumstances targeted killing operations have some counterproductive outcomes.¹⁷⁴ What is certain is the uncertainty about the effects of targeted killing operations.

169. Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leadership Decapitation*, 18 SECURITY STUD. 719, 753-54 (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*, 384 INT’L SEC. 7, 35 (2014); see also MARTHA CRENSHAW, EXPLAINING TERRORISM: CAUSES, PROCESSES AND CONSEQUENCES 93 (2011); JACOB N. SHAPIRO, THE TERRORIST’S DILEMMA: MANAGING VIOLENT COVERT ORGANIZATIONS 257 (2013); Keith Patrick Dear, *Beheading the Hydra? Does Killing Terrorist or Insurgent Leaders Work?*, 133 DEFENCE STUDIES 293, 323-24 (2013).

170. Mohammed M. Hafez & Joseph M. Hatfield, *Do Targeted Assassinations Work? A Multivariate Analysis of Israel’s Controversial Tactic during Al-Aqsa Uprising*, 29 STUD. CONFLICT & TERRORISM 359, 377-78 (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 ETHICS & INT’L AFF. 111, 118-20 (2003).

171. LIVING UNDER DRONES, DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN (2012).

172. 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 28-31 (2015). For a summary of some of these findings, see Scott Shane, *The Lessons of Anwar Al-Awlaki*, N.Y. TIMES (Aug. 27, 2015), http://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html?_r=0 [hereinafter Shane, *The Lessons of Anwar Al-Awlaki*].

173. Shane, *The Lessons of Anwar Al-Awlaki*, *supra* note 172.

174. Additionally, targeted killing (as opposed to capturing) prevents the use of interrogations as an important source of information to prevent future attacks; it encourages, at

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

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

Salah Shehadeh was the head of the Operational Branch of Hamas in Gaza, and was accused by Israel of having killed a large number 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. This bomb killed Shehadeh himself, his assistant (Zaher Saleh Nassar), his wife (Laila Khamis Shehadeh), and Shehadeh's fifteen-year-old daughter (Iman Salah Shehadeh). 11 other civilians were also killed in the attack, including twenty-seven-year-old, Iman Hassan Matar, together with her five children, eleven-year-old, Alaa Muhammad Matar; five-year-old, Dunia Rami Matar; four-year-old, Muhammad Raed Matar; two-year-old, Aiman Raed Matar; and Dina Raed Matar, who was less than a year old at the time, were all killed in one of the nearby tin shacks. Twenty-two-year-old, Muna Fahmi al-Huti, and her two children, five-year-old, Subhi Mahmoud al-Huti and three-year-old, Muhammad Mahmoud al-Huti, were also killed in the nearby "garage house." Finally, forty-two-year-old, Yusef Subhi 'Ali a-Shawa, was also killed in one of the tin shacks, and sixty-seven-year-old, Khader Muhammad a-Sa'idi, who was walking in the street, was fatally wounded (he later died of his wounds). Additionally, 150 civilian bystanders were injured.¹⁷⁵

A. *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 (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

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 133, at 97-100.

175. Ariel Meyerstein, *Case Study: The Israeli Strike Against Hamas Leader Salah Shehadeh*, CRIMES WAR PROJECT (Sept. 19, 2002).

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

The Commission was composed of three members. The Prime Minister appointed Adv. Zvi Inbar—the former MAG and the Legal Advisor of the Knesset (the Israeli Parliament)—as the head of the Commission. The other two members of the Commission were Major General (retired) Yitzhak Eitan (former Commander of the IDF Central Command) and Mr. Yitzhak Dar (former head of the Operations Department at the Israel Security Agency (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.¹⁷⁶ 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 early stage, when the Commission has not yet completed its workings and no conclusions have been made."¹⁷⁷ On August 31, 2009, the Commission's chairperson, Adv. Inbar, passed away, and was replaced by retired Supreme Court Justice Tova Strasberg-Cohen.

B. *The Report*

On February 27, 2011, the Commission published its final report.¹⁷⁸ It begins with an analysis of the security situation that existed be-

176. HCJ 8794/03 *Hass v. Judge Advocate General* (not published, 12.23.08) [hereinafter *The Shehadeh Case*].

177. *Id.* ¶ 13.

178. The Report of the Special Investigatory Commission on the targeted killing of Salah Shehadeh [in Hebrew, hereinafter: *The Shehadeh Commission Report*], February 27, 2011.

tween the beginning of the Second Intifada (September 2000), and the targeted killing of Shehadeh on July 22, 2002.¹⁷⁹ The Commission characterized this period as an “armed conflict” and noted that during these two years many Palestinian terror attacks took place within Israel. These attacks caused the death of 474 Israelis and injured 2,649.¹⁸⁰

The report then describes the role that each governmental authority plays in a targeted killing operation. The ISA, 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).¹⁸¹ 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).¹⁸² 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.¹⁸³

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.¹⁸⁴ 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

179. *Id.* at 21-24.

180. *Id.* at 21.

181. *Id.* at 25.

182. *Id.* at 26.

183. *Id.* at 27.

184. *Id.* at 34-37.

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.¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷ 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.¹⁸⁸

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.¹⁸⁹ All the information was brought to Yuval Diskin, the Deputy Head of the ISA, 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. Thereafter, Diskin, consulted with the IDF authority responsible for targeted killings, the Deputy Chief of General Staff, Gabi Ashkenazi, and with the highest political echelons. Finally, Diskin consulted with then Minister of Defense, Benjamin Ben-Eliezer, and then Prime Minister, Ariel Sharon.¹⁹⁰ After receiving all of the relevant authorizations, the ISA

185. *Id.* at 31.

186. *Id.* at 43.

187. *Id.* at 55-59.

188. *Id.* at 59-60.

189. *Id.* at 61.

190. *Id.*

began tracking Shehadeh's location.¹⁹¹ Knowing he was wanted by the Israeli authorities, Shehadeh used seven hideouts and kept moving between them.¹⁹² Throughout this time, several alternative plans to target Shehadeh were abandoned, due to a low-success assessment and a high-risk to IDF soldiers and civilians in the area (twice due to positive information concerning the presence of Shehadeh's daughter).¹⁹³ 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.¹⁹⁴

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.¹⁹⁵ 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 was 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.¹⁹⁶

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.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ 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

191. *Id.* at 62.

192. *Id.* at 62-63.

193. *Id.* at 63.

194. *Id.* at 67-68.

195. *Id.* at 63.

196. *Id.* at 64.

197. *Id.* at 65.

198. *Id.* at 66-67.

199. *Id.* at 66.

would not have been carried out.²⁰⁰ 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 to the decision-makers was incomplete.²⁰¹ 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.²⁰² 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.²⁰³ 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.²⁰⁴

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.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷

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

200. *Id.* at 67, 72.

201. *Id.* at 78.

202. *Id.* at 79.

203. *Id.* at 79-81.

204. *Id.* at 81.

205. *Id.* at 103-06.

206. *Id.* at 97-98, 47.

207. *Id.* at 105.

formulated by the IDF.²⁰⁸ Moreover, it expressed the opinion that the ISA should strengthen its intelligence efforts with regard to collateral damage to the uninvolved civilian population.²⁰⁹ 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.²¹⁰ 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 can—and should—be improved.

C. *Uncertainty, Intelligence and Risk of Error*

1. *Deference to the Security Agencies*

The Commission's report was based on the information that was submitted to it by the IDF, the ISA and the Air Force.²¹¹ 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 2002.²¹² 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.²¹³ Another example can be found in the Commission's acceptance of the

208. *Id.* at 107.

209. *Id.*

210. *Id.* at 108.

211. *Id.* at 17-20.

212. The Shehadeh Commission Report, *supra* note 135, at 21, 55-59.

213. *Id.*

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 rejected—to use two half-ton bombs instead).²¹⁴ To support this finding, the Commission added that 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).²¹⁵ 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).²¹⁶

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.²¹⁷ 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 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*."²¹⁸ 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.²¹⁹

While it certainly could be the case that no specific individual was criminally responsible for committing international or domestic crimes, it is nonetheless possible that international law (in this case,

214. *Id.* at 63-644.

215. *Id.* at 65.

216. *Id.* at 99.

217. *Id.* at 98.

218. *Id.* at 100.

219. *Id.* at 103-04.

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. *The Requirement of “Positive Information”*

In dealing with the death of Shehadeh’s fifteen-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.²²⁰ 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 him. In 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 was not there and to carry on with the operation.²²¹ 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 fifteen-year-old girl, as well as seven other children, were killed simply because no one chose to collect and provide *positive information* confirming their presence.

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.²²² It also mentioned the air force estimations concerning severe collateral damage to the

220. *Id.* at 67.

221. *Id.* at 69.

222. *Id.* at 78-79.

tin shacks and their inhabitants.²²³ 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.²²⁴ The Commission decided to treat this information as “speculative” and “unclear.”

4. *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.²²⁵ 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.²²⁶ 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.²²⁷ At this point, two senior ISA members advocated two opposing options. The Head of Operations Division suggested a different course of action to minimize collateral damage and to prevent the anticipated harm to uninvolved civilians. However, 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 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.²²⁸ 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

223. *Id.* at 78.

224. *Id.* at 78.

225. *Id.* at 73-74.

226. *Id.* at 73.

227. *Id.* at 73.

228. *Id.* at 74.

altogether.²²⁹ 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 proportional to the enormous damage anticipated from the continuing terrorist attacks planned by Shehadeh.²³⁰ Between July 19th (when the final decision to carry out the operation was made) and July 22nd (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.²³¹ 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 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 level, 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 decisionmakers 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 affirming the presence of civilians in

229. *Id.* at 74-75.

230. *Id.* at 76.

231. *Id.*

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.

5. *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.²³² 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.²³³ The Prime Minister could not testify due to his medical condition.²³⁴

6. *Wartime fact-finding and national narratives*

The Shehadeh Report exemplifies how national investigatory commissions may be held captive by their members' national identities and narratives. The members of the Shehadeh Investigatory Commission demonstrated complete trust in the witnesses it interviewed from the ISA and IDF, avoided challenging inconsistent information, and expressed their confidence in the Israeli authorities. In their preliminary note, the Commission members thank the political and military personnel for their interviews and for providing the commission with all of the relevant materials.²³⁵ In the Report itself, the Commission states that “all senior IDF and ISA commanders and the political leadership fully cooperated with the commission, willingly and in a complete and unequivocal manner.” The Commission further devotes a full paragraph for describing the efforts of the political and military authorities. These compliments included “finding every relevant document,” “testifying fully, openly, and without evasion,”

232. *Id.* at 82-83.

233. *Id.* at 82-83.

234. *Id.* at 84.

235. *Id.* at 4.

and “answering challenging questions without any reservations.”²³⁶ In several sections of the Report, the Commission praises the IDF and ISA commanders for their awareness of the relevant laws, and their sensitivity to the potential risks to uninvolved civilians.²³⁷ The narrative adopted and reproduced by the Shehadeh Report is fully consistent with the national Israeli narrative, and the Israeli ethos that “the IDF is the most moral army in the world.”²³⁸ The Report uses positive words to describe the ISA and IDF actions, such as “sensitivity,” “awareness,” “preventive,” and refrains from criticizing any of the relevant decision-makers. When dealing with the death of Shehadeh’s daughter—15 years old Iman Shehadeh—the Report states that she “found her death” at the residence (rather than “was killed by”), emphasizing that her death was “unintended,” “unwanted,” and “unexpected” (even though the Deputy-Head of the ISA decided to cancel the operation as he suspected she will be killed by the bomb).²³⁹ In stark contradiction, when describing Palestinian actions, the Report uses completely different language, emphasizing the “murderous” nature of Palestinian terrorism (even when dealing operations directed against IDF soldiers rather than against civilians (or more accurately, without distinguishing between different types of actions).²⁴⁰ According the Shehadeh Commission narrative, Palestinian actions are “murderous terrorism,” while IDF actions are sensitive and thoughtful; Israeli casualties are “victims,” killed in bloodshed violence, while Palestinian casualties are “unanticipated collateral damage,” who “found their death” in a “tragic” occurrence. These examples demonstrate the inherent limitations of state-sponsored investigatory mechanisms, which may frustrate domestic attempts at effective oversight of targeted killing operations.

VI. 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

236. *Id.* at 17-8.

237. *Id.* at 98.

238. Daniel Bar-Tal, Eran Halperin & Neta Oren, *Socio-Psychological Barriers to Peace Making: The Case of the Israeli Jewish Society*, 41 SOC. ISSUES & POLY REV. 63, 86 (2010).

239. *Id.* at 69.

240. *Id.* at 21, 24, 56-57, 65, 80, 97, 101-02, and 111.

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.

A. 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.

B. Activity-based test to DPH:

To improve clarity and provide a less subjective test for determinations of DPH, an activity-based test (“acts of war which by their nature or purpose are likely to cause actual harm,”) should be adopted. Such a test would include 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.

C. 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.

D. Precaution as a State of Mind

To improve the outcomes of security decision-making in the context of deadly preventive measures, this article recommends shifting the focus from automated algorithms and check lists to basic 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.

E. 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.

F. 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.

VII. 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.²⁴¹

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 Palestinian terror attacks, the information regarding the concrete damage to Palestinian civilians and to their properties caused by the Israeli military 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

241 Barrack Obama, President of the United States, Speech at National Defense University in Washington, D.C.: National Security (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

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.”