

## ARTICLES

### **“GUNS FOR HIRE, DEATH ON DEMAND”: THE PERMISSIBILITY OF U.S. OUTSOURCING OF DRONE ATTACKS TO CIVILIAN SURROGATES OF THE ARMED FORCES AND CHALLENGES TO TRADITIONAL JUST WAR THEORY**

*Kevin Hugh Govern*<sup>\*</sup> & *Scott Adam Schlager*<sup>\*\*</sup>

- I. ASSASSINATIONS AND LICIT TARGETED KILLINGS—  
DISTINCTIONS WITH A DIFFERENCE? ..... 148
- II. “GUNS FOR HIRE”: THE HISTORY OF PRIVATE  
MILITARY FIRMS AND PRIVATE MILITARY  
CORPORATIONS AS DISTINCT ENTITIES AND NOT JUST  
MERCENARIES BY ANOTHER NAME ..... 153
- III. AUTHORITY AND LIABILITY OF CIVILIAN OPERATIVES  
UNDER JUST WAR THEORY, INTERNATIONAL LAW, AND  
DOMESTIC LAW ..... 161

---

\* B.A., J.D., Marquette University Law School and LL.M., the Judge Advocate General’s School, U.S. Army, and LL.M., the University of Notre Dame Law School.

\*\* B.A., University of Pennsylvania. Mr. Schlager wishes to thank Professor Claire O. Finkelstein at the University of Pennsylvania Law School and his classmates in Law 949-401 during the Fall 2011 semester at Penn Law. Both thank the many notable scholars before them who have informed the ethical debate over targeted killing, covert operations, and the legality of non-military actors performing military duties—especially those who contributed to the Center for Ethics and the Rule of Law (CERL), University of Pennsylvania School of Law discussions and scholarship on this and other subjects—you have been invaluable lodestars. Under rights reserved by the author to use all or part of this writing in collective works and/or subsequent works of authorship created by the author and/or the author’s institution, and the author’s reserved right to create and reproduce derivative works, certain materials and subjects covered in this Article have appeared as Kevin Govern and Eric Bales, “Taking Shots at Private Military Firms: International Law Misses its Mark (Again)” published in the *Fordham International Law Journal* (volume 32, at page 55) in 2008. Any errors or omissions are solely the responsibility of the authors.

IV. THE DEBATE OVER THE WAY AHEAD UNDER LAW AND CUSTOMARY PHILOSOPHICAL BASES FOR CIVILIAN USE OF FORCE IN TARGETED KILLING .....	176
V. CONCLUSION.....	201

### I. ASSASSINATIONS AND LICIT TARGETED KILLINGS—DISTINCTIONS WITH A DIFFERENCE?

The *Oxford Dictionary Online* defines Assassin as “a murderer of an important person in a surprise attack for political or religious reasons.”<sup>1</sup> Due to the complexity of “surprise attack for political . . . reasons,” such killings cannot occur without legal implication, political repercussion, operational complexity,<sup>2</sup> or the absence of historical context.<sup>3</sup> This begs the question: what exactly constitutes “targeted killing,” as compared or opposed to, an “assassination”? The answer to this question is far from settled, largely because there is profound disagreement about which body of law should be used to evaluate licit targeted killings, as distinguished from illegal assassinations. The renowned international law of war expert Professor Gary Solis terms “targeted killing” to be

---

1. *Assassin Definition*, OXFORD DICTIONARY ONLINE, [http://oxforddictionaries.com/definition/american\\_english/assassin?q=Assassin](http://oxforddictionaries.com/definition/american_english/assassin?q=Assassin) (last visited Feb. 25, 2013).

2. Glenn W. Johnson, *Mortus Discriminatus: Procedures in Targeted Killing*, v, (June 2007) (M.S. Thesis, Naval Postgraduate School), *available at* <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA469936>. Johnson’s Abstract noted that as of 2007, at least in the unclassified realm “no widely established standard or published set of guidelines and planning considerations exist for operational planners to conduct targeted killing operations. Due to the political complexity intertwined with targeted killing these types of operations rarely occur without repercussion. Operational planners need to understand that targeted killing operations cannot exist solely at the operational level because their consequences have strategic and political ramifications. By utilizing a case study analysis, this thesis will identify the operational planning considerations that need to be addressed to successfully conduct a targeted killing mission.”

3. *Id.* at 23–41. Johnson examines in a non-exclusive, non-chronological order, the successful and unsuccessful efforts at targeted killings of: A. Ahmed Jibril (founder and leader of the Popular Front for the Liberation of Palestine—1980s through present—unsuccessful), Pablo Escobar (Columbian druglord—July 2, 1994—successful); Palestinian terrorists (in Israel’s Operation Wrath of God—also known as Operation Bayonet—vengeance killings of terrorists involved in 1972 massacre of Israeli Olympians—1972—successful); *Obergruppenführer* Reinhard Heydrich (chaired the 1942 Wannsee Conference, which discussed plans for the deportation and extermination of all Jews in German-occupied territory—attempt made as Operation Anthropoid—October 28, 1941—ultimately successful); Hamas Terrorists (various dates—varying success); and, Admiral Isoroku Yamamoto (Japanese Naval Marshal General and the commander-in-chief of the Combined Fleet during World War II—April 18, 1943—successful).

“the targeting and killing, by a government or its agents, of a civilian or ‘unlawful combatant’ taking a direct part in hostilities in the context of an armed conflict who is not in that government’s custody and cannot be reasonably apprehended.”<sup>4</sup>

Former Special Ambassador for Counterterrorism Dell Dailey, has said “targeted killing,” as understood by select members of Special Operations Forces (Operators), is “the employment of a weapons platform designed for both sensing and destroying an identified enemy target with the maximum use of current technology while retaining a human in the decision making process.”<sup>5</sup>

The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions Philip Alston has said, “a targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under color [sic] of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”<sup>6</sup>

In contemporary times, U.S. presidents have proscribed or proscribed various forms of targeted killings, and related to such prescriptions and proscriptions, delegated limited presidential functions.<sup>7</sup> Relevant to this Article, was the December 4, 1981 Executive Order 12333, issued by President Ronald Reagan, “United States Intelligence Activities.”<sup>8</sup> Section 2.11 of the order provides the following: “Prohibition on Assassination. No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”<sup>9</sup> Section 2.12 of Executive Order

---

4. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 538 (2010).

5. CLAIRE FINKELSTEIN ET AL., *TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD* 358 (2012). Among his many military and diplomatic assignments, Dailey directed the new Center for Special Operations, the military hub for all counterterrorism, before retiring to control of the State Department’s counterterrorism office, from which he “promoted interagency collaboration and built closer partnerships between military personnel and the members of other U.S. government departments and agencies involved in global counterterrorism activities. *Biography of Dell L. Dailey*, U.S. DEP’T OF STATE, <http://www.state.gov/outofdate/bios/87639.htm> (last visited Feb. 25, 2013).

6. Philip Alston, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6, at 4 (May 28, 2010), available at <http://www.extrajudicialexecutions.org/application/media/14%20HRC%20Targeted%20Killings%20Report%20%28A.HRC.14.24.Add6%29.pdf>.

7. Regarding presidential delegation of authority, consider generally that Article II, section 1 of the Constitution reads, in part, “[t]he executive power shall be vested in a president of the United States of America.” Article II, section 3 asserts that, “[t]he President shall take care that the laws be faithfully executed . . .” U.S. CONST. art. II, §§ 1, 3.

8. Exec. Order No. 12333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

9. *Id.* Executive Order 12333 was the last of three executive orders banning assassination. See generally ELIZABETH B. BAZAN, CONG. RESEARCH SERV., RS 21037,

12333 forbids indirect participation in activities prohibited by the order, stating: “Indirect participation. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.”<sup>10</sup> While Executive Order 12333 is still in force, post September 11, 2001 legislation has “opened the door” to a reinterpretation of the assassination ban, if not repealing it entirely. On Friday, September 14, 2001, both the House and the Senate passed joint resolutions authorizing the President to:

Use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>11</sup>

Published reports in popular media<sup>12</sup> as well as governmental

---

ASSASSINATION BAN AND E.O. 12333: A BRIEF SUMMARY (Jan. 4, 2002), *available at* <http://www.fas.org/irp/crs/RS21037.pdf>. Bazan noted that the first order was issued by President Ford in response to concerns raised in the 1970s with respect to alleged abuses by the U.S. intelligence community. Exec. Order No. 11905, § 5(g), 41 Fed. Reg. 7703, 7738 (Feb. 19, 1976). This section of the Executive Order 11905 stated, “Prohibition of Assassination. No employee of the United States Government shall engage in, or conspire to engage in, political assassination.” *Id.* This is commonly viewed as a condemnation of assassination and rejection of it as an instrument of American policy. BAZAN, *Supra*, at 1–2. Bazan also noted that “the assassination ban in E.O. 11905 was superseded by Executive Order 12036, Sec. 2-305 (assassination prohibition) and Sec. 2-309 (indirect participation prohibition), 3, 43 Fed. Reg. 3674, 3688, 3689 (President Jimmy Carter, 1/26/78). The pertinent provisions in President Reagan’s E.O. 12333, in turn, superseded those in President Carter’s order.” *Id.* at 2.

10. Exec. Order No. 12333, 46 Fed. Reg. 59,941 (Dec. 4, 1981); S.J. Res. 23, 107th Cong. (2001); H.R.J. Res. 64, 107th Cong. (2001).

11. The Senate passed Senate Joint Resolution 23, before 11:00 a.m. on Friday, September 14, 2001. The House passed it late Friday evening, September 14, 2001. The President signed it into law on Tuesday, September 18, 2001. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 2224 (2001). For a detailed discussion of authorizations of the use of U.S. military force, see JENNIFER K. ELSEA & RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL 31133, DECLARATIONS OF WAR AND AUTHORIZATIONS OF USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS (2007), *available at* <http://www.fas.org/sgp/crs/natsec/RS22357.pdf>.

12. Siobhan Gorman, *CIA Had Secret Al Qaeda Plan*, WALL ST. J. (July 13, 2009), *available at* <http://online.wsj.com/article/SB124736381913627661.html#mod=djemalertNEWS>. See also Marc Ambinder, *What Was that Secret CIA Operation? Targeted Assassinations?*, ATLANTIC (July 31, 2009), *available at* <http://www.theatlantic.com/politics/archive/2009/07/what-was-that-secret-cia-operation-targeted-assassinations/21144/>.

sources<sup>13</sup> have suggested that in the wake of the 9/11 terrorist attacks, the Pentagon has expanded its counterterrorism intelligence activities, counterterrorist operations, and as a subset of the latter, targeted killings, while Congress has maintained legal authority for oversight of such activities. In Sections 601–604 of the 1991 Joint Explanatory Statement of the Committee of Conference, significant provisions were set forth regarding congressional oversight of intelligence activities, including requirements relating to the authorization of covert actions by the President and the reporting of covert actions to Congress. These provisions imposed the following requirements:

A finding that determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States must be in writing.

A finding may not retroactively authorize covert activities which have already occurred. The President must determine that the covert action is necessary to support identifiable foreign policy objectives of the United States.

A finding must specify all government agencies involved and whether any third party will be involved.

A finding may not authorize any action intended to influence United States political processes, public opinion, policies or media.

A finding may not authorize any action which violates the Constitution of the United States or any statutes of the United States.

Notification to the congressional leaders specified in the bill must be followed by submission of the written finding to the chairmen of the intelligence committees.

The intelligence committees must be informed of significant changes in covert actions.

No funds may be spent by any department, agency or entity of the Executive Branch on a covert action until there has been a

---

13. ALFRED CUMMING, CONG. RESEARCH SERV., RL 33715, COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS (2009), available at <http://www.fas.org/sgp/crs/intel/RL33715.pdf>.

signed, written finding.<sup>14</sup>

Two major camps are emerging which have competing views about the choice of law that should govern targeted killings in the international arena. First, there is international human rights law (IHR), which argues a more restricted view of targeted killings.<sup>15</sup> Second, there is international humanitarian law (IHL), which argues for a broader view of targeted killings.<sup>16</sup> Targeted killings are largely viewed as illegal from the framework of IHR because this view gives a presumption of innocence that would be violated by a targeted killing from, say, a Predator drone attack. Instead the objects of targeted killings, under such a theory, “should be arrested, detained, and interrogated with due process of law; and force should be employed only if necessary. There are no other measures available, and is not of a lethal nature if a lesser degree of force can be effective.”<sup>17</sup>

---

14. *Id.* at 5–6 (citing § 503 of the National Security Act of 1947, codified at 50 U.S.C. § 413b).

15. W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 719 (2007).

16. *Id.* at 719; *International Human Rights Law*, U.N. HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx> (last visited Feb. 25, 2013) (noting that “[i]nternational human rights law lays down obligations which States are bound to respect”). According to the High Commissioner for Human Rights,

[a] series of international human rights treaties and other instruments adopted since 1945 have conferred legal form on inherent human rights and developed the body of international human rights. Other instruments have been adopted at the regional level reflecting the particular human rights concerns of the region and providing for specific mechanisms of protection, [and that w]hile international treaties and customary law form the backbone of international human rights law other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development. Respect for human rights requires the establishment of the rule of law at the national and international levels.

*Id.*

17. Fisher, *supra* note 15, at 719. For what comprises IHL, see *What is International Humanitarian Law?*, ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW, ICRC (July 2004), [http://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf). According to the International Committee for the Red Cross (ICRC),

International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.

## II. "GUNS FOR HIRE": THE HISTORY OF PRIVATE MILITARY FIRMS AND PRIVATE MILITARY CORPORATIONS AS DISTINCT ENTITIES AND NOT JUST MERCENARIES BY ANOTHER NAME

This Article could not do justice to chronicling the complete history of private military firms (PMFs) or private military corporations (PMCs); instead the reader should consider, amongst many excellent works on the subject, Peter Singer's masterwork, *Corporate Warriors*,<sup>18</sup> as an encyclopedic examination of present-day PMFs and PMCs. Also beyond the scope of this commentary lies the scourge of extrajudicial, illicit killings committed by criminals categorized as maritime pirates, sea robbers, skyjackers/air pirates, or terrorists.<sup>19</sup> Simply put, PMFs operate globally, often with strategic impact on both the process and outcome of commencing, sustaining, and concluding armed conflicts.<sup>20</sup> They have also become integral to the domestic security systems of many nations around the globe.<sup>21</sup> A significant clarification will rate much commentary to follow: PMF contractors are not mercenaries,<sup>22</sup>

---

*Id.*

18. PETER W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 8 (2003). Peter Singer is a National Security Fellow at the Brookings Institute. *Biography*, PWSINGER.COM, <http://www.pwsinger.com/biography.html> (last visited Feb. 25, 2013). Singer has been widely published in his critiques against the privatization of warfare. *See, e.g.*, Kevin H. Govern & Eric C. Bales, *Taking Shots at Private Military Firms: International Law Misses its Mark (Again)*, 32 *FORDHAM INT'L L.J.* 55 (2008); LOUISE DOSWALD-BECK, *FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES* ch. 7 (Simon Chesterman & Chia Lehnardt eds., 2007) (private military companies under international humanitarian law). A variety of terms have been used for such private military entities. Hereinafter, this chapter will refer to Private Military Firms (PMFs) for such entities.

19. Kevin H. Govern, *National Solutions to an International Scourge: Prosecuting Piracy Domestically as a Viable Alternative to International Tribunals*, 19 *U. MIAMI INT'L & COMP. L. REV.* 1 (2011). This author significantly distinguishes between and among those categories of illegal actors subject to national and international criminal law, and the laws of war. As a general rule, pirates and terrorists are presumed subject to criminal law, not the law of war.

20. SINGER, *supra* note 18.

21. *Id.*

22. *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, Human Rights Council, U.N. Doc. A/HRC/7/7, ¶ 56 (Jan. 9, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/100/75/PDF/G0810075.pdf?OpenElement>. ("[The Working Group] is of the opinion that many . . . such manifestations are new modalities of mercenary-related activities."). *See also* Alexander Higgins, *US Rejects UN Mercenary Report*, USA TODAY (Oct. 17, 2007), available at [http://usatoday30.usatoday.com/news/world/2007-10-17-3392316\\_246\\_x.htm](http://usatoday30.usatoday.com/news/world/2007-10-17-3392316_246_x.htm). "[The] U.N. report . . . said the use of private security guards like those involved in the [Nusoor Square] shooting . . . amounted to a new form of mercenary activity." *Id.*

and forces other than standing national armies can also legitimately engage in warfare.<sup>23</sup> PMF contractors have a legal distinction that sets them apart from mercenaries,<sup>24</sup> and it is unlikely that any nation could successfully establish who is a mercenary under current international law.<sup>25</sup> In Singer's estimation, hiring of private individuals to fight battles "is as old as war itself."<sup>26</sup>

Without engaging in an exhaustive exposition on the history of mercenaries and PMFs, there are several notable instances of such private forces being engaged to conduct licit targeted killing and illicit assassination missions. For instance, *Ninja* were peasant farmers who learned the art of war to combat the feudal lords' (*daimyo*'s) duly constituted private military forces (*samurai*)<sup>27</sup> as well as master-less military forces (*ronin*).<sup>28</sup> The *Ninja* first arose in the fourteenth century, but were not widely known or used till the fifteenth century and were hired through the mid-eighteenth century to perform capture, infiltration and retrieval, and, most infamously, assassinations.<sup>29</sup> A Welshman, Owain Lawgoch (Owain of the Red Hand), formed a "free company" of mercenaries and fought for the French against the English during the Hundred Years War.<sup>30</sup> Owain, as a mercenary, lived and died by the sword and was successfully targeted and killed by the Scotsman Jon Lamb under the orders of the English Crown in 1378 during the siege of Mortagne-sur-Mer.<sup>31</sup> Modern history is replete with other examples, which rebut the contemporary notion that war, assassination, and targeted killing has been conducted exclusively by standing armies of sovereign nation-states,<sup>32</sup> and the "monopoly of the state over violence

23. Shawn McCormack, *Private Security Contractors in Iraq Violate Laws of War*, 31 SUFFOLK TRANSNAT'L L. REV. 75, 98 (2007) (claiming contractors violate their status as noncombatants whenever they use force).

24. See generally Wm. C. Peters, *On Law, Wars and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 367 (2006); Antenor Hallo de Wolf, *Modern Condottieri in Iraq: Privatizing War from the Perspective of International and Human Rights Law*, 13 IND. J. GLOBAL LEGAL STUD. 315, 324 (2006) (stating "one of the most fervent and skeptical critics of [PMFs], the former U.N. Special Rapporteur on Mercenaries, Enrique Ballesteros, has implicitly acknowledged that it is necessary to distinguish [PMFs] and their personnel from actual mercenaries.").

25. See GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT, 328 n.83 (1980) (Professor Geoffrey Best argues that any individual who could not exclude himself from the poorly drafted definition(s) of mercenary deserves to be shot—and his attorney with him!).

26. SINGER, *supra* note 18, at 19.

27. ANDREW ADAMS, NINJA: THE INVISIBLE ASSASSINS 46 (1970).

28. *Id.* at 43.

29. *Id.* at 84 (for assassination techniques).

30. GERAINT H. JENKINS, A CONCISE HISTORY OF WALES 110 (2007).

31. *Id.*

32. SINGER, *supra* note 18, at 18–19.



is the exception in world history, rather than the rule.”<sup>33</sup> This Article’s next part will examine the paradigm shift from nation state military force to non-state actors in the realm of state security.

By the nineteenth century, strong national armies had diminished the need and the opportunity for mercenaries,<sup>34</sup> but the diminishing interest of the superpowers in the security of weaker states created an opportunity for unemployed soldiers to once again band together and fill an unmet need for countries unable to provide effectively for their own security.<sup>35</sup>

The end of the Cold War was the catalyst for the growth of modern mercenarism, and with it the employment of force to conduct support to “conventional operations” as well as assistance in assassinations and targeted killings.<sup>36</sup> As the United States and the Soviet Union began downsizing, the “market” was flooded with soldiers highly skilled in combat arms.<sup>37</sup> With the thaw in relations with the Soviet Union, the superpowers were less concerned about maintaining dominating influence around the globe. The combination of shrinking militaries and their diminishing commitment to regional security sustained the mercenary trade by leaving an unfilled security need, particularly in Africa.

The backers of mercenaries operating in Africa were colonial powers looking to maintain their influence during decolonization in the 1950s and 1960s.<sup>38</sup> The most damning link for mercenarism was with *Apartheid*, the social and political policy of racial segregation and discrimination enforced by white minority governments in South Africa from 1948 to 1994.<sup>39</sup> One infamous assassination by a mercenary came in the April 19, 1993 killing of the African National Congress National Executive leader Chris Hani by the South African Government-hired

---

33. *Id.* at 3 (citing JANICE THOMSON, *MERCENARIES, PIRATES AND SOVEREIGNS* 3 (1994)).

34. See Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 *MIL. L. REV.* 1 (2003). Todd Milliard’s exhaustive research on the experiences of mercenarism, especially with regard to post-colonial Africa, is shaping international law on mercenarism.

35. Tina Garmon, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 *TUL. J. INT’L & COMP. L.* 325, 326–27 (2003).

36. Ryan Scoville, *Toward an Accountability-Based Definition of “Mercenary,”* 37 *GEO. J. INT’L L.* 541, 542 (2006).

37. *Id.*

38. SINGER, *supra* note 18, at 27, 37.

39. U.N. Secretary-General, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, Commission on Human Rights and the General Assembly, U.N. Doc. A/49/362 (Sept. 6, 1994), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/9c7293cd53263251802566f7005f53ca?Opendocument>.

Polish mercenary Janus Walusz.<sup>40</sup> From this and similar uses, mercenaries became synonymous with the suppression of self-determination movements and international opinion quickly turned against what had been the long-accepted practice of private actors in warfare.<sup>41</sup>

Arguably, some “meritorious mercenarism” also took place in Africa. In 1994, Executive Outcomes was hired by the Angolan government to prevent its overthrow by the rebel National Union for the Total Independence of Angola (UNITA).<sup>42</sup> Executive Outcomes decimated UNITA, allowing Angola’s government to remain in control and consolidate its power. In 1995, Executive Outcomes did much the same for Sierra Leone when it dislodged the Revolutionary United Front (RUF) from the diamond fields and forced them to negotiate a peace settlement with the government.<sup>43</sup> More controversially, Executive Outcomes purportedly attempted to assassinate the rebel leader Dr. Jonas Savimbi,<sup>44</sup> and the Angolan government, under pressure from the United Nations and the United States, was forced to terminate the Executive Outcomes’ contract. Executive Outcomes was replaced by the U.N. peacekeeping force known as the U.N. Angola Verification Mission (UNAVEM).<sup>45</sup> Angola returned to war shortly thereafter—with conventional uniformed forces as well as mercenaries of different affiliations in mutual affray.

Assassination by mercenary was not limited to the African subcontinent, however; it was reported that the mercenary invasion of 30 French and Belgian mercenaries was led by Bob Denard of the Comoros from November 26, 1989 through December 15, 1989, resulting in a *coup d’état* overthrowing and then assassinating President Ahmed Abdallah Aderemane.<sup>46</sup>

While mercenaries and other contracted military forces continued to operate around the world in the ensuing decades, it was not until the

---

40. EDWARD LAWSON, *ENCYCLOPEDIA OF HUMAN RIGHTS* 1016 (2d ed. 1996).

41. U.N. Secretary-General, *supra* note 39.

42. Thomas K. Adams, *The New Mercenaries and the Privatization of Conflict*, 24 *PARAMETERS* 109 (1999).

43. *Id.*

44. *Executive Outcomes: Against All Odds – Firefight with UNITA, Part One*, *SOLDIER FORTUNE MAG. ONLINE* (Feb. 3, 2010), <http://www.sofmag.com/2010/02/executive-outcomes-against-all-odds-fire-fight-with-unita-part-one>.

45. *Angola – UNAVEM I*, U.N. DEP’T OF PEACEKEEPING OPERATIONS (DPKO), <http://www.un.org/Depts/DPKO/Missions/unavemi.htm> (last visited Feb. 9, 2013). The U.N. Angola Verification Mission (UNAVEM I) was established in December 1988 to verify the phased and total withdrawal of Cuban troops from the territory of Angola. The withdrawal was completed by May 25, 1991. UNAVEM III terminated its mission June 30, 1997.

46. See John Riley & Michael Gambone, *Men with Guns*, 28 *WIS. INT’L L.J.* 39, 73 n.104 (2010).

events of 9/11, however, that mercenarism experienced its Renaissance<sup>47</sup> in the form of a metamorphosis into recent and present-day PMF operations. The Pentagon's U.S. Central Command had by late 2010 nearly 225,000 contractors working in Iraq and Afghanistan and other areas.<sup>48</sup> These PMF and PMC operations have ranged from conducting stationary and convoy security in active combat zones, rather than outright combat operations, to so-called sensitive activities,<sup>49</sup> under which intelligence agencies such as the Central Intelligence Agency (CIA), the National Security Agency (NSA), and Special Operations Forces (SOF) field thousands more under classified contracts extending into every U.S. military command around the world.

PMFs took on a significant, albeit classified, role with respect to supporting and conducting combat operations and targeted killings shortly after September 11, 2001. President George W. Bush signed a presidential finding that authorized the CIA to kill Osama bin Laden and his cohorts.<sup>50</sup> The CIA, finding itself short on paramilitary operators, hired private contractors for work to on drone strikes and intelligence in Afghanistan,<sup>51</sup> despite the claims of the Department of Defense (DoD) that "[w]e don't have any contracts to do that work for us. We don't contract that kind of work out."<sup>52</sup> One of the largest and most conspicuous PMFs currently operating is Blackwater Worldwide (Blackwater) (currently known as Xe Services, also known as Academi), founded in 1998 by billionaire Erik Prince; Prince contradicted the DoD in an interview, telling *Vanity Fair* that Blackwater worked with U.S. Special Forces in identifying targets and

---

47. Eugene B. Smith, *The New Condottieri and U.S. Policy: The Privatization of Conflict and Its Implications*, 32 *PARAMETERS* 104, 107–08 (2002).

48. Tim Shorrock, *America's New Mercenaries*, *DAILY BEAST* (Dec. 15, 2010), <http://www.thedailybeast.com/blogs-and-stories/2010-12-15/counterinsurgency-outsourcing-americas-new-mercenaries-in-afghanistan-middle-east-africa/full/>.

49. See, e.g., ARMY REGULATION (AR) 380–81, SPECIAL ACCESS PROGRAMS (SAPs) AND SENSITIVE ACTIVITIES (Apr. 21, 2004), available at <http://www.fas.org/irp/doddir/army/ar380-381.pdf>. AR 380–81 defines Sensitive activities as "Programs that restrict personnel access, such as ACC measures; sensitive support to other Federal agencies; clandestine or covert operational or intelligence activities; sensitive research, development, acquisition, or contracting activities; special activities; and other activities excluded from normal staff review and oversight because of restrictions on access to information." *Id.* at 84.

50. ROBERT YOUNG PELTON, *LICENSED TO KILL: HIRED GUNS IN THE WAR ON TERROR* 30 (2006). Osama was the object of a successful targeted killing on April 30, 2011—Operation Geronimo. Yassin Musharbash, *Al-Qaida Loses Its Leader Osama Bin Laden, Prince of Terror*, *SPIEGEL ONLINE INT'L* (May 2, 2011), <http://www.spiegel.de/international/world/0,1518,760072,00.html>.

51. PELTON, *supra* note 50, at 30–31.

52. Jeremy Scahill, *The Secret U.S. War in Pakistan*, *NATION* (Dec. 7, 2009), <http://www.thenation.com/doc/20091207/scahill>.

planning missions, citing an operation in Syria,<sup>53</sup> and post-2004 targeted killing operations in which: “[Blackwater] was building a unilateral, unattributable capability. If it went bad, we weren’t expecting the chief of station, the ambassador, or anyone to bail us out.”<sup>54</sup> The magazine also published a photo of a Blackwater outpost near the Afghanistan–Pakistan border, purportedly used for training Afghan police.<sup>55</sup> During the initial stages of the campaign, over half of the 100 CIA paramilitary operators in Afghanistan were contractors<sup>56</sup> and contracted security services from PMFs like Blackwater.<sup>57</sup> The majority of Blackwater’s security operations occurred at the Kabul Airport and the Ariana Hotel, but a small detachment was stationed at “Fort Apache,” the firebase from which Task Force 11 planned, rehearsed, and conducted missions to conduct direct action missions,<sup>58</sup> notably to neutralize Osama bin Laden and other senior Taliban and al-Qaeda High Value Targets (HVTs).<sup>59</sup>

Blackwater was once the United States’ “go-to contractor in Iraq and Afghanistan,”<sup>60</sup> and trained tens of thousands of security personnel to work in “hot spots” around the world.<sup>61</sup> After media attention bombarded the company as a result of controversial shootings in Iraq, Blackwater spawned more than thirty subsidiaries in part to ensure continuance of millions of dollars in American Government contracts.<sup>62</sup> At least three of those companies secured contracts with the U.S. military or the CIA, an agency that has awarded up to \$600 million in classified contracts to Blackwater and its subsidiaries throughout the

---

53. Adam Ciralsky, *Tycoon, Contractor, Soldier, Spy*, VANITY FAIR (Jan. 2010), available at <http://www.vanityfair.com/politics/features/2010/01/blackwater-201001> (last visited Feb. 9, 2013).

54. *Id.*

55. *Id.*

56. *Id.* (the other half were CIA employees or Special Forces operators “on loan” to the CIA).

57. *Id.*

58. *Direct Action*, DEP’T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JOINT PUBLICATION 1-02, 108 (Dec. 15, 2012). JP 1-02 defines “direct action” as “Short-duration strikes and other small-scale offensive actions conducted as a special operation in hostile, denied, or diplomatically sensitive environments and which employ specialized military capabilities to seize, destroy, capture, exploit, recover, or damage designated targets. Also called DA. See also special operations; special operations forces. (JP 3-05).” *Id.*

59. *Id.* Task Force 11 (TF 11) was purportedly the U.S. Joint Special Operations Command (JSOC) unit alternatively named TF 626 and TF 145 with its most recently recorded name being TF 88.

60. IRAQ FOR SALE: THE WAR PROFITEERS (Brave New Films 2006).

61. *Id.*

62. James Risen & Mark Mazzetti, *30 False Fronts Won Contracts for Blackwater*, N.Y. TIMES, Sept. 4, 2010, at A1A, available at <http://www.nytimes.com/2010/09/04/world/middle-east/04blackwater.html>.

past decade.<sup>63</sup>

*New York Times* reporters, James Risen and Mark Mazzetti, uncovered credible evidence that Blackwater started receiving CIA contracts in early 2002 to provide support and security to CIA missions in Afghanistan, and orders for the contractors to begin collecting information on the whereabouts of Al Qaeda leaders, carry out surveillance, and train for possible missions.<sup>64</sup> During a panel discussion on the privatization of intelligence and alluding to a foundational need for contractors to fill needs inherent to successful targeted killing, planning, and execution, General Michael V. Hayden said, "[t]here are skills we don't have in government that we may have an immediate requirement for."<sup>65</sup> Quoting one government official familiar with the CIA program and the role of contractors in targeted killing, "The actual pulling of a trigger in some ways is the easiest part, and the part that requires the least expertise . . . It's everything that leads up to it that's the meat of the issue."<sup>66</sup>

By 2006, twelve Blackwater "tactical action operatives" were purportedly recruited for a secret raid into Pakistan, code-named Vibrant Fury, against a suspected al Qaeda training camp.<sup>67</sup> An offshoot of Blackwater, "Select PTC" was purportedly involved in classified, clandestine logistics support and operational activities in countries around the world, including Jordan, Sweden, Denmark, Pakistan, Afghanistan, Iraq, Syria and the Philippines,<sup>68</sup> and the same unit was

63. *Id.*

64. James Risen & Mark Mazzetti, *C.I.A. Said to Use Outsiders to Put Bombs on Drones*, N.Y. TIMES, Aug. 20, 2009, available at <http://www.nytimes.com/2009/08/21/us/21intel.html>.

65. *Id.* Hayden ran the CIA from 2006 until early 2009. By way of caveat, the article goes on to say

General Hayden, who succeeded Mr. Goss at the agency, acknowledged that the C.I.A. program continued under his watch, though it was not a priority. He said the program was never prominent during his time at the C.I.A., which was one reason he did not believe that he had to notify Congress. He said it did not involve outside contractors by the time he came in.

*Id.*

66. *Id.*

67. *Same Blackwater, Different Names*, ABC NEWS (Feb. 1, 2010), <http://abcnews.go.com/Blotter/blackwater-names/story?id=9634372&page=2>.

68. *Id.* See also Michael Biesecker, *Company Once Known as Blackwater Settles Arms Case*, AP (Aug. 7, 2012), available at <http://news.yahoo.com/company-once-known-blackwater-settles-arms-case-211509319.html>.

The international security contractor formerly known as Blackwater agreed to pay a \$7.5 million fine to settle federal criminal charges related to arms smuggling and other crimes. Documents unsealed August 7, 2012 in a U.S. District Court in North Carolina said the company, now called Academi LLC,

also purportedly awarded a classified contract to assassinate al Qaeda leaders around the world.<sup>69</sup>

An example of such a targeted killing took place in November 2002 in Yemen, when a Predator drone fired a Hellfire missile into the car carrying Abu Ali al-Harithi, a senior al-Qaeda leader. Along with al-Harithi, five other men died, including one American who was traveling with him.<sup>70</sup> Blackwater may well have been involved in supporting that operation; the CIA relied on Blackwater to arm the agency's Predator drones that were used for targeted killing operations,<sup>71</sup> "assembl[ing] and load[ing] Hellfire missiles and laser-guided bombs onto the pilotless aircraft in secret bases in Afghanistan and neighboring Pakistan."<sup>72</sup> Although CIA employees maintained control over firing the drones' weaponry, such collaborative missions demonstrate that the agency "now depends on outside contractors to perform some of the agency's most important assignments."<sup>73</sup> These interagency efforts, however, blur the lines of liability when missions go awry. For example, former CIA employees revealed that "[i]f a Predator missed a target, CIA employees would sometimes blame Blackwater employees

---

agreed to pay the fine as part of a deferred prosecution agreement to settle 17 violations. The list of violations includes possessing automatic weapons in the United States without registration, lying to federal firearms regulators about weapons provided to the king of Jordan, passing secret plans for armored personnel carriers to Sweden and Denmark without U.S. government approval and illegally shipping body armor overseas.

*Id.*

69. Biesecker, *supra* note 68.

70. Walter Pincus, *U.S. Missiles Kill Al Qaeda Suspects*, WASH. POST, Nov. 6, 2002, available at <http://www.theage.com/au/articles/2002/11/05/1036308311314.html>. See also Johnson, *supra* note 2, at 1. For information on the MQ-1B Predator drone used in this and other operations, see, e.g., Fact Sheet – MQ-1B Predator, U.S. Air Force, posted Apr. 29, 2013, <http://www.af.mil/information/factsheets/factsheet.asp?fsID=122>. The Hellfire II missile is described by its manufacturer, Lockheed-Martin, as follows:

The HELLFIRE II missile is a combat-proven tactical missile system that can be launched from multiple air, sea, and ground platforms. Offering multi-mission, multi-target capability and precision-strike lethality, the HELLFIRE II missile is the primary 100 lb class air-to-ground precision weapon for the armed forces of the United States and many other nations.

Press Release, Lockheed Martin, Hellfire II Missile (2013), <http://www.lockheedmartin.com/us/products/HellfireII.html>.

71. Alex Sundby, *CIA Hired Blackwater to Arm Afghan Drones*, CBS NEWS (Aug. 21, 2009, 10:00 AM), [http://www.cbsnews.com/8301-503543\\_162-5257267-503543.html?tag=contentMain;contentBody](http://www.cbsnews.com/8301-503543_162-5257267-503543.html?tag=contentMain;contentBody).

72. *Id.*

73. *Id.*

for the mistake.”<sup>74</sup> Such instances of inaccuracy or oversight threaten ambiguity for imposing liability and remain fundamental obstacles for PMC operations.

### III. AUTHORITY AND LIABILITY OF CIVILIAN OPERATIVES UNDER JUST WAR THEORY, INTERNATIONAL LAW, AND DOMESTIC LAW

Recently, American presidents and intelligence officials seem to have adhered to the legal maxim that “[t]he safety of the state is the supreme law.”<sup>75</sup> Accordingly, their policy choices lead critics to question their moral and legal standing at times. Government leaders and ordinary citizens have long expressed shared concerns for the “common good”<sup>76</sup> and for the “common defense.”<sup>77</sup> In pursuit of these goals, some American presidents have taken drastic measures that—at times—stretched the bounds of reason, morality, and the law. Targeted killing has proven to be such a measure. During the Constitutional Convention, Federalist critics remarked privately that there was “a preposterous combination of powers in the President and the Senate, which may be used improperly.”<sup>78</sup> Anti-Federalists forewarned of an “immediate aristocratic tyranny; that from the difficulty, if not the impracticability of its operation, must soon terminate in the most uncontrolled [sic] despotism.”<sup>79</sup> These commentators referred to the vague and far-reaching powers to deal with wars and foreign conflicts that are accorded to the President and Congress by the U.S. Constitution. Alexander Hamilton wrote in Federalist Paper Number 70 that the presidency was to be the one part of government that could respond with “decision, activity, secrecy, and dispatch [to unforeseen crises, especially war].”<sup>80</sup> Today, terrorism poses such grave threats to

---

74. *Id.*

75. From the Latin: *Salus reipublicae suprema lex*. See, e.g., *Salus reipublicae suprema lex*, EU DICTIONARY, <http://eudict.com/?lang=lateng&word=salus%20reipublicae%20suprema%20lex> (last visited Feb. 27, 2013).

76. See Benjamin Franklin’s motto for the Library Company of Philadelphia, 1731, in Latin: “*Communiter Bona profundere Deum est.*” and in English: “to pour forth benefits for the common good is divine,” available at <http://www.librarycompany.org/about/Instance.pdf> (last visited Feb. 27, 2013).

77. U.S. CONST. pmbl.

78. See THE FEDERAL CONSTITUTION IN VIRGINIA 1787-1788, at 35 (Worthington Chauncey Ford 1903).

79. ELBRIDGE GERRY, OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS BY A COLUMBIAN PATRIOT, SIC TRANSIT GLORIA AMERICANA (1788), available at [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=1670&chapter=1955&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1670&chapter=1955&layout=html&Itemid=27).

80. DEAN REUTER & JOHN YOO, CONFRONTING TERROR: 9/11 AND THE FUTURE OF AMERICAN NATIONAL SECURITY ESSAYS BY LEADING VOICES IN LAW AND POLICY, ENCOUNTER

American national security that President Barack Obama “would rather kill al Qaeda leaders—whether by drones or Special Ops teams—than wade through the difficult questions raised by their detention.”<sup>81</sup>

The idea to arm Predator drones for targeted killing missions reportedly came from Ambassador J. Cofer Black, Director of the bin Laden unit at the CIA’s Counterterrorist Center in the Commonwealth of Virginia, who wanted to go forward with an armed Predator drone deployment to Afghanistan in September 2001.<sup>82</sup> James Pavitt, Deputy Director of Operations at CIA since 1999 has long worried

about unintended consequences if the CIA suddenly moved back into the business of running lethal operations against targeted individuals—assassination, in the common usage. Such targeted killings carried out directly by the CIA could open agents in the field to retaliatory kidnappings or killings. The missions might also expose the agency to political and media criticism.<sup>83</sup>

As it turns out, Pavitt forecasted correctly; years later the media condemned the CIA for its targeted killing activities. During a September 4, 2001 Cabinet Meeting, then CIA Director George Tenet wanted the Bush Administration to understand that

The CIA would be operating a lethal fixed-wing aircraft of the sort normally controlled by the Air Force and its Pentagon chain of command. If Bush and his Cabinet wanted to entrust that operational role to the CIA, Tenet said, they should do so with their eyes wide open, fully aware of the potential fallout if there were a controversial or mistaken strike.<sup>84</sup>

The Air Force did not want to assume operation of a new technology that had not been rigorously tested: “Air Force doctrine and experience argued for the use of fully tested bombers and cruise missiles even when the targets were lone terrorists. The Air Force was not ready to begin fielding or commanding armed robots.”<sup>85</sup> This was quite reasonable, inasmuch as rigorous testing can preempt easily correctable errors in machine functionality and ensure that if a mission is to be

---

BOOKS 282 (2011).

81. *Id.* at 288.

82. STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10TH*, 2011, at 580–81 (2004).

83. *Id.*

84. *Id.* See also DANIEL BENJAMIN & STEVEN SIMON, *THE AGE OF SACRED TERROR* 345–46 (2003) (for further discussions on CIA Director Tenet’s conversations during the September 4, 2001 Cabinet meetings).

85. COLL, *supra* note 82, at 581.



undertaken, that its goals can be achieved within a small margin of error.

In order to assess the legitimacy of the CIA's carrying out of targeted killing missions, it becomes necessary to understand the organization's responsibilities.<sup>86</sup> President Bill Clinton's Presidential Decision Directives 39 and 62 outlined two major operational anti-terrorist mandates for the CIA: (1) rendition and (2) disruption.<sup>87</sup> Under these Clinton directives, "foreign terrorists who posed a credible threat to the United States were subject to preemption and disruption abroad, consistent with U.S. laws."<sup>88</sup> If justice could not be served against terrorists at home or abroad, the CIA, as lead on this operation, was to infiltrate the terrorist enterprise by attacking the factions of al Qaeda and related groups.<sup>89</sup> These presidential directives were broad enough to include a vast array of strategic operations and helped to solidify the CIA as an active player in combating terrorism.<sup>90</sup>

Almost by definition, CIA operations are meant to be covert and unacknowledged. According to Title 50 of the U.S. Code § 413b(e): Presidential Approval and Reporting of Covert Actions, covert actions "[are] intended that the role of the [U.S.] Government will not be apparent or acknowledged publicly."<sup>91</sup> CIA covert operators and Pentagon Special Operations Forces have come together in U.S. efforts to combat terrorism. As a result of the combination of these two forces, the question of who has the power to authorize the use of lethal force and under what circumstances has become highly debated.<sup>92</sup>

The debate over whether Pentagon or CIA operatives should conduct such operations was going on long before September 11, 2001.<sup>93</sup> In June 1948, the National Security Council (NSC) approved NSC 1012 that "essentially codified the notion of plausible denial . . . operations were to be 'so planned and executed that any U.S. government responsibility for them is not evident to unauthorized persons and that if uncovered the U.S. government can plausibly disclaim any responsibility for

---

86. See Nat'l Comm'n on Terrorist Attacks Upon the United States, Intelligence Policy: Staff Statement No. 7, 1 [hereinafter Statement No. 7], available at [http://www.9-11commission.gov/staff\\_statements/staff\\_statement\\_7.pdf](http://www.9-11commission.gov/staff_statements/staff_statement_7.pdf).

87. See Presidential Decision Directive 39, U.S. Policy on Counter Terrorism (June 21, 1995), available at <http://www.fas.org/irp/offdocs/pdd/pdd-39.pdf>; see also Fact Sheet, Combating Terrorism: Presidential Decision Directive 62, Office of the Press Secretary (May 22, 1998), available at <http://www.fas.org/irp/offdocs/pdd-62.htm>.

88. Statement No. 7, *supra* note 86, at 3.

89. *Id.*

90. *See id.*

91. 50 U.S.C. § 413b(e) (2013); see also GREGORY F. TREVERTON, INTELLIGENCE FOR AN AGE OF TERROR 207 (2009).

92. *Id.*

93. *Id.* at 228.

them.”<sup>94</sup> Essentially, this creates a *Chinese wall* protecting the President from CIA wrongdoing. This broad protection is one of the arguments supporting CIA control of paramilitary operations. Another argument for the CIA is that they operate more discreetly than the military.<sup>95</sup> Further, because the CIA is not a military force, its members are not classified as combatants under current international law. Conversely, the capabilities required for paramilitary operations are military, supporting military control. Additionally, “the task has not been a continuous priority of the CIA[,] and it makes no sense for the nation to build parallel capacities.”<sup>96</sup>

Michael Scheuer, the ex-head of CIA’s Osama bin Laden unit, notes that “America since the fall of the Berlin Wall has been eager to find proxies to do our dirty work.”<sup>97</sup> In today’s drone wars that proxy is the CIA itself, for the Agency provides a level of operational secrecy that the military does not, and an air of plausible deniability for American officials.

Under the Hughes-Ryan Act of 1974, CIA covert operations require a presidential finding that a particular operation is necessary to U.S. national security.<sup>98</sup> After the Iran-Contra Affair, Congress sought to impose new restrictions on the CIA’s covert actions in the 1991 Intelligence Authorization Act (the “1991 Act”).<sup>99</sup> Presidential findings must be sent “to the relevant [congressional] committees as soon as possible after they are signed and, in any event, before the operation begins . . . .”<sup>100</sup> In contrast, military Special Operations Forces may be authorized to conduct drone attacks by simple chain-of-command authority from the President as Commander-in-Chief of the armed forces.<sup>101</sup> As Gregory F. Treverton of the Rand Corporation notes:

The 1991 Act created what turned out to be a loophole by exempting from the definition of covert action “traditional military activities or routine support to such activities.” The Act did not define what *traditional* meant; however, the committee report indicated that it meant what is usually called “preparing the battle space” – that is, actions before and related to anticipated hostilities involving U.S. troops or when hostilities

---

94. *Id.* at 210.

95. GREGORY F. TREVERTON, *THE NEXT STEPS IN RESHAPING INTELLIGENCE* 14 (2005).

96. *Id.* at 13–14.

97. Nick Baumann, *Locked Up Abroad – for the FBI*, MOTHER JONES (July 29, 2011), <http://www.motherjones.com/politics/2011/08/proxy-detention-gulet-mohamed>.

98. *See* Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 32, 88 Stat. 1795 (1974).

99. TREVERTON, *supra* note 91, at 230.

100. *Id.*

101. *Id.*

are underway, whether or not the actions are public. *Anticipate[d] [hostilities were]* interpreted in the [Committee] report to mean that operational planning had already been approved.<sup>102</sup>

Treverton goes on to argue that there exists little difference between CIA and U.S. Special Operations Command (USSOCOM) covert operations:

If findings in the war against terrorism have become so broad as to cover almost any CIA operation — including those direct *Predator* attacks on suspected terrorists — whether the CIA or the military conducts them seems to matter little. If this is true, however, the problem lies with the breadth of the findings — if they are so broad as to cover almost anything, then the finding process has become a sham.<sup>103</sup>

Treverton's dismissal of any distinction between CIA or USSOCOM covert operations overlooks international laws precluding non-military actors from conducting military operations. If the United States wishes to adhere to its promise of complying with the laws of armed conflict and international law, then it needs to clarify the CIA's role in conducting drone operations. It does matter who performs targeted killings.

The CIA's Special Operations Group (SOG) is the department within the Special Operations Directorate (SOD) responsible for carrying out covert paramilitary special operations, including targeted killing.<sup>104</sup> SOGs paramilitary functionality calls into question its permissibility under international laws, including the laws of war.<sup>105</sup> During the Vietnam War, the CIA participated in a joint covert program, named "The Phoenix Program," which sought out key Vietcong targets for strategic assassinations.<sup>106</sup> Some parallels exist

---

102. *Id.*

103. *Id.* at 231. Since 1987, USSOCOM has been a four-star functional combatant command authorized by Congress "to prepare Special Operations Forces to carry out assigned missions and, if directed by the president or secretary of defense, to plan for and conduct special operations." See, e.g., About USSOCOM, USSOCOM Website, undated, <http://www.socom.mil/Pages/AboutUSSOCOM.aspx>.

104. E.g., Douglas Waller, *The CIA's Secret Army*, TIME, Feb. 3, 2003, available at <http://www.time.com/time/magazine/article/0,9171,1004145-1,00.html> (discussing the CIA Special Operations Group).

105. See James Kitfield, *Wanted: Dead*, NAT'L J., Jan. 9, 2010, available at [http://www.aclu.org/files/dronefoia/dos/drone\\_dos\\_20110720DOS\\_DRONE000018.pdf](http://www.aclu.org/files/dronefoia/dos/drone_dos_20110720DOS_DRONE000018.pdf); see also Alex Roslin, *When the State Turns Assassin*, MONTREAL GAZETTE, Oct. 20, 2001, available at <http://www.globalsecurity.org/org/news/2001/011020-attack01.htm> (reviewing the legality of terrorist assassinations).

106. See generally *Phoenix 1967-1971*, GLOBALSECURITY.ORG, <http://www.globalsecur>

between The Phoenix Program and recent targeted killings performed via drone attacks. As Anthony D'Amato, an international law professor at Northwestern University in Chicago, points out:

The laws of war don't explicitly forbid assassination, (but) there is an implicit ban based on the duty to take prisoners. You can shoot an enemy soldier in combat, but if you are in a position to arrest him and take him prisoner—that is, without risk (of) your own bodily injury—you cannot shoot him.<sup>107</sup>

The CIA's drone program offers no opportunity to capture enemy targets. Arguably, the detainment of "dangerous" enemy targets poses its own questions, but a discussion of those implications is not germane to this article. Professor D'Amato goes on to note "assassination of individuals in peacetime is a crime against humanity. Assassination of individuals in war is a war crime."<sup>108</sup> Yet the U.S. refusal to recognize the applicability of certain international laws to the global fight against terrorism may lessen the likelihood that U.S. officials would indeed be held responsible for alleged war crimes.<sup>109</sup>

Evaluating CIA performance of targeted killing, either via drone or special operations, utilizing principle-agent theory elucidates several important issues in the legal framework. Principle-agent theory dictates that principals must avoid moral hazard when hiring agents to perform services on their behalf.<sup>110</sup> As Ethan Corbin of the Fletcher School of Law and Diplomacy at Tufts University notes, "[i]f and when a state decides to ally itself with . . . sub-state actor[s] as an integral component of its national security policy, clear dilemmas arise."<sup>111</sup> Principle-agent theory centers on having the interests of the agent align with those of the principal. The central issue in this relationship relies on the fact of asymmetric information sharing between the parties: that is between the

---

ity.org/intell/ops/vietnam-phoenix.htm (explaining the Phoenix Program).

107. Roslin, *supra* note 105.

108. *Id.*

109. *Id.*

110. Ethan Corbin, *Principals and Agents: Syria and the Dilemma of Its Armed Group Allies*, 35 FLETCHER F. WORLD AFF. 25, 27, 44 (2011).

Moral hazard is when a party insulated from risk behaves differently than it would if it were fully exposed to risk. The definition of moral hazard in terms of armed group agents therefore encompasses not only the concept of suboptimal outcomes (or shirking behavior) but, in this instance, the brazen use of force that would expose the principal to greater risk than the agent.

*Id.* at 44 n.8.

111. *Id.* at 28.

President, NSC, and CIA. The CIA often possesses more accurate or more complete information than the President, who is charged with issuing a presidential directive to carry out a targeted killing mission. There exists a potential for CIA to manipulate information and the President to make poor decisions regarding the use of force in a targeted killing operation. Moreover, another complex relationship exists between the United States and the International Community (IC). The United States seeks to act in accordance with policies serving the best interests of its citizens and those policies may not align fully with the objectives of the IC. Moreover, another complex relationship exists between CIA and Congress, the ultimate oversight authority. As esteemed political scientist James Q. Wilson notes:

Congress controls the major day-to-day activities of an agency. Congress is the “principal,” the agency is its “agent” . . . If this is true it must mean that there are no other significant sources of influence. Second, Congress has the ability and inclination to intervene when it learns that an agency is sinning by omission or commission. But an agency would not sin if it were wholly the agent of Congress; thus this meaning of control presupposes that other forces — the [P]resident, the courts, interest groups, or the bureaucrats themselves — have influence on the agency independent of Congress. Third, Congress creates and maintains the structural conditions within which an agency operates.<sup>112</sup>

Because Congress possesses powers of “authorization, appropriation, investigation, and confirmation” they exert considerable authority over the CIA.<sup>113</sup> The Senate Select Committee on Intelligence reviews Presidential Findings for targeted killing missions, approves financing of classified projects, and helps to steer general policy regarding covert actions such as the targeted killing programs of the CIA.<sup>114</sup> It is important to recognize the effect of outside influence on the CIA policy regarding targeted killing, in order to get a better idea of how to regulate its authority so that the country can ensure its compliance with International Law and moral standards.

CIA targeted killings via drone attacks have

raised important legal questions about the role of targeted killing in the fight against the Taliban and Al Qaeda. Administration

---

112. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 236 (1989).

113. *See generally* Select Comm. on Intelligence, 112th Cong., Rules of Procedure 112–14 (Comm. Print 2011).

114. *Id.*

officials contend that such killings are legal under established principles of self-defense, international laws of armed conflict and the Authorization for Use of Military Force — the so-called “law of 9/11” passed by Congress following the 2011 terrorist attacks.<sup>115</sup>

Harold Koh, State Department legal advisor, defends the Obama administration’s use of CIA drone attacks for the basis of national self-defense.<sup>116</sup> During his Nobel Prize acceptance speech, President Obama established U.S. commitment to abiding by international protocols of armed conflict stating:

Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct . . . [E]ven as we confront a vicious adversary that abides by no rules . . . the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength.<sup>117</sup>

Critics contend that CIA targeted killings have not been carried out in this spirit. As the ancient Romans knew, it is a miserable state of things where the law is vague and uncertain.<sup>118</sup> Mary Ellen O’Connell, Professor of Law at the University of Notre Dame argues that members of the CIA are not lawful combatants and their participation in killing—even in an armed conflict—is a crime.<sup>119</sup> By way of comparison and contrast, Kenneth Anderson, Professor of Law at American University, thinks that if O’Connell’s argument stands ground, then somewhere there is a perpetrator, and that justice must be served:

[I]f you declare that CIA participation is a crime, then it follows somewhere there is a perpetrator. . . . Crime is a charge of more than mere non-compliance [with international law]. If there is a crime, someone must be responsible for doing it, whether you

---

115. Thomas J. Billitteri, *Drone Warfare*, 20 CQ RESEARCHER 653, 656 (2010).

116. Harold H. Koh, *U.S. Department of State’s Legal Advisor’s Remarks at the Annual Meeting of the American Society of International Law*, U.S. DEP’T OF STATE (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

117. Barack H. Obama, *Remarks by the President at the Acceptance of the Nobel Peace Prize*, WHITEHOUSE.GOV (Dec. 10, 2009 1:44 PM), available at <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

118. From the Latin: *Res est misera ubi jus est vagum et incertum*. JOHN BOUVIER & FRANCIS RAWLE, 2 BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 2161 (1914).

119. MARY ELLEN O’CONNELL, UNLAWFUL KILLING WITH COMBAT DRONES: A CASE STUDY OF PAKISTAN, 2004–2009, at 7 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1501144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144).

call it murder, criminal extrajudicial execution, what have you . . . . [The CIA is] acting under perhaps the clearest, deliberately and (admirably, in my view) least deniable set of orders from the President of the United States in a long time on contentious national security matters. If there is a crime, there must somewhere be a criminal or else it is merely a series of unfortunate events; if there is a criminal, he or she did not act alone, because these agents acted under instructions from a principal.<sup>120</sup>

Professor Anderson also notes that many people are reluctant to go after American leaders who sanction targeted killings, because it is not “politically feasible.”<sup>121</sup> Nevertheless, the apparent lack of political will to examine the legitimacy of targeted killing performed by the CIA should not deter academic inquiry into whether such actions constitute criminal misconduct under domestic or international law.

The DoD carefully scrutinizes the legality of carrying out attacks in mission analysis and the targeting process. On November 3, 2002, the CIA was charged with conducting a drone targeted killing operation in Yemen, because the U.S. Air Force was concerned about legal issues.<sup>122</sup> Philip Alston, former Special Rapporteur for the U.N. Commission on Human Rights concluded that this strike constituted a clear case of extrajudicial killing.<sup>123</sup> Jane Mayer’s article entitled *The Predator War*, published in the *New Yorker*, outlines the U.S. government’s two different drone programs:

The military’s version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.’s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based. The program is classified as covert, and the intelligence agency declines to provide any information to the public about where it operates, how it selects targets, who is in charge, or how many people have been killed.<sup>124</sup>

---

120. Kenneth Anderson, *The Mary Ellen and Benjamin Wittes Debate on Targeted Killing and Drone Warfare*, *Opinio Juris* (Oct. 26, 2010), available at <http://opiniojuris.org/2010/10/26/the-mary-ellen-oconnell-and-benjamin-wittes-debate-on-targeted-killing-and-drone-warfare/>.

121. *Id.*

122. O’CONNELL, *supra* note 119, at 3.

123. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Use of Force During Armed Conflict*, Int’l Law Comm’n, U.N. Doc. E/CN.4/003/3, ¶¶ 37–39 (Dec. 22, 2004).

124. Jane Mayer, *The Predator War: What are the Risks of the C.I.A.’s Covert Drone*

Professor O’Connell disagrees with this characterization, because, in actuality, all attacks, even those performed by the military, are conducted with CIA input.

As Professor O’Connell highlights, there is an existing legal framework to govern drone warfare. There is a state’s right to self-defense or, with the authorization of the U.N. Security Council, a state can engage in armed conflict.<sup>125</sup> Outside these guidelines, “[s]tates are restricted from using military force . . . . They may resort to law enforcement measures in some cases. International humanitarian law further restricts the use of military force; all uses of force are also subject to human rights principles.”<sup>126</sup> The basic principles applicable to evaluating when a state may go to war are collectively enumerated in the *jus ad bellum* requirements and the *jus in bello* principles governing the conduct in war situations. Professor O’Connell states that “[t]he right to resort to [drone attacks] must be found in the *jus ad bellum*; the way they are used must be based on the *jus in bello* and human rights.”<sup>127</sup> Accordingly, Article 2(4) of the U.N. Charter, which prohibits the use of force, and Article 51, which allows states to respond in self-defense in certain situations, is relevant to our discussion of the permissibility of CIA engagement in targeted killings.<sup>128</sup> Yet, as Professor O’Connell duly notes, a problem arises in examining drone war killings through the lens of these Articles in that “[t]he Charter does not directly regulate the resort to force within states between government forces and non-state actors or between non-state actor militant groups.”<sup>129</sup> One can also analyze this problem under a law enforcement model, but as several scholars point out, there exist gaps in that theory of reasoning when its applied to targeted killings, especially by the CIA.<sup>130</sup>

*Jus in bello* is a particularly helpful theoretical framework when trying to assess the legitimacy of CIA conducted targeted killings. According to Knut Dormann, legal advisor to the International Committee of the Red Cross in Geneva, persons with a right to take direct part in hostilities are lawful combatants; those without a right to

---

*Program?*, NEW YORKER (Oct. 26, 2009), available at [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer).

125. O’CONNELL, *supra* note 119, at 11.

126. *Id.*

127. *Id.* at 13.

128. *See, e.g.*, U.N. Charter art. 2, para. 4; *see also* U.N. Charter art. 51.

129. O’CONNELL, *supra* note 119, at 16.

130. *See generally* Michael L. Gross, *Assassination and Targeted Killing: Law Enforcement, Execution, or Self-Defense?*, 23 J. APPLIED PHIL. 323 (2006) (discussing law enforcement model applicability to targeted killing context); Claire Finkelstein, *Targeted Killing as Preemptive Action*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 156–82 (Claire Finkelstein et al. eds., 2012).



do so are unlawful combatants.<sup>131</sup> If a person has a right to participate in hostilities, this means that the person may not be charged with a crime for using force.<sup>132</sup> According to Colonel Peter M. Cullen of the U.S. Army, CIA operatives have no right to participate in hostilities and are unlawful combatants; accordingly, they may be charged with a crime.<sup>133</sup> A discussion of the proportionality and distinction requirements of *jus in bello* follows later.

Negative historical connotations of mercenary use have resulted in a push for criminalizing mercenarism.<sup>134</sup> Resulting international provisions, however, fail to adequately define mercenaries and remain ineffective in establishing a regulatory scheme that could be plausibly applied to mercenaries, let alone modern PMFs.<sup>135</sup> Without extensively discussing whether and how international law becomes binding, it is generally accepted that the sources of international law are: (1) treaties, (2) customary international law, (3) *jus cogens* principles ("preemptory norms") recognized by civilized nations, and (4) judicial decisions of the International Court of Justice.<sup>136</sup> Only treaties and custom are discussed in detail for purposes of this Article.

Treaties are definitive sources of international law.<sup>137</sup> Binding treaties are those between states that are memorialized in writing, intend to convey legal obligations or create reliance, and are subject to governance under international law.<sup>138</sup> While treaties are generally regarded as binding upon only those states party to them, a treaty can nevertheless bind non-party states insofar as it is declaratory of customary international law.<sup>139</sup> Some commentators differentiate treaties codifying customary international law from those promulgating

---

131. See Knut Dormann, *The Legal Situation of "Unlawful/unprivileged Combatants,"* 85 INT'L REV. RED CROSS 45, 45-46 (2003) ("[U]nlawful/unprivileged combatant/belligerent is understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy.").

132. *Id.* at 45.

133. Peter M. Cullen, *The Role of Targeted Killing in the Campaign Against Terror* 9 (2007), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA471529>; see O'CONNELL, *supra* note 119, at 22 n.102.

134. See generally Sundby, *supra* note 71 (discussing the CIA's use of an outside company to arm drones patrolling Afghanistan).

135. R. ERNEST DUPUY & TREVOR N. DUPUY, *THE COLLINS ENCYCLOPEDIA OF MILITARY HISTORY FROM 3500 B.C. TO THE PRESENT* 335 (2d ed. 1989).

136. Statute of the International Court of Justice, I.C.J. Acts & Docs. art. 38, available at <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0>.

137. DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 26 (2d ed. 2006).

138. Vienna Convention on the Law of Treaties, art. 2, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331.

139. THOMAS BUERGENTHAL & SEAN D. MURPHY, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* 118-19 (3d ed. 2002).

innovations.<sup>140</sup> While near unanimity can be indicative of customary international law, a high number of accessions alone is not dispositive when state practice is contrary to a treaty, but even treaties with few accessions serve more than a rhetorical purpose—they often signal the opening stages of a drive toward creating customary international law.<sup>141</sup>

The Hague Conventions represent the first attempt to codify customary international law on the use of mercenaries.<sup>142</sup> Specifically, the Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (also known as Hague V) sought to clarify the rights and duties of neutral states toward belligerent states during war by regulating mercenary recruitment. Its drafters distinguished between active recruitment of mercenaries by a state within its own territory and “the acts of individual citizens leaving to join a [mercenary] force of their own accord.”<sup>143</sup> Hague V, Article 4 precludes a neutral state from opening recruitment centers within its borders and raising armies for the benefit of a party to an armed conflict.<sup>144</sup> On the other hand, Article 6 expressly communicates that a state is not required to prevent its citizens nor foreign nationals from crossing its frontier to join the ranks of a belligerent’s army.<sup>145</sup> While a neutral state is required to refrain from domestic recruitment or staging of mercenaries, Hague V does not outlaw mercenarism and does not apply to PMFs because they are private corporations.<sup>146</sup>

The Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) is applicable whenever parties conduct themselves as belligerents—a declaration of war is not necessary.<sup>147</sup> Geneva III establishes, *inter alia*, the protections due to prisoners of war (POW),

---

140. BEDERMAN, *supra* note 137, at 27.

141. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175, 183 (2005); see also Beatrice Onica Jarka, *30 Years from the Adoption of Additional Protocols I and II to the Geneva Conventions*, 15 LEX SCIENTIA INT’L J. 23 (2008), available at <http://lexetscientia.univnt.ro/ufiles/3.%20Romania.pdf> (providing an example of customary international law changing when Protocol I inserted innovations to try to change then-existing laws of war on mercenarism).

142. H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT’L L. 37, 41–42 (1978).

143. *Id.* at 41.

144. Hague Convention V on Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. 4, Oct. 18, 1907, 9 I.L.M. 99, 1144 U.N.T.S. 123 [hereinafter Hague V].

145. *Id.* art. 6.

146. See, e.g., Zoe Salzman, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT’L L. & POL. 853, 856 (2008).

147. Geneva Convention III Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

setting out six qualifying classes in Article 4A.<sup>148</sup> However, nowhere in Geneva III are mercenaries mentioned, and the term “direct participation . . . is highly ambiguous.”<sup>149</sup> Also, mercenaries were regularly incorporated into the military during the period immediately preceding the enactment of the Geneva Conventions.<sup>150</sup>

As the Geneva Conventions were being drafted, the Charter of the United Nations (U.N. Charter) was enacted, establishing a collective method of addressing threats to international peace and security.<sup>151</sup> This included the requirement that Member States “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the [p]urposes of the United Nations.”<sup>152</sup> Several “non-binding” U.N. resolutions<sup>153</sup> issued between the Charter’s entry into force and the adoption of the U.N. Convention Against Mercenaries purportedly place additional restrictions on state authority to use force, including the use of mercenaries;<sup>154</sup> whether the PMF “distinction with a difference” would exempt PMF activities from this Convention’s application has yet to be litigated.<sup>155</sup>

In 1965, the U.N. General Assembly unanimously adopted Resolution 2131, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.<sup>156</sup> Resolution 2131 bars direct and indirect intervention by one state into the internal or external affairs of another state.<sup>157</sup> States were admonished not to “organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities *directed towards the violent overthrow of . . . another state* or

148. *Id.* art. 4A.

149. Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 531 (2005) (referring to article 4(A)(4) & (5) of Geneva III).

150. Before the United States formally entered World War II, U.S. citizen-mercenaries were incorporated into the war effort. The “Flying Tigers” was a group of American fighter pilots operating under the CAMCO Corporation who “shot down Japanese planes and targeted infrastructure for three times what regular aviators made, plus a bonus for every downed plane.” PELTON, *supra* note 50, at 3.

151. Geneva III, *supra* note 147, art. 2(1).

152. *Id.* art. 2(4).

153. See BEDERMAN, *supra* note 137 (non-binding resolutions and treaties with few signatories may signal the opening salvo in an attempt to bring a new rule into general practice, later creating a binding customary international law).

154. *Id.*

155. *Id.*

156. G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 11 (1965) [hereinafter Res. 2131].

157. *Id.* ¶ 1.

interfere in civil strife of any other state.”<sup>158</sup> Though enjoying broad support, Resolution 2131 is unlikely to stand for the proposition that mercenarism is a prohibited activity. Beyond its failure to specifically mention mercenaries, “no subsequent UN declaration and *few* scholars have cited the resolution as authority for this proposition.”<sup>159</sup> Rather, Resolution 2131 restricts state behavior toward other states without regard to who the state intended to use for the interference and may well be inapplicable to PMFs because they are not state actors.<sup>160</sup>

Resolution 2465, the Declaration on Granting of Independence to Colonial Countries and Peoples, was adopted by the General Assembly.<sup>161</sup> Regarding mercenarism, the resolution attempted to make the use of mercenaries “against movements for national liberation and independence” a criminal act, brand mercenaries as “outlaws,” and compel Member States to enact domestic legislation to punish “the recruitment, financing and training of mercenaries in their territory.”<sup>162</sup> Having garnered a majority by only two votes, Resolution 2465 cannot be said to represent a widely accepted international principle.<sup>163</sup> Even in the most generous reading, Resolution 2465 limits itself by applying only to mercenary activity aimed at suppressing “movements for national liberation and independence.”<sup>164</sup>

The General Assembly issued Resolution 2625, the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, in 1970.<sup>165</sup> With Resolution 2625, the pendulum swung

158. *Id.* ¶ 2 (emphasis added).

159. Françoise Hampson, *Mercenaries: Diagnosis Before Prescription*, 3 NETH. Y.B. INT’L L. 1, 20–21 (1991).

General Assembly resolutions, [while] not binding as such in [the area of resort to armed force], may nevertheless represent an encapsulation of customary international law. This is particularly likely to be the case where they are adopted by large majorities, especially if the majority includes the Security Council veto powers.

*Id.*

160. *See, e.g.*, WERNER LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 94 (1979).

161. G.A. Res. 2465, U.N. GAOR, 23d Sess., Supp. No. 18, U.N. Doc. A/7218, at 4 (Dec. 20, 1968) [hereinafter Res. 2465].

162. *Id.* ¶ 8.

163. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 (1987) (resolutions evidence customary international law only when adopted by large majorities).

164. Res. 2465, *supra* note 161, ¶ 8.

165. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121, 123 (Oct. 24, 1970) [hereinafter Res. 2625].

against state-sponsored organization or encouragement of mercenarism.<sup>166</sup> Toleration by the state, however, was not proscribed by the terms of this resolution, as Resolution 2625 is aimed squarely at the client state that consumes mercenary services and only prohibits state organization and incitement of mercenarism.<sup>167</sup> Consistent with the principles of neutrality embodied in Hague V, Resolution 2625 “stands out because of its consistency with international law and its lack of political overtones, two characteristics that may explain the resolution’s unanimous approval and its explicit incorporation into customary international law by a subsequent decision of the International Court of Justice.”<sup>168</sup> Resolution 2625 does not purport to prevent private corporations from recruiting, training, and conveying individuals for intervention in the territories of a sovereign state.<sup>169</sup>

With Resolution 3103, the Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, the General Assembly again took up mercenarism in the context of post-colonialism.<sup>170</sup> Returning to the political rhetoric of earlier resolutions, it reads: “The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.”<sup>171</sup> Resolution 3103 addresses the status of being a mercenary inasmuch as they “should be punished as criminals,” as compared to describing mercenaries as “outlaws.”<sup>172</sup> At least one learned authority termed Resolution 3103 a “novel and unsupported declaration” that in no way criminalizes state use of mercenaries.<sup>173</sup>

Resolution 3314, the Draft Definition of Aggression, describes “aggression” as the “use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United

---

166. Govern, *supra* note 19, at 76.

167. *Id.*

168. Milliard, *supra* note 34, at 27 (referring to the case of *Nicaragua v. United States*, 1986 I.C.J. 14 (June 27)).

169. Govern, *supra* note 19, at 76.

170. G.A. Res. 3103, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030, at 142 (1973) [hereinafter Res. 3103].

171. *Id.* art. 5.

172. *Cf.* Res. 3103, *supra* note 170, ¶ 5; Res. 2465, *supra* note 161, ¶ 8.

173. Frits Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The First Session of the Diplomatic Conference, Geneva, 1974-1977*, 5 NETH. Y.B. INT’L L. 3, 24 (1978) (concluding Res. 3103 was neither an accurate nor authoritative statement on the law).

Nations.”<sup>174</sup> The unjust use of force can occur via a state’s armed forces or by utilizing “mercenaries, which carry out acts of armed force against another [s]tate” or substantially aid a state in the aggression.<sup>175</sup> With its adoption by consensus in 1974, it is apparent that Member States accepted it as customary international law.<sup>176</sup> By its terms, then, Resolution 3314 identifies all state use of mercenaries to affect “[unjust] force *against the* territorial integrity or political independence of another State” as an act of aggression, in violation of Article 2(4) of the U.N. Charter.<sup>177</sup> The affected parties of this resolution are not mercenaries or PMFs, but rather it is the state that commits an injustice; unfortunately the status of individual warriors was never addressed in the Resolution.<sup>178</sup>

#### IV. THE DEBATE OVER THE WAY AHEAD UNDER LAW AND CUSTOMARY PHILOSOPHICAL BASES FOR CIVILIAN USE OF FORCE IN TARGETED KILLING

Just as there is disagreement as to the status of civilian warriors under international law, is also constant disagreement over when and how civilians may use the new and advanced technologies like drones on the battlefield.<sup>179</sup> As P.W. Singer lays out in *Wired For War*, “When UAVs are piloted by rank-and-file soldiers [and CIA agents] who have powers once reserved for generals . . . it cannot help but create some changes in military professional identity and culture . . .”<sup>180</sup> We live in an age of blurred boundaries between intelligence outfits and military units. Accordingly, we face the pressing question of whether or not drone operators who work for CIA comply with international law, especially laws governing combatants. Clarifying the authority for the CIA to engage in targeted killing could establish the legitimacy of such attacks and create hope in restoring America’s respect in the world by demonstrating that America will adhere to international protocols and

---

174. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 143 (Dec. 14, 1974) [hereinafter Res. 3314].

175. *Id.* ¶ 3(g).

176. Milliard, *supra* note 34, at 30.

177. Res. 3314, *supra* note 174, art. 1.

178. Govern, *supra* note 19, at 78.

179. See, e.g., DEFENSE ADVANCED RESEARCH PROJECTS AGENCY (DARPA), [http://www.darpa.mil/our\\_work/](http://www.darpa.mil/our_work/) (last visited Apr. 28, 2013). DARPA’s mission is to “prevent strategic surprise from negatively impacting U.S. national security and create strategic surprise for U.S. adversaries by maintaining the technological superiority of the U.S. military.” *Id.*

180. P.W. SINGER, *WIRED FOR WAR* 362 (2009).

that it is not a nation of exception.<sup>181</sup> As William C. Banks, Professor of Law and Professor of Public Administration in the Maxwell School of Citizenship and Public Affairs at Syracuse University notes in congressional testimony in April 2010:

Contemporary laws have not kept up with changes in the dynamics of military conflicts. Nowhere is the weakness of the legal regime more glaring than in its treatment of targeted killing . . . . The relevant spheres of authority overlap—the laws of the United States (constitutional, statutory, executive, and customary), international laws (treaty-based and customary), and international humanitarian law (a subset of international law that applies during “armed conflicts.” The relationship of the spheres of authority to one another, and their application as binding law is fraught with dispute and contentiousness.<sup>182</sup>

Yet, the task faced by the American public of determining the permissibility of CIA-led targeted killings is nearly impossible because of the tremendous amount of secrecy and asymmetric information. A time honored maxim states that, “[n]ot everything that is lawful is honorable; not everything that is allowable is morally right.”<sup>183</sup> Might does not (necessarily) make right. Of course the United States should protect its national security interests, but the American public has a right to judge if government actions are legal, and if not, to “petition government for [such] grievances” as permitted by the Constitution, that is, to seek a change in national policy. The propriety and legality of CIA-led drone attacks comes from analyzing the existing legal framework of international law, the appropriateness of civilian agency actions in such missions versus uniformed military forces, and whether this affects the notion of “military legitimacy” in our pursuit of national security objectives.

Critics contend CIA drone attacks violate the laws of war because they (i) are executed by civilian agents and (ii) occur inside another nation’s sovereign territory. Proponents of CIA drone attacks defend the strikes as lawful acts of war and national self-defense in the fight against the Taliban and Al Qaeda.<sup>184</sup> When one surveys the

---

181. See, e.g., WILLIAM V. SPANOS, *THE EXCEPTIONALIST STATE AND THE STATE OF EXCEPTION* 150–62 (2011).

182. Testimony of William C. Banks, Comm. on Oversight & Government Reform, Subcomm. on National Security & Foreign Affairs, U.S. House of Representatives (Apr. 28, 2010), available at [http://www.fas.org/irp/congress/2010\\_hr/042810banks.pdf](http://www.fas.org/irp/congress/2010_hr/042810banks.pdf).

183. From the Latin: *Non omne quod licet honestum est*. See, e.g., GABRIEL ADELEYE ET AL., *WORLD DICTIONARY OF FOREIGN EXPRESSIONS: A RESOURCE FOR READERS AND WRITERS* 270 (1999).

184. THOMAS J. BILLITTERI, *DRONE WARFARE* 141 (2012).

aforementioned resolutions, a trend toward restricting mercenarism is apparent and evidences an emerging concept of customary international law.<sup>185</sup> These restrictions, however, apply to the state organization, encouragement, or conveyance of mercenaries.<sup>186</sup> Despite this restriction, states are not precluded from tolerating mercenary activities that lead to a use of armed force in other states, nor are they prohibited from employment and deployment of contracted forces throughout the spectrum of operations permissible under international humanitarian law (IHL).<sup>187</sup>

The Protocol Additional to the Geneva Convention Relating to the Protection of Victims of International Armed Conflicts (Protocol I) builds on Geneva III by proffering a definitive statement on mercenaries.<sup>188</sup> Though ratified by 85% of the Member States, Protocol I's efficacy is limited because the states most active in international armed conflicts, particularly the United States, are not party to it.<sup>189</sup> Of course, provisions of a convention can nevertheless be applicable against a non-party state when those rules represent customary international law, but this necessitates consistent state practice.<sup>190</sup> While Protocol I is widely accepted as a codification of customary international law, the categorization of mercenaries as unlawful combatants in Article 47 is not.<sup>191</sup> The strictures of Article 47 are so contentious that universal acceptance is unlikely,<sup>192</sup> and it risks becoming virtually irrelevant to armed conflicts involving one or more non-contracting parties.<sup>193</sup>

Article 47 undoubtedly condemns mercenary activities and seeks to remove the protections otherwise afforded to them.<sup>194</sup> This is a significant departure from customary international law, which traditionally gives "mercenaries the same status as the members of the

---

185. Govern, *supra* note 19, at 78.

186. Milliard, *supra* note 34, at 30–31.

187. See, e.g., Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359 (2009), available at <http://ejil.oxfordjournals.org/content/20/2.toc>.

188. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977) art. 47 [hereinafter Protocol I].

189. Henckaerts, *supra* note 141, at 177.

190. McCormack, *supra* note 23, at 93–94. The International Court of Justice takes great stock in the near-universal ratification of instruments like the U.N. Charter. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States, 1986 I.C.J. 14 (June 27), 99–100, § 188. *But see* Henckaerts, *supra* note 141, at 183 (wide popularity is not in and of itself dispositive)).

191. Henckaerts, *supra* note 141, at 187; Jarka, *supra* note 141, at 1–2, 4–5.

192. Yoram Dinstein, *Comments on Protocol I*, 37 (Special Issue) INT'L REV. RED CROSS 515 (1997).

193. Protocol I, *supra* note 188, art. 47.

194. *Id.* art. 47(1).



belligerent force for which they [are] fighting.”<sup>195</sup> However, what Article 47 did not do is criminalize mercenarism.<sup>196</sup> While mercenaries might now face domestic prosecution, “[t]he mere fact of being a mercenary is not . . . a criminal act [under Article 47].”<sup>197</sup> The Soviet Union’s closing statement reinforces this conclusion: “We hope that this article . . . will provide an incentive to Governments to adopt domestic legislation prohibiting . . . the use of mercenaries.”<sup>198</sup> Proponents of Article 47 argue that this deprivation represents recent developments in customary international law.<sup>199</sup> Additionally, regional developments—most notably within the African Union—are cited as evidence.<sup>200</sup>

The definition in Article 47 of Protocol I is viewed as unworkable because of its six cumulative elements that must be met in tandem.<sup>201</sup> If any one of the six criteria is not met, the definition fails. Perhaps the most unworkable element of the mercenary definition in Article 47 is the showing of an individual mercenary’s motivation.<sup>202</sup> By necessity a prosecutor must include a “comparison to the motivations of individuals who join states’ armies, many of whom join because of relatively attractive compensation and benefit packages.”<sup>203</sup> If an individual could actually be shown to meet all six criteria, he or she would be barred from claiming prisoner of war protections or combatant immunities<sup>204</sup> but would nevertheless enjoy the fundamental guarantees of Article 75

195. Burmester, *supra* note 142, at 55.

196. Milliard, *supra* note 34, at 41 (citing 6 OR 159 (CDDH/SR.41, May 26, 1977) (“The aim of the article was to *discourage* mercenary activity and prevent irresponsible elements from getting the rights due to a combatant or prisoner of war.”) (emphasis added)).

197. Burmester, *supra* note 142, at 55.

198. Milliard, *supra* note 34, at 40 (citing 6 OR 204 (CDDH/SR.41, May 26, 1977) (statement of the Union of Soviet Socialist Republics)).

199. See Protocol I, *supra* note 188, § IV(C)(6) (discussing the emerging trend discernible from U.N. General Assembly Resolutions).

200. Milliard, *supra* note 34, at 36 (referencing the flurry of Conventions and Resolutions within the African Union on the subject of mercenarism). The following were issued in short order by the Organization of African Unity: Resolution on the Activities of Mercenaries [1967] AHG/Res. 49 (IV); International Commission of Inquiry on Mercenaries, Draft Convention on the Prevention and Suppression of Mercenarism [1976] (Luanda Convention); Convention for the Elimination of Mercenarism in Africa [1977] OAU Doc. CM/817 (XXIX), Annex II (3d rev.).

201. Lindsey Cameron, *Private Military Companies and Their Status Under International Humanitarian Law*, 88 INT’L REV. RED CROSS 573, 578, 586 (2006).

202. Protocol I, *supra* note 188. The subjectivity of Article 47(2)(c) will be extremely difficult to prove. Burmester, *supra* note 142, at 79 n.38 (citing Report of the Committee of Privy Counselors Appointed to Inquire into the Recruitment of Mercenaries, ¶ 7 (1976)).

203. ANTHONY MOCKLER, *THE NEW MERCENARIES* 6 (1985); cf. PELTON, *supra* note 50, at 3 (Colonial American forces also resorted to mercenaries); see also Cameron, *supra* note 201, at 580 (“many soldiers enlist for strictly, or at least primarily, for financial motives”).

204. Cameron, *supra* note 201, at 579.

of Protocol I.<sup>205</sup> Modern PMF contractors, however, do not meet all six elements of the definition of a mercenary under Protocol I and cannot, therefore, be summarily stripped by Article 47 of combatant immunities and prisoner of war protections.<sup>206</sup>

The notion of PMFs engaging in targeted killing is a serious problem, because ordinarily the role of PMF contractors is far from being recruited to fight in an armed conflict.<sup>207</sup> PMF contractors predominately engage in the protection of diplomats, which by its very nature seeks to avoid hostilities.<sup>208</sup> If the use of force by PMFs is to flee from an ambush then that effort can hardly be described as direct participation in the war effort.<sup>209</sup> Admittedly, Protocol I considers any military hostilities, whether offensive or defensive, to be “participating in hostilities.”<sup>210</sup> However, direct participation does not include everything that is merely helpful to one side over the other.<sup>211</sup> The concept of “direct participation” is a murky one, and its scope remains an open question, subject to caveats with regards to self-defense and defense of third parties in any event.<sup>212</sup> Finally, most contractors with PMFs are nationals of a party to a conflict, at least in the instances of Iraq and Afghanistan,<sup>213</sup> but absent the nationals of a party status, Article 47 of Protocol I requires its six cumulative elements be met in tandem for PMFs to be considered mercenaries.<sup>214</sup>

The United Nations took up the question of mercenarism again in 1980 in response to dissatisfaction among Member States with Protocol I’s shortcomings,<sup>215</sup> and so continued the challenges<sup>216</sup> in the creation of a comprehensive instrument for the “eradication of these nefarious activities. . . .”<sup>217</sup> Fast-forward 22 years to the U.K. Foreign and Commonwealth Office conclusion that Article 47’s mercenary

---

205. *Id.* (citing Protocol I, *supra* note 188, art. 45 (extending protections to unlawful combatants)).

206. *Id.* (citing Protocol I, *supra* note 188, art. 47).

207. Govern, *supra* note 19, at 84.

208. PHILLIP HOLDER, THE EXECUTIVE PROTECTION PROFESSIONAL’S MANUAL 15, 26–27, 43–48, 59–73 (1997).

209. Govern, *supra* note 19, at 84.

210. Protocol I, *supra* note 188, art. 49(1) (defining “attacks” as “violence against an adversary, whether in offense or in defense”).

211. *Id.*

212. *See generally* Govern, *supra* note 19.

213. McCormack, *supra* note 23, at 94.

214. Cameron, *supra* note 201, at 578, 586.

215. Milliard, *supra* note 34, at 57.

216. Hampson, *supra* note 159, at 30.

217. U.N. Ad Hoc Comm. on the Drafting of an Int’l Convention Against the Recruitment, Use, Financing and Training of Mercenaries, *Rep. of the Sixth Committee*, U.N. Doc. A/44/766 (1989).

definition was completely unworkable.<sup>218</sup> Regrettably the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (known as U.N. Convention Against Mercenaries) not only failed to overcome those shortcomings but fell into the same definitional abyss as Article 47.<sup>219</sup>

The Protection of Victims of Non-International Armed Conflicts of June 8, 1977 (Protocol II), while remaining silent on mercenaries or PMFs, may arguably give greater latitude in using PMFs for targeted killings because it allows for broader definitions of civilians who are legally subject to attack, even though such killings under IHL must comply with proportionality.<sup>220</sup> Under Article I of Additional Protocol II (providing that non-international conflict is satisfied by conflicts between armed forces of a State and "organized armed groups"), PMFs (as well as mercenaries) are reasonably considered to be "organized armed groups" capable of such an attack—as well as leaving them subject to attack.<sup>221</sup> Article 51(5)(b) of Additional Protocol I of the Geneva Conventions requires that attacks be proportionate to be legal, so the means and force employed in PMF efforts to conduct targeted killing must not exceed the threats encountered and opposed.<sup>222</sup>

The U.N. Mercenary Convention provides a primary and secondary definition of "mercenary." The primary definition incorporates the largely unworkable elements of Protocol I, Article 47,<sup>223</sup> but applies to

218. Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation* [Green Paper, Cm 577, 2002] 20 ¶ 6.

219. G.A. Res. 44/34 [1989] Annex, U.N. Doc. A/RES/44/34. The Global Policy Forum notes that

[a]lthough the UN Working Group on the Use of Mercenaries has been extremely critical of private security contractors, the UN is increasingly turning to PMSCs in its missions abroad. Private contractors have not been used in combat roles, but UN reliance on these firms is growing as its personnel become increasingly targeted in zones of conflict.

PMSCs and the U.N., Global Policy Forum 2013, <http://www.globalpolicy.org/nations-a-states/private-military-a-security-companies/pmcs-and-the-un.html>.

220. U.N. Ad Hoc Comm. on the Drafting of an Int'l Convention Against the Recruitment, Use, Financing and Training of Mercenaries, *Rep. of the Sixth Committee*, U.N. Doc. A/44/766 (1989).

221. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977) [hereinafter Protocol II]. See also W. Jason Fische, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 726–27 (2007).

222. *Id.* at 727.

223. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 2163 U.N.T.S. 75, art. I(1) (1989) [hereinafter U.N. Convention Against Mercenaries].

all armed conflicts, not just international armed conflicts,<sup>224</sup> and the phrase “direct participation in hostilities”<sup>225</sup> was removed as a definitional element and made an enumerated offense.<sup>226</sup>

The Convention Against Mercenaries also establishes states’ responsibilities. Article 5 provides that states “shall not recruit, use, finance or train mercenaries” for any purpose, and specifically, states shall not do so “for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination.”<sup>227</sup> The Convention also makes an unmistakable distinction for the first time in international law: all states shall refrain from using mercenaries.<sup>228</sup> Regrettably, the Convention Against Mercenaries has become, by its drafting and state practices, a largely irrelevant and ineffectual document. Enacted in 1989, it did not become effective until 2001.<sup>229</sup> As of 2013, the total number of Member States that have ratified or acceded to the Convention is only 32, with 4 reservations or declarations.<sup>230</sup> Low accession and contrary practice militate against the Convention being a true codification of customary international law, and therefore the convention is not binding.

Conventional wisdom holds that mercenaries are not motivated by political or noble causes.<sup>231</sup> Lawmakers who attempt to regulate mercenaries and PMF activities often default to a moral and philosophical absolute with regards to the private use of force: they consider it to be an “evil.”<sup>232</sup> This can be linked to the notion of requisite compensation as “significant private gain,” albeit without providing a benchmark of what sort of gain, versus the use of force by duly constituted, publicly paid military forces in that nation’s defense.<sup>233</sup> Even if notions of “significant private gain” are proven, the illegality of being a mercenary under the extant convention sanctioning mercenarism has no enforcement mechanism beyond domestic

---

224. *Id.* art. XVI(b).

225. *Id.* art. III.

226. *Id.* art. I(2).

227. *Id.* arts. V(1), 5(2).

228. *Id.* art. V.

229. Press Release, U.N. GAOR 3d Comm., 56th Sess., 3d mtg., U.N. Doc. GA/SHC/3650 (2001).

230. International Humanitarian Law – State parties/Signatories, International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, ICRC (Dec. 4, 1989), <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=530&ps=P>.

231. Milliard, *supra* note 34, at 60 (citing 15 OR 196 (CDDH/III/SR.57, Apr. 29, 1977) (statement of Mr. Alkaff, Yemen: “Mercenaries [have] always been attracted by the hope of gain”)).

232. *Id.* at 60.

233. U.N. Convention Against Mercenaries, *supra* note 223, art. I(2)(b).

legislation that each contracting state was to enact.<sup>234</sup> The secondary definition of the U.N. Mercenary Convention most likely does not apply to PMF contractors,<sup>235</sup> because PMF contractors are not recruited to participate in a “concerted act of violence” aimed at overthrowing or undermining a state.<sup>236</sup> It is also nearly impossible to prove that financial gain is the primary motive, fiscal, moral, or otherwise, for most contracted uses of force.<sup>237</sup> Lacking evidence to prove at least two of the five criteria, PMFs will seldom have a credible case made against them of violating the Convention by the few nations that have ratified or acceded to the Convention.

Though only a handful of the U.N. instruments discussed reasonably reflect customary international law with regards to the use of mercenaries, all of them in tandem begin to reshape the field in this area, when considered in light of numerous non-binding resolutions and conventions that go beyond the traditional law of war.<sup>238</sup> It would be incorrect to assume that PMF contractors operate outside the law, notwithstanding their ultimate status in international law, because U.S. citizens and nationals who fill the ranks of PMFs are almost always subject to the criminal jurisdiction of the United States for any crimes they allegedly commit.<sup>239</sup>

For that matter, in 2008, an international code of conduct was established and has been championed by the Swiss government as part of the Montreux process aimed at regulating PMFs. Specifically, the resulting Montreux Document was the result of an “international process launched by the Government of Switzerland and the ICRC [as] an intergovernmental document intended to promote respect for international humanitarian law and human rights law whenever private military and security companies are present in armed conflicts.”<sup>240</sup> It is not legally binding, but is a “compilation of relevant international legal

---

234. E.L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications or International Humanitarian Law Enforcement*, 49 HARV. INTL L.J. 221, 230–31 (2008).

235. *Id.* at 233 (citing Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 INT’L REV. RED CROSS 525, 568–70 (2006) (discussing why most PMFs do not meet the six-point cumulative definition of “mercenary”).

236. Peters, *supra* note 24, at 323.

237. Gaston, *supra* note 234, at 233 (citing Protocol I, *supra* note 188, art. 47(2); U.N. Convention Against Mercenaries, *supra* note 223, art. I(a)).

238. Govern, *supra* note 19, at 88.

239. *Id.* at 89.

240. *The Montreux Document – On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, ICRC (Sept. 17, 2008), <http://www.icrc.org/eng/resources/documents/publication/p0996.htm>.

obligations and good practices” that resulted from negotiations between industries, governments, and civil societies in their efforts “to establish an oversight mechanism to provide the code of conduct with some limited enforcement capacities.”<sup>241</sup>

Taking the Montreux Document a step further, the Swiss government’s multi-stakeholder approach delivered in 2010 an International Code of Conduct (ICoC) for Private Security Service Providers.<sup>242</sup> The ICoC does not create new law, but lays down the minimum standards for Private Security Company (PSC) behavior.<sup>243</sup> Specifically, the ICoC

sets out standards for PSC compliance with International Humanitarian and Criminal Law, and international human rights standards for the use of force. It explicitly prohibits killings and sets a higher standard against torture, forced labor and child labour for private companies than those adhered to by many of their state agency clients.<sup>244</sup>

From the 19th until the 22nd of February 2013 the drafting conference of the Charter for the Oversight Mechanism took place in Montreux.<sup>245</sup> By signing the ICoC, signatory companies publicly commit to operate in accordance with the Code. Signatory Companies are expected to seek to become members of the Association, which was anticipated to be functional by the middle of 2013.<sup>246</sup> The launch conference of the International Code of Conduct Association, which will give shape to the oversight mechanism, will take place on September 19th and 20th, 2013 in Geneva.<sup>247</sup>

---

241. Mark Taylor, *A Global Compact For Mercenaries? – Laws of Rule*, GLOBAL POL’Y FORUM (Feb. 18, 2013), <http://www.globalpolicy.org/pmscs/52282-a-global-compact-for-mercenary-aries.html?itemid=id#50211>. From the same timeframe, security analyst Ray Smith noted that “[t]he Swiss government is taking steps to regulate private military companies operating under its jurisdiction. The effort to pass domestic legislation coincides with Switzerland’s recent attempts to facilitate an international code of conduct for private security companies.” Ray Smith, *Switzerland Checks Mercenaries – Partially*, IPS (Feb. 18, 2013), <http://www.globalpolicy.org/pmscs/52284-switzerland-checks-mercenaries-partially.html?itemid=id#50211>.

242. International Code of Conduct for Private Security Service Providers (ICoC), Swiss Confederation, Nov. 9, 2010, [http://www.icoc-psp.org/uploads/INTERNATIONAL\\_CODE\\_OF\\_CONDUCT\\_Final\\_without\\_Company\\_Names.pdf](http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf).

243. Taylor, *supra* note 241. Private Security Company (PSC) is a term often used interchangeably with PMF and PMC, mentioned previously. *See, e.g.*, Govern & Bales, *supra* note 18, at 55 *passim*.

244. Taylor, *supra* note 241.

245. ICoC, *supra* note 242.

246. *Id.*

247. *Id.*

Where compliance with law and best practices has failed, Cedric Ryngaert points out that litigants of corporate wrongdoing have, since the 1990s, “increasingly used the Alien Tort Claims Act (ATCA) against corporations in relation to their overseas activities . . . [so, v]ictims of PMC abuses abroad could well piggyback on this trend, and file a tort claim with a U.S. federal court.”<sup>248</sup> Such claims against PMCs have been successfully litigated without requiring that the violation have occurred in the United States or that the plaintiff or defendant be a U.S. citizen—most notably in the District Court for the District of Columbia.<sup>249</sup> As an alternative approach to seeking remedies for alleged PMC abuses, alleged victims “have also filed common law tort claims for wrongful death and fraud, as opposed to violations of international law, in [U.S.] courts,”<sup>250</sup> or if the offence could be characterized as a war crime, U.S. criminal jurisdiction over U.S. nationals could readily be established under the 1996 War Crimes Act.<sup>251</sup>

Personal jurisdiction is had by three different mechanisms: the Special Maritime and Territorial Jurisdiction of the United States (SMTJ), the Military Extraterritorial Jurisdiction Act (MEJA), and most recently the amendment of Article 2(a)(10) of the Uniform Code of

---

248. Cedric Ryngaert, *Litigating Abuses Committed by Private Military Companies*, 19 EUR. J. INT’L L. 1035 (2008) (citing 28 U.S.C. § 1350 (2006)).

249. *Id.* (citing Laura A. Dickinson, *Contract as a Tool for Regulating Private Military Companies*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES (Simon Chesterman & Chia Lehnardt eds., 2007)); Eric Mongelard, *Corporate Civil Liability for Violations of International Humanitarian Law*, 88 INT’L REV. RED CROSS 665, 688–89 (2006). For examples of such cases, see also *Saleh v. Titan Corp.*, 353 F. Supp. 2d 1087 (D.D.C. 2004); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005).

250. *Nordan v. Blackwater Sec. Consulting LLC*, 382 F. Supp. 2d 801 (E.D.N.C. 2005); *Fisher v. Halliburton*, 390 F. Supp. 2d 610 (SD Tex. 2005); *Johnson v. Halliburton*, No. EDCV05-265 (CD Cal., filed Mar. 29, 2005). Ryngaert notes:

These cases were brought by PMC employees against their employer. It may be noted, however, that in the *Saleh* and *Ibrahim* cases, which related to violations of third parties’ rights, the plaintiffs also filed common law claims (assault and battery, wrongful death and survival, intentional infliction of emotional distress, and negligence. *Saleh v. Titan Corp.*, Case 1:05-cv-01165-JR, (D.D.C., June 11, 2007), at 2. After the court’s dismissal of the ATCA-based claims, only the common law-based claims are still viable as we write. It is noted that, while ATCA claims can be brought by foreigners against other foreigners (“universal jurisdiction”), common law claims cannot. *Id.* at 20 (holding that 28 U.S.C. § 1332 “does not confer jurisdiction over suits by a group consisting of only foreign persons against another foreign person,” in the case of CACI NV, incorporated in the Netherlands).

Ryngaert, *supra* note 248, at 1036 n.11.

251. 18 U.S.C. § 2441 (2006).

Military Justice (UCMJ).<sup>252</sup> An exercise of jurisdiction under MEJA or SMTJ rests with the U.S. Attorney General, while an exercise of jurisdiction under the UCMJ places contractors under court-martial jurisdiction of military commanders in the field if the Justice Department opts not to take the case first.<sup>253</sup>

The SMTJ creates nine specific circumstances where the United States can exercise jurisdiction outside of its territorial borders; the two most germane to PMF contractors are those offenses committed by or against a U.S. national in a location outside the jurisdiction of any nation, or within the land, building, or residence used by overseas diplomatic or military missions of the United States.<sup>254</sup> The MEJA builds upon the SMTJ by extending its jurisdiction to crimes committed by personnel employed by or accompanying the U.S. military outside of U.S. territory—provided the offense is punishable by more than one year's imprisonment.<sup>255</sup> The provisions of MEJA expressly allow concurrent court-martial jurisdiction, if applicable.<sup>256</sup> Any custodial actions must be executed by DoD law enforcement officers. Transfer to a foreign criminal justice system or removal to the United States is only by order of a federal judge or an order by the Secretary of Defense because of military necessity.<sup>257</sup>

The most recent, relevant change to UCMJ extraterritorial *in personam* jurisdiction was the 2007 insertion of four simple words into Article 2(a)(10) of the UCMJ: “or a contingency operation.”<sup>258</sup> It has been a long-established principle that the U.S. military could exercise court-martial jurisdiction over PMF contractors in its employ during declared wars but never outside of that.<sup>259</sup> The recent amendment

252. Govern, *supra* note 19, at 89.

253. Memorandum from Secretary of Defense Robert Gates for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, and Commanders of the Combatant Commands, Subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations, FEDERATION OF AMERICAN SCIENTISTS (Mar. 10, 2008), <http://www.fas.org/sgp/othergov/dod/gates-ucmj.pdf> [hereinafter Gates Memo].

254. 18 U.S.C. §§ 7(7), 7(9) (2006).

255. 18 U.S.C. § 3261(a)(1) (2006).

256. *Id.* § 3261(c).

257. *Id.* §§ 3262–3264.

258. UCMJ art. II(a)(10), 10 U.S.C. § 802(a)(10) (“The following persons are subject to this chapter . . . [i]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”) (emphasis added). See also Peter W. Singer, *Frequently Asked Questions on the UCMJ Change and its Applicability to Private Military Contractors*, BROOKINGS (Jan. 12, 2007), <http://www.brookings.edu/research/opinions/2007/01/12defenseindustry-singer>.

259. *United States v. Averette*, 41 C.M.R. 363, 365 (C.M.A. 1970) (reversing the court-martial conviction of a civilian contractor because the version of § 802(a)(10) then in effect



changes all of this and now brings PMF contractors within the reach of military convening authorities during operations such as those continuing today in Afghanistan and elsewhere.<sup>260</sup>

One international trade lawyer, Susan Kovarovics, has commented on one recent overseas operation, ultimately concluding that U.S. citizens participating in training foreign troops will likely be subject to criminal liability absent U.S. government approval.<sup>261</sup> In this particular instance, former president of Blackwater (a/k/a Xe, a/k/a Academi), Erik Prince, built an 800-member battalion of foreign troops nicknamed "Reflex Responses" (R2) for the United Arab Emirates (U.A.E.) at the request of the crown prince of Abu Dhabi, Sheik Mohamed bin Zayed al-Nahyan.<sup>262</sup> The private force's intended purpose is "to conduct special operations missions inside and outside the country, defend oil pipelines and skyscrapers from terrorist attacks and put down internal revolts,"<sup>263</sup> which could well include "implied" or "stated" missions to kill opposition leaders or insurgents.

To bolster the force, R2 allegedly recruited a platoon of South African mercenaries, including some veterans of Executive Outcomes, the previously mentioned South African company notorious for staging coup attempts or suppressing rebellions against African strongmen in the 1990s.<sup>264</sup> The contract purportedly includes a one-paragraph legal and ethics policy noting that R2 should institute accountability and disciplinary procedures, with "the overall goal . . . to ensure that the team members supporting this effort continuously cast the program in a professional and moral light that will hold up to a level of media scrutiny."<sup>265</sup> Beyond R2's involvement, other, less credible reportage alludes to the possibility that other PMF groups may also support and/or conduct targeted killings, namely "to assassinate Pashtun leaders in Pakistan and Afghanistan and target tribal compounds for strikes by U.S. Predator drones."<sup>266</sup>

---

applied only in cases of declared war).

260. See, e.g., Gates Memo, *supra* note 253 (discussing the amendment to give convening authorities jurisdiction over U.S. civilians operating in their areas of responsibility).

261. Mark Mazzetti & Emily B. Hager, *Secret Desert Force Set Up by Blackwater's Founder*, N.Y. TIMES (May 7, 2011), <http://www.nytimes.com/2011/05/15/world/middle-east/15prince.html?emc=eta1>.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. See, e.g., Eric S. Margolis, *Soldiers on Sale . . . Who's In Charge of These Hired Killers?*, INFORMATION CLEARING HOUSE (Mar. 21, 2010), <http://www.informationclearinghouse.info/article25043.htm>. Margolis claims:

Two obscure Pentagon outfits, the "Cultural Engineering Group" in Florida,

Kateri Carmola, an expert on the use of PMFs, noted that while it was common for countries to hire contractors for military purposes, “there is no real legal precedent for a company like [R2], where the U.A.E. would be used as a launch pad for a wide range of missions, and potentially for a wide range of clients.”<sup>267</sup> As part of such internal defense missions, that battalion may well be called upon to conduct targeted killing of key insurgent or insurrection leaders. It is assumed that the crown prince of Abu Dhabi will deploy such troops if they are confronted with pro-democracy uprisings like similarly situated Arab and African countries experienced in 2011 and 2012.<sup>268</sup>

The R2 initiative reportedly enjoyed some limited and unofficial support within the White House, with an unnamed official stating in 2011, “The gulf countries and the U.A.E. in particular, don’t have a lot of military experience. It would make sense if they looked outside their borders for help.”<sup>269</sup> However, the project does not have the unwavering legal blessing of the United States.<sup>270</sup> Legal experts and government officials conclude “some of those involved with the battalion might be breaking federal laws that prohibit American citizens from training foreign troops if they did not secure a license from the U.S. State Department.”<sup>271</sup> Prince’s recent security firm is an Emirati company, and may not require U.S. State Department authorization; nevertheless, U.S. citizens contributing to the training of foreign troops will likely be subject to criminal liability absent U.S. government approval.<sup>272</sup>

In a May 2010 special report by Reuters, author Adam Entous stated: “An analysis of data provided to Reuters by U.S. government sources shows that the CIA has killed around 12 times more low-level fighters than mid-to-high-level al Qaeda and Taliban leaders since the drone strikes intensified in the summer of 2008.”<sup>273</sup> These figures call into

---

and “Counter-Narco-terrorism Technology Programme” of Virginia funded [senior Pentagon official specializing in clandestine operations, Mike Furlong] with \$24.6 million. Furlong hired a bunch of former Special Forces types and assorted thugs. These rent-a-Rambos’s (sic) real mission was to assassinate Pashtun leaders in Pakistan and Afghanistan, and target tribal compounds for strikes by US Predator drones.

*Id.*

267. Emily B. Hager & Mark Mazzetti, *United Arab Emirates Confirms Hiring Blackwater Founder’s Firm*, N.Y. TIMES (May 15, 2011), [http://www.nytimes.com/2011/05/16/world/middleeast/16prince.html?\\_r=1&ref=blackwaterusa](http://www.nytimes.com/2011/05/16/world/middleeast/16prince.html?_r=1&ref=blackwaterusa).

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. Hager & Mazzetti, *supra* note 267.

273. Adam Entous, *Special Report: How the White House Learned to Love the Drone*, REUTERS 1–2 (May 2010), <http://static.reuters.com/resources/media/editorial/20100518/Drones>.

question the effectiveness of drone strikes to severely disrupt terrorist network functionality. Moreover, Reuters also learned from current and former U.S. officials that Pakistan, "though officially opposed to the [drone] strikes, is providing more behind-the-scenes assistance than in the past. Beyond the human intelligence that the CIA relies on to identify targets, Pakistani agents are sometimes present at U.S. bases, and are increasingly involved in target selection and strike coordination."<sup>274</sup> The support of CIA targeted killing programs by local governments such as Pakistan and Yemen may help to mitigate critic concerns as to the legitimacy of the program. Foreign governments that support CIA targeted killing missions, whether by providing human intelligence or strike coordination, in essence, condone the practice of targeted killing in a de facto manner. This begs the question of vicarious liability for foreign governments or foreign intelligence services that assist CIA special operations, if the CIA program is deemed unethical or in violation of international laws. Some opponents of CIA drone strikes go so far as to suggest foreign intelligence officials should be held responsible for conspiracy to violate the international laws of war.

Bruce Riedel, a former CIA analyst who chaired President Obama's 2009 strategic review of Afghanistan and Pakistan policy, said the Obama administration ran with the drone program because, when it came to office, "[i]t found itself with a real al Qaeda threat and one tool to work with . . . I don't think he (Obama) had really any alternatives. He seized the tool that was in front of him."<sup>275</sup> Yet, alternatives do exist and range from having the military conduct the drone attacks to capturing terrorists for interrogation purposes. Government officials should always proceed charily when there is opportunity for public backlash and a questionably legitimate public policy rationale for clandestine operations to begin with. Whenever the media mentions capturing of terrorists, non-enemy combatants, and the like, it connotes allusions of torture, and other forms of prisoner mistreatment, in no small part due to the publicly aired atrocities at Abu Ghraib. Until the government restores public trust and strict accountability standards are implemented for prisoner holding, Obama and his acolytes understandably want to avoid subjecting the Administration to unnecessary scrutiny. Moreover, the more the Administration distances themselves from the CIA, the military, or others directly participating in the targeted killings, the more the Administration officials may believe they will escape scrutiny or responsibility for the consequences of the Administration's sometimes secret policies. President Obama and the

---

pdf.

274. *Id.* at 2.

275. *Id.* at 3.

White House apparatus seek to benefit from the secret programs' plausible deniability. John Rizzo, the CIA's top attorney during the Bush administration said that he

found it odd that while Bush-era interrogation methods like water-boarding came under sharp scrutiny . . . all the while of course, there were lethal operations going on, and think about it, there was never, as far as I could discern, ever, any debate, discussion questioning . . . the United States targeting and killing terrorists.<sup>276</sup>

How the CIA identifies "lawful targets" is also a subject of controversy. A U.S. counterterrorism official said: "Targets are chosen with extreme care . . . There's no such thing as a random strike."<sup>277</sup> Yet, the American Civil Liberties Union, and other human rights groups question the safeguards put into place by the government and assert that the CIA has "kill[ed] hundreds of militants whose identities are largely unknown."<sup>278</sup> These groups also express concerns over civilians. A Pakistani intelligence official dealing with South Waziristan said the vast majority of the deaths were just foot soldiers. "They hit whoever they get," another intelligence official in North Waziristan said.<sup>279</sup> A former U.S. intelligence official said it was unclear what protocols the CIA was following for targeting foot soldiers: "If it becomes a more generalized 'kill anybody' (approach), it degrades the notion we're going after serious threats to the United States. It's a slippery slope."<sup>280</sup> Toward that end of discerning lawful targets, in President Obama's most recent national security speech, his pronouncement on targeted killing was that

[w]e act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. Before any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set.<sup>281</sup>

Journalists have collected information on how the CIA distinguishes between civilians and their targets: "To determine who is a civilian, the

---

276. *Id.* at 9.

277. *Id.* at 3–4.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Obama Rejects Perpetual War, but Questions Remain About Targeted Killings*, NATION (May 23, 2013), <http://www.thenation.com/article/174522/obama-rejects-perpetual-war-questions-remain-about-targeted-killings#ixzz2Vwi7Cjky>.

CIA looks at a number of indicators, including gender. As a general rule, a woman is counted as a noncombatant, former officials said."<sup>282</sup> "A Pakistani intelligence officer in North Waziristan estimated that 20 percent of total deaths were civilians or non-combatants, or one in five."<sup>283</sup> Jeffrey Addicott, former senior legal advisor to the U.S. Army Special Forces, said:

The ratio is getting better but based on my military experience, there's simply no way [to avoid civilian casualties] . . . For one bad guy you kill, you'd expect 1.5 civilian deaths . . . because no matter how good the technology . . . killing from that high above, there's always the "oops" factor.<sup>284</sup>

In the estimation of the DoD's Joint Chiefs of Staff, "[k]nowing that there exists the imminent probability of civilian casualties, no matter how minimal, should cause policy makers to question their tactics."<sup>285</sup> Targeting individual enemy combatants in war is perfectly legal and moral, where it is legal to individually target the leader or commander of a uniformed military force, so too it would be legal to target the leader of a terrorist organization.<sup>286</sup> Admiral Isoroku Yamamoto was the WWII Japanese Naval Marshal General who ordered the attack on Pearl Harbor. After intercepting and decoding Japanese radio transmissions that revealed that Admiral Yamamoto would be flying to the Solomon Islands for an inspection tour, the U.S. Air Force dispatched fighter planes to ambush and shoot down Yamamoto's plane. The CIA did not exist until after 1947, and despite the existence of the Office of Strategic Services to collect and analyze strategic information required by the Joint Chiefs of Staff and to conduct special operations not assigned to other agencies, Yamamoto's targeting was handled by conventional military forces.<sup>287</sup> Johnson notes that *SS-Obergruppenfuhrer* (Protection Squadron General) Heydrich, a high-ranking German Nazi official during World War II, and one of the main architects of the Holocaust, was not targeted for his role in Holocaust atrocities but for his oppressive governing of German-occupied portions of

---

282. ENTOUS, *supra* note 273, at 5.

283. *Id.*

284. *Id.*

285. See JOINT CHIEFS OF STAFF, JOINT TARGETING CYCLE AND COLLATERAL DAMAGE ESTIMATION METHODOLOGY (2009), available at [http://www.aclu.org/files/dronefoia/dod/drone\\_dod\\_ACLU\\_DRONES\\_JOINT\\_STAFF\\_SLIDES\\_1-47.pdf](http://www.aclu.org/files/dronefoia/dod/drone_dod_ACLU_DRONES_JOINT_STAFF_SLIDES_1-47.pdf).

286. Johnson, *supra* note 2.

287. See Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES (Sept. 23, 2007), [http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html?\\_r=2&pagewanted=all&oref=slogin&oref=slogin](http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html?_r=2&pagewanted=all&oref=slogin&oref=slogin).

Czechoslovakia.<sup>288</sup> The targeted killings of Yamamoto and Heydrich certainly have parallels to Al Qaeda leaders, inasmuch as what is true of uniformed officers may well apply to leaders of non-state actors during wartime.<sup>289</sup>

Is it legitimate for the United States to justify its targeted killing programs on the ground that because terrorists violate the laws of war, then so can the United States in pursuing terrorists? While Professor Somin claims that terrorists are harder to distinguish from civilians, and that governments might abuse this distinction, she feels that a “categorical ban on the targeted killing of terrorists” is not justified and “such abuses can be constrained in two other ways.” Professor Somin establishes a theoretical framework for permissibility of targeted killings on the following two bases:

- (1) targeted killings can be used against terrorists in conflicts that are large-scale enough to qualify as a war; and
- (2) even when we have an antiterrorist conflict that qualifies as a war, the deliberate targeting of innocent people under a pretextual accusation of terrorism can still be prosecuted as a war crime.<sup>290</sup>

It is worth analyzing Professor Somin’s interpretation of what exactly constitutes a war. Professor Somin concedes that the precise extent at which an armed conflict can be characterized as a war is debatable. Professor Somin’s analysis remains specious on the account of this uncertainty in precisely defining the term “war.” Essential to Professor Somin’s argument is that she does not distinguish between enemy combatants who are uniformed members of a military and those who are not. Professor Somin also notes that former President Clinton’s Solicitor General Walter Dellinger argues that terrorists are enemy combatants.<sup>291</sup> On this basis, the CIA gains some credence for assuming the role of a military agent.

State Department legal advisor Harold H. Koh asserts that the conflict between al Qaeda classifies as a war: “The United States is in an armed conflict with al Qaeda, as well as the Taliban and associated

---

288. Johnson, *supra* note 2.

289. *Id.*

290. Ilya Somin, *Admiral Yamamoto and the Justification of Targeted Killing*, VOLOKH CONSPIRACY (May 13, 2011), <http://www.volokh.com/2011/05/13/admiral-yamamoto-and-the-justification-of-targeted-killing/>.

291. See CNN: *License to Kill; Was Assassinating Bin Laden Legal?* (CNN television broadcast, May 4, 2011), available at <http://www.cnn.com/video/#/video/bestoftv/2011/05/04/exp.arena.osama.killing.legal.cnn>.

forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."<sup>292</sup> Kenneth Anderson, Professor of Law at American University says, "Obama's targeted killing doctrine appears to be little different from Bush's: Once someone has been deemed a lawful target, the CIA has no obligation to warn or seek to detain that person before attacking."<sup>293</sup> Lawyers masterfully manipulate language to suit their purpose. Attorney Koh says that targeted killing cannot be likened to assassinations: "[T]he use of lawful weapons systems . . . for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute 'assassination.'"<sup>294</sup>

Professor Mary Ellen O'Connell of the University of Notre Dame Law School counters Attorney Koh's self-defense assertion with her position that claims:

[The United States does not] have the right to bomb people where there's no armed conflict . . . The United States is not fighting in self-defense against Pakistan. We do not hold Pakistan responsible for cross-border incursions into Afghanistan and may not, lawfully, use military force in Pakistan in response to those incursions.<sup>295</sup>

Others such as Green Beret legal advisor Addicott disagree in that:

The battlefield in the "war on terror" is global and not restricted to a particular nation. As in World War Two, there are no national limitations or boundaries. This is war and we are entitled to kill them anywhere we find them . . . We can kill them when they're eating, we can kill them when they're sleeping. They are enemy combatants, and as long as they're not surrendering, we can kill them.<sup>296</sup>

However, Addicott appears to ignore the impossibility of surrender under a targeted killing program. First, targeted killing missions are secret and the enemy is not forewarned that they will have a set time period to surrender or else reap the consequence of death. Without giving the enemy the chance to surrender, the United States violates a

---

292. ENTOUS, *supra* note 273, at 5.

293. *Id.*

294. *Id.* See also Executive Order 12333 issued by President Ronald Reagan on December 4, 1981 officially banning assassinations. Exec. Order 12,333, 3 C.F.R. § 90 (1981).

295. *Id.* at 6.

296. ENTOUS, *supra* note 273, at 6.

principle of warfare. If the tables were turned and a foreign entity decided to target U.S. commanders or leaders, then rest assured they would want, and likely demand, the chance to surrender. There appears to be a double standard in warfare conduct—there is the United States—and then there is every other nation.

Nations like Pakistan are reluctant to publicly support CIA drone attacks. Yet, Reuters reports that an American Diplomat was slipped a note by a Pakistani Parliamentarian on one occasion stating, “The people in the tribal areas support the drones. They cause very little collateral damage. But we cannot say so publicly for reasons you understand.”<sup>297</sup> U.S. officials appear to go along with Pakistani reluctance to publicly condone drone attacks, and one former CIA intelligence official said the “CIA was conducting the drone strikes instead of the U.S. military because the covert nature of the program gives Islamabad the ‘fig leaf of deniability . . . They can’t stand up to their own people and say they’re in league with the U.S.’”<sup>298</sup> In actuality, the CIA could not successfully complete their targeted killings without the help of Pakistani intelligence services. The Pakistani intelligence outfits assist the CIA in that they “tell you who they (the targets) are and that isn’t coming from some white guy running around the FATA. That’s coming from the Pakistanis,” said a U.S. official.<sup>299</sup> The lack of transparency of Pakistani intelligence’s role in assisting the CIA in drone operations causes further frustration when trying to build a complete picture of the situation.

U.S. intelligence officials support the use of drones over any other method because they deem it to be “the most precise and possibly humane targeted killing program in the ‘history of warfare.’”<sup>300</sup> CIA lawyers determine if “high-value targets . . . pose a continuing and imminent threat” to national security.<sup>301</sup> Other precautions seem to be taken in order to limit casualties. Such measures offer reassurances to critics of the drone targeted killing program. Specially designed missiles that have a small blast field with minimal shrapnel are utilized, and weapons can be maneuvered away from a target if “there’s any possibility whatsoever that a non-combatant may be at risk . . .,” said a U.S. official.<sup>302</sup> A CIA lawyer is always present during the operation in order to verify the identity of the target. Yet, despite all these practical measures to limit casualties, the program has one major flaw according to Addicott, in that when you kill one individual, chances are they have

---

297. *Id.* at 7.

298. *Id.*

299. *Id.* at 8.

300. *Id.* at 9.

301. *Id.*

302. *Id.*



multiple children and as a result you incite the population toward a hatred of the United States and thereby exacerbate the very problem you seek to avoid by the targeted killings in the first place. Under this analysis, targeted killing becomes a zero-sum game. Critics of targeted killings point to individuals like Faisal Shahzad, a Pakistani immigrant living in Connecticut who attempted to ignite a car bomb in the middle of Time Square on May 1, 2010.<sup>303</sup> During the trial, testimony of Shahzad suggested that the U.S. facilitated raid of the Red Mosque in Islamabad on July 10, 2007, fueled his anti-American attitude and prompted him to attempt the bombing. The CIA and the United States need to consider whether a program that arguably may increase terrorist activity is worthwhile. However, more evidence needs to be gathered before any definitive conclusions can be made that targeted killings increase terrorist attacks.

Afsheen John Radsan, Professor at William Mitchell College of Law and assistant general counsel to the CIA from 2002 to 2004 says, "Killer drones are the future of warfare."<sup>304</sup> Professor Radsan also says that, as a result of their emergence, "targeted killing—whether by the CIA or anyone else—is controversial. Proponents contend it is legal to use armed drones in self-defense or as part of an armed conflict under international humanitarian law. Critics decry targeted killing as extra-judicial assassination."<sup>305</sup> Professor Radsan believes that the International Human Rights Law covers the CIA drone attacks in parts of Pakistan and that

operational parts of al Qaeda and the Taliban are civilians "directly participating in hostilities." Until they renounce violence, they are functional combatants, subjecting them to American targeting under the law. [Professor Radsan is] confident a consensus will emerge that, under some circumstances, targeted killing of suspected terrorists is legal.<sup>306</sup>

Professor Radsan also addresses the issue of CIA performing drone operations instead of the operations being exclusively conducted by the DoD: "While CIA officers are unlikely to wear uniforms and to follow other military formalities, they take it for granted, whether engaged in

---

303. Andrea Elliot, *Militant's Path from Pakistan to Time Square*, N.Y. TIMES (June 22, 2010), <http://www.nytimes.com/2010/06/23/world/23terror.html>.

304. Afsheen John Radsan, *Loftier Standards for the CIA's Remote-Control Killing* (2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1604745](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604745). See also Scott Shane, *C.I.A. to Expand Use of Drones in Pakistan*, N.Y. TIMES (Dec. 3, 2009), <http://www.nytimes.com/2009/12/04/world/asia/04drones.html?pagewanted=all>.

305. Radsan, *supra* note 304, at 1–2.

306. *Id.* at 2.

intelligence gathering or in covert action, that they will not be treated as privileged belligerents (POWs) if al Qaeda captures them . . .”<sup>307</sup> Professor Radsan argues that certain IHL guidelines must govern CIA targeted killing, including, but not limited to: (1) distinction, (2) military necessity, and (3) proportionality. Distinction involves separating combatants from civilians. Military necessity states, “an attack should be reasonably expected to create a concrete and direct military advantage.”<sup>308</sup> Proportionality requires limiting of collateral damage. Professor Radsan also identifies a fourth principle, the idea of “precaution,” which “requires all feasible measures to minimize harm to peaceful civilians and property.”<sup>309</sup>

In *Operation Neptune Spear: Was Killing bin Laden a Legitimate Military Objective*, a co-author of this Article examined the legitimacy of targeted killings, specifically in the case of Osama bin Laden, in situations where there exists a “legitimate military target,” the decision makers evaluate all options, and the existing body of law governs the type of military action.<sup>310</sup> If non-military personnel, such as civilian members of the intelligence community perform military actions in the targeted killing raids, are these actions still permissible under the international law framework or moral reasoning?<sup>311</sup> Because CIA operatives generally do not wear military garb, and may operate under Non-Official Cover (NOC) status,<sup>312</sup> even if they receive approval from National Command Authority (NCA),<sup>313</sup> this method arguably violates the principle of distinction.<sup>314</sup>

---

307. *Id.*

308. *Id.*

309. *Id.*

310. Kevin H. Govern, *Operation Neptune Spear: Was Killing bin Laden a Legitimate Military Objective?*, in *TARGETED KILLINGS LAW AND MORALITY IN AN ASYMMETRICAL WORLD* 317 (Claire Finkelstein et al. eds., 2012).

311. *See id.* at 350–51 (discussing disagreement between CIA and military leaders on launching a missile strike at Taliban leader Mullah Omar).

312. When serving under what is referred to as “nonofficial cover” (NOC), CIA officers assume covert roles in organizations without ties to the government, such as American businessmen. *See, e.g.*, Alex Berenson, *C.I.A. Agents, Blowing Their Own Cover*, *TIME* (Nov. 26, 2010), [http://www.nytimes.com/2010/11/28/books/review/Berenson-t.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/11/28/books/review/Berenson-t.html?pagewanted=all&_r=0).

313. *See* Gregory S. McNeal, *The U.S. Practice of Collateral Damage Estimation and Mitigation* (Nov. 9, 2011), <http://ssrn.com/abstract=1819583> (discussing U.S. Military estimation of collateral damage in targeted killing operations); *see* Kenneth Anderson, *Targeted Killing*, *HOOVER* (May 11, 2009), <http://www.hoover.org/publications/defining-ideas/article/5281>.

314. *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3316; U.N. General Assembly, *Rome Statute of the International Criminal Court* (last amended Jan. 2002), July 17, 1998, A/CONF. 183/9; Rome Statute of the International Criminal Court, art. 8(2)b. With regard to “nonstandard” uniforms, *see, e.g.*, W.

Generally speaking, war must be waged by military outfits and not by civilian entities. According to a U.N. report on targeted killing (Report), the CIA's drone fleet is "reportedly flown by civilians, including both intelligence officers and private contractors (often retired military personnel)."<sup>315</sup> Moreover, the Report states:

Under IHL, civilians, including intelligence agents, are not prohibited from participating in hostilities. Rather, the consequence of participation is two-fold. First, because they are "directly participating in hostilities" by conducting targeted killings, intelligence personnel may themselves be targeted and killed. Second, intelligence personnel do not have immunity from prosecution under domestic law for their conduct . . . Thus, CIA personnel could be prosecuted for murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable [U.S.] law.<sup>316</sup>

Under this analytical approach, the CIA cannot partake in targeted killings without fear of prosecution for murder under the nation's law in which the attack took place.

Since September 11, 2001, the United States has categorized its fight against Al Qaeda "as an armed conflict, a framework upheld by all three branches of the [U.S.] government."<sup>317</sup> This begs the question, if all three branches of government characterize the fight against Al Qaeda as an armed conflict warranting military force, do military actions performed by non-military actors still come within a permissible mandate? Under IHL, this action does not appear permissible.

In *Ex Parte Milligan*,<sup>318</sup> the U.S. Supreme Court found that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."<sup>319</sup>

---

Hays Parks, *Special Forces Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 494 (2003), available at [http://www.pegc.us/archive/Journals/parks\\_4\\_Chi\\_J\\_Intl\\_L\\_493.pdf](http://www.pegc.us/archive/Journals/parks_4_Chi_J_Intl_L_493.pdf).

315. See Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Philip Alston, *Study on Targeted Killings*, U.N. General Assembly, Human Rights Council 14 Sess. Agenda item 3, at 7 (May 28, 2010), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

316. *Id.* at 22.

317. Laurie Blank, *Finding the Paradigm: Investigating Bin Laden's Demise*, JURIST (May 8, 2011), <http://jurist.org/forum/2011/05/laurie-blank-finding-the-paradigm.php>, cited in Govern, *supra* note 310, at 357.

318. *Ex Parte Milligan*, 71 U.S. 2, 120–21 (1866).

319. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 268–69 (7th ed. 2010).

Diametrically opposed to that view is Cicero's concept of: "*Inter arma silent leges*."<sup>320</sup> There exists an intermediate view, as articulated by Justice William Rehnquist who wrote in 1998, "laws will not be silent in time of war, but they will speak with a somewhat different voice."<sup>321</sup> Citizens must question the limits of executive power concerning the use of our armed forces and intelligence outfits during exigent circumstances. Professors Kathleen M. Sullivan and Gerald Gunther pose three questions essential to solving this puzzle, to which we will respond:

- (1) Is it reasonable to expect the government to behave within the same constitutional boundaries during periods of crisis as periods of calm?
- (2) Should courts intervene during a national security crisis to determine whether or not the actions of the executive branch have violated the Constitution or infringed upon the powers of the legislative branch?
- (3) Should the judiciary wait until the crisis is resolved so as not to impede the political branches in their efforts to resolve it?<sup>322</sup>

Indeed it is reasonable to expect governments to substantially behave within the same constitutional boundaries during periods of crisis as periods of calm, otherwise abrogable constitutions offer little if any consistency, predictability, or transparency for the peoples holding such social compacts as the highest law of their land. Having said that, systems with constitutional courts may offer advisory opinions if so empowered regarding the limits of executive authority, or consider such challenges as their jurisdictions allow. Fundamentally, when cases and controversies are brought for challenge after a crisis is resolved, they inevitably fail the justiciability element of mootness; thus, a champion for the challenge must ensure they act while matters are still ripe for judicial resolution.<sup>323</sup>

Michael N. Schmitt, Professor of Law at the U.S. Naval War College, argues that "civilian objects may become military objectives when the enemy employs them for military ends."<sup>324</sup> This view is

---

320. "In Times of War Laws are Silent." *See, e.g.*, ANTHONY EVERITT, *CICERO: THE LIFE AND TIMES OF ROME'S GREATEST POLITICIAN* 96–99 (2001).

321. SULLIVAN & GUNTHER, *supra* note 319, at 269.

322. *Id.* at 266.

323. *See, e.g.*, WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007); JEREMY A. RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005).

324. *See* Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan in the War in Afghanistan: A Legal Analysis* 311 n.24, [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1600272\\_code1411821.pdf?abstractid=1600272&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1600272_code1411821.pdf?abstractid=1600272&mirid=1).

particularly convincing when analyzing CIA targeted killing of terrorists. Yet, as Professor Radsan admits, "The enemy's practice of hiding among peaceful civilians makes it quite difficult for him to determine who is a legal target—especially when civilians carry weapons for protection from thieves, bandits, and insurgents."<sup>325</sup> Dakota S. Rudesill, International Affairs Fellow at the Council on Foreign Relations, emphasized the need for precision in the use of warfare technologies so as to remain compliant with the proportionality requirements of the International Laws of Armed Conflict.<sup>326</sup> Since Roman times, legal theorists have held that "It is always safer to err in acquitting than in punishing, (and) on the side of mercy than of justice."<sup>327</sup> If the CIA can utilize capture missions, instead of targeted killing missions, it would put the United States in a more honorable position. Yet, even if the CIA does not move toward more capture missions, with technological advancements in the accuracy of weapons technologies used in targeted killing operations, the CIA can ensure that they remain compliant with the doctrine of proportionality.

Under IHL, attackers must ensure that aggressors take all necessary steps to ensure accuracy and successful achievement of their intended objectives. The CIA's use of drones in targeted killings is very different from normal military operations and thus requires a slightly different accountability and review standard, although the general underlying principles dealing with armed conflict apply in both situations. What must be done to "[reconcile] democracy with secrecy . . . what sort of accountability best balances these interests?"<sup>328</sup> Professor Radsan notes that the CIA's drone campaign is unlike traditional armed conflict for several reasons:

- (1) the limited number of strikes allows each situation to be individually and comprehensively evaluated,
- (2) every strike has a lethal consequence and therefore there must be heightened scrutiny as a result,
- (3) the availability of video, audio, cables, and other documents allows for a "meaningful ex post review," and
- (4) the level of secrecy that accompanies CIA targeted killing

---

325. Radsan, *supra* note 304, at 3.

326. Dakota S. Rudesill, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT'L L. 517, 531–32 nn.1, 71 (2007) (discussing precision and agency).

327. From the Latin: *Tutius semper est errare in acquietando quam in puniendo, ex parte misericordiae quam ex parte justitiae*. See, e.g., Adams' Notes of Authorities for His Argument for the Defense, Oct. 1770, 3 Legal Papers of John Adams, <http://www.masshist.org/publications/apde/portia.php?id=LJA03d008>.

328. Radsan, *supra* note 304, at 6.

operations requires a “countervailing check.”<sup>329</sup>

It is important to recognize the jurisdictional boundaries for CIA targeted killing, as previously noted. In light of the domestic use of drones for customs and border enforcement, amongst other roles, will the CIA drone attacks ever be permitted in the United States? Will CIA drone attacks ever be permitted in the United States? It is not likely under present laws or policies.

Professor Radsan’s most cogent argument may be that “The government’s power to kill must be carefully controlled—or it could turn into a tyranny worse than terrorism.”<sup>330</sup> CIA targeted killing becomes most controversial when one of our own, an American citizen, is placed on the target list. In the summer of 2012, Congress considered two measures that “would compel the Obama administration to show members of Congress what Sen. Chuck Grassley (R-Iowa) calls Obama’s ‘license to kill’” namely, the “internal memos outlining the legal justification for killing Americans overseas without charge or trial.”<sup>331</sup> Professor Radsan argues that this objection to killing American citizens because it violates due process is unfounded because it has two misplaced premises:

Extraterritorial actions which the American government takes against non-citizens do not implicate due process.<sup>332</sup>

Due process requires a judicial trial before the United States may

---

329. *Id.* at 7.

330. *Id.* at 8.

331. *See* To Extend Certain Amendments made by the FISA Amendments Act of 2008, and for Other Purposes, S. 3276, 112 Cong., 2d Sess., <http://www.motherjones.com/documents/405322-cornyn-targeted-killing-amendment>. In Adam Serwer, *Congress Wants to see Obama’s License to Kill*, MOTHER JONES (July 31, 2012), <http://www.motherjones.com/politics/2012/07/congress-disclose-obama-targeted-killing-memos>, Serwer noted that

Cornyn’s amendment would require the Obama administration to provide the Office of Legal Counsel memo justifying the killing program to legislators on several congressional committees. Democrats on the Judiciary Committee voted to shelve Cornyn’s proposal, but that does not mean the effort is dead. Cornyn could propose his amendment again later this year, and there is also a section of a separate intelligence bill that would compel the administration to share all of the Justice Department’s legal opinions on intelligence matters with the congressional intelligence committees—unless the White House invokes executive privilege.

332. Radsan, *supra* note 304, at 9.

kill one of its own citizens.<sup>333</sup>

Professor Radsan supports the first claim by citing his previous article on the Supreme Court's decision in *Boumediene v. Bush*, which subjects the U.S. government to due-process restrictions wherever it acts in the world.<sup>334</sup> Support for Professor Radsan's second claim comes from the idea that:

in a law enforcement context, the trial requirement holds true except where the target poses an immediate and severe threat. It does not hold true, however, under IHL. During World War II, for instance, it was legal for American soldiers—without a judicial trial—to fire on American citizens who fought for the Nazis.<sup>335</sup>

...

Our nation is now developing a due process for targeted killing by drone. If non-American lives are just as important as American lives, then one model of due process (or precaution to use an International Human Rights Law term) should apply across the board. In negative terms, if the controls are not good enough for killing Americans, then they are not good enough for killing Pakistanis, Afghans, or Yemenis.<sup>336</sup>

If we cannot resolve this very question of due process applicability, how can we condone CIA targeted killings?

## V. CONCLUSION

In *Nuremburg Revisited and Revised: The Legitimation of Torture in the United States*, Professor Jonathan Turley, Shapiro Chair for Public Interest Law at The George Washington University Law School laments that "[t]he greatest triumph for terrorists is not the destruction of a people but to get a people to destroy their own values."<sup>337</sup> Debate on the legitimacy of CIA-led targeted killings foists the reality that the United

---

333. *Id.*

334. See *Boumediene v. Bush*, 553 U.S. 723 (2008); see also Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009).

335. Radsan, *supra* note 304, at 10.

336. *Id.* Regarding the implications of this surrogate warfare methodology in Yemen, see, e.g., Leila Hudson et al., *Drone Warfare in Yemen: Fostering Emirates Through Counterterrorism?*, MIDDLE E. POL'Y COUNCIL (2012), available at <http://mepc.org/journal/middle-east-policy-archives/drone-warfare-yemen-fostering-emirates-through-counterterrorism>.

337. DEAN REUTER & JOHN YOO, CONFRONTING TERROR: 9/11 AND THE FUTURE OF AMERICAN NATIONAL SECURITY 115 (2011).

States may be acting contrary to what our President has declared and converse to international legal custom regarding armed conflict. What we need is a reaffirmation of our commitment to respect the principle of distinction in warfare, whether conducted by our military or by the CIA or other paramilitary forces. In protecting our national security, President Obama and future administrations should be vigorous but not at the cost of our integrity. Targeted killings have legal basis when performed by military actors, but the CIA is not part of the military. Despite past precedent for CIA-led special operations, it is time that our government reevaluates the use of the CIA for sensitive targeted killing missions, especially outside the context of a declared war. Presidents should not use the CIA to skirt legal obligations. The CIA should not be allowed to shirk and subvert democracy by hiding under the guise of national security secrecy. And, to the policymakers who support targeted killing by the CIA: “You knew what was going to happen. You intended it to happen. You wanted it to happen. You are glad it has happened; and it serves you right.”<sup>338</sup> Indeed, the unthinkable has happened—critics are challenging government policy—the beauty of democracy.

Thomas Paine articulately described the importance of adhering to the rule of law in society: “For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.”<sup>339</sup> The CIA is challenging this very principle.

In art imitating life, from a relatively contemporary source, the 2006 film entitled *The Good Shepherd* brings to light the power of this intelligence juggernaut.<sup>340</sup> Richard Hayes, the fictional CIA agent tells his colleague Edward Wilson that he did not think oversight committees could “look into [CIA’s] closet . . . as if [they’d] let them.”<sup>341</sup> Hayes goes on to say that “I remember a senator once asked me, when we talk about ‘CIA,’ why we never use the word ‘the’ in front of it. And I asked him, ‘Do you put the word ‘the’ in front of ‘God’?’”<sup>342</sup> There is a danger that Executive Branch operations carried out by the CIA and its surrogates will come to embody the very essence of a God—if they pass judgment on who lives and who dies, at times, regardless of international law and morality.

---

338. GEORGE BERNARD SHAW, *THE IRRATIONAL KNOT* 332 (1905).

339. THOMAS PAINE, *COMMON SENSE* 50 (Mundus Publishing 1942) (1776).

340. *THE GOOD SHEPHERD* (Universal Pictures 2006). The character Edward Wilson is not to be confused with the real-life CIA operative Edwin Wilson, but rather the character was a loose composite based on James Jesus Angleton and Richard M. Bissell. See Rachel Dempsey, *Real Elis Inspired Fictional ‘Shepherd,’* YALE DAILY NEWS (Jan. 18, 2007), <http://www.yaleailynews.com/news/2007/jan/18/real-elis-inspired-fictional-shepherd/>.

341. *Id.*

342. *Id.*



If the CIA or its surrogates violate the letter of laws, or customs and standards of morality, which are the spirit of those laws, will they be protected from prosecution and/or sanction? Professor Turley highlights that one defense stood out from the Nuremberg Trials, and it was the *Befehl ist Befehl* or *Orders are Orders* defense.<sup>343</sup> Nuremberg Principle IV states “[t]he fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”<sup>344</sup> Professor Turley argues that Obama revived the *Befehl ist Befehl* defense “when he announced a blanket immunity for CIA officials and his intention to protect CIA officials as vigilantly as they protect our security . . .”<sup>345</sup> According to Professor Turley, “future Presidents understand that they need only select a group of willing lawyers to issue self-serving analysis to shield themselves and their subordinates from prosecution.”<sup>346</sup>

This and future administrations need to recognize that if abuses in the form of torture had not taken place at Abu Ghraib and in other CIA “black-sites,” then the President would have other options beside targeted killing, and probably greater opportunities to legally gather intelligence to thwart future attacks. As Brian Michael Jenkins of the Rand Corporation wrote in *Unconquerable Nation: Knowing Our Enemy, Strengthening Ourselves*: “[t]he terrorist threats we confront today will continue for many years. We are still closer to the beginning than the end of what is likely to be a very long campaign . . . The defense of democracy demands the defense of democracy’s ideals.”<sup>347</sup>

Americans must always remember that “[t]he conflict with Islamic extremist terrorists is ultimately a war of ideas, and we lose the war if we stoop to their methods.”<sup>348</sup> Violating international protocol by having CIA-led targeted killings retards American progress in

---

343. REUTER AND YOO, *supra* note 337, at 122.

344. *Id.*

345. *Id.* at 123.

346. *Id.* at 124.

347. See BRIAN MICHAEL JENKINS, RAND CORP., *UNCONQUERABLE NATION: KNOWING OUR ENEMY, STRENGTHENING OURSELVES* 176 (2006). Regarding the Obama Administration’s heeding the advice of critics, see, e.g., GREG MILLER, *OBAMA’S NEW DRONE POLICY HAS CAUSE FOR CONCERN* (May 25, 2013), [http://www.washingtonpost.com/world/national-security/obamas-new-drone-policy-has-cause-for-concern/2013/05/25/0daad8be-c480-11e2-914f-a7aba60512a7\\_story.html](http://www.washingtonpost.com/world/national-security/obamas-new-drone-policy-has-cause-for-concern/2013/05/25/0daad8be-c480-11e2-914f-a7aba60512a7_story.html). See also COUNCIL ON FOREIGN RELATIONS, *HOW DOES THE RECENT SHIFT IN U.S. DRONE POLICY IMPACT “SIGNATURE STRIKES”?* (June 11, 2013), <http://www.cfr.org/united-states/does-recent-shift-us-drone-policy-impact-signature-strikes/p30885>. See also MICAH ZENKO, *ENHANCING THE OBAMA ADMINISTRATION’S DRONE STRIKES TRANSPARENCY*, COUNCIL ON FOREIGN RELATIONS (June 4, 2013), <http://blogs.cfr.org/zenko/2013/06/04/enhancing-the-obama-administrations-drone-strikes-transparency/>.

348. REUTER & YOO, *supra* note 337, at 240.

rebuilding our status as an international paradigm of democracy and excellence.

History does repeat itself, albeit with different actors, in different locations, in different times. American citizens helpless to counteract abuse of wartime powers by the President and (at the President's direction) the CIA. The immense secrecy surrounding the CIA's drone program makes it difficult, if not impossible, for the American public to decide whether to support or oppose the programs.<sup>349</sup> Increased transparency about targeting procedures would allow the public to better judge the appropriateness (and effectiveness) of the programs and would likely result in greater accountability for the targeted killing program, absent some form of judicial review.<sup>350</sup> In turn, these measures would increase the likelihood of the Administration's policies being aligned with the norms and requirements of international law.

General George Washington's orders to Benedict Arnold in September 1775 could and should stand as the threshold standards of conduct during military operations and the treatment of combatants and noncombatants alike:

Should any American soldier be so base and infamous as to injure any Canadian or Indian in his person or property, I do most earnestly enjoin you to bring him to such severe and exemplary punishment, as the enormity of the crime may require. Should it extend to death itself, it shall not be disproportioned to its guilt, at such a time and in such a cause.<sup>351</sup>

---

349. Even though President Obama has tried to shift focus on positive accomplishments of the CIA, questions still loom over the drone program legality. *See, e.g.*, Shikha Dalmia, *Will Liberals Hold Obama Accountable for Civil Liberties Violations?*, WASH. EXAMINER (May 23, 2013), <http://washingtonexaminer.com/shikha-dalmia-will-liberals-hold-obama-accountable-for-civil-liberties-violations/article/2530380>.

350. *See, e.g.*, Jameel Jaffer, *Reaction – Judicial Review of Targeted Killings*, 126 HARV. L. REV. F. 185 (2013), available at [http://www.harvardlawreview.org/media/pdf/forvol126\\_jaffer.pdf](http://www.harvardlawreview.org/media/pdf/forvol126_jaffer.pdf); *see* Interview by Michael Rass with Amos Guiora, *Israeli Legal Expert: Lack of Judicial Oversight in Targeted Killings a 'Recipe for Disaster,'* PRI'S THE WORLD (Feb. 5, 2013), <http://www.the.world.org/2013/02/israel-targeted-killings/>.

351. Orders of General George Washington to Colonel Benedict Arnold, Camp at Cambridge (Sept. 14, 1775), available at <http://www.americanrevolution.org/arnold/arnold3.html>. In its entirety, the letter read:

CAMP AT CAMBRIDGE, 14th September, 1775 To COLONEL BENEDICT ARNOLD. Sir: - You are intrusted (sic) with a command of the utmost consequence to the interests and liberties of America. Upon your conduct and courage, and that of the officers and soldiers detached on this expedition, not only the success of the present enterprise, and your own honor, but the safety and welfare of the whole continent may depend. I charge you, therefore, and

Some 127 years later, Senator George Frisbie Hoar said during a 1902 speech arguing against U.S. occupation of the Philippines that “who ever heard before of an American gentleman, or an American, who took as a rule for his own conduct the conduct of his antagonist, or who claimed that . . . [we] should act as savages because she had savages to deal with.”<sup>352</sup> Senator Hoar was trying to make the point that America needs to respect the morality of conduct when dealing with its enemies. He goes on to say that “[He] had supposed, Mr. President, that the question, whether a gentleman shall lie or murder or torture, depended on his sense of his own character, and not on his opinion of his victim.”<sup>353</sup> President Obama, the CIA, and other government leaders need to embrace Washington’s and Hoar’s principles and adhere to both the spirit and the letter of international laws of war, regardless of what

---

the officers and soldiers under your command, as you value your own safety and honor, and the favor and esteem of your country, that you consider yourselves as marching not through the country of an enemy, but of our friends and brethren, for such the inhabitants of Canada, and the Indian nations, have approved themselves in this unhappy contest between Great Britain and America, and that you check, by every motive of duty and fear of punishment, every attempt to plunder or insult the inhabitants of Canada. Should any American soldier be so base and infamous as to injure any Canadian or Indian in his person or property, I do most earnestly enjoin you to bring him to such severe and exemplary punishment, as the enormity of the crime may require. Should it extend to death itself, it shall not be disproportioned to its guilt, at such a time and in such a cause. But, I hope and trust, that the brave men who have voluntarily engaged in this expedition, will be governed by far different views, and that order, discipline and regularity of behavior, will be as conspicuous as their valor. I also give it in charge to you to avoid all disrespect of the religion of the country, and its ceremonies. Prudence, policy, and a true Christian spirit, will lead us to look with compassion upon their errors without insulting them. While we are contending for our own liberty, we should be very cautious not to violate the rights of conscience in others, ever considering that God alone is the judge of the hearts of men, and to him only in this case, they are answerable. Upon the whole, sir, I beg you to inculcate upon the officers and soldiers the necessity of preserving the strictest order during the march through Canada; to represent to them the shame, disgrace, and ruin to themselves and their country, if they should by their conduct turn the hearts of our brethren in Canada against us; and, on the other hand, the honors and rewards, which await them, if by their prudence and good behavior they conciliate the affections of the Canadians and Indians to the great interest of America, and convert those favorable dispositions they have shown into a lasting union and affection. Thus wishing you, and the officers and soldiers under your command, all honor, safety, and success, I remain, Sir, Your most obedient humble servant, GEORGE WASHINGTON.

*Id.*

352. GEORGE FRISBIE HOAR, *SUBJUGATION OF THE PHILIPPINES INIQUITOUS* (1902), available at <http://www.bartleby.com/268/10/25.html>.

353. *Id.*

terrorist enemies do. It would be unconscionable, and gravely disappointing, if the United States would act through the CIA to conduct targeted killings that violate the very principles of international conduct to which we claim to adhere.

Our nation deserves enhanced transparency regarding the CIA's targeted killing programs. As James Madison so eloquently spoke, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."<sup>354</sup> The CIA is an invaluable resource in opposing U.S. enemies, but it needs to heed and adhere to the international laws of war. The Romans may have believed that "Necessity makes lawful what otherwise was unlawful,"<sup>355</sup> but should we in the present era follow that maxim where there are substantial legal and policy concerns about the CIA and nonmilitary civilian contractors carrying out drone attacks, especially when the uniformed military has the same capacities and clearer political and legal authority to do so? Drone attacks could—and probably should—move entirely under the purview of the DoD, with the CIA assisting only in the gathering and confirming of intelligence.<sup>356</sup> With impending defense cuts as called for in the Sequester Transparency Act signed by President Obama on August 7, 2012,<sup>357</sup> the transfer of certain targeted killing operations to the CIA should not become a ploy by our government to avoid facing the realities of decreased defense spending. The time has come for our government to address these issues seriously, truthfully, and transparently with the American people and the world.

---

354. James Madison, *Letter to W.T. Barry* (Aug. 4, 1822), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html>.

355. From the Latin: *Quod alias non fuit licitum necessitas licitum facit*. See, e.g., BOUVIER & RAWLE, *supra* note 118, at 2146.

356. See Richard A. Best, Jr. & Andrew Feickert, *Special Operations Forces (SOF) and CIA Paramilitary Operations: Issues for Congress*, 2006 CRS REPORT FOR CONGRESS (2006), available at <http://www.fas.org/sgp/crs/intel/RS22017.pdf>.

357. Sequestration Transparency Act of 2012, Pub. L. No. 112-155, 125 Stat. 552 (2012). This law gave the president 30 days to report to Congress on the estimated impact of the 2011 Budget Control Act's sequestration threat on discretionary and mandatory spending.