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## NATIONAL SECURITY POLICYMAKING IN THE SHADOW OF INTERNATIONAL LAW

Laura A. Dickinson\*

### *Abstract*

*Scholars have long debated whether and how international law impacts governmental behavior, even in the absence of coercive sanction. But this literature does not sufficiently address the possible impact of international law in the area of national security policymaking. Yet, policies that the executive branch purports to adopt as a wholly discretionary matter may still be heavily influenced by international legal norms, regardless of whether or not those norms are formally recognized as legally binding. And those policies can be surprisingly resilient, even in subsequent administrations. Moreover, because they are only seen as discretionary policies, they may be more easily adopted than formal legal interpretations. For all of these reasons, the impact of international law on national security policymaking is a crucial unexplored area in the debate about the efficacy of international law.*

*This Article describes how the norms and values embedded in international human rights law can sometimes be adopted, if not as a matter of formal law at the international level, then as a matter of official policy and practice. In addition, it surveys the advantages and disadvantages of such an approach, using two different Obama administration counterterrorism policies and Trump administration successor policies as case studies. Ultimately, I argue that the emergence and persistence of such policies is evidence of international law's*

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\* © 2021 Laura A. Dickinson. Oswald Symister Colclough Research Professor and Professor of Law, The George Washington University Law School. Earlier versions of this Article benefited from input at a U.S. Department of Defense roundtable discussion, NYU Law School's Hauser Colloquium, a conference on the boundaries of international law co-hosted by the University of Melbourne and Cambridge University, the 2019 International Law and National Security Workshop of the International Committee of the Red Cross at Cardozo Law School, the John L. Fugh Symposium at the U.S. Army Judge Advocate General's Legal Center and School, and faculty workshops at the University of British Columbia Law School, Università degli Studi Roma Tre, and The George Washington University Law School. I would also like to thank Professors David Fontana, Ryan Goodman, Robert W. Gordon, Adil Haque, Harold Hongju Koh, Sean Murphy, Gabor Rona, Galit Sarfaty, Beth Van Schaack, Sandesh Sivakumaren, and Dan Solove for comments and discussion that improved the Article enormously. I am also grateful for feedback from a variety of thoughtful and knowledgeable practitioners, including Mary DeRosa, former U.S. National Security Council Legal Adviser, Steven Hill, Legal Adviser and Director of the Office of Legal Affairs at NATO, Nicole Hogg, Legal Advisor and Legal Department Head, ICRC Regional Delegation for the United States and Canada, and Rita Siemion, Director of National Security Advocacy, Human Rights First.

*constraining impact. International law, it turns out, casts a long shadow as its paradigms get translated into policy. I also analyze the attributes of these policies, including their “legalistic” character and the consequences of creating policies of this type. This analysis suggests that importing international law paradigms into national security policymaking can be a pragmatic and effective alternative to formal international lawmaking, though it also may side-step the process of creating robust new international law rules. Therefore, it is a practice that executive branch officials from the United States and other countries, human rights organizations, and administrative, constitutional, and international law scholars should at least consider, while weighing both the pros and cons. In addition, the stickiness of such policymaking, even across administrations, illustrates the importance of institutional path dependence, the role of lawyers, the constraint of interoperability with key U.S. allies in multilateral military actions, and the way norms get embedded in government organizations.*

#### INTRODUCTION

The Trump administration ushered in what appeared to be a new era of hostility to international law in the United States. From the repudiation of the Paris Climate accord<sup>1</sup> to the withdrawal from the Iran Nuclear Agreement,<sup>2</sup> the administration seemed to cast off international legal frameworks at every turn.

Even against this backdrop, however, former President Trump’s dismissive stance towards international legal norms in the national security domain stands out. Trump campaigned on bringing back torture, bombing civilians, and “loading up” Guantanamo Naval Base with more counterterrorism detainees. For example, Trump

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<sup>1</sup> Trump announced his intention to withdraw the United States from the Paris Agreement, an international climate change convention, in June of 2017. Remarks Announcing United States Withdrawal from the United Nations Framework Convention on Climate Change Paris Agreement, 2017 DAILY COMP. PRES. DOC. 373 (June 1, 2017). The Agreement itself does not permit states to indicate an intent to withdraw until three years from the date the Agreement entered into force, Framework Convention on Climate Change, *Adoption of the Paris Agreement*, U.N. Doc FCCC/CP/2015/L.9/Add.1 (Dec. 12, 2015), Art. 28.1, and U.S. withdrawal took effect on November 4, 2020. See Lisa Friedman, *U.S. Quits Paris Climate Agreement: Questions and Answers*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/climate/paris-climate-agreement-trump.html> [https://perma.cc/N5VV-ZHKR]. President Biden announced his intent to rejoin the Agreement on the first day of his Presidency, and the United States officially became a party to the Agreement again on February 19, 2021. Press Statement, Anthony Blinken, U.S. Secretary, The U.S. Officially Rejoins the Paris Agreement (Feb. 19, 2021), <https://www.state.gov/the- united-states-officially-rejoins-the-paris-agreement/> [https://perma.cc/HJB5-B4LZ].

<sup>2</sup> National Security Presidential Memorandum on Ceasing United States Participation in the Joint Comprehensive Plan of Action and Taking Additional Action to Counter Iran’s Malign Influence and Deny Iran All Paths to a Nuclear Weapon, 2018 DAILY COMP. PRES. DOC. 311 (May 8, 2018).

said that “torture works” and promised to “immediately” reinstate waterboarding and other forms of torture when he became President “because ‘we have to beat the savages’ of the Islamic State.”<sup>3</sup> Similarly, on the campaign trail, Trump vowed to keep the wartime prison at Guantanamo Naval Base open, offered to “load it up with some bad dudes,” and said he would support prosecuting U.S. citizens accused of terrorism in the military commissions there.<sup>4</sup> In an interview on Fox News in 2015, then presidential candidate Trump explained that, to defeat ISIS, he would “take out their families.”<sup>5</sup> And toward the end of his Presidency, Trump suggested he might target sites of Iranian cultural heritage in any conflict with Iran,<sup>6</sup> and he pardoned U.S. service members convicted of war crimes.<sup>7</sup>

The Trump administration’s apparent rejection of international law might seem to provide evidence of international law’s fundamental irrelevance. So-called international relations realists and others have long argued that international law has little, if any, enforcement power, and that states follow international law only when convenient. Therefore, according to these scholars, international law has no independent constraining effect.<sup>8</sup>

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<sup>3</sup> James Risen & Sheri Fink, *Trump Said ‘Torture Works.’ An Echo Is Feared Worldwide*, N.Y. TIMES (Jan. 5, 2017), <https://www.nytimes.com/2017/01/05/us/politics/trump-torture-guantanamo.html> [<https://perma.cc/56DX-WK3H>].

<sup>4</sup> Charlie Savage, *Donald Trump ‘Fine’ with Prosecuting U.S. Citizens at Guantanamo*, N.Y. TIMES (Aug. 12, 2016, 5:18 PM), <https://www.nytimes.com/2016/08/13/us/politics/donald-trump-american-citizens-guantanamo.html> [<https://perma.cc/Q62E-MY4Y>].

<sup>5</sup> Tom LoBianco, *Donald Trump on Terrorists: ‘Take Out Their Families,’* CNN (Dec. 3, 2015, updated 12:19 PM), <https://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html> [<https://perma.cc/V9N2-2ZAW>].

<sup>6</sup> Maggie Haberman, *Trump Threatens Iranian Cultural Sites, and Warns of Sanctions on Iraq*, N.Y. TIMES (Jan. 5, 2020, 4:53 PM), <https://www.nytimes.com/2020/01/05/us/politics/trump-iran-cultural-sites.html> [<https://perma.cc/4ZCS-SR39>].

<sup>7</sup> Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/15/us/trump-pardons.html> [<https://perma.cc/44FJ-CV4Q>].

<sup>8</sup> See, e.g., EDWARD HALLETT CARR, *THE TWENTY YEARS’ CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* 85–88 (2d ed. 1946) (rejecting internationalism/cosmopolitanism and stating that the principles commonly invoked in international politics were “unconscious reflexions [sic] of national policy based on a particular interpretation of national interest at a particular time”); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 26–28 (2005) (using game theory and rational choice modeling in an effort to show that international law has no independent value); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 5 (5th ed. 1973) (noting that the “main signpost that helps political realism to find its way through the landscape of international politics is the concept of interest defined in terms of power”); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 130 (1979) (arguing that “although states may be disposed to react to international constraints and incentives,” states also determine their actions and policies based on their internal interests); Robert H. Bork, *The Limits of ‘International Law,’* 18 NAT’L INT. 3–9 (Winter 1989–1990) (discussing the various limitations of international law); Francis A. Boyle, *The Irrelevance*

Yet, at least in the national security context, some international legal norms proved surprisingly durable even in the atmosphere of distrust and disdain for international law that pervaded the Trump years.<sup>9</sup> The Trump administration did not, in fact, reinstate torture (as far as we know) or launch a campaign to attack civilians in armed conflict. Nor did it bring a single new detainee to Guantanamo Naval Base.

Perhaps most unexpectedly, when conducting counterterrorism operations abroad, the Trump administration was more deferential to international human rights law (IHRL) norms than one might have anticipated. In particular, the Trump administration continued to use elements of an Obama administration policy framework for deploying lethal force against leaders of terrorist groups in parts of Africa and other places that many countries do not recognize as war zones.<sup>10</sup> Under this framework, military personnel reportedly must ensure, for example, that there is a “near certainty” civilians will not be killed during the operation.<sup>11</sup> Such a rule resembles the rules embedded in IHRL and goes far beyond what the generally more permissive laws of war would require. Significantly, this framework that has been so surprisingly resilient was not even adopted by the Obama administration as *legally binding* requirements under international law.<sup>12</sup> Instead, the rules were embodied in a set of legalistic *policies* applicable to counterterrorism operations.

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*of International Law: The Schism Between International Law and International Politics*, 10 CAL W. INT’L L.J. 193, 200–01 (1980) (arguing that World War II made clear that states cannot rely solely on international law to protect their interests).

<sup>9</sup> For a more general argument about the resilience of international law in the Trump administration, see generally HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2018).

<sup>10</sup> See WHITE HOUSE, *REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS* (2018) [hereinafter 2018 FRAMEWORKS REPORT]. The White House provided the report pursuant to Section 1264 of the National Defense Authorization Act for Fiscal Year (FY) 2018 (Pub. L. No. 115-91), which was later amended by Section 1261 of the NDAA for FY 2020 (Pub. L. No. 11-92). The Trump administration provided another brief (and overdue) update to this report on Oct. 20, 2020. WHITE HOUSE, *REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS* (2020).

<sup>11</sup> See, e.g., Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html> [<https://perma.cc/UHJ3-Z8VG>] [hereinafter Savage & Schmitt, *Trump Poised*]. The Trump policy, which was made public shortly before this Article goes to press, also allowed more discretion for decisionmakers to deviate from the standard “where necessary.” See Charlie Savage, *Trump’s Secret Rules for Drone Strikes Outside War Zones Are Disclosed*, N.Y. TIMES (May, 1 2021) <https://www.nytimes.com/2021/05/01/us/politics/trump-drone-strike-rules.html> [<https://perma.cc/C3V9-W7FZ>] [hereinafter Savage, *Trump’s Secret Rules*].

<sup>12</sup> See EXECUTIVE OFF. PRESIDENT, *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities* (May 22, 2013), [https://www.justice.gov/oip/foia-library/procedures\\_for\\_approving\\_direct\\_action\\_against\\_terrorist\\_targets/download](https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download) [<https://perma.cc/4HZ8-W54C>] [hereinafter PPG].

A growing scholarly literature, much of it empirical, responds to the international relations realists and seeks to demonstrate the on-the-ground constraining impact of international law, even in the absence of coercive sanctions.<sup>13</sup> But this literature does not sufficiently address the possible impact of international law in the area of national security *policymaking*. Yet, it turns out that policies that the executive branch purports to adopt as a wholly discretionary matter may still be heavily influenced by international legal norms, regardless of whether or not those norms are formally recognized as legally binding. And those policies can be surprisingly resilient, even in subsequent administrations. Moreover, because they are only seen as discretionary policies, they may be more easily adopted than formal legal interpretations. For all of these reasons, the impact of international law on national security policymaking is a crucial, unexplored area in the debate about the efficacy of international law. Furthermore, it is not only a debate with scholarly significance but one that has tremendous practical relevance for government officials and representatives of non-governmental organizations as well. Indeed, national security officials in the U.S. administration of President Biden should be considering these issues as they review and revise key national security policies.<sup>14</sup> Among other things, these officials must decide whether to continue with the policy approach or, alternatively, to adopt a narrower conception of armed conflict zones and embrace broader, more robust interpretations of IHRL as a matter of law rather than policy.

This Article describes how the norms and values embedded in international human rights law can sometimes be adopted, if not as a matter of formal law at the international level, then as a matter of official policy and practice. In addition, it surveys the advantages and disadvantages of such an approach, using two different Obama administration counterterrorism policies and their Trump administration successor policies as case studies. Ultimately, I argue that the emergence and persistence of such policies is evidence of international law's constraining impact.

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<sup>13</sup> For examples of scholarly literature advancing this argument, see generally RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Courtenay R. Conrad & Emily Hencken Ritter, *Treaties, Tenure and Torture: The Conflicting Domestic Effects of International Law*, 75 J. POL. 397 (2013); Daniel W. Hill, Jr., *Estimating the Effects of Human Rights Treaties on State Behavior*, 72 J. POL. 1161 (2010); Yonatan Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements*, 67 INT'L ORG. 469 (2013); Yonatan Lupu, *Legislative Veto Players and the Effects of International Human Rights Agreements*, 59 AM J. POL. SCI. 578 (2015). *But see* Adam S. Chilton & Eric A. Posner, *Treaties and Human Rights: The Role of Long-Term Trends*, 81 LAW & CONTEMP. PROBS. 1 (2018); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935 (2002).

<sup>14</sup> See, e.g., Charlie Savage & Eric Schmitt, *Biden Secretly Limits Counterterrorism Drone Strikes Away from War Zones*, N.Y. TIMES (Mar. 3, 2021), <https://www.nytimes.com/2021/03/03/us/politics/biden-drones.html> [<https://perma.cc/L7Q9-SHGR>] (noting that Biden officials are reviewing whether to revise targeting policies) [hereinafter Savage & Schmitt, *Biden Secretly Limits*].

International law, it turns out, casts a long shadow as its paradigms get translated into policy. I also analyze the attributes of these policies, including their “legalistic” character and the consequences of creating policies of this type. This analysis suggests that national security policymaking can be a pragmatic and effective way of implementing international legal paradigms even in the absence of formal international lawmaking,<sup>15</sup> though it also may side-step the process of creating robust new international law rules. Therefore, it is a practice that executive branch officials from the United States and other countries, human rights organizations, and administrative, constitutional, and international law scholars should at least consider, while weighing both the pros and cons. In addition, the stickiness of such policymaking, even across administrations, illustrates the importance of institutional path dependence, the role of lawyers, the constraint of interoperability with key U.S. allies in multilateral military actions, and the way norms get embedded in government organizations.

Part I of this Article provides the necessary background for evaluating the efficacy of the Obama administration’s policy approach. It describes the fundamental conflict between the United States and many of its allies over the appropriate international legal paradigm or paradigms that should govern extraterritorial counterterrorism operations, such as those involving the use of lethal force or military detention. These counterterrorism operations have, in the years since the September 2001 attacks on the United States, stretched the boundaries of armed conflict both geographically and temporally.<sup>16</sup> The question, therefore, arises: should government lawyers assess such operations under a war paradigm, governed by international humanitarian law (IHL), sometimes called the Law of Armed Conflict (LOAC)? Or, by contrast, should they evaluate these counterterrorism operations abroad as law enforcement operations, which would generally be governed under the more restrictive regime of IHRL? Further complicating matters is whether the doctrine of national self-defense that is part of the *jus ad bellum* (the body of law regulating the resort to force by one state in the territory of another) should provide the primary basis for the legal analysis. Or does some combination of these domains of international law form the governing legal framework?

The question of the appropriate legal paradigm is not merely of technical, academic interest to lawyers toiling away at their desks in the bowels of the Pentagon, the State Department, and other government buildings. Rather, it has profound consequences for any proposed military operations to detain or kill

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<sup>15</sup> To be sure, due to the secrecy surrounding implementation of such policies, executive branch officials may interpret them in self serving ways even as they borrow international legal categories to confer legitimacy on their actions. See Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1569 (2016).

<sup>16</sup> See generally ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* (2016) (explaining how the military now influences many dimensions of public policy); CHARLIE SAVAGE, *POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL POWER AND SECRECY* (2015) [hereinafter SAVAGE, *POWER WARS*] (exploring how executive authority and secrecy developed in the twentieth and twenty-first centuries).

terrorist targets abroad. For example, with respect to the use of lethal force, under a war paradigm, targeted killing of an enemy is lawful unless it runs afoul of broad principles such as distinction (civilians and civilian objects must not be attacked) and proportionality (the expected military advantage of the action must exceed the expected harm to civilians and civilian objects).<sup>17</sup> But in peacetime, when IHRL generally governs, individuals cannot be killed at all, except in much more limited circumstances, such as when the killing is absolutely necessary to defend oneself or others.<sup>18</sup>

Significantly, the Obama administration—like the Bush administration before it—took the position that, as a purely legal matter, IHL/LOAC rather than IHRL applies globally to U.S. counterterrorism operations, at least as to certain terrorist organizations, such as Al Qaeda.<sup>19</sup> Even outside zones widely recognized as embroiled in armed conflict, the United States has maintained that, with respect to certain hostile groups, a war is taking place.<sup>20</sup> Accordingly, the law of war should govern. The Trump administration continued to embrace this view. This interpretation of international law, however, contrasts with the interpretation of many U.S. allies, who have maintained that IHL/LOAC does not necessarily apply globally to operations against terrorists such as Al Qaeda, instead adopting a more fact-specific analysis of whether an armed conflict is occurring in the particular geographic location where operations are contemplated. If an armed conflict is not occurring, according to their analysis, the generally higher standards of IHRL applicable to the use of force and detention would often govern.<sup>21</sup> In addition, allies who view armed conflict zones more narrowly would apply the *jus ad bellum* in the targeting context and would take a more stringent approach to some of these *ad bellum* elements than the United States does.

This conflict in the legal approach is potentially quite significant. Many countries that adopt a more confined view of IHL/LOAC, such as the UK, France, Germany, and Canada, partner regularly with the United States in counterterrorism operations across the globe. Thus, different views regarding the applicable legal regime create numerous so-called “interoperability”<sup>22</sup> challenges that could make it more difficult for these allies to co-operate with the United States.

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<sup>17</sup> See *infra* notes 90–118 and accompanying text.

<sup>18</sup> See *infra* notes 57–89 and accompanying text.

<sup>19</sup> See, e.g., WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 11, 19 (2016) [hereinafter 2016 FRAMEWORKS REPORT]; see also 2018 FRAMEWORKS REPORT, *supra* note 10, at 4–7.

<sup>20</sup> See, e.g., 2016 FRAMEWORKS REPORT, *supra* note 19, at 18 (identifying military operations against Al Qaeda in the Arabian Peninsula (AQAP) as an ongoing armed conflict).

<sup>21</sup> See generally KENNETH WATKIN, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT (2016) (explaining the difficulties that states now face in using military force during modern conflicts).

<sup>22</sup> “Interoperability” is not a term that appears within IHL/LOAC, but the North Atlantic Treaty Organization (NATO) defines the term as “the ability to act together coherently,



Enter what I am calling “legalistic” national security policies. In the face of these conflicting interpretations of applicable international law, the United States has crafted a number of national security policies that have imposed rules and standards that are more restrictive than the legal minimum, but they have done so as a matter of *policy* rather than as an interpretation of *international law requirements*. These policies, although they are merely policies at the international level, are often quite legalistic. They are written in a way that requires legal analysis and legalistic judgments because they impose rules and standards that must be interpreted. Indeed, many of them impose legal obligations as a matter of domestic law. Yet, because they are framed as policies, they allow the U.S. Government to formally retain its interpretation of the scope of IHL/LOAC and largely reject IHRL’s applicability even as it adopts IHRL standards as a matter of practice.

Part II describes two sets of these “legalistic” national security policies adopted by the Obama administration and continued to some degree during the Trump administration, one addressing operational rules for targeted killings of suspected terrorists abroad,<sup>23</sup> and the other pertaining to the procedures required to justify continued U.S. detention of suspected terrorists.<sup>24</sup> Each of these policies includes norms and procedures that bring U.S. practice closer to the norms of IHRL, even as the United States has never accepted the applicability of IHRL to the counterterrorism operations that these policies govern.<sup>25</sup> And both have been surprisingly durable. Implemented during the Obama administration, each policy faced harsh political criticism by candidate Trump on the campaign trail. Yet, despite rolling back some aspects of these policies, the Trump administration preserved elements of each.<sup>26</sup>

The first such policy provides standards for the use of lethal force outside zones that are universally recognized as sites of armed conflict. Known initially as the Presidential Policy Guidance on Procedures for Approving Direct Action Against

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effectively and efficiently to achieve Allied tactical, operational and strategic objectives.” *Interoperability*, Official NATO Terminology Database, <https://nso.nato.int/natoterm/Web.mvc> [<https://perma.cc/URE7-FUV2>] (last visited Nov. 23, 2020). As one commentator noted, “Interoperability is necessary to ensure a coalition can function with unity of effort and unity of purpose . . . . It is indispensable to the implementation of a comprehensive approach to armed conflict operations.” Blaise Cathcart, *Coalition Warfare and the Law of Armed Conflict in 2040*, in *THE LAW OF ARMED CONFLICT AT 2040* (Mike Schmitt & Matt Waxman eds., forthcoming 2021).

<sup>23</sup> See PPG, *supra* note 12.

<sup>24</sup> Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 10, 2011) (entitled “Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to Authorization to Use Military Force”). Some of these policies have now been incorporated into domestic law. Pub. L. No. 112-81, § 1023, 125 Stat. 1564–65 (codified at 10 U.S.C. § 801 (2012)).

<sup>25</sup> See 2016 FRAMEWORKS REPORT, *supra* note 19, at 26 (noting that the U.S. follows the law of armed conflict and respects state sovereignty when it conducts extraterritorial military operations but does not mention international human rights law).

<sup>26</sup> With respect to targeting, see Savage & Schmitt, *Trump Poised*, *supra* note 11. With respect to Guantanamo detainees, see, e.g., Exec. Order No. 13,823, 83 Fed. Reg. 4831 (Jan. 30, 2018) (entitled “Protecting America Through Lawful Detention of Terrorists”).

Terrorist Targets Outside the United States and Areas of Active Hostilities (PPG),<sup>27</sup> this policy sets standards and procedures for the use of lethal force against terrorist targets. The policy includes both substantive standards and criteria for each proposed action, as well as procedural rules such as mandates about the level of review by senior governmental officials. Significantly, these standards and procedures exceed the requirements of IHL/LOAC. Reportedly, the Trump administration continued this policy to a degree, retaining some, but not all, of its elements.<sup>28</sup>

A second set of legalistic policies concerns the military detention of terrorism suspects outside the United States. One such policy, the rules for periodic review boards (PRBs) at Guantanamo Naval Station established during the Obama administration,<sup>29</sup> sets forth standards and procedures for evaluating the continued detention of terrorism suspects held there. Like the PPG, these rules contain both substantive standards, such as whether the detainee presents a continuing threat, as well as procedural requirements for certain government personnel to participate in the review. The Trump administration retained these rules<sup>30</sup> (some of which have been codified).<sup>31</sup> Some commentators have maintained that such rules are mandated by IHRL, IHL/LOAC, or some combination of the two bodies of law.<sup>32</sup> The United States, however, has never accepted that these rules are legally required under international law but has adopted them as a matter of policy.<sup>33</sup> And the United States developed other, similar policies for detainees held by the U.S. military outside the United States at locations other than Guantanamo Bay.<sup>34</sup>

Finally, Part III discusses the implications of this “legalistic policy” path. By adopting these policies, the United States did not formally agree to be bound by IHRL in conducting extraterritorial counterterrorism operations.<sup>35</sup> Yet, these policies implement human rights values to some degree. Arising in an inter-

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<sup>27</sup> PPG, *supra* note 12.

<sup>28</sup> *See, e.g.*, 2018 FRAMEWORKS REPORT, *supra* note 10, at 7 (explaining the Trump administration’s decision to “continue[], as a matter of policy, to apply heightened targeting standards that are more protective of civilians than are required under the law of armed conflict.”). *See also infra* note 122 and accompanying text.

<sup>29</sup> Exec. Order No. 13,567, *supra* note 24.

<sup>30</sup> Exec. Order No. 13,823, *supra* note 26.

<sup>31</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1023, 125 Stat. 1298, 1564–65 (codified at 10 U.S.C. § 801 (2012)).

<sup>32</sup> *See, e.g.*, INTER-AM. COMM’N ON H.R., TOWARDS THE CLOSURE OF GUANTANAMO 39–49 (2015).

<sup>33</sup> *See, e.g., id.* at 45; 2016 FRAMEWORKS REPORT, *supra* note 19, at 30–32.

<sup>34</sup> *See, e.g.*, U.S. DEP’T OF DEF., DIRECTIVE NO. 2310.01E, § 3(i) (Aug. 19, 2014) (describing a periodic review policy for the detention of all individuals in DoD custody or control). For a detailed account of these policies and procedures, in comparison to those adopted by the United Kingdom, see Laura A. Dickinson, *Administrative Law Values and National Security Functions: Military Detention in the United States and the United Kingdom*, in OXFORD HANDBOOK ON COMPARATIVE ADMINISTRATIVE LAW 635 (Peter Cane, Herwig C.H. Hofmann, Eric C. Ip & Peter L. Lindseth eds., 2020) [hereinafter Dickinson, *Administrative Law Values*].

<sup>35</sup> *See, e.g.*, 2016 FRAMEWORKS REPORT, *supra* note 19, at 24–26, 30–31.

governmental setting in which key U.S. allies follow IHRL, interoperability benefits appear to have pushed the United States in a more human rights-oriented direction that has persisted across administrations to a surprising degree. International human rights law, it seems, casts a long shadow, even in situations where governments are articulating discretionary policies rather than formally binding legal interpretations.

Part III also examines the possible advantages and disadvantages of pursuing a policy path. To some human rights advocates, the Obama administration missed an opportunity to formally roll back the war paradigm and articulate a stronger role for IHRL as it applies to extraterritorial counterterrorism operations.<sup>36</sup> And, to be sure, the costs of this approach are significant. On the other hand, the policy approach helped, as a practical matter, to move the United States towards greater alignment with human rights norms than might have otherwise been the case. Specifically, these policies helped mitigate the interoperability challenges involved when collaborating with allies on counterterrorism operations, smoothed over inter-agency disputes about the proper scope of IHRL in this area, and, as a procedural matter, preserved legalistic judgments (and a corresponding role for lawyers) even as formally these judgments remained outside the realm of IHRL. Finally, as mentioned at the outset, these policies have been surprisingly durable. Policy is, in theory, more variable from administration to administration. Yet, despite rolling back some aspects of these policies, the Trump administration, perhaps remarkably, preserved some core elements of each.<sup>37</sup> As the Biden administration reviews these policies, in addition to debating their substantive elements, administration officials should carefully and explicitly consider the costs and benefits of a policy approach as compared to one that is more grounded in IHRL itself.

Thus, this Article explores how national security policymaking plays a hitherto unrecognized role both in effectuating international law norms even in the absence of formal law and in advancing those norms in the face of conflicting interpretations about their content. In a rapidly changing domain of international affairs, such legalistic policies can serve an important bridging function that can further multilateral operations while preserving commitments to fundamental rule of law values. In addition, such policies can help address internal differences within governments as well. At a minimum, the phenomenon of such legalistic policies, drafted to navigate among international law paradigms, is worthy of ongoing study and discussion.

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<sup>36</sup> See, e.g., *Obama Administration Discloses Previously Classified Procedures for Authorizing Force Outside Areas of "Active Hostilities,"* HUM RTS. FIRST (Aug. 7, 2016) <https://www.humanrightsfirst.org/press-release/obama-administration-discloses-previously-classified-procedures-authorizing-force> [<https://perma.cc/TEE9-ZFJC>] (referring to the PPG and noting that "[t]he President should formalize safeguards that would bring our country's use of force into compliance with international law, including by clearly differentiating between the rules that apply to the use of force in war and the rules that govern the use of lethal force in all other circumstances") (internal quotations omitted).

<sup>37</sup> See, e.g., 2018 FRAMEWORKS REPORT, *supra* note 10, at 7.

I. WAR OR NOT-WAR?: INTERNATIONAL LAW PARADIGMS APPLICABLE  
TO EXTRATERRITORIAL COUNTERTERRORISM OPERATIONS

In order to see the significance of national security policymaking in the area of counterterrorism activities, it is necessary to understand the crucial debate that has raged for two decades about which international legal regime should apply to such operations. Military operations against terrorists globally since the September 11, 2001 attacks on the United States raise complex questions about the scope of applicable legal paradigms and have stretched the boundaries of those paradigms. In this new context, the contemporary battlefield arguably has changed, and the rise of non-state actors such as terrorist groups, the growing use of military and security contractors, the development of new military and security technologies such as unmanned aerial vehicles (more commonly known as “drones”), and the emergence of weapons systems with autonomous capabilities have all put enormous pressure on existing law.<sup>38</sup>

States developed IHL/LOAC when war largely consisted of contests between and among large, hierarchical, organized militaries.<sup>39</sup> The foundational treaties defining a significant portion of this body of law, the Geneva Conventions, reflect this context: among the hundreds of provisions in these treaties, only one is devoted to conflicts involving non-state actors.<sup>40</sup> Although subsequent treaties attempted to address wars with non-state groups such as guerilla movements or insurgents (and IHL/LOAC imposes obligations on all actors within an armed conflict),<sup>41</sup> even these efforts did not really contemplate the prospect of transnational conflicts with non-state actors crossing the boundaries of multiple states. The emergence of new military technologies has also raised questions about whether existing law is

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<sup>38</sup> See, e.g., LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* 2–3 (2011) [hereinafter DICKINSON, *OUTSOURCING WAR AND PEACE*]; Laura A. Dickinson, *Drones, Automated Weapons, and Private Military Contractors: Challenges to Domestic and International Legal Regimes Governing Armed Conflict*, in *NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE* 93–96 (Molly K. Land & Jay D. Aronson eds., 2018) [hereinafter Dickinson, *Drones*].

<sup>39</sup> See DICKINSON, *OUTSOURCING WAR AND PEACE*, *supra* note 38, at 40–68.

<sup>40</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Fourth Geneva Convention].

<sup>41</sup> See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609.

adequate to regulate the challenges of warfare as it is currently practiced or might be practiced in the future.<sup>42</sup>

Other relevant bodies of international law, including IHRL<sup>43</sup> and the *jus ad bellum*,<sup>44</sup> the law that governs the resort to force in the territory of another state, also largely contemplated the regulation of state actors (as opposed to non-state entities). For example, IHRL does not directly bind non-state entities.<sup>45</sup> And, at the time of the terrorist attack of September 11, 2001, it was contested whether non-state actors could even commit an armed attack that would trigger a state's right of self-defense under the *jus ad bellum*.<sup>46</sup> Furthermore, these bodies of law were formed long before technologies such as drones, autonomous capabilities, and cyber-attacks existed.

Because of these fundamental changes, it is often extremely difficult to determine which international legal regime (or regimes) should govern extraterritorial operations against terrorists beyond traditional battlefields such as Afghanistan, Iraq, and Syria. One approach is to treat such terrorists largely as criminals and deploy a law enforcement model for tracking, capturing, prosecuting, and—in certain very limited circumstances—killing them.<sup>47</sup> Within this model, the framework of IHRL would generally apply. In contrast, if terrorists are viewed as fighting a global war, then the battlefield itself is potentially global, and the largely less-restrictive IHL/LOAC regime would apply. Or, if targeting terrorism suspects is seen as an act of national self-defense, then the law regarding the resort to force in national self-defense under the *jus ad bellum* might govern. Moreover, these legal regimes are not necessarily mutually exclusive, and not surprisingly, states and commentators have taken different positions regarding when, where, and under what circumstances IHRL, IHL/LOAC, and self-defense regimes should apply and how they overlap.<sup>48</sup>

These differences matter. The question of which legal regime (or combination) governs has consequences for decisions related to (1) whether to capture or kill a terrorism suspect; (2) the rules applicable to targeted killings; (3) the level of acceptable civilian casualties; (4) how detention may be carried out; (5) the appropriate procedures and personnel to conduct operations; and (6) whether, and what type of, investigations are required in the face of allegations of misconduct.

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<sup>42</sup> See Dickinson, *Drones*, *supra* note 38, at 93–94, 102–12.

<sup>43</sup> See DICKINSON, *OUTSOURCING WAR AND PEACE*, *supra* note 38, at 40–68.

<sup>44</sup> See Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483 (2012).

<sup>45</sup> See DICKINSON, *OUTSOURCING WAR AND PEACE*, *supra* note 38, at 10–11.

<sup>46</sup> See Deeks, *supra* note 44.

<sup>47</sup> See, e.g., WATKIN, *supra* note 21, at 287–300; Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1087–88 (2008).

<sup>48</sup> WATKIN, *supra* note 21, at 287–322; Marco Sassoli, *Use and Abuse of the Laws of War in the War on Terrorism*, 22 MINN. J. L. & INEQUALITY 195, 198–203 (2004).

For example, consider the U.S. operation that killed Al Qaeda leader and U.S. citizen Anwar Al-Awlaki in a 2011 drone strike in Yemen.<sup>49</sup> The operation sparked a heated debate in the United States and elsewhere about the possible legal basis for the strike.<sup>50</sup> In addition to significant questions about whether the U.S. Constitution permitted such lethal action against a U.S. citizen overseas, lawyers and policymakers disagreed about whether the action violated international law.<sup>51</sup> Central to that disagreement was a difference of views about whether the specific location where Al-Awlaki was killed should be considered the site of an ongoing armed conflict.<sup>52</sup> If so, then IHL/LOAC would govern, and if not then the more stringent protections of IHRL would likely apply, along with the *ius ad bellum*. Indeed, journalistic accounts suggest that even within the U.S. government itself, lawyers and policymakers clashed over this question.<sup>53</sup>

Although the United States did not initially provide the legal basis for the Al-Awlaki strike,<sup>54</sup> the government has since clarified that it sees itself in a global war against Al Qaeda and ISIS and therefore views the battlefield as potentially worldwide for purposes of international law.<sup>55</sup> Moreover, the United States position applies not only to targeted killings such as the Al-Awlaki strike but other extraterritorial counterterrorism operations such as detention. And in both contexts, the U.S. position differs fundamentally from that of many U.S. allies, who have adopted a more confined view of the scope of IHL/LOAC and a broader role for IHRL.

This conflict in the legal approach is potentially quite significant. It could dictate different outcomes for a particular operation, with IHL/LOAC permitting actions that IHRL would restrict. Thus, for countries that adopt a more confined view of IHL/LOAC and that partner regularly with the United States in counterterrorism operations across the globe, the difference in views could present

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<sup>49</sup> See Mark Mazetti, Eric Schmitt & Robert Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), <https://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html> [<https://perma.cc/MJ4Q-5ZX7>].

<sup>50</sup> See, e.g., Charlie Savage, *Secret US Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 8, 2011), <https://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html> [<https://perma.cc/WTE6-7KYJ>] [hereinafter Savage, *Secret US Memo*].

<sup>51</sup> See, e.g., Michael Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, J. CONFLICT & SEC. L. 385 (2011).

<sup>52</sup> See, e.g., Charlie Savage, *Court Releases Large Parts of Memo Approving Killing American in Yemen*, N.Y. TIMES (June 23, 2014), <https://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html> [<https://perma.cc/K67X-6XKQ>].

<sup>53</sup> See *id.*; see also Savage, *Secret US Memo*, *supra* note 50.

<sup>54</sup> The United States subsequently released a memo providing the legal reasoning that supported the strike. Memorandum for Eric Holder, Att’y Gen., U.S. Dep’t of Justice, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010) <https://fas.org/irp/agency/doj/olc/aulaqi.pdf> [<https://perma.cc/9U8L-87T7>].

<sup>55</sup> 2016 FRAMEWORKS REPORT, *supra* note 19, at 11, 19.

significant “interoperability”<sup>56</sup> challenges that could make it more difficult for these allies to co-operate with the United States. It could, for example, affect intelligence-sharing, the use of military bases to launch airstrikes, and other aspects of military operations.

This Part describes in more detail first the IHRL model and then the IHL/LOAC model for engaging in counterterrorism operations. The discussion makes clear the important differences in what these two models permit and, therefore, the stakes in the interpretive battle over which paradigm applies. Because the *jus ad bellum* framework is also relevant to extraterritorial counterterrorism operations, and the United States differs from some allies in its interpretation of this body of law as well, this Part also briefly describes its foundational principles. This Part then describes the differences between the U.S. view and that of key allies, focusing on two of its critical counterterrorism partners: The United Kingdom and Germany.

*A. The Strict Law-Enforcement/International Human Rights Law Paradigm*

International human rights law generally dictates a strict law-enforcement approach to extraterritorial terrorism operations outside of traditional battlefields. Thus, IHRL would generally govern crucial decisions about the tracking, capturing, and disposition of terrorist targets outside a country’s territory and outside armed conflict zones. In many circumstances, this legal regime is more restrictive than the legal rules imposed by the alternative IHL/LOAC paradigm.<sup>57</sup>

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<sup>56</sup> See Cathcart, *supra* note 22; see also Kirby Abbott, *A Brief Overview of Legal Interoperability Challenges for NATO Arising from the Interrelationship Between IHL and IHRL in Light of the European Convention on Human Rights*, 96 INT’L REV. RED CROSS 107, 108 (2014) (“Should NATO Member States eventually diverge on whether the use of force frameworks are to be defined primarily by a law enforcement paradigm . . . or by a war-fighting paradigm . . . it would be difficult to say that NATO would be legally interoperable in any meaningful sense.”); Steven Hill, *The Role of NATO’s Legal Adviser*, in THE ROLE OF LEGAL ADVISERS IN INTERNATIONAL LAW 213 (Andraz Zidar & Jean-Pierre Gauçi, eds. 2016); Steven Hill & David Lematayer, *Legal Issues of Multinational Military Operations: An Alliance Perspective*, 55 MIL. L. & L. WAR REV. 13, 14 (2016) (“[L]egal interoperability remains of a great importance: it ensures that within a military alliance, military operations can be conducted effectively consistent with the legal obligations of each nation.”).

<sup>57</sup> For an overview of this legal framework, see, e.g., Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Killings*, ¶¶ 28–33 A/HRC//14/24/Add.6 (May 28, 2010) [hereinafter *Alston Report*]; SUSAN BREAU, MARIE ARONSSON & RACHEL JOYCE, DISCUSSION PAPER 2: DRONE ATTACKS, INTERNATIONAL LAW, AND THE RECORDING OF CIVILIAN CASUALTIES 3–4 (2011); *Rise of the Drones II: Examining the Legality of Unmanned Targeting Before the Subcomm. on Nat’l Sec. & Foreign Affs. of the H. Comm. on Oversight and Gov’t Reform*, 111th Cong. 2, 18–25 (2010) (statement of Mary Ellen O’Connell, Professor, Univ. of Notre Dame); WATKIN, *supra* note 21, at 287–300.

Under the IHRL paradigm, foundational rights that could come into play during counterterrorism operations include the right to life,<sup>58</sup> the right to be free from torture, cruel, and inhuman, and degrading treatment,<sup>59</sup> and a variety of due process rights, including the right to be free from arbitrary arrest and detention.<sup>60</sup> Such rights are protected in global treaties, such as the International Covenant on Civil and Political Rights (ICCPR)<sup>61</sup> and the Convention Against Torture,<sup>62</sup> as well as regional agreements, such as the European Convention on Human Rights and Fundamental Freedoms,<sup>63</sup> the American Convention on Human Rights,<sup>64</sup> and the African Charter on Human and People's Rights.<sup>65</sup> And some of these rights may be deemed customary international law (and therefore binding on states whether or not they have ratified specific treaties).<sup>66</sup>

### *1. The Use of Lethal Force*

As applied to counterterrorism activities, IHRL generally requires state agents to pursue non-lethal options such as capturing suspects, if at all possible, rather than using lethal force. The right to life does allow state agents to deploy lethal force in defense of themselves or others, but only in narrow circumstances. In interpreting the right to life enshrined in the ICCPR, the Human Rights Committee (a treaty body that monitors implementation of the treaty) has said that “any permissible deprivation of life must be reasonable, necessary, and proportional to the aims sought, and must be established under the law with effective institutional safeguards to protect against potential arbitrary abuses.”<sup>67</sup> Under this standard, state agents are

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<sup>58</sup> See International Covenant on Civil and Political Rights art. 6, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>59</sup> See *id.* art. 7.

<sup>60</sup> See *id.* art. 9.

<sup>61</sup> See *id.*

<sup>62</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1464 U.N.T.S. 85.

<sup>63</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

<sup>64</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

<sup>65</sup> African (Banjul) Charter on Human and People's Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/6713 rev. 5, 21 I.L.M. 59.

<sup>66</sup> See Statute of the International Court of Justice art. 38(1)(b), April 18, 1946, 33 U.N.T.S. 993 (defining customary law as “general practice [of states] accepted as law”); see also Int'l L. Comm., *Draft Conclusions on Identification of Customary International Law with Commentaries*, U.N. Doc. A/73/10 (2018).

<sup>67</sup> Hum. Rts. Comm., *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, § II.12, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter *General Comment No. 36*]; (“In order not to be qualified as arbitrary under article 6, the application of potentially lethal force by a private person acting in self-defense, or by another person coming to his or her defence, must be



not authorized to undertake planned killings of specific persons.<sup>68</sup> Rather, state agents are permitted to use lethal force only if the need were to arise while pursuing other lawful law-enforcement objectives, such as conducting surveillance, making an arrest, or protecting others at risk of harm.<sup>69</sup> Thus, courts and tribunals have generally concluded that, when state agents are pursuing terrorism suspects, the obligation to respect the right to life prohibits agents from proceeding to lethal options unless they first determine that other non-lethal options, such as capture, are not feasible.<sup>70</sup>

In addition, even if capture is deemed infeasible, IHRL still sets a high bar for targeting a terrorism suspect with lethal force. In particular, IHRL restricts the use of lethal force to situations in which there is a strict<sup>71</sup> or absolute<sup>72</sup> necessity, and any use of force must be proportionate to the threat.<sup>73</sup> A strict or absolute necessity

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strictly necessary in view of the threat posed by the attacker.”). *UN Human Rights Committee Clarifies, Expands Guidance on Right to Life*, INT’L JUST. RES. CTR. (Nov. 20, 2018), <https://ijrcenter.org/2018/11/20/un-human-rights-committee-clarifies-expands-guidance-on-right-to-life/> [<https://perma.cc/UL5V-TQ4S>]; see also *General Comment No. 36*, ¶ 10 (2018).

<sup>68</sup> As the U.N. Special Rapporteur for Summary and Extrajudicial Killings has noted, under IHRL “a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation.” *Alston Report*, *supra* note 57, ¶ 33.

<sup>69</sup> See *id.* For example, the European Court of Human Rights (ECHR) has concluded that the European Convention permits the use of lethal force only when state agents are pursuing other, authorized law-enforcement activities, and then only when the use of such force is absolutely necessary. See, e.g., *Erdoğan and Others v. Turkey*, App. No. 57049/00, ¶ 86 (2007), <http://hudoc.echr.coe.int/eng?i=001-75148> [<https://perma.cc/S86Q-RJ84>].

<sup>70</sup> See, e.g., *McCann and Others v. United Kingdom*, App. No. 18984/91, ¶ 200 (1995) <http://hudoc.echr.coe.int/eng?i=001-57943> [<https://perma.cc/VS79-C4RC>] (concluding that U.K. soldiers who shot and killed terrorism suspects had an honest belief that those suspects were about to detonate a bomb, and that there was no time to pursue means lesser than the use of lethal force—such as capture). Indeed, even when there is a risk that a terrorism suspect might escape capture, the use of lethal force is not permissible unless there are other reasons to justify the killing as absolutely necessary, such as the risk of harm to others. *Kakoulli v. Turkey*, App. No. 38595/97, ¶ 121 (2005), <http://hudoc.echr.coe.int/eng?i=001-71208> [<https://perma.cc/Y3NW-ZWPC>]; see also *Alston Report*, *supra* note 57, ¶ 32.

<sup>71</sup> See *General Comment No. 36*, *supra* note 67; see also *Miguel Castro-Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160*, ¶ 239 (Nov. 25, 2006) (“State police forces may only recur to the use of lethal weapons when it is strictly inevitable to protect a life and when less extreme measures result ineffective.”) (internal quotations omitted).

<sup>72</sup> See, e.g., *Tagayeva and Others v. Russia*, App. No. 26562/07, ¶ 595 (Apr. 13, 2017), <http://hudoc.echr.coe.int/eng?i=001-172660> [<https://perma.cc/4TTS-M77Q>].

<sup>73</sup> See *Alston Report*, *supra* note 57, ¶ 32. In the Inter-American human rights system, the Inter-American Court has likewise noted that state agents who use lethal force to protect the security of the population do not necessarily violate the right to life; however, any use of

standard is difficult to satisfy because it requires, for example, that the suspect pose a threat to the life of others, and in some formulations such a threat must be “imminent.”<sup>74</sup> Further, it requires a determination that “there is no other means . . . of preventing that threat to life.”<sup>75</sup> If the strict or absolute necessity threshold cannot be reached, lethal force would be off the table.

International human rights law further requires state agents to assess and minimize the impact of any use of force on civilians who might, for example, be in the vicinity of the terrorist target.<sup>76</sup> For example, even in the process of conducting an operation to thwart known terrorists posing a threat to others, the strict necessity standard encompasses a “duty of care” for state agents to evaluate the risk of harm to any civilians who might be affected and take steps to limit any harm to those civilians.<sup>77</sup> While the precise standard is not entirely clear, it is a stringent one. Thus, even if authorities were to conclude that the target posed a continuing, imminent threat, their hands would nonetheless likely be tied if they could not minimize harm to civilians in a use-of-force operation.

## 2. Detention

Application of IHRL would also have important consequences for any decision to detain a terrorism suspect. International human rights law mandates minimum standards regarding the conditions of detention and treatment of detainees, as well as due process requirements regarding access to a lawyer, charges to be filed before an independent court within a specific period of time, notice of such charges to the

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force must not be “disproportionate.” *Neira-Alegria et al. v. Peru*, Merits, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 20, ¶¶ 69, 72, 76 (Jan. 19, 1995) (concluding that Peru violated the right to life of three persons convicted of terrorism when state agents killed them in jail).

<sup>74</sup> See, e.g., *Miguel Castro-Castro Prison*, Inter-Am. Ct. H.R. (ser. C) No. 20, ¶ 245 (concluding that there was no justification for the use of force by state agents during an alleged prison riot of terrorism suspects because there was no imminent threat to the state agents, “nor was there any need of self-defense, or an i[m]minent danger of death or serious injuries against the police officers”). Special Provision 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials specifies that “enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury . . . [and] lethal use of firearms may only be made when strictly unavoidable in order to protect life.” U.N. Conference on the Prevention of Crime and the Treatment of Offenders, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, 114, U.N. Doc. A/CONF.144/28/Rev.1 (1990).

<sup>75</sup> *Alston Report*, *supra* note 57, ¶ 32.

<sup>76</sup> See, e.g., *Tagayeva*, App. No. 26562/07, ¶ 603; *Ahmet Özkan and Others v. Turkey*, App. No. 21689/93, ¶ 308 Eur. Ct. H.R. (2004) [http://hudoc.echr.coe.int/eng?i=001-61696\[https://perma.cc/8FQ6-98ET\]](http://hudoc.echr.coe.int/eng?i=001-61696[https://perma.cc/8FQ6-98ET]).

<sup>77</sup> See, e.g., *Ahmet Özkan*, App. No. 21689/93, ¶ 297.

detainee, and so on.<sup>78</sup> As discussed below, there is disagreement about the precise IHRL obligations authorities must follow regarding detainees within an armed conflict,<sup>79</sup> but there is general agreement that IHL/LOAC does not require the same rigorous due process standards as IHRL.

### 3. *Procedural Elements*

Finally, IHRL may restrict the type of personnel permitted to conduct operations, and it may also dictate procedures those personnel must follow. For example, under IHRL, any operations conducted by military personnel rather than law enforcement may raise red flags.<sup>80</sup> The use of military equipment and weaponry may similarly prompt significant questions about whether the state is upholding its IHRL commitments. International human rights law further mandates that states must set forth and follow plans and procedures in conducting security operations, including, if possible, assessing operations in advance.<sup>81</sup> And states must adequately investigate and evaluate operations afterward to assess possible human rights violations that may have occurred.<sup>82</sup>

### 4. *Extraterritoriality Issues*

Although IHRL seems to provide a clear, stringent framework for regulating the counterterrorism activities of states, it should be noted that some of these counterterrorism activities raise complicated jurisdictional questions that could thwart the applicability of IHRL and may vary depending on the type of operation.<sup>83</sup> In particular, most global and regional IHRL treaties include provisions stating that

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<sup>78</sup> For a good overview of these obligations under the European Convention, see *Mohammed and Others v. Ministry of Defence and Another* [2017] UKSC 1, 18–19 (appeal taken from EWHC & EWCA (Civ)); *Serdar Mohammed v. Ministry of Defence* [2017] UKSC 2, 2 (appeal taken from EWHC & EWCA (Civ)).

<sup>79</sup> For a more detailed discussion of different interpretations of IHRL as it applies to extraterritorial military detention, see Dickinson, *Administrative Law Values*, *supra* note 34.

<sup>80</sup> See, e.g., *McCann and Others v. United Kingdom*, App. No. 18984/91, ¶ 212, ECHR (1995), translated in 41 LOY. L.A. INT'L & COMP. L. REV. 1039 (2018), <https://hudoc.echr.coe.int/eng?i=001-57943> [<https://perma.cc/6PAS-WU9>] (noting that it was not clear whether military personnel had the same level of training that police officers are required to have about the legal responsibilities law enforcement officials have before using lethal force).

<sup>81</sup> See, e.g., *id.*, ¶¶ 11, 54, 183, 203; see also *Carandiru v. Brasil*, Case 11.291, Inter-Am. Comm'n. H.R., Report No. 34/00, OEA/Ser.L./V/II.106, doc. 3 rev. ¶¶ 61, 66, 91 (1999).

<sup>82</sup> See, e.g., *Finogenov v. Russia*, 2011-VI Eur. Ct. H.R. 365, ¶ 282; *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99, ¶ 166; *Cruz Sánchez v. Perú*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 292 (Apr. 17, 2015).

<sup>83</sup> For a comprehensive examination of these issues, see generally YUVAL SHANY, *THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS LAW* (forthcoming 2021).

these obligations apply within the “territory” or “jurisdiction” of the state.<sup>84</sup> Accordingly, a key question is the extent to which the idea of “jurisdiction” in these treaties should include counterterrorism activities undertaken extraterritorially.

The United Nations committees charged with monitoring states’ implementation of global human rights treaties and United Nations Special Rapporteurs have taken a broad approach to jurisdiction. They have generally concluded that these treaties impose obligations on states parties globally regardless of location or type of activity. Thus, the United Nations Human Rights Committee, which monitors the ICCPR, has articulated a framework that essentially would require the global application of that treaty.<sup>85</sup> Similarly, the United Nations Special Rapporteur for Summary Executions has argued that, with respect to the use of lethal force, “the legality of a killing outside the context of armed conflict is governed by human rights standards . . . .”<sup>86</sup>

Regional courts and tribunals have adopted somewhat varying jurisprudence on the issue. The European Court of Human Rights has adopted a context-specific approach. Although cases have fluctuated in their precise formulation, relevant factors include the degree of power or control that state agents have over rights-

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<sup>84</sup> See, e.g., ICCPR, *supra* note 58, art. 2.1 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”); European Convention, *supra* note 63, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”); American Convention, *supra* note 64, art. 1 (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . . .”).

<sup>85</sup> For example, the recent General Comment 36 of the United Nations Human Rights Committee, which interprets the right life as set forth in Article 6 of the ICCPR, articulated a very broad view of the scope of the treaty as defined in Article 2 (1): “In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.” *General Comment No. 36, supra* note 67, ¶ 63. This approach, which holds that the treaty’s obligations extend to persons directly or foreseeably “impacted” by state operations is much broader than that of the European Court of Human Rights, interpreting an analogous provision of the European Convention discussed below. Commentators have suggested that the “impact” approach essentially imposes global obligations on states. See, e.g., Daniel Møgster, *Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR*, EJIL: TALK! (Nov. 27, 2018), <https://www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/> [<https://perma.cc/M9AK-Q22V>]. For an overview of approaches to extraterritoriality under human rights treaties, see KAREN DA COSTA, *THE EXTRATERRITORIAL APPLICATION OF SELECTED HUMAN RIGHTS TREATIES* (2013); MARKO MILANOVIC, *THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (2011).

<sup>86</sup> *Alston Report, supra* note 57, ¶ 31.

bearing individuals, as well as effective or overall control by a state of a particular territory.<sup>87</sup> The Inter-American Court of Human Rights has taken a somewhat broader view, recently concluding that IHRL obligations extend beyond circumstances in which the state controls persons or territory to include situations in which there is a “causal” nexus between conduct performed within the territory of the State and a human rights violation occurring abroad.<sup>88</sup> Similarly, the African Commission on Human and People’s Rights (African Commission) has issued a general comment asserting that state obligations under the Charter are triggered not only when the state has “effective authority, power, or control over . . . the victim,” but also over the “perpetrator.”<sup>89</sup>

Thus, assuming the jurisdictional hurdles can be overcome, IHRL provides a robust framework for regulating the counterterrorism activities of a state. Treating terrorist acts as crimes, this body of law requires states to conduct rights-based law

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<sup>87</sup> Thus, when a state agent has custody over an individual in detention, the applicability of Convention obligations is most clear. *See, e.g., Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99, ¶ 136. The use of lethal force presents a more open question, with ground operations in areas controlled by the state more likely to trigger Convention obligations than operations conducted from the air. *See Issa v. Turkey*, App. No. 31821/96, 41 Eur. Ct. H.R. 23, ¶ 71 (Nov. 16, 2004) (“[A] State may . . . be held accountable for violation of Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating . . . in the latter State[.]”); *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333 (concluding that Convention obligations do not extend to airstrikes in countries outside Council of Europe countries).

<sup>88</sup> The Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 95, 101–03 (Nov. 15, 2017). The court, therefore, did not quite go so far as to conclude that state obligations are triggered for every act imputed to a state agent, but did determine the state has a duty of care with respect to the extraterritorial acts of its agents. For a discussion of extraterritoriality in this advisory opinion, see Antal Berkes, *A New Extraterritorial Jurisdictional Link Recognized by the IACtHR*, BLOG EUR. J. INT’L L. (Mar. 28, 2018), <https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/> [<https://perma.cc/5DRU-ULDV>]; Maria L. Banda, *Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights*, 22 AM. SOC’Y INT’L L. INSIGHTS (May 10, 2018), <https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human> [<https://perma.cc/23J4-KSLU>].

<sup>89</sup> Afr. Comm’n on Hum. & People’s Rts., *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)*, ¶ 14 (Nov. 18, 2015) [hereinafter *General Comment No. 3*]. For an overview of extraterritoriality in the African human rights system, see Lilian Chenwi & Takele Soboka Bulto, *Extraterritoriality in the African Regional Human Rights System from a Comparative Perspective*, in *EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS FROM AN AFRICAN PERSPECTIVE* 13–62 (Lilian Chenwi & Takele Soboka Bulto eds. 2018). Moreover, the Commission determined that a state is responsible not only when it “exercises effective control over the territory on which the victim’s rights are affected,” but also if the state “engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life.” *General Comment No. 3*, at ¶ 14.

enforcement operations rather than allowing states to treat terrorists as part of an ongoing global war.

*B. The International Humanitarian Law/Law of Armed Conflict Paradigm*

International humanitarian law, also known as the law of armed conflict (IHL/LOAC), provides a far more permissive framework for counterterrorism operations than the law-enforcement/human rights model. The precise rules differ depending on the type of armed conflict—either international or non-international. Because contemporary counterterrorism operations do not generally entail international armed conflicts between and among states, this Article focuses on the rules for non-international armed conflicts (NIACs). But the fundamental principles of this body of law are the same in both types of conflicts. These principles, which include distinction, proportionality, feasible precautions, and military necessity,<sup>90</sup> seek to protect human dignity even in the midst of armed conflict. Yet, applying these principles generally gives broader leeway to those conducting armed conflict than IHRL would allow.

*1. The Use of Lethal Force*

To begin with, under IHL/LOAC, there would generally be no obligation to capture, rather than kill, a legitimate target taking part in hostilities,<sup>91</sup> assuming that the armed forces conducting the strike followed the fundamental principles of IHL/LOAC. The principle of distinction mandates that only military objects or certain types of individuals may be targeted for attack. Civilians<sup>92</sup> and civilian objects,<sup>93</sup> for example, may not be targeted. But those who are combatants<sup>94</sup> or who are taking a direct part in hostilities<sup>95</sup> may be the object of attack (provided other IHL/LOAC principles are followed), and there is no obligation to capture rather than kill them.

To be sure, there is considerable disagreement about how individuals are classified. For example, individuals taking a direct part in hostilities may be targeted only for such time as they are doing so.<sup>96</sup> Yet states and other entities disagree about

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<sup>90</sup> For the U.S. view on these principles, see 2016 FRAMEWORKS REPORT, *supra* note 19, at 20–21.

<sup>91</sup> See Michael N. Schmitt, *Wound, Capture or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants,'* 24 EUR. J. INT'L L. 855 (2013). For a contrary view, see Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819 (2013).

<sup>92</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51.3, *adopted* June 8, 1977, 1125 U.N.T.S. 3, 26 [hereinafter Protocol I].

<sup>93</sup> *Id.* art. 52.1.

<sup>94</sup> *Id.* art. 43.2.

<sup>95</sup> *Id.* art. 51.3.

<sup>96</sup> *Id.*

the scope of this rule and its elements.<sup>97</sup> In addition, separate from that question, the United States has maintained that mere membership in a particular armed group deemed hostile to the United States, such as specific terrorist organizations, renders one subject to attack.<sup>98</sup> Other states have disagreed with such a broad classification, asserting instead that the *only* relevant question in a NIAC is whether the individual is taking a direct part in hostilities.<sup>99</sup>

Even apart from the “capture versus kill” decision, IHL/LOAC also provides a very different approach from IHRL regarding the use of lethal force. For example, IHL/LOAC does not require armed forces to assess the imminence of a threat before deploying lethal force.<sup>100</sup> Rather, the key issue is whether those deploying force are respecting the fundamental principles of IHL/LOAC. Thus, in addition to satisfying the principle of distinction discussed above, armed forces would need to determine whether military necessity justified the attack,<sup>101</sup> whether any precautions such as dropping leaflets or providing other warnings in the area of the attack were feasible,<sup>102</sup> and whether the attack was proportionate.<sup>103</sup>

Accordingly, military authorities applying the principle of proportionality must assess whether an attack is expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, to the degree that the civilian harm would be excessive in relation to the concrete and direct military advantage anticipated.<sup>104</sup> This calculus, while significant, is much less restrictive than the corresponding duty of care under IHRL, which, as noted above, requires authorities to ensure that civilians will not be harmed.

## 2. Detention

Detention obligations also differ under IHL/LOAC from those under IHRL. First, considerable ambiguity remains regarding states’ obligations in NIACs with regard to detainees, who would not qualify as prisoners of war (POWs) because that

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<sup>97</sup> See, e.g., INT’L COMM. RED CROSS, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 5–63 (2009) (prepared by Nils Melzer) (“The Interpretive Guidance provides a legal reading of the notion of ‘direct participation in hostilities’ with a view to strengthening the implementation of the principle of distinction.”); Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 INT’L L. STUD. 181, 188 (2012).

<sup>98</sup> 2016 FRAMEWORKS REPORT, *supra* note 19, at 20.

<sup>99</sup> See, e.g., HCJ 769/02 Pub. Comm. Against Torture v. Israel 62(1) PD 507, ¶ 24 [2006] (Isr.), reprinted in 46 INT’L LEGAL MATERIALS 375, 385 (2007). Under this framework, membership in a group, and the role an individual plays within that group, might be relevant to determine whether that individual performs a “continuous combat function.”

<sup>100</sup> Protocol I, *supra* note 92, arts. 51.2, 51.5(b), 57.2(a)(iii).

<sup>101</sup> *Id.* arts 51.5(b), 57.2(a)(iii), 54.5.

<sup>102</sup> *Id.* art. 57.

<sup>103</sup> *Id.* arts. 51.5(b), 57.2(a)(iii).

<sup>104</sup> *Id.* arts. 51.5(b), 57.2(a)(iii).

status is reserved only for certain detainees in international armed conflicts.<sup>105</sup> Second, even assuming fairly substantive obligations regarding treatment and process—for example, to establish the status of detainees—IHL/LOAC could permit detention for the duration of hostilities for some categories of detainees, and does not necessarily mandate that detainees be charged with, and prosecuted for, a crime within a particular time frame or even at all.<sup>106</sup>

### 3. *Procedural Obligations*

Finally, IHL/LOAC does require states to follow certain procedures, but they do not match the procedural obligations of IHRL. The IHL/LOAC requirement to take feasible precautions<sup>107</sup> could be construed as a kind of procedural rule—to consider whether civilians could be warned in a particular operation. This body of law also contemplates a role for lawyers to provide decision-making advice, although as a practical matter, the extent of that advice may differ depending on the time available to make a decision about an operation, a distinction between so-called “deliberate” and “dynamic” targeting.<sup>108</sup> If there is a possibility that war crimes have occurred, IHL/LOAC imposes an obligation to investigate and prosecute those crimes.<sup>109</sup> But these procedural requirements are not as extensive as the type of advance planning or after-the-fact investigation mandated by IHRL.

### C. *The Jus Ad Bellum Paradigm*

The *jus ad bellum* is another body of law relevant to extraterritorial counterterrorism operations because it regulates the resort to force by one state in the territory of another state. Unlike the differences among states over the scope of IHL/LOAC and its intersection with IHRL, the applicability of this body of law to extraterritorial counterterrorism operations is not generally a matter of disagreement. But because states have differed in their interpretation of some key elements, and categories from this body of law have found their way into the U.S. policies described below, I will briefly mention it here. Furthermore, if the United States were to adopt a more limited view of armed conflict zones and the applicability of IHL/LOAC, differences between the United States and allies over the interpretation of *ad bellum* categories could become even more apparent.

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<sup>105</sup> See Third Geneva Convention, *supra* note 40.

<sup>106</sup> For a more detailed treatment of this issue, see Dickinson, *Administrative Law Values*, *supra* note 34.

<sup>107</sup> Protocol I, *supra* note 92, art. 57.

<sup>108</sup> See Jennifer O'Connor, Gen. Counsel, U.S. Dep't of Def., *Applying the Law of Targeting to the Modern Battlefield*, Remarks at N.Y.U. Sch. of Law (Nov. 28, 2016) <https://dod.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf> [<https://perma.cc/D74N-XRWA>].

<sup>109</sup> See Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L. SEC. J. 31, 36–39 (2011).



The key principles of the *jus ad bellum* can be found in the United Nations Charter<sup>110</sup> and customary international law.<sup>111</sup> States may not generally intervene<sup>112</sup> in another state without its consent except in two circumstances: if the United Nations Security Council has authorized the intervention,<sup>113</sup> or if the state conducting the intervention is acting in individual or collective self-defense.<sup>114</sup> Although some advocate a third exception to justify intervention on humanitarian grounds,<sup>115</sup> this exception is not widely accepted.<sup>116</sup>

The self-defense exception has sparked disagreement with regard to counterterrorism operations. Under this doctrine, a state may act if it (or an ally) is under armed attack or one that is imminent, and any response is necessary and proportionate.<sup>117</sup> As discussed below, the United States differs from some allies on the meaning of “imminence.” Furthermore, in the case of attacks by non-state actors, a rule has emerged that a state may respond on the territory of another state where those non-state actors are located if that state is “unwilling or unable” to mitigate the threat posed by the non-state actors.<sup>118</sup>

#### *D. States’ Contrasting Approaches*

The United States and other allied nations have often embraced contrasting legal paradigms when they have engaged in extraterritorial counterterrorism

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<sup>110</sup> See U.N. Charter, arts. 2, 39–43, 51

<sup>111</sup> See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

<sup>112</sup> U.N. Charter art. 2, ¶ 4.

<sup>113</sup> *Id.* arts. 39–43.

<sup>114</sup> *Id.* art. 51.

<sup>115</sup> See, e.g., Letter from the Rt. Hon. Hugh Robertson MP, UK Minister of State, Foreign & Commonwealth Office, to the Rt. Hon. Sir Richard Ottaway MP UK House of Commons (Jan. 14, 2014), <http://justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf> [<https://perma.cc/P468-2STC>] (providing responses to questions about the UK Government’s position on humanitarian intervention and the responsibility to protect); Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, EJIL: TALK! (Oct. 4, 2013), <https://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward/> [<https://perma.cc/U69P-KXDD>] (discussing “why President Obama did not violate international law by threatening to use force in Syria in the face of a persistent Russian veto, and how the Syria crisis might best evolve from here”).

<sup>116</sup> Notably, the United States does not acknowledge the legal theory in its summary of *ad bellum* law in the *Frameworks Report*. 2016 FRAMEWORKS REPORT, *supra* note 19, at 8–11.

<sup>117</sup> U.N. Charter art. 51; *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 35, 237 (June 27).

<sup>118</sup> For a discussion of this emerging rule and disputes about it, see Deeks, *supra* note 44, at 486.

operations outside traditional battlefields. In general, the United States has adopted the IHL/LOAC framework, also sometimes dubbed the “conduct of hostilities approach,” and has maintained that IHL/LOAC applies globally to operations against specific terrorist groups.<sup>119</sup> Furthermore, the United States has taken a fairly broad approach to defining what counts as self-defense under the *jus ad bellum*. By contrast, many U.S. allies have maintained that the conduct of hostilities approach must be more geographically and temporally constrained.<sup>120</sup> Outside this more circumscribed zone of armed conflict, the law enforcement/IHRL paradigm would more likely govern, even as to Al Qaeda and ISIS members, along with the *jus ad bellum* in the targeting context. And some of these countries have also questioned the broad approach of the United States to *ad bellum* rules.

### 1. United States

The United States has essentially adopted the view that IHL/LOAC applies globally to certain categories of terrorist groups, such as Al Qaeda, some Al Qaeda affiliates, and ISIS. Probably the clearest articulation of this approach can be found in a report issued during the last days of the Obama administration, the *2016 Report on Legal and Policy Frameworks Guiding the United States Use of Military Force and Related National Security Operations*, often termed the “Frameworks Report.”<sup>121</sup> This report synthesizes a variety of prior public statements by top U.S. officials and assertions in public documents. It reflects the views of the entire U.S. executive branch. Although the Trump administration reportedly changed some of the policies outlined in the Obama administration document, a 2018 report to Congress indicates that the Trump administration did not deviate significantly from the interpretation of international legal frameworks that the Obama administration report maps out.<sup>122</sup>

In particular, the *2016 Frameworks Report* stresses that the United States applies a conduct of hostilities model to extraterritorial counterterrorism operations. For example, the *2016 Frameworks Report* notes that, “in armed conflicts with non-State actors that are prone to shifting operations from country to country, the United States does not view its ability to use military force against a non-State actor with which it is engaged in an ongoing armed conflict as limited to ‘hot’ battlefields.”<sup>123</sup>

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<sup>119</sup> 2016 FRAMEWORKS REPORT, *supra* note 19, at 11.

<sup>120</sup> *See infra* notes 128–60 and accompanying text.

<sup>121</sup> 2016 FRAMEWORKS REPORT, *supra* note 19, at 1.

<sup>122</sup> 2018 FRAMEWORKS REPORT, *supra* note 10, at 1. The report does not identify any changes to the international legal frameworks and notes that, “[i]f a particular item or topic area from the original [Frameworks] report is not covered in this update or its classified annex, it remains unchanged from the original report.” *Id.*; *see also* Allison Murphy & Scott R. Anderson, *We Read the New War Powers Report so You Don’t Have to*, LAWFARE (Mar. 14, 2018, 5:37 PM), <https://www.lawfareblog.com/we-read-new-war-powers-report-so-you-dont-have> [<https://perma.cc/FL6H-3VQA>].

<sup>123</sup> 2016 FRAMEWORKS REPORT, *supra* note 19, at 11.

The report treats groups such as Al Qaeda and ISIS as enemy forces within this ongoing, potentially global, armed conflict.

In addition to viewing the armed conflict as broad in geographic scope, the United States has taken an expansive approach to the temporal duration of the armed conflict. Thus, it has asserted that the armed conflict against terrorist groups will not end until “the United States will degrade and dismantle the operational capacity and supporting networks of terrorist organizations like al-Qa’ida to such an extent that they will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States.”<sup>124</sup> Only at that point will there “no longer be an ongoing armed conflict between the United States and those forces.”<sup>125</sup>

This view leads the United States to apply IHL/LOAC to a variety of extraterritorial counterterrorism operations, including targeting and detention. The United States also takes the position that, within armed conflict, IHL/LOAC rules generally displace any otherwise applicable IHRL rules. Thus, for the United States, the relatively more permissive IHL/LOAC rules govern, whether in making targeting decisions or in detaining terrorism suspects linked to the armed conflict.

The United States also takes a broad view of the rules allowing the use of force in self-defense under the *jus ad bellum*. Although such use of force is permissible only if the force is necessary and an armed attack has occurred or is imminent, the United States has interpreted “imminence” quite expansively, emphasizing that imminence must be understood in light of “modern-day capabilities, techniques, and technological innovations of terrorist organizations.”<sup>126</sup> Moreover, the United States has said that once it determines that it is acting in self-defense against a certain group, “it is not necessary as a matter of international law to reassess whether an armed attack is occurring or imminent prior to every subsequent action taken against that group, provided that hostilities have not ended.”<sup>127</sup>

## 2. *Alternative Approach of Some U.S. Allies: Germany and the United Kingdom*

Some U.S. allies have embraced a more constrained approach to the reach of IHL/LOAC and instead have given broader scope to the law enforcement paradigm, which often entails applying IHRL to extraterritorial operations against terrorist

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<sup>124</sup> *Id.* at 11–12.

<sup>125</sup> *Id.* at 12.

<sup>126</sup> *Id.* at 9.

<sup>127</sup> *Id.* at 11.

groups.<sup>128</sup> Some allies have also adopted a more limited view of the conditions under which force is permissible using a self-defense theory.<sup>129</sup>

The narrower approach of these allies applies in part to the geographic scope of any armed conflict occurring with terrorist organizations. Their approach limits the application of the IHL/LOAC paradigm to traditional, geographically defined, armed conflict zones. Thus, the domain of a NIAC against terrorist organizations is confined to the geographic boundaries of the territory where the specific armed conflict is most obviously occurring. As John Brennan, the Assistant to the President for Homeland Security and Counterterrorism, noted in 2011, “Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the ‘hot’ battlefields.”<sup>130</sup> For such states, IHL/LOAC targeting and detention is generally permissible only in a territorial battlefield.<sup>131</sup> Outside these zones, such states typically follow a law-enforcement paradigm that generally entails the implementation of IHRL, although as discussed above, the precise scope of the specific human rights obligations depends on an analysis of whether each obligation applies extraterritorially. Thus, a 2013 report on a meeting of experts and European government officials noted that, as to extraterritorial targeted killings, “[a] core divergence between the U.S. and European positions revolves around their respective views that contemporary targeted killing operations were conducted under the paradigm of armed conflict and hence governed by IHL, or fell under law enforcement operations regulated by human rights law.”<sup>132</sup> There is a similar divergence as to extraterritorial detention operations because the ECHR has specifically held that the human rights obligations of the European Convention apply to extraterritorial detention.

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<sup>128</sup> See Nehal Bhuta & Hin-Yan Liu, *Targeted Killing, Unmanned Aerial Vehicles and EU Policy*, GLOBAL GOVERNANCE PROGRAMME 1, 3 (Mar. 2013), [http://cadmus.eui.eu/bitstream/handle/1814/27737/2013-1-Policy%20Brief\\_RSCAS\\_GGP.PDF?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/27737/2013-1-Policy%20Brief_RSCAS_GGP.PDF?sequence=1) [<https://perma.cc/XB5B-PS26>]; John O. Brennan, Ass’t to the President for Homeland Sec. & Counterterrorism, Remarks at the Program on Law and Security at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> [<https://perma.cc/TN9L-TXAK>] [hereinafter Brennan, Harvard Law School Remarks]; see also Marco Sassoli, *The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 34, 56 (Orna Ben-Naftali ed. 2011) (stating that many U.S. allies limit the applicability of IHL/LOAC to hot battlefields such as Afghanistan).

<sup>129</sup> See, e.g., HOUSE OF LORDS HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS, THE GOVERNMENT’S POLICY ON THE USE OF DRONES FOR TARGETED KILLING, SECOND REPORT OF SESSION 2015–16, HL Paper 141, HC 574, at 45–48 (UK) [hereinafter 2016 UK Parliament Drone Report].

<sup>130</sup> See Brennan, Harvard Law School Remarks, *supra* note 128; Sassoli, *supra* note 128, at 56.

<sup>131</sup> Sassoli, *supra* note 128, at 228.

<sup>132</sup> Bhuta & Liu, *supra* note 128.

In addition to taking a more geographically constrained approach to armed conflict, many U.S. allies also view armed conflicts as more limited temporally than the United States. They would not necessarily agree that the armed conflict against a non-state actor only ends when that non-state actor is “unable to launch a strategic attack.” Such language in the *2016 Frameworks Report* goes beyond existing statements about the end of hostilities under IHL/LOAC in international courts and tribunals.<sup>133</sup> Finally, many U.S. allies do not share the expansive U.S. conception of “imminence” in the doctrine of self-defense within the *jus ad bellum* discussed above.<sup>134</sup>

It is often difficult to pinpoint states’ precise views because government officials do not always articulate them publicly. As noted in the summary of the 2013 meeting of experts and European officials cited above, “European governments reject the paradigm [of global war], but do not comment on U.S. strikes undertaken in reliance on the paradigm.”<sup>135</sup> Moreover, different branches within each government sometimes articulate different positions. Views can evolve over time. And views may differ as to different types of military operations, such as targeted killings and detention. A series of recent cases, reports, and publications have shed some more light on the positions of two key U.S. allies: Germany and the United Kingdom.

(a) *Germany*

Several cases in Germany highlight the discrepancy between German and U.S. approaches to the legal framework governing extraterritorial counterterrorism operations. These cases illustrate the divergence of views between the United States and Germany over the scope of the battlefield, the role of IHRL in such operations, and what constitutes self-defense. The cases also demonstrate the complexity of assessing a particular government’s position when litigation exposes differences in views among multiple branches of a country’s government. Despite this complexity, however, it is clear that there is substantial daylight between the U.S. and German approaches to interpreting the scope and applicability of international legal paradigms.

The most recent German case capturing such discrepancies arises from ongoing litigation challenging German involvement in U.S. targeted killing operations in Yemen through the use of Ramstein airbase, located in southwestern Germany.<sup>136</sup> Reports had indicated that Ramstein contains a U.S. drone control center, where data

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<sup>133</sup> For an excellent overview of the different approaches to the end of armed conflict, see Deborah N. Pearlstein, *Law at the End of War*, 99 MINN. L. REV. 143 (2014).

<sup>134</sup> Bhuta & Liu, *supra* note 128, at 3.

<sup>135</sup> *Id.* at 4. The report further notes that “[s]ome experts advocate a more vocal objection to the U.S. invocation of the armed conflict paradigm . . . because . . . no European State has accepted this paradigm even after a series of terrorist attacks post-9/11.” *Id.* at 3.

<sup>136</sup> Emma DiNapoli, *German Courts Weigh Legal Responsibility for U.S. Drone Strikes*, LAWFARE (Apr. 4, 2019, 9:18 AM), <https://www.lawfareblog.com/german-courts-weigh-legal-responsibility-us-drone-strikes> [<https://perma.cc/L5KZ-JEBZ>].

is routed via fiber optic cables to the drones conducting the strikes.<sup>137</sup> Relatives of individuals killed in U.S. strikes brought suit in German courts under the German Basic Law (similar to a constitution), including its right to life provision and a provision that allows German courts to consider international law.<sup>138</sup> The lower court dismissed the case on the ground that the issues were too sensitive for judicial review, but an appellate court reversed, in part.<sup>139</sup>

Without drawing conclusions as to the legality of any specific strikes, the appellate court concluded that Germany has an obligation to investigate the strikes in part because of systematic problems it identifies regarding U.S. interpretation of international law.<sup>140</sup> In particular, the decision cited as problematic the U.S. assumption that there is a global armed conflict against al Qaeda and its affiliates, rather than assessing the existence of an armed conflict in a particular geographic area.<sup>141</sup> Although the court ultimately concluded that an armed conflict was occurring in the area of Yemen where the strikes occurred, it cited the U.S. approach to this issue as one reason why Germany must conduct its own independent investigation into the legality of the strikes.<sup>142</sup>

The court also expressed concern about the U.S. view regarding the content of several other international legal commitments applicable to the strikes. For example, the court signaled that it would not necessarily accept the U.S. interpretation of the *jus ad bellum*.<sup>143</sup> The court expressed concern about the U.S. failure to recognize the applicability of human rights protections guaranteeing the right to life within an armed conflict.<sup>144</sup> And the court noted that the United States takes an overly broad view of persons who may be targeted under IHL/LOAC itself.<sup>145</sup> At the time this Article goes to press, another appellate court has now limited the scope of this decision, but plaintiffs have appealed that ruling to the German Constitutional

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See Leander Beinlich, *Germany and Its Involvement in the U.S. Drone Programme Before German Administrative Courts*, EJIL: TALK! (Apr. 8, 2019), <https://www.ejiltalk.org/germany-and-its-involvement-in-the-us-drone-programme-before-german-administrative-courts/> [<https://perma.cc/KF2Z-78DG>]; Jürgen Bering, *Legal Explainer: German Court Reins in Support for U.S. Drone Strikes*, JUST SECURITY (Mar. 22, 2019), <https://www.justsecurity.org/63336/legal-explainer-german-court-reins-in-support-for-u-s-drone-strikes/> [<https://perma.cc/M6G8-4ZG3>]; see also DiNapoli, *supra* note 136. The court applied international law pursuant to Article 2 (providing for a right to life) and Article 25 (incorporating international law into German law) of Germany's Basic Law. Although the court determined that there was a NIAC in Yemen at the time, the court nonetheless concluded that the U.S. view of a global armed conflict raised questions about whether the United States was conducting its targeting operations consistent with international law.

<sup>142</sup> Bering, *supra* note 141.

<sup>143</sup> DiNapoli, *supra* note 136.

<sup>144</sup> Bering, *supra* note 141.

<sup>145</sup> *Id.*

Court.<sup>146</sup> No matter how the highest court ultimately frames its decision, the litigation illustrates that German officials must grapple with interpretations of international law that contrast with those of the United States, even as they collaborate with the United States on counterterrorism operations.

(b) *The United Kingdom*

The United Kingdom has also differed in its approach to the legal paradigms applicable to extraterritorial counterterrorism operations, as compared to the United States. The full contours of the UK view are somewhat difficult to discern, as public debates within the United Kingdom clarify some aspects but leave others ambiguous. In particular, governmental actors within different branches of government have expressed slightly varying positions. Nonetheless, it is clear that, like Germany, the United Kingdom generally adopts a more confined view of the battlefield than does the United States.

A 2016 exchange between a Parliamentary Committee and the UK executive branch regarding drone strikes targeting UK citizens fighting for ISIS highlights areas of contrast between the United Kingdom and the United States, even as it suggests that Parliament and the executive branch do not necessarily see eye to eye on every dimension of the legal issues in question.<sup>147</sup> The United Kingdom conducted one strike directly and worked “hand in glove” with the United States, which conducted the others.<sup>148</sup> Parliament launched an inquiry to determine the legal basis of the strikes.<sup>149</sup> Although the Government clarified that it believed the particular strikes were conducted within a NIAC (a point that was unclear at the start of the inquiry), it also stated that it might use lethal force (via drone or otherwise) extraterritorially outside of armed conflict in places such as in Libya.<sup>150</sup> Significantly, the inquiry concluded that “the UK government does not take the U.S. position that it is in a global war against ISIL/Da’esh such that it can use lethal force against them anywhere in the world.”<sup>151</sup>

Parliament and the UK Government appeared to differ slightly, however, on the legal basis for any use of lethal force by the United Kingdom outside of armed conflict. The Parliamentary committee that conducted the inquiry concluded that the legal basis for action outside of armed conflict would be IHRL and the law regarding

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<sup>146</sup> See David Rising, *US Drone Strike Case Appealed to Germany’s Highest Court*, ASSOC. PRESS (Mar. 23, 2021), <https://apnews.com/article/europe-berlin-germany-courts-international-law-18d8684b6c2a5eaa55166795dac721f2> [<https://perma.cc/VN9L-W6CT>].

<sup>147</sup> See 2016 UK Parliament Drone Report, *supra* note 129; see also HOUSE OF COMMONS, THE GOVERNMENT’S RESPONSE TO OUR REPORT, 2015–16 (UK) [https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74703.htm#\\_idTextAnchor005](https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74703.htm#_idTextAnchor005) [<https://perma.cc/7RP7-E4YR>] (delineating UK Government response to the 2016 UK Parliament Drone Report, *supra* note 129).

<sup>148</sup> See 2016 UK Parliament Drone Report, *supra* note 129, at 16.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 7.

<sup>151</sup> *Id.* at 50.

national self-defense.<sup>152</sup> Yet, according to the inquiry report, the UK Government had asserted it would apply IHL/LOAC and the law of national self-defense in such circumstances, contending that IHL/LOAC sufficiently incorporated IHRL.<sup>153</sup> The committee concluded, however, that it took issue with the Government's assertion that following IHL/LOAC outside of armed conflict will satisfy any human rights obligations, as the "conventional view" is that IHL/LOAC does not apply outside of armed conflict.<sup>154</sup>

In the detention context, the 2017 decision of the UK Supreme Court in the *Serdar Mohammed*<sup>155</sup> case further highlights the difference in approaches between the United Kingdom and the United States. In that case, detainees held by the United Kingdom in extraterritorial military detention challenged various aspects of that detention under the European Convention. Although that case involved detention *within* armed conflict (in Afghanistan), the court's willingness to apply relatively robust due process protections in that context indicates that such protections (or even more stringent protections) would govern any extraterritorial military detention conducted by the United Kingdom outside the bounds of armed conflict.

### 3. *Ambiguity and Overlap*

The conflict between the legal paradigms discussed above may not always be quite as sharp as it may seem at first blush. It is important to acknowledge that the precise rules within each of the paradigms described above are often contested and may, in some contexts, be stretched to resemble one another. In addition, the conduct of hostilities and law-enforcement paradigms are not necessarily mutually exclusive and may overlap in some circumstances. Furthermore, both paradigms intersect with the self-defense framework. As a result, the conflict between the conduct of hostilities and law-enforcement approaches may not always be a stark one.

International human rights law, for example, is not a straightjacket and allows room for flexibility when states conduct counterterrorism operations. Indeed, the European Court of Human Rights has in some opinions interpreted human rights obligations, including the right to life, to give states a fair degree of latitude to conduct such operations. In the *Finogenov* decision,<sup>156</sup> for example, the Court addressed a heavy-handed Russian operation to rescue civilians from a terrorist attack on a Moscow theatre in 2002. During the rescue, Russian authorities used military-like tactics and deployed a mysterious gas that killed hundreds of people. Although the Court faulted Russia for insufficient accountability and transparency,

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<sup>152</sup> *Id.* at 8, 51

<sup>153</sup> *Id.* at 6–7.

<sup>154</sup> *Id.* at 8, 51. *See also* HOUSE OF COMMONS, THE GOVERNMENT'S RESPONSE TO OUR REPORT, *supra* note 147.

<sup>155</sup> *Mohammed and Others v. Ministry of Defence and Another* [2017] UKSC 1, 3 (appeal taken from EWHC & EWCA (Civ)); *Serdar Mohammed v. Ministry of Defence* [2017] UKSC 2, 2–5 (appeal taken from EWHC & EWCA (Civ)).

<sup>156</sup> *Finogenov v. Russia*, 2011-VI Eur. Ct. H.R. 365, ¶ 282.



it took a relatively lenient approach to the underlying substantive rights even within Russian territory.

Similarly, the precise content of some IHL/LOAC obligations remains uncertain, particularly in NIACs, where the treaty law is less developed. The Geneva Conventions address NIACs primarily only in common article 3, and not all states have ratified Additional Protocol II, which pertains to NIACs. Furthermore, the status of customary international law as it applies to NIACs is contested and ambiguous. States have not helped matters much because they have not generally provided much clarification regarding whether the practices they undertake in NIACs are followed as a matter of legal obligation. The recent Department of Defense Law of War Manual, which runs more than a thousand pages, devotes only one scant chapter to NIACs.<sup>157</sup>

In addition to ambiguity regarding the content of norms, there is also considerable debate about the extent to which the legal paradigms overlap, and if so, how they intersect. Within an armed conflict, under the doctrine of *lex specialis*, is IHL completely inapplicable? Does it govern some situations unrelated to the armed conflict? Or does it govern in some situations related to the armed conflict, such as the interrogation of detainees? Or might it inform the interpretation of standards within IHL/LOAC? There is a multitude of views about this topic. Ken Watkin, who formerly served as Canada's top military lawyer, has noted that it is "no longer practically possible in the post 9-11 period to rely on traditional exclusionary views of the law or provide relatively simple answers based on the 'black-letter' law of the 1949 Geneva Conventions governing inter-state conflict."<sup>158</sup> He observed that the "counterterrorism operating environment is simply too complex to permit such a simple, even static response."<sup>159</sup>

Nevertheless, these approaches continue to serve as competing paradigms that have concrete consequences, and the bottom line in all of this debate is that fundamentally the United States has adopted a very different approach from its allies on these questions. Indeed, the *2016 Frameworks Report* acknowledges these differences and notes that allies meet regularly to address the operational consequences of this disagreement.<sup>160</sup>

## II. LEGALIZED POLICIES FOR COUNTERTERRORISM OPERATIONS

Even as the United States has embraced a war paradigm with respect to the international law regime governing its activities against certain terrorist organizations, it has nonetheless, *as a matter of policy* at the international level, imposed certain additional restrictions on its operations. These restrictions consist

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<sup>157</sup> OFF. OF GEN. COUNS., DEP'T OF DEF., LAW OF WAR MANUAL (June 12, 2015), <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190> [https://perma.cc/P7E6-WFAP].

<sup>158</sup> WATKIN, *supra* note 21, at 272.

<sup>159</sup> *Id.*

<sup>160</sup> See 2016 FRAMEWORKS REPORT, *supra* note 19, at 14.

of rules that are more demanding than the minimum legal requirements the United States has said it is obligated to follow under international law. But they are policies that effectively reflect aspects of the very international human rights norms that the government formally says it is not required to obey.

Historically, states have regularly adopted such restrictions in the form of rules of engagement, which are military rules specific to a particular armed conflict that may exceed the minimum obligations imposed under IHL/LOAC. But the pressures of contemporary armed conflicts, marked by protracted NIACs with terrorist organizations, have sparked new circumstances for such policies. This Part examines two such policies. First, it discusses the Obama administration's policy for targeting terrorist suspects abroad, entitled the Presidential Policy Guidance on Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (PPG).<sup>161</sup> Second, it describes the periodic review board (PRB) process instituted to address the ongoing detention of terrorism suspects at Guantanamo Bay naval base.<sup>162</sup> In both cases, the policies include elements that exceed the legal minimum requirements imposed by IHL/LOAC and resemble, to some degree, elements of IHRL. Moreover, in both cases, although the Trump administration reportedly discarded some aspects of these policies, critical elements appear to have survived even in an administration critical of international legal restrictions.

#### A. The PPG Framework

The PPG provided a detailed framework for using force against terrorists outside territories described as “areas of active hostilities,”<sup>163</sup> in other words, outside geographic areas universally recognized as armed conflict zones. Significantly, the term “areas of active hostilities” does not correspond to any accepted legal category within IHL/LOAC, a point that has sparked some controversy in part because it has enabled the U.S. executive branch to determine unilaterally which territories qualify. The term has been interpreted, however, to refer to territories outside zones that would unequivocally be understood to be sites of armed conflict within existing IHL/LOAC tests for armed conflict. In the *Frameworks Report*, the United States identified the specific places that it deemed at the time to be “areas of active hostilities.” In December 2016, the date of the first *Frameworks Report*, those areas included Afghanistan, Iraq, Syria, designated areas in Libya, and U.S. actions to defend U.S. or partner interests outside the terrorism context, such as the 2016 U.S. military strikes on radar facilities in Houthi-controlled territory in Yemen.<sup>164</sup>

Outside these “areas of active hostilities,” the PPG provided a detailed set of substantive and procedural rules for “direct action” against terrorist targets, including the use of lethal force and capture. With respect to substantive rules, the

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<sup>161</sup> See PPG, *supra* note 12.

<sup>162</sup> See, e.g., Dickinson, *Administrative Law Values*, *supra* note 34.

<sup>163</sup> See PPG, *supra* note 12, introductory text.

<sup>164</sup> 2016 FRAMEWORKS REPORT, *supra* note 19, at 25.

PPG required that lethal force could only be used against a target that posed a “continuing, imminent threat” to U.S. persons.<sup>165</sup> In addition, the PPG mandated that, before lethal action could be taken, a determination had to be made that there was (1) near certainty that the terrorist target is present and that non-combatants would not be injured or killed;<sup>166</sup> (2) an assessment that capture was not feasible at the time of the operation;<sup>167</sup> (3) an assessment that the relevant governmental authorities in the country where action is contemplated were unwilling/unable to effectively address the threat;<sup>168</sup> and (4) an assessment that no other reasonable alternatives existed to effectively address the threat to U.S. persons.<sup>169</sup>

In addition to these substantive rules, the PPG also imposed rigorous procedural requirements. For example, the PPG mandated that certain individuals or entities had to approve operations.<sup>170</sup> In many cases involving the use of lethal force, senior executive branch officials were required to review and approve the operation.<sup>171</sup>

The Trump administration reportedly retained some, but not all, of these requirements.<sup>172</sup> The administration did not release a report of comparable detail outlining its policy, but it acknowledged that “[t]he United States continues, as a matter of policy, to apply heightened targeting standards that are more protective of civilians than are required under the law of armed conflict.”<sup>173</sup> Newspaper accounts supplied additional details. For example, the Trump administration expanded the zones designated as areas of “active hostilities” to include Somalia.<sup>174</sup> With respect to the substantive rules specifically, journalistic accounts suggest that the Trump administration dispensed with the rule that a terrorist target must pose a continuing, imminent threat to U.S. persons and interests and that there must be a near certainty that the terrorist target is present—instead adopting a “reasonable certainty” test.<sup>175</sup>

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<sup>165</sup> PPG, *supra* note 12, § 3A.

<sup>166</sup> *Id.* § 1C(8)(a)–(b).

<sup>167</sup> *Id.* § 1C(8)(d)(i).

<sup>168</sup> *Id.* § 1C(8)(d)(ii).

<sup>169</sup> *Id.* § 1C(8)(d)(iii).

<sup>170</sup> *Id.* § 1.

<sup>171</sup> *Id.* § 4.

<sup>172</sup> See Savage & Schmitt, *Trump Poised*, *supra* note 11.

<sup>173</sup> The Trump administration follow-up report to the 2016 FRAMEWORKS REPORT is quite paltry, but it does acknowledge that there is a targeting policy that includes heightened standards above what IHL/LOAC requires. 2018 FRAMEWORKS REPORT, *supra* note 10, at 7.

<sup>174</sup> See Charlie Savage & Eric Schmitt, *Trump Eases Combat Rules in Somalia Intended to Protect Civilians*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html> [<https://perma.cc/8435-BCVZ>] [hereinafter Savage & Schmitt, *Trump Eases Combat Rules in Somalia*].

<sup>175</sup> Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9-11 War?*, N.Y. TIMES (Oct. 28, 2017) <https://www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html> [<https://perma.cc/3VU5-AZNP>]; see also EXECUTIVE OFF. PRESIDENT, *Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Targets*

But the Trump administration appeared to retain other elements found in the PPG, such as the preference for capture and the requirement that there must be “near certainty” that civilians will not be harmed before lethal force may be used.<sup>176</sup> With respect to the procedural elements, the Trump administration reportedly permitted decision-making to take place at lower levels of command.<sup>177</sup> Indeed, at the time this Article goes to press, the Trump administration policy was finally made public, and it is now evident that the policy also gave discretion to decisionmakers to deviate from the standard “where necessary.”<sup>178</sup> The Biden administration has suspended the Trump policy and is currently reviewing how to modify the policy again.<sup>179</sup>

The elements of the PPG, and to a lesser extent, the Trump administration’s successor policy, exceed the requirements of IHL/LOAC and, I would argue, at least move in the direction of IHRL. Both the substantive standards and the procedures set forth in these policies contain elements that resemble components of the IHRL framework for the use of lethal force. Although the terms used are not exactly the same, the concepts are similar.

For example, under the PPG, U.S. authorities were required to determine that a terrorist target poses a “continuing, imminent threat” to U.S. persons and interests before approving the use of lethal force. This standard far exceeds the targeting standards of IHL/LOAC outlined in Part I. Rather, it looks more like the standard typically mandated by IHRL that authorities may not deploy lethal force except when “strictly” or “absolutely necessary,” limiting the use of such force to circumstances such as when harm is “imminent.” Similarly, the PPG’s preference for capture mirrors IHRL’s rule that lethal force must be a last resort, with no other reasonable alternatives (such as capture). In addition, the PPG resembles IHRL in mandating that there must be “near certainty” civilians will not be harmed before lethal action may be taken. The IHL/LOAC proportionality rule does not even come close to dictating such certainty but rather accepts the grim reality that civilian casualties are lawful within an armed conflict if expected casualties are proportionate to expected military advantage. IHRL, by contrast, requires under some formulations, “due regard” for harm to third parties, and in others, a degree of certainty that third parties will not be injured.

The procedural aspects of the PPG also bear similarities to the obligations of IHRL and far exceed any procedural rules found in IHL/LOAC. As discussed in Part I, IHRL formulations of the right to life encompass obligations on the part of the state to undertake certain procedures such as advance planning before conducting operations that entail the use of lethal force. IHRL does not map out specific procedures per se, but a lack of adequate planning could trigger a violation. Although

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(1)(F), (2)(C), <https://int.nyt.com/data/documenttools/trump-ppg-drone-strike-rules-foia/52f4a4baf5fc54c5/full.pdf> [<https://perma.cc/WH7P-JPVP>] [hereinafter PSP]; Savage, *Trump’s Secret Rules*, *supra* note 11.

<sup>176</sup> Savage & Schmitt, *Trump Poised*, *supra* note 11; Savage, *Trump’s Secret Rules*, *supra* note 11.

<sup>177</sup> See PSP, *supra* note 175; Savage, *Trump’s Secret Rules*, *supra* note 11.

<sup>178</sup> See PSP, *supra* note 175; Savage, *Trump’s Secret Rules*, *supra* note 11.

<sup>179</sup> Savage & Schmitt, *Biden Secretly Limits*, *supra* note 14.

IHL/LOAC might be said to impose some procedural requirements, such as warning civilian populations before military operations where possible, these obligations are less stringent and more flexible. The PPG's rules about levels of authorization, and even the existence of the PPG itself, could be seen to implement the kind of procedural obligation that IHRL envisions.

The Trump administration's successor policy, despite discarding some aspects of the PPG, nonetheless retained elements that still exceed the requirements of IHL/LOAC and move in the direction of IHRL. In particular, the requirement that lethal force may only be used if there is a "near certainty" civilians will not be harmed goes far beyond the IHL/LOAC proportionality rule. And although the Trump administration's successor policy reportedly dispensed with rules mandating approval of operations by senior civilian officials and gave decisionmakers the discretion to deviate from the standards "where necessary," the existence of the policy itself is more than IHL/LOAC would demand. As in the case of the PPG, the successor policy might go some distance toward satisfying the kind of procedural planning obligations imposed by IHRL.

It should be noted that the PPG could also be interpreted as incorporating some elements of the *jus ad bellum*. In particular, the PPG's requirement that U.S. officials determine that the territorial state authorities are unwilling or unable to address the particular threat resembles the emerging doctrine that the use of force by one state in the territory of another in self-defense could be permissible if the territorial state is unwilling or unable to address the threat. Also, the PPG's requirement that there must be a "continuing, imminent threat" to U.S. persons and interests could be viewed as incorporating elements of the *jus ad bellum* self-defense doctrine (which includes a showing of an armed attack or an imminent armed attack) in addition to or in the alternative to an IHRL "imminence" rule for self-defense.

Thus, as a matter of policy, both the PPG and the Trump administration's successor policy can be seen to incorporate some elements of IHRL and the *jus ad bellum*. To be sure, it is a little unclear precisely which legal categories the policies are adopting. And the PPG (and presumably the Trump administration successor) do not specifically acknowledge that they are incorporating legal categories at all. But the bottom line is that the United States has adopted restrictive rules—both in the PPG and in the Trump administration's successor policy—that are more akin to IHRL standards than to the IHL/LOAC standards that the United States continues to insist are the appropriate legal rules in this context.

### *B. The PRB Framework*

As in the case of targeting, the United States has embraced a war paradigm for the detention of terrorism suspects captured outside the United States and held in military detention, even far from conventional battlefields. Since 9-11, the United States has held thousands of persons in military detention extraterritorially, not only in Iraq and Afghanistan but also notably in Guantanamo Bay.<sup>180</sup> Across multiple

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<sup>180</sup> See Dickinson, *Administrative Law Values*, *supra* note 34.

administrations, the United States has consistently clung to the view such extraterritorial detainees are war detainees and that the international legal requirements applicable to them are therefore those mandated by IHL/LOAC, rather than the more restrictive rules of IHRL.<sup>181</sup> Yet, as in the case of the PPG and its successor targeting policy, the United States has as a matter of *policy* adopted procedures and practices for these detainees that exceed the requirements of IHL/LOAC as the United States interprets it, and move at least somewhat in the direction of IHRL. The most significant of these policies is the periodic review board procedure (PRBs) for Guantanamo detainees adopted in the Obama administration and continued in the Trump and Biden administrations.<sup>182</sup>

The PRBs emerged in 2011 when the Obama administration issued an Executive Order forming boards to assess the status of Guantanamo detainees who had been designated for preventive detention under the laws of war or who had been referred for criminal prosecution but had not yet been charged.<sup>183</sup> The PRBs provided enhanced protections for detainees compared to precursor procedures, known as Combatant Status Review Tribunals (CSRTs), initiated in the Bush administration.<sup>184</sup> Pursuant to the Order, the PRBs' function was to evaluate whether the continued detention of a covered individual was warranted in order "to protect against a significant threat to the security of the United States."<sup>185</sup> Because Congress has prohibited the transfer of any Guantanamo detainees to the United States,<sup>186</sup> the only option for moving a detainee out of Guantanamo is transfer to another country. In cases where the PRB concludes that continued detention is unnecessary, the Secretaries of State and Defense are responsible for making vigorous efforts to transfer such detainees outside the United States, consistent with national security interests.<sup>187</sup> Congress subsequently codified the PRBs as part of the 2012 National Defense Authorization Act, which mandates that the executive branch must make PRB rules and procedures available to Congress.<sup>188</sup>

The procedures before the PRBs, set forth in the NDAA and U.S. executive branch rules, consist of an initial review and subsequent periodic reviews as to whether the continued detention of each individual is necessary to prevent a security

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<sup>181</sup> *See id.*

<sup>182</sup> The United States has adopted similar, though somewhat less stringent, policies for detainees held extraterritorially in locations other than Guantanamo, such as Afghanistan. For a more detailed account of these policies, see *id.*

<sup>183</sup> Exec. Order No. 13,567, *supra* note 24.

<sup>184</sup> *See, e.g.,* Thomas B. Nachbar, *Executive Branch Policy Meets International Law in the Evolution of the Domestic Law of Detention*, 53 VA. J. INT'L L. 201, 224 (2013).

<sup>185</sup> Exec. Order No. 13,567, *supra* note 24, § 2.

<sup>186</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §1027, 125 Stat. 1298, 1566–67 (codified at 10 U.S.C. §801 (2012)).

<sup>187</sup> Exec. Order No. 13,567, *supra* note 24, § 4.

<sup>188</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1023, 125 Stat. 1298, 1564–65 (codified at 10 U.S.C. § 801 (2012)).

<sup>188</sup> *See id.*; Exec. Order No. 13,567, *supra* note 24.

risk.<sup>189</sup> Each detainee, who is provided with a personal representative, has the opportunity to participate in a hearing before the PRB.<sup>190</sup> In addition, detainees may hire lawyers to represent them at their own expense. At the hearing, the detainee and his representative can challenge the government's factual basis for ongoing detention and introduce evidence.<sup>191</sup> After the initial review, officials must conduct a full review every three years, with interim reviews every six months.<sup>192</sup>

The boards are composed of senior civilian officials from the Departments of Defense, Homeland Security, Justice, and State, members of the Office of the Director of National Intelligence, and officials from the Joint Chiefs of Staff.<sup>193</sup> Each board has access to all government information relevant to the detainee being reviewed and considers this information alongside diplomatic considerations, security assurances, the detainee's mental and physical health, and any other mitigating information.<sup>194</sup> The board may not rely on any information obtained through torture or cruel, inhuman, or degrading treatment.<sup>195</sup> The recommendation of the board is submitted to cabinet-level officials at the represented departments and agencies, and these officials are allotted 30 days to object to the PRB's disposition of any given detainee.<sup>196</sup> An objection triggers a review by a review committee of these agency principals. Once the decision is made, it is published on the review secretariat's website.<sup>197</sup>

Despite statements by President Trump suggesting that he would radically depart from the Obama administration approach to military detention at Guantanamo and elsewhere,<sup>198</sup> the Trump administration largely continued the procedures established in the Obama administration to evaluate military detainees, including the

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<sup>189</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1023, 125 Stat. 1298, 1564–65 (codified at 10 U.S.C. § 801 (2012)); Exec. Order No. 13,567, *supra* note 24.

<sup>190</sup> Exec. Order No. 13,567, *supra* note 24.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See Charlie Savage, *The Fight over Guantánamo's Parole Board, Explained*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/us/politics/guantanamo-bay-parole-periodic-review-board.html?ref=todayspaper> [<https://perma.cc/BYV7-P2VX>].

<sup>194</sup> THE PERIODIC REVIEW BOARD, U.S. DEP'T OF DEF. PERIODIC REV. SECRETARIAT, <https://www.prs.mil/About-the-PRB/> [<https://perma.cc/ZV57-7STQ>] (last visited May 16, 2021).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> REVIEW INFORMATION, U.S. DEP'T OF DEF. PERIODIC REV. SECRETARIAT, <https://www.prs.mil/Review-Information> [<https://perma.cc/BZ9K-LHCY>] (last visited May 16, 2021).

<sup>198</sup> Editorial, *Donald Trump vs. Guantánamo's Forever Prisoners*, N.Y. TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/opinion/trump-guantanamo-prisoners.html> [<https://perma.cc/UT96-B25F>].

PRBs.<sup>199</sup> President Trump did state that he would keep the Guantanamo Bay detention facility open—in marked contrast to President Obama’s efforts to close the facility—and add to the detainee population there.<sup>200</sup> Yet the Trump administration did not transfer any new detainees to Guantanamo, and indeed transferred one detainee out of the facility.<sup>201</sup> An executive order issued fairly early in the Trump administration explicitly provided for the continued operation of the PRBs.<sup>202</sup> To be sure, federal law required the administration to continue with the PRBs because the elements of the PRBs were codified in the 2012 National Defense Appropriation Act.<sup>203</sup> But the order went further than the statute requires, stating that such boards and their existing procedures (inherited from the Obama administration) would be used “to determine whether continued law of war detention is necessary to protect against a significant threat to the security of the United States.”<sup>204</sup> Secretary of Defense James Mattis also issued implementing guidelines for the PRB process.<sup>205</sup> And in habeas proceedings initiated by Guantanamo detainees, Trump administration lawyers referred to the PRB proceedings as evidence of fairness in decision-making about ongoing detention.<sup>206</sup> The Biden administration has continued to follow PRB procedures.<sup>207</sup>

Like the PPG, the PRB process can be seen as a legalized policy that moves somewhat in the direction of IHRL. The U.S. executive branch has never stated that the PRBs are required as a matter of international law—either IHRL or IHL/LOAC. Yet, the board procedures come closer to the kinds of due process requirements of IHRL (and also the kind of procedures IHL/LOAC mandates for certain categories of detainees in international armed conflicts) than the precursor CSRTs. As compared to the CSRTs, the PRBs include enhanced procedural protections for the individual detainees. Detainees have more opportunity to present and rebut evidence

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<sup>199</sup> See Charlie Savage, *U.S. Transfers First Guantanamo Detainee Under Trump, Who Vowed to Fill It*, N.Y. TIMES (May 2, 2018), <https://www.nytimes.com/2018/05/02/us/politics/guantanamo-detainee-transferred-trump-al-darbi.html> [https://perma.cc/4B68-NMXJ] [hereinafter Savage, *U.S. Transfers*]; Exec. Order No. 13,823, *supra* note 26.

<sup>200</sup> Exec. Order No. 13,823, *supra* note 26. See also Savage, *U.S. Transfers*, *supra* note 199.

<sup>201</sup> See Savage, *U.S. Transfers*, *supra* note 199.

<sup>202</sup> Exec. Order No. 13,823, *supra* note 26.

<sup>203</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1023, 125 Stat. 1298, (codified at 10 U.S.C. § 801 (2012)).

<sup>204</sup> Exec. Order No. 13,823, *supra* note 26, at 4832.

<sup>205</sup> Memorandum from Patrick M. Shanahan, Sec’y of Def., Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay Per Executive Order 13567 (Mar. 28, 2017), [https://www.prs.mil/Portals/60/Documents/2017\\_PRB\\_Policy\\_Memo\\_Signed.pdf](https://www.prs.mil/Portals/60/Documents/2017_PRB_Policy_Memo_Signed.pdf) [https://perma.cc/N76W-YN97].

<sup>206</sup> Respondents’ Opposition to Petitioners’ Motion for Order Granting Writ of Habeas Corpus at 4–5, *Al-Bihani v. Trump*, (No. 04-cv-1194) (TFH) (ISN569) (D.D.C. Feb. 16, 2018).

<sup>207</sup> See Carol Rosenberg, *Biden Administration Clears 3 Guantanamo Detainees for Release*, N.Y. TIMES (May 17, 2021), <https://www.nytimes.com/2021/05/17/us/politics/guantanamo-detainees-release.html> [https://perma.cc/A53H-LURM].



that forms the factual basis for their continued detention, and they are entitled to personal representatives to assist them. Though comprised entirely of executive branch officials and therefore not courts constituted within a separate branch of government, the boards bear some hallmarks of independence. For example, they are more independent than purely military tribunals or the precursor CSRT panels, as members include career officials from multiple agencies. Moreover, the establishment and continuation of the PRBs via executive orders and the codification of key elements in U.S. legislation increases the transparency and rationality of proceedings. Although the contents of many of the specific proceedings remain classified, the legal framework for the proceedings and its rules are clear and open to the public.

To be sure, PRB procedures still do not provide the kind of full-fledged judicial proceedings that would be required under IHRL when state agents detain criminal suspects in peacetime. Although the detainees have the benefit of assistance from a personal representative and may hire lawyers at their own expense, they are not entitled to legal representation without cost. The detainees have greater opportunities to present and rebut evidence in the PRBs than in the earlier CSRTs, but hearsay is still permitted, and they are not necessarily entitled to view all of the evidence. And, of course, the PRBs are not independent courts.

Moreover, in practice, the PRBs have a mixed record. On the one hand, the PRB reviews have concluded that many Guantanamo detainees were not a continuing threat and therefore were “eligible for transfer” to their home countries or third countries.<sup>208</sup> But on the other hand, the PRB process has been slow, and the outcome for the detainees approved for transfer remains uncertain. Although the initial executive order specified that all initial reviews would commence no later than one year from the date of the order, “the hearings did not begin until 2013, and all initial hearings were not completed until September 2016.”<sup>209</sup> Furthermore, even detainees deemed eligible for transfer following PRB review may not leave Guantanamo unless the United States makes arrangements with another country that is willing and able to provide sufficient security assurances. The Obama administration transferred 36 of 38 PRB-approved detainees from Guantanamo to their home countries or third countries, but the others approved remained in detention at the end of the administration.<sup>210</sup> Overall, the Obama administration transferred, repatriated, or resettled 197 Guantanamo detainees (some were transferred pursuant to procedures that pre-dated the PRBs).<sup>211</sup> The Trump

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<sup>208</sup> See, e.g., LAURA A. DICKINSON & JAMES E. BAKER, THE U.S. MILITARY COMMISSIONS: LOOKING FORWARD 25 (2018) (May 2018 American Bar Association Standing Committee on Law and National Security Report).

<sup>209</sup> HUM RTS. FIRST, GUANTANAMO PERIODIC REVIEW BOARDS, FACT SHEET: DECEMBER 2018 1 (2018), <https://www.humanrightsfirst.org/sites/default/files/guantanamo-prb-fact-sheet.pdf> [<https://perma.cc/VA5W-JPPW>].

<sup>210</sup> *Id.*

<sup>211</sup> HUM RTS. FIRST, GUANTANAMO BY THE NUMBERS (Oct. 10, 2018), <https://www.humanrightsfirst.org/resource/guantanamo-numbers> [<https://perma.cc/84BH-FDYG>].

administration transferred only one.<sup>212</sup> At the time of writing this Article, the Biden administration has deemed three additional detainees eligible for transfer through the PRB process, and one has been transferred.<sup>213</sup> Currently, 39 remain in detention, 27 of whom still have not been charged with a crime within the military commissions system.<sup>214</sup> Of those 27, ten have now been cleared for transfer if security conditions permit, while 17 have been recommended for continued detention.<sup>215</sup>

Critics of the PRB process have suggested that, despite operating according to the same administrative framework, the work of the PRBs under the Trump administration was in practice deeply flawed.<sup>216</sup> In particular, commentators have cited long delays in the publication of PRB decisions as evidence of dysfunction and potential interference by senior political officials.<sup>217</sup> None of the PRB proceedings during the Trump administration resulted in approval to transfer any additional Guantanamo detainees.<sup>218</sup> At least one commentator has argued that the Trump administration turned the review boards into a “one-way ratchet for justifying continued detention” and a “fig leaf.”<sup>219</sup> In the Biden administration, the PRBs have found new life, yielding decisions declaring more detainees eligible for transfer.<sup>220</sup>

Despite their significant flaws, the boards nonetheless represent a middle ground between the kind of unchecked military detention established in the George W. Bush administration and the full-fledged judicial process that would be required for detainees in the civilian justice system. As such, they provide an example of the kind of policies that serve a variety of functions discussed below—bridging differences with U.S. allies and internal critics who take a more constrained view of the war paradigm for extraterritorial counterterrorism.

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<sup>212</sup> *Id.*

<sup>213</sup> See Rosenberg, *supra* note 207; Carol Rosenberg & Charlie Savage, *Biden Administration Transfers Its First Detainee from Guantanamo Bay*, N.Y. TIMES (July 19, 2021), <https://www.nytimes.com/2021/07/19/us/politics/guantanamo-bay-detainee-released.html> [https://perma.cc/39NP-2Z4H].

<sup>214</sup> *The Guantanamo Docket*, N.Y. TIMES (June 1, 2021), <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html> [https://perma.cc/S2EF-L5KF]; Rosenberg & Savage, *supra* note 213.

<sup>215</sup> Rosenberg & Savage, *supra* note 213; *The Guantanamo Docket*, *supra* note 214. The remaining 12 detainees have been brought within the military commissions system: seven face charges in the military commissions, two have been convicted, and three have been proposed for trial by military commission. *Id.*

<sup>216</sup> See, e.g., Benjamin Farley, *Who Broke Periodic Review at Guantanamo Bay*, LAWFARE (Oct. 15, 2018, 10:00 AM), <https://www.lawfareblog.com/who-broke-periodic-review-guantanamo-bay> [https://perma.cc/BU2H-BL4K].

<sup>217</sup> *Id.*

<sup>218</sup> FULL REVIEW, U.S. DEP’T OF DEF. PERIODIC REV. SECRETARIAT, <https://www.prs.mil/Review-Information/Full-Review/> [https://perma.cc/279Q-65ZK] (last visited Nov. 19, 2020); SUBSEQUENT FULL REVIEW, U.S. DEP’T OF DEF. PERIODIC REV. SECRETARIAT, <https://www.prs.mil/Review-Information/Subsequent-Full-Review> [https://perma.cc/BY3W-R7YZ] (last visited Nov. 19, 2020).

<sup>219</sup> Farley, *supra* note 216.

<sup>220</sup> See Rosenberg, *supra* note 207.

*C. Legalistic Nature of Policies*

The two policies discussed here—the PPG and its Trump administration successor targeting policy, as well as the PRB procedures—are distinctive in an important respect: they are what we might call “legalistic.” Both in substance and in the procedures they set forth, each of the policies contains legalistic categories. Moreover, each demands a role for lawyers, even if that role is implicit. To implement the policies, agency and military officials must, as a practical matter, obtain advice from executive branch lawyers, both civilian and military.

With respect to substance, each of the policies includes categories that, if not directly imported from legal frameworks, bear at least some resemblance to such categories. For example, in the case of the PPG, the concept of “continuing, imminent threat” has analogs in both IHRL and the law of self-defense. And the term “near certainty” is the kind of term that is relevant in a variety of legal analyses. Similarly, the PRB procedures require officials to evaluate whether a detainee poses a “continuing threat”—another term that could easily be lifted from other legal frameworks. And these policies are, in any event, now codified as law at the domestic level even if not recognized as required by international law.

These policies are also legalistic in the procedures they establish. The PPG requires government officials at certain levels to assess operations.<sup>221</sup> That requirement implies some type of formalized bureaucratic process. Much less is known about the details of the Trump administration successor targeting policy, though journalistic accounts suggest that it allowed decisions to be made by lower-level officials.<sup>222</sup> It is not unreasonable to assume, however, that even there, some type of formalized internal bureaucratic process governed application of the rules set forth in the policy. The PRB policy is even more legalistic in the procedures it creates: effectively, the policy establishes a kind of administrative tribunal and review process.<sup>223</sup>

All of these policies imply a role for executive branch lawyers, even if that role is not necessarily explicit. Lawyers appear to be necessary to interpret the terms of the targeting policy as it is applied. And executive branch lawyers are crucial to evaluating the terms of the PRB policy. In other words, lawyers’ judgments and recommendations are essential to implement these policies just as they are to evaluate the legality of operations under international law. In a sense, the policies establish lawyers as guardians of the policy implementation process itself. Thus, although the United States has never acknowledged that these policies are required by international law, they establish an institutional role for lawyers.

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<sup>221</sup> See PPG, *supra* note 12, § 3.

<sup>222</sup> See Savage & Schmitt, *Trump Eases Combat Rules in Somalia*, *supra* note 174.

<sup>223</sup> See Dickinson, *Administrative Law Values*, *supra* note 34.

### III. APPLYING INTERNATIONAL LAW PARADIGMS AND THE IMPLICATIONS OF THE POLICY APPROACH

By implementing terrorism targeting and detention policies, the United States has moved in the direction of IHRL even as it has rejected the formal legal constraints of this body of law. Why has it done so? The context in which these policies have emerged strongly suggests that interoperability—the ability to work with partners who follow IHRL—is a significant factor. Specifically, the multilateral dimension of counterterrorism operations requires the United States to take account of other countries' view of the law, leading to a ratcheting up in standards. Whether they provide intelligence to the United States or offer consent to U.S. operations on their territory, partner states that follow IHRL exert pressure on the United States to observe human rights principles.

Further, it is significant that when the United States adopts these policies, they acquire a “legalistic” valence that appears to exert a kind of practical binding force through internal organizational culture and practice. Lawyers help write the policies, using legal terms that in turn require legal analysis. As a consequence, the process of internally approving military operations requires evaluation of these policies in the same manner as if they were international legal standards. The durability of these policies may stem, in part, from the way they become embedded in the national security bureaucracy.<sup>224</sup> As in the case of the interoperability benefits, the organizational dimension of these policies could be tested in future empirical work.

The story of these policies, therefore, contributes an important new perspective to the long-running international law compliance debate. What we see is that even when international law does not technically exert binding force, the need to apply its paradigms can end up making a real (and possibly lasting) difference. But that then raises the question: is it actually *better* for these international human rights norms to be effectuated through discretionary national security policymaking? Or would it have been preferable for the Obama administration to have produced a formal legal determination that counterterrorism operations outside the hot battlefield are governed by international human rights law? Should the new Biden administration continue the policy approach or articulate a broader role for IHRL? In other words, what are the pros and cons of seeking international law compliance or addressing international law's ambiguities through policy rather than law?

The advantages and disadvantages, of course, vary considerably depending on one's position and perspective. For example, an advantage for the U.S. executive branch might be viewed as a disadvantage from the perspective of non-governmental organizations championing the cause of human rights. In addition, the governments of different countries may perceive the advantages and disadvantages in an altogether different light. What is clear, however, is that the adoption of legalized

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<sup>224</sup> See generally Laura. A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1 (2010) [hereinafter Dickinson, *Military Lawyers*] (describing the important role military lawyers can play in fostering compliance with international law rules).

policies such as the PPG and the PRBs has consequences. Here, I will map them out from two somewhat contrasting perspectives: the U.S. executive branch and the human rights community. I recognize that neither perspective is itself monolithic, but it is helpful to understand how legalistic policies may look from these two vantage points.

*A. U.S. Executive Branch—Advantages of Policy Approaches*

From the perspective of U.S. executive branch officials, it may be advantageous to embrace a legal paradigm that sets fewer minimum requirements and then adopt legalistic policies such as the PPG and the PRBs that exceed these minimum legal requirements. In the face of ambiguity about the scope of international law and the choice of the appropriate legal paradigm or paradigms, this approach offers an attractive path forward for a variety of reasons. Indeed, it may often be easier for executive branch officials to adopt policies than to clarify the scope of the law or choose the more demanding legal paradigm.

*1. Policy Is Flexible*

To begin with, policy is flexible. When executive branch officials assert only a minimalist view of legal requirements but then exceed those requirements as a matter of policy, officials maintain room to maneuver. Such an approach, therefore, may be more pragmatic; it can be fine-tuned and calibrated to specific circumstances, and it preserves discretion for the executive branch.

This flexibility was likely an important consideration in adopting the PPG and the PRBs. The framework of IHRL, as applied to targeting and detaining terrorists extraterritorially, might seem to be overly formalist and impractical in many circumstances. Watkin sums up this position quite forcefully, observing that the strictures of a purist or strict IHRL approach to counterterrorism present the spectre of a “security black hole.”<sup>225</sup> If governments must satisfy all the requirements of IHRL, including showing in virtually every circumstance that a threat is imminent before using lethal force, it may be difficult to act quickly enough to effectively counter that threat. The more minimalist rules of IHL/LOAC do not require strict necessity or imminence assessments before lethal force may be used. A state that embraces policies such as the PPG or PRB procedures retains the discretion to choose standards that resemble those of IHRL when it is feasible to do so. But because the policy does not impose legal restraints at the international level, a state that has adopted such a policy may also deviate from the standards in the policy if circumstances dictate. The state thus preserves scope for a range of action while still emphasizing its commitment to follow international law.

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<sup>225</sup> WATKIN, *supra* note 21, at 300.

## 2. Policy Can Bridge Gaps in Legal Interpretation Among States, IOs, and NGOs

A policy approach can also serve as a bridge between different interpretations of international law held by different states, as well as among states, international organizations (IOs) and NGOs. When one state, such as the United States, believes that IHL/LOAC governs extraterritorial counterterrorism operations even outside traditional battlefields, and another asserts that the more demanding law of international human rights applies, a policy that incorporates elements of IHRL can minimize the impact of these contrasting views. If the state that adheres to the more permissive rules of IHL/LOAC implements practices that exceed those minimum rules, the practical impact of this state's contrasting legal approach will diminish. The conflict over legal paradigms thus may virtually disappear as a practical matter, at least at the operational level.

One could make the case that the PPG and the PRBs have served this type of role. As discussed above, the PPG brought the United States closer—at least in practice—to the approach of many allies, IOs, and civil society groups that take a more constrained view of the scope of armed conflicts with terrorist groups. The standards for direct action specified in the PPG, including for targeted killing and capture, approximate the rules of IHRL outside areas designated as “areas of active hostilities.” To be sure, these standards do not fully equal the stringent requirements of IHRL, and the terms of each do not fully map onto one another. And, furthermore, the Trump administration's successor policy moved back in the other direction, expanding the gap in approaches. But nonetheless, this policy still exceeded the minimum requirements of IHL/LOAC and thus came closer to an IHRL framework than a purely minimalist application of IHL/LOAC. Even under the Trump administration approach, outside areas of active hostilities the U.S. military reportedly still could not use lethal force unless there was a near certainty that civilians will not be killed.<sup>226</sup> In the targeting context, such policies also provided an opportunity to implement standards that approximated *jus ad bellum* elements that many allies, IOs, and NGOs embraced given their more limited view of the scope of existing armed conflict. Thus, even though U.S. allies (and IOs and NGOs) might still have disagreed with the U.S. view of the appropriate legal paradigm for such operations, there were likely fewer practical disagreements with regard to the specific actions the United States actually undertook during counterterrorism operations.

Similarly, the PRBs have brought the United States a few steps closer to a human rights paradigm for the detention of terrorism suspects. Although the procedures do not fully embody human rights due process protections, they do provide more protections for detainees in the form of regularized administrative proceedings.

The PPG, and to a slightly lesser extent, the Trump administration's successor policy, along with the PRB procedures, also potentially reduce conflicts with the territorial states where the United States is taking direct action. By requiring U.S.

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<sup>226</sup> See Savage & Schmitt, *Trump Poised*, *supra* note 11.

actors to ensure there is a near certainty that civilians will not be harmed during a direct action, the PPG and the Trump administration policy both minimize the extent to which host states may object to such action on their territory. And the operation of the PRBs potentially blunts criticisms of human-rights oriented U.S. allies regarding the Guantanamo detainees.

By bridging these types of differences among states, IOs, and NGOs, legalized policies such as the PPG and the PRBs can reduce interoperability concerns of multilateral operations. Such interoperability needs could arise when, for example, U.S. allies must consider whether to share intelligence that could be used in a U.S. targeting or detention operation. Indeed, the *2016 Frameworks Report* acknowledges that differences in legal interpretation among states can bring challenges to such operations.<sup>227</sup> The report notes that the U.S. regularly consults with allies to find pragmatic solutions in such situations—to find a way to work together.<sup>228</sup> The PPG and the Trump administration’s successor policy (and any replacement policy crafted by the Biden administration), as well as the existence of the PRB procedures, can help with this effort.

### *3. Policy Provides a Path to Resolve Differences of Legal Interpretation Within a Government*

A legalistic policy also has the potential to bridge differences *within* a government. Executive branch officials may themselves disagree about the applicable legal framework for a particular operation or type of operation. When such disputes arise, a legalistic policy can smooth over such differences. It may be easier in many cases to achieve consensus to adopt such a policy than to resolve the dispute with a definitive decision about what legal regime applies.

The PPG and the PRB procedures may be examples of this kind of bridge. The precise history of the PPG and the PRB procedures is not known due to the sensitivity of the national security context in which they arose. Accounts now public of debates within the Obama administration at the time, however, indicate that top administration lawyers were locked in heated discussions regarding contrasting paradigms under international law and the use of force, as well as the interpretation of the rules within those paradigms.<sup>229</sup>

Against the backdrop of hard-fought contests over legal meaning, a policy approach such as the PPG or the PRB procedures would certainly seem attractive. Rather than hashing out freighted differences over legal restrictions on U.S. action, executive branch officials crafting policy solutions can avoid such differences altogether. The choice of a legal paradigm and an explicit public acknowledgment of the applicability of that paradigm, particularly a restrictive one, has enormous consequences for a state that hews faithfully to its international legal commitments. Policies such as the PPG and the PRB procedures circumvent this issue while

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<sup>227</sup> 2016 FRAMEWORKS REPORT, *supra* note 19, at 14.

<sup>228</sup> *Id.*

<sup>229</sup> *See* SAVAGE, POWER WARS, *supra* note 16.

advancing the underlying values of the human rights paradigm and addressing the concerns of IOs and NGOs that adopt a more human rights oriented stance. In the targeting context, these policies also provide an opportunity to implement standards that approximate *jus ad bellum* elements that many of these entities embrace given their more limited conception of the scope of existing armed conflict. For executive branch officials wary of the human rights paradigm, the policy preserves the legal discretion of the United States. For executive branch officials who believe the human rights principles are important, the policy enables them to implement those principles in a pragmatic way. In this sense, such a policy is a win-win.

*B. U.S. Executive Branch—Disadvantages of Policy Approaches*

For the reasons described above, policies such as the PPG and the PRB procedures bring distinct advantages for the executive branch. But even from a purely executive branch perspective, such policies carry some disadvantages as well. Indeed, some of the benefits discussed above have as their flip side some negative consequences.

*1. Policy Approaches Can Impede the Resolution of Legal Differences Among States and the Development of the Law*

Even as they serve a bridging function among states, policy approaches may slow or impede the resolution of legal differences among such states. Such policies, to some extent, mask the legal dimensions of a problem and can interfere with the development of the law. For example, a state that only chooses to bind itself as a matter of policy might still want *other* states to similarly bind themselves, but it loses its ability to insist on such compliance if the issue is only treated as a matter of policy, not law. To the extent that the United States is essentially abiding by IHRL rules in extraterritorial counterterrorism operations but not committing to them as legally binding, a policy approach reduces the opportunity for the United States to encourage states who do not follow such principles to embrace a human rights approach. Abiding by IHRL as a matter of law in more extraterritorial counterterrorism contexts also would give the United States opportunities to shape how that body of law is applied in such settings and engage with institutions that, with or without U.S. participation, seek to apply IHRL to U.S. activities abroad. Therefore, it may be in the state's interest to advance a view of the law that would bind others to standards the state itself is following.

In addition, the adoption of a policy impedes the development of clear legal rules regarding state obligations under customary international law, which requires both state practice and a sense of legal obligation.<sup>230</sup> In order for a state to embrace a norm as customary international law, it must, therefore, both demonstrate a general practice of following the norm and also indicate that it is following the norm because

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<sup>230</sup> See Statute of the International Court of Justice, *supra* note 66, art. 38.



it must do so—out of a sense of obligation.<sup>231</sup> Scholars and policymakers disagree about what actions constitute sufficient state practice to amount to customary international law.<sup>232</sup> There is also a robust debate about the type of evidence that would establish that a state is acting out of a sense of legal obligation.<sup>233</sup> But regardless of these debates, policies such as the PPG and the PRB, even if they count as state practice, are not likely to serve as evidence that a state is acting out of a sense of legal obligation at the international level—precisely because they are policies and not law. Therefore, the embrace of such policies would not support the development of customary international law.

The PPG and the PRB procedures offer examples of policies that, while potentially easing interoperability concerns among states with different legal views, mask the legal dimensions of the problem and potentially slow the development of customary international law. The PPG (and to a lesser degree the Trump administration’s successor policy), along with the PRB procedures, put the United States more on the same page—as a matter of practice—as those states that adopt a law-enforcement approach to extraterritorial counterterrorism operations. But in doing so, those policies obscure the differences among states about the appropriate international law paradigm that governs the extraterritorial use of force or detention with regard to such operations. The policies themselves do not refer to specific legal categories. Although the standards in the PPG and the PRB procedures resemble the categories of IHRL, these standards do not match these categories exactly. Indeed, the policies do not refer to IHRL at all. Thus, the policies do not, in any sense, explicitly acknowledge the conflict in legal terms. Accordingly, with respect to direct extraterritorial action outside of “hot” battlefields and extraterritorial military detention, the policies do nothing to advance greater harmonization of divergent legal perspectives—either in the direction of the more restrictive IHRL or the more minimalist IHL/LOAC approach.

Because the United States has adopted the PPG and PRB as a matter of policy at the international level—not as actions taken due to a sense of legal obligation, neither policy contributes to the development of customary international law. One might argue that, to the extent that the policy is law at the domestic level, actions taken pursuant to the PPG and the PRB procedures should count as actions taken pursuant to a sense of legal obligation. Yet, the notion that domestic legal obligations of this nature could satisfy the *opinion juris* element of customary international law is not universally accepted. Thus, operations conducted within the framework of the PPG or the PRB procedures would not clearly establish customary international law.

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<sup>231</sup> *Id.*

<sup>232</sup> See, e.g., Jack Goldsmith & Eric Posner, *Further Thoughts on Customary International Law*, 23 MICH. J. OF INT’L L. 191, 193–95 (2020).

<sup>233</sup> *Id.*

## *2. Policy Can Impede the Resolution of Different Legal Interpretations Within a Government*

As discussed above, policy approaches can help paper over differences in legal interpretation internally within a state. That also means, however, that the adoption of such policies can effectively block efforts to actually resolve those differences of legal interpretation. Policy allows for a pragmatic path forward without forcing a decision to be made on the underlying legal question. But as a consequence, the policy decision can lead to long-term inconsistency because it does not bind future administrations in the same way that legal interpretations do. And though, of course, even a legal interpretation can be revisited by a future administration, the process for doing so is far more difficult than simply changing a policy.

In the case of the PPG and the PRB procedures, the policy approach has led to just this sort of malleability. It did not resolve what may have been internal differences in legal views about direct extraterritorial action against terrorists. For example, as discussed above, one of the first initiatives the Trump administration reportedly took was to revise the PPG, even as it retained some of the policy's elements.<sup>234</sup> Future administrations could always make further changes to the policy, as the Biden administration is reportedly now considering at the time this Article goes to press.

## *3. The Adoption of Policies Can Be Misconstrued as the Development of Customary International Law*

Finally, the implementation of a legalistic policy may spark confusion about whether the policy is evidence of customary international law. As discussed above, the adoption of a policy should not establish customary international law because the states that embrace such policies are not doing so out of a sense of legal obligation. Nonetheless, a variety of actors in the international community—including some states, IOs, or NGOs—may draw attention to a policy and assert that it is, in fact, evidence of customary international law. Even if the state adopting the policy would stand on strong legal ground in rejecting such assertions, these types of statements require executive branch time and attention. From an executive branch perspective, legalistic policies, therefore, carry the risk that other entities will misconstrue the legal dimension of state actions according to the policies.

This risk has arguably been borne out to some degree with respect to the PPG and the PRB procedures. Some entities have suggested that the PPG and the PRB procedures reflect legal, rather than policy, rules.<sup>235</sup> To be sure, executive branch

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<sup>234</sup> See Savage & Schmitt, *Trump Poised*, *supra* note 11.

<sup>235</sup> See, e.g., HUM RTS. FIRST, OBAMA ADMINISTRATION DISCLOSES PREVIOUSLY CLASSIFIED PROCEDURES FOR AUTHORIZING FORCE OUTSIDE AREAS OF “ACTIVE HOSTILITIES” (Aug. 7, 2016), <https://www.humanrightsfirst.org/press-release/obama-administration-discloses-previously-classified-procedures-authorizing-force> [<https://perma>

officials could mitigate this risk by repeatedly and transparently asserting that it is acting pursuant to policy. Indeed, if every time states adopt such policies, an effort is made to infer that customary international law has been created, then states might stop adopting more restrictive policies altogether and might instead retreat to a more minimalist approach.

### *C. The Human Rights Community*

The advantages and disadvantages of legalistic policies depend in part on perspective. The executive branch perspective discussed above is likely to differ from perspectives within the human rights community. To be sure, neither the U.S. executive branch nor the human rights community is uniform. In particular, the human rights community is quite diverse, and it includes a variety of actors and entities from around the world. But in general, the concerns of the executive branch will not match those in the human rights community.

#### *1. Advantages of Policy Approach*

From a human rights perspective, government adoption of more human rights protective policies is a mixed bag. On the one hand, such policies have the practical impact of making the state more compliant with human rights norms in its day-to-day counterterrorism operations. This is a big plus from a human rights perspective, and it is possible that if the human rights community had pushed for a full-throated legal embrace of IHRL in the extraterritorial counterterrorism context, even during the Obama administration, the effort would have failed. Thus, one might see the adoption of legalistic policies as an important, pragmatic human rights victory with very real positive consequences on the ground. Moreover, even though administrations can, in theory, change such policies, they are remarkably durable in practice.

In the case of the PPG and the PRB procedures, the human-rights protecting standards it imposed were a real win for the human rights community. Under the PPG, as a matter of policy, the United States agreed to adhere to human rights values in the use of force extraterritorially. Under the PRBs, the United States has provided more procedural protections for Guantanamo detainees. Furthermore, it is significant that key aspects of these policies persisted even in the Trump administration.<sup>236</sup> These policies are, therefore, evidence that published policy decisions can be sticky and lead to path dependence, even if not to the same extent as legal determinations.

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.cc/NSJ6-RATN] (noting that “[t]he President should formalize safeguards that would bring our country’s use of force into compliance with international law, including by clearly differentiating between the rules that apply to the use of force in war and the rules that govern the use of lethal force in all other circumstances”) (internal quotations omitted).

<sup>236</sup> With respect to targeting, see Savage & Schmitt, *Trump Poised*, *supra* note 11. With respect to Guantanamo detainees, see, *e.g.*, Exec. Order No. 13,823, *supra* note 26.

## 2. *Disadvantages of Policy Approach*

On the other hand, as discussed above, the adoption of legalistic policies can slow the development of the law. Thus, if a state opts to make policy rather than embrace a human rights-oriented view of the law, human rights groups may view this choice as a cop-out. Furthermore, the secrecy around the implementation of these policies can lead to self-serving interpretations by executive branch officials that water down their terms.<sup>237</sup> And, as previously noted, a policy is more vulnerable to subsequent reinterpretation or case-by-case backsliding than a legal interpretation would be.

With respect to both the PPG and the PRBs, a fair case can be made that the Obama administration missed an opportunity to articulate a more human rights-oriented approach to counterterrorism. By adopting legalistic policies, it failed to articulate legal limitations beyond the minimum rules of IHL/LOAC with respect to extraterritorial counterterrorism operations outside of armed conflict. This failure made it easier for the subsequent administration to reverse course. Of course, from a human rights perspective, adoption of the policies was still far preferable to a minimalist IHL/LOAC legal interpretation, so adoption of a potentially sticky policy was certainly better than no human rights regarding action at all. Nonetheless, this is an important issue for the human rights community to consider in engaging with the human rights-oriented Biden administration: to what extent should the human rights community advocate for the executive branch to embrace a more expansive role for IHRL and a more confined role for IHL/LOAC in extraterritorial counterterrorism operations outside traditional battlefields.

### *D. Other Considerations: The Role for Lawyers*

Policy presents one final issue worth noting. From a human rights perspective, one might be worried that rules adopted as a matter of policy rather than legal obligation might diminish the role of lawyers in decision-making regarding counterterrorism operations. In general, decreasing the role of lawyers might give military officers a freer hand to make determinations that are less likely to take human rights into account. However, because the policies I have described are sufficiently legalistic, they actually still require a role for lawyers in interpreting them. Thus, it is not clear that the role of lawyers actually diminishes. Indeed, it may be that lawyers are *more* necessary because the interaction of the underlying IHL/LOAC and the policy may actually make the rules more complicated to parse. Of course, one could also view the role of lawyers as a problem because legal vetting can delay the deployment of military operations or tie the military's hands.

In the case of the PPG and most likely its successor Trump administration policy, along with the PRB procedures, both military and civilian lawyers had to engage at a variety of levels to assess the implementation of the policy. And, as I have argued elsewhere, military lawyers often play a very real constraining role in

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<sup>237</sup> See Sinnar, *supra* note 15.

military operations.<sup>238</sup> On the other hand, the role of lawyers imposes a greater complexity on operations and could, in theory, slow them down. Whether that is good or bad depends on whether you focus on the potential human rights value in increased deliberation or whether you think military operations will be unnecessarily delayed by needless red tape.

#### CONCLUSION

The story of the PPG and the PRB procedures highlights that one of the critical frontiers in thinking about international law compliance is the boundary between law and policy in the domain of extraterritorial counterterrorism operations. Although scholars and human rights observers who work in this domain tend to focus on legal rules, it turns out that executive branch policies can be a crucial aspect of compliance with the values underlying international legal regimes. Even if they do not accept certain international legal regimes as binding at the international level, governments may nonetheless translate and embed international law paradigms within such policies.

And such policies may have important advantages, both for governments that seek consensus with other countries and within their own national security bureaucracy, as well as for human rights advocates who seek greater practical human rights compliance on a day-to-day level. Indeed, governments may be more willing to adopt robust human rights policies for many of their activities if they do not feel that doing so will bind them in all circumstances as a matter of law. On the other hand, when governments adopt policies, they miss important opportunities to clarify international law and incorporate core legal standards more forcefully into their military operations.

Thus, the decision of whether to adopt policies rather than legal rules is a key issue both for further study and practical deliberation, particularly as the new Biden administration considers whether to revise existing policies. For example, in revising these policies, the Biden administration, which has expressed a strong commitment to ending so-called “forever wars” and to protecting human rights, may now wish to consider articulating a more limited scope for the armed conflict paradigm and a broader role for IHRL as a matter of law rather than policy. At the same time, to the extent that ambiguities remain regarding the content and reach of extraterritorial IHRL obligations in a variety of contexts, policy may still provide a pragmatic path forward in a variety of contexts. A narrower conception of armed conflict zones and the accompanying legal paradigm will also put greater pressure on interpretations of *ad bellum* rules, which in turn could spark a need for policies to address lingering differences in interpretation among allies and others in this area as well. At a minimum, the advantages and disadvantages of policies versus legal interpretations are a fruitful area for continued investigation and debate. Comparative analysis may also reveal differences in decision-making processes in this area from country to country. And scholars of the sociology of institutions may provide insights regarding

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<sup>238</sup> See generally Dickinson, *Military Lawyers*, *supra* note 224.

the impact of lawyers in interpreting these legalistic policies within governmental bureaucracies. Finally, it will be important to see the extent to which voluntary policies harden into customary law over time.

In any event, given that global counterterrorism operations are likely to continue for the foreseeable future, those interested in charting the path of international law compliance must pay attention not only to the formal categories of international law but also to the way different governments finesse those categories through the use of policy. Indeed, sometimes those policies may actually be more important in determining actual state practice on the ground than the official international law doctrines. Further, as a normative matter, scholars, government officials, NGOs, and others must consider the advantages and disadvantages of a policy-oriented approach to international law compliance.