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## **Out of the Shadows: Recommendations to Advance Transparency in the Use of Lethal Force**

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# Out of the Shadows

RECOMMENDATIONS TO  
ADVANCE TRANSPARENCY IN  
THE USE OF LETHAL FORCE

COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC  
AND SANA'A CENTER FOR STRATEGIC STUDIES



# Out of the Shadows

## Recommendations to Advance Transparency in the Use of Lethal Force

COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC

AND

SANA'A CENTER FOR STRATEGIC STUDIES

JUNE 2017



## About the Authors

The **Columbia Law School Human Rights Clinic** works to advance human rights around the world, working in partnership with civil society organizations and communities. The clinic carries out human rights investigations, legal and policy analysis, litigation, report-writing, and international advocacy. The clinic brings together innovative education, social justice, and scholarly research, and students are trained to be strategic human rights lawyers.

The **Sana'a Center for Strategic Studies (SCSS)** is an independent policy and research think-tank based in Sana'a, Yemen. SCSS work focuses on providing new approaches to understanding Yemen and the surrounding region, through balanced perspectives, in-depth studies, and expert analysis. Founded in 2014, SCSS conducts research and consultations in the fields of political, economic, civil, and social development, in addition to providing technical and analytical advice regarding key issues of local, regional, and international concern.

# Acknowledgements

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This report does not represent the institutional views of Columbia Law School.

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*“[A]s a teacher, my job is to educate.  
But how do I teach something like this? How do I explain what I myself do  
not understand? How can I in good faith reassure the children that the drone  
will not come back and kill them, too, if I do not understand why it killed  
my mother and injured my children?”<sup>1</sup>*

Rafiq Ur Rehman,  
son of Mamana Bibi, a 67-year-old grandmother killed in a U.S. drone strike in Pakistan, October 2012

*“Sunlight is said to be the best of disinfectants . . . .”<sup>2</sup>*

Justice Louis D. Brandeis



# I. Executive Summary

*“We want to know why our son got killed, and we demand justice.”<sup>3</sup>*

Yaslem Saeed bin Ishaq,

father of 28-year-old Saleh Yaslem Saeed bin Ishaq, killed by a drone strike in Yemen, August, 2013

Families around the world suffer devastating loss when their relatives are killed in U.S. drone strikes and other attacks. Their suffering is magnified and prolonged by uncertainty and injustice when the U.S. government does not officially acknowledge their loss or explain the strikes, as has frequently been the case for U.S. strikes in Pakistan, Somalia, and Yemen. Continual non-recognition or denial of their harm suggests to families that their loved ones are dispensable, not even worthy of minor recognition. The U.S. government’s failure over the past decade to be transparent and accountable for its lethal force abroad denies the rights and dignity of people injured, and the families of those killed, in strikes; fuels grievances against the United States; undermines the advancement of human rights, the rule of law, and peace and stability; harms democratic accountability in the United States; and damages U.S. credibility abroad.

The U.S. government’s secretive and expanding use of “targeted killings” and drone strikes since the terrorist attacks on September 11, 2001 is highly controversial.<sup>4</sup> For many years, such killings were carried out as part of counter-terrorism operations and in near-complete secrecy by the Central Intelligence Agency (CIA) and the U.S. military’s Joint Special Operations Command (JSOC), including in Pakistan, Somalia, and Yemen, far from any traditional and recognized battlefield. The government did not meaningfully explain their legal basis. The U.S. government has admitted that it killed between 2,867–3,138 people between 2009–2016, in an estimated 526 strikes in areas the government deemed outside of “active hostilities.”<sup>5</sup> Our research reveals that the government has acknowledged approximately 153 strikes, about 20 per cent of the more than 700 reported strikes since 2002. For strikes between 2009 and 2016, independent organizations have recorded an estimated minimum of almost 400 civilian casualties in Pakistan, Somalia, and Yemen, while the government claims that the number is less than 120.<sup>6</sup>

U.S. drone strike and “targeted killing” practices have raised serious concerns about violations of the international law rules that govern the use of force, the destabilizing effects for peace and security, lack of effectiveness in countering terrorism, blowback, the transgression of ethical norms, and harmful precedents. The level of secrecy surrounding the practice has also been a key point of concern. Numerous policymakers, scholars, and civil society representatives have raised alarm about the government’s secrecy about the laws and policies it applies and about its practices and their effects, and the attendant lack of accountability. While the U.S. government has at times voiced its commitment to transparency, many have noted the gulf between the expressed commitment and actual practice. However, there has yet to be a detailed analysis of U.S. transparency practice, or a comprehensive evaluation of the specific ways in which the U.S. government has been secret or transparent about the use of lethal force overseas.

This report deepens understanding of transparency and accountability by evaluating U.S. practice against a set of human rights-based “Ensuring Transparency in the Use of Force Benchmarks.” These benchmarks, grounded in the interests and rights of people impacted by U.S. strikes, international law, and the promotion of the rule of law and democratic accountability, enable detailed assessments of government transparency in the use of lethal force. The benchmarks, designed by the authors of this report, assist policymakers, journalists, and others to track the level of secrecy over time, and enable evaluation of whether a government is improving transparency or rolling back any positive reforms.

**This report finds that the United States has been consistently and excessively secret, although it took some positive steps forward starting in 2010, and made particularly important transparency advances in 2016. These transparency reforms should continue to be strengthened and further built upon.** The report identifies recommendations the U.S. and other governments should take to advance transparency, account for past harms, meet their human rights obligations, and set a rights-promoting precedent.

The report examines the importance of transparency, and sets out the overlapping justifications for different types of transparency. While secrecy is clearly necessary in certain circumstances, such as to protect genuinely sensitive information, or to protect sources whose lives may be at risk, much information has been withheld that could be disclosed—as demonstrated by some of the U.S. government’s belated disclosures.

Improved transparency is not a panacea for the many concerns related to the U.S. use of force abroad. But transparency *matters*. It matters for those injured and the families of those killed, compliance with international law, protecting the rule of law, democratic accountability, harm deterrence, and U.S. leadership and credibility.

Transparency about the facts—who was killed, what happened and where, for individual strikes and in overall statistics—matters to survivors and families of those killed in strikes, whose suffering currently remains unacknowledged and unaccounted for. It matters to the general public, who require such information to engage in informed debate about their government’s actions, and to hold their elected representatives to account.

Transparency about the laws and policies being applied to strikes, about the facts of strikes, and about the government’s decision-making and accountability processes, is essential for the rule of law, deterring abuse, enabling oversight, and establishing accountability for abuse. As a prerequisite to accountability, transparency is necessary to ensure that a government adheres to domestic and international legal limits. Rules that are secret fundamentally undermine the rule of law, and rules that lack clarity lend themselves to abuse and weaken the capacity of external actors to assess whether a rule is being implemented in practice. As former U.S. government officials have noted, transparency enhances U.S. government credibility and builds trust with key partners.<sup>7</sup>

Transparency is also required by binding international law.<sup>8</sup> International law requires governments to be transparent about state conduct, and permits only narrow exceptions for secrecy in limited circumstances. Victims have a specific right to a remedy, which includes rights to disclosure and the truth.<sup>9</sup>

## Key Findings

This report provides a detailed analysis of the disclosures made by the U.S. government about its lethal force policies and practices. The report focuses on U.S. practice in Pakistan, Somalia, and Yemen, where, for many years, strikes have been carried out far from traditional battlefields and in significant secrecy.<sup>10</sup>

The report reveals the extent to which U.S. government policy and practice remains excessively secret, and also areas in which its transparency has improved. It focuses on four core areas: transparency about applicable law and policy; transparency about actual strike practices; transparency about government decision-making processes; and transparency about accountability. The report evaluates U.S. practice against a five-point scale: ranging from “no or almost no transparency or reform efforts” (red) to “complete transparency or sustained, extensive reform efforts” (green).

The report finds that the U.S. government has been unjustifiably secretive, but took some valuable, if belated, steps forward for transparency between 2010 and 2016. Importantly, the government publicly released some information about legal and policy constraints on and procedures for the use of lethal force abroad. It also released rudimentary statistical data on civilian casualties, and began acknowledging and providing basic information regarding specific strikes in Somalia, from 2014, and Yemen, from 2016. However, far too much remains unknown, with nearly all past strikes and civilian casualties unexplained, strikes in Pakistan remaining almost wholly unacknowledged, little information on accountability and the legal basis for strikes in specific cases, and a continued lack of clarity regarding the application of key legal and policy rules.

This report finds:

1. **The U.S. has improved transparency about the legal and policy rules applicable to the use of lethal force overseas, but the rules remain vague and poorly explained.** For many years, U.S. strikes were carried out in near-complete secrecy, away from active conflict zones, and the government did not meaningfully explain the laws and policies it was applying to strikes. Belatedly, following litigation and heavy domestic and international pressure for transparency, the U.S. government began in 2010 to publicly explain important elements of its legal reasoning and the legal basis it believes justifies its strikes. Disclosures in 2016 during the last year of the Obama Administration were a particularly important step forward for transparency in setting out in broad terms the U.S. government's view of the legal framework and policies for the protection of civilians.

Despite these steps forward, important details remain unclear. Numerous memoranda explaining the legal basis for specific strikes and operations remain secret. Key legal and policy terms relevant to understanding who, how, and in what circumstances the U.S. government believes it can kill are not clearly defined, affording a wide latitude for interpretation with the potential to undermine constraints on the President's authority to kill. Without adequate disclosures explaining *how* the United States interprets, defines, and applies key terms it is difficult both to understand precisely what are the United States' views of the legal and policy limits on the use of lethal force, and to assess whether the United States is accurately interpreting its binding international legal obligations.

2. **Drone strike and lethal force practices are highly secretive, there has been limited or no information provided to families or the general public about specific strikes, and civilian casualty data lacks sufficient detail.** For many years, the U.S. government disclosed almost no information at all about specific strikes, and U.S. practices were shrouded in secrecy. Individual strikes were not formally acknowledged at all except in a few, exceptional cases. Changes introduced regarding strikes in Yemen since 2016, and in Somalia since 2014, mean that operations there are usually publicly disclosed. Almost no strikes in Pakistan have been formally acknowledged by the U.S. government.

In addition, after the President of the United States formally admitted for the first time in 2013 that "U.S. strikes have resulted in civilian casualties,"<sup>11</sup> the government—very belatedly—released some civilian casualty data in 2016, but the release lacked sufficient detail.<sup>12</sup> Critics have questioned the veracity of the U.S. government's figures, and it is difficult to engage in a serious review or analysis of the U.S. numbers because the government has provided so little information.<sup>13</sup> The U.S. has not provided basic statistics about the numbers of strikes per country or year, for example, and the information it has provided has been far too general to give the public information necessary to evaluate and understand the nature of its practice of "targeted killings" and drone strikes.

While there have been recent acknowledgments of specific strikes in Somalia and Yemen, they lack detail. For the many years of strikes carried out before the United States began acknowledging them, the government has still provided no individual acknowledgement or explanation, even for strikes in which organizations have put forward detailed and credible allegations of civilian casualties. Strikes in Pakistan remain almost completely secret, causing hurt and anguish to families and survivors, cutting them off from any kind of remedy, and preventing the public from properly understanding and assessing the effects of U.S. actions abroad. Of the 721 strikes in Pakistan, Somalia, and Yemen recorded by The Bureau of Investigative Journalism between January 2002 and May 2017, the government has specifically and formally acknowledged approximately only 153, the large majority since 2014.<sup>14</sup>

The United States has almost never disclosed the names of civilians killed and has released details of investigations and assessments in relation to just a handful of the hundreds of strikes in Pakistan, Somalia, and Yemen. The U.S. government has not given adequate responses to non-governmental organizations (NGOs) who have requested explanations about specific strikes in which there is credible evidence of civilian casualties and potential unlawful killings. It has only officially named one U.S. civilian and one Italian civilian killed in a strike in Pakistan, as well as several other U.S. citizens it said were “not specifically targeted”—an ugly double standard, given that the vast majority of those killed and injured are citizens of Pakistan, Yemen, and Somalia.<sup>15</sup>

- 3. The U.S. government has provided information on decision-making processes, particularly for the military, but the CIA’s decision-making processes remain highly secretive.** For many years, the U.S. government provided only incomplete information about how a decision to carry out a strike was made. In 2016, following lengthy litigation challenging the government’s secrecy, the U.S. government released some information in the form of a Presidential Policy Guidance (PPG) about the institutional actors and process involved in deciding to launch a strike in areas “outside of active hostilities.”<sup>16</sup> The government had previously released a summary of this document in 2013 that described the decision-making process only in the most general terms.<sup>17</sup>

For circumstances not covered by this policy, there remains a stark difference at the agency level between transparency regarding CIA and military decision-making processes. It is very difficult to find publicly available written information about CIA targeting decision-making processes, whereas the U.S. military has, over the years, disclosed the military’s formal targeting decision-making processes in a series of military targeting doctrine documents.

The 2016 release and the information released by the military over the years give some clarity to the chain of command and the key officials responsible for decisions. However, exceptions to decision-making procedures in the 2016 PPG are referenced but not explained, meaning that some types of decision-making processes remain unclear.

- 4. The U.S. government has disclosed post-strike military investigative procedures and some aspects of congressional oversight processes, but there is little or no transparency regarding specific actions taken to ensure accountability in individual cases.** The U.S. military is, and has been for some time, transparent about its investigative processes and protocols. However, very little information is available for the CIA. While executive branch oversight mechanisms exist, it has been difficult to evaluate the role they play in overseeing U.S. drone and other strikes due to the lack of clear information. Since 2012, congressional oversight mechanisms have become more transparent, when information was revealed about some aspects of how they carry out oversight of U.S. strikes, but without more detailed information about recommendations made and actions taken by the executive branch, it is difficult to assess how meaningful this oversight is.

There is no clear and accessible mechanism for those injured and the families of those killed in strikes in Pakistan, Somalia, and Yemen to bring forward allegations or to claim and receive compensation or condolence payments. While, in general, the U.S. military releases results of court-martials, it does not release statistical disaggregated information regarding how many investigations were conducted, disciplinary action and prosecutions undertaken, and convictions. Likewise, the U.S. government has not disclosed statistical disaggregated information about the number of compensation or condolence payments made, amounts paid, and other details in Pakistan, Somalia, and Yemen. The U.S. government has also not provided information about individual compensation or condolence payments provided to those injured and families of people killed in specific cases. In U.S. courts, the government has also sought to prevent scrutiny of its strikes abroad by arguing for a broad application of the state secrets doctrine—a doctrine that the government can use to prevent the disclosure of evidence in a lawsuit for national security reasons. When the government’s arguments are accepted by the courts, it can prevent the case from being heard at all on its merits, as there is not enough information to proceed with the case.

## Advancing Transparency and Accountability in the Use of Lethal Force

The U.S. government should urgently improve transparency regarding its use of force overseas. The excessive secrecy of the Bush and Obama administrations led to widespread criticism, undermined counterterrorism efforts, and increased the suffering caused to those injured and the families of those killed. The Obama administration appeared to learn from some of these mistakes and harms by instituting limited reforms on the use of lethal force abroad between 2010 and 2016. The U.S. government should resist any temptation to reinstate greater secrecy, and should instead continue to advance transparency and accountability. This report sets out specific recommended actions for the U.S. government to take to build on its recent reforms. It also provides detailed recommendations for other states as well as U.N. actors to take to support the advancement of transparency in the use of force. Key recommendations follow.

### *The U.S. government should:*

- Promptly release the results of all government investigations into specific strikes, subject only to redactions where families of those killed, or those injured, have requested privacy or to ensure their physical safety, or only as strictly necessary for legitimate national security reasons.
- Provide detailed explanations for all past and future cases in which there are credible allegations of unlawful killings or civilian harm. In particular, provide urgent responses to ten serious cases that civil society groups have raised with the U.S. government.<sup>18</sup>
- Record, acknowledge, and explain to families and the public every civilian death, providing the name of the person killed.
- Disclose the legal basis for individual strikes, including by releasing all Office of Legal Counsel and other agency legal memoranda that set forth the basis for the use of force against all persons targeted, whether U.S. citizen or non-citizen.
- Ensure that the Director of National Intelligence continues to release a set of casualty figures on an annual basis pursuant to Executive Order 13,732. The release should be expanded to include information about numbers of those killed and injured in each country, the year and location of strikes, the names and ages of those killed, and whether strikes were judged to be lawful or unlawful.



- Compile and publish an annual breakdown of investigations opened, disciplinary measures and prosecutions undertaken, convictions, and compensation, condolence payments, or other forms of redress made.

***All other states should:***

- Reinforce existing standards on transparency, accountability, and the rule of law in relation to the use of force by:
  - recommending in the U.N. Human Rights Council Universal Periodic Review and other multilateral fora that states adopt improved transparency practices; and
  - supporting and proactively engaging in international processes that aim to increase transparency and accountability with respect to both the proliferation and use of armed drones.

# I. Recommendations

## To the Government of the United States

### TO THE EXECUTIVE

#### 1. Improve transparency around legal and policy frameworks

- 1.1 Follow up the release of the 2016 Legal and Policy Frameworks document by issuing an updated, detailed, and reasoned analysis which adequately explains which legal and policy frameworks apply to *all* of its operations overseas. Explain why these frameworks apply, and provide detailed justifications for their application, including a clear and definitive statement setting out which standards apply as a matter of law, and which apply as a matter of policy.
- 1.2 Disclose the legal basis for individual strikes, including by releasing all Office of Legal Counsel and other agency legal memoranda that set forth the basis for the use of force against all persons targeted, whether U.S. citizen or non-citizen, subject only to redactions strictly necessary for legitimate national security reasons.
- 1.3 On a regular basis, publicly disclose where and when the Presidential Policy Guidance applies.
- 1.4 Notify the U.N. Security Council in each instance where the United States uses force in the exercise of self-defense.
- 1.5 Disclose all instances where consent was provided by another government to carry out a strike on its territory, including:
  - when consent was provided;
  - which department and/or official of that government provided consent; and
  - an explanation of the scope of consent provided, including whether it was limited temporally, geographically, or operationally.
- 1.6 Provide detailed definitions and explanations of how all key legal and policy terms and criteria are interpreted and applied, including:
  - “areas of active hostilities;”
  - “associated forces;”
  - “cannot or will not effectively address the threat to U.S. persons;”
  - “continuing, imminent threat;”
  - “extraordinary circumstances,” and “fleeting opportunity;”
  - “feasibility of capture;”
  - “high value terrorist;”
  - “individual targetable in the exercise of national self-defense;”
  - “near certainty” that non-combatants will not be killed or injured;
  - “near certainty” with respect to the presence of targets;
  - “non-combatant;”

- the criteria used to determine that a foreign government is “unable or unwilling to address a threat posed by the non-state actor on its territory”; and
- the circumstances and criteria for determining when a non-international armed conflict begins and ends.

1.7 Where any legitimate need for secrecy for national security reasons has passed, disclose more detailed targeting rules and rules of engagement.

## 2. Improve transparency in relation to lethal force practices

2.1 Provide detailed explanations for all past and future strikes in which there are credible allegations of unlawful killings or civilian harm. In particular, provide urgent responses to the ten serious cases that civil society groups have raised with the U.S. government.<sup>19</sup>

2.2 Record, acknowledge, and explain to families and the public every civilian death, providing the name of the person killed.

2.3 Acknowledge all ongoing and future strikes, including by applying Executive Order 13,732 on United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force.

2.4 To enable greater transparency, transfer authority for conducting lethal strikes from the CIA to the Department of Defense.

2.5 Ensure that the Director of National Intelligence continues to release a set of casualty figures on an annual basis pursuant to Executive Order 13,732. The release should be expanded so that it is sufficiently detailed and disaggregated, and include:

- government estimates of the numbers of those killed and injured in strikes, and the numbers of strikes assessed to be lawful or unlawful, broken down by month, year, country, age, and sex;
- the name and age of each of those killed; and
- the methodology used to gather, assess, and compile civilian casualty estimates.

## 3. Enhance transparency around decision-making processes

3.1 Disclose details of internal government processes to make strike decisions, including explanations for all exceptional procedures as envisaged in the 2013 Presidential Policy Guidance.

## 4. Ensure robust oversight and accountability mechanisms

In order to ensure external oversight and accountability of its lethal use of force operations:

4.1 Make public and accessible information about the activities and findings of internal executive branch reviews or oversight mechanisms in relation to the use of lethal force overseas (if any), subject only to redactions strictly necessary for legitimate national security reasons.

4.2 To the extent that the government takes any actions or makes modifications to lethal use of force policy or practices in response to oversight, disclose such information subject only to redactions strictly necessary for legitimate national security reasons.

- 4.3 Ensure that findings and lessons learned from post-strike investigations lead to measures that better avoid or mitigate civilian casualties. Publicly report progress on how lessons have been implemented and assessments of the efficacy of reforms made.
- 4.4 Compile and publish an annual breakdown of:
- all investigations opened;
  - disciplinary measures and prosecutions taken; and
  - convictions against individuals responsible for violations of law or rules involving the use of force overseas.
- 4.5 Release statistical and aggregate information on the number of cases in which compensation or condolence payments were paid to those injured or families of people killed in strikes, together with the amounts paid. Publish case-specific information each time a payment is made specifying the amount and the reason, where the recipients of the payment agree to public disclosure and such disclosure is not assessed to be a security risk to the recipient or their families.
- 4.6 Disseminate, through appropriate media and other channels, concretely how those harmed by U.S. strikes or their representatives may make allegations and seek condolence or compensation payments. Publicized information should include: procedures, criteria, and timelines for government responses. Do not invoke the state secrets privilege to prevent post-strike judicial review, where to do so would effectively deny to alleged victims their right to a remedy, a right to which they are entitled under international law.

## TO THE DEPARTMENT OF DEFENSE

### 5. Enhance disclosure of information on use of lethal force practices

- 5.1 Promptly and publicly acknowledge all strikes. For each strike, release:
- the name of the agency responsible;
  - the date of the strike;
  - the country in which it occurred;
  - the numbers of those believed killed and injured, with their age, gender, and whether civilian;
  - in armed conflict situations, information on whether the person killed or injured was a civilian or combatant, and whether any civilian casualties were foreseen or were unanticipated;
  - outside of armed conflict situations, the numbers of people killed or injured, and whether they were assessed after the strike to be lawfully targeted or not;
  - the legal basis for the strike; and
  - details regarding whether a post-strike investigation has been launched, including an expected timeframe for completion.

Such information should be provided in a uniform database, and in a manner that is accessible so that it is possible for the public, journalists, and NGOs to review and evaluate strikes.

## **6. Improve transparency about decision-making processes related to targeting**

- 6.1** Publicly explain the decision-making processes followed by the Joint Special Operations Command in its targeting operations.

## **7. Ensure robust oversight and accountability**

- 7.1** Disclose procedures and standards for assessing the reliability and accuracy of allegations of civilian harm made by alleged victims and witnesses, human rights organizations or other monitoring groups, the media, or others.
- 7.2** Promptly release the results of investigations into specific strikes, subject only to redactions where families of those killed or those injured have requested privacy or to ensure their physical safety, or only as strictly necessary for legitimate national security reasons. strictly necessary for legitimate national security reasons.

Release:

- the steps that were taken to investigate the strike, including whether any of those directly impacted, witnesses, and/or families were interviewed;
  - the scope and purpose of the investigation and which agencies and particular teams were involved, including, for example, the resources and expertise devoted to investigations;
  - details of to whom the investigating team reported its findings;
  - the assessment and analysis of the lawfulness of the strike, including analysis of what precautions were taken before and during attack;
  - the assessment of the legality of the strikes and an explanation of whether and why civilians were killed or injured;
  - information on what lessons have been learned from the strike and whether and how practices and procedures can be improved in the future to reduce civilian casualties; and
  - where strikes are assessed to have resulted in civilian casualties, violated the law, or to have been in contravention of administrative rules, information on what procedures are being followed to investigate, discipline, and/or prosecute those responsible and/or provide compensation or condolence payments to those injured and the families of those killed.
- 7.3** Acknowledge and provide explanations where there are discrepancies between the U.S. government's findings and those of the United Nations, human rights organizations, or journalists, including how the civil society reports were assessed in the course of U.S. investigations.

## **TO THE CENTRAL INTELLIGENCE AGENCY**

### **8. Cease carrying out lethal strikes.**

*For all past strikes:*

### **9. Disclose information about CIA application of legal and policy framework**

- 9.1 Disclose which specific domestic and international legal and policy frameworks the CIA operated under when using lethal force overseas, in each country where the CIA carried out strikes.

## **10. Disclose information on use of lethal force practices**

- 10.1 Publicly and officially acknowledge the CIA's role in drone strikes in areas in which the agency has used lethal force.
- 10.2 Establish a process to declassify information about the CIA's use of lethal force since September 11, 2001.
- 10.3 Without further delay, publicly acknowledge all strikes, releasing:
- the name of the agency responsible;
  - the date of the strike;
  - the country in which it occurred;
  - preliminary figures of those believed killed and injured, with age, gender and whether civilian, where known;
  - in armed conflict situations, information on whether the person killed or injured was a civilian or combatant, and whether any civilian casualties were foreseen or were unanticipated;
  - outside of armed conflict situations, the numbers of people killed or injured, and whether they were assessed after the strike to be lawfully targeted or not;
  - the legal basis for the strike; and
  - details regarding whether a post-strike investigation has been launched, including an expected timeframe for completion.

Such information should be provided in a uniform database, and in a manner that is accessible so that it is possible for the public, journalists, and NGOs to review and evaluate strikes.

## **11. Disclose information about the CIA's decision-making processes**

- 11.1 Make public and accessible the CIA's decision-making procedures for carrying out strikes.

## **12. Disclose information about the CIA's accountability mechanisms**

- 12.1 Make public and accessible the agency's civilian protection mechanisms, including its civilian casualty mitigation processes and post-strike investigation procedures.
- 12.2 Disclose procedures and standards for assessing the reliability and accuracy of allegations of civilian harm made by alleged victims and witnesses, human rights organizations or other monitoring groups, the media, or others.
- 12.3 Without further delay release the results of investigations into specific strikes, subject only to redactions strictly necessary for legitimate national security reasons.

Release:

- the steps that were taken to investigate the strike, including whether any of those directly impacted, witnesses, and/or families were interviewed;

- the scope and purpose of the investigation and which agencies and particular teams were involved, including, for example, the resources and expertise devoted to investigations;
- details of to whom the investigating team reported its findings;
- the assessment and analysis of the lawfulness of the strike, including analysis of what precautions were taken before and during attack;
- the assessment of the legality of the strikes and an explanation of whether and why civilians were killed or injured;
- information on what lessons have been learned from the strike and whether and how practices and procedures can be improved in the future to reduce civilian casualties; and
- where strikes are assessed to have resulted in civilian casualties, violated the law, or to have been in contravention of administrative rules, information on what procedures are being followed to investigate, discipline, and/or prosecute those responsible and/or provide compensation or condolence payments to those injured and the families of those killed.

**12.4** Acknowledge and provide explanations where there are discrepancies between findings of the U.S. government's investigations and those of the United Nations, human rights organizations and journalists, including how these findings were assessed in the course of U.S. investigations.

## TO THE U.S. CONGRESS

### 13. Enhance transparency of oversight processes

**13.1** Congressional committees involved in oversight of the use of force overseas should regularly disclose information about their procedures, activities, findings, and recommendations, subject only to redactions strictly necessary for legitimate national security reasons. They should release:

- updated details on the procedures they follow to conduct oversight on the use of lethal force;
- the types of information disclosed to the Congressional committees, and how they review it, including how regularly; and
- information on actions taken and recommendations made by congressional committees to address issues and concerns that emerge through oversight.

**13.2** Members of Congress should request the executive to report to them on:

- detailed explanations for all past and future strikes in which there are credible allegations of unlawful killings or civilian harm;
- the legal basis for strikes, including by disclosing legal memoranda for specific strikes;
- how the government interprets and applies key legal and policy terms, as set out in the Annex to this report;

- civilian casualties, including what lessons have been learned to mitigate and avoid civilian harm, and how these policies are being implemented;
- individual investigations into specific strikes;
- statistical and aggregate information on accountability, in particular how many investigations, prosecutions, and convictions there have been in relation to drone strikes and “targeted killings,” and the number of cases in which condolence payments or compensation has been paid, with amounts.

## TO THE U.S. JUDICIARY

### **14. Ensure adequate post-strike judicial review of strikes and ensure the right to a remedy for victims of U.S. strikes**

- 14.1** Conduct robust review of any government invocation of the state secrets privilege, and ensure that the application of that privilege does not result in the denial of a remedy for victims of U.S. strikes.
- 14.2** Ensure that the public interest in knowing about the policies, legal interpretations, and practices of the government in relation to its use of lethal force is given due consideration when weighing whether to order government disclosure of information.

## TO STATES IN WHICH THE U.S. GOVERNMENT CARRIES OUT STRIKES

- 15.1** Publicly disclose whether consent has been given to the U.S. government to carry out operations in that country, and, if so, when it was given, by whom, and the scope of such consent (geographical, temporal, operational).
- 15.2** Disclose to the public, subject only to redactions strictly necessary for national security reasons, any agreements with the U.S. government regarding the use of force in their country.
- 15.3** Release government estimates for casualty figures on an annual basis, that include:
- the numbers of those killed and injured in strikes, and the numbers of strikes assessed to be lawful or unlawful, broken down by month, year, country, age, and sex;
  - government estimates of the names and ages of those killed, where available; and
  - the methodology used to gather, assess, and compile civilian casualty estimates.
- 15.4** Publicly release the results of any investigations into U.S. strikes on their territory.
- 15.5** Ensure that domestic laws and international law are not violated through U.S. use of force in their country.



## TO ALL STATES

- 16.1** Publish the government’s views of the legal frameworks applicable to the use of force overseas, as well as any applicable policies.
- 16.2** Publicly disclose:
- acknowledgement of all strikes, as well as civilian casualty data; and
  - decision-making and accountability processes.
- 16.3** Disclose to the public, subject only to redactions strictly necessary for legitimate national security reasons, any agreements with the U.S. government regarding the use of lethal force in other countries and the extent of assistance provided to these operations.
- 16.4** Ensure that any such agreements are not in violation of domestic laws and international law.
- 16.5** Reinforce existing standards on transparency, accountability, and the rule of law in relation to the use of force by:
- recommending in the U.N. Human Rights Council Universal Periodic Review and other multilateral fora that states adopt improved transparency practices; and
  - supporting and proactively engaging in international processes that aim to increase transparency and accountability with respect to both the proliferation and use of armed drones.
- 16.6** If seeking to acquire armed drone technology, ensure that the “Ensuring Transparency in the Use of Force Benchmarks” set out in this report are met.

## TO THE UNITED NATIONS SPECIAL RAPPORTEURS ON EXTRAJUDICIAL EXECUTIONS, COUNTERING TERRORISM, AND TRUTH

- 17.1** Monitor, evaluate and report on the transparency of the policies and practices of the U.S. government and other states on the use of force, and call on the U.S. government and other states to ensure greater transparency and accountability.
- 17.2** Request information from the U.S. government and other states on their policies and practices in relation to the use of force, including:
- how they interpret and apply their legal and policy obligations;
  - government estimates of civilian casualties in strikes;
  - detailed explanations for all past and future strikes in which there are credible allegations of unlawful killings or civilian harm;
  - the results of investigations into strikes; and
  - details of measures taken to ensure accountability for wrongdoing.
- 17.3** Develop and provide guidance to states on how to meet their obligations to be transparent and accountable about the use of force.

## II. Ensuring Transparency in the Use of Force

### Benchmarks: Summary Evaluation of U.S. Practice 2002-2017

#### 1. The Government Discloses Information about the Legal and Policy Frameworks Governing the Extraterritorial Use of Lethal Force, including by Clearly Defining Key Terms

Benchmark	Evaluation of U.S. practice
	<p><b>RED:</b> No or almost no transparency or reform efforts</p> <p><b>ORANGE:</b> Slight transparency or reform efforts</p> <p><b>YELLOW:</b> Moderate transparency or reform efforts</p> <p><b>BLUE:</b> Very transparent, or significant reform efforts</p> <p><b>GREEN:</b> Extremely transparent, or sustained, extensive reform efforts</p>
<p><b>Benchmark 1:</b> The government explains the legal frameworks that apply to its operations.</p>	<p><b>YELLOW: Moderate transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>• After years of secrecy, the U.S. government has publicly explained in very broad terms the legal frameworks it considers applicable to its lethal strikes abroad.</li> <li>• However, key questions that are crucial in determining the extent of any constraints on the use of force require further clarification, including the definition of key legal terms and how the U.S. government interprets and applies the law.</li> </ul>
<p><b>Benchmark 2:</b> The government discloses its assessment of the legality of individual strikes.</p>	<p><b>RED: No or almost no transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>• The U.S. government has disclosed its detailed assessment of the legality of a particular strike in only one case and pursuant to FOIA litigation—the strike targeting Anwar al-Aulaqi. In that case, the government documents revealed only its assessment of the lawfulness of the operation before the strike was disclosed, based on a set of assumptions before the strike occurred—not its evaluation of the strike after it occurred.</li> <li>• Specific legal reasoning for numerous other individual strikes against non-citizens remains secret.</li> </ul>
<p><b>Benchmark 3:</b> The government explains the policy frameworks that apply to its operations.</p>	<p><b>YELLOW: Moderate transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>• In 2016, the U.S. government released key policy documents related to its use of force in “areas outside of active hostilities”: an Executive Order on civilian casualties, and a redacted form of its policy standards and decision-making process for strikes, having released a fact-sheet summary of the same in 2013.</li> <li>• These were important steps, but important elements of these policies remain unexplained. In particular, the government has not explained key terms that allow for a wide degree of flexibility in their application, making it unclear when or how these policies apply.</li> </ul>

<p><b>Benchmark 4:</b> The government clearly distinguishes between legal obligations and policy standards.</p>	<p><b>BLUE: Significant transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>• Before 2010, the U.S. government explained little about its views of its legal obligations, and did not explain any additional policy standards it applied. From 2010 onwards, U.S. government officials began publicly disclosing the broad outlines of the legal and policy standards the government believed applicable to strikes, but the distinction between the two was not always clear.</li> <li>• In 2016, the U.S. government released a compendium of legal and policy standards. Despite the significant effort at pulling together this compendium, some uncertainty still remains due to inconsistency across the range of legal and policy documents it has released.</li> </ul>
<p><b>Benchmark 5:</b> The government reports uses of force in “self-defense” to the Security Council</p>	<p><b>ORANGE: Slight transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>• Since 2010, the United States has repeatedly invoked self-defense to justify its operations against al-Qaeda and other armed groups, including in Somalia and Yemen. The U.S. government has not explicitly disclosed its legal basis for operations in Pakistan, so it is unclear if it relies on self-defense as a legal justification for strikes there.</li> <li>• However, the U.S. government has not reported to the U.N. Security Council its use of force in any of those countries, save for one occasion when it used force against Houthi forces in Yemen in 2016.</li> </ul>
<p><b>Benchmark 6:</b> The government is transparent about its reliance on a host country’s consent as a legal basis for the use of force in that country.</p>	<p><b>ORANGE: Slight transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>• In a 2012 report, the U.S. government acknowledged that it was working jointly with the Yemeni government to combat al-Qaeda. The United States has also acknowledged on a handful of occasions that specific operations had been carried out jointly with Yemeni government forces and, on one occasion, explicitly that it had the full support of the Yemeni authorities. In December 2016, the U.S. government specifically and officially disclosed that counterterrorism operations, including drone strikes, are conducted with the consent of government officials in Yemen and Somalia. The government did not clarify which part of the government gave consent, or the scope of consent given.</li> <li>• The U.S. government has not explicitly disclosed whether the government of Pakistan has consented to strikes on its territory.</li> </ul>

## 2. The Government Discloses Factual Information about Lethal Use of Force Practices

Benchmark	Evaluation of U.S. practice
<p><b>Benchmark 7:</b> The government regularly publishes detailed statistics and aggregate information on lethal strike practices.</p>	<p><b>YELLOW: Moderate transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>For many years, the U.S. government released no official statistics on U.S. strikes and civilian casualties. The release of civilian casualty data for the first time in 2016, and then again in 2017, and the stated commitment to continue to release such data on an annual basis, was a step forward.</li> <li>However, the data released does not contain sufficient detail or disaggregation. Key gaps include: numbers of those injured in strikes; breakdowns by month, year, country, age, and sex; numbers of strikes assessed to be lawful or unlawful; and names of those killed.</li> </ul>
<p><b>Benchmark 8:</b> The government promptly acknowledges each and every strike.</p>	<p><b>ORANGE: Slight transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>Prior to 2014, the U.S. government had only officially acknowledged a handful of individual strikes, mostly those in which U.S. citizens were killed. Since late 2014, the U.S. Department of Defense began formally acknowledging at least some strikes in Somalia, and from 2016, also in Yemen. Almost all strikes by the CIA, and almost all strikes in Pakistan, remain unacknowledged.</li> <li>Even for strikes that are acknowledged, only basic information is revealed—generally location, date, and that the military is responsible.</li> </ul>
<p><b>Benchmark 9:</b> The government promptly discloses all assessments or investigations into strikes and other lethal operations, acknowledging and naming any civilians or bystanders harmed, as well as anyone unlawfully killed.</p>	<p><b>ORANGE: Slight transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>The U.S. government has released almost no assessments or investigations into specific strikes in Pakistan, Somalia, and Yemen. The government almost never provides the names of civilians killed in strikes. Except in isolated cases, the U.S. government has failed to provide detailed explanations of how many civilians it killed in a specific strike, or why civilians were killed, even where NGOs have provided detailed information about alleged civilian casualties to the U.S. government.</li> <li>There are few exceptions to this general secrecy. Three examples include: the apology for and announcement of an investigation into the mistaken 2015 killing of two western civilians in Pakistan; a basic report on an assessment of allegations of civilian casualties in Somalia in 2016; and the unusual U.S. government release of a basic assessment concluding that there were “likely” civilian casualties, including children, in a botched raid in Yemen in January 2017.</li> </ul>

### 3. The Government Discloses Information about Use of Force Decision-Making

Benchmark	Evaluation of U.S. practice
<p><b>Benchmark 10:</b> The government clearly explains the institutional decision-making process for the use of lethal force overseas.</p>	<p><b>YELLOW: Moderate transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>• For many years, the decision-making process for U.S. strikes was largely secret, particularly in relation to CIA strikes. In August 2016, the U.S. government took an important step by revealing—in the course of extensive litigation, and following a court order—the processes for high-level decision-making for pre-planned strikes.</li> <li>• For places not covered by this policy, at the agency level, there remains a stark difference here between transparency regarding CIA and military decision-making processes. It is very difficult to find publicly available written information about CIA targeting decision-making processes, whereas the U.S. government has, over the years, disclosed its formal targeting decision-making processes in a series of military targeting doctrine documents.</li> </ul>

## 4. The Government Discloses Information about Accountability Measures

Benchmark	Evaluation of U.S. practice
<p><b>Benchmark 11:</b> The government provides information about the executive and legislative branch oversight mechanisms in place to review government policies and practices on the use of lethal force overseas.</p>	<p><b>YELLOW: Moderate transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>The U.S. government is largely transparent about what mechanisms exist that, at least potentially, have the power to oversee its use of lethal force overseas, and about the mandate, powers, the procedures followed by such mechanisms.</li> <li>There was some increased, but sporadic, transparency from 2012 onward about what these mechanisms actually do, including as a result of occasional demands by committee members for more information, which have revealed what is or is not actually disclosed to these bodies. However, overall the U.S. government has not been sufficiently transparent about the bodies' findings, recommendations, and actions, and what, if any, actions the executive branch has taken in response.</li> </ul>
<p><b>Benchmark 12:</b> The government discloses detailed information on its post-strike assessment, investigation, and accountability processes.</p>	<p><b>BLUE: Significant transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>The U.S. government has released general information about military post-strike investigations and civilian casualty assessment procedures.</li> <li>Despite these releases, the disclosures fail to provide adequate information about when different investigatory processes may apply, to which units and entities they apply, whether such processes are applied or interpreted differently depending on context, and the extent to which investigations must strictly adhere to the processes. Again, there is very little information about CIA investigative processes, particularly compared with what is disclosed by the military.</li> </ul>
<p><b>Benchmark 13:</b> The government provides information about any disciplinary or criminal investigations taken against individuals involved in U.S. strikes.</p>	<p><b>ORANGE: Slight transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>The U.S. military regularly releases details of court martial convictions. However, the details are sparse and it is difficult to assess what action, if any, the U.S. government has taken regarding disciplinary measures, criminal charges, or convictions, in relation to documented strikes in Pakistan, Somalia, and Yemen. It is even more difficult to find publicly available information about disciplinary or criminal investigations in relation to CIA personnel.</li> </ul>
<p><b>Benchmark 14:</b> The government releases detailed information about an accessible, systematic, and effective mechanism for condolence payments and compensation.</p>	<p><b>ORANGE: Slight transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>For many years, it was unclear what, if any, policy and practice the U.S. government employed for condolence or compensation when it carried out unlawful killings, or otherwise killed or injured civilians in strikes in Yemen, Pakistan, and Somalia. In 2016, the U.S. government announced a policy of "offer[ing] condolences, including <i>ex gratia</i> payments," to civilians who are injured or to the families of civilians killed.</li> <li>However, the ability of those injured and family members of people killed in U.S. operations to obtain an effective remedy or condolence payment is hampered by the absence of clear information on how to access it. It remains unclear whether the Executive Order's policy on condolence payments will lead to clear guidelines that can be effectively adopted and implemented by all agencies, including covert bodies like the CIA, or whether the ability to provide payment will rest with specific institutions.</li> </ul>

<p><b>Benchmark 15:</b> The government discloses information about compensation and condolence payments provided.</p>	<p><b>RED: No or almost no transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>• The U.S. government frequently authorizes monetary payments for civilians suffering losses due to U.S. combat operations in Iraq and Afghanistan. However, the U.S. government has not officially disclosed similar payments to those injured or families of those killed in Pakistan, Yemen, and Somalia, except in one case involving an Italian killed in a U.S. strike.</li> </ul>
<p><b>Benchmark 16:</b> The government provides statistical information about:</p> <ul style="list-style-type: none"> <li>• Individual accountability for strikes, including by investigation, disciplinary action, and/or prosecution; and</li> <li>• Compensation, condolence payments, or other forms of redress provided.</li> </ul>	<p><b>RED: No or almost no transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>• The U.S. government has not released overall data regarding the numbers of investigations opened into alleged wrongdoing in relation to strikes in Somalia, Yemen, and Pakistan.</li> <li>• The U.S. government has also not released figures of disciplinary actions, prosecutions, and convictions in such cases. It has also not released any disaggregated details of payments made to individuals as compensation or condolence payments for strikes.</li> </ul>
<p><b>Benchmark 17:</b> The government and the courts do not permit any form of state secrets privilege to prevent a victim of unlawful killing from establishing a violation and obtaining an effective remedy.</p>	<p><b>RED: No or almost no transparency or reform efforts</b></p> <ul style="list-style-type: none"> <li>• In those cases that have reached the courts, the U.S. government has relied expansively on the state secrets privilege.</li> <li>• While these cases were dismissed on other grounds and the issue of state secrets was not ultimately adjudicated by the courts, the U.S. government's reliance on the doctrine was broad enough that it would deny alleged victims any form of accountability for its use of force overseas.</li> </ul>

## IV. Background to U.S. Drone Strike and “Targeted Killing” Policies and Practices: History and Controversies

The use of lethal force, including by weaponized drones, to conduct “targeted killings” in places far from traditional battlefields represents one of the most controversial elements of U.S. counterterrorism policy. Notwithstanding serious concerns about the effectiveness, ethics, legality, and secrecy of such strikes, the use of lethal force in U.S. operations outside active conflict zones, including by drone strikes, has rapidly become a defining feature of the U.S. approach to counterterrorism. To help explain how and why this has happened, this section provides a brief overview of the history, the core controversies, and debates surrounding U.S. “targeted killings” and drone strikes.

### 1 Background and Brief History of U.S. Drone Strikes and “Targeted Killings”

The first known U.S. drone strike took place in Afghanistan on October 7, 2001, just weeks following the September 11, 2001 attacks in which more than 3,000 people were killed.<sup>20</sup> Shortly afterwards, President George W. Bush granted broad authority for counterterrorism operations,<sup>21</sup> marking the beginning of the shift to a so-called “global war” that blurred the lines between war and peace. Since then, the United States has continued to carry out drone strikes and “targeted killings” in countries outside of traditional conflict zones, including Pakistan, Somalia, Yemen,<sup>22</sup> and the Philippines.<sup>23</sup>

For many years, little was publicly known about drone strikes and “targeted killings.” However, with the significant increase in strikes under the Obama administration from 2008 onward, came increased scrutiny. Whereas President Bush authorized an estimated 50 strikes,<sup>24</sup> the Obama administration conducted over 500 drone strikes in areas far from traditional battlefields.<sup>25</sup> In the early months of the Trump presidency, the rate increased again.<sup>26</sup>

#### What are drones and “targeted killings”?

The term “drone” is frequently used interchangeably with “targeted killings,” although they are not the same. “Drone” refers to the technology used, whereas “targeted killing” refers to a type of killing.

**Drones** are remotely piloted or remotely controlled technologies. This report refers to armed drones that can be used both for surveillance as well as carrying out attacks, firing missiles at individuals, groups, or other targets. Drones have been used with increasing frequency to carry out “targeted killings.” Drones can be flown for long hours in remote locations, which makes them well suited to this type of operation.

**“Targeted killing”** typically refers to the intentional, preplanned killing of a specifically identified individual. Drones are just one way of carrying out a “targeted killing.” Other types of air strikes, or attacks by individuals, can also be used for “targeted killing.” The term “targeted killings” does not have legal significance in that such killings may be lawful or unlawful, depending on the circumstances. For instance, the deliberate targeting of a soldier in a recognized situation of armed conflict will ordinarily be lawful according to the laws of war. War is an exceptional circumstance. Outside of conflict situations, it will rarely be permissible to carry out a “targeted killing.”



Over the years, more information has become available about U.S. “targeted killing” and drone operations. In 2012, journalists revealed that individuals are identified and selected to be on a “kill list,” a government-maintained database used to track and select targets for particular strikes.<sup>27</sup> Reports also uncovered the U.S. government’s use of so-called “signature strikes,” whereby targets are selected based on their behavior and personal networks, even if they have not been individually identified.<sup>28</sup> Depending on the location and nature of a strike, it may be carried out by the Central Intelligence Agency (CIA), or by the U.S. military under the Department of Defense (DoD).<sup>29</sup>

The United States has controversially carried out strikes in Pakistan, Somalia, and Yemen—areas where the existence of an armed conflict has been deeply contested and where the United States has not been engaged in large-scale military operations. According to U.S. officials, strikes in Yemen have primarily been directed at members of al-Qaeda in the Arabian Peninsula (AQAP). In Pakistan targets include the Taliban and other armed groups, and in Somalia strikes target alleged members of al-Qaeda, some of whom are also possibly members of al-Shabaab.<sup>30</sup> All of these groups are implicated in gross human rights abuses and violations of international law.<sup>31</sup>

Until 2016, the U.S. government did not release figures regarding the numbers of people killed in strikes and other lethal operations in Pakistan, Somalia, and Yemen. Still, some officials publicly suggested that civilian casualties were very limited. For example, in June 2011, then Assistant to the President for Homeland Security and Counterterrorism, John Brennan, claimed that U.S. drone strikes in the previous year had not resulted in even a “single collateral death.”<sup>32</sup> Only belatedly in 2013 did President of the United States formally admit for the first time that “U.S. strikes have resulted in civilian casualties.”<sup>33</sup>

In response to civil society’s repeated calls for more detailed information, in July 2016 and January 2017, the U.S. Director of National Intelligence (DNI) published casualty figures related to all U.S. strikes outside of Afghanistan, Iraq, and Syria between 2009 and 2016. Between January 2009 and December 2016, the U.S. government says it killed between 2,867 and 3,138 people in places far from traditional battlefields. It claims that between 65 and 117 were “non-combatants.”<sup>34</sup> There are significant discrepancies, however, between the government’s figures and estimates gathered by independent organizations, including those that use on-the-ground fact-finding missions in the countries where strikes have taken place to estimate casualty figures.<sup>35</sup>

As U.S. strikes continue, with increases in numbers of lethal force operations in the early months of the Trump presidency,<sup>36</sup> there are concerns about drones’ proliferation and their use by other countries. According to reports, Russia, South Korea, and Taiwan have developed drone capabilities; China, Hezbollah, Iran, and South Africa have acquired armed drones;<sup>37</sup> and Iraq,<sup>38</sup> Israel,<sup>39</sup> Nigeria,<sup>40</sup> Pakistan,<sup>41</sup> and the United Kingdom have used armed drones to carry out strikes.<sup>42</sup> More countries are sure to acquire these capabilities, meaning that the issue of drone strikes and “targeted killings” will be even more global than it already is.

## 2 Drone Strikes and “Targeted Killings” Controversies

The use of drone strikes and “targeted killings” has given rise to a range of controversies, spanning concerns about the efficacy of strikes; ethical issues, especially due to concerns about civilian casualties; and the potential illegality of U.S. policies and practices.<sup>43</sup> Overarching and compounding these interrelated critiques are problems caused by the lack of government transparency about its policies and practices.

**The efficacy of strikes—for destroying armed groups, countering terrorism, and promoting peace and stability around the world—has been questioned.** Serious questions have been raised regarding the potential for drone strikes to prolong or escalate “conflict and instability.”<sup>44</sup> Some have argued that U.S. policy and practice has actually strengthened terrorist groups, as public anger and fear caused by U.S. strikes have been used for recruitment by terrorist organizations.<sup>45</sup> Furthermore, while U.S. officials have claimed that strikes have been effective in disrupting terrorist groups by causing heavy losses to al-Qaeda’s leadership,<sup>46</sup> critics have argued that a significant number of those killed in U.S. drone strikes were not the purported “leaders” of armed groups, but instead were low-level, often unidentified individuals.<sup>47</sup>

**Commentators have also challenged the ethics of strikes.** While proponents of the drone strikes argue that they are more precise,<sup>48</sup> and therefore more ethical because they are less likely to result in civilian casualties, these claims have been increasingly questioned.<sup>49</sup> These ethical concerns have been heightened by the large discrepancy in civilian casualty figures provided by the government and those gathered by independent journalists, United Nations officials, and human rights organizations. Some question whether the ease with which drones are deployed, and the purported, although contested, accuracy of strikes actually make policymakers more willing to resort to the use of lethal force.<sup>50</sup> Furthermore, the physical and emotional distance inherent in drone strikes also poses ethical problems. Many have asked whether it is right for drone controllers on a military base in Nevada to kill people on the other side of the world at the push of a button. In short, critics argue that the lack of proximity to operations creates a level of abstraction between the drone operator and his or her intended target, as those engaging in actions from a distance have little understanding of the human effects of their actions.<sup>51</sup>

**There are serious concerns regarding the legality of U.S. strikes.** The increased use of drones to carry out “targeted killings” by the Obama administration in areas far from recognized conflict zones is critical to understanding what attracted so much attention to this issue. In genuine situations of armed conflict, a more permissive legal regime applies—international humanitarian law (IHL)—in which certain categories of people, such as soldiers and members of armed groups directly involved in fighting, can legitimately be targeted. But war is exceptional. Ordinarily, in peacetime, international law only permits intentional killing if it is strictly necessary to prevent a truly imminent (immediate) threat to life.

In contrast, U.S. officials have characterized the government’s approach as legally sound, publicly elaborating on the legal reasoning in a series of speeches and other disclosures.<sup>52</sup> From what is publicly available, the U.S. government appears to argue that strikes are justified either as part of a global war with al-Qaeda and “Associated Forces”—a broad term applied to a whole range of groups—or on the basis of a purported right of self-defense as a standalone justification to use lethal force against individuals across borders.<sup>53</sup> States themselves have expressed distinctly contrary opinions.<sup>54</sup> Academics, human rights experts, and UN officials have also consistently criticized U.S. legal interpretations as outlier views, with particularly strong criticism of the “global war” paradigm.<sup>55</sup> In Pakistan, Somalia, and Yemen the situation has been highly contested, with many organizations and analysts challenging U.S. claims that it can deliberately target individuals in those locations. Further questions have been raised about U.S. compliance with other legal obligations, including those applicable in armed conflict. These include concerns that the United States takes an overly broad view of whom it can target in war, and concerns regarding a lack of accountability for civilians killed and injured in strikes.<sup>56</sup>

**Finally, U.S. “targeted killings” and drone strikes have been criticized for being secretive and lacking transparency,** which is the subject of this report and explored in greater detail in the next section. The U.S. government has been criticized for its failure to provide sufficient or

clear information about the legal and policy criteria it applies to operations, the factual information around strikes, and the decision-making and accountability processes. While, as noted above, there have been a number of improvements, critics have emphasized how the lack of transparency in these core areas has hindered debate on many other controversies. For example, an evaluation of the legality of strikes requires sufficient information about the context to determine what laws apply, as well as sufficient factual information to assess whether those laws were violated. Civil society and others have argued that the U.S. government has not disclosed enough information in this regard, and that secrecy has further hindered accountability. Serving and former government officials have argued that the U.S. government has, in fact, been open and transparent, and more forthcoming on these matters than other countries.<sup>57</sup>

## V. Taking Stock of Disclosures on the Use of Lethal Force: Where are we now?

In the years after September 11, 2001, President George W. Bush initiated and implemented U.S. “targeted killings” in extreme secrecy, with almost no acknowledgment that the U.S. government was involved in carrying out drone and other strikes in places like Pakistan, Somalia, and Yemen. When President Obama assumed office in January 2009, he issued a memorandum to his senior officials heralding the value of transparency in “promot[ing] accountability and provid[ing] information for citizens about what their Government is doing.”<sup>58</sup> As detailed in this section, Obama’s actual transparency record on the use of lethal force was checkered at best and marked by continued secrecy in key areas, despite some improvements toward the end of his presidency. When President Trump was inaugurated in January 2017, commentators questioned whether he would continue the movement toward greater transparency and accountability initiated by Obama, or would instead repeat the mistakes of the early Obama years by returning to excessive secrecy, a secrecy that had undermined counterterrorism efforts and increased the suffering caused to those injured and the families of those killed.

This section evaluates and assesses the past fifteen years of U.S. practice, and identifies shortcomings that remain to help guide future policy reform.

Too often, discussions about transparency are hampered by generalities and misunderstandings. Calls for transparency are made and are met with responses that transparency is adequate or is being advanced, or that information must be withheld for reasons of national security. Missing from this conversation is a specific, disaggregated analysis of what has and has not been disclosed. What *kinds* of transparency are important, and why? In which areas have positive steps been taken toward transparency? What exactly do U.S. government disclosures tell the public about U.S. policy and practice on the use of lethal force? What is unclear, uncertain, secret, not known?

This section deepens understanding of existing U.S. government transparency and accountability by evaluating U.S. practice against a set of human rights-based “Ensuring Transparency in the Use of Force Benchmarks.” These benchmarks, grounded in the interests and rights of people impacted by U.S. strikes,<sup>59</sup> international law, and the promotion of the rule of law and democratic accountability, enable detailed assessments of government transparency in the use of lethal force. The benchmarks, designed by the authors of this report, assist policymakers, journalists, and others to track the level of secrecy over time, and enable evaluation of whether a government is improving transparency or rolling back any positive reforms.

This section provides clarity on what has been achieved and where more transparency is needed. It provides:

- **A timeline of selected calls for transparency and key U.S. government disclosures.** The timeline provides an overview of transparency advocacy and government disclosures since 2002, plotting the many calls for transparency against the official disclosures that have been made by the U.S. government.
- **A set of “Ensuring Transparency in the Use of Force Benchmarks”.** The benchmarks provide clarity about exactly what the government should be transparent about. These benchmarks are designed to aid in assessing U.S. government transparency about its use of drones and lethal force in the context of counterterrorism and armed conflict.

- **An analysis of disclosures made over the past decade, and what steps are needed to improve transparency.** For each benchmark, the report explains the significance of what remains unknown and offers an assessment of the U.S. government’s current disclosure in four critical areas:
  - Information about the applicable legal and policy frameworks, and the government’s interpretation and application of them;
  - Information about practices—who was killed, what happened and where, for individual strikes and operations and in overall statistics;
  - Information about how decisions are made to target someone; and
  - Information about accountability processes and measures—oversight, justice, and condolence payments and compensation for those it harms.

# Timeline

## Selected calls for transparency and key disclosures by the government

For many years, the government disclosed almost nothing about its practices of killings in areas outside traditional battlefields. Advances came only in the wake of independent fact-finding and repeated, sustained calls for transparency, including advocacy by the families of those killed and NGOs, as well as Freedom of Information Act (FOIA) requests and subsequent litigation following refusals by the government to disclose sufficient information. At the same time, important efforts by key officials at the White House and in other government departments to prioritize transparency and respond to civil society demands have resulted in some notable improvements.

Selected Calls for Transparency	Year	Key Disclosures
<ul style="list-style-type: none"> <li>U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions (SR EJE) Asma Jahangir (1998-2004) voices concerns about transparency and accountability following a drone strike in Yemen in 2002.<sup>60</sup></li> </ul>	2002	<ul style="list-style-type: none"> <li>U.S. government officials obliquely acknowledge strike in Yemen in comments to the media.<sup>61</sup></li> </ul>
	2003	<ul style="list-style-type: none"> <li>The U.S. government responds to SR EJE Asma Jahangir, stating that it would make “no comment” on the specific allegations, but asserted its right to use force against “legitimate military targets” in “any military operations conducted during the course of an armed conflict with Al Qaida,” which, the United States claimed, did not fall within the mandate of the Special Rapporteur.<sup>62</sup></li> </ul>
<ul style="list-style-type: none"> <li>SR EJE Philip Alston (2004-2010) expresses concern in an allegation letter to the U.S. government regarding the killing of Haithim al-Yemeni, and asks for clarification on the rules of law under which the United States was operating, the procedural safeguards, and the basis on which the decision was made to kill rather than capture.<sup>63</sup></li> </ul>	2005	
<ul style="list-style-type: none"> <li>SR EJE and U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism reiterate the concerns expressed in the August 26, 2005 letter,<sup>64</sup> in two new letters to the U.S. government decrying the lack of transparency and accountability.<sup>65</sup> One letter was a response to the U.S. government’s response to the SR EJE on the allegations regarding strikes in Pakistan, noting the unsatisfactory response given regarding the first allegation.<sup>66</sup> The second letter was sent after three strikes in Pakistan—two in 2005 and one in 2006—allegedly resulted in the deaths of several civilians.<sup>67</sup></li> </ul>	2006	<ul style="list-style-type: none"> <li>The U.S. government responds to the SR EJE’s allegation letter, stating that it is in an ongoing international armed conflict with Al-Qaeda and that it is under no obligation to disclose information.<sup>68</sup></li> </ul>

<ul style="list-style-type: none"> <li>• <b>Extensive investigations by NGOs into strikes proliferate</b> after 2009, documenting the extent of civilian harm, the impact of strikes on communities, and possible legal violations.<sup>69</sup></li> <li>• <b>SR EJE submits findings</b> from his June 2008 mission to the United States to the U.N. Human Rights Council, in which he reiterates concerns about the lack of accountability and emphasizes the need for U.S. transparency about its legal framework and targeting decisions.<sup>70</sup></li> </ul>	<b>2009</b>	<ul style="list-style-type: none"> <li>• <b>Until the end of 2009, there is almost complete secrecy around U.S. drone strikes and “targeted killings,”</b> with no official U.S. acknowledgement about the United States’ use of armed drones, even in general terms.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>The American Civil Liberties Union (ACLU) begins filing Freedom of Information Act (FOIA) requests</b> to demand disclosures from the Department of Defense, Department of Justice, Department of State, and CIA about legal and factual information related to drone strikes.<sup>71</sup> Such FOIA litigation remains ongoing and has led to some of the most important disclosures, including the release of the Presidential Policy Guidance in August 2016.<sup>72</sup></li> <li>• <b>The ACLU and the Center for Constitutional Rights (CCR) file a lawsuit</b> in August 2010 challenging the government’s asserted authority to carry out “targeted killings” of U.S. citizens located far from any armed conflict zone and <b>arguing that the American public are entitled to know the standards it uses for authorizing the premeditated and deliberate killing of U.S. citizens</b> located far from any battlefield.<sup>73</sup> A federal court dismissed the case in the same year, arguing that it raised “political questions” that the court could not decide.</li> <li>• <b>SR EJE calls for greater transparency</b> on the legal rationale for drone strikes and the bases for selection of targets in two reports on targeted killings, submitted to the U.N. Human Rights Council and the U.N. General Assembly.<sup>74</sup></li> <li>• <b>Center for Civilians in Conflict (CIVIC) publishes report</b> on civilian harm in northwest Pakistan.<sup>75</sup></li> <li>• <b>Human Rights Watch writes a letter</b> to President Obama asking for transparency on the rationale behind the use of drones and the procedural safeguards taken to minimize harm in response to Harold Koh’s March 2010 speech.<sup>76</sup></li> </ul>	<b>2010</b>	<ul style="list-style-type: none"> <li>• <b>In March, Harold Koh, Legal Adviser to the State Department, gives a speech at the annual meeting of the American Society of International Law</b> in which he acknowledges U.S. “targeting practices,” stating that the Administration believes that such practices “comply with all applicable law, including the laws of wars.”<sup>77</sup> This speech also lays out the U.S. position on the legal framework for its targeting practices, citing an ongoing armed conflict with Al Qaeda and associated forces, the right to self-defense, and the 2001 Authorization for Use of Military Force (AUMF).<sup>78</sup></li> </ul>

<ul style="list-style-type: none"> <li>• Congressman Ron Wyden asks the Director of National Intelligence for the government’s legal analysis on the President’s authority to kill U.S. citizens.<sup>79</sup> By 2014, 31 members of Congress had made 24 requests specifically calling for such information.<sup>80</sup></li> <li>• Jack Goldsmith, former Assistant Attorney General, Office of Legal Counsel and Special Counsel to the Department of Defense from 2002–2003, calls for the release of the legal memorandum justifying the killing of Anwar al-Aulaqi.<sup>81</sup></li> <li>• Several different NGOs continue to write letters calling for increased transparency.<sup>82</sup></li> </ul>	<b>2011</b>	<ul style="list-style-type: none"> <li>• In June, John Brennan, Assistant to the President for Homeland Security and Counterterrorism, states that “nearly for the past year there hasn’t been a single collateral death” in a speech at the Paul H. Nitze School of Advanced Studies.<sup>83</sup> He later reportedly clarified his remarks by saying he had “no information to the contrary.”<sup>84</sup></li> <li>• In September 30, President Obama announces the death of Anwar al-Aulaqi, stating that he had been killed earlier that same morning in Yemen.<sup>85</sup></li> </ul>
<ul style="list-style-type: none"> <li>• Stanford Law School International Human Rights and Conflict Resolution Clinic and NYU School of Law Global Justice Clinic publish a report on civilian casualties from drone strikes in Pakistan.<sup>86</sup></li> <li>• Columbia Law School Human Rights Clinic publishes a report reviewing the different estimates and methodologies for counting drone strike deaths, and calling for the U.S. government to release more information.<sup>87</sup></li> <li>• CIVIC and Columbia’s Human Rights Clinic jointly publish a report assessing the civilian impact of drones, specifically identifying the need for transparency about civilian harm and related policies.<sup>88</sup></li> <li>• The Bureau of Investigative Journalism (TBIJ) releases data on drone strikes conducted between 2002 and 2011 in Somalia and Yemen.<sup>89</sup> In subsequent years, TBIJ continues to gather data on drone strikes and other covert actions in Pakistan, Somalia, Yemen, and elsewhere.</li> <li>• Reprieve and the UK law firm Leigh Day petition UK courts for judicial review of UK drones policy following the reported killing of around 50 people in a 2011 drone strike in Pakistan.<sup>90</sup> The case was dismissed in 2014 on jurisdictional grounds because the courts were concerned that the “findings would be understood by the U.S. authorities as critical of them.”<sup>91</sup></li> </ul>	<b>2012</b>	<ul style="list-style-type: none"> <li>• In a speech at Northwestern University in March, U.S. Attorney General Eric Holder acknowledges that the United States had targeted senior operational leaders of Al-Qaeda and “associated forces.”<sup>95</sup></li> <li>• One month later in April, John Brennan, Assistant to the President for Homeland Security and Counterterrorism, gives a speech that includes the first official U.S. acknowledgment of the use of drone strikes, describing the United States as “the first nation to regularly conduct strikes using remotely piloted aircraft in an armed conflict.”<sup>96</sup> In the speech Brennan also notes the need for greater transparency to help correct the impression internationally that drone strikes are used “casually.”<sup>97</sup></li> <li>• Also in April, Stephen Preston, CIA General Counsel, gives a speech at Harvard Law School describing in outline the CIA and its relationship with oversight bodies and the law.<sup>98</sup></li> </ul>



<ul style="list-style-type: none"> <li>• The ACLU and the CCR file a lawsuit <b>challenging the government’s targeted killing of three U.S. citizens, including 16-year-old Abdulrahman al-Aulaqi, in drone strikes far from any armed conflict zone, and calling for disclosure of the legal criteria the U.S. government used to justify the strikes.</b> In 2014 Judge Rosemary Collyer, while concerned at the breadth of the government’s arguments to try and prevent the courts from hearing the case, still dismissed the case on the grounds that U.S. law afforded no remedy, and that the judiciary had a very limited role in the area of national security.<sup>92</sup></li> <li>• In October, <b>hundreds of people joined a protest against U.S. drone strikes</b> in a march in Pakistan led by Pakistani politician Imran Khan and joined by the NGO Code Pink.<sup>93</sup></li> <li>• In a briefing paper directed at the reelected Obama administration, <b>Human Rights First calls for greater transparency</b> in relation to U.S. drone strikes.<sup>94</sup></li> </ul>	<b>2012</b> (CONT.)	
<ul style="list-style-type: none"> <li>• <b>Senate Subcommittee on the Constitution, Civil Rights and Human Rights</b> holds hearing on drone warfare,<sup>99</sup> with <b>Rosa Brooks and Farea Al-Muslimi giving testimonies calling for greater transparency.</b><sup>100</sup> <b>Al-Muslimi, Chairman of the Sana’a Center for Strategic Studies</b> calls on the U.S. government to issue a formal apology and compensate the families of victims killed or injured by U.S. drone strikes, and disclose the names of those on “kill lists.”</li> <li>• In May, following litigation by the Foundation for Fundamental Rights and Reprieve, a Pakistani court <b>declared the U.S. government responsible for war crimes for its use of drones in northwest Pakistan, held that the U.S. government should compensate victims, and ordered the Pakistani government to take a series of steps to stop future strikes.</b><sup>101</sup></li> <li>• In October, <b>U.N. Special Rapporteurs raise concerns about transparency</b> with the U.N. General Assembly, U.N. Human Rights Council, and the U.S. government.<sup>102</sup></li> <li>• Responding to the presentations of the U.N. Special Rapporteurs, <b>a number of states express concern about the lack of transparency regarding drone strikes.</b><sup>103</sup></li> <li>• <b>U.N. Secretary-General expresses concern at “the continuing lack of transparency surrounding attacks involving armed drones and the consequences thereof,”</b> in a report to the U.N. Security Council on the Protection of Civilians.<sup>104</sup></li> </ul>	<b>2013</b>	<ul style="list-style-type: none"> <li>• In February, <b>John Brennan, during the Senate hearing on his nomination to become Director of the CIA,</b> tells the Senate Intelligence Committee that strikes were used against targets planning attacks against the United States, not as a form of retribution.<sup>111</sup></li> <li>• In a May letter to congressional leaders, <b>U.S. Attorney General Eric Holder discloses that one American citizen had been targeted and three others killed in counter-terrorism operations conducted by the United States “outside of areas of active hostilities.”</b><sup>112</sup></li> <li>• In May, <b>President Obama</b> delivers a speech at the National Defense University where he <b>acknowledges strikes against Al Qaeda and associated forces in Afghanistan and beyond as a response to a “continuing and imminent threat.”</b> He also recognizes that there are civilian casualties in strikes.<sup>113</sup></li> <li>• On the same day as this speech in May, the U.S. government releases a factsheet on the newly promulgated <b>“U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities.”</b><sup>114</sup></li> <li>• In August in widely reported comments to the press, <b>Secretary of State, John Kerry makes very rare acknowledgment of U.S. strikes in Pakistan.</b><sup>115</sup></li> </ul>

<ul style="list-style-type: none"> <li>• Amnesty International publishes a report documenting alleged unlawful killings from drone strikes in Pakistan.<sup>106</sup></li> <li>• The family of Mamana Bibi, a 65-year-old grandmother killed in 2012 by a U.S. drone strike in North Waziristan, Pakistan, testifies before a Congressional briefing on drone strikes.<sup>107</sup></li> <li>• The Council on Foreign Relations publishes a report on reforming U.S. drone strike policies, including calling for greater transparency.<sup>108</sup></li> <li>• A coalition of NGOs writes the first in a series of letters expressing concern about U.S. drone strikes and targeted killings policy and secrecy.<sup>109</sup></li> <li>• Admiral Dennis C. Blair, former Director of National Intelligence, Harold Koh, former Legal Advisor to the State Department, and Gen. James Cartwright (Ret.) call for greater transparency in relation to drone strikes.<sup>110</sup></li> </ul>	<p><b>2013</b> (CONT.)</p>	
<ul style="list-style-type: none"> <li>• In March, the states at the U.N. Human Rights Council adopt Resolution 25/22, calling on states to comply with international law when using armed drones, to “ensure transparency in their records” on their use, and to conduct prompt, independent and impartial investigations into potential legal violations.<sup>116</sup></li> <li>• In April, the U.N. Human Rights Committee, in its concluding observations on U.S. compliance with its ICCPR obligations, calls on the U.S. government to disclose the legal basis for strikes, conduct investigations into alleged violations, and provide an effective remedy and accountability mechanisms for victims of unlawful killings.<sup>117</sup></li> <li>• In September, states again make calls for transparency in relation to drone strikes at a panel discussion at the U.N. Human Rights Council,<sup>118</sup> where the Deputy High Commissioner for Human Rights, the SR EJE, the SR CTHRs, and other panelists also emphasized the importance of transparency.<sup>119</sup></li> <li>• The NGO Coalition sends a letter to the U.N. Human Rights Council, encouraging it to build upon resolution 25/22, and calling for increased transparency by states.<sup>120</sup></li> <li>• In October, the European Center for Constitutional and Human Rights and Reprieve file a legal complaint in Germany challenging the use of the U.S. airbase at Ramstein, Germany in drone strikes.</li> </ul>	<p><b>2014</b></p>	<ul style="list-style-type: none"> <li>• In June, the U.S. government releases a redacted Department of Justice memorandum justifying the targeting of Anwar al-Aulaqi and dated July 16, 2010, pursuant to a court order arising out of litigation over an ACLU FOIA request.<sup>123</sup> The document authorizes and explains the legal basis for both the Department of Defense and the CIA to kill Anwar al-Aulaqi, a U.S. citizen in Yemen.<sup>124</sup></li> <li>• The U.S. government issues its first official acknowledgment of a strike in Somalia with the Pentagon announcement of the death of Ahmed Godane, co-founder of al-Shabaab.<sup>125</sup></li> </ul>

<ul style="list-style-type: none"> <li>• <b>Human Rights Watch</b> publishes a report of further investigations into a drone strike on a wedding in Yemen.<sup>121</sup></li> <li>• <b>Open Society Foundations</b> publishes a report on U.S. and Pakistan government responsibilities to victims of drone strikes.<sup>122</sup></li> </ul>	<b>2014</b> (CONT.)	
<ul style="list-style-type: none"> <li>• The <b>U.N. Office for Disarmament Affairs</b> publishes a study pursuant to a recommendation of the Advisory Board on Disarmament Matters, containing detailed recommendations for improving the transparency, oversight and accountability for the use of drones.<sup>126</sup></li> <li>• The <b>NGO Coalition</b> directs a letter to President Obama, calling for public acknowledgment and investigations of targeted killings and drone strikes.<sup>127</sup></li> <li>• The <b>Open Society Justice Initiative</b> and the <b>Mwatana Organization for Human Rights</b> publish a report on civilian harm caused by U.S. targeted killings in Yemen, calling for the disclosure of legal and policy standards related to the use of force.</li> <li>• The <b>Foundation for Fundamental Rights (FFR) and Reprieve</b> publish a report on the issue of compensation for the victims of U.S. drone strikes in Pakistan.<sup>128</sup></li> </ul>	<b>2015</b>	<ul style="list-style-type: none"> <li>• <b>President Obama</b> makes an official statement on the deaths of <b>Warren Weinstein and Giovanni Lo Porto</b>,<sup>129</sup> four months after they are killed by a U.S. drone strike.<sup>130</sup> In his statement, the President acknowledges that both were accidentally killed in a U.S. counterterrorism operation, explaining that the initial intelligence supporting the strike did not indicate that there were civilians present. More broadly, President Obama acknowledges that “deadly mistakes” can occur in operations.<sup>131</sup></li> <li>• In May, pursuant to <b>ACLU FOIA</b> litigation,<sup>132</sup> the U.S. government releases a <b>Department of Justice White Paper</b>, dated November 8, 2011, on the “<b>Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force.</b>”<sup>133</sup></li> <li>• <b>Stephen Preston</b>, General Counsel of the Department of Defense, presents the legal framework for the use of military force against <b>Al-Qaeda, ISIL, and “Associated Forces.”</b><sup>134</sup></li> </ul>
<ul style="list-style-type: none"> <li>• <b>Amnesty International</b> sends a letter to <b>Caroline Krass</b>, General Counsel of the CIA, requesting acknowledgement of the death of <b>Mamana Bibi</b>, pursuant to Executive Order 13,732 on civilian casualties.<sup>135</sup></li> <li>• The <b>NGO Coalition</b> sends a letter to the Obama administration calling for implementation of Executive Order 13,732 on civilian casualties.<sup>136</sup></li> </ul>	<b>2016</b>	<ul style="list-style-type: none"> <li>• On <b>March 23rd</b>, the U.S. government officially acknowledges strikes in Yemen for the first time since the 2011 <b>Anwar al-Aulaqi</b><sup>137</sup> strike and the belated 2013 acknowledgements of the strikes killing <b>Samir Khan</b> and <b>Abdul Rahman al-Aulaqi</b>. The U.S. military starts regularly acknowledging strikes in Yemen from this time on.</li> <li>• <b>State Department Legal Advisor Brian Egan</b> delivers the keynote address at the <b>American Society of International Law</b> annual meeting in April, summarizing the U.S. understanding of the legal basis for use of force against <b>ISIS</b>, and explaining the U.S. interpretation of several key elements of international law.<sup>138</sup></li> <li>• In July, <b>President Obama</b> issues Executive Order 13,732 on “<b>United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force,</b>” which discloses that there are civilian casualties in strikes, and cites future steps to minimize casualties and acknowledge harm.<sup>139</sup></li> </ul>

	<b>2016</b> (CONT.)	<ul style="list-style-type: none"> <li>• On the same day, the <b>Director of National Intelligence releases its report, “Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities,”</b> revealing that from January 20, 2009 to December 31, 2015, 473 strikes took place “outside areas of active hostilities,” resulting in an estimated 2,372–2,581 “combatant” deaths and 64–116 “non-combatant” deaths.<sup>140</sup> The Summary acknowledges the challenges in calculating these casualty rates, especially given the “non-permissive environments” in which strikes often occur, and offers limited analysis aimed at explaining the discrepancies between these estimates and casualty estimates drawn from “credible reporting” by NGOs.<sup>141</sup></li> <li>• Pursuant to ACLU FOIA request litigation,<sup>142</sup> in <b>August the U.S. government releases the redacted Presidential Policy Guidance (PPG),</b><sup>143</sup> along with several other related documents.<sup>144</sup> Previously, the U.S. government had released only a short fact sheet about the 2013 PPG.<sup>145</sup> The PPG sets out the “Procedures for Approving Direct Action against Terrorist Targets Located outside the United States and Areas of Active Hostilities.”<sup>146</sup></li> <li>• In November, <b>Jennifer M. O’Connor, General Counsel to the Department of Defense, gives a speech in which she discusses the U.S. military’s targeting processes</b> and some of the legal rules it applies to targeting in armed conflict situations.<sup>147</sup></li> <li>• The White House releases several documents in December, including the <b>Report on Legal and Policy Frameworks</b> that consolidates previous disclosures related to the legal and policy rules that the U.S. government applies to strikes.<sup>148</sup></li> </ul>
<ul style="list-style-type: none"> <li>• In January, the Yemeni organization <b>Mwatana Organization for Human Rights releases its documentary ‘Waiting for Justice,’</b> with testimonies of civilian victims of a U.S. drone strike that Mwatana says are a reminder of scores of civilian victims in Yemen who are still waiting for justice and recognition.<sup>149</sup></li> <li>• In March, the <b>ACLU filed a Freedom of Information Act request</b> with the Central Intelligence Agency, the Department of Defense, Department of Justice, and State Department requesting records on the legal basis, decision-making process and assessment of civilian harm for the January 29, 2017 raid. As no response to the request was received, in May, the ACLU filed a complaint calling on the courts to enforce the request.<sup>150</sup></li> </ul>	<b>2017</b>	<ul style="list-style-type: none"> <li>• In January, the <b>Director of National Intelligence releases its second “Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities” report,</b> which states that, during 2016, 53 strikes took place “outside areas of active hostilities,” resulting in an estimated 431–441 “combatant” deaths and 1 “non-combatant” death.<sup>153</sup></li> <li>• During a <b>Senate Armed Services Committee hearing</b> to receive testimony on the “posture of U.S. Central Command (CENTCOM) and U.S. Africa Command (AFRICOM)” <b>General Joseph Votel, Commander of CENTCOM, accepted responsibility for the January 29, 2017 Yemen raid and acknowledged that the operation killed between 4 and 12 civilians.</b><sup>154</sup></li> </ul>

- In March, Reprieve and the law firm Lewis Baach file a petition asking U.S. courts to order the removal of two journalists from any lists of individuals targeted by the United States to be killed, and including a broader request that the Court order the United States to adhere to legal standards when conducting drone strikes.<sup>151</sup>
- In June, the NGO Coalition sends a letter to the Trump administration calling for transparency and accountability, and urging the government to strengthen and improve, not weaken, policies on the use of force.<sup>152</sup>

2017  
(CONT.)

## VI. Ensuring Transparency in the Use of Force Benchmarks: Detailed Assessment

This report develops a set of “Ensuring Transparency in the Use of Force Benchmarks” designed to enable detailed assessments of government transparency in the use of lethal force. These are organized below according to four categories of information for which transparency is required, namely:

- Information about the applicable legal and policy frameworks, and the government’s interpretation and application of them;
- Information about practices—who was killed, what happened and where, for individual strikes and in overall statistics;
- Information about how decisions are made to target someone; and
- Information about accountability processes and measures—lessons learned, justice, and condolence payments and compensation for those it harms.

## 1 The Government Discloses Information about the Legal and Policy Frameworks Governing Drone Strikes, including by Clearly Defining Key Terms

Laws that are secret fundamentally undermine the rule of law, and laws that lack clarity lend themselves to abuse and weaken external oversight. While the U.S. government has disclosed general statements about which legal frameworks it considers apply to lethal strikes, information on why and how it applies these frameworks in specific cases remain secret. The U.S. government disclosures also lack clarity in certain key respects. By failing to adequately define key terms, there are concerns that current and future administrations may abuse their power by claiming a sweeping authority to kill anywhere in the world in an ill-defined set of circumstances.<sup>155</sup>

### **Benchmark 1: The government explains the legal frameworks that apply to its operations.**

This requires that the government:

- States which legal frameworks apply to its operations in general and in relation to specific strikes;
- Explains its legal reasoning for the applicability of the legal frameworks in general and in relation to specific strikes;
- Sets out the legal rules that apply to its strikes, including the criteria it uses to select targets and targeting rules, subject only to redactions strictly necessary for legitimate national security reasons; and
- Defines and explains its interpretation of key terms in the legal rules it applies.

### *Summary*

Explanations by governments about which legal frameworks, rules, and criteria governments apply to strikes overseas, are critical in ensuring that there is respect for the rule of law—both domestically and internationally. Governments should be transparent about their legal basis for the use of force. Without transparency of this kind, the legislature, the public, other governments, and those directly impacted by the strikes, have no way of knowing whether a government’s legal interpretations are in accordance with domestic and international law. Openness about these laws and policies can operate as both a constraint on abuse of power, and at the same time serve as a useful guide and safeguard for those charged with implementing it. Transparency about legal frameworks and rules is a prerequisite for accountability and oversight. It is also a concrete way that a government can demonstrate its commitment to the rule of law and the seriousness with which it weighs decisions to use its most potent authority: the use of lethal force.

For years the U.S. government offered almost nothing in the way of its legal basis for strikes, apart from broad, generalized assertions that it was in an armed conflict with al-Qaeda and “related terrorist networks.” Then, between 2010 and 2016, the U.S. government made a number of important disclosures concerning which legal frameworks it believes govern its operations. The U.S. government has publicly explained in very broad terms the legal frameworks it considers applicable to its lethal strikes abroad. It has offered general explanations of why it considers certain legal frameworks apply to its extra-territorial lethal strikes, with more detailed reasoning advanced in just one specific case concerning the targeting of a U.S. citizen.

However, key issues that are crucial to determining the extent of any constraints on the use of force require further clarification. These include: specific legal reasoning for numerous other individual strikes, particularly those against non-citizens in Pakistan, Somalia, and Yemen; details of when, and in what circumstances, the United States considers an armed conflict to begin and end; the legal justification for the targeting of individuals on the basis of national self-defense; and analysis of the applicability of international human rights law to U.S. strikes overseas. Key legal and policy terms relevant to understanding who, how, and in what circumstances the U.S. government believes it can kill are also not clearly defined, risking a wide latitude for interpretations or for interpretations to be modified over time.

## *Analysis*

The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. disclosures regarding: *which* legal frameworks apply; its *detailed legal reasoning*; the *legal rules and criteria* that it applies; and its *definition and explanation of key legal terms*.

**Disclosure about which legal frameworks apply.** Under President Bush, the government disclosed little about the legal justification for strikes, apart from assertions that the United States was in an armed conflict with “Al Qaida and related terrorist networks.”<sup>156</sup> The U.S. government refused to respond to specific allegations regarding strikes, instead proffering blanket statements that “Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances.”<sup>157</sup>

From 2010 to 2016, the U.S. government made a number of important disclosures concerning which legal frameworks it believes governs its operations. Starting in 2010, officials in the Obama administration began to publicly explain, in general terms, the government’s view of the legal basis to conduct strikes abroad.<sup>158</sup> These speeches were later supplemented by the publication of some documents, many of which were released in response to FOIA litigation. Of particular importance are explanations contained in the 2014 “Report on Process for Determining Targets of Lethal or Capture Operations,”<sup>159</sup> and the 2010 Department of Justice White Paper and Memorandum analyzing the lawfulness of targeting Anwar al-Aulaqi, a U.S. citizen who was killed in a U.S. drone strike in September 2011. Much of this analysis was collected together and released in a more comprehensive form in December 2016 when the U.S. government issued a “Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force And Related National Security Operations” (the Report on Legal and Policy Frameworks).<sup>160</sup> That same day, President Obama issued a Presidential Memorandum aimed at improving, or at least maintaining, transparency in this regard in the future. The Presidential Memorandum specified that each year the U.S. government should prepare and update the Report on Legal and Policy Framework, and release it to the public.<sup>161</sup>

These speeches and documents should, in theory, help the public to understand which legal frameworks apply to the U.S. government’s use of lethal force overseas. However, the U.S. government’s defense of its actions, and the information it has put forth, offer only a fragmented picture of what legal constraints the United States believes apply to its use of lethal force abroad. Under international law, there are two layers of rules governing the use of force, both of which must be satisfied for a strike to be lawful—the legal framework for the use of force in *another state*, and, separately and additionally, the test for the legal framework for using lethal force *against an individual*.

The use of force in another *state* is strictly prohibited by international law, except in self-defense against an armed attack of sufficient gravity, with the consent of that state, or with the authorization of a Chapter VII U.N. Security Council Resolution.<sup>162</sup> The use of force against an *individual* is generally



governed by human rights law, which permits intentional lethal force only where strictly necessary to protect against an imminent threat to life.<sup>163</sup> During armed conflict, international humanitarian law applies, in addition to international human rights law.<sup>164</sup> International humanitarian law permits the targeting of soldiers and members of armed groups directly participating in hostilities.<sup>165</sup>

When explaining its legal basis for using force in *another country*, the U.S. government has argued that it can do so:

- pursuant to a U.N. Security Council resolution;<sup>166</sup>
- with the consent of the host state;<sup>167</sup> and/or
- as part of a state's inherent right to individual and collective self-defense under international law.<sup>168</sup>

This is separate, and in addition, to the legal frameworks that govern any use of force against an individual. Under international law, this includes international human rights law, and, in situations of armed conflict, international humanitarian law. The U.S. government has asserted that it can use force against an individual either:

- as part of what it claims is an ongoing armed conflict of global reach with al-Qaeda and its "Associated Forces;"<sup>169</sup> or
- as part of a state's inherent right to self-defense under international law (this justification is included in a number of U.S. government documents, but notably was not explicitly included in the December 2016 Report on Legal and Policy Frameworks).<sup>170</sup>

It is notable that the U.S. government has hardly referred to human rights law in the documents it has disclosed explaining its legal basis for the use of force.<sup>171</sup>

Under domestic law, the U.S. government has asserted its authority to carry out strikes pursuant to:

- the 2001 Authorization for the Use of Military Force (AUMF), which is the purported basis for strikes in Somalia and most strikes in Yemen;<sup>172</sup> and
- less frequently, the President's constitutional authority to take military action in certain circumstances, pursuant to his responsibility as Commander in Chief and Chief Executive for foreign and military affairs.<sup>173</sup>

These disclosures have advanced public knowledge and deepened debate around legal issues, but some important gaps still remain. In particular, the U.S. government has not explicitly said which legal frameworks apply to strikes in Pakistan, despite numerous strikes, deaths, and injuries there, and the information it has given in relation to strikes in Yemen and Somalia is at the most general level.<sup>174</sup> The government has not provided any details regarding whether its assessment of the legal frameworks it has applied to strikes in those countries has changed as the situation and U.S. operations in those countries have evolved.

**Explanation for why these legal frameworks apply.** The U.S. government has not adequately explained fully why, and in what circumstances, these legal frameworks apply to its operations. It has provided very general information, but little in the way of justifications for specific strikes.

Numerous legal memoranda explaining the U.S. government's legal justifications for strikes against individuals remain secret. The only legal memorandum regarding a (proposed) specific strike disclosed by the U.S. government is in relation to Anwar al-Aulaqi, one of the only U.S. citizens to have been directly targeted in a drone strike, according to the U.S. government.<sup>175</sup> No analysis has been released on the hundreds of other strikes against non-U.S. citizens.

*Explanation for why it may use force in the territory of another country.* Whether the United States can use force in the territory of another country is separate from whether it can use force against an individual under international law.

For many years, the U.S. government did not provide any justification for its use of force in particular countries, offering only general assertions—that it uses force in self-defense and/or with the consent of a host state. For instance, President Obama, in a 2012 report addressed to Congress acknowledged that the United States was engaged in limited direct actions in Somalia, and had been working “closely with the Yemeni government” to defeat the threat posed by Al-Qaeda in the Arabian Peninsula.<sup>176</sup> His report, along with other government statements, did not offer any further explanation of what the specific basis was, for example, in Pakistan, Somalia, and Yemen. As explained in more detail under benchmarks 5 and 6, this changed in December 2016, when the U.S. government claimed publicly that for Somalia and Yemen, at least, it had the consent of those governments and was also acting in “self-defense.”<sup>177</sup> However, as explored further under benchmark 6, the U.S. government did not explain for what periods it had consent, which branch of the foreign government had given consent, or if there were any limitations.<sup>178</sup> As of May 2017, the U.S. government had still not explicitly offered any justification for its use of force in Pakistani territory.

*Explanation for why it may use force against an individual.* The U.S. has advanced two very general rationales—in self-defense and as part of an armed conflict—for why it may use force against an individual.

1. *In self-defense.* While the U.S. government has asserted that it can target individuals “as part of a state’s inherent right to self-defense under international law,” it has offered so little explanation of the rationale for this basis that it is unclear which legal frameworks the government itself is invoking in this analysis—whether the law of self-defense, international humanitarian law, and/or international human rights law. For example, the United States has stated that strikes in Somalia and Yemen have been carried out “in furtherance of U.S. national self-defense.” However, it is unclear if the United States’ argument rests on an erroneous claim that there is a stand-alone justification for the use of force against an individual, whether it pertains to carrying out strikes in those respective countries, or if it refers to self-defense at the tactical level in accordance with a specific unit’s rules of engagement.<sup>179</sup>

Clarity on this point is crucial, not least because the claim that self-defense can be advanced as a stand-alone justification for the use of force against an individual has no foundation under international law.<sup>180</sup> The law of self-defense—*jus ad bellum*—governs when a state can use force in the territory of another state—it is an accepted exception to the general prohibition against using force in, or against another state. It does not govern using force against an individual. Only human rights law, and, in armed conflicts, international humanitarian law, govern when and how force against persons is lawful.<sup>181</sup>

2. *As part of an armed conflict.* In general, the government has not offered adequate legal explanations to justify the scope, or the beginning and end of an armed conflict.<sup>182</sup> The speeches given between 2010 and 2016 by senior Obama administration officials provided little beyond an assertion that the U.S. government was in an armed conflict. Before 2016, the most extensive explanation offered by the U.S. government was in the 2010 al-Aulaqi Memorandum, which set out a theory of why the U.S. government believes the laws of war could be applicable. Its applicability, however, is limited to a strike against Anwar al-Aulaqi in Yemen and is based on an analysis of “the facts as they [were] represented” at the time to the Department of Justice Office of Legal Counsel.<sup>183</sup>

In one of the more comprehensive of the U.S. government's disclosures, the 2016 Report on the Legal and Policy Frameworks, the government provided only a short explanation of its views on the "End of Armed Conflict with Non-State Groups." Here, the U.S. government merely asserted that the conflict with groups like al-Qaeda would only end where the operational capacity and supporting networks have been degraded to "such an extent that they will have been effectively destroyed and will no longer be able to launch a strategic attack against the United States."<sup>184</sup> The U.S. Department's Law of War Manual adds a little more detail, stating that hostilities may be terminated by "the complete subjugation of an enemy State and its allies,"<sup>185</sup> and lists other criteria including "when opposing parties decide to end hostilities and actually do so, i.e., when neither the intent-based nor act-based tests for when hostilities exist are met."<sup>186</sup> The criteria for "subjugation" or "destruction" of the enemy are vague, and difficult or impossible to apply objectively.<sup>187</sup>

While the U.S. government sets out its general views on when an armed conflict begins,<sup>188</sup> the U.S. government has also offered very little explanation for how it has applied this in practice to specific situations, which is key to understanding its application to a supposed conflict with al-Qaeda and "Associated Forces" with a potentially global reach. While a theory is advanced in the al-Aulaqi Memorandum, it is again confined to those particular facts and circumstances.

More explanation is needed of the U.S. government's controversial theory that it is in an armed conflict with al-Qaeda and "Associated Forces" extending across a range of different countries. This theory has been challenged by other states, as well as international legal experts, human rights organizations, and the International Committee of the Red Cross.<sup>189</sup> This is important because the United States is essentially asserting a global authority to kill under the more permissive rules of the law of armed conflict. Ordinarily, under international human rights law, lethal force would be permitted only in much more restrictive circumstances, against someone who presents an imminent threat—meaning "seconds, not hours"<sup>190</sup>—to life or serious injury. The extensive criticism of the U.S. position only makes the need for transparency and clarity greater.<sup>191</sup>

The U.S. government has given some specific explanations regarding what it believes to be the legal basis for the application of the laws of war to targeting operations around the globe, but gaps remain, as follows:

**Yemen.** The al-Aulaqi Memorandum offers a snapshot analysis of why the United States considers international humanitarian law applicable to a particular strike in Yemen, but little more, and again, based on an assumed set of facts prior to the targeting of al-Aulaqi. There was never a full post-strike judicial review of this strike, meaning that the application of this theory to the actual strike against al-Aulaqi was never independently assessed outside of the executive branch. In December 2016, the U.S. government made a more general declaration regarding its operations, stating that "the United States has conducted counterterrorism operations against [al-Qaeda in the Arabian Peninsula (AQAP)] in Yemen with the consent of the Government of Yemen in the context of the armed conflict against AQAP."<sup>192</sup> The report implied that AQAP was an "Associated Force" of al-Qaeda.<sup>193</sup> However, it was not clear from this information how, on what basis, and from when, the government made these determinations. There is also a lack of clarity regarding whether the U.S. government believes itself to be in an armed conflict directly with AQAP, or if it is fighting alongside the Yemeni government in an armed conflict with AQAP, or both.

**Somalia.** In December 2016, the U.S. government explained that strikes in Somalia were being conducted "with the consent of the Government of Somalia in support of Somalia's operations in the context of the armed conflict against al-Shabaab."<sup>194</sup> The U.S. explained that it had assessed that al-Shabaab had "made plain" its continued allegiance and operational ties to al-Qaeda that made al-Shabaab party to an armed conflict with the U.S. government as an "Associated Force"

of al-Qaeda. The government explained that it based this assessment on “public statements by al-Shabaab, and its responsibility for numerous attacks, threats, and plots against U.S. persons and interests.”<sup>195</sup> Again, it was not clear how and when this determination was made, and therefore when this justification for strikes began.

**Pakistan.** As there has been no U.S. government explanation of which legal framework governs strikes, there are no details on whether the U.S. government considers that international humanitarian law applies there.

Again, in all of these cases, much would be achieved by releasing the legal memoranda in relation to individual strikes as well as a general assessment of the legality of strikes there. The release of the redacted al-Aulaqi Memorandum shows that such disclosures are possible.

3. *Application of international human rights law.* Critically, the government has not publicly disclosed any analysis of the applicability of international human rights law to “targeted killings,” save for in a footnote in the al-Aulaqi Memorandum, where human rights is mentioned in passing, and at least to imply that human rights law continues to apply in armed conflict.<sup>196</sup> Given that the U.N. Human Rights Committee has expressed concern regarding U.S. “targeted killings,” and that this is one of the central controversies surrounding strikes, the U.S. government should explain in detail its view on the application of human rights law—both in custom and treaty law—to U.S. strikes and actions.<sup>197</sup>

*Explanation for why domestic law applies to strikes.* In its domestic law, the U.S. government has primarily relied on the 2001 Authorization to Use Military Force (AUMF) and the President’s war powers.<sup>198</sup> The government has yet to adequately explain its application of some of the key terms contained in the AUMF, and used to justify the extension of the AUMF to groups that did not exist at the time it was passed.<sup>199</sup> The United States has also explained generally why it believes the AUMF applies to strikes in Somalia (see above).<sup>200</sup> Apart from the highly contextualized analysis in the al-Aulaqi Memorandum, the U.S. government has also only asserted—without extensive reasoning—that strikes in Yemen are similarly carried out pursuant to the AUMF.<sup>201</sup> Serious other gaps remain regarding the application of domestic law to certain categories of persons. While the U.S. government has explained how and why the Constitution applies to strikes against U.S. citizens, no detailed analysis or guidance has been provided in relation to the targeting of non-citizens—who have been the targets of all strikes barring the al-Aulaqi strike.<sup>202</sup> Accordingly, there is no publicly available and detailed analysis of the U.S. government’s application of domestic law to any specific strikes other than the proposed targeting of al-Aulaqi.<sup>203</sup>

**Sets out the legal rules that apply to its strikes, including the criteria it uses to select targets and targeting rules, subject only to redactions strictly necessary for legitimate national security reasons.** The U.S. government has made significant disclosures regarding the legal rules that apply to its strikes, chief among them the release of the Department of Defense’s Law of War Manual in 2015, and subsequent amendments in 2016. However, more detailed targeting rules in specific contexts remain mostly secret, including rules that are no longer operational and for which the national security justification for non-disclosure may no longer be relevant.

Transparency regarding the rules—the specific criteria used to determine if someone is targetable—that the United States applies is important to understand how, who, in what circumstances, and with what limitations the government believes it can target. Some of this information may be sensitive, and can potentially be redacted where it carries a genuine national security risk. This may be the case, for example, where information is so detailed that it would give the enemy a tactical advantage, or if it endangers an intelligence source. At the same time, there should not be any reason to keep secret general rules and principles, as well as the standard of proof that the U.S. government applies

to making such decisions. Additionally, after the elapse of some time, and especially when no longer operational, more specific targeting criteria should generally be capable of disclosure, as the national security rationale may no longer apply.

The United States belatedly revealed that it believes that almost all of its operations involving the use of force overseas are governed by the law of armed conflict.<sup>204</sup> However, the U.S. government has not advanced the explicit legal basis for almost all operations in Pakistan.<sup>205</sup> The U.S. government has explained what it believes these rules are, in particular highlighting the application of the principles of distinction, proportionality, necessity, and humanity.<sup>206</sup> The U.S. government has also suggested that it would apply its Law of War Manual to most, and possibly all, strikes.<sup>207</sup> The Law of War Manual—which has been criticized in some notable respects, including, for example, its treatment of the principle of proportionality<sup>208</sup>—sets out in detail the rules applicable in armed conflict according to the Department of Defense.<sup>209</sup> The Manual contains details of how and in what circumstances the U.S. government considers an individual targetable, including how it assesses that someone is a member of an armed group or is directly participating in hostilities. It also explains how it assesses proportionality and what the rules are in relation to precautions before and during attack.<sup>210</sup>

The U.S. military also publishes its more detailed standing rules of engagement (SROE), which apply to all U.S. military operations outside of U.S. territory,<sup>211</sup> as well as targeting doctrine documents setting out in detail the process for targeting.<sup>212</sup> These standard form documents may be modified for specific contexts. However, the specific rules of engagement have not been released in relation to Pakistan, Somalia, and Yemen. While rules at that level of detail are more justifiably kept secret for national security reasons, they should not be unduly withheld where the national security reason for non-disclosure no longer holds. This may be after a certain amount of time has elapsed or where the rules are no longer operational or sensitive. Release of such documents would facilitate external assessment of lessons learned and best practice in particular contexts, as well as accountability, by allowing for evaluation and discussion of the extent to which the rules the U.S. military has developed are in compliance with the law.

By making such disclosures, the U.S. government would advance accountability, and help develop lessons learned and improved practices by allowing for expert and outside analysis and consultation. Importantly, the U.S. government has also not disclosed the standard of proof it applies to assess and weigh the intelligence it has, before taking lethal action. Such considerations may frequently be determinative of whether or not a strike is undertaken. The botched January 2017 raid in Yemen that resulted in the death of a number of civilians, including an 8-year-old girl, as well as a U.S. Navy SEAL, is a good example of how important such considerations are, and why the standards applied should be made public, especially in the face of media reports claiming that “[President] Trump approved his first covert counterterrorism operation without sufficient intelligence.”<sup>213</sup>

Uncertainty remains regarding how the United States applies the rules of the laws of war, particularly in the case of Pakistan where, at least until the beginning of 2017, the CIA is believed to have been responsible for almost all strikes. This is because Pakistan is not mentioned in the 2016 Report on Legal and Policy Frameworks and it is unclear if the U.S. government is explicitly applying the laws of war to its operations there. Additionally, the Law of War Manual technically applies only to operations by the military, and not the CIA.<sup>214</sup> Similarly, the SROE and targeting doctrine are military documents, and it is not clear if they are used or applied by the CIA.

Explains its interpretation of key terms in the legal rules it applies. The U.S. government has explained some of the terms integral to understanding its application of legal rules. These include, for example, setting out some basic, if inadequately explained, criteria for determining the “imminence” of a threat, which can be one part of the test the U.S. government applies to determine if an individual is targetable. The U.S. government has also explained a number of other key terms relevant to how it

determines the legality of strikes, including fairly detailed explanations for who may be targeted in armed conflict situations in the Law of War Manual.<sup>215</sup>

However, numerous terms central to understanding the application of the government’s legal and policy standards remain unclear or ill-defined. Terms that are not clearly defined risk being unjustifiably broadly interpreted, expanding what the government views as the “lawful” circumstances for the use of force. For example, if strikes can only be carried out against individuals presenting an “imminent” threat, much rests on how the term “imminent” is determined. Under international human rights law, the intentional lethal use of force is only permissible where *proportionate* and *necessary*, meaning that a threat must pose an “imminent” threat to life or serious injury.<sup>216</sup> It is this high standard leads international legal experts to conclude that drone strikes and targeted killings will likely never be lawful outside of situations of armed conflict.<sup>217</sup> In contrast, the U.S. interpretation of imminence is far broader, stretching the term far beyond any recognizable meaning. U.S. officials have themselves explicitly argued for this more “flexible” standard, which gives the United States a dangerously wider latitude to use lethal force than what international law allows.<sup>218</sup>

Inadequately defined legal terms include, for example:

- How the U.S. government assesses when an **“individual may be targeted in the exercise of national self-defense.”** This is not a concept that exists in international law and is not explained in the government disclosures;
- Beyond basic guidelines, the U.S. government has not explained **what criteria it uses to determine that a threat is “imminent,”** which it states is a pre-requisite for the use of force; and
- The U.S. government has stated that it believes—controversially—it is exceptionally entitled to take strikes without the consent of a host state when a foreign government is **“unable or unwilling to address the threat posed by the non-state actor on its territory.”**<sup>219</sup> However, the U.S. government has not been clear about how, and according to what criteria, it makes such a determination.

These are just some of the examples of important legal terms that the U.S. government has not defined adequately. The Annex to this report, *Key Legal and Policy Terms Requiring Further Clarification*, contains further and detailed analysis in this regard.

**Benchmark 2: The government discloses its assessment of the legality of individual strikes subject only to redactions strictly necessary for legitimate national security reasons, or to ensure the physical safety of specific individuals.**

This includes:

- The basis on which the legality of the strike was judged prior to the strike; and
- An assessment of the lawfulness of the strike after the strike has taken place.

## *Summary*

Disclosures of government assessments of the legality of a strike, both before and after the strike, are key to the rule of law, ensuring that families know why their relatives were killed, and as a pre-requisite to holding the government or specific individuals accountable. By releasing such information, governments can also demonstrate a commitment to acting in accordance with the law. Transparency

about the legal basis for individual strikes also serves democratic accountability by helping the public to assess whether the government's actions and legal interpretations in specific cases are consistent with its legal obligations.

Pursuant to FOIA litigation, the U.S. government has disclosed its detailed assessment of the legality of a particular strike in only one case—the strike targeting U.S. citizen Anwar al-Aulaqi. In that case, government documents revealed its assessment of the lawfulness of the operation based on a set of assumptions before the strike occurred. The U.S. government has yet to disclose any detailed assessment of the legality of the strike after it occurred based on what actually happened. In a separate case in Somalia, the U.S. government has released a very basic and rudimentary analysis explaining how a particular strike was lawful based on an assessment of the strike as it actually occurred. However, it does not include nearly the level of detail set out in the memoranda on al-Aulaqi. In a handful of other cases the U.S. government has provided very basic details about the legal basis for the strike. Specific legal reasoning for hundreds of other individual strikes against non-citizens remains secret.

### *Analysis*

The U.S. government has released very little information about its legal rationale for specific strikes. While there has been an increasing volume of information released regarding the U.S. government's view of the overarching legal and policy framework and rules governing its use of lethal force, there is no public explanation of the legal rationale for most individual strikes. The main exception is the release of redacted legal memoranda drafted by the Department of Justice's Office of Legal Counsel (OLC) justifying a strike against Anwar al-Aulaqi.<sup>220</sup> The release of the memoranda sparked significant controversy surrounding the U.S. government's interpretation and application of international law to its use of lethal force overseas. In that case, the limited U.S. government transparency allowed for more meaningful debate. The government is still fighting to withhold numerous other memoranda on the grounds that they are "inextricably intertwined" with properly classified material and part of the "deliberative process" within government. As the ACLU has pointed out, the government's position does not explain "why all the roughly one hundred withheld final memoranda is inextricably intertwined with properly withheld information," nor does it apply to final legal memoranda that in many cases are likely to represent the "agencies' effective law and policy with respect to the targeted killing program."<sup>221</sup> Continued controversy over specific strikes, and the U.S. application of the legal rules in these cases, only heightens the need for disclosure of the U.S. government's legal analysis for numerous specific strikes.<sup>222</sup>

Government claims that these memoranda are protected from disclosure by virtue of attorney-client or the "deliberative process" privilege also lack merit.<sup>223</sup> Attorney-client privilege does not cover authoritative statements of the law.<sup>224</sup> Most significantly, these secret memoranda are often the "controlling legal advice" given "to executive branch agencies," and determine the legality of a particular strike or lethal operation.<sup>225</sup> OLC memorandums often amount to the "last word on the legality" of government action.<sup>226</sup> As highlighted in a detailed 2016 Brennan Center report on secret law, "When an agency solicits an OLC opinion, what it seeks is not 'legal advice;' it is closer to a declarative judgment issued by a court." Claims to preserve the secrecy of government memoranda on the use of lethal force based on attorney-client privilege also fail to take into account the particular detriment to accountability and the public interest that results. The considerations are not the same as regular attorney-client privilege between two private parties in litigation with each other. A failure to disclose binding legal documents that essentially authorize the government to kill makes public accountability, let alone legal justice, almost impossible.

The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. disclosures of: the *legal basis upon which the strike was judged lawful prior to the strike*; and assessments of the *lawfulness of the strike after the strike has taken place*. U.S. practice is analyzed in relation to each of Pakistan, Somalia, and Yemen.

## PAKISTAN

*The basis on which the legality of the strike was judged prior to the strike.* The U.S. has not disclosed the specific, detailed, legal reasoning that formed the basis for the operation for any of the hundreds of strikes it has carried out in Pakistan. The notable exceptions are the killings of Jude Kenan Mohammad and Osama bin Laden in 2011, of Adam Gadahn in 2015, and of Mullah Mansur in 2016. Only in a handful of cases has the U.S. government revealed very basic information about the assessment the government made before carrying out the operation.

In 2015, President Obama explained briefly that an initial assessment of the strike that killed Ahmed Farouq, Giovanni Lo Porto, and Warren Weinstein in 2015 indicated that the “operation was fully consistent with the guidelines under which [the U.S. government] conducts counterterrorism efforts in the region.” He also stated that the government “believed that this was an al Qaeda compound [and] that no civilians were present,” implying that this was considered a lawful strike before it occurred.<sup>227</sup>

In the case of bin Laden, a senior ranking official stated that “The United States had a legal and moral obligation to act on the information it had” about bin Laden.<sup>228</sup> Reportedly, four separate legal memorandums were prepared in advance of the raid by high-ranking lawyers in the Obama administration, but none of these have been disclosed.<sup>229</sup> However, following the strike, the U.S. government gave a very detailed briefing setting out the intelligence background and preparation for the operation.<sup>230</sup> While not explicitly a legal analysis, much of the information provided was relevant to a legal assessment.

The U.S. government did not explicitly explain the legal basis for the Mansur strike, but stated in general terms that Mansur had “been the leader of the Taliban and actively involved with planning attacks against facilities in Kabul and across Afghanistan, presenting a threat to Afghan civilians and security forces, our personnel, and coalition partners.”<sup>231</sup>

*An assessment of the lawfulness of the strike after the strike has taken place.* The U.S. government has rarely disclosed any assessments of the lawfulness of strikes in Pakistan after they have occurred. The few details available are exceptional, and even in those the details provided are mostly minimal.

In relation to the bin Laden raid, a senior ranking official stated that “great care was taken to ensure operational success, minimize the possibility of non-combatant casualties, and to adhere to American and international law in carrying out the mission.”<sup>232</sup> Then Attorney General Eric Holder also said that it was “obviously lawful,”<sup>233</sup> but, although a lot of detail was provided in terms of the factual assessment relevant to the legal analysis, few explicit details of the legal assessment were given.<sup>234</sup> In a 2012 speech, then CIA General Counsel Stephen Preston provided further details, but little analysis, claiming only that the operation was “thoroughly lawyered” and that “the U.S. Government had determined with confidence that there was clear and ample authority for the use of force, including lethal force, under U.S. and international law and that the operation would be conducted in complete accordance with applicable U.S. and international legal restrictions and principles.”<sup>235</sup>

In the U.S. government disclosure that a U.S. strike in Pakistan had killed the Giovanni Lo Porto and Warren Weinstein in 2015, the government explained that it was undertaking a post-strike assessment. President Obama stated that “we do believe that the operation did take out dangerous members of al Qaeda” and that the United States was unaware that “al Qaeda was hiding the presence of Warren



and Giovanni in this same compound.” President Obama went on to say that he had “directed a full review of what happened,” but, as of May 2017, the results of any review remained secret.<sup>236</sup> The White House Press Secretary also said that there was “an ongoing inspector general review” into the incident, but that also has not been disclosed.<sup>237</sup>

In March 2016 following the targeting of Mullah Mansur along the Afghanistan–Pakistan border, the Department of Defense stated that Mansur “had been the leader of the Taliban and actively involved with planning attacks against facilities in Kabul and across Afghanistan, presenting a threat to Afghan civilians and security forces, our personnel, and coalition partners,” and that the military was “still assessing the results of the strike and will provide more information as it became available.”<sup>238</sup> As of May 2017, more information regarding the military’s assessment has not been provided, although the Pentagon’s statement indicates that it believes the strike against Mansur was lawful.

For almost all other cases in Pakistan there has been no post-strike explanation of even this basic kind.

## SOMALIA

*The basis on which the legality of the strike was judged prior to the strike.* The U.S. government has not disclosed the detailed specific legal analysis prior to any strikes in Somalia. It has asserted in a number of strike acknowledgments in 2016 that the action was taken in “self-defense,” and that, for instance, the “safety and security of the Somali force and their U.S. advisors” was threatened.<sup>239</sup> In a post-strike review of a strike in Galcayo on 28 September 2016, the U.S. military stated that it believed the targets to be “part of al-Shabaab,” implying that prior to the strike they were judged to be lawful targets.<sup>240</sup>

*An assessment of the lawfulness of the strike after the strike has taken place.* In only one instance has the U.S. government disclosed any post-strike assessment of the lawfulness of a strike in Somalia, and even in that case it only released the most basic details. Following a strike targeting an “al-Qaeda-associated terrorist group” in Galcayo on September, 28 2016, the U.S. government acknowledged that it had seen “reports alleging non-combatant casualties.”<sup>241</sup> To its credit, the U.S. government responded quickly to these reports and announced a “review of all available information.” On November 15 2016, the U.S. military released very basic results of its assessment of the strike, in which it found that U.S. forces “lawfully and appropriately used force to defend the PSF [(Puntland Security Forces)] element in response to the attack by the local militia forces against that U.S.-partner force.”<sup>242</sup>

## YEMEN

*The basis on which the legality of the strike was judged prior to the strike.* Apart from the strike against Anwar al-Aulaqi in 2011, the U.S. government has not disclosed its prior assessment of the legality of specific strikes in Yemen. However, the disclosure of the redacted legal memoranda drafted by the OLC justifying a future strike against Anwar al-Aulaqi is significant.<sup>243</sup> They remain the most detailed analysis in relation to a specific strike that the U.S. government has disclosed, even if they are largely based on a presumed set of facts provided to the OLC. In the memoranda, the U.S. government set out its reasoning for why, according to a particular set of facts, the targeting of Anwar al-Aulaqi would be lawful. This was particularly important because it demonstrated how it is possible to make such disclosures. In any event, the government’s selective disclosures in that case were not a substitute for adequate transparency. As the ACLU argued, aspects of the targeted killing of the three U.S. citizens that would rely on undisclosed, and protectable, intelligence, sources and methods, could be reasonably protected and isolated, on a document-by-document basis, rather than providing an automatic, sweeping response that the material was classified and was accordingly privileged.

*An assessment of the lawfulness of the strike after the strike has taken place.* In the al-Aulaqi case, the legal memoranda that were released set out the U.S. government’s analysis of the legality of the strike some months *before it occurred* based on a presumed set of facts. The U.S. government has still not disclosed any analysis it carried out afterwards, based on the facts of the operation itself. This is also the case for all other strikes in Yemen.

### **Benchmark 3: The government explains the policy frameworks that apply to its operations.**

This requires that the government:

- States whether additional policy standards exist to guide operations;
- Releases its policy standards, redacted only as strictly necessary for national security reasons;
- Explains the circumstances in which its policy standards apply, as well as any exemptions to applicability; and
- Defines and explains its interpretation of key terms in the policy standards it applies.

### *Summary*

Policy standards can act as an overlay on the legal rules that governments apply to their use of force. Accordingly, they can be almost as important as the legal rules in that they help to define the parameters according to which a government carries out strikes. Where a government has created them, policy standards are key to understanding in what circumstances, and according to which rules, a government may use lethal force.

This is particularly apparent in U.S. government practice, where policy standards have, at times, been an inadequate stand-in for the proper application of international law. In particular, the landmark U.S. government policy on strikes “outside areas of active hostilities,” the 2013 Presidential Policy Guidance (PPG), is regarded by some as partly a response to the legal concerns of European governments regarding how the United States was employing drones, and an effort to bring U.S. practice more closely into line with the views of its European allies.<sup>244</sup> While introducing minimal additional protections, the PPG actually remains a long way short of the requirements of international law by further blurring the distinctions between the strict rules on the use of force in peacetime and the more permissive rules applicable only in situations of armed conflict.<sup>245</sup>

In 2013, the government disclosed a summary fact-sheet of the PPG. In 2016, pursuant to FOIA litigation, it released the guidance in redacted form. Separately in the same year, the U.S. government issued an Executive Order on civilian casualties. These were important steps, but crucial elements of these policies remain unexplained. In particular, the government has not explained key terms that allow for a wide degree of flexibility in their application, making it unclear when or how these policies apply.

### *Analysis*

The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. disclosures regarding: whether *additional policy standards exist* to guide operations; the *policy standards themselves*; the *circumstances in which the standards apply*, and any *exemptions*; and its *definition and explanation of key policy terms*.

**Explains whether additional policy standards exist to guide operations.** Policy standards can potentially limit or expand the scope of targeting operations. Accordingly, it is crucial that the existence of policy standards is disclosed. This includes being transparent about why and when policies regarding the use of force are rescinded.

The U.S. government has disclosed the existence of at least some of its policy standards. In 2013, following a speech in which President Obama announced the existence and broad outlines of a new policy on the use of force,<sup>246</sup> the U.S. government published a fact-sheet summarizing recently promulgated policy standards that applied in what it termed “areas outside of active hostilities.”<sup>247</sup> These standards were released in a redacted form in August 2016.<sup>248</sup> In July 2016, President Obama signed Executive Order 13,732 on U.S. Policy on Pre- and Post- Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, which was published in full. The Executive Order is focused mainly on actions taken to increase protection of civilians by different agencies.

It is not clear if these are the only policy standards that the United States applies to its operations, as there has been no definitive statement by the U.S. government. In his introduction to the 2016 Report on Legal and Policy Frameworks, President Obama stated that it included just “some of the key legal and policy frameworks” applied by the government (emphasis added).<sup>249</sup> Clarity on that point would ensure that the public is fully aware of the policy rules and limitations that the government applies when carrying out strikes.

**Releases its policy standards, redacted only as strictly necessary to protect national security.**

The U.S. government has publicly released some of its policies for using lethal force abroad. Transparency around these rules is critical in order to understand in what circumstances the government considers it can use lethal force. In particular, the 2016 release of the “Presidential Policy Guidance,” (PPG) a summary fact-sheet of which was issued in 2013, sets out a number of rules and conditions for targeted strikes in areas the U.S. government deems to be “outside of active hostilities.”<sup>250</sup> It includes standards such as:

- An “informed, high-level official” must determine that the proposed target poses a “continuing, imminent threat to U.S. persons;”<sup>251</sup>
- Lethal action is undertaken only when capture is not “feasible,”<sup>252</sup> and where no other “reasonable alternatives exist to effectively address the threat;”<sup>253</sup>
- The country where action is contemplated has given consent to the operation or is “unable or unwilling” to address the threat to U.S. persons;<sup>254</sup>
- With specific reference to the principles of distinction, proportionality, military necessity and humanity, the laws of war are complied with;<sup>255</sup>
- There is “near certainty” that the “individual being targeted is in fact the lawful target and is located at the place where the action will occur;”<sup>256</sup> and
- There is “near certainty” that “non-combatants” will not be injured or killed.<sup>257</sup>

The PPG also includes some completely redacted sections which appear to set out the detailed considerations that are taken into account when an individual is targeted for capture or for the use of force. There may be genuine national security reasons to keep criteria at this level of detail secret. The burden for showing why such information is to be kept secret remains with the government, which must publicly explain why it was not disclosed.<sup>258</sup> The government did not publicly explain the redactions in the PPG, but submitted a classified declaration with the court that set out its reasons for withholding this information, most of which were redacted from the subsequent decision given by the court.<sup>259</sup>

The July 2016 Executive Order 13,732 on U.S. Policy on Pre- and Post- Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force also sets U.S. government policy ostensibly aimed at the protection of civilians. This includes pre- and post-strike reviews and training, as well as a commitment for all agencies to take “feasible precautions in conducting attacks to reduce the likelihood of civilian casualties,”<sup>260</sup> which is itself actually an inadequate and lower expression of the legal requirement under the laws of war.<sup>261</sup>

It remains unclear if the government had released redacted versions of all of its policies governing the use of lethal force, at least in areas it deemed “outside of active hostilities,” but to the extent that there are any others, or if new policies are promulgated, they should be disclosed. Without confirmation that all U.S. government policies have been disclosed, it is not possible to know if the public has been given the full picture of what legal and policy standards are applied by the U.S. government.

**Explains the circumstances in which its policy standards apply, as well as exemptions.** In order to understand properly how a particular policy applies, and to what extent it actually constrains the use of force, it is critical that the public knows specifically in what circumstances policies apply. The U.S. government has not adequately explained how, when, or where these policies apply.

The Presidential Policy Guidance (PPG) applies only to “areas outside of active hostilities.”<sup>262</sup> The government explained in July 2016, that “Afghanistan, Iraq, and Syria” were deemed “areas of active hostilities,” and accordingly the policy does not apply there, although it was not clear if that meant that the policy applied everywhere else.<sup>263</sup> The PPG has been in place since 2013, and yet it is not clear when the U.S. government designated Afghanistan, Iraq, and Syria as “areas of active hostilities” or if for certain periods of time those or other countries were similarly designated. Furthermore, it is still not clear if the PPG applies to Pakistan, as the legal and policy framework the United States applies there is not explicitly set out in the 2016 Legal and Policy Frameworks compendium issued by the U.S. government.<sup>264</sup>

The need for further clarity about where the PPG applies was highlighted when the government revealed in December 2016 that parts of Libya had been declared an “area of active hostilities”—making the policy no longer applicable to strikes in those parts of Libya—following a request for assistance from the Libyan Government of National Accord.<sup>265</sup> Reportedly, 420 strikes had been carried out in Surt, Libya between August 2016 and November 2016.<sup>266</sup> Concern about the flexibility of the application of these policy standards was heightened in early 2017, when media reports reported that the policy no longer applied to parts of Yemen and Somalia as well.<sup>267</sup>

The ease with which the U.S. government appears to have made the PPG inapplicable to parts of Libya, Yemen, and Somalia, raises important questions about how and why the government makes such decisions, and the criteria it applies to assess whether the PPG applies to strikes in a particular area. The U.S. government belatedly released some information in 2016, explaining that it determines whether a region is “an area of active hostilities” by taking into account a range of variables:

- Whether there is an armed conflict under international law taking place in the country;
- The size and scope of the terrorist threat;
- The scope and intensity of U.S. counterterrorism operations; and
- The necessity of protecting any U.S. forces in the relevant location.<sup>268</sup>

While this does help in understanding in what situations the PPG might be applicable, it is notable that the above criteria is not cumulative (i.e. it does not appear they all have to be satisfied for the location to be an “area of active hostilities”) nor exhaustive—the government itself has said that it takes

into account “other things,” although what those are remain undefined.<sup>269</sup> The criteria to assess the PPG’s applicability are also overly broad, and there is no indication of what parameters are used to determine the size and scope of the threat or the scope and intensity of U.S. operations, for example. The concern—a very real one due to the malleable application of the standards in places like Libya, Somalia, and Yemen—is that the PPG itself is too flexible, and allows the policy to be turned on and off according to the political needs of the administration in power, greatly undermining its potential to protect civilians.

In addition, the PPG sets out a complex process for decision-making for operations, but crucially allows for key exemptions, i.e. circumstances to which the policy does not apply *even in* “areas outside of active hostilities”. This is explored and explained further in Benchmark 10 on transparency around decision-making processes.

**Explains its interpretation of key terms in the policy standards it applies.** As with legal rules, a detailed understanding of the terms in the U.S. government’s policy standards is key to understanding the scope of the application of the policy, the extent to which a policy may constrain or enable the use of force, and whether the policy itself is lawful. The U.S. government has not adequately defined some of the key terms central to understanding how, when, and where its policy standards apply.

Inadequately defined policy terms include, for example:

- As explained above, what criteria the U.S. government uses to determine **where the Presidential Policy Guidance—the 2013 policy standards governing U.S. use of force overseas in certain circumstances—is applicable**. The policy applies to an “area outside of active hostilities,” but the phrase is inadequately explained; and
- How a determination is made that **capture is not “feasible” and “no other reasonable alternatives exist to address the threat,”** which are preconditions for the use of force in the PPG. The U.S. government offers some explanation but it is incomplete and leaves a wide latitude for action.

These are just some examples of important legal terms that the U.S. government has not defined adequately. The Annex to this report, *Key Legal and Policy Terms Requiring Further Clarification*, contains further and detailed analysis.

#### **Benchmark 4: The government clearly distinguishes between legal obligations and policy standards.**

### *Summary*

Legal rules and policy standards can act either to narrow or expand the scope of authority for the use of force by a government. Legal rules also act as a minimum, while governments can use policy to hold themselves to higher standards. They are also distinct in another important respect—policy standards are more easily set aside, while a government’s recognition that it is bound to follow certain legally binding rules on the use of force is much stronger. Such recognition carries stronger normative weight that is much harder for successor administrations to set aside.

To resolve a lack of clarity and possible inconsistencies in disclosures to date, the U.S. government needs to explain fully which standards it applies as a matter of law and which as a matter of policy.

Before 2010, the U.S. government explained little about its views of its legal obligations, and did not explain any additional policy standards it applied to the use of force. From 2010 onwards, U.S. government officials began publicly disclosing the broad outlines of the legal and policy standards the government believed applicable to strikes, but the distinction between the two was not always clear. In 2016, the U.S. government released a compendium of legal and policy standards. Despite the significant effort at pulling together this compendium, some uncertainty still remains. Apparent inconsistencies across the range of disclosed legal and policy documents make it unclear which standards are applied as a matter of policy, and which as law.

## *Analysis*

The following analyzes U.S. practice in relation to this benchmark, assessing the extent to which the U.S. government has clearly distinguished *between its legal obligations and the standards it applies as a matter of policy* in its disclosures.

**Clearly distinguishes between legal obligations and policy standards.** Despite significant efforts at clarification, the government has not fully explained which standards or rules it applies entirely as a matter of policy,<sup>270</sup> and which reflect the government’s view of its binding international law obligations.<sup>271</sup>

In a 2016 speech, Brian Egan, then the State Department’s Legal Advisor, explained some of the distinctions between the legal and policy standards that the U.S. government applies to the use of lethal force. In particular, he explained some of the standards that the U.S. government applied as a matter of policy only, including the requirements that lethal action only be undertaken when capture is not “feasible,” and where there is near certainty that “non-combatants” will not be injured or killed.<sup>272</sup>

However, there remain contradictions in the documents the U.S. government has officially disclosed. For example, the 2010 DOJ White Paper and al-Aulaqi Memorandum appear to state that “imminence” and “feasibility” of capture are legal requirements (at least for U.S. citizens, with which the DOJ White Paper and al-Aulaqi Memorandum were concerned), while the 2014 Report on Process includes these requirements under the heading “Policy Considerations” and the PPG explicitly states that the prioritization of capture over lethal action is a matter of “policy.” In another example, the 2016 Executive Order on civilian casualties includes a requirement for agencies to take “feasible precautions in conducting attacks to reduce the likelihood of civilian casualties,”<sup>273</sup> under a section labeled as “Policy.” The law of armed conflict is referenced in this section, and, although this is similar to wording in the Department of Defense’s 2016 Law of War Manual, it is not clear why this is presented as a policy standard.<sup>274</sup> The formulation here also differs from the standard under international humanitarian law.<sup>275</sup> While government policy should accord with law—and so references under a section on “policy” may, of course, reference the law, there is a need for greater clarity.

The December 2016 Report on Legal and Policy Frameworks added some clarity, in clearly designating as “policy” all of the standards in the PPG and the 2016 Executive Order, but there remains confusion because of the interchangeable use of terms, and the fact that some of the elements in the PPG and Executive Order actually are legal obligations (even if not always articulated in conformity with international law).<sup>276</sup> What is needed is a comprehensive explanation listing the standards applied only as a matter of policy, distinguished from those that are applied as a matter of law, which could easily be done in an update to the 2016 Report on Legal and Policy Frameworks.

## **Benchmark 5: The government reports uses of force in “self-defense” to the Security Council.**

Each report should:

- Be by means of an official letter addressed to the U.N. Security Council President, or the U.N. Secretary General, from the intervening state’s permanent representative to the United Nations;
- Occur each time a state first invokes self-defense to use force against a new state or armed group, or when force is first used in self-defense in a new state; and P
- Provide sufficient detail to understand the nature and justification of the state’s action(s) in self-defense.

### *Summary*

International law requires governments to report their use of force in “self-defense” to the UN Security Council.<sup>277</sup> The reporting requirement is aimed at promoting respect for territorial integrity, state sovereignty, and the international rule of law. Compliance with the reporting requirement can also assist a state genuinely suffering an armed attack to bring the unlawful action to the attention of the international community, and make clear to other states that its response is justified as a proper invocation of the right to self-defense. Detailed reports that outline the government’s justification for the use of force can serve as a crucial tool to assess the legal basis underpinning self-defense claims and help uphold respect for state sovereignty and the international rule of law.

Since 2010, the United States has repeatedly invoked self-defense to justify its operations against al-Qaeda and other armed groups, including in drone strikes and other operations in Somalia and Yemen. The U.S. government has not explicitly disclosed its legal basis for operations in Pakistan, so it is unclear if it relies on self-defense for strikes there. However, the U.S. government has never reported to the U.N. Security Council its use of force in any of those countries, save for one occasion when it used force against Houthi forces in Yemen in 2016.

### *Analysis*

The use of force in another *state* is strictly prohibited by international law, except in self-defense against an armed attack of sufficient gravity, with the consent of the territorial state, or with the authorization of a Chapter VII U.N. Security Council Resolution.<sup>278</sup> Article 51 of the U.N. Charter requires that a government “immediately” report to the Security Council “[m]easures taken” in self-defense in the territory of another state in response to an “armed attack.”<sup>279</sup> A review of state practice shows that states have typically submitted the majority of reports within one week of initiating self-defense measures, and have on occasion, criticized other states for “late reporting.”<sup>280</sup>

The obligation to report is triggered when a state first invokes self-defense to use force against a new state or armed group, or when force is first used in self-defense in a new state. In each of these cases, the principles of necessity, proportionality, and immediacy of the action must be taken into account. Without these parameters, the notification requirement would otherwise lose its meaning, as one notification could potentially be used to justify force around the globe, against different actors, and without any temporal limit.<sup>281</sup> Reporting a government’s operations when it uses force against new actors, in new countries, or in response to a new or re-emerging threat allows an external assessment of self-defense claims invoked under international law by the international

community and the public. It also prevents the intervening State from being the sole judge of its own self-defense claims.

The Article 51 reporting requirement promotes respect for territorial integrity, state sovereignty, and the international rule of law. The reporting requirement “pos[es] an obligation of transparency and justification to the international community, by placing the [self-defense] issue formally on the agenda of the Council and recognizing its role,” as all States are required to submit reports to the Council according to the UN Charter.<sup>282</sup> The Article 51 reporting obligation also presents an opportunity for the attacking state to offer its justification for the use of force and to facilitate informed decision-making by the U.N. Security Council.<sup>283</sup> The International Court of Justice has held that the absence of a report may undermine the legitimacy of the self-defense claim and “may be one of the factors indicating” whether an intervening state believed it was acting lawfully.<sup>284</sup>

Article 51 of the U.N. Charter does not set out the form the notification should take, nor does it explain what information the reports should provide.<sup>285</sup> However, for reasons of transparency, accountability, and the rule of law, and in keeping with State practice, the notification should be in the form of a written report to the U.N. Security Council President or U.N. Secretary General.<sup>286</sup> Its content should contain sufficient detail to ensure that the Security Council is adequately informed of military actions taken, the legal rationale, and the circumstances that prompted the action in order to allow for informed debate. A more detailed justification by the intervening State may also serve the broader interests of peace and security because it helps other States understand the legality and legitimacy of the actions taken, and be better informed about how to resolve any particular conflict.<sup>287</sup>

The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. disclosures regarding: whether the U.S. government has *reported the use of force in self-defense to the U.N. Security Council and each time it first invoked self-defense to use force against a new state or armed group, or when force was first used in self-defense in a new state*; and the provision of *sufficiently detailed information* for the Council’s members to understand the nature of the self-defense claim.

**Reporting “self-defense” to the U.N. Security Council and reporting each time a state first invokes self-defense to use force against a new state or armed group, or when force is first used in self-defense in a new state.**

In official speeches and government documents, the U.S. government has repeatedly invoked self-defense to justify its targeted killing and drone strike operations in places far from traditional battlefields, particularly in Somalia and Yemen.<sup>288</sup> However, it has not notified the U.N. Security Council about its use of force in Pakistan, Somalia, or Yemen, except on one occasion in October 2016 for strikes “against Houthi forces in Yemen.”<sup>289</sup> This may be because the U.S. government relies on either its 2001 notification regarding al-Qaeda and the use of force in that year in Afghanistan,<sup>290</sup> or that it believes it does not need to notify the U.N. Security Council where it has the consent of the country in which it is intervening, even if it concurrently, and explicitly, invokes self-defense—as is the case for Somalia and Yemen.<sup>291</sup>

These approaches undermine the international rule of law.<sup>292</sup> There are good reasons why notification should be provided for every invocation of self-defense even where an intervening state believes it has the consent of the host state. As the U.S. government itself has acknowledged, there are serious challenges in terms of identifying from whom to obtain consent “in a world in which governments are rapidly changing, or have lost control of significant parts of their territory.”<sup>293</sup> Serious questions have been raised about the validity of consent given by Pakistan, Somalia, and Yemen.<sup>294</sup> This uncertainty calls into question the legality of the United States’ actions—if the consent is not valid, the U.S. government’s only remaining justification for the use of force there is self-defense. Notification to



the U.N. Security Council helps clarify the legal basis and allows for the Council to assess the United States' actions, and is at a minimum required by law if the United States does not have the consent of the host state. Accordingly, when the United States invokes self-defense to use force in another country it should notify the U.N. Security Council, even where consent is also offered as a justification.

- **Pakistan.** The U.S. government has not reported to the U.N. Security Council any instances where it has used force in self-defense in Pakistan, presumably because it has never explicitly invoked a self-defense framework to justify its use of force there—as part of its broader lack of transparency about the legal basis for its actions in Pakistan. There are reports that the U.S. government has the consent of at least some of the Pakistani authorities,<sup>295</sup> which can serve as one exception to the general prohibition to use force. There are also concerns regarding the validity and scope of Pakistan's consent at different times, concerns that are directly relevant to assessing the legality of U.S. operations there.<sup>296</sup> Without transparency about the U.S. government's asserted legal basis for strikes in Pakistan, it is impossible to ascertain whether the United States has met any of its Article 51 reporting obligations.
- **Somalia.** The U.S. government has not made any notifications to the U.N. Security Council about the use of force in self-defense in Somalia, despite its assertion that it relies on both the consent of the Somali government and the self-defense exception for its use of force there.<sup>297</sup>

In its general acknowledgment of operations in Somalia, the U.S. government stated in a 2012 War Powers Resolution report to Congress that the military has “taken direct action in Somalia” in a limited number of cases, “against members of Al-Qaida,” some of whom it considered to also be members of Al-Shabaab.<sup>298</sup> The U.S. military has also expressly stated that some specific strikes in Somalia are “self-defense” strikes.<sup>299</sup> Department of Defense officials have stated that the AUMF only provides authority to take “direct action against a limited number of targets in Somalia,” and that strikes against other fighters were part of the “tactical defense” of U.S. and AMISOM forces.<sup>300</sup> It is unclear whether the U.S. government is invoking self-defense as a basis to use force in Somalia in accordance with the U.N. Charter, or whether force is limited to what the U.S. military views as its tactical operations, what is sometimes termed “unit self-defense,” and ordinarily part of military rules of engagement.<sup>301</sup>

In December 2016, the U.S. government explicitly stated that strikes in Somalia were being “conducted [both] with the consent of the Government of Somalia in support of Somalia’s operations in the context of the armed conflict against al-Shabaab *and in furtherance of U.S. national self-defense.*”<sup>302</sup> (emphasis added). The scope, parameters, and period for Somalia’s consent remain unclear (as discussed in Benchmark 6), making it even more important for the United States to report to the U.N. Security Council in all relevant cases. As the U.S. government is, or has been relying on the self-defense exception, it should also report its actions to the U.N. Security Council. Greater transparency would help explain how broadly or narrowly the United States is applying the concept of self-defense, assess which legal frameworks apply, and distinguish legal justifications for the *jus ad bellum* from other relevant legal rules.

- **Yemen.** In October 2016, the U.S. government deposited a letter with the U.N. Security Council stating its military had engaged in “limited self-defense strikes” in Yemen following an attack on a U.S. naval ship off the coast of Yemen.<sup>303</sup> The letter stated that the U.S. response was “limited and proportionate to protect U.S. personnel and ships,” and that in any event the strike was carried out with the consent of the Yemeni government.<sup>304</sup> The United States stated in the letter that it did not believe that an “Article 51 reporting requirement was necessary in [those] circumstances.” However, by its actions and statements, the U.S. government did seem to recognize the importance of reporting to the U.N. Security Council to uphold the international rule of law, and as a means of asserting the legality and legitimacy of its own actions. In her letter to the U.N. Security Council, the U.S. Ambassador to the United Nations stated that the United States had “nevertheless wanted to inform the Council that these actions were taken consistent with international law.”<sup>305</sup>

The U.S. government has not, however, deposited similar letters regarding strikes against al-Qaeda in the Arabian Peninsula on Yemeni territory, despite its assertion that it relies on both the consent of the Yemeni government and the self-defense exception for its use of force there.<sup>306</sup> The scope, parameters, and period for Yemen’s consent remain unclear (as discussed in Benchmark 6), making it even more important that the United States report to the U.N. Security Council in all relevant cases. As the U.S. government is, or has been relying on the self-defense exception, it should also report its actions to the U.N. Security Council.<sup>307</sup>

**Provision of sufficiently detailed information for the Security Council’s members to understand the nature of the self-defense claim.**

- **Pakistan.** The U.S. government has not made any notifications to the U.N. Security Council regarding the use of force in self-defense in Pakistan.
- **Somalia.** The U.S. government has not made any notifications to the U.N. Security Council regarding the use of force in self-defense in Somalia, despite its assertion that it relies on both the consent of the Somali government, and the self-defense exception.<sup>308</sup>
- **Yemen.** The U.S. government deposited a letter with the U.N. Security Council in October 2016 describing the U.S. government’s use of force in Yemen as a response to an attack on U.S. Navy warships stationed in the Red Sea on October 9 and 12. The letter provides detail of the factual circumstances that could facilitate informed decision-making by the Security Council. The U.S. government has not however, deposited similar letters for strikes against al-Qaeda in the Arabian Peninsula on Yemeni territory, despite its assertion that it relies on both the consent of the Yemeni government and the self-defense exception to justify U.S. operations in Yemen.<sup>309</sup>

**Benchmark 6: The government is transparent about its reliance on a host country’s consent as a legal basis for the use of force in that country, by:**

- Stating that consent was provided;
- Clarifying which part of the government of the other country provided consent; and
- Explaining the scope of the consent provided.

### *Summary*

International law generally prohibits the use of extraterritorial force. The consent of a state to use force in its territory is a manifestation of that state’s sovereignty, and is a valid exception to the general prohibition on the use of force on the territory of another state. Transparency around consent is critical to ensure the international rule of law, democratic accountability for a country’s operations abroad, and to enable assessments of the legal responsibility of both the intervening and the host state under international and domestic law. The U.S. government has recognized that respect for a state’s sovereignty is an important constraint on the ability of the United States to act unilaterally.<sup>310</sup>

In a 2012 report, the U.S. government acknowledged that it was working jointly with the Yemeni government to combat al-Qaeda. The United States has also acknowledged on a handful of occasions that specific operations had been carried out jointly with Yemeni government forces and, on one occasion, explicitly that it had the full support of the Yemeni authorities. In December 2016, the U.S. government specifically and officially disclosed that “counterterrorism operations” are conducted with the consent of government officials in Yemen and Somalia.<sup>311</sup> The U.S. government did not clarify which part of the government gave consent or the scope of consent given. Notably, the U.S. government has not explicitly disclosed whether the government of Pakistan has consented to strikes on its territory.

### *Analysis*

The use of force on the territory of another state is generally prohibited. One of the exceptions to this general rule is where a state (the “host state”) provides valid consent to another state to use force on its territory.<sup>312</sup> International law requires that consent to use force be “freely given,”<sup>313</sup> clearly established,<sup>314</sup> reflect the host state’s intent,<sup>315</sup> and be provided by the highest available government authority.<sup>316</sup> Critically, a host state cannot consent to acts that would violate its international human rights law obligations, and it will usually be legally responsible for unlawful actions to which it has consented.<sup>317</sup> Consent should also be authorized by elected representatives, or by the legitimate government of the state.<sup>318</sup> The U.S. government has itself acknowledged that it “can be a complex matter to identify the appropriate person or entity from whom consent should be sought and the form such consent should take,” and that it carefully “considers these issues when examining the question of consent.”<sup>319</sup>

In a 2013 speech, President Obama reaffirmed the general prohibition against the use of force when he noted that the United States “cannot take strikes wherever [it] chooses,” and that its extraterritorial operations “are bound by consultations with partners, and respect for state sovereignty.”<sup>320</sup> The U.S. government has affirmed more specifically that consent is a justification for the use of force in the territory of another state.<sup>321</sup> In 2012, then Director of the Central Intelligence Agency John Brennan referred specifically to the importance of consent as a basis for using drones on the territory of another state and against “enemies outside of an active battlefield,”—alluding to drone strikes that

occur in Pakistan, Somalia, and Yemen.<sup>322</sup> That same year, then Attorney General Eric Holder noted that consent serves as a constraint on the ability of the United States to act unilaterally.<sup>323</sup>

Despite the U.S. government's claims of state consent, the government has not provided detailed explanations of when, by whom, and for how long it has consent to use force. Transparency around consent is crucial for the rule of law. Without it, it is impossible to know whether the intervening state has consent, what limits there are to such consent, and if these limits have been complied with, all questions crucial to the legality of any operation. Keeping the fact and details of consent secret undermines the legal and political accountability of both the host and intervening states, and can impact the legitimacy of the operation. Consent is also central to democratic accountability, in both the host state, which is exercising its sovereignty in the name of the people in allowing the use of lethal force in its territory and often against its own citizens, and for the intervening state and its responsibility to account to its own population for the use of lethal force overseas. Accordingly, the people of both countries should be entitled to know the terms of such agreements.

An analysis of U.S. practice in Pakistan, Somalia, and Yemen follows, in particular U.S. government disclosures on *whether consent was provided*; explanations of *which part of the host government gave consent*; and any disclosures on the *scope of the consent* provided.

## PAKISTAN

*Disclosure that consent was provided.* The U.S. government has not formally acknowledged that it has the consent of the Pakistani government to use lethal force on its territory. Responding to questions about drone strikes in Pakistan, then Secretary of State John Kerry reportedly said that the “program will end” but stopped short of saying that Pakistan had consented to U.S. operations there.<sup>324</sup> Media reports have suggested that some parts of Pakistan's government have consented to drone strikes, with leaked government cables indicating that the CIA had the tacit support of elements within the Pakistani government for drone operations between 2007 and 2011.<sup>325</sup> The U.S. government only notified the Pakistani authorities about a May 2016 drone strike against a Taliban leader in Baluchistan province after it occurred, according to anonymous government officials quoted in the media, suggesting that the U.S. government did not have consent for the strike.<sup>326</sup> Given that the existence of consent has been contested in Pakistan for over a decade, and its validity questioned,<sup>327</sup> U.S. government disclosures about all strikes there would help to clarify its purported authority to carry out strikes in Pakistan and the applicable law.

*Explanation of which part of the government provided consent.* There has been significant international controversy about whether or not Pakistan has consented to U.S. strikes (or the scope of any consent), yet the United States has remained silent.<sup>328</sup> In 2013, various government institutions in Pakistan protested U.S. drone strikes in the country.<sup>329</sup> Notwithstanding official public protests, leaked cables indicate that parts of the Pakistani government had agreed to U.S. drone strikes privately, while condemning them in public in order to appease a population highly critical of drone strikes.<sup>330</sup> It is not clear in Pakistan's case whether any purported consent given in secret represents the clear intention of the state. The U.S. government should therefore disclose how it evaluates consent, and clarify any inconsistencies in the Pakistani government position. The argument that it would not be possible to carry out strikes if consent was not in secret undermines the very legitimacy of that consent, and has longer-term destabilizing impacts.

*Disclosure of the scope of consent provided.* The U.S. has not disclosed any information regarding the scope of any consent it has to carry out strikes in Pakistan.

## SOMALIA

*Disclosure that consent was provided.* After years of almost complete secrecy on this issue, the U.S. government stated in December 2016 that U.S. strikes in Somalia are carried out with Somali government consent.<sup>331</sup>

*Explanation of which part of the government provided consent.* The U.S. government has not explained from which part of the Somali government it obtained consent, or who within the government gave consent. Prior to the December 2016 disclosure, there had only been reports of the Somali government's consent to U.S. drone strikes and counterterrorism operations in news articles quoting Somali government officials. For instance, the Deputy Defense Minister Abdirashid Mohamed Hidig explained in 2011 that U.S. counterterrorism operations in the country are coordinated with Somali authorities.<sup>332</sup> In 2013 Somali President Hassan Sheikh Mohamoud, the head of the Federal Government of Somalia, affirmed that U.S. drone strikes in the country are conducted with his support, but the U.S. government did not formally confirm this at the time.<sup>333</sup>

*Disclosure of the scope of consent provided.* In its December 2016 disclosure, the U.S. government gave no details of the scope of consent given by the Somali government.<sup>334</sup>

## YEMEN

*Disclosure that consent was provided.* The U.S. government stated in December 2016 that U.S. strikes in Yemen are carried out with the consent of the government, but it did not clarify which government provided consent or over which time period or for which actions.<sup>335</sup> On a few occasions prior to this, the U.S. government had publicly stated that operations had been carried out jointly or with the support of the Yemeni government. An illustration of this can be found in President Obama's 2012 War Powers Resolution report to Congress, which provided that "[t]he U.S. military has also been working closely with the Yemeni government to operationally dismantle and ultimately eliminate the terrorist threat posed by al-Qa'ida in the Arabian Peninsula (AQAP)."<sup>336</sup> On one rare occasion—following the failed rescue attempt of Luke Somers in Yemen in 2014—the U.S. government explicitly explained it had the consent of the Yemeni government stating that “the Yemeni government approved the operation and gave its full support.”<sup>337</sup> The U.S. government has also implied that it had the consent of the Yemeni authorities on a few other occasions.

*Explanation of which part of the government provided consent.* The U.S. government has not explicitly clarified which official or office in the government provided consent, except in one case, the operation to rescue journalist Luke Somers, where then Secretary of Defense Chuck Hagel specifically thanked Yemeni President Hadi “for their assistance and cooperation.”<sup>338</sup> The U.S. government's reliance on consent as a legal justification to carry out operations in Yemen was especially troubling when drone strikes continued after the resignation of President Hadi, which was followed by a power vacuum in 2015.<sup>339</sup> It is not clear at that time who was approving such strikes and according to which authority. More complete disclosures by the U.S. government would be important to enable assessments of its legal authority to use force in Yemen. The U.S. should publicly clarify which government offices have provided consent at the various points in time.<sup>340</sup>

*Disclosure of the scope of consent provided.* In December 2016, the U.S. government publicly stated for the first time that it conducts its counterterrorism operations against AQAP in Yemen with the consent of the government.<sup>341</sup> However, it is not consistently clear whether the Yemeni government has always provided its consent to all U.S. strikes in the country, or when and for what period the consent applies. On one occasion the U.S. government expressly stated that the Yemeni government had specifically approved an operation, and on some other occasions it has implied this, but this is not

the norm.<sup>342</sup> This has resulted in confusion about the scope of consent in Yemen. The U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism reported that he was informed by Yemeni public officials that the United States routinely seeks prior consent on a case by case basis for every operation, and in situations where consent is withheld, a strike will not proceed.<sup>343</sup> However, at the time of the Special Rapporteur's report, President Hadi publicly maintained that "specific strikes were not preapproved," but were "generally permitted."<sup>344</sup> The U.S. should publicly clarify whether Yemen's consent to drone strikes has been or is on a case-by-case basis, or is "generally permitted."

Similar confusion erupted following a botched U.S. Special Operations raid in Yemen in January 2017 that resulted in the reported death of numerous civilians, including Anwar al-Aulaqi's 8-year-old granddaughter, Nawar al-Aulaqi, as well as a Navy SEAL, just a few days after President Trump's inauguration.<sup>345</sup> There were initial reports that the Yemeni government had withdrawn consent for ground operations in Yemen following the operation. However, after two days of uncertainty, the Yemeni embassy in Washington, D.C., issued a statement in which it explained that the Yemeni government "has not suspended any programs with regard to counterterrorism operations in Yemen with the United States" and "reiterates its firm position that any counterterrorism operations carried out in Yemen should continue to be in consultation with Yemeni Authorities and have precautionary measures to prevent civilian casualties." The U.S. government did not comment directly on these reports. Questions regarding the precise scope of such consent, and how it is given for U.S. operations, remain unclear, underscoring the need for greater transparency.<sup>346</sup>

## 2 The Government Discloses Factual Information about Lethal Strike Practices

Factual information about U.S. lethal strike *practices* is critical to understanding and evaluating U.S. use of force, promoting meaningful and democratic debate, ensuring truth for those injured and the families of those killed, as a necessary step toward accountability, and to inform lessons learned for future actions. The release of information about actual strike practices has been one of the loudest and most common demands made on the U.S. government. This section contains a series of benchmarks for transparency in relation to factual information about strikes. U.S. government practice is analyzed in relation to disclosures of statistics regarding its operations and civilian casualties, and its record of acknowledging and releasing information about specific strikes.

### **Benchmark 7: The government regularly publishes detailed statistics and aggregate information on lethal strike practices.**

Published statistical and aggregate information should include:

- Numbers of strikes, broken down by country, and year and month;
- Numbers of those killed and injured, broken down by:
  - Country;
  - Year and month;
  - Location;
  - Sex; and
  - Age.
- For strikes conducted outside situations of armed conflict:
  - Numbers of persons killed and injured, organized by whether they were assessed to be an imminent threat to life or serious injury or not.
  - Amount of property damage caused, organized by the numbers of types of buildings damaged and the extent of damage.
- For strikes conducted in situations of armed conflict:
  - Numbers of persons killed or injured, organized by their status—whether civilian, combatant, directly participating in hostilities, or unknown;
  - Numbers of anticipated and unanticipated civilian casualties;
  - Where known, the organizational affiliation of any persons assessed to be combatants or persons directly participating in hostilities; and
  - Property damage caused, including whether civilian or military objective, and the extent of damage caused.
- Compiled list of names of all those killed, where known, with, in armed conflict situations, status (civilian, combatant, or directly participating in hostilities);
- Statistics on number of strikes assessed to involve lawful or unlawful actions; and
- Details of the methodology used to compile the data, including:
  - Explanations of the terms and categories used;
  - A full list of the categories of sources consulted;
  - What weight is given to categories of sources;

- How the reliability and accuracy of reports is assessed;
- How contradictory reports are addressed; and
- Whether reports are updated and figures revised based on new information.

### *Summary*

The release of statistical data on strikes is crucial to enable the American public and the international community to understand the real costs of U.S. strikes abroad. The release of such data facilitates a meaningful discussion of some of the core controversies surrounding strikes, including the claimed precision of strikes, and whether they are ethical or lawful.

For many years, the U.S. government released no official statistics on U.S. strikes and civilian casualties. The government released very little official information, and even then it was mainly to deny civilian casualties. John Brennan, for example, stated in 2011 that U.S. strikes in a given year did not cause any “collateral” deaths, while asserting that it is U.S. policy to strike only when there is “near certainty that no civilians will be killed or injured.” When civil society groups and others reported statistical data on alleged civilian harm, the government sometimes did not refute such reports, and sometimes responded by saying—generally through “anonymous officials”—that it believed the actual numbers were lower. In 2016, the U.S. government released for the first time basic strike data for 2009–2015, consisting of aggregate numbers of strikes, estimated “non-combatant” and “combatant” deaths “outside areas of active hostilities”—which it explained did not include Iraq, Syria, and Afghanistan. The release of this data, the subsequent release in January 2017 of data for 2016 strikes, and the commitment to continue to release such data on an annual basis, were important steps forward. However, the data released does not contain sufficient detail or disaggregation. Key gaps include: numbers of those injured in strikes; breakdowns by month, year, country, age, and sex; numbers of strikes assessed to be lawful or unlawful; and names of those killed.



## *Analysis*

Before 2016, the U.S. government released no statistical information regarding the number of strikes in Pakistan, Somalia, and Yemen, and no statistics on the number of those killed and injured by strikes.<sup>347</sup> At times, officials denied civilian casualties. For example, in 2011, John Brennan, then Assistant to the President for Homeland Security and Counterterrorism, and subsequently Director of the CIA, stated that “for the past year, there has not been a single, collateral, death” in U.S. strikes.<sup>348</sup> Sometimes, officials acknowledged in general terms that civilians had been killed, but provided no specific data. For example, in 2013, President Obama admitted that “it is a hard fact that U.S. strikes have resulted in civilian casualties.”<sup>349</sup> Instead, data came from NGOs and journalists, who carried out detailed on-the-ground investigations into specific strikes and compiled statistics based primarily on reviewing and analyzing secondary sources.<sup>350</sup> Occasionally, anonymous government officials were quoted in the press as stating that civilian casualties were much lower than estimates advanced by NGOs and journalists.<sup>351</sup>

On July 1, 2016, the Director of National Intelligence (DNI) released a summary of information obtained from U.S. agencies and departments about the number of strikes outside “areas of active hostilities” between 2009 and 2015, and provided data on the government’s estimates of “non-combatant” and “combatant” casualties.<sup>352</sup> The DNI summary report stated that “Areas of active hostilities” then included Afghanistan, Iraq, and Syria, but it was not completely clear if the DNI Summary covered all other countries in which the United States was engaged in operations involving the use of force except those three. In January 2017, the U.S. government released a subsequent report giving the government’s estimates of “non-combatant” and “combatant” casualties for areas “outside of active hostilities” in 2016.<sup>353</sup>

The data released was a positive but insufficient step toward transparency. Between January 2009 and December 2016, the U.S. government says it killed between 2,867 and 3,138 people in areas “outside of active hostilities,” and claimed that between 65 and 117 were “non-combatants.”<sup>354</sup> The release of these figures, the commitment to release figures each year pursuant to the Presidential Executive Order published on July 1, 2016,<sup>355</sup> and the subsequent January 2017 release of figures for 2016,<sup>356</sup> were welcome developments in regularizing some basic transparency regarding U.S. lethal force operations—the first official disclosure of statistical information about strikes. One of the reasons that civil society organizations have been calling for greater transparency in this area is so that the government figures can be compared to those gathered by independent organizations.

The need for greater transparency is clear, as the DNI figures are much lower when compared with figures gathered by civil society organizations and based on detailed investigations into specific strikes. According to the 2016 DNI summary report, between January 2009 and December 2015 there were a total of 473 U.S. strikes in “areas outside of active hostilities,” resulting in between 64 and 116 “non-combatant deaths.”<sup>357</sup> In contrast, NGOs that investigated just 52 of those strikes found that they resulted in 161-183 civilian casualties. These 52 strikes, carried out between January 2009 and April 2014, were the subjects of detailed NGO investigations comprised of interviews with victims, witnesses and local government officials, as well as reviews of secondary sources.<sup>358</sup> While the U.S. government has questioned the reliability of the NGO figures, it should be noted that these NGO investigations are more detailed than the government’s in at least one important respect—the NGOs all carried out in-person research with witnesses and families. It appears that the U.S. government rarely conducts such on-the-ground investigations following a strike, especially in places that the United States considers “outside areas of active hostilities,” where it often has no or a minimal ground troop presence.<sup>359</sup>

U.S. Government Provided Data	Human Rights Organizations <sup>360</sup> Selected Reports <sup>361</sup>
Number of strikes reported between January 2009 and December 2015: <sup>362</sup>  <p style="text-align: center;"><b>473</b></p>	Selected number of strikes investigated and reported on by NGOs in Yemen and Pakistan between January 2009 and April 2014: <sup>363</sup>  <p style="text-align: center;"><b>52</b></p>
Estimated number of civilians killed (“non-combatants”):  <p style="text-align: center;"><b>64-116</b></p>	Estimated number of civilians killed:  <p style="text-align: center;"><b>161-183</b></p>

Even though the human rights organizations reported on strikes that presented particular concerns for high rates of civilian casualties, which are likely not representative of all strikes carried out during the same period, the discrepancy necessitates closer inspection. This is impossible without the release of more detailed, disaggregated information—in particular: data broken down by year and month; location; sex, and age; the names of those killed and injured; and more details about the U.S. government’s methodology.

What follows is an analysis of U.S. practice and disclosures of statistics regarding: *numbers of strikes; numbers killed and injured; outside armed conflict situations, numbers lawfully or unlawfully targeted, or not known; in armed conflict situations, civilian casualty data, as well as numbers lawfully or unlawfully targeted; names of those killed; the lawfulness of strikes; and the methodology used to compile the data.*

**Numbers of strikes, broken down by country, month, and year.** The 2016 DNI summary report includes figures of the number of strikes between 2009–15 in areas the U.S. government deemed “outside of active hostilities.” However, these figures were not broken down by country, month and year. Similar concerns apply to the 2017 DNI summary report, which reported only strikes carried out in 2016, but did not disaggregate by country or month.

**Numbers killed and injured, disaggregated.** The 2016 and 2017 DNI summary reports are both in aggregate form only—with no breakdown by month, country, or location, or by the age and sex of those killed and injured. They also include no information regarding those injured or civilian property damaged.

**For strikes outside armed conflict situations, numbers killed or injured, and whether assessed to be an imminent threat to life or serious injury, and property damage.** While it appears that the data in the 2016 and 2017 DNI summary reports relates only to strikes that the U.S. government considers are part of an armed conflict, this is not clearly stated. The DNI summary reports do not include details of how many individuals were assessed to be an imminent threat to life or serious injury. The reports also do not include details of property damage.

**For strikes in armed conflict situations, civilian casualty data.** Both the 2016 and 2017 DNI summary reports are broken down by the “status” of the person killed, setting out estimates of the number of “combatants” and “non-combatants” for the years 2009–2015, and 2016, respectively. In addition, the 2016 and 2017 DNI summary reports do not include numbers of anticipated and unanticipated civilian casualties, or the organizational affiliation of any persons assessed to be combatants or persons directly participating in hostilities. The DNI summary reports also do not contain information regarding any property damage caused, including whether a civilian or military objective, and the extent of damage caused.

**Names of those killed.** The 2016 and 2017 DNI summary reports contain no names of targets or civilians killed. The names are important to acknowledge to families their individual loss. They are also important for oversight of U.S. practice, including for the verification of U.S. government assertions about whom it targets, such as the 2010 statement that it was only targeting “high-level Al-Qaeda leaders who are planning attacks.”<sup>364</sup>

**Lawfulness of strikes.** The U.S. government provided no details regarding the total numbers of strikes assessed to be lawful or unlawful in the 2016 and 2017 DNI summary reports.

**Methodology.** Both the 2016 and 2017 DNI summary reports include sections on “U.S. Government Post-Strike Review Processes and Procedures.” In this section, the reports explain that the U.S. government arrives at its figures after “incorporat[ing] the best available all-source intelligence, media reporting, and other information.”

Positively, the government expresses its willingness to review and revise assessments where “new, credible information”<sup>365</sup> comes to light, or where “new information becomes available that alters the original judgment.”<sup>366</sup> The 2016 report also includes a fuller list, missing from the 2017 report, of some types of sources that it consults, including “collection and analysis of multiple sources of intelligence before, during, and after a strike, including video observations, human sources and assets, signals intelligence, geospatial intelligence, accounts from local officials on the ground, and open source reporting.” Notably, the report does not include interviews with survivors of attacks, witnesses, and family members, raising significant concerns about the comprehensiveness of the government’s investigations and of the reliability of its data.<sup>367</sup>

Also absent from the U.S. government’s explanation of its methodology in the DNI Summary reports are:

- Explanations of what weight is given to different types of sources;
- How, and according to what methodology, the reliability and accuracy of reports of civilian casualties are assessed; and
- How contradictory reports are assessed, reconciled, or used.

Both the 2016 and 2017 reports also include an explanation of how the U.S. government defines the terms “combatant” and a “non-combatant.”<sup>368</sup> In these reports, the U.S. government states that:

*‘non-combatants’ are individuals who may not be made the object of attack under applicable international law. The term “non-combatant” does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of U.S. national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.*<sup>369</sup>

This definition potentially excludes individuals who would ordinarily be considered civilians under international law. The targeting of individuals “in the exercise of U.S. national self-defense” lacks foundation under international law (see Benchmark 1). It is also unclear how the U.S. government determines that an individual is “part of a belligerent party to an armed conflict.” This term could be interpreted very broadly, which may result in the U.S. government’s figures for “non-combatant” casualties being much lower.<sup>370</sup>

It is not completely clear what the reports mean when referring to individuals of “unknown” or “uncertain” status, although the explanation provided appears to indicate that these individuals are considered to be “non-combatants” and are included in the total given for “non-combatant” deaths.<sup>371</sup>

The summary reports also include sections on “Discrepancies Between U.S. Government and Non-Governmental Assessments.” The 2016 summary report consists mainly of explanations by the U.S. government of why it believes there to be discrepancies between figures gathered by NGOs and the government’s figures, primarily by reference to the U.S. government’s access to intelligence information. The 2016 summary report also implies that NGOs and others may too easily be swayed by “the deliberate spread of misinformation by some actors.”<sup>372</sup> However, the 2016 summary report does not contain detailed information to back up these assertions. The 2017 report claims that “no discrepancies were identified between post-strike assessments from the U.S. government and credible reporting from NGOs regarding non-combatant deaths,” although it is not clear which reports the U.S. government consults or assesses to be credible, and how it does so.<sup>373</sup> For 2017, at least, figures gathered by The Bureau of Investigative Journalism were much closer to the U.S. government’s figures, but the same is not true for the period of 2009-15.<sup>374</sup>

### **Benchmark 8: The government promptly acknowledges each and every strike.**

Each acknowledgment should be formally and officially made by a named government agency or official and include the following information:

- The name(s) of the government agency(ies) responsible for the strike;
- The date of the strike;
- The country in which the strike occurred, as well as the province/state, and city/town, as relevant;
- What kind of post-strike investigation the government launched, including whether an operational debriefing, other kind of preliminary examination, or disciplinary investigation, or criminal investigation; and
- An estimated timeline for the release of a fuller explanation and further details regarding the strike.

### *Summary*

Prompt and public acknowledgment of strikes that includes essential factual details, including what the government is doing to investigate the strike, is a minimal—but crucial—element of transparency that gives those injured and families of those killed basic information and recognition of the fact of a strike, and the general public an idea of where and when strikes are occurring.<sup>375</sup> It is a critical prerequisite to more meaningful accountability.

Prior to 2014, the U.S. government had only officially acknowledged a handful of individual strikes, mostly those in which U.S. citizens were killed. Since late 2014, the U.S. Department of Defense began formally acknowledging at least some strikes in Somalia, and from 2016, also in Yemen. Strikes by the CIA remain almost completely unacknowledged, which is likely part of the reason that, together with the government of Pakistan’s reported interest in keeping their consent to U.S. strikes secret, no information has been officially released regarding all but five strikes in Pakistan, where the CIA is reported to be responsible for most strikes. Even for strikes that are acknowledged, only basic information is revealed—generally location, date, and the fact that the military is responsible. The U.S. government should disclose additional details in each acknowledgement—particularly what investigative steps are being taken, and giving an indication of when further details will be revealed.

## Analysis

The U.S. government only acknowledged the existence of its “targeted killing” and drone strikes in general terms in 2010,<sup>376</sup> and only belatedly and selectively has the government officially acknowledged specific strikes. Until late 2014, outside of a few, isolated incidents that the government officially commented on—for example incidents in which U.S. citizens or very high profile targets had been killed in Yemen and Pakistan in 2011—the only information the public had about specific strikes was from anonymously quoted officials and the investigations of journalists and civil society.<sup>377</sup>

Following years of almost complete secrecy, U.S. practice notably improved from late 2014 for Somalia,<sup>378</sup> and from 2016 onwards in Yemen,<sup>379</sup> when the U.S. Department of Defense began for the first time to provide updates acknowledging specific strikes in those countries. However, transparency about individual strikes varies widely depending on where the strikes take place, and the government agency or department responsible for the strike. Strikes in Pakistan, and those conducted by the CIA, remain almost completely secret, with no information disclosed except in a handful of isolated and exceptional cases. Starting in 2017, Department of Defense disclosures of specific strike acknowledgments became more difficult to track and assess, as strike and targeting information on Yemen was no longer released in small batches, but large numbers of strikes were reported in a single press release.

The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. disclosures regarding: *acknowledgment* of strikes; the *agency responsible* for the strike; the *date and location* of the strike; what *kind of investigation* is underway; and the *estimated timeline* for *release of further information*. U.S. practice in Pakistan, Somalia, and Yemen is analyzed in turn. “Acknowledgment” in this report means a strike acknowledgment by a named official or agency statement and excludes anonymous sourcing, such as media reporting of quotes from “unnamed officials.”

### PAKISTAN

*Acknowledgment of strikes.* Publically, the United States has formally acknowledged only a handful of incidents in Pakistan, despite numerous strikes in Pakistan during the presidencies of George W. Bush, Barack Obama, and Donald Trump. These include:

- the 2011 killing of Osama bin Laden;<sup>380</sup>
- the U.S. government confirmed the 2011 killing of U.S. citizen Jude Kenan Mohammad in a May 2013 letter to Senator Patrick Leahy from Attorney General Eric Holder, and only following significant pressure.<sup>381</sup>
- in May 2015, the President publicly admitted to the mistaken deaths of an American and Italian citizen, several months after the incident occurred in January 2015.<sup>382</sup> A statement released by the White House that same day confirmed that another U.S. citizen, Ahmed Farouq, was killed in the same operation.
- the White House also confirmed that another U.S. citizen, Adam Gadahn, had been killed in a separate U.S. counterterrorism operation in January 2015.<sup>383</sup> Although the U.S. government said that neither Gadahn nor Farouq were specifically targeted, limited information was provided regarding what led to their deaths, although the government made general claims that the two men were prominent al-Qaeda “leaders.”<sup>384</sup>
- in a rare acknowledgment in May 2016, the U.S. government officially acknowledged a strike that targeted Taliban leader Mullah Akhtar Muhammad Mansur. The government first acknowledged the killing in a Pentagon press statement, which was subsequently confirmed by the President himself.<sup>385</sup>

While it appears that all of these strikes were in Pakistan, there is some doubt whether they in fact occurred there because for some of these cases the U.S. government acknowledged them only as being “in a remote area of the Afghanistan–Pakistan border region” and did not explicitly disclose the country in which the operation took place.<sup>386</sup>

Those injured and the families of people killed in the vast majority of strikes in Pakistan have received no acknowledgment from the government at all.

*Disclosure of the agency responsible for the strike.* The U.S. government did not indicate which agency was responsible for the strikes that killed Jude Kenan Mohammad, Giovanni Lo Porto, Ahmed Farouq, Adam Gadahn, and Warren Weinstein in Pakistan. In the strike against Mullah Akhtar Muhammad Mansur, the U.S. government confirmed that the Department of Defense carried out the strike.<sup>387</sup>

*Disclosure of date and location of the strike.* In President Obama’s public address on the targeting of Osama bin Laden, he explained that the May 2, 2011 operation was carried out “against a compound in Abbottabad, Pakistan.”<sup>388</sup> This was an exceptional level of transparency. The level of specificity regarding the date and particular location of a target in Pakistan was not repeated in relation to others strikes. In the Jude Kenan Mohammad case, no details were given other than confirmation that the United States had carried out the strike.<sup>389</sup> In the strike that killed Giovanni Lo Porto, Warren Weinstein, and Ahmed Farouq, the U.S. government explained that it occurred on the Afghanistan–Pakistan border in January 2015, but there was no confirmation of the precise date or a more specific location.<sup>390</sup> The White House similarly explained that Adam Gadahn was killed in a separate counterterrorism operation against an al-Qaeda compound in January 2015 “in the same region.”<sup>391</sup> However, no further details were provided to confirm a more specific location in the country. The U.S. confirmed the date—May 21, 2016—of the strike against Mullah Akhtar Muhammad Mansur, but only that it was in a remote area of the Afghanistan–Pakistan border region.<sup>392</sup>

*Disclosure of what kind of investigation is underway.* In the case of Warren Weinstein and Giovanni Lo Porto, President Obama stated on April 23, 2015 that he had directed a “full review of what happened” to identify lessons learned and changes that could be made.<sup>393</sup> As of May 31, 2017, the results of any review remained secret. In relation to Jude Kenan Mohamed, although the letter from Attorney General Holder stated he was not specifically targeted by the United States, no further information was disclosed regarding whether there was an investigation into the strike that led to his killing. Similarly, the White House Press Secretary’s statement regarding Adam Gadahn reveals that he was not specifically targeted by the United States, although the statement did note that he was a member of al-Qaeda. There was no indication that there was an investigation into this incident.<sup>394</sup> In the Mullah Akhtar Muhammad Mansur case, the Pentagon Press Secretary stated that the Department of Defense was “still assessing the results of the strike and will provide more information as it becomes available,” although it was not clear what type of investigation this was and no further information has been disclosed.<sup>395</sup>

*Disclosure of estimated timeline for release of further information.* In none of the mentioned cases did the U.S. government disclose a timeline for the release of further information.

## SOMALIA

*Acknowledgment of strikes.* The U.S. government did not officially acknowledge strikes in Somalia until late 2014, despite reports by journalists of strikes occurring.<sup>396</sup> Since then, U.S. government transparency practice has improved, with the first official acknowledgment of a strike in Somalia on September 2, 2014.<sup>397</sup> As of May 2017, the Department of Defense had acknowledged approximately 20 strikes in Somalia.<sup>398</sup> It is not clear whether these acknowledgements include all strikes carried out

in Somalia. In April 2017, after numerous media reports indicated that the United States had carried out airstrikes in south-western Somalia, the Department of Defense issued a statement stating that it was not responsible for the attacks, and the most recent action it took in Somalia had occurred in January 2017.<sup>399</sup>

*Disclosure of the agency responsible for the strike.* In all of the acknowledgments since 2014, the U.S. government has made it clear that the military is responsible for the strikes in Somalia.

*Disclosure of date and location of the strike.* In all of the strikes acknowledged since 2014, the U.S. government has indicated the date of the strike, and in most cases at least a regional location within Somalia for the strike.

*Disclosure of what kind of investigation is underway.* The U.S. government has explained that it reviewed “all relevant information” in response to reports of alleged civilian casualties, in just one of the incidents that it has acknowledged since 2014.<sup>400</sup> The government stated that it found the reports not to be credible. The government’s first acknowledgment of the strike did not include any reference to the allegations of civilian casualties, but it is possible they had not been received at that time.<sup>401</sup> No information regarding any review or investigation for the other strikes has been disclosed.

*Disclosure of estimated timeline for release of further information.* None of the disclosures include any date to release more details regarding the strike.

## YEMEN

*Acknowledgment of strikes.* Until March 2016, the U.S. government officially acknowledged only a few specific strikes in Yemen. These acknowledgments included:

- an oblique acknowledgment of a November 2002 strike in Yemen by Secretary of State Colin Powell, and Deputy Secretary of Defense, Paul Wolfowitz in the same month;<sup>402</sup>
- President Obama’s announcement on the day Anwar al-Aulaqi was killed in September 2011;<sup>403</sup>
- the cursory information provided by Attorney General Eric Holder in 2013 to Members of Congress regarding the deaths of two other U.S. citizens in Yemen, including al-Aulaqi’s 16-year-old son;<sup>404</sup>
- remarks by President Obama, Secretary of State John Kerry, and Secretary of Defense Chuck Hagel regarding two failed attempts to rescue photojournalist Luke Somers in 2014;<sup>405</sup> and
- a statement by National Security Council Spokesperson Ned Price acknowledging the death of alleged al-Qaeda in the Arabian Peninsula leader Nasir al-Washishi, although it was not made explicitly clear in the statement that the United States was responsible for his death.<sup>406</sup>

U.S. practice in relation to Yemen changed significantly from March 2016, when the U.S. Department of Defense began acknowledging specific strikes.<sup>407</sup> In April 2017, in a rare acknowledgement on the use of drones, Pentagon Spokesman Navy Captain Jeff Davis confirmed that the U.S. government carried out 20 strikes over a weekend, which were “largely unmanned.”<sup>408</sup> Separately, the Department of Defense confirmed that the U.S. military carried out a total of 80 “precision strikes against AQAP militants” in Yemen between February 28, 2017 and April 24, 2017.<sup>409</sup> The release however signaled a decline in U.S. practice on transparent acknowledgement of all strikes, as the total number of strikes was reported in a single press release, and failed to provide further strike specific information.<sup>410</sup> Again, it is not clear whether the strikes the U.S. government reports includes all strikes carried out in the country, particularly those conducted by the CIA.<sup>411</sup>

*Disclosure of the agency responsible for the strike.* In all of the acknowledgments since 2016, the U.S. government has made it clear that the military is responsible for the strikes in Yemen.

*Disclosure of date and location of the strike.* In all the strikes acknowledged during 2016, the U.S. government has indicated the date of the strike, and in nearly all cases at least a regional location within Yemen for the strike. As U.S. targeting operations increased in Yemen in March 2017, Department of Defense disclosures on particular strikes became less specific and more difficult to track and assess. For instance, acknowledgment of a U.S. strike in the Abyan governorate and other strikes was only disclosed through a March 6, 2017 Pentagon statement update on an unrelated operation on North Korean missile strike launches.<sup>412</sup> Unlike previous reports which were typically announced by U.S. Central Command and would provide specific dates in which each strike was carried out,<sup>413</sup> the Pentagon statement on March 6, 2017 simply stated that 40 strikes had been conducted in Abyan governorate over the course of five days, without specific dates for each.

*Disclosure of what kind of investigation is underway.* In a few cases, the U.S. government has provided details of what kind of investigation is ongoing in relation to specific incidents, but these tend to be for high profile cases and are exceptions, not the rule.

After a U.S. military strike targeted an alleged Al-Qaeda training camp in Yemen in March 2016, a Pentagon spokesperson confirmed that the military was “continuing to assess the results of the operation but [their] initial assessment [was] that dozens of AQAP fighters have been removed from the battlefield.”<sup>414</sup>

Following a U.S. special operations raid in Yemen on January 29 2017 that resulted—according to news reports—in the death of a number of civilians, including Anwar al-Aulaqi’s 8-year-old granddaughter as well as a U.S. Navy Seal, the U.S. military stated in a press release that it had “concluded regrettably that civilian non-combatants” were killed, despite claims by the White House that the operation was a “success.”<sup>415</sup> It stated further that it believed the casualties may include children, and that an “ongoing credibility assessment seeks to determine if there were any still-undetected civilian casualties.”<sup>416</sup> On March 3, 2017, upon announcing that more than 30 strikes were carried out in south-eastern Yemen over the course of two days, the U.S. military acknowledged that the results of the strikes were “still being assessed.”<sup>417</sup> In a March 2017 hearing before the Senate Armed Services Committee, Army General Joseph Votel, Commander of U.S. Central Command confirmed in response to Senate questions that an investigation of civilian casualties of the January 2017 raid was “completed.”<sup>418</sup> Votel took responsibility for the raid and confirmed that between 4 and 12 civilians had been killed.<sup>419</sup>

On May 23, 2017, the Department of Defense disclosed that its forces conducted a counterterrorism operation on an AQAP compound in Marib, about 150 miles north of Aden. According to the U.S. government, the operation resulted in the death of at least seven members of al-Qaeda who “were killed in small-arms fire and precision airstrikes from an AC-130 gunship.”<sup>420</sup> Pentagon spokesman Captain Jeff Davis stated that there were “no credible reports of civilian casualties.”<sup>421</sup> However, village residents reported to journalists that ten civilians were killed and wounded in the raid, including a fifteen-year-old who was shot dead as he was fleeing his home.<sup>422</sup>

As of the end of May 2017, the U.S. government had not given any indication of whether investigations into the strikes were being undertaken in relation to other acknowledged strikes.

*Disclosure of estimated timeline for release of further information.* None of the disclosures on strikes in Yemen give any timeline for release of further information.



**Benchmark 9: The government promptly discloses all assessments or investigations into strikes and other uses of lethal force, acknowledging and naming any civilians or bystanders harmed, as well as anyone unlawfully targeted.**

For each strike that results in civilian harm, or where there are credible allegations of civilian harm and/or that a strike was unlawful, the government releases:

- Numbers of those killed and injured, and their names, ages, and sex;
- Details of what steps were taken to investigate the strike, including whether any victims, witnesses, and/or families were interviewed;
- The scope and purpose of any investigation and which agencies and expertise were involved in the investigation of the strike;
- Results of any assessment or investigation, with redactions where families of those killed, or those injured, have requested privacy or to ensure their physical safety, or only as strictly necessary for legitimate national security reasons;
- What lessons have been learned from the particular strike and how practices and procedures will be improved in the future to reduce civilian casualties, or avoid unlawful strikes, in other operations;
- In situations of armed conflict:
  - The status of each individual killed or injured—whether a civilian, a combatant, directly participating in hostilities, or unknown;
  - The type of any property damaged, including what it was used for (if known), extent of the damage, and whether the property was civilian or deemed a legitimate military objective; and
  - Whether civilian harm was foreseen or unanticipated, what precautions were taken in attack, and an explanation for why civilians were killed and/or injured.
- Outside of situations of armed conflict:
  - An explanation for why people were killed and/or injured, i.e. an explanation of if, how, and why they posed an imminent threat to life or serious injury; and
  - The type of property damaged, including what it was used for (if known), and the extent of the damage.

### *Summary*

Governments should publicly release information about people killed and injured and property damaged in specific strikes as a means of ensuring those injured and the families of those killed have access to official information about what happened and as part of the redress to which they may be entitled. The results of investigations and assessments must be released to allow for a proper and continuous external evaluation of the extent to which specific strikes comply with the law. Such disclosure also contributes to democratic accountability, giving the American public information needed to engage in informed debate about these issues and to form opinions about whether they agree with government practices. In releasing this information, governments can demonstrate their commitment to assessing the impact of each strike, ensure that practices are reviewed in the future, and build credibility and trust with impacted communities critical of U.S. counterterrorism operations.

The United States has almost never disclosed the names of civilians killed, or the results and details of assessments or investigations of strikes and lethal operations in Pakistan, Somalia, and Yemen.

Except in isolated cases, the U.S. government has failed to provide detailed explanations of how many civilians it killed in a specific strike, or why civilians were killed, even where NGOs have provided detailed information about alleged civilian casualties to the U.S. government.<sup>423</sup> There are few exceptions to this general secrecy. Three examples include: the apology for and naming of one U.S. civilian and one Italian civilian killed in a strike in Pakistan—an ugly double standard, given that the vast majority of those killed and injured are citizens of Pakistan, Yemen, and Somalia;<sup>424</sup> a basic report on an assessment of allegations of civilian casualties in Somalia in 2016; and the unusual U.S. government release of an assessment concluding that there were between 4 and 12 civilian casualties, including children, in a botched raid in Yemen in January 2017. This is despite the fact that the U.S. government itself says it conducts post-strike assessments of civilian casualties.<sup>425</sup>

## *Analysis*

Following years in which almost nothing was disclosed about specific strikes, the United States began to acknowledge strikes—in 2014, in Somalia, and 2016, in Yemen—with some consistency and to disclose the numbers of those killed in each strike, and occasionally, of those injured. However, disclosures in relation to Yemen and Somalia usually do not include the names and ages of those killed. In Pakistan, by contrast, almost no information has been released whatsoever about specific strikes, save for a few highly exceptional cases. In other countries in which the United States uses force, such as in Iraq and Syria, the U.S. military provides regular updates on instances of civilian harm resulting from U.S. strikes, as well as brief details of targets.<sup>426</sup>

On a few occasions, the U.S. government has also released redacted results of investigations in cases in Afghanistan and Iraq.<sup>427</sup> The U.S. military has shown it is capable of selectively releasing investigation reports that include “minute-by-minute recounting of events, maps, radio chatter, interviews with commanders and pilots, an assignment of responsibility, recommendations for administrative actions, and corrective recommendations for how to mitigate against the risk of similar civilian casualty events in the future.”<sup>428</sup> As this practice demonstrates, while the results of investigations may be sensitive, at least after the lapse of some time and with appropriate redactions, they should be capable of disclosure—the United States can be transparent about such information.<sup>429</sup>

The release of the results of government investigations and assessments is critical for those injured and families of those killed in strikes. As Rafiq ur Rehman, whose mother, Mamana Bibi, was killed in a U.S. drone strike in Pakistan in 2011, told a Congressional hearing in a rare opportunity to address his concerns to U.S. government officials, “Nobody has ever told me why my mother was targeted that day.”<sup>430</sup>

In a July 2016 Executive Order, the U.S. government committed to publicly “acknowledge U.S. government responsibility for civilian casualties,” formalizing the previous commitments of officials such as John Brennan. The U.S. government also committed to review or investigate “incidents involving civilian casualties.”<sup>431</sup> The Executive Order represents an important step toward transparency and accountability, but it falls short by making the review, investigation, and release of information in each case contingent on “mission objectives” and an appropriateness test.<sup>432</sup> These terms are potentially subject to broad interpretations, and could result in irregular implementation. If the Executive Order is implemented in a manner that encompasses all past and future cases, it would amount to a significant advance in improving transparency and accountability for specific strikes.

The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. disclosures regarding: *numbers killed and injured*, with *names, ages, and sex*; *details of steps taken* to investigate specific

strikes; the *scope and purpose* of the investigation, including which agencies were involved; the *results of any assessment or investigation*; what *lessons have been learned*, and how *practices and procedures will be improved*; in armed conflict, *explanations of civilian harm*, whether *individuals killed were civilians*, the *type and extent of property damaged*, whether *civilian harm was foreseen or unanticipated*, *what precautions were taken in attack*, and an *explanation for why civilians were killed and/or injured*; and, outside of armed conflict, *explanations for why people were killed and injured*, and *details of people lawfully or unlawfully killed and property damaged*. U.S. practice in relation to strikes in Pakistan, Somalia, and Yemen is analyzed in turn.

## PAKISTAN

*Numbers killed and injured, with names, ages, and sex.* No formal statement or named official has formally disclosed information about the hundreds of strikes and operations in Pakistan. Some of the limited exceptions include the killings of Osama bin Laden and Jude Kenan Mohammad in 2011, Adam Gadahn, Ahmed Farouq, Giovanni Lo Porto, and Warren Weinstein in 2015, and Mullah Akhtar Muhammad Mansur in 2016. While it appears that all of these operations were in Pakistan, there is some doubt because for some of these cases the U.S. government acknowledges them only as being “in a remote area of the Afghanistan-Pakistan border region” or similar.<sup>433</sup> In the 2011 bin Laden raid, the President conceded that a woman had been killed, and two others injured, but did not disclose their names and age.<sup>434</sup> In the 2015 strike that killed Lo Porto and Weinstein, President Obama also disclosed that “the operation did take out dangerous members of al Qaeda,” although he did not specify how many, nor their names, ages, and sex.<sup>435</sup> The U.S. government subsequently stated that Farouq—who was alleged to be an al-Qaeda “leader”—had been killed in the same strike.<sup>436</sup>

*Details of steps taken to investigate specific strikes.* So little has been officially disclosed about strikes in Pakistan that there is almost no information regarding steps taken by the U.S. government to investigate specific strikes. The one exception is the strike that resulted in the deaths of Italian citizen, Giovanni Lo Porto, and U.S. citizen, Warren Weinstein, in January 2015. In April 2015, President Obama stated that an “initial assessment” had been carried out, but that he had directed a “full review of what happened” to identify lessons learned and changes that should be made.<sup>437</sup> As of May 2017, the results of any review remained secret.

*Scope and purpose of the investigation, including which agencies involved.* The only information regarding the investigation of any specific strikes is the Lo Porto and Weinstein case. In that exceptional case, President Obama did not explain what the process was or which agencies would be involved in the investigation.

*Results of any assessment or investigation.* The results of the Lo Porto and Weinstein strike investigation remained secret in May 2017, more than two years after President Obama stated that he had ordered a “full review” of the strike. The existence—let alone the results—of almost all other investigations into strikes in Pakistan remain completely secret.

*What lessons have been learned, and how practices and procedures will be improved.* In May 2015, President Obama explained that the review of the Lo Porto and Weinstein case was aimed at identifying “any lessons that can be learned from this tragedy, and any changes that should be made.”<sup>438</sup> The White House Press Secretary went on to emphasize that the review was focused on “what occurred in this particular operation and to make recommendations about some reforms to the protocols and policies that are in place that would make it less likely that an unintended consequence like this would crop up again,” but the results of this review had not been made public as of May 2017.<sup>439</sup> There is very little other information on lessons learned from other incidents in Pakistan.

***In situations of armed conflict:***

As explained in Benchmark 1, it is not completely clear what legal frameworks the United States applies to its operations in Pakistan. It is not clear if the United States views itself as in an armed conflict there, and, if so, with which armed groups and when. The analysis in both this and the succeeding section evaluates the U.S. Government against the benchmarks relevant to both situations of armed conflict and outside of armed conflict.

While detailed factual information has been provided about isolated cases, they are the rare exceptions. For hundreds of other strikes in Pakistan, the U.S. government has formally provided almost no information.

- *Status of those killed and injured, i.e. whether they were civilians or not.* In the operations the U.S. government has formally acknowledged in Pakistan, it only indicated that Jude Kenan Mohamed,<sup>440</sup> Adam Gadahn, and Ahmed Farouq were “not specifically targeted” without an indication of whether the killings were lawful. The U.S. government did reveal that they did not consider Gadahn or Farouq to be “high value targets,” although it claimed that both Gadahn and Farouq held prominent positions as “leaders” in al-Qaeda, with Farouq specifically “playing a prominent role in leading [al-Qaeda in the Indian Subcontinent’s] operations and planning in that region of the world.”<sup>441</sup> Gadahn was also described as a “prominent spokesman for al-Qaeda.”<sup>442</sup> Even accepting the questionable premise that the United States was engaged in an armed conflict in Pakistan at that time, this characterization of Gadahn raises concerns as to whether he was a lawful target even under international humanitarian law.<sup>443</sup>

Osama bin Laden was described as “the leader of al Qaeda,” and clearly viewed by the U.S. government as a legitimate target.<sup>444</sup> The U.S. government statement also claimed that “one woman was killed when she was used as a shield by a male combatant,”<sup>445</sup> and that two other women were injured, but it was not completely clear whether the government considered these women civilians.

In relation to the strike resulting in the deaths of Giovanni Lo Porto and Warren Weinstein in 2015, President Obama admitted that their deaths were a mistake, and official statements clearly indicated that they were civilians.<sup>446</sup>

The U.S. government clearly indicated that it viewed Mullah Mansur as a legitimate target, stating that he “has been the leader of the Taliban and actively involved with planning attacks against facilities in Kabul and across Afghanistan, presenting a threat to Afghan civilians and security forces, our personnel, and coalition partners.”<sup>447</sup>

- *Type, extent, and status of property damage.* Notwithstanding the uncertainty regarding the applicable legal frameworks noted above, the U.S. government did not disclose much information regarding any property damage in the five strikes. It revealed, for example, the damage to the U.S. military helicopter in the raid on bin Laden’s compound, and only that the strike that killed Farouq, Lo Porto, and Weinstein was “against an al Qaeda compound.”<sup>448</sup>
- *Whether civilian harm was foreseen or unanticipated, what precautions were taken in attack, and an explanation for why civilians were killed and/or injured.* The only disclosures of this kind have been in relation to the operations that killed bin Laden, Farouq, Weinstein, and Lo Porto. There is almost no information in relation to the hundreds of other strikes in Pakistan. The disclosures in the bin Laden, Farouq, Weinstein, and Lo Porto cases show that such information can be revealed and should be standard in all cases.

In the bin Laden case, the U.S. government claimed in general terms that the operation was “a surgical raid by a small team designed to minimize collateral damage and to pose as little risk as possible to non-combatants on the compound or to Pakistani civilians in the neighborhood”

and that “great care was taken to ensure operation success, [and to] minimize the possibility of non-combatant casualties.”<sup>449</sup> In its press briefing announcing the raid, the U.S. government also claimed that “one woman was killed when she was used as a shield by a male combatant.”<sup>450</sup> It did not explain why two other women were injured in the raid.

In the Lo Porto and Weinstein strike, which also killed Ahmed Farouq, the U.S. government clearly indicated that it did not know that Weinstein and Lo Porto were in the targeted compound.<sup>451</sup> The government claimed that its “near-certainty assessment was that no civilians would be harmed if this operation were carried out,” which “unfortunately” was “not correct” and “led to [the] tragic, unintended” deaths of Lo Porto and Weinstein.<sup>452</sup> The U.S. government said it “believed that... no civilians were present; and that capturing these terrorists was not possible” based on “the intelligence that we had obtained at the time, including hundreds of hours of surveillance.” President Obama stated that they had assessed that “no civilians were present” and that the deaths of Lo Porto and Weinstein were a mistake. The results of a fuller review have not been made public as of May 2017.<sup>453</sup>

Regarding the strike that killed Gadahn, the U.S. government indicated that “U.S. officials had determined with near certainty that an operation could be carried out against an al Qaeda compound that was frequented, or at least where at least one al Qaeda leader was located.”<sup>454</sup>

#### ***Outside of armed conflict:***

- *Explanations for why people were killed and injured.* The only information that the U.S. government has disclosed about why people were killed and injured in the few publicly acknowledged strikes in Pakistan is limited to what is noted above.
- *Type and extent of property damage.* The only information that the U.S. government has disclosed is limited to what is noted above.

## **SOMALIA**

*Numbers killed and injured, with names, ages, and sex.* Since 2014, and particularly from 2016 onwards, the U.S. government has regularly disclosed and acknowledged strikes in Somalia. In each acknowledgment, some basic details are given, including numbers killed, and on occasion the name and sex of the target, but generally not the age. Names of targets that are released by the U.S. government tend to be alleged senior leaders of al-Shabaab, but civilian names have never been disclosed.<sup>455</sup> Numbers for those injured have not been given, but, because of a lack of transparency it is not clear if this is because no one has been injured in any of these strikes, which seems unlikely, or because the U.S. government does not assess or know about any injuries, or because it knows of injuries but has not disclosed this information. There is still no information on almost all strikes before 2014.

*Details of steps taken to investigate specific strikes.* In only one instance has the U.S. government disclosed that it was carrying out a post-strike investigation of a strike in Somalia. Following a strike targeting an “al-Qaeda-associated terrorist group” in Galcayo on September 28, 2016, the U.S. military acknowledged that it had seen “reports alleging non-combatant casualties.” Although the statement said that the military “had assessed all credible evidence and determined those reports are incorrect,”<sup>456</sup> a further update was provided in November 2016, indicating that investigations had continued.<sup>457</sup> In the September 2016 update, the U.S. military explained that its “review includes all relevant and credible information provided from numerous sources, including reports posted to social media. If the allegation is initially determined to be credible, additional levels of assessment are conducted.”<sup>458</sup> It is not clear what was meant by “numerous sources” and whether this involved, for example, speaking to witnesses or carrying out any investigations at the site. Aside from the September 2016 strike, it is not clear from official disclosures if the U.S. government has conducted investigations into other strikes, or what steps have been taken.

*Scope and purpose of the investigation, including which agencies involved.* In the September 2016 Galcayo strike, the U.S. government indicated that its initial assessment was directed at assessing whether the allegations of civilian casualties were “credible.”<sup>459</sup> The U.S. military further explained that “if the allegation is initially determined to be credible, additional levels of assessment” would be conducted. As the final result of the investigation was that the allegations were not credible, it appears the investigation stopped at this first stage.<sup>460</sup> The release suggests that this was an internal U.S. military investigation by United States Africa Command, but this is not completely clear from the publicly available information.

*Results of any assessment or investigation.* On November 15, 2016, the U.S. military released very basic results of its assessment of the September 28, 2016 strike, in which it found that “U.S. forces lawfully and appropriately used force to defend the PSF [(Puntland Security Forces)] element in response to the attack by the local militia forces against that U.S.-partner force.”<sup>461</sup>

*What lessons have been learned, and how practices and procedures will be improved.* The U.S. government has not indicated that any lessons have been learned from any investigations into specific strikes in Somalia, including the Galcayo strike, where it found that its forces acted lawfully. It is not clear if it has developed improved practices from other investigations, as there has been no disclosure in that regard.

### ***In armed conflict:***

The U.S. government has stated that it is in an armed conflict in Somalia, on the side of the government and against al-Shabaab, which it views as an “associated force” of al-Qaeda.<sup>462</sup> While, as noted above in Benchmark 1, this assertion is questionable and has been challenged, the analysis of the U.S. government’s transparency below is based on its own view of the situation.

- *Status of those killed and injured i.e. whether they were civilians or not.* In its disclosures on specific strikes, the U.S. government has indicated that it views those killed as legitimate targets in almost all cases. In one case—a strike in Galcayo, Somalia on September 28, 2016, the U.S. military disclosed the results of a more detailed review following “reports alleging non-combatant casualties.”<sup>463</sup> In its review, the U.S. military concluded that “sufficient evidence was presented to conclude no civilian casualties were caused by the September 28 strike,” that “the armed fighters who attacked the PSF [(Puntland Security Forces)] patrol at the time were believe[d] to be part of al-Shabaab, but with further review it was determined they were local militia forces,” and that in total “10 armed fighters” were killed and three more were injured.<sup>464</sup>
- *Type, extent, and status of property damaged.* Occasionally in its disclosures on Somalia, the U.S. government specifies that property has been damaged. For example, the government has referred to the destruction of an al-Shabaab encampment, as well as striking a vehicle in which the individuals targeted were travelling.<sup>465</sup> In the same statement, the U.S. government appeared to indicate that it believed these targets to be military objectives.<sup>466</sup> It is not clear that information regarding damage to property is systematically recorded and disclosed whenever that information is available, or if disclosure is done more selectively and only regarding some strikes.
- *Whether civilian harm was foreseen or unanticipated, what precautions were taken in attack, and an explanation for why civilians were killed and/or injured.* The U.S. government has not released information regarding whether civilian harm was foreseen or unanticipated in relation to any strikes. In the September 28, 2016, Galcayo strike the U.S. military disclosed after the fact that it assessed no civilians had been killed, but not what the assessment was before or at the time of the strike.<sup>467</sup> The U.S. government has not released information regarding measures taken to ascertain if civilians were present or mitigation efforts taken at the time in relation to any specific strike in Somalia. The U.S. government has not disclosed any instances in which it believed civilians were harmed in strikes in Somalia.

### ***Outside of armed conflict:***

- *Explanations for why people were killed and injured.* The U.S. government disclosures are based on its assessment that it is involved in an armed conflict in Somalia. Accordingly, while this legal classification may be contested, the disclosures themselves reflect this assessment, making it difficult to evaluate U.S. practice against this part of the benchmark, which is explicitly focused on disclosures outside situations of armed conflict.
- *Type and extent of property damage.* The U.S. government disclosures is based on its assessment that it is involved in an armed conflict in Somalia. Accordingly, while this legal classification may be contested, the disclosures themselves reflect this assessment, making it difficult to evaluate U.S. practice against this part of the benchmark, which is explicitly focused on disclosures outside situations of armed conflict.

## **YEMEN**

*Numbers killed and injured, with names, ages, and sex.* Since the U.S. government began regularly acknowledging specific strikes in Yemen from 2016, the government has released some basic information about each strike, including the numbers of people killed, and, occasionally, the sex of a target, and an indication that someone was injured.<sup>468</sup> These are usually provided quite soon after the strike. There is still no information on almost all earlier strikes, save for a few exceptions, such as the 2011 strike that killed Anwar al-Aulaqi. Names and an indication of the age of those killed are usually not provided.

*Details of steps taken to investigate specific strikes.* In only one incident has the U.S. government released any information regarding steps taken to investigate particular strikes. Following a Special Operations raid in Yemen on January 29, 2017, the U.S. military announced that “a team designated by the operational task force commander has concluded regrettably that civilian non-combatants were likely killed” in the incident. The statement added that a “credibility assessment” was “ongoing” to “determine if there were any still-undetected civilian casualties.”<sup>469</sup> It was not clear at the time whether the same team was conducting the “credibility assessment,” or specifically what steps were being taken to investigate the incident.

Subsequently, in a March 2017 hearing before the Senate Armed Services Committee, Army General Joseph Votel, Commander of U.S. Central Command confirmed, in response to Senate questions, that an investigation of civilian casualties of the January 2017 raid was “completed.” Despite a determination that the U.S. government “did cause civilian casualties” for which the government and Commander accepted responsibility, Votel said that he had “made the determination that there was no need for an additional investigation into this particular operation.”<sup>470</sup> It is not clear if there is no information regarding other strikes because no steps have been taken to investigate strikes, or just because this information is not disclosed.

*Results of any assessment or investigation.* The U.S. government has not disclosed any results of investigations into strikes in Yemen, save for the initial details coming out of its assessment of the January 2017 raid, which it stated resulted in between four and 12 civilian casualties.<sup>471</sup> Despite confirming that the investigation into civilian casualties and after-action review had been “completed” Votel provided few additional details.<sup>472</sup>

In relation to other strikes there have been no disclosures of the results of any investigations. It is not clear, because of a lack of transparency—if this is because no investigations have been carried out, or if this is just because that information has not been disclosed.

*What lessons have been learned, and how practices and procedures will be improved.* The U.S. government has not released detailed information about lessons learned from individual cases. Some information was revealed about the botched January 2017 raid in Yemen. In his March 2017 testimony to the Senate Armed Services Committee, General Votel stated that he “had a good understanding of exactly what happened on this objective, and [had] been able to pull lessons learned” that would be applied to future operations.<sup>473</sup> However, Votel did not disclose any details of what exactly were the lessons that had been learned. The U.S. has disclosed almost no information regarding lessons learned or how practices and procedures have been improved from investigations into other specific strikes in Yemen.

***In armed conflict:***

The U.S. government has stated that it is in an armed conflict in Yemen with al-Qaeda in the Arabian Peninsula.<sup>474</sup> While, as noted above in Benchmark 1, this assertion is questionable and has been challenged, the analysis of the U.S. government’s transparency below is based on its own view of the situation.

- *Status of those killed and injured i.e. whether they were civilians or not.* In the disclosures on specific strikes, the U.S. government indicated that it views those killed as legitimate targets in almost all cases. For example, the U.S. government claimed that “no civilian casualties were reported,” despite subsequent allegations of civilian casualties in a U.S. raid in Yemen in May 2017.<sup>475</sup>

In an unusual case following a botched U.S. special operations raid in Yemen on January 29, 2017, the U.S. military conceded—following sustained media attention and pressure—that “civilian non-combatants were likely killed” and that “casualties may include children.”<sup>476</sup> In its initial release, the U.S. military did not provide any numbers of civilians killed or injured, but noted that a “credibility assessment” was “ongoing” to “determine if there were any still-undetected civilian casualties.”<sup>477</sup> Subsequently, in a hearing before the Senate Armed Services Committee in March 2017, U.S. Army General Joseph Votel, Commander of U.S. Central Command, asserted that an investigation of civilian casualties of the January 2017 raid was “completed” and that the investigation concluded that the operation had resulted in the death of approximately four to twelve civilians.<sup>478</sup>

- *Type, extent, and status of property damaged.* The U.S. rarely releases information on whether its operations caused any property damage. One such disclosure occurred in March 2017, in which the government stated that its strikes hit “targeted militants, equipment, and infrastructure” as well as “heavy weapons systems” in the regions of Abyan, Bayda, and Shabwah.<sup>479</sup> In another case, the U.S. government disclosed that property was damaged in a strike reportedly targeting whether al-Qaeda operatives that also destroyed a “vehicle loaded with weapons.”<sup>480</sup> It is not clear whether information regarding damage to property is systematically recorded and disclosed whenever that information is available, or if disclosure is done more selectively and only for some strikes.
- *Whether civilian harm was foreseen or unanticipated, what precautions were taken in attack, and an explanation for why civilians were killed and/or injured.* In almost all cases, the U.S. government has released little or no information regarding whether civilian harm was foreseen or anticipated, what precautions were taken, and why civilians were killed. The only case about which the U.S. government has released much information is the botched January 2017 raid.

The January 2017 raid included only assessments after the fact, not what was known before. The U.S. government explained that assessments about the January 2017 raid were ongoing, and included looking into “whether additional non-combatant civilians that were not visible to the assault force at the time were mixed in with combatants.” The statement also said that “the known possible civilian casualties appear to have been potentially caught up in aerial gunfire that was called in to assist



U.S. forces in contact” with the enemy.<sup>481</sup> In the March 2017 hearing before the Senate Armed Services Committee in March 2017, despite taking responsibility for civilian casualties, General Votel did not explain why they had been killed, nor what measures had been taken to ascertain if civilians were present, and what efforts were made to minimize civilian harm, if any.<sup>482</sup>

The U.S. government has not disclosed any other instances in which it has clearly stated that civilians were harmed in strikes in Yemen.

***Outside of armed conflict:***

- *Explanations for why people were killed and injured.* The U.S. government disclosures appear to be based on its assessment that it is involved in an armed conflict in Yemen. Accordingly, while this legal classification may be contested, the disclosures themselves reflect this assessment, making it difficult to evaluate U.S. practice against this part of the benchmark, which is explicitly focused on disclosures outside situations of armed conflict.
- *Type and extent of property damage.* The U.S. government disclosures appear to be based on its assessment that it is involved in an armed conflict in Yemen. Accordingly, while this legal classification may be contested, the disclosures themselves reflect this assessment, making it difficult to evaluate U.S. practice against this part of the benchmark, which is explicitly focused on disclosures outside situations of armed conflict.

### 3 The Government Discloses Information about its Decision-Making Processes for Lethal Targeting

Information about how decisions to target an individual are made, by whom, and according to what procedures are key to understanding the extent to which procedures are rigorous, and to ensuring individual and governmental accountability in the event of any mistake or wrongdoing.<sup>483</sup> This section is focused on U.S. government transparency in relation to decision-making processes.

**Benchmark 10:** The government clearly explains the institutional decision-making process for the use of lethal force overseas, including the agencies and institutional positions involved, the role of each in the decision-making structure, and the chain of command.

#### *Summary*

A government should make public the chain of command and institutional process for making targeting decisions. While, for obvious security reasons, this does not need to include the names of those involved, particularly those present in conflict zones or places of heightened risk for the decision-maker, the structures and institutional roles should be clear. Disclosure of decision-making institutional structures and procedures—that is, which government institutions and positions are involved, and what role they play in the decision to kill someone—is a crucial component of democratic accountability. It allows the public to know which arms of the government are involved in such decisions and to hold them politically accountable for their actions. By disclosing such processes, a government also shows, to both its own population and those impacted by strikes, the extent to which it is committed to ensuring the rule of law by adhering to rigorous processes that include adequate checks and safeguards. It also helps to ensure that those responsible for wrongdoing can be held legally accountable.

For many years, the decision-making process for U.S. strikes was largely secret, particularly in relation to CIA strikes. The public had to rely on reports by journalists, who in 2012 revealed President Obama’s direct involvement in decisions to target named individuals or others on the basis of a pattern of behavior—so-called “signature strikes.”<sup>484</sup> In August 2016, the U.S. government took an important step by releasing the 2013 Presidential Policy Guidance (PPG)—in the course of extensive FOIA litigation, and following a court order—and thus revealing the processes for high-level decision-making for pre-planned strikes, as well as the official positions and agencies involved in such decisions, for strikes in areas it deems “outside of active hostilities,” including Yemen and Somalia, and, possibly, Pakistan. In 2013, the U.S. government had released a summary of the PPG, but this provided only very generalized information about decision-making processes. Even following the 2016 release of the PPG, there was still uncertainty where and when the PPG was applicable due to a lack of transparency and clarity regarding key terms. For circumstances not covered by this policy, at the agency level, there remains a stark difference in transparency about CIA and military decision-making processes. It is very difficult to find publicly available written information about CIA targeting decision-making processes, whereas the U.S. government has, over the years, disclosed its formal targeting decision-making processes in a series of military targeting doctrine documents.

## *Analysis*

For many years, the U.S. government provided only incomplete information about how a decision to carry out a strike was made. Despite some moves toward greater transparency in the later years of the Obama Presidency from 2013 onwards, including the disclosure in the redacted PPG of the decision-making process followed in places determined by the U.S. government to be outside “areas of active hostilities,” still much remained unknown by the time President Trump assumed office.

For example, the relevance of the process set out in the PPG is not clear due to the lack of transparency about where it applies at any given time. For circumstances not covered by this policy, there remains a stark difference at the agency level between transparency regarding CIA and military decision-making processes. In the past decade, the U.S. military has disclosed detailed documents setting out the doctrine that guides its targeting process, including when the PPG does not apply, although its application to specific conflict zones is usually kept secret. In contrast, it is very difficult to find publicly available written information about CIA decision-making processes outside of the PPG.

The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. disclosures regarding the *institutional decision-making process for the use of lethal force overseas*. It assesses the transparency of the process under the *Presidential Policy Guidance*, as well as separate, or additional, *military and CIA processes*.<sup>485</sup>

### **Disclosure of the institutional decision-making process for the use of lethal force overseas, including the agencies and institutional positions involved, the role of each in the decision-making structure, and the chain of command.**

*Targeting under the Presidential Policy Guidance.* The 2013 PPG, which was disclosed in summary form in 2013, and in a fuller form with redactions in 2016 pursuant to FOIA litigation, sets out a scheme of multi-layered consultations within the executive branch.<sup>486</sup> It identifies which agencies and institutions are involved in targeting decisions deemed by the U.S. government to be in “areas outside of active hostilities” (although some agencies are redacted). It specifically lists some of the agencies and administrative positions of officials involved in the strike approval process,<sup>487</sup> and sets out the circumstances in which the President is directly involved in a targeting decision. The PPG is largely focused on “direct action against an identified high-value terrorist,” that is, largely intentional pre-meditated lethal strikes, so it will likely not apply to all uses of force by the United States in “areas outside of active hostilities.” Where U.S. forces use force to defend themselves in a dynamic situation, the process may be governed by the rules of the particular agency concerned.

The PPG also includes exceptional procedures, which are not fully explained: It allows for alternative decision-making processes in the event of “unforeseen circumstances”, a “fleeting opportunity” or “extraordinary cases”, all of which are undefined in the PPG.<sup>488</sup> While the decision-making processes are set out for these exceptional procedures, it is unclear when these processes are invoked and according to what criteria. Similarly, an alternative decision-making process is envisaged for some uses of force against targets that are not “identified High Value Terrorists” (a term that is not defined in the PPG), but this process is not set out in the PPG.<sup>489</sup>

The U.S. government has not provided definitive information about where the PPG applies, and has applied, historically—raising questions as to when and where the decision-making process set out there is applicable. For example, while President Obama was still in office in December 2016, the government stated that “areas of active hostilities” included “Afghanistan, Iraq, Syria, and certain portions of Libya.” In January 2017, this changed to just “Afghanistan, Iraq, and Syria,” illustrating how frequently and easily the designation can be changed.<sup>490</sup> Similarly, it was reported that the Trump administration designated

parts of Somalia and Yemen as “areas of active hostilities” to allow for more flexibility in carrying out strikes there, but as of May 2017 there had been no official disclosure in this regard.<sup>491</sup>

It is not consistently clear which countries and regions are “areas of active hostilities”, as these occasional disclosures reveal only the snapshot assessment in relation to a country or region at a particular given time.<sup>492</sup> It is accordingly not clear whether or during which periods Pakistan, Somalia and Yemen have come under the PPG since its inception in 2013.<sup>493</sup> Accordingly, the U.S. government’s failure to be regularly and consistently open about where and when the PPG applies means that the public actually does not have a clear picture of the application of this policy, or how decisions are made in relation to strikes in particular places at any given time.

There is an additional question as to whether all strikes in Somalia, Yemen, and Pakistan are actually governed by the PPG, or whether only certain parts of the PPG are applicable. For example, so-called “dynamic” strikes in response to a particular and immediate threat to U.S. or allied forces in these countries probably do not fall under the PPG, at least in terms of who makes the decision to carry out the strike. This may include a number of strikes in Somalia frequently described as “self-defense” strikes by the U.S. military.<sup>494</sup> It is likely—although this is not made clear in the U.S. government disclosures—that these cases fall exceptionally under section 5(B) of the PPG which provides for “Extraordinary Cases” and variations from the PPG process, and which include “lethal force against an individual who poses a continuing, imminent threat to *another country’s persons*” (emphasis added).<sup>495</sup> These are governed by a more general operational plan approved by the President, but this also has not been publicly disclosed.

Finally, while it appears from remarks by former government officials that strikes carried out in Pakistan would be governed by the PPG,<sup>496</sup> this is not completely clear. This is because Pakistan is not referenced at all in the December 2016 Report on Legal and Policy Frameworks, which helped to clarify in general terms the U.S. government’s view of the legal and policy frameworks applicable to specific countries. Accordingly, the public cannot be completely sure about whether strikes carried out in Pakistan are governed by the PPG.

Where the PPG does not apply, or for strikes that fall into the exceptions set out in the PPG, the process will largely be governed by the rules of the agency responsible for the strike, the U.S. military or the CIA.

- *Targeting by the military.* At the agency level, often pursuant to FOIA litigation by the ACLU, the U.S. government has disclosed detailed general military doctrine targeting documents that set out procedures for target selection. These disclosures are significant, and set out modes of operating, the processes, and the roles of different parts of the military in the decision-making process.<sup>497</sup> However, there remains a question as to whether the Joint Special Operations Command is formally bound by these documents.<sup>498</sup> The specific operational plans and mode of decision-making by Joint Special Operations Command in Somalia and Yemen remain undisclosed, although an insight into the process prior to the elaboration of the PPG was provided through documents leaked to journalists.<sup>499</sup> What was revealed in these reports does, in a number of respects, at least appear to mirror the general targeting doctrine that has been publicly disclosed.
- *Targeting by the CIA.* It is very difficult to find publicly available written information about CIA targeting decision-making processes for any strikes not governed by the PPG. There is also a lack of clarity regarding what procedures govern strikes carried out jointly and involving both the CIA and the U.S. military, as this remains unexplained.<sup>500</sup>

## 4 The Government Discloses Information about Accountability

Transparency about *accountability* is essential for ensuring public confidence in the government and allowing individuals who have suffered harm to obtain compensation and justice. A government's explanations of what oversight processes are in place, and their impact, can facilitate review of whether the government's systems are sufficient and demonstrate to the public the adequacy of the safeguards in place. Disclosing investigative procedures, measures that have been taken to ensure individual accountability, and details about where and how individuals can claim compensation, demonstrates a commitment to the rule of law, enables the system to function, and helps individuals and families to make those claims. In revealing the measures that the government has taken to discipline or prosecute wrongdoers, and to provide redress to victims, the government can demonstrate to its public and affected communities overseas a commitment to respect for international law and due process.

This section evaluates U.S. government transparency about accountability processes and outcomes. It analyzes U.S. practice regarding oversight; the procedures for investigation and compensation; measures taken to ensure accountability, including through investigations and the payment of condolence money or compensation; aggregate information about what accountability has in fact occurred; and the extent to which the state secrets doctrine is utilized to block alleged victims from accessing a remedy.

### **Benchmark 11: The government provides information about the executive and legislative branch oversight mechanisms in place to review government policies and practices on the use of lethal force overseas.**

This includes disclosing:

- The mandate, powers, and procedures for each mechanism that oversee the use of lethal force overseas;
- The types and categories of information that are disclosed to oversight mechanisms;
- The reports, findings, recommendations, and actions taken by oversight mechanisms, subject only to redactions strictly necessary for legitimate national security reasons or for the protection of individual rights; and
- Any actions taken by the executive branch in response.

### *Summary*

Transparency about oversight mechanisms is an essential way of promoting public confidence in decision-making processes, and in government review systems. Revealing how these mechanisms work, what powers they have, what findings and recommendations they make, and how the government has responded, can demonstrate how meaningful these procedures are. Transparency can itself enhance oversight by incentivizing the overseers to be rigorous in their scrutiny of the government's policies and practices. Where the findings of oversight mechanisms are made public, other actors, such as journalists, civil society, academics, and think tanks can continue to monitor the government's practices and help ensure follow-up on recommendations.

The U.S. government is largely transparent about what mechanisms exist that, at least potentially, have the power to oversee its use of lethal force overseas. The government has publicly disclosed information about the mandate, powers, and the procedures followed by such mechanisms. However, despite

some increased, but sporadic, transparency from 2012 onwards about what those mechanisms actually do, and occasional complaints by congressional oversight committee members that have revealed what is or is not disclosed to these bodies, the U.S. government has been far less transparent about the bodies' findings, recommendations, and actions, and what, if any, actions the executive branch has taken in response. This lack of transparency on the substance of the oversight has fueled critiques of government abuse of power and secrecy. Without regular explanations of what types of information is actually disclosed to oversight mechanisms, and what actions they take, it is difficult to fully assess how meaningful this oversight is. This is particularly important where mechanisms can be rendered defunct by a lack of congressional or executive branch action.

## *Analysis*

The following section analyzes U.S. practice in relation to this benchmark, assessing official U.S. government transparency on executive and legislative branch oversight, specifically regarding: the *mandate, powers, and procedures* of oversight mechanisms that oversee the use of lethal force overseas; the *types and categories of information* that are *disclosed to oversight mechanisms*; the *reports, findings, recommendations, and actions taken* by oversight mechanisms; and the *actions taken by the executive branch* in response to oversight.

**Mandate, powers, and procedures of oversight mechanisms that oversee the use of lethal force overseas.** The U.S. government has been transparent about the existence of the various different executive and legislative branch oversight mechanisms that, at least theoretically,<sup>501</sup> are capable of exercising some form of oversight over its use of lethal force overseas. What the U.S. government has been less clear about is the precise role, if any, that each of these institutions plays in overseeing the use of lethal force overseas.

The U.S. government is also transparent—at least in general terms—about the mandate and powers of the different oversight mechanisms. Some of the notification procedures to the congressional committees are also publicly enshrined in law. However, the government has been less clear on what procedures, if any, that the mechanisms each follow to review the government's use of lethal force.

- *Executive branch oversight.* Within the executive branch, the U.S. government has an array of institutions that, at least potentially, are capable of carrying out some form of oversight of the use of lethal force, but it is not completely clear from available information which of these institutions actually exercise oversight on this issue.<sup>502</sup> These include the various Inspectors General within the agencies and different parts of the military, as well as other executive branch mechanisms such as the President's Intelligence Advisory Board.<sup>503</sup>

The powers and mandate of the various executive branch Inspectors General are transparently set out in legislation,<sup>504</sup> as well as on the websites of the various different entities.<sup>505</sup> These are supplemented by other documents that set out various procedures followed by the Inspectors General, such as the Council of the Inspectors General on Integrity and Efficiency Guidelines on investigations, which are publicly available.<sup>506</sup>

As of May 2017, however, there was no information on the webpages for the National Security Council or the President's Intelligence Advisory Board and Intelligence Oversight Board.<sup>507</sup> Most of these mandates are broad, and include, for example, the authority to “receive and investigate... alleged violations of laws, rules, or regulations,”<sup>508</sup> which would potentially encompass alleged violations in relation to the use of force overseas.

However, there is no specific information regarding what executive branch institutions actually oversee the use of lethal force overseas. One indication that these bodies are not extensively

involved in oversight of U.S. use of force operations in other countries, albeit not a clear one, came in a 2013 speech by President Obama. In that speech, Obama stated that he had “asked my administration to review proposals to extend oversight of lethal actions outside of warzones that go beyond our reporting to Congress,” which included the “establishment of an independent oversight board in the executive branch,” implying that there was not one.<sup>509</sup> In 2015, David Medine, then Chairman of the Privacy and Civil Liberties Oversight Board (PCLOB), an independent, bipartisan agency within the executive branch, called publicly for the PCLOB to oversee drone strikes targeting U.S. citizens.<sup>510</sup> However, this bid was ultimately unsuccessful, and following congressional action to limit the ability of PCLOB to review covert actions in 2016, Medine resigned.<sup>511</sup>

- *Legislative branch oversight.* Within the legislative branch, the most significant Congressional oversight of U.S. use of lethal force in Pakistan, Somalia, and Yemen, comes through the Armed Services Committees and the Intelligence Committees of both the House and Senate, which oversee, respectively, the military and the intelligence agencies, including the CIA.<sup>512</sup> The picture painted from public disclosures is of a notification-driven regime, where the executive branch provides some information to the oversight bodies, but questions remain about how much scrutiny there is on the substance of the issues. As discussed below, due to a lack of transparency regarding the actions taken by the overseers, this is difficult to assess fully.

Particularly from 2012 onwards, and sporadically, selectively, and belatedly, some of these bodies have themselves explicitly stated that they oversee the government use of lethal force.<sup>513</sup> These general oversight powers are also enshrined in U.S. law.<sup>514</sup> Broadly speaking, the Intelligence Committees are responsible for oversight of CIA activities, whereas the oversight of the military’s operations, including the Joint Special Operations Command (JSOC),<sup>515</sup> generally falls to the Armed Services committees of the House and Senate.<sup>516</sup> However, there is some uncertainty regarding which committees oversee joint operations.<sup>517</sup>

In relation to oversight of intelligence agencies, under Title 50 of the United States Code, the Senate and House intelligence committees have authority to be kept “fully and currently informed of all covert actions.”<sup>518</sup> The Code goes on to set out the parameters for notification to these committees of such actions, including caveats to these notification requirements.<sup>519</sup> The CIA General Counsel also publicly explained the procedures in broad outline in a 2012 speech, where he stated that the CIA “would have to discharge its obligation under the congressional notification provisions of the National Security Act to keep the intelligence oversight committees of Congress ‘fully and currently informed’ of its activities. Picture a system of notifications and briefings—some verbal, others written; some periodic, others event-specific; some at a staff level, others for members.”<sup>520</sup>

In 2012, legislation was passed requiring the executive branch to report quarterly to the armed services committees on “counterterrorism operations.”<sup>521</sup> This was expanded in 2013, when the procedure for notifying the congressional armed services committees of strikes by the military was enhanced.<sup>522</sup> This has been carried through into section 1036 of the National Defense Authorization Act 2017, which, sets out various requirements for notification by the Secretary of Defense to the congressional armed services committees of “sensitive military operations”—which encompasses strikes “outside a declared theater of active armed conflict,” and increases the frequency of “counterterrorism operations briefings” from quarterly to monthly.<sup>523</sup> In 2016, pursuant to FOIA litigation, the U.S. government also disclosed two 2014 documents: one was an example of the type of report sent to Congress as part of this process,<sup>524</sup> while the other set out further details for how these notifications happen. However, the section that detailed what type of information the written notifications are meant to include was redacted.<sup>525</sup> It is also unclear if these procedures continued to remain in place, as documents for subsequent years have not

been disclosed. Further, snapshot details regarding procedures by the committees are available in piecemeal form, for example, from statements by the committee chairs,<sup>526</sup> but do not exist in a form that clearly sets out what procedures are currently in place, whether they have changed, or whether they are consistently followed.

These legislative requirements are essentially the bare minimum required by law. They are supplemented by—for strikes in areas deemed by the U.S. government as areas “outside of active hostilities”—the Presidential Policy Guidance, which was disclosed in redacted form in 2016. This includes notifying Congress where there are new operation plans, an expansion of a previous plan, if an operation is carried out, and “updates” every three months on “identified [‘high-value terrorists’].”<sup>527</sup>

In addition, in practice there is often more ad hoc oversight, as indicated, for example, by Stephen Preston in his 2012 speech as CIA General Counsel noted above. More comprehensive transparency about what kind of oversight is actually going on in practice would greatly enhance the public’s understanding of what procedures are actually followed, and of the level and intensity of oversight activity.

**Types and categories of information that are disclosed to oversight mechanisms.** An effective oversight mechanism should be able to receive and review information that may not ordinarily be disclosed to the public. However, it is important that the public is at least aware of what types and categories of information are disclosed to these bodies, as it can aid in an assessment of whether oversight is effective, whether the U.S. government is disclosing sufficient information to these bodies to enable meaningful oversight, or if a lack of executive action has essentially rendered these bodies defunct.

- *Executive branch oversight.* Little, if anything, has been disclosed regarding what information is available to the executive branch mechanisms regarding the use of lethal force. Most of what the public knows comes from isolated and generalized disclosures. For example, in 2012, the then CIA General Counsel said that “the CIA reports apparent legal violations and other significant or highly sensitive matters that could impugn the integrity of the Intelligence Community” to the Intelligence Oversight Board.<sup>528</sup>
- *Legislative branch oversight.* For the congressional oversight bodies, some information has been disclosed, on an *ad hoc* basis, by the committees themselves. For example, the chair of the Senate intelligence committee has said that the committee reviews video footage of strikes.<sup>529</sup> Over the years, the committees have clearly had problems obtaining some information, as evidenced by the comments of committee members and demands of Members of Congress for access to all of the legal opinions and reasoning regarding targeted strikes.<sup>530</sup>

Legislation also sets out various requirements for specific disclosures. For example, legislation introduced in 2013 required that the executive notify the armed services committee in writing of any “sensitive military operation” within 48 hours of it taking place and submit a report explaining how the executive branch goes about deciding that particular individuals or groups are targetable.<sup>531</sup> Regarding oversight of the CIA, the executive is obliged by legislation to submit findings and reports regarding “covert actions,” including the legal basis for the action.<sup>532</sup>

In addition, President Obama stated in 2013 that “After I took office, my administration began briefing all strikes outside of Iraq and Afghanistan to the appropriate committees of Congress. Let me repeat that: Not only did Congress authorize the use of force, it is briefed on every strike that America takes.”<sup>533</sup> In the same year, in a letter to Members of Congress, Attorney General Eric Holder said that the Department of Justice and other departments and



agencies have continually worked with the appropriate oversight committees in the Congress to ensure that those committees are fully informed of the legal basis for our actions.”<sup>534</sup> In the same letter he disclosed to the Senators details about U.S. citizens who had been killed in U.S. strikes since 2009, and further details regarding the government’s legal basis for targeting Anwar al-Aulaqi.<sup>535</sup>

However, information about what is actually disclosed to the committees is not revealed on a regular basis, which would enable the public to know at least whether the types and categories of information being disclosed is sufficient to allow the potential exercise of meaningful oversight. Disclosures of this kind would also allow the public to assess whether things have changed, for example whether the committees are receiving more or less information.

**Reports, findings, recommendations, and actions taken by oversight mechanisms.** The U.S. government has not been sufficiently transparent about any reports, findings, recommendations, or actions taken by oversight mechanisms regarding the use of lethal force. Aside from public hearings by other congressional committees, which are not notified of operational information about strikes, the only information provide to the public about actions taken has been through occasional statements and demands from congressional committee members. There is very little information at all regarding executive branch oversight.

- *Executive branch oversight.* While some of the Executive branch oversight mechanisms release reports, it is very difficult to find any reports, findings, recommendations, and actions taken by such bodies in relation to the use of lethal force overseas. Reports of the CIA Inspector General, for example, are classified as a matter of U.S. law.<sup>536</sup> While the Department of Defense Inspector General releases to the public many of its reports, it does not appear to directly address the use of lethal force overseas. As some reports are redacted, it is not possible to fully assess whether this is in fact the case.<sup>537</sup>
- *Legislative branch oversight.* The key legislative oversight committees have revealed only occasional snippets of information about concrete actions taken or recommendations made to get the executive branch to modify any practices it is concerned about. Reports by the committees of their activities contain scant information on this issue.<sup>538</sup>

The main information that is available comes from occasional statements by Committee Chairs. For example, in a 2013 statement, Senate Intelligence Committee Chair, Senator Dianne Feinstein, revealed that the Committee had asked for legal opinions written by the Office of Legal Counsel on targeted killing, tried to pass legislation requiring disclosure of these opinions, and had reviewed two of these opinions.<sup>539</sup> She also said that:

“The committee receives notifications with key details of each strike shortly after it occurs, and the committee holds regular briefings and hearings on these operations—reviewing the strikes, examining their effectiveness as a counterterrorism tool, verifying the care taken to avoid deaths to non-combatants and understanding the intelligence collection and analysis that underpins these operations. In addition, the committee staff has held 35 monthly, in-depth oversight meetings with government officials to review strike records (including video footage) and question every aspect of the program.”<sup>540</sup>

Regular disclosures of this kind would greatly increase transparency of the oversight process. Other members of the Committee have taken public action to demand disclosure of additional legal opinions and a fuller explanation of the legal rules the U.S. government applied to the targeting of U.S. citizens.<sup>541</sup>

Feinstein also explained in a 2012 letter that the Committee had “questioned every aspect of the program, including legality, effectiveness, precision, foreign policy implications and the care taken to minimize noncombatant casualties.”<sup>542</sup> However, little was disclosed about what came out of the Senate Intelligence Committee review and what recommendations the Committee actually made. Accordingly, without further transparency, it is difficult to assess the extent to which the Committee engages in rigorous independent review or a rubber-stamping exercise. As noted in the following section, concerns about rubber-stamping have been heightened by subsequent, and apparently contradictory, statements by Committee members.<sup>543</sup>

Similarly, the main information the public has about the congressional armed services committees comes from generalized assertions by committee members. In May 2013, Senator Mac Thornberry told the Washington Post that “The Pentagon is pretty good about coming up, and describing some of these operations after they occur, we have evolved to a pretty good briefing relationship... and there have been tremendous hassles back and forth between the executive and legislative branch about that first part, the legal justifications and the authorities they are relying on.”<sup>544</sup> There have also been indications that the armed services committees have acted to withhold funds to try and force the government to comply with the basic congressional notification requirements by law, indicating a lack of government compliance with those obligations.<sup>545</sup> Again, there is not sufficient or consistent information regarding what actions are taken, with what frequency, and whether oversight activities have ceased, slowed down, or increased over time.

Other committees, which lack access to operational information, have also held public hearings on these issues.<sup>546</sup>

**Actions taken by the executive branch in response to oversight.** There have been a lot of changes to U.S. policy on drone strikes and the use of force in the years since September 11, 2001. Many have been disclosed, as documented in this report. However, rarely, if ever, does the government reveal whether these actions were taken pursuant to executive branch or congressional oversight. If such information were disclosed, and adequately explained, it would go a long way toward showing that these oversight mechanisms are effective; that these mechanisms are capable of recognizing mistakes, recommending changes and improvements; and that the U.S. government then acts on these suggestions.

As the government has not disclosed much information of this kind, nor regarding the findings and recommendations made by the oversight bodies themselves in relation to the use of force, it makes it very hard to assess whether executive and legislative branch oversight mechanisms are actually functioning effectively. On the few occasions they have spoken publicly on this issue, officials have suggested that congressional oversight on these issues mainly consists of notifications and the provision of information by the executive to the committees.<sup>547</sup>

Comments of committee overseers have, at times, only heightened concerns about whether congressional oversight of the use of lethal force by the U.S. government is meaningful at all.<sup>548</sup> Feinstein, for example, was reported to have said in February 2013 that “Right now it is very hard [to oversee] because it is regarded as a covert activity, so when you see something that is wrong and you ask to be able to address it, you are told no,” implying that the secrecy was actually hindering effective oversight.<sup>549</sup> These concerns endured into the Trump administration, with reports in 2017 that the White House was telling federal agencies to ignore Democratic congressional members’ oversight requests, making transparency even more important.<sup>550</sup>

## **Benchmark 12: The government discloses detailed information on its post-strike assessment, investigation, and accountability processes.**

This includes disclosure of:

- The existence of any protocols setting out how investigations are to be conducted, and of the protocols themselves;
- Whether post-strike investigation procedures are the same or different for the different agencies and departments which are responsible for carrying out strikes;
- Details about different types of investigations;
- The purpose and scope of post-strike investigations, including whether purely lessons-learned and/or to assess legal violations;
- The roles, responsibilities, and expertise of the various agencies, departments, units and personnel involved in investigatory processes; and
- The reporting obligations of relevant institutions following an investigation.

### *Summary*

Post-strike assessments and investigations are essential for determining the effectiveness of a strike, lessons learned, the extent and nature of any civilian harm, and the legality of a strike. Transparency about investigation processes is critical to facilitate independent oversight and assessment of the adequacy of post-strike investigation procedures, and to promoting rights-holders' access to a remedy. It also demonstrates a government's commitment to accountability. Without a transparent investigation process, communities impacted by drone strikes and other uses of force will remain deeply suspicious of any claims by governments of due process and accountability.

The U.S. government and, in particular, the U.S. military have released extensive information about a number of the forms of post-strike investigations and civilian casualty assessments it undertakes. In 2015 and 2016, the U.S. government took several positive steps toward transparency through the release of the July 1, 2016 Executive Order on civilian casualties, a corresponding report with statistical data on strikes issued by the Director of National Intelligence, and the release and updates of the Department of Defense's amended Law of War Manual. Through these disclosures, the government provided the public with greater clarity on the procedures followed by government agencies when investigating the conduct and the aftermath of a strike.

Despite these releases, there is still some uncertainty about the extent to which investigations must strictly adhere to the processes as set out in the Executive Order and DNI Summary. There is a lack of clarity about whether Department of Defense directives and rules regarding reporting and investigations are similarly adhered to by special units, such as the Joint Special Operations Command (JSOC), and other agencies, such as the CIA, which are both responsible for carrying out strikes in areas such as Pakistan, Somalia, and Yemen. Particularly for the CIA, the U.S. government should be more transparent about when and how a post-strike investigation is triggered, who is responsible for carrying out the investigation, and the overall scope and purposes of the investigation.

## *Analysis*

Transparency about post-strike investigations processes plays an important role in enabling public scrutiny of government safeguards to minimize civilian harm. Openness about accountability processes fosters a culture of accountability that facilitates redress for victims, and demonstrates a commitment to improving policies to prevent or reduce future harm.<sup>551</sup>

The U.S. military is largely transparent about the procedures that it has in place to investigate strikes and ensure accountability. In recent years, it has enhanced this by articulating, through directives and manuals, the need to conduct investigations into allegations of civilian harm and report such findings through the chain of command. The 2016 amended Law of War Manual encourages battle damage assessments and reviews or other investigations of “incidents involving civilian casualties” and other “‘close call’ incidents that do not cause civilian casualties but in which post-incident reporting reveals that a high risk of causing civilian casualties was not fully understood when relevant decisions were made.”<sup>552</sup> Such regulations provide for the use of informal and preliminary inquiries to determine any need for further investigation.

With a long-awaited presidential Executive Order on July 1, 2016, the Obama administration required that all relevant agencies “as appropriate and consistent with mission objectives and applicable law . . . investigate incidents involving civilian casualties,” including by “considering relevant and credible information from all available sources.”<sup>553</sup> The Executive Order did not, however, reveal what such a process would entail, and the caveat “as appropriate and extensive with mission objectives” appears to allow extensive flexibility for implementation by agencies. While the CIA is ostensibly covered by the Executive Order,<sup>554</sup> it remains unclear to what extent it actually implements the Executive Order. Unlike the military, the CIA has not disclosed nearly the same level of information regarding its accountability processes.

The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. transparency about: *the existence of protocols setting out how investigations are to be conducted, and of the protocols themselves*; whether *post-strike investigation procedures are the same or different* for different agencies and departments which are responsible for carrying out strikes; details about *different types of investigations*; explanation of the *purpose and scope of the investigatory process*; information on the *responsibilities and roles of departments, agencies, units, and personnel* involved in the investigatory process; and *what reporting obligations exist* following an investigation.

**The existence of protocols setting out how investigations are to be conducted, and of the protocols themselves.** The U.S. military is largely transparent about the procedures it has in place to investigate what it calls “reportable incidents” and regarding investigations into alleged civilian casualty incidents, and even incidents that do not result in civilian casualties but are “close calls.” However, there remains a lack of clarity around procedures followed by other agencies, despite the promulgation of a 2016 Executive Order designed to standardize civilian casualty investigation procedures across the board.

Department of Defense (DoD) policy requires that “all reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual be reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.”<sup>555</sup> DoD directives define reportable incidents to include “possible, suspected, or alleged” violations of the law of war, “for which there is “credible information.”<sup>556</sup> As such, DoD directives require an investigation into possible violations that occur outside of war, with a commander immediately involving the Staff Judge Advocate and Criminal Investigation Division (CID) if there is a credible allegation.

Generally, U.S. military operating guidelines and military manuals promote post-strike investigations, often in the form of battle damage assessments (BDA), as a crucial component of the overall target assessment process.<sup>557</sup> If civilian harm is alleged, an investigation typically should follow to verify losses and learn lessons to prevent future harm.<sup>558</sup> The 2016 amended Law of War Manual also encourages battle damage assessments and reviews or other investigations of “incidents involving civilian casualties” and other “‘close call’ incidents that do not cause civilian casualties but in which post-incident reporting reveals that a high risk of causing civilian casualties was not fully understood when relevant decisions were made.”<sup>559</sup> Where on-site battle damage assessments are not feasible due to security considerations, or the physical location of military units makes access to the strike location difficult, army procedures recommend tracking civilian harm based on footage of recorded incidents.<sup>560</sup>

In addition, a commander may order an administrative investigation. Army Regulation 15-6 (AR 15-6) sets out a series of detailed procedures and protocols to follow.<sup>561</sup> AR 15-6 requires legal review by a Judge Advocate of investigations in “any case involving serious or complex matters.”<sup>562</sup> According to the Judge Advocate General Operational Law Handbook, after reviewing the report of an investigation, the appointing authority (generally a commander), may approve the report, disapprove the report, or return the report for additional investigation.<sup>563</sup>

While the military has been transparent about its internal investigation processes, it is not clear whether other agencies responsible for conducting lethal force operations, such as the CIA, use the same or similar procedures, as it is very difficult to find any public information on these issues. The only disclosures have been cursory *ad hoc* references by officials. For example, Stephen Preston, then CIA General Counsel, said in 2012 that the “CIA is required to report all possible violations of federal criminal laws by employees, agents, liaison, or anyone else.”<sup>564</sup> This is separate from the oversight responsibilities of the Inspector General, which are more transparently set out in law, and are, at least in theory, supposed to comply with the Council of the Inspectors General on Integrity and Efficiency Guidelines on investigations, which are publicly available.<sup>565</sup>

The release of the 2013 Presidential Policy Guidance in August 2016, and the Executive Order 13,732 and the corresponding DNI Summary<sup>566</sup> in July 2016, build on what is already set out in U.S. military practice and offer a more universal framework for U.S. post-strike investigations.<sup>567</sup>

The Presidential Policy Guidance requires that an after action report be submitted to the National Security staff including a description of the operation, a summary explaining how the operation met the criteria in the PPG, an assessment of whether the operation achieved its objective, and assess-

ments of numbers of “combatants killed and injured” and “collateral damage,” as well as all “munitions and assets used.” This information should also be updated “as appropriate.”<sup>568</sup>

Under the Executive Order, “relevant agencies” shall “investigate incidents involving civilian casualties,”<sup>569</sup> and conduct “careful reviews of all strikes... to assess the effectiveness of operations,”<sup>570</sup> giving consideration to “relevant and credible information from all available sources, such as other agencies, partner governments, and nongovernmental organizations.”<sup>571</sup> However, how the government defines and assesses “relevant and credible information” is not explained, raising concerns that the government may be dismissing claims regarding civilian harm that merit investigation.<sup>572</sup> Also, while it appears that the Executive Order does apply to all government agencies, it applies only “as appropriate and consistent with mission objectives and applicable law,” making it unclear how and to what extent it applies in practice. The Executive Order was also short on detail in terms of the applicable investigation protocols. This is less of a concern regarding the military, where more detailed protocols are available elsewhere, but is more of a concern for the CIA, about which much less information is available.

There have also been piecemeal releases of how post-strike investigations are carried out in other disclosures. In its annual civilian casualty estimates for “areas outside of active hostilities,” first released in 2016, the U.S. government stated that post-strike reviews looked to “multiple sources of intelligence... including video observations, human sources and assets, signals intelligence, geospatial intelligence, accounts from local officials on the ground, and open source reporting.”<sup>573</sup>

**Explanation of whether post-strike investigation procedures are the same for or different for agencies and departments which are responsible for carrying out strikes.** Apart from the disclosures relating to post-strike investigations in the context of conventional military operations, it is unclear whether the CIA, which has played a significant role in carrying out drone strikes in Pakistan, Somalia, and Yemen, follows the military post-strike investigatory processes set out above. There is also uncertainty regarding what procedures JSOC follows. While there is no standard instruction governing investigations which take place in a joint environment where more than one service branch operates, judge advocates determine which service’s regulations are most appropriate.<sup>574</sup>

**Details about different types of investigations.** The DoD has been transparent about the existence of different types of investigations for each specific service or branch (e.g. Army, Navy, or Air Force). All service branch investigations follow similar basic concepts.<sup>575</sup> Army investigations may “include commanders’ inquiries, investigations in accordance with Army Regulation 15-6, criminal investigations, and independent investigations by other organizations including the United Nations or host nation agencies.”<sup>576</sup> Whereas commanders’ inquiries may be conducted in immediate response to allegations of civilian casualties, the results are non-punitive and are meant to establish facts expeditiously and apply lessons for the future. AR 15-6 investigations on the other hand, which may result in a determination of fault or compensation, may be initiated in response to credible civilian casualty allegations and reports and take longer to complete.<sup>577</sup> For investigations into strikes by the CIA, there is very little information publicly available.

**Explanation of the purpose and scope of the investigatory process.** Through both general guidelines, and those specific to the military, the U.S. government has explained the intended purpose and scope of its investigative procedures. The stated intention of investigations is to determine the facts of the civilian harm incidents, provide amends to the local population, and to identify lessons to mitigate civilian casualties in the future.<sup>578</sup> The *Law of War Manual* further reiterates the importance of the investigation process to reduce the risk of civilian casualties in the future and to evaluate circumstances that led to “close-call” incidents where no civilians were harmed, but where the high-risks of causing casualties were not fully understood when decisions were made.<sup>579</sup> The Manual underscores the importance of supporting the implementation and the enforcement of the law of war as both a legal and practical matter, and mandates commanders to investigate alleged reports of law of war violations.<sup>580</sup>

The 2016 DNI Summary also indicates that after a strike, the United States carries out “careful reviews” in order to assess the “effectiveness of operations.”<sup>581</sup> The Executive Order emphasizes the protection of civilians as a rationale for conducting post-strike investigations, explaining that “in furtherance of U.S. Government efforts to protect civilians . . . and with a view toward enhancing such efforts,”<sup>582</sup> relevant agencies shall “investigate incidents involving civilian casualties . . . and take measures to mitigate the likelihood of future incidents.”<sup>583</sup>

The Executive Order’s explanation is consistent with the description John Brennan offered during his nomination hearing to become Director of the CIA. Brennan explained, “[i]n those rare instances in which civilians have been killed, after-action reviews have been conducted to identify corrective actions and to minimize the risk of innocents being killed or injured in the future.”<sup>584</sup> Another potential purpose for investigations identified in the Executive Order relates to accountability for civilian harm, as “relevant agencies” are required to “acknowledge U.S. Government responsibility for civilian casualties and offer condolences . . . to civilians who are injured or to the families of civilians who are killed.”<sup>585</sup>

**Information on the responsibilities and roles of departments, agencies, units, and personnel involved in the investigatory process.** The U.S. military has been reasonably transparent about the roles and responsibilities of different entities in the investigatory process through releases of army regulations and related directives. AR 15-6 and a 2006 Department of Defense Directive set out detailed procedures. Through battle damage assessments (BDAs) units investigating the aftermath of a strike or operation are to flag up the chain of command, usually the commander of the unit or the installation to which they are assigned, incidents that require further inquiry or investigation.<sup>586</sup> The commander may then order further investigation into the matter and appoint an investigating officer. Following the report, units conducting an initial credibility assessment are supposed to appoint an investigative officer who submits the conclusions of the report to the unit commander.<sup>587</sup>

Apart from references to the role of “relevant agencies,” the Executive Order and DNI Summary do not provide specific information about which agencies are involved in investigatory processes and, within those agencies, who is responsible for conducting investigations, disseminating findings, and implementing policy improvements to policies. It is therefore unclear whether all agencies that carry out drone strikes or lethal force operations have the same responsibilities to investigate reports of civilian casualties as the U.S. military. The 2016 release of the 2013 Presidential Policy Guidance (PPG) provided some further limited information in this regard. Specifically, Section 6 of the PPG requires that the department or agency that conducted an operation provide a preliminary after-action report to the National Security Staff (NSS) within 48 hours of taking direct action, and to update such information “as appropriate.”<sup>588</sup>

**Explanation of what reporting obligations exist following an investigation.** The U.S. military does not have any regulations in place that require the release of the results of post-strike investigations. Army regulations provide that the authority to release the findings of AR 15-6 investigations rests with the authority that ordered the investigation, unless specifically authorized by law or if there is a Freedom of Information Act request.<sup>589</sup> U.S. military guidance sets out a detailed process for how the findings of an investigation into civilian casualties may be shared with the affected community. The Army’s *Civilian Casualty Mitigation* guidance, for instance, suggests that depending on the local customs, an investigation’s findings should be shared through engagements with local key leaders or a victim’s family members—although it is unclear the extent to which this is implemented in practice in places like Pakistan, Somalia, and Yemen.<sup>590</sup> In addition to Congressional notification requirements (discussed in Benchmark 11), the Presidential Policy Guidance requires that an after action report be submitted to the National Security staff.<sup>591</sup> For CIA investigations, the procedures are not clearly set out or available.

### **Benchmark 13: The government provides information about any disciplinary or criminal investigations taken against individuals involved in U.S. strikes.**

This requires releasing:

- For each strike, whether any disciplinary or criminal investigation was or will be launched;
- The results of any disciplinary or criminal investigations with redactions where families of those killed, or those injured, have requested privacy or to ensure their physical safety, or only as strictly necessary for legitimate national security reasons; and
- The disciplinary measures imposed, specific charges prosecuted or convicted, and any sentence, as relevant.

### *Summary*

Disclosure of information about individual accountability measures is critical for those injured and the families of those killed in strikes. It is required by international law, and necessary for the rule of law, and deterring abuse. Under international law, investigations into alleged violations of the right to life must be transparent.<sup>592</sup>

Since approximately 2014, the U.S. army and other service branches release summaries of court martial convictions, but it is unclear if these releases include court martials of JSOC members involved in covert operations. Court martial transcripts are not completely secret but ordinarily need to be made subject to a FOIA request, which can be denied. The details in the summaries that the U.S. military releases are sparse and it is difficult to assess what action, if any, the U.S. government has taken regarding disciplinary measures, criminal charges, or convictions, in relation to documented strikes in Pakistan, Somalia, and Yemen. It is even more difficult to find publicly available information about disciplinary or criminal investigations in relation to CIA personnel.

### *Analysis*

By releasing specific information regarding individual accountability for strikes, the United States can demonstrate its commitment to upholding the rule of law and ensuring that there are sufficient safeguards against abuse—to the American public, its partners and allies abroad, including in whose territory the United States is operating, and to those directly impacted by strikes. For families of those killed in strikes, and those injured, knowing that there is some accountability when decisions of such gravity are taken is critical. Information about accountability measures taken by the government can also combat false narratives or perceptions about U.S. policy. Indeed, the U.S. government could do a lot more to restore legitimacy and confidence in its procedures by consistently and regularly releasing information regarding individual accountability for strikes where there are credible allegations of civilian casualties or unlawfulness.

Since approximately 2014, the U.S. army and other service branches release summaries of court martial convictions, but it is unclear if these releases include court martials of JSOC members who are involved in covert operations. Court martial transcripts are not completely secret but ordinarily need to be made subject to a FOIA request, which can be denied. The summaries disclosed also lack detail, so it is hard to discern whether the case relates to lethal targeting operations.<sup>593</sup>



The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. transparency regarding: *whether any disciplinary or criminal investigation was or will be launched*; the *results of any disciplinary or criminal investigations*; and *disciplinary measures imposed, specific charges prosecuted or convicted*, in relation to strikes and other lethal operations in Pakistan, Somalia, and Yemen.

*Whether any disciplinary or criminal investigation was or will be launched.* While the U.S. military releases details of court martial convictions, the details are sparse and it is difficult to assess if any information regarding the initiation or imposition of disciplinary or criminal procedures in relation to any documented strikes in Pakistan, Somalia, and Yemen has been disclosed—nor even the fact that there have been no investigations, if that is the case. It is even more difficult to find information on disciplinary or criminal investigations into CIA personnel in relation to drone strikes or other operations involving the use of lethal force.<sup>594</sup>

*Results of the investigation.* The U.S. government has not released the results of individual criminal or disciplinary investigations into strikes and other lethal operations in Pakistan, Somalia, and Yemen. The only results of investigations released appear to be post-strike assessments, as set out in Benchmark 9. It is not clear that these investigations had any kind of disciplinary or criminal component.

*Type of disciplinary measures, criminal charges, or convictions.* While the U.S. military releases details of court martial convictions, the details are sparse and it is difficult to assess if any information regarding disciplinary measures imposed, criminal charges lodged, or convictions imposed, in relation to documented strikes in Pakistan, Somalia, and Yemen has been disclosed—nor even the fact that there have been no disciplinary action, criminal charges, or convictions, if that is the case.

**Benchmark 14: The government releases detailed information about an accessible, systematic, and effective mechanism for condolence payments and compensation.**

This entails disclosing procedures and program policies and how people can access these mechanisms, including:

- Where and in what circumstances the policies apply and the mechanisms operate;
- To which institutions and officials claims can be made;
- Claim processes and claim eligibility requirements;
- Timelines for government responses; and
- How payments are calculated, payment methods, and timelines.

### *Summary*

Transparency about processes to provide compensation or condolence payments to civilian victims is essential for accountability. Without it, the U.S. government will further alienate the individuals and communities impacted by strikes. Being open about this process can help demonstrate a commitment to the rule of law and to remedy mistakes. Even if processes are in place, a failure to be transparent about the details of these mechanisms and how to access them, will give rise to suspicions that they are not genuine or fair.

For many years, it was unclear what, if any, policy and practice the U.S. government employed for condolence payments or compensation when it carried out unlawful killings or otherwise killed or injured civilians in strikes in Yemen, Pakistan, and Somalia. This stood in stark contrast to improved practices in other countries, such as Afghanistan. In 2016, this changed when the United States announced that it would “offer condolences, including *ex gratia* payments,” to civilians who are injured or to the families of civilians killed in “U.S. operations involving the use of force in armed conflict or in the exercise of the Nation’s inherent right of self-defense.”

However, it remains unclear whether the Executive Order’s policy on condolence payments will be systematically implemented by all agencies, including covert bodies like the CIA, or whether actual payments will rest with specific institutions. Those injured and families of those killed in strikes in Pakistan, Somalia, and Yemen do not have access to any publicly proclaimed, formal complaint mechanism to bring forward allegations or to claim and receive compensation or condolence payments for losses and the harm they have suffered. Transparently administering and disclosing a predictable and fair program of compensation and condolence payments to populations harmed across all U.S. operations would go a long way toward building some accountability for U.S. actions and to recognizing the harm caused to civilians.

### *Analysis*

States that are responsible for an unlawful killing under international law have an obligation to provide remedies to victims, including in the form of compensation.<sup>595</sup> This obligation does not apply when a state carries out its operations in compliance with international law and civilians are harmed in the course of lawful action.<sup>596</sup> However, the U.S. government has developed a practice of providing other forms of redress known as “*ex gratia*” or “condolence” payments, which carries no admission of legal wrongdoing, but is a means of recognizing the harm and loss individuals and families have suffered.<sup>597</sup> Condolence payments—and transparency about such a program—can assist families to recover some of their economic losses and to mitigate the grievances caused by U.S. non-recognition of their actions and harms caused.<sup>598</sup>

The U.S. government recognized the importance of condolence payments when it took steps to establish a system for civilians harmed by its combat operations in Iraq and Afghanistan.<sup>599</sup> Yet the U.S. government has not built on these experiences by properly implementing similar measures in Pakistan, Somalia, and Yemen.

While U.S. government officials have commented that the U.S. government in general works with local governments to gather the facts “as appropriate” and provide condolence payments to families of those killed,<sup>600</sup> there has not been transparency about how this operates in practice. The uncertainty has been heightened by apparently contradictory U.S. government statements regarding condolence payments in Pakistan, Somalia, and Yemen.<sup>601</sup>

While the Executive Order establishes a policy, the U.S. government has not made public details of the specific mechanisms for condolence payments for those impacted by strikes in Yemen, Somalia, and Pakistan.<sup>602</sup> It should disclose these mechanisms so that those injured and families of people killed may access them.<sup>603</sup>

The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. transparency regarding: the disclosure of *procedures and program policies*; information regarding *access to mechanisms*; and *how payments are administered*.

**Disclosure of procedures and program policies.** On July 1, 2016, the U.S. government officially established a standing government policy to provide condolence payments to civilians harmed by *all* its military operations, after many years during which it was unclear if there was a policy to provide condolence payments to those in Pakistan, Somalia, and Yemen.<sup>604</sup> Section 2(b)(ii) of the Executive Order specifically directed relevant U.S. agencies to acknowledge “U.S. Government responsibility for civilian casualties and offer condolences, including *ex gratia* payments, to civilians who are injured or to the families of civilians who are killed.”<sup>605</sup> The Executive Order represented an important move toward greater transparency and accountability for civilian harm.

However, notably, the Executive Order provides no clear guidelines for when and how condolence payments are to be made. The Executive Order gives agencies too much discretionary power by stating that condolence payments will only be made “as appropriate and consistent with mission objectives and applicable law,” which makes the application of the policy insufficiently clear and transparent, and more vulnerable to criticism. Appropriate guidelines are needed to address issues such as who is entitled to redress, what sorts of harm would warrant monetary payment, what criteria there is for eligibility, whether there are any grounds for exclusion, and when and how a person can make a claim.<sup>606</sup> Timeliness is essential because a family’s suffering only increases when recognition and compensation is delayed. Transparency can assist in making these programs more efficient, by alerting claimants to the program and what they need to do to make a claim.<sup>607</sup> These procedures should also be clear and uniform so that those injured and families of those killed can have certainty about the steps involved and are afforded enough time to file a claim, and to avoid any suspicion of partiality or uneven implementation.<sup>608</sup> The Executive Order should be implemented systematically across all agencies and apply to both future and retroactive incidents of harm.

The program of condolences in Iraq and Afghanistan, although codified into law,<sup>609</sup> suffered from a similar defect whereby a lack of guidelines created an *ad hoc*, discretionary practice in which individual commanders took inconsistent approaches to offering condolence payments.<sup>610</sup> A lack of a clear system leads to inconsistencies in condolence payment amounts and the application of any inclusion or exclusion criteria.<sup>611</sup> Public information on the procedures is therefore critical to ensure consistency, to enable monitoring of whether agencies are adhering to condolence guidelines, and for those injured and families of those killed to understand how to make claims.

- In **Pakistan**, the U.S. government has not announced the provision of any condolence payments to Pakistani civilians harmed by its operations in Pakistan.<sup>612</sup> There are reports of payments, but these are not officially confirmed, and the role of the United States is unclear.<sup>613</sup> The only publicly acknowledged payment was to the family of Italian Giovanni Lo Porto.<sup>614</sup> Those killed and families of those killed by U.S. drone operations in Pakistan have no accessible means or process for seeking redress, and have been forced to seek assistance from government authorities in Pakistan in the absence of an available mechanism.<sup>615</sup> According to credible reports by human rights organizations, those injured and families of people killed in U.S. strikes often complained that Pakistani authorities did very little to assist victims and were often not available in their communities.<sup>616</sup> The lack of access to condolence payments, information on any compensation scheme, and means to obtain payment stands in sharp contrast to the system implemented by the U.S. government just across the border in Afghanistan.<sup>617</sup>
- In **Somalia**, it is not clear whether information on condolence payments is disseminated to affected communities, and the U.S. government had not publicly announced any such system as of May 2017.
- In **Yemen**, the United States has not been transparent about any formal redress system.<sup>618</sup> There have been news reports that condolence payments have been made in Yemen,<sup>619</sup> but most families of those killed in drone strikes in Yemen do not know of any formal investigation into drone strike incidents and have demanded justice and compensation for the harm that has been done to them.<sup>620</sup>

## **Benchmark 15: The government discloses information about compensation and condolence payments provided.**

This requires:

- Publicly acknowledging each time compensation is paid or condolence payments are made; and
- Providing details about the amounts,

where the recipients agree to public disclosure, such disclosure does not breach their right to privacy and is not assessed to be a security risk to the recipient(s).

### *Summary*

Transparency about compensation and condolence payments made to victims demonstrates—both to impacted communities and the government’s own electorate—a government’s commitment to accountability and redressing civilian harm.

While monetary payments are frequently authorized for civilians suffering losses due to U.S. combat operations in Iraq and Afghanistan, the U.S. government has not disclosed similar payments to those injured or to the families of those killed in strikes in Pakistan, Yemen, and Somalia, if any. Those reports that are available are generally reported in the media without named sources speaking on the record. The one exception is a case involving an Italian killed in a U.S. strike. Available reports indicate great disparities between the various monetary payments made to those injured or families of those killed by U.S. operations, and the lack of publicly available information only heightens concern in this regard. A failure to publicly disclose the details of payments, except where families request privacy or where disclosure would present a security risk, may only further compound their sense of injustice.

### *Analysis*

States that are responsible for unlawful killings have a duty to provide those injured or families of those killed with a prompt and effective remedy, including compensation.<sup>621</sup> In the event of lawful government action in armed conflict, “condolence” payments for civilian harm which carry no legal obligation, admission of guilt, and are largely left to individual military commanders to provide are widely perceived as good practice.<sup>622</sup> The U.S. government has implemented a policy of making condolence payments to civilians harmed by its operations in Afghanistan and Iraq.<sup>623</sup> The U.S. government through the U.S. Agency for International Development also maintains a Conflict Victims Support Program in Pakistan, which provides rehabilitation and livelihood assistance to conflict victims in the country. However, those impacted by U.S. drone strikes are not covered under the program.<sup>624</sup>

In July 2016, the U.S. government released Executive Order 13,732 on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, which directed U.S. government agencies to publicly acknowledge civilian casualties and provide condolence payments, where “appropriate” and “consistent with mission objectives and applicable law.”<sup>625</sup> This was important as the first public disclosure of a limited policy to provide for condolence payments. However, the U.S. government has not been transparent about releasing data on condolence payments, even as NGOs have called for specific action in a series of well-documented strikes with credible allegations of civilian harm and/or unlawful strikes.<sup>626</sup>

The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. transparency regarding: each time *compensation or condolence payments are provided*; and details about *the amounts paid*.

**Public disclosures each time compensation or condolence payments are provided.** There has been almost no official acknowledgement of compensation paid or condolence payments made for strikes in Pakistan, Yemen, and Somalia, save in one highly exceptional case involving western victims.

As of May 2017, in almost all strikes in Pakistan, Yemen, and Somalia, the U.S. government had not publicly disclosed offers of condolence, or compensation payments made to those injured or families of civilians killed in strikes. In one exceptional case, the U.S. Embassy in Rome confirmed a payment to the family of Italian civilian Giovanni Lo Porto mistakenly killed in a strike. Following the very public U.S. government acknowledgment and promise to pay compensation to Lo Porto's family and to the family of Warren Weinstein,<sup>627</sup> a U.S. citizen killed in the same strike in Pakistan in 2015, many have reasonably raised concerns about the differential treatment for western victims.<sup>628</sup> The reported payment made in the Lo Porto case and injustice of the U.S. government's approach reinforce the belief that local lives lost in Pakistan, Somalia, and Yemen are not given due weight by the U.S. government. Publicly available information about condolence payments and compensation mostly comes only from media reports.

- **Pakistan.** On September 16, 2016, following a leak in Italian media, the U.S. Embassy in Rome confirmed a condolence payment for the “mistaken killing”<sup>629</sup> of Giovanni Lo Porto, an Italian aid worker killed in a January 2015 drone strike in Pakistan.<sup>630</sup> Press accounts at the time also reported that the U.S. government was in the process of negotiating a condolence payment with the family of Warren Weinstein, a U.S. citizen who was killed in the same strike as Lo Porto.<sup>631</sup> As of May 2017, the U.S. government had not publicly confirmed whether payment had been made to the Weinstein family. There are reports of payments in occasional cases, but they are not officially acknowledged, and the role of the U.S. government in these payments is unclear.<sup>632</sup> Numerous other families who have lost relatives in Pakistan have not reported compensation or condolence payments for their losses, and the U.S. government has provided no information in this regard.<sup>633</sup>
- **Somalia.** In 2013, then Pentagon spokesman Bill Speaks stated that the “Department of Defense has not made *solatia* payments in Yemen or Somalia.”<sup>634</sup> It appears this may still be the case in Somalia, although, due to a lack of transparency, it is impossible to be completely certain. In its disclosures on specific strikes in Somalia since 2014, the U.S. government has so far indicated that it views those killed as legitimate targets. Moreover, some reports of civilian casualties in Somalia have been dismissed by the U.S. government and deemed “not credible.”<sup>635</sup> The Bureau of Investigative Journalism has indicated, however, that civilians have been harmed in Somalia,<sup>636</sup> yet there have been no reports of condolence payments made to those injured or families of those killed by U.S. operations.
- **Yemen.** The U.S. government has generally declined to comment on condolence payments or compensation in relation to specific strikes in Yemen.<sup>637</sup> When pressed about the U.S. government's role in making cash payments to families in Yemen, officials declined to “comment on specific cases,” stating only in general terms that there exists a practice of *solatia* payments where “non-combatants” were “killed or injured.”<sup>638</sup> In response to a Freedom of Information Act Request, U.S. Central Command disclosed to an investigative news site that it has documents related to condolence payments in Yemen, but refused to release information about what they related to, or provide details of any amounts.<sup>639</sup> There have also been reports that compensation has been paid to some families, for example in relation to a controversial December 2013 strike in Yemen.<sup>640</sup> This contradicts statements from Pentagon officials who have indicated that the United States had not made condolence payments in Yemen, including that “there have been no requests from family members of the deceased resulting from these incidents.”<sup>641</sup>

Despite confirming between “four and twelve” civilian casualties following a controversial U.S.-led raid in Yemen in January 2017, the U.S. military did not indicate whether it would be providing condolence payments to civilians and families of those harmed.<sup>642</sup>

**Providing details about the amounts, except when families request privacy or where disclosure may expose the recipients to a security risk.** Over the years, there have been occasional media reports—unconfirmed by U.S. government officials speaking on the record, save in the case of Italian Giovanni Lo Porto—of condolence payments made through local government intermediaries to those injured and the families of those killed.<sup>643</sup> The U.S. government’s role in those payments however, has been unclear.

- **Pakistan.** Following the killing of Giovanni Lo Porto, the U.S. Embassy in Rome confirmed that the U.S. government provided payment to Lo Porto’s family. Reports of the amount paid to the family as an “ex gratia payment” varied from between \$1.2 million to \$ 3 million.<sup>644</sup> The U.S. government has not disclosed details of payments for anyone else killed or injured in strikes in Pakistan.
- **Somalia.** There have been no reports of the amount of any condolence payments made in Somalia.
- **Yemen.** There have been reports of condolence payments in Yemen, but no official acknowledgment. In 2013, pursuant to a Freedom of Information Act (FOIA) request for information about condolence payments, including procedural guidelines for payments, budget data, and records of payments made by ProPublica, the Department of Defense acknowledged that they possessed 33 pages of relevant documents relating to condolence payments in Yemen, but claimed that the documents were exempt from release for a series of reasons, on the basis that such documents were classified and related to “military, plans, operations, and weapons systems; intelligence activities; personnel overseas; inter/intra agency records, including deliberative process privilege, attorney work product privilege, and attorney client communications.”<sup>645</sup> However, the explanation amounted to little more than a list of exemptions under FOIA, and it was not apparent that sufficient effort had been made to desegregate information that could legitimately be withheld, from that which could not.

In another case, a Yemeni family was reportedly offered a bag containing \$100,000 in U.S. dollar bills in a meeting with security officials.<sup>646</sup> Families of people killed and injured in a controversial drone strike that hit a wedding convoy in 2014 were reportedly paid more than \$1 million dollars by the Yemeni government.<sup>647</sup> It has been suggested that the U.S. government was making payments through the Yemeni government in these cases, but this has never been confirmed by the U.S. government.<sup>648</sup>

### **Benchmark 16: The government provides statistical information about:**

- **Individual accountability for strikes, including about investigations, disciplinary actions, and/or prosecutions; and**
- **Compensation, condolence payments, or other forms of redress provided.**

This requires releasing:

- An annual statistical breakdown of all investigations opened, and disciplinary measures and prosecutions taken against individuals for violations of laws or rules in incidents involving the use of force overseas, broken down by:
  - Number of investigations opened into incidents involving the lethal use of force abroad, broken down by type of investigation (administrative, criminal, etc.);
  - Number of investigations closed without any further action taken, and reasons (i.e. numbers, broken down into categories);
  - Number of disciplinary actions taken, broken down by type of disciplinary action;
  - Number of prosecutions in such cases, broken down by charges; and
  - Number of convictions, broken down by type of sentence.
- An annual statistical breakdown of all payments made to individuals as compensation or condolence payment, or other forms of redress, for incidents involving the use of force overseas, including:
  - Number of claims made to the government;
  - Number of claims denied;
  - Reasons for denying claims;
  - Number of cases in which a payment was made;
  - Average amount paid for successful claims; and
  - Country in which incidents occurred.

### *Summary*

Governments enhance respect for the rule of law and promote confidence in public institutions, when they release information about the accountability of the government's own forces. In doing so, a government can demonstrate that it takes seriously allegations of wrongdoing and has in place procedures capable of responding to and addressing wrongdoing, and that it takes seriously the harm suffered by victims.

While the U.S. government does occasionally—and exceptionally—issue updates on investigations in relation to specific strikes, it has not released overall data regarding the numbers of investigations opened into alleged wrongdoing in relation to strikes in Somalia, Yemen, and Pakistan. It has also not released figures of disciplinary actions, prosecutions, and convictions in such cases. Release of this information would help the American public, as well as those injured and the families of those killed in strikes, to understand how regularly the accountability mechanisms that the United States has in place are utilized and how effective they are. The U.S. government has also not released any disaggregated details of payments made to individuals as compensation or condolence payments for strikes.

## *Analysis*

The U.S. government has released almost no statistical information regarding investigations and actions taken to ensure individual accountability in relation to strikes, including compensation or condolence payments.

The following analyzes U.S. practice in relation to this benchmark, assessing official U.S. transparency regarding disclosing: an annual *statistical breakdown of all investigations opened, and disciplinary measures and prosecutions* taken; and an *annual statistical breakdown of all payments made to individuals as compensation or condolence payment*, or other forms of redress provided.

**Annual statistical breakdown of all investigations opened, and disciplinary measures and prosecutions taken.** While the U.S. government has released some information regarding investigations into specific incidents in Somalia, Yemen, and Pakistan, it has not released an annual statistical breakdown of investigations opened, disciplinary measures, prosecutions, and convictions.

**Annual statistical breakdown of all payments made to individuals as compensation or condolence payment, or other forms of redress provided.** One of the important criticisms of U.S. practice has been the absence of any transparent record of payments made in aggregate. There remains no public record of this.<sup>649</sup> While certain information may be withheld from the public to the extent necessary to protect the right to privacy of the families harmed, or the persons killed, these limitations should not prevent the publication of at least the numbers of times payments have been made and for how much.<sup>650</sup> Indeed, U.S. military guidelines in Afghanistan already require for the names of the deceased to be annotated in a roster in situations where condolence payments are provided.<sup>651</sup> The equivalent information for Pakistan, Somalia and Yemen could easily be made public with appropriate redactions for the privacy of the family, if required.



**Benchmark 17: The government and the courts do not permit any form of state secrets privilege to prevent a victim of unlawful killing from establishing a violation and obtaining an effective remedy.**

This entails:

- The executive branch refraining from invoking state secrets privileges in such a way that prevents victims from obtaining an effective remedy; and
- The courts scrutinizing invocations of state secrets privileges to ensure that victims are not denied their right to a remedy.

### *Summary*

All victims of violations of international human rights law or international humanitarian law are entitled to an effective remedy. This right is rendered illusory where a state invokes the state secrets privilege to block judicial review of alleged violations. States should never seek or be allowed to withhold information that could prove an unlawful killing. To do so would prevent the courts from serving as forums for accountability and transparency, where the legality of an incident or practice can be heard, debated, and assessed.

In the U.S. context, courts have only been called upon to review the legality of strikes on a few occasions. In those cases that have reached the courts, the U.S. government has relied expansively on the state secrets privilege. While these cases were dismissed on other grounds, the U.S. government's reliance on the doctrine was broad enough that it would deny alleged victims any form of accountability.

### *Analysis*

Invocations of the state secrets privilege that deny individuals their rights to access to a remedy and to know about the harm that was done to them are inconsistent with international law.<sup>652</sup> While information can be withheld where strictly necessary for national security reasons, it should never be done so to prevent accountability for violations. There is an overriding public interest in disclosure about serious violations of international human rights and humanitarian law.<sup>653</sup> International law requires that remedies are available not only in law, but are accessible and effective in practice. This includes the right to:

- equal and effective access to justice;
- fair and impartial proceedings;
- adequate, effective, and prompt reparation for harm suffered; and
- access to relevant information concerning violations.<sup>654</sup>

The legality of U.S. targeting operations since 9/11 has had little meaningful judicial scrutiny.<sup>655</sup> Where victims of U.S. strikes have sought to challenge the legality of executive action in U.S. courts, the executive branch has, thus far, successfully argued that the courts should not hear the merits of the case.<sup>656</sup> While these cases have been dismissed on grounds other than state secrets, the government has also sought to prevent scrutiny of its strikes abroad by arguing for a broad application of the state secrets doctrine—a doctrine that the government can use to prevent the disclosure of evidence in a lawsuit for national security reasons.

The following analyzes U.S. practice in relation to this benchmark, assessing whether: the executive branch *refrains from invoking state secrets or national security privileges in such a way that prevents victims from obtaining an effective remedy*; and whether *courts scrutinize invocations of state secrets or national security privileges to ensure that victims are not denied their right to a remedy*.

**Executive branch refrains from invoking state secrets privileges in such a way that prevents victims from obtaining an effective remedy.** In *Al-Aulaqi v Obama*, a constitutional challenge to the proposed killing of U.S. citizen Anwar al-Aulaqi, brought on behalf of his father by the ACLU and the Center for Constitutional Rights, the Obama administration sought to rely on the state secrets privilege to deny judicial review and have the motion dismissed.<sup>657</sup> The government asserted a broad interpretation of the state secrets privilege, arguing that any “information that would tend to confirm or deny any allegations in the Complaint pertaining to the CIA” should be excluded.<sup>658</sup> This assertion would have encompassed classified facts that “would have had to be disclosed if the government had prosecuted Anwar al-Aulaqi rather than killed him.”<sup>659</sup> As Jameel Jaffer, one of the lead litigators with the ACLU in that case, has written, “why should less be demanded of the government when it imposes a death sentence unilaterally?”<sup>660</sup>

The effect of such a broad exclusion would be to block any possibility of a remedy for a potential victim, as a judge would not be able to adjudicate the claim. Indeed, the U.S. government itself went on to assert that the claim should be dismissed because it would be impossible to adjudicate on the merits if all such information was kept secret.<sup>661</sup>

**Courts scrutinize invocations of state secrets privileges to ensure that victims are not denied their right to a remedy.** In the cases before the courts on these issues, including *Al-Aulaqi v Obama*, the courts have not addressed the state secrets privilege because the claims were dismissed on other grounds. However, in that case, the adjudicating judge did indicate that he would have upheld the government’s claim for state secrets privilege if the case had required it, demonstrating that the state secrets privilege remains a potential barrier to a remedy in such cases.<sup>662</sup>

## VII. Why Transparency?

In the context of U.S. use of lethal force overseas, where extreme secrecy has been the prevailing practice, the rationales for transparency are worth expanding upon. Disentangling the different reasons for transparency allows for more meaningful debate about where and when transparency is needed, for what kinds of information, and to what degree.

Transparency is essential for securing the rule of law. It helps to deter harm, enable oversight, and is necessary to ensure meaningful accountability for abuse. Without transparency there cannot be informed public debate and democratic accountability. Fulfillment of transparency also sets a rights-promoting positive precedent for future administrations and other governments around the world. It serves governments' own strategic interests and helps to ensure public confidence in government actions and policies. Governments also have concrete legal obligations to be transparent about state conduct, law, and policy, subject only to narrow limitations, and victims have specific rights to disclosure and truth.

This section sets out the interrelated rationales and bases for transparency about law, policy, practice, and process in relation to State use of lethal force overseas. The matrix of benchmarks formulated in this report are grounded in these rationales and bases, drawing on both the lessons learned from U.S. practice, and the interlocking requirements of international law, the rule of law, harm deterrence, and democratic accountability.

### I Transparency is Essential for the Rule of Law

The rule of law is a core principle of democratic governance and international law. In 2005, U.N. Member States reaffirmed their commitment to “an international order based on the rule of law and international law.”<sup>663</sup> Transparency is key to the rule of law. As the U.N. has recognized, the rule of law requires “laws that are publicly promulgated” and “legal transparency.”<sup>664</sup> Rule of law concerns are heightened when a state exercises its most potent power—to kill—regarding which, there is a heightened need for clarity.<sup>665</sup>

States must be transparent at the international level to further and uphold the international legal order and respect for state sovereignty. States must be transparent about their legal interpretations of the rules on the use of force, when they have obtained consent to take action in another state's territory, and when they use force in self-defense. A failure to do so will threaten international security and the carefully constructed legal constraints on State use of force.<sup>666</sup> It will also weaken collective respect for legal requirements. Transparency is critical here as a tool through which states can demonstrate that they are acting in compliance with the law.<sup>667</sup> Legal transparency is also especially essential in the area of national security, where judicial review is so limited. Disclosure of the government's legal basis for operations is all the more important where “the government's policies and activities are often immunized from judicial review by secrecy and jurisdictional doctrines.”<sup>668</sup>

The U.S. Army defines the rule of law as:

*“a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights principles.”<sup>669</sup>*

The U.S. Army Field Manual goes on to flesh out these requirements. It highlights the need for the State to be bound by law, and not to act arbitrarily, and for the law to be readily ascertainable—otherwise known as the principle of legal certainty.<sup>670</sup> This allows individuals to know how and when their

behavior is unlawful, and to modify it so as to comply with the law.<sup>671</sup> Accordingly, people should be able to understand what kind of behavior may make them a target in the eyes of the government carrying out lethal strikes. Disclosure of the legal and policy rules that a government uses is therefore critical.

Adherence to the rule of law further requires that individuals have access to justice, including an effective and impartial investigative and legal system. This entails putting in place clear and transparent accountability processes, including information about how investigations are conducted and by whom, as well as regarding how to make claims. These are also elements of a state's obligations to ensure access to a remedy under international human rights law, as set out in more detail below.

## 2 Transparency Deters Harm

“Sunlight is the best of all disinfectants,” wrote U.S. Supreme Court Justice Louis D. Brandeis more than a hundred years ago,<sup>672</sup> eloquently expressing one of the core benefits of transparency. Transparency is important for deterring future harm, is a critical prerequisite for effective external oversight, and is necessary for accountability.<sup>673</sup>

Transparency helps to deter harm because the potential for future exposure makes government actors more likely to act within the constraints of the law, for fear that their misconduct may be revealed to the public.<sup>674</sup> Secret programs, on the other hand, offer few incentives to rectify abuse. Indeed, the abuse may never be uncovered in the first place, to allow it to be rectified. In the context of the use of lethal force, secrecy is even more harmful because the stakes are so high.<sup>675</sup> Therefore, just the release of legal interpretations and policies may help to constrain the use of force by states, because states are then publicly accountable for the legal interpretations and policies that they promulgate.<sup>676</sup> The disclosure of civilian casualty data may also act as a restraint by influencing public opinion and increasing pressure for reduced casualties to be reported.<sup>677</sup> Transparency regarding investigations increases compliance with the law and helps deter future violations by revealing that procedures are followed properly, and that wrongdoing is adequately punished.<sup>678</sup>

## 3 Transparency Enables Oversight, and is Necessary for Accountability

Transparency is also essential for proper oversight and results in better and more effective oversight. Without the disclosure of adequate information regarding the legal frameworks, interpretations, and policies applied by the government, it is difficult to assess from outside whether domestic laws and policies comply with constitutional and international law. Without adequate information about strikes and accountability, facts about specific strikes, investigations, and redress for victims, it is impossible to exercise effective oversight over state practice. Oversight bodies cannot exercise effective and meaningful oversight without disclosing all of this information and more.

As the Special Rapporteur on extrajudicial, summary or arbitrary executions has said, “Only on the basis of such information can effective oversight and enforcement take place. The first step toward securing human rights in this context is transparency about the use of drones.”<sup>679</sup> Accordingly, transparency requires that the criteria for targeting and the authority that approves killings should be publicly known.<sup>680</sup> Armed drone and “targeted killing” programs should also be placed in institutions that are capable of disclosing to the public the methods and findings of their intelligence, criteria used in selection of targets and precautions incorporated in such criteria.<sup>681</sup>

Transparency is crucial in assessing allegations of large numbers of civilian casualties and the proper identification of civilian casualties where they do occur. Detailed government disclosures are required to allow for assessment and comparison against independently gathered data.<sup>682</sup> These concerns are heightened in the case of drone strikes, which frequently occur in remote and dangerous areas, where independent access to monitor what is happening is difficult or impossible.<sup>683</sup> In such situations, there should be a heightened requirement for transparency on the part of the State.

Blanket exceptions to transparency on the grounds of national security—or vague, limited disclosures that do not allow for any meaningful challenge or debate—make it impossible to verify the legality of a killing, or to ensure that unlawful targeted killings do not result in impunity.<sup>684</sup> This information is not only essential for oversight within the different branches of the State, including the executive branch itself, as well as the legislature and the judiciary, but also by other actors, such as the media, civil society, the United Nations, and other states.<sup>685</sup>

Information must also be available in order to allow for proper legal accountability. Accountability may be lacking because of a failure to disclose the facts around a drone strike, or due to secrecy or a lack of clarity around the legal framework, rules or interpretations applied, making legal challenges difficult.<sup>686</sup> In 2013, the U.N. High Commissioner for Human Rights underscored how the current lack of transparency around U.S. “targeted killings” creates an accountability vacuum affecting the ability of victims to seek redress.<sup>687</sup> Acknowledging strikes, and creating transparent and accessible compensation and investigation mechanisms will go a long way to advancing accountability.

#### **4 Transparency Promotes Informed Public Debate and Democratic Accountability**

Transparency underpins any functioning, open, and democratic government based on the rule of law. By providing information necessary to understand governmental policy, governments can ensure informed public debate and adequate democratic accountability.

A core principle of open and democratic government is that its policies are open to question, challenge, and reform. Executive power must not go unchallenged, but be kept honest and duly constrained. Voters choose their representatives based on expectations of how those they elect will behave and make decisions while in office.<sup>688</sup> Accordingly, both the people and their representatives must be sufficiently informed about important government policies and practices to make these choices. Nowhere must this be more essential than in the exercise of the most extreme form of executive power—the intentional use of lethal force.

The need for adequate, informed debate, and the provision of more information to the public, is heightened in relation to the use of armed drones, where the political costs to governments tend to be lower due to the reduced risk to the personnel using drones. From the outset, political leaders are usually less concerned than they would be in the context of a ground invasion or other kind of conflict with greater obvious domestic costs, and are subject to less political constraints.<sup>689</sup> Accordingly, there is an even greater need than usual for a fully informed and rational debate about the legality, effectiveness, and ethics of U.S. practices and policies. Where a state’s legal rules and interpretations, policy, and practices are shrouded in secrecy, the public cannot adequately understand or debate the government’s actions.<sup>690</sup> Full transparency is key here, as selective disclosures can only further muddy the waters.<sup>691</sup> Democratic principles and the rule of law combine to require that law not be secret—the “parliamentary process permits of no concealment.”<sup>692</sup>

Full public disclosure and explanation of the legal and policy parameters of a government's policy on strikes would allow for an informed public debate about the legality of its actions. Release of factual information about specific strikes and statistics on civilian harm or unlawful killings allows policy-makers and voters to make an educated assessment of its effectiveness, and on the real costs of such operations. Release of information regarding decision-making processes and administrative decisions and relevant documents must be exposed to public and peer scrutiny to allow the public to assess whether sufficient safeguards are in place.<sup>693</sup> Relatedly, information regarding accountability processes, and the outcomes of such processes, should be disclosed to allow evaluation of whether there is sufficient oversight and whether the system is capable of addressing harm and providing redress for victims. Without all of this information, a government is depriving its citizens of the information necessary to understand, debate, and consent to its policies.

## **5 Transparency Sets Rights-Promoting Positive Precedents for Future Administrations and Other Governments**

Transparency implemented now sets a positive precedent for future administrations and other governments, and helps to strengthen the rule of law in the United States and around the world. Government policies and conduct that demonstrate a strong commitment to international law and human rights ideals set a positive example for other countries to follow as they consider what policies they should adopt to govern their own use of lethal force and drone strikes. Governments with armed drone capabilities that are excessively secret threaten to set a dangerous precedent for successor administrations and other nations to follow. This concern has been underscored by many, including a bipartisan panel in the United States that includes former military leaders and national security officials,<sup>694</sup> and a multi-party parliamentary oversight body in the U.K.<sup>695</sup> Secrecy, or even just a lack of clarity, can open the door to abuse by successor administrations and other countries, who may use this precedent to justify their own secrecy and a broad authority to carry out strikes as armed drones continue to proliferate across the globe.

Transparency around U.S. legal interpretations, policies, and conduct, would demonstrate the concrete limits on the use of lethal force, thereby firming up standards and ensuring that there are proper constraints in place for future administrations.<sup>696</sup> Transparency about specific strikes, the release of statistics on the numbers of people killed and injured, information regarding decision-making and accountability processes, and the results of those processes, can set the standard for other States and enhance due process, and respect for and enforcement of international law, including the laws of war. It will further set a precedent in terms of transparency, encouraging successors to be open in government, and therefore more accountable to the public.

## **6 Transparency Advances States' Strategic Interests**

Open government acknowledgment of targeting errors and civilian casualties can help send the important message to impacted communities that their interests and lives matter. Investigations offer an opportunity to respond credibly to allegations made in many countries that the United States is deliberately targeting civilians and civilian objects such as mosques and schools—allegations that gravely undermine relations with partner governments and drive anti-U.S. public sentiment.<sup>697</sup> It allows the government to counter false and incorrect information about its policies and practices.

Surveys suggest that U.S. drone strikes remain unpopular in countries such as Pakistan, where there is a perception that too many civilians are killed, that strikes are not necessary to defend the country from armed groups, and that strikes take place without the approval of the Pakistani government.<sup>698</sup>

Publishing detailed statistics and aggregate information about casualties provides a “systematic method for engaging the public understanding of civilian casualties”, a role which is often fulfilled by NGOs.<sup>699</sup> Arguably, such a mechanism can lead to internal pressure to keep casualties low.<sup>700</sup> Further, providing information about consent in situations where force has been used in the territory of another country can address concerns by local populations that strikes take place without consent of their governments.

Secrecy undermines the legitimacy of a state’s actions in the eyes of the public, at home and overseas, and the government’s allies. The failure of the United States to explain its policies and practices has been cited as a constraint on its freedom of action with other states.<sup>701</sup> A government’s failure to be transparent about its actions can make people suspicious about whether a state is actually complying with international law.<sup>702</sup> Conversely, transparency—about the application of legal rules and policy standards, about practices and specific strikes, about decision-making and accountability, including an openness about wrongdoing or civilian casualties when they occur—can demonstrate a government’s concern, and desire, for compliance with the law, which can in turn enhance the legitimacy of its actions.

## 7 Transparency is Required by and Advances Respect for International Law

Transparency is a foundational principle that runs through international law. Transparency about certain actions is specifically and explicitly required by international law. Transparency is also a necessary procedural element of guaranteed substantive rights. This section explains states’ transparency obligations under three different branches of international law—general public international law, international human rights law, and international humanitarian law.

*Public international law.* States have a specific legal obligation under the UN Charter to report to the Security Council any instance in which they use force in the exercise of national self-defense in the territory of a state where they are not already engaged, or when it uses force against new parties in a conflict.<sup>703</sup> This is a key element of states’ accountability to the Security Council, to ensure that such actions are lawful and also that they do not impede “the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”<sup>704</sup>

*International human rights law.* As the United Nations Human Rights Committee has observed, “the realization of the principles of transparency and accountability” are “essential for the promotion and protection of human rights.”<sup>705</sup> Accordingly, transparency underpins much of international human rights law and is necessary for the guarantee of specific substantive rights. International human rights law protects a number of rights that include specific transparency obligations:

- *Right of access to information.* The right of access to information is centrally important.<sup>706</sup> As the then U.N. Special Rapporteur on freedom of opinion and expression, Abid Hussain, said in 1994, “Freedom will be bereft of all effectiveness if the people have no access to information.”<sup>707</sup> This is a general, overarching right that allows the public “a right of access to information held by public bodies.”<sup>708</sup> The Inter-American Court of Human Rights has recognized a general presumption of maximum disclosure—that “all information is accessible, subject to a limited system of exceptions.”<sup>709</sup> To give effect to this right, the U.N. Human Rights Committee has underscored that governments “should proactively put in the public domain Government information of public interest.”<sup>710</sup> As set out in this section, there are compelling reasons why laws and policies on the use of lethal force, as well as statistics on civilian casualties and accountability, and specific information about strikes, particularly where there are credible allegations of civilian casualties or a lack of compliance with law, should all be considered information of public interest.<sup>711</sup>

- *Right to participate in public affairs.* International human rights law guarantees the right to participate in public affairs.<sup>712</sup> As the Office of the United Nations High Commissioner for Human Rights has explained, “exercise of the right to participation further depends on transparency and on access to complete information.”<sup>713</sup> This right is, in part, the legal manifestation of democratic accountability, which is further discussed above, in the *Transparency Promotes Informed Public Debate and Democratic Accountability* section. It underpins “democratic government based on the consent of the people.”<sup>714</sup> Accordingly, in relation to the use of force and the benchmarks set out in this report, the right to participation in public affairs reinforces the need for transparent law, policy, and decision-making processes, as well as transparency around the consequences of strikes, such as civilian casualty statistics, so that citizens can, for example, fully and properly exert influence through public debate or dialogue.<sup>715</sup>
- *Right to life and the duty to investigate.* Where the state deliberately kills someone, the onus is on the state to demonstrate that the killing is lawful.<sup>716</sup> Moreover, the duty to investigate alleged unlawful killings, a procedural element of the right to life,<sup>717</sup> is closely linked to the right to truth. Investigations must have a sufficient degree of public scrutiny and transparency in order to secure accountability in practice and to be effective.<sup>718</sup> The requirement of transparency is critical in terms of allowing for proper and appropriate victim involvement in investigative processes—including access to information relating to allegations of human rights violations and their investigation.<sup>719</sup> Transparency resulting from investigations can also help fulfill the public’s right to know about human rights violations.<sup>720</sup> This goes beyond just concrete findings of violations. As the Special Rapporteur on counter-terrorism and human rights has underscored, the results of fact-finding investigations giving rise to credible allegations of violations must be made public.<sup>721</sup>

*Limitations on rights.* While international human rights law recognizes that there may be limits on transparency, secrecy must be established in law, be for a legitimate purpose (such as national security, or for the physical safety of victims and/or witnesses), and be proportionate and necessary.<sup>722</sup> While attorney-client privilege may sometimes be a legitimate reason to withhold information, it does not cover authoritative statements of the law.<sup>723</sup> Limitations must be narrowly construed—the rule should drive the exception, rather than the other way around.<sup>724</sup> The burden of demonstrating the legitimacy of any restriction rests with the government.<sup>725</sup> Any assessment of the proportionality of a decision not to disclose must also take into account the impact of secrecy on other rights and obligations, including any impact on the effectiveness of an investigation, and on victims’ rights to a remedy. Shortcomings in transparency may undermine public confidence and prevent the government from “meeting the legitimate concerns that might arise from the use of lethal force.”<sup>726</sup>

In keeping with the right of access to information, governments should aim first at ensuring maximum disclosure. Some information may be kept secret on national security grounds, such as information that may reveal sources and methods used by intelligence agencies, or information that, if released, may expose an individual to a risk of physical harm. Some categories of information can never be kept secret as a matter of international law, while others are subject to a very high presumption of overriding interest in favor of disclosure. Notably, information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security, cannot be withheld on national security grounds in any circumstances.<sup>727</sup> Information about other violations of human rights or humanitarian law, the structures and powers of government, and decisions to use military force, is subject to a high presumption of disclosure, and should be publicly and proactively disclosed.<sup>728</sup> None of this information can be withheld in a manner that would deprive victims of accountability or access to an effective remedy.



In a situation of public emergency that threatens the life of the nation, which is publicly proclaimed, the right to access to information may also be derogated from on an exceptional and temporary basis only.<sup>729</sup>

- *Right to a remedy.* Victims of violations also have the right to a remedy under international human rights law, comprising a number of different elements.<sup>730</sup> Access to a remedy includes access to a judicial remedy.<sup>731</sup> The use of state secrets or similar doctrines to block judicial consideration of allegations of serious violations of international human rights and humanitarian law will violate this right.<sup>732</sup> Victims also have the right to relevant information concerning accountability processes, including reparation mechanisms. States must proactively and publicly disseminate information about all available remedies for violations.<sup>733</sup> This means that states must make public the existence, procedures, and rules, governing its accountability mechanisms, including in respect of alleged unlawful killings.

A component of the right to a remedy is the right to truth, which includes the right to have verification of the facts and “full and public disclosure of the truth” by the responsible state, as well as a public apology, including acknowledgement of the facts and acceptance of responsibility.<sup>734</sup> Victims are entitled to seek and obtain information on the violations they have been subjected to, the causes leading to their victimization, on the causes and conditions pertaining to violations they have suffered, and to learn the truth in regard to these violations.<sup>735</sup> This right extends beyond victims to “society as a whole,” which has a right of access of information regarding serious human rights violations. This is a collective right that ensures that society has access to information essential for the workings of democratic systems.”<sup>736</sup> These obligations are also linked to states’ related but independent obligations to ensure guarantees of non-repetition for violations.<sup>737</sup> The truth is essential to “avoid a repetition” of similar wrongdoing in the future.<sup>738</sup> Without the truth about what has happened, and exposure of wrongdoing, there is a real risk that the same harm may occur again in the future.

*International humanitarian law.* States continue to have a duty to uphold human rights, investigate alleged violations, and provide a remedy to victims in situations of armed conflict,<sup>739</sup> even if the circumstances of armed conflict may affect the modalities of an investigation.<sup>740</sup> Under international humanitarian law, states are also specifically required to investigate war crimes allegedly committed by their national or armed forces, or on their territory, and to prosecute suspects. Credible allegations of violations must be investigated, and such investigations must be prompt, thorough, effective, independent, impartial, and transparent.<sup>741</sup> As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has noted, “[w]henver there are reasons to query whether violations of international humanitarian law may have occurred in armed conflict as a result of a drone strike, such as the incorrect designation of persons as targetable or disproportionate civilian harm, accountability demands at least a preliminary investigation.”<sup>742</sup> Under international humanitarian law, states using lethal force should also determine and disclose civilian casualties.<sup>743</sup> Relatives of persons killed or missing also have the right to know the fate of their relatives.<sup>744</sup>

## ANNEX: Key Legal and Policy Terms Requiring Further Clarification

### *“Areas of active hostilities”*

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**Why is it important?** The term has no equivalent or significance in international humanitarian law.<sup>745</sup> Determining its meaning is still a fundamental question because it is directly relevant to the application of U.S. policy standards on the use of force. The Presidential Policy Guidance (PPG) and other related documents are only applicable to places deemed by the U.S. government to be outside “areas of active hostilities.” There is a concern that this U.S.-invented distinction is used to justify the application of the more permissive laws of war with some additional policy constraints to situations where only human rights law should apply.

**What has the government disclosed?** In his April 2016 speech, State Department Legal Advisor Brian Egan stated that when determining “areas of active hostilities,” the U.S. government takes into account “the scope and intensity of the fighting.”<sup>746</sup> This was supplemented by the December 2016 Report on Legal and Policy Frameworks, which stated that the “determination as to whether a region constitutes an ‘area of active hostilities’ does not turn exclusively on whether there is an armed conflict under international law taking place in the country at issue, but also takes into account, among other things, the size and scope of the terrorist threat, the scope and intensity of U.S. counterterrorism operations, and the necessity of protecting any U.S. forces in the relevant location.”<sup>747</sup>

The 2015 DNI Summary of Information issued in July 2016 states that “‘Areas of active hostilities’ currently include Afghanistan, Iraq and Syria.” In the December 2016 Report on Legal and Policy Frameworks, this changed to “Afghanistan, Iraq, Syria, and certain portions of Libya.”<sup>748</sup> It changed back to just “Afghanistan, Iraq and Syria” in the 2016 DNI Summary of Information issued in January 2017.<sup>749</sup>

**What is unclear?** The U.S. government’s explanation does not provide sufficient or comprehensive detail, including whether other criteria are applied to determine which places are designated “areas of active hostilities.” It is also an extremely flexible standard, and much more information is needed to understand what thresholds the government applies when weighing the different factors, such as the threat to U.S. forces in a particular location, or the scope and intensity of U.S. counterterrorism operations. There is also a question as to if and how this determination differs from an assessment of whether there is an ongoing armed conflict, as the intensity of fighting is relevant for such a determination under international law. The classification of this term, and the application of the laws of war to situations where they should not apply, obscures the identification of relevant legal rules governing the use of lethal force.<sup>750</sup> It is also unclear for which periods different locations are classified as within, or outside of, “areas of active hostilities.” The only information that has been provided comes from these periodic disclosures. There is reason to question how the U.S. government applies this term to certain countries, areas, or regions, given the relative ease and flexibility with which successive administrations have designated new locations as “areas of active hostilities.” The addition and removal of “certain portions of Libya” in 2016 to 2017, and reported removal of parts of Yemen and Somalia in 2017,<sup>751</sup> further demonstrate the importance of regular disclosures on this issue, so that it is clear where the PPG is applicable at any given time.

## *“Associated forces”*

**Why is it important?** Military actions have been taken against groups deemed “associated forces” under the authority granted in the 2001 Authorization to Use Military Force (AUMF), despite the fact that the AUMF itself does not include the term. The use of this term by the administration has been criticized by a number of commentators, who have highlighted, for example, that “the problem with the concept of associated forces is that it has now also lowered the barrier of entry for the United States by simply allowing the president and the military to decide when and where to engage in war, largely in secret.”<sup>752</sup>

Conscious of the shaky legal footing this provides for such military actions, previous proposals for an AUMF against ISIS have included the term “associated forces,” causing many commentators to worry about the broad authority this would grant the President to determine with whom the U.S. is at war.<sup>753</sup> Comments from officials, such as Defense Secretary Ashton Carter, who remarked, in response to a question in a Senate Foreign Relations Committee on a proposed revised AUMF in 2015, “you do see in this social media-fueled movement called ISIL, people who are wannabes or want to join or have been associated with al-Qaeda or some other group who are putting up the flag of ISIL. And we need to recognize that that’s a characteristic of the campaign and that’s why the AUMF has the language that it does” have only heightened concerns regarding the flexible application of these terms.<sup>754</sup>

**What has the government disclosed?** U.S. officials have stated repeatedly that the 2001 AUMF authorizes the government to wage war against al-Qaeda and all “associated forces,” steadily expanding the term to broadly include “al-Qa’ida, the Taliban and certain other terrorist or insurgent groups in Afghanistan; al-Qa’ida in the Arabian Peninsula (AQAP) in Yemen; and individuals who are part of al-Qa’ida in Somalia and Libya. [It also includes] the Nusrah Front and, specifically, those members of al-Qa’ida referred to as the Khorasan Group in Syria [and] the group [the U.S.] fought in Iraq when it was known as al-Qa’ida in Iraq, which is now known as ISIL.”<sup>755</sup>

In various documents, including the 2016 Report on Legal and Policy Frameworks, the U.S. government has stated that an “Associated Force” is:

- an organized, armed group that has entered the fight alongside al-Qaeda; and
- a co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners.<sup>756</sup>

This definition incorporates references to the concept of co-belligerency under the law of neutrality, which is contested, particularly in its application to armed groups in non-international armed conflicts.<sup>757</sup>

The 2016 Report on Legal and Policy Frameworks goes on to state that “a group is not an associated force simply because it aligns with al-Qa’ida or the Taliban or embraces their ideology. Merely engaging in acts of terror or merely sympathizing with al-Qa’ida or the Taliban is not enough to bring a group within the scope of the 2001 AUMF. Rather, a group must also have entered al-Qa’ida or the Taliban’s fight against the United States or its coalition partners.”<sup>758</sup>

**What is unclear?** It is unclear how these terms are applied and interpreted. In particular there is insufficient clarity on how, and on what basis, a group is determined to be an “Associated Force”. In particular, it is not clear what factors the U.S. government uses to determine that a group has “entered the fight” alongside al-Qaeda or the Taliban. Relatedly, there is no indication of what standard the U.S. government uses to determine that a group has met specific organizational features or concepts of co-belligerency to be appropriately classified as an “associated force,” which may be crucial when assessing whether force may be used against groups around the world on the basis of their linkages with al-Qaeda or the Taliban.

U.S. government disclosures are also conflicting in some respects: It has been suggested, for example, that an “associated force” includes “affiliated relationships, or endorsement-like relationships”<sup>759</sup> even though the Report on Associated Forces states that “the legal conclusion that a group is an associated force against whom military force may be used is distinct from the intelligence assessment that a group is ‘affiliated’ with al-Qa’ida.”<sup>760</sup> The lack of government clarity on the concept of “associated forces,” affords the executive branch great latitude to decide when and where to engage in multiple conflicts across the world without explanation and allows it to argue it does not need to seek additional legal authorization from Congress.

### *“Cannot or will not effectively address the threat to U.S. persons”*

**Why is it important?** According to the PPG, the 2016 Report on Legal and Policy Frameworks, and statements by officials, where the territorial State has not consented to the use of force, the U.S. government will only carry out a strike if it determines that the territorial State “cannot or will not effectively address the threat to U.S. persons.” This, the U.S. government has asserted, is an application of the necessity requirement under the law of self-defense.<sup>761</sup> The “cannot or will not” requirement appears to be used interchangeably with the “unwilling or unable” test set forward by the U.S. government.

**What has the government disclosed?** The PPG states that the U.S. will use lethal force after “an assessment that the relevant government authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons.” In Brian Egan’s April 2016 speech,<sup>762</sup> a determination of when a state “cannot” or is “unable” to effectively address a threat to U.S. persons entails a consideration of when: “a State has lost or abandoned effective control over the portion of its territory from which the non-state actor is operating,” which it asserts “is the case with respect to the situation in Syria.” In the 2016 Report on Legal and Policy Frameworks 2016, the U.S. government echoed Egan’s words and added that: “With respect to the ‘unwilling’ prong of the standard, unwillingness might be demonstrated where, for example, a state is colluding with or harboring a terrorist organization operating from within its territory and refuses to address the threat posed by the group.”<sup>763</sup>

**What is unclear?** The “unwilling or unable” test is already a controversial and disputed exception to the international law prohibition on the use of force in another state’s territory.<sup>764</sup> The test hinges on a targeting state’s view of another states’ capacity to control or resolve threats in its own territory,<sup>765</sup> leaving an already contentious and vague standard open to abuse.

A number of issues remain unclear. In particular, clarification is needed on:

- the circumstances in which the U.S. considers a host state to be “unable or unwilling” to address a terrorist threat within its territory. The U.S. government has only provided two illustrative examples, not a definitive list;
- the criteria the U.S. government applies to make such an assessment, and whether the determination is an objective or subjective one; and
- lastly, the circumstances in which the U.S. may be unsatisfied with a territorial state’s willingness to cooperate or disagrees with the manner in which the territorial state is addressing, or proposing to address, the threat.

## *“Continuing, imminent threat”*

**Why is it important?** The PPG states that “the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons.” Legal documents and official speeches also refer to “imminence” as the standard for targeting. Discussion of this issue is complicated by the fact that this standard appears to be part of two separate considerations the U.S. government applies when undertaking a targeting decision:

- a determination under the law of self-defense that an individual presents an “imminent threat,” described below, and
- an assessment pursuant to its policy standards under the Presidential Policy Guidance, that an individual presents a “continuing, imminent threat” before being targeted.

In practice, it is possible that these assessments blur into one, but the U.S. government has presented them as separate requirements.

**What has the government disclosed?** The U.S. government’s 2014 Report on Process, which appears is similar to several public statements on this issue,<sup>766</sup> states that the determination of whether an individual constitutes a “continuing, imminent threat” entails considerations of:

- the relevant window of opportunity to act;
- the possible harm that missing the window would cause to civilians; and
- the likelihood of heading off future disastrous attacks against the United States.<sup>767</sup>

**What is unclear?** It appears that the U.S. government is applying and invoking this term exclusively as a policy standard. However, the U.S. government’s invocation of “imminence” as a legal justification to undertake a targeting decision, is complicated by the notion that “imminence” has distinct meanings in international law, specifically under the law of self-defense and, separately, under international human rights law.<sup>768</sup> Accordingly, it requires an explanation for how U.S. drone strikes and other use of lethal force operations can be justified under terms already grounded in law.

In addition, the criteria the U.S. government has provided in relation to its policy standards justifying its lethal operations are elastic and inconsistent with international human rights law. For example, the government has not explained how a threat can be both “imminent” as understood under international law, and “continuing,” at the same time. A separate, but important point, is how the government determines that there is a “relevant opportunity to act,” the “possible harm that missing the window would cause to civilians,” and the “likelihood of heading off future disastrous attacks.” Absent clear parameters for their application, these are all highly speculative future judgments that seem unrelated to an “imminence” determination and vulnerable to a subjective understanding. Again, this policy standard raises serious concerns as to its compatibility with international law.<sup>769</sup>

The U.S. government has, on the other hand, disclosed its criteria for assessing imminence under the law of self-defense, which is discussed separately below.<sup>770</sup> At the same time, it is not clear how the determination of “imminence” under the PPG relates to the determination of “imminence” for the purposes of the self-defense exception to the prohibition on the use of force, or whether it relates to the, legally separate reason that individuals or groups are targetable under international humanitarian law as directly participating in hostilities (see below).<sup>771</sup>

## *“Feasible” (capture) and “no other reasonable alternatives exist to address the threat”*

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**Why is it important?** The PPG, and various other legal memos, documents and speeches released by the U.S. government, state that lethal action is only taken “when capture of an individual is not feasible and no other reasonable alternatives exist to effectively address the threat.”<sup>772</sup> The US government has stated this to be both a legal requirement under domestic law when targeting US citizens, and a policy requirement under the PPG. This has the potential to be a key restraint on the use of force, allowing targeting only where capture is not feasible, but its effectiveness rests on when capture is determined to be “feasible” (or not).

**What has the government disclosed?** The DOJ White Paper contains some guidance as to when capture may not be feasible:

- “if it could not be physically effectuated during the relevant window of opportunity; or
- If the relevant country were to decline to consent to a capture operation.”<sup>773</sup>

Relatedly, the PPG includes as a condition precedent to a lethal strike, an assessment that capture is “not feasible at the time of the operation” and “the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons.”<sup>774</sup> The Report on Legal and Policy Frameworks explains that this is also part of the “due process balancing analysis” when assessing the legality of a strike under domestic law.<sup>775</sup>

**What is unclear?** It is not clear how feasibility is determined, and how it interacts with the other legal and policy standards applied by the U.S. government. How is the “window of opportunity” determined, and how is this weighed in the assessment of threat and imminence? As some analysts have rightly asked, “what if the host government is willing to capture the threat, but the U.S. doesn’t think that such a response by the host government is sufficient or doesn’t think the government will do it quickly enough?”<sup>776</sup> As the same commentators further observed, “[it] begs the question as to whether the PPG’s prioritization of capture over kill can be made moot in many cases by that fact that, on the one hand, an individual can be regarded as an imminent threat over a relatively long period of time while, on the other hand, a capture feasibility assessment only evaluates the conditions for capture at the precise time when the government is planning to carry out its kill operation.”<sup>777</sup>

## *“High value terrorist”*

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**Why is it important?** The PPG, and various other speeches by U.S. government officials indicate that extraterritorial use of lethal force will only be authorized against individuals that are identified as “high-value terrorists” (HVTs).

**What has the government disclosed?** Section 3 of the PPG outlines a process by which the U.S. government may use lethal force against designated HVTs, whose identities are known, if the “individual’s activities pose a continuing, imminent threat to U.S. persons,” and section 4 notes that a similar process exists for targeting terrorist targets other than “identified HVTs.”

**What is unclear?** Much is still unknown about the broader criteria for identifying an individual as an HVT. Moreover, Section 4 of the PPG mentions a nominating and approval process for targets other than “high-value terrorists,” but it does not specify what that process is, or to whom it would apply. The legal and factual criteria that the U.S. government applies to distinguish an HVT from targets not identified as HVTs is also unclear, even though the PPG specifies that both must present a “continuing, imminent threat to U.S. persons” before they can be targeted. The White House explanation for the unintended killing of Adam Gadahn and Ahmed Farouq in Pakistan in 2015 is illustrative of the need for further clarity. In an April 2015 press briefing, then Press Secretary Josh Earnest noted that Gadahn and Farouq were not classified as “HVTs,” but Earnest still claimed they were “leaders of al-Qaeda, and we know that is actively plotting and planning against the United States.”

### *“Imminent threat” under the jus ad bellum*

**Why is it important?** The term “imminence” carries clear significance in U.S. legal analysis of whether a strike is lawful under international law.<sup>778</sup> Under international law, an attack in self-defense may only be undertaken against “imminent” threats.<sup>779</sup>

**What has the government disclosed?** Citing only a law review article, the U.S. government has stated that it applies the following criteria when assessing whether an attack is “imminent”:

- the nature and immediacy of the threat;
- the probability of an attack;
- whether the anticipated attack is part of a concerted pattern of continuing armed activity;
- the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and
- the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.<sup>780</sup>

**What is unclear?** While the U.S. government in 2016 provided more information than it had done before, the criteria that it has provided—apart from being controversial as a matter of current international law—is very vague and unclear in terms of how it might be applied.<sup>781</sup>

For example, what threshold and standard of proof does it apply to determine that an attack is “probable” enough to justify an anticipatory strike? What criteria does it apply to determine what amounts to a “concerted pattern of continuing armed activity”? How does it measure the “likely scale of the attack” and “injury, loss or damage likely to result,” and how “likely” to result does the injury, loss or damage need to be? How does it determine “the likelihood that there will be other opportunities to undertake effective action”?

Without clear parameters, these are all highly subjective criteria that may be applied in a broad, inconsistent, and unconstrained manner. As one commentator has suggested, in response to the United Kingdom’s Attorney General advancing the same criteria, the disclosure of such information “will do little to alleviate... grave concerns” that “States will either abuse [the principle of anticipatory self-defense] or apply it recklessly.”<sup>782</sup>

## *“Individual who is targetable in the exercise of U.S. national self-defense”*

**Why is it important?** The U.S. government specifies that three categories of people are targetable, according to its interpretation of international law. These three categories include individuals who are “targetable in the exercise of U.S. national self-defense.”<sup>783</sup>

**What has the government disclosed?** The government has only disclosed that it believes individuals may be targetable in the exercise of U.S. national self-defense, but offers no explanation or definition of this term.

**What is unclear?** The U.S. government’s invocation of this category and brief explanations that link the term to legal concepts are problematic as the category does not exist in international law.<sup>784</sup> The prohibition on the use of force under international law, which exceptionally allows for the use of force in self-defense, relates to the legality of the use of force by a state on the territory of another state, not against an individual. The law governing the use of force against an individual is governed either by international humanitarian law and international human rights law, in situations of armed conflict, or international human rights law alone, outside these circumstances. A lot of uncertainty results because the U.S. government non-combatant distinctions ignore the applicability of international human rights law, and conflate the *jus ad bellum* self-defense principles, with the conduct regulating combat operations that are governed by a *jus in bello* framework.<sup>785</sup> The U.S. government has not presented any legal rationale for this category of individuals, nor defined the term, nor explained what criteria it uses to determine whether it believes someone is targetable on this basis.

## *“Near-certainty”*

**Why is it important?** “Near-certainty” that civilians will not be injured or killed is one of the core standards for protection of civilians contained in the PPG, and has been touted by Obama administration officials as evidence of its commitment to protecting civilians.<sup>786</sup> “Near-certainty” has also been used as a standard to assess the presence of targets in a location.<sup>787</sup>

**What has the government disclosed?** In 2012, prior to the promulgation of the PPG, John Brennan, then Assistant to the President for Homeland Security and Counterterrorism, stated that targeted killing operations are authorized only if there is a “high degree of confidence” that innocent civilians would not be injured or killed, and that the U.S. takes “extraordinary precautions” to avoid these casualties.<sup>788</sup> The 2013 PPG goes further to state that there must be “[n]ear certainty that non-combatants will not be injured or killed,” and that “an identified HVT or other lawful terrorist target other an identified HVT is present.”<sup>789</sup>

In the July 1, 2016 Executive Order on civilian casualties, President Obama directed “all relevant agencies” to, among other things, “take feasible precautions in conducting attacks to reduce the likelihood of civilian casualties, such as providing warnings to the civilian population (unless the circumstances do not permit), adjusting the timing of attacks, taking steps to ensure military objectives and civilians are clearly distinguished, and taking other measures appropriate to the circumstances.”<sup>790</sup> “Reduce the likelihood” is a lower standard than that required by international humanitarian law, which requires parties to a conflict to take “all feasible precautions to avoid, and in any event to minimize” civilian casualties.<sup>791</sup>



**What is unclear?** Based on these statements made by the government, it would seem that, in situations of armed conflict, the U.S. potentially holds itself to both a *higher* (PPG near-certainty) and a *lower* (Executive Order wording on feasible precautions) standard with regards to civilian casualties than required by international law. Neither of these standards would be appropriate for situations where the U.S. uses force outside of armed conflict.

Additionally, the PPG also appears to be slightly contradictory in regard to the near-certainty standard for assessing the presence of targets on the ground. The document states that the U.S. government “must employ all reasonable resources to ascertain the identity of the target so that action can be taken,” and that “verifying a target’s identity before taking lethal action ensures greater certainty of outcome.”<sup>792</sup> While this is only after the “use of lethal action [has been] deemed necessary,” it is unclear how these provisions relate to the near-certainty standard, and whether in practice they water it down.

Uncertainty about what these standards actually mean in practice is compounded by reports of the high civilian casualty statistics provided by NGOs and journalists, concerns have not been allayed by the very general aggregate statistics and explanations provided by the U.S. government in July 2016 and January 2017.

### *“Non-combatant”*

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**Why is it important?** The term “non-combatant” appears to be used by the U.S. government to refer to civilians who are not targetable according to the law of armed conflict, and are classified as such when it provides statistics.<sup>793</sup>

**What has the government disclosed?** As noted above, ‘non-combatants’ are defined as “individuals who may not be made the object of attack under the law of armed conflict. The term ‘non-combatant’ does not include an individual who is taking direct part in hostilities, or an individual who is targetable in the exercise of national self-defense.”<sup>794</sup>

**What is unclear?** There are some broader issues relating to how the U.S. government defines non-combatant, and the different categories it asserts fall under this heading.<sup>795</sup> In addition to uncertainty in relation to how those categories are defined, questions remain regarding how the U.S. classifies individuals whose targetable status could not be confirmed or known. In its 2017 release of civilian casualty data for 2016, the U.S. government stated that “The assessment of non-combatant deaths can include deaths for which there is an insufficient basis for assessing that the deceased is a combatant.”<sup>796</sup> While this indicates that there may be a presumption of civilian status for some deaths where there is an insufficient basis for assessing someone to be a combatant, the use of the word “can” in this construction makes it highly ambiguous.<sup>797</sup> Such confusion raises additional questions regarding whether the U.S. government is applying the term combatant broadly to include persons that would rightfully be categorized as civilians.<sup>798</sup>

## Endnotes

1. Karen McVeigh, *Drone Strikes: Tears in Congress as Pakistani Family Tells of Mother's Death*, *GUARDIAN* (Oct. 29, 2013), [www.theguardian.com/world/2013/oct/29/pakistan-family-drone-victim-testimony-congress](http://www.theguardian.com/world/2013/oct/29/pakistan-family-drone-victim-testimony-congress) (reporting statement of Rafiq Ur Rehman at congressional briefing hosted by Congressman Alan Grayson (D-FL) on Oct. 29, 2013).
2. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).
3. OPEN SOCIETY JUSTICE INITIATIVE & MWATANA ORGANIZATION FOR HUMAN RIGHTS, *DEATH BY DRONE: CIVILIAN HARM CAUSES BY U.S. TARGETED KILLINGS IN YEMEN* 57 (2015), [www.opensocietyfoundations.org/sites/default/files/death-drones-report-eng-20150413.pdf](http://www.opensocietyfoundations.org/sites/default/files/death-drones-report-eng-20150413.pdf) [hereinafter OSJI & MWATANA, *DEATH BY DRONE*].
4. The first reported use of a drone to carry out a “targeted killing” was in 2001 in Afghanistan. See Chris Woods, *The Story of America's Very First Drone Strike*, *ATLANTIC* (May 30, 2015), [www.theatlantic.com/international/archive/2015/05/america-first-drone-strike-afghanistan/394463/](http://www.theatlantic.com/international/archive/2015/05/america-first-drone-strike-afghanistan/394463/).
5. This term is not an international law term, but is a term created by the U.S. government to describe certain places where it engages in counterterrorism operations. The U.S. government has explained what areas of “active hostilities” are only at particular given moments of time, explaining in July 2016 that “Afghanistan, Iraq and Syria,” were currently designated as “areas of active hostilities,” and in December 2016, explaining that “areas of active hostilities” had changed to “Afghanistan, Iraq, Syria, and certain portions of Libya.” See OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, *SUMMARY OF INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES* 1 (2016), [www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF](http://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF) [hereinafter DNI SUMMARY 2016]; THE WHITE HOUSE, *REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NAT'L SECURITY OPERATIONS* (Dec. 2016), [www.justsecurity.org/wp-content/uploads/2016/12/framework.Report\\_Final.pdf](http://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf) [hereinafter Report on the Legal and Policy Frameworks].
6. For U.S. government figures, see DNI SUMMARY 2016, *supra* note 5; and OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, *SUMMARY OF INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES* 1 (2016), [www.dni.gov/files/documents/Summary%20of%202016%20Information%20Regarding%20United%20States%20Counterterrorism%20Strikes%20Outside%20Areas%20of%20Active%20Hostilities.pdf](http://www.dni.gov/files/documents/Summary%20of%202016%20Information%20Regarding%20United%20States%20Counterterrorism%20Strikes%20Outside%20Areas%20of%20Active%20Hostilities.pdf) [hereinafter DNI SUMMARY 2017]; Independent figures are based on strikes labeled “confirmed” in Pakistan, Somalia, and Yemen, as well as “other confirmed and possible strikes” in Yemen documented by The Bureau of Investigative Journalism. See *Drone Wars: The Full Data*, THE BUREAU OF INVESTIGATIVE JOURNALISM, [www.thebureauinvestigates.com/category/projects/drones/drones-graphs/](http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/) [hereinafter *Drone Wars: The Full Data*].
7. Christopher Fonzzone and Stephen Pomper, *How Trump's Team Can Use Obama's Counterterrorism Playbook to Defeat al-Qaeda and ISIL*, *JUST SECURITY* (Feb. 21, 2017), [www.justsecurity.org/37970/guide-obamas-playbook-fighting-terrorism-and-trumps-team-win/](http://www.justsecurity.org/37970/guide-obamas-playbook-fighting-terrorism-and-trumps-team-win/); Luke Hartig, *The Drone Playbook: An Essay on the Obama Legacy and Policy Recommendations for the Next President*, *New America Foundation* 8-9 (Aug. 2016), [https://na-production.s3.amazonaws.com/documents/Drone\\_Playbook\\_Essay\\_8.16.pdf](https://na-production.s3.amazonaws.com/documents/Drone_Playbook_Essay_8.16.pdf).
8. See e.g. U.N. Charter art. 51; Christof Heyns, (Special Rapporteur on extrajudicial, summary, or arbitrary executions), *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, U.N. Doc. A/68/382 (Sept. 13, 2013) [hereinafter Heyns Report (A/68/382)]; Human Rights Committee, *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, ¶ 3, U.N. Doc. CCPR/C/GC/24 (Sept. 12, 2011) [hereinafter HRC, *General Comment No. 43, Article 19*]; International Covenant on Civil and Political Rights art. 19(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; American Declaration of the Rights and Duties of Man art. IV, *opened for signature* April 1948, O.A.S. Res. XXXIV OEA/Ser. L./V.II.23, rev. 6 [hereinafter American Declaration].

9. See ICCPR, *supra* note 8, art. 2(3); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of international Humanitarian Law, ¶¶ 2(b), 3(c), 11(1)–(2), 12, 13, 22, and 24, G.A. Res. 60/147 (Mar. 21, 2006) [hereinafter Basic Principles on the Right to a Remedy]; *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 29630/09, ¶192 Eur. Ct. H.R. (2012); Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, ¶ 9(f), U.N. Doc. CCPR/C/U.S.A/CO/4 (Apr. 23, 2014) [hereinafter HRC, *Concluding Observations on U.S.*].
10. The framework was designed to apply to any government use of lethal force outside its territory. It could be used to assess the level of transparency in situations other than those examined in this report, including recognized active conflict zones such as Syria and Iraq.
11. The White House, Office of the Press Sec’y, Remarks by the President in the State of the Union Address (Feb. 12, 2013), [www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address](http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address); [hereinafter Obama State of the Union, Feb. 2013] see also The White House, Office of the Press Sec’y, Remarks by President at the National Defense University (May 23, 2013), [www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university](http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university) [hereinafter Obama NDU Speech].
12. DNI SUMMARY 2016, *supra* note 5; DNI SUMMARY 2017, *supra* note 6.
13. See, e.g., Gabor Rona, *Reasons to Distrust Intelligence Report on Civilian Casualties*, JUST SECURITY (Feb. 23, 2016), [www.justsecurity.org/38031/debate-reasons-distrust-dni-report-civilian-casualties/](http://www.justsecurity.org/38031/debate-reasons-distrust-dni-report-civilian-casualties/). [hereinafter Rona, Intelligence report, Feb. 2016.] For an alternative view advanced by former U.S. government officials, see Ryan Goodman and Stephen Pomper, *Correcting the Record—Further Thoughts on the Intelligence Report on Civilian Casualties*, JUST SECURITY (Feb. 27, 2016), [www.justsecurity.org/38163/correcting-record-thoughts-intelligence-report-civilian-casualties/](http://www.justsecurity.org/38163/correcting-record-thoughts-intelligence-report-civilian-casualties/). See also Micah Zenko, *Do Not Believe the U.S. Government’s Official Numbers on Drone Strike Civilian Casualties*, FOREIGN POLICY (Jul. 5, 2016), <http://foreignpolicy.com/2016/07/05/do-not-believe-the-u-s-governments-official-numbers-on-drone-strike-civilian-casualties/> [hereinafter Zenko, Numbers].
14. The number of official acknowledgments is based on the authors’ review of public, formal, and written government statements or documents, including: Department of Defense, U.S. Central Command, and U.S. Africa Command issued press releases or statements; White House or White House Office of the Press Secretary issued press releases or statements; and a 2013 letter from then Attorney General Eric Holder to Congress. The review was of primary sources and aimed to assess acknowledgments by the government made directly available to the public through official channels. Accordingly, our review did not examine reports by the press or contained in other secondary sources, statements that are not available on the websites of the entities listed above, or confirmations given directly by the U.S. government to specific organizations but not made public. The total was compiled by the authors of this report. The total includes some acknowledgments of numerous strikes together—such as the blanket acknowledgment of 70 airstrikes in Yemen in one press release in April 2017, a practice representing a decline in transparency in the early months of the Trump administration. In the latter part of the Obama Administration, the U.S. military had started a practice of acknowledging most strikes in Somalia and Yemen individually, or in small batches of a few strikes, with each individually acknowledged in the same statement. Compare Terri Moon Cronk, *U.S. airstrikes hit terrorists in Yemen* (Apr. 3, 2017) U.S. Dep’t of Defense, [www.defense.gov/News/Article/Article/1139309/us-airstrikes-hit-terrorists-in-yemen/](http://www.defense.gov/News/Article/Article/1139309/us-airstrikes-hit-terrorists-in-yemen/) with U.S. CENTRAL COMMAND, *Centcom Announces Yemen Counterterrorism Strikes* (June 3, 2016), [www.defense.gov/News/Article/Article/790791/centcom-announces-yemen-counterterrorism-strikes](http://www.defense.gov/News/Article/Article/790791/centcom-announces-yemen-counterterrorism-strikes). The number of strikes is based on drone strikes and other covert actions recorded as confirmed and documented by The Bureau of Investigative Journalism. See *Drone Wars: The Full Data*, *supra* note 6.
15. The White House, Office of the Press Sec’y, Statement by the President on the Deaths of Warren Weinstein and Giovanni Lo Porto (Apr. 23, 2015), [www.whitehouse.gov/the-press-office/2015/04/23/statement-president-deaths-warren-weinstein-and-giovanni-lo-porto](http://www.whitehouse.gov/the-press-office/2015/04/23/statement-president-deaths-warren-weinstein-and-giovanni-lo-porto) [hereinafter President’s Statement on Deaths of Weinstein and Lo Porto]; Letter from Eric Holder, Att’y Gen. to Members of Cong. (May 22, 2013), [www.justice.gov/slideshow/AG-letter-5-22-13.pdf](http://www.justice.gov/slideshow/AG-letter-5-22-13.pdf).

16. Presidential Policy Guidance on Procedures for Approving Direct Action against Terrorist Targets Located outside the United States and Areas of Active Hostilities (May 22, 2013) [hereinafter PPG].
17. The White House, Office of the Press Sec’y, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> [hereinafter PPG Fact Sheet].
18. Letter from Am. Civil Liberties Union et al., to President Barack Obama, *Implementation of Executive Order of July 1, 2016 Regarding Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force* (Oct. 6, 2016), [www.aclu.org/letter/coalition-letter-president-obama-implementation-executive-order-july-1-2016-regarding-pre-and](http://www.aclu.org/letter/coalition-letter-president-obama-implementation-executive-order-july-1-2016-regarding-pre-and) [hereinafter NGO Coalition Letter, Oct. 2016]
19. *Id.*
20. This first drone strike was reported as a failed attempt to kill Taliban leader Mullah Mohammed Omar. See Woods, *supra* note 4.
21. On October 25, 2001, President Bush signed the classified National Security Presidential Directive 9, “Defeating the Terrorist Threat to the United States” which gave broad authority for the “global war on terrorism.” Memorandum from the Office of the White House, National Security Presidential Directive-9, Defeating the Terrorist Threat to the United States (Oct. 25, 2001), <http://fas.org/irp/offdocs/nspd/nspd-9.pdf>.
22. For an explanation of Yemen’s current conflict, which began with the Houthi takeover of the capital of Sana’a in September 2014, see Sana’a Center for Strategic Studies, *The Role of Local Actors in Yemen’s Current War*, <https://sanaacenter.org/a/wp/?p=2079&lang=en>. See also Nathalie Weizmann, *International Law on the Saudi-Led Military Operations in Yemen*, JUST SECURITY (Mar. 27, 2015) [www.justsecurity.org/21524/international-law-saudi-operation-storm-resolve-yemen/](http://www.justsecurity.org/21524/international-law-saudi-operation-storm-resolve-yemen/) for a discussion on the classification of the conflict under international humanitarian law and the potential involvement of the United States as a party to the conflict.
23. Akbar Ahmed & Frankie Martin, *Deadly Drone Strike on Muslims in the Southern Philippines*, BROOKINGS (Mar. 5, 2012), [www.brookings.edu/opinions/deadly-drone-strike-on-muslims-in-the-southern-philippines/](http://www.brookings.edu/opinions/deadly-drone-strike-on-muslims-in-the-southern-philippines/); AMNESTY INT’L, “WILL I BE NEXT?”: U.S. DRONE STRIKES IN PAKISTAN 14 (2013), [www.amnestyusa.org/sites/default/files/asa330132013en.pdf](http://www.amnestyusa.org/sites/default/files/asa330132013en.pdf) [hereinafter AMNESTY, WILL I BE NEXT?].
24. MICAH ZENKO, REFORMING U.S. DRONE STRIKE POLICIES 8 (Council on Foreign Relations, Council Special Report No. 65, Jan. 2013) [hereinafter ZENKO, REFORMING].
25. See generally Drone Wars: The Full Data, *supra* note 6; Geoff Dyer, *Deadly US Programme Still Controversial*, FINANCIAL TIMES (Sept. 8, 2015), [www.ft.com/content/b43d557e-563e-11e5-a28b-50226830d644](http://www.ft.com/content/b43d557e-563e-11e5-a28b-50226830d644); Micah Zenko, *America’s 500th Drone Strike*, COUNCIL ON FOREIGN RELATIONS (Nov. 21, 2014), <http://blogs.cfr.org/zenko/2014/11/21/americas-500th-drone-strike>. It is worth noting, however, that in the final years of Obama’s Presidency, the number of strikes appeared to decrease, particularly in Pakistan. According to figures gathered by the Bureau of Investigative Journalism, the number of strikes in Pakistan decreased from a peak of 128 in 2010 to three in 2016, whereas in Yemen they peaked at a reported 37 in 2012, with 32 strikes recorded in 2016.
26. Micah Zenko, *The (Not-So) Peaceful Transition of Power: Trump’s Drone Strikes Outpace Obama*, POLITICS, POWER, AND PREVENTIVE ACTION (Mar. 2, 2017), [www.cfr.org/blog-post/not-so-peaceful-transition-power-trumps-drone-strikes-outpace-obama](http://www.cfr.org/blog-post/not-so-peaceful-transition-power-trumps-drone-strikes-outpace-obama).
27. Jo Becker and Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), [www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html](http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html).
28. Dan De Luce and Paul McLeary, *Obama’s Most Dangerous Drone Tactic Is Here to Stay*, FOREIGN POLICY (Apr. 5, 2016), [http://foreignpolicy.com/2016/04/05/obamas-most-dangerous-drone-tactic-is-here-to-stay/?wp\\_login\\_redirect=0](http://foreignpolicy.com/2016/04/05/obamas-most-dangerous-drone-tactic-is-here-to-stay/?wp_login_redirect=0).

29. The U.S. military began acknowledging that it carried out some strikes in 2014. See, e.g., U.S. CENTRAL COMMAND, *U.S. Central Command announces 3 recent strikes in Yemen*, Release No. 17-039 (Jan. 25, 2017), [www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1059762/us-central-command-announces-3-recent-strikes-in-yemen/](http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1059762/us-central-command-announces-3-recent-strikes-in-yemen/). Strikes by the CIA have never been officially acknowledged, but CIA involvement in strikes has been documented by journalists and NGOs for some time. See, e.g., CTR. FOR CIVILIANS IN CONFLICT & HUMAN RIGHTS CLINIC AT COLUMBIA LAW SCH., *THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS* 10, 65 (2012) [hereinafter *CIVILIAN IMPACT OF DRONES*], pp. 7-8.
30. In 2016, the U.S. government stated that it had designated al-Shabaab as an “associated force” of al-Qaeda, meaning that the government believed it had legal authority to target members of al-Shabab. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5. See also Ryan Goodman, *State Dep’t Legal Adviser’s Answer to “Acute Question” on US Mil. Action against Al-Shabaab*, JUST SECURITY (Nov. 1, 2016), [www.justsecurity.org/34038/state-dept-legal-advisers-answer-acute-question-military-action-al-shabaab/](http://www.justsecurity.org/34038/state-dept-legal-advisers-answer-acute-question-military-action-al-shabaab/); Stephen W. Preston, General Counsel of the Department of Defense, Address at the Annual Meeting of the American Society of International Law: The Legal Framework for the United States’ Use of Military Force Since 9/11, (Apr. 10, 2015), [www.defense.gov/News/Speeches/Speech-View/Article/606662](http://www.defense.gov/News/Speeches/Speech-View/Article/606662) [hereinafter Preston, Legal Framework].
31. See, e.g., AMNESTY INT’L, ‘THE HANDS OF CRUELTY:’ ABUSES BY ARMED FORCES AND TALIBAN IN PAKISTAN’S TRIBAL AREAS (2012), [www.amnestyusa.org/research/reports/the-hands-of-cruelty-abuses-by-armed-forces-and-taliban-in-pakistan-s-tribal-areas](http://www.amnestyusa.org/research/reports/the-hands-of-cruelty-abuses-by-armed-forces-and-taliban-in-pakistan-s-tribal-areas); U.N. Secretary-General, *Children and Armed Conflict*, A/70/836-S/2016/360 (April 20, 2016), [www.un.org/ga/search/view\\_doc.asp?symbol=s/2016/360&referer=/english/&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=s/2016/360&referer=/english/&Lang=E).
32. Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, on Ensuring al-Qa’ida’s Demise, (Jun. 29, 2011), [www.whitehouse.gov/the-press-office/2011/06/29/remarks-john-o-brennan-assistant-president-homeland-security-and-counter](http://www.whitehouse.gov/the-press-office/2011/06/29/remarks-john-o-brennan-assistant-president-homeland-security-and-counter) [hereinafter Brennan Speech 2011]. In the question-and-answer session afterwards, Brennan stated that “for the past year, there has not been a single, collateral, death because of the exceptional proficiency, precision of the capabilities we’ve been able to develop.” See C-SPAN, *Brennan on Drone Civilian Casualties* (Jun. 29, 2011), [www.c-span.org/video/?c4483994/brennan-drone-civilian-casualties](http://www.c-span.org/video/?c4483994/brennan-drone-civilian-casualties).
33. Obama State of the Union, Feb. 2013, *supra* note 11.
34. DNI SUMMARY 2016, *supra* note 5; DNI Summary 2017, *supra* note 6.
35. See, e.g., Zenko, Numbers, *supra* note 13, in which Zenko suggests that as of July 3, 2016, the U.S. government had carried out 528 strikes under the Obama Administration, killing 4,189 persons, of whom 474 were estimated to be civilians. Zenko made his estimate based on the data collected by the New America Foundation, the Long War Journal, and The Bureau of Investigative Journalism. While those figures are not precise estimates—they are gathered using varying methodologies and primarily based on secondary sources—they do give an indication of the large discrepancy with the figures provided by the government. See also Farea al-Muslimi, *Letter to the Editor: Drone warfare and civilian deaths*, N.Y. TIMES (Mar. 1, 2016), [www.nytimes.com/2016/03/02/opinion/letters-to-the-editor.html?\\_r=1](http://www.nytimes.com/2016/03/02/opinion/letters-to-the-editor.html?_r=1) (“General Hayden argues that civilian deaths have been both minimal and justified. But the United States has refused to provide evidence to support these statements and left unanswered credible reports of civilian casualties. In my research, I found that many of those killed by the United States were civilians. In my village, residents were unable to rescue strike victims because of their fears that they would be killed in a “double tap” strike.”)
36. See e.g. Cheryl Pellerin, *Pentagon Spokesman Updates Iraq, Syria, Yemen Operations* (Apr. 27, 2017) [www.defense.gov/News/Article/Article/1161065/pentagon-spokesman-updates-iraq-syria-yemen-operations/](http://www.defense.gov/News/Article/Article/1161065/pentagon-spokesman-updates-iraq-syria-yemen-operations/) (noting that “since February 28” the United States has “conducted more than 80 precision strikes against AQAP militants, infrastructure, fighting positions and equipment, and we’ll continue to conduct operations including strikes against known terrorists.”); see also Eli Watkins and Joyce Tseng, *US strikes Yemen more in a few weeks than it did all last year*, CNN (Apr. 4, 2017) [www.cnn.com/2017/04/04/politics/yemen-strikes-us-involvement/](http://www.cnn.com/2017/04/04/politics/yemen-strikes-us-involvement/).
37. *World of Drones: Military*, INT’L SECURITY, <http://securitydata.newamerica.net/world-drones.html> (last visited May 30, 2017).

38. *Id.*
39. *Id.*
40. *Air Force drone hits Boko Haram's base in Sambisa*, NATION (Feb. 3, 2016) <http://thenationonlineng.net/air-force-drone-hits-boko-harams-base-in-sambisa/> (quoting Director of Public Relations and Information of the Nigerian Air Force, Group Captain Ayodele Famuyiwa as stating that the “Nigerian Air Force Unmanned Combat Aerial Vehicle (UAV) has destroyed a logistics base used by members of the Boko Haram Terrorists (BHT) group”).
41. Usman Ansari, *Pakistan Surprises Many With First Use of Armed Drone*, DEFENSE NEWS (Sept. 8, 2015), [www.defensenews.com/story/defense/air-space/strike/2015/09/08/pakistan-surprises-many-first-use-armed-drone/71881768/](http://www.defensenews.com/story/defense/air-space/strike/2015/09/08/pakistan-surprises-many-first-use-armed-drone/71881768/).
42. MICAH ZENKO & SARAH E. KREPS, *LIMITING ARMED DRONE PROLIFERATION 3* (Council on Foreign Relations, Council Special Report No. 69, June 2014).
43. For a summary of these debates, see SARAH KNUCKEY, *DRONES AND TARGETED KILLINGS: ETHICS, LAW, POLITICS 13-21* (Sarah Knuckey ed., 2015) [hereinafter KNUCKEY, *DRONES AND TARGETED KILLINGS*].
44. *See, e.g.*, STIMSON CENTER, *RECOMMENDATIONS AND REPORT OF THE TASK FORCE ON U.S. DRONE POLICY 10* (2d ed. 2015) [hereinafter STIMSON TASK FORCE REPORT]; *see also* Zenko, *Reforming*, *supra* note 24, at 23.
45. *See, e.g.*, Statement of Farea al-Muslimi, in KNUCKEY, *DRONES AND TARGETED KILLINGS*, *supra* note 43, at 65-81 [hereinafter Statement of Farea al-Muslimi]; David Kilcullen & Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. TIMES (May 16, 2009), [www.nytimes.com/2009/05/17/opinion/17exum.html?\\_r=0](http://www.nytimes.com/2009/05/17/opinion/17exum.html?_r=0); Ibrahim Mothana, *How Drones Help Al Qaeda*, in KNUCKEY, *DRONES AND TARGETED KILLINGS*, *supra* note 43, at 82-85. *But see* Aqil Shah, *Drone blowback in Pakistan is a myth. Here's why*, WASH. POST (May 17, 2016), [www.washingtonpost.com/news/monkey-cage/wp/2016/05/17/drone-blow-back-in-pakistan-is-a-myth-heres-why/](http://www.washingtonpost.com/news/monkey-cage/wp/2016/05/17/drone-blow-back-in-pakistan-is-a-myth-heres-why/) (arguing that this claim that drone strikes actually contribute to increases in terrorism is overstated).
46. John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Address at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), [www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100](http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100) [hereinafter Brennan Speech 2012].
47. *See* CIVILIAN IMPACT OF DRONES, *supra* note 29; Statement of Farea al-Muslimi, *supra* note 45; While the United States has never officially repudiated such a claim, *see* Daniel Byman, *Why Drones Work: The Case for Washington's Weapon of Choice*, in KNUCKEY, *DRONES AND TARGETED KILLINGS*, *supra* note 43, at 46-56 (arguing that the program has eliminated senior Al Qaeda and Taliban leaders).
48. Brennan Speech 2012, *supra* note 46; Kenneth Anderson, *The Case for Drones*, in KNUCKEY, *DRONES AND TARGETED KILLINGS*, *supra* note 43.
49. For questions surrounding the purported accuracy of drone strikes, *see* ZENKO, *REFORMING*, *supra* note 24, at 6-7, where Zenko highlights that “the precision and discrimination of drones are only as good as the supporting intelligence, which is derived from multiple sources.”
50. John Kaag & Sarah Kreps, Opinion, *The Moral Hazards of Drones*, N.Y. TIMES (July 22, 2012, 5:15 PM), [http://opinionator.blogs.nytimes.com/2012/07/22/the-moral-hazard-of-drones/?\\_r=0](http://opinionator.blogs.nytimes.com/2012/07/22/the-moral-hazard-of-drones/?_r=0) [hereinafter Kaag & Kreps, *Moral Hazards*]; *see also* James Igoe Walsh & Marcus Schulzke, *The Ethics of Drone Strikes: Does Reducing the Cost of Conflict Encourage War?*, (September 2015) [www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=1289](http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=1289).
51. *See, e.g.*, Philip Alston & Hina Shamsi, *A killer above the law?* THE GUARDIAN (Feb. 8, 2010), [www.theguardian.com/commentisfree/2010/feb/08/afghanistan-drones-defence-killing](http://www.theguardian.com/commentisfree/2010/feb/08/afghanistan-drones-defence-killing).

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58. Memorandum from President Barack Obama to the Heads of Exec. Dep'ts and Agencies, Transparency and Open Government (Jan. 21, 2009), [www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2009/m09-12.pdf](http://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2009/m09-12.pdf).
59. In this report, the terms “strike” and “strikes” are used broadly to include U.S. airstrikes (including drone strikes), missile attacks, and ground operations.
60. See Asma Jahangir (Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions), ¶¶ 37–39, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003).
61. CNN Late Edition with Wolf Blitzer, CNN (Nov. 10, 2002), [www.cnn.com/TRANSCRIPTS/0211/10/le.00.html](http://www.cnn.com/TRANSCRIPTS/0211/10/le.00.html); *U.S. missile strike kills al Qaeda chief*, CNN (Nov. 5, 2002), <http://edition.cnn.com/2002/WORLD/meast/11/05/yemen.blast/>.
62. Letter from Jeffrey de Laurentis, Chief of Section, Political and Specialized Agencies, of the U.S. Mission in Geneva, to the Secretariat of the Commission on Human Rights (Apr. 14, 2003), as available in Commission on Human Rights, *Letter from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America* at 2, E/CN.4/2003/G/80 (Apr. 22, 2003).
63. Letter from Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, to the U.S. Mission to Geneva ¶ 41 (Aug. 26, 2005), as available in Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Philip Alston: Summary of Cases Transmitted to Governments and Replies Received at 264–65, E/CN.4/2006/53/Add.1 (Mar. 27, 2006).
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65. Letter from Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions & Martin Scheinin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, to the U.S. Mission to Geneva (Mar. 7, 2006), as available in Human Rights Council, *Communications to and from Governments* at 346–61, A/HRC/4/20/Add.1 (Mar. 12, 2007).
66. *Id.* at 346–358.
67. *Id.* at 358–361.
68. Letter from the U.S. Mission in Geneva to Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (May 4, 2006), as available in Human Rights Council, *Communications to and from Governments* at 344–46, A/HRC/4/20/Add.1 (Mar. 12, 2007).
69. See, e.g., CENTER FOR CIVILIANS IN CONFLICT, UNITED STATES MILITARY COMPENSATION TO CIVILIANS IN ARMED CONFLICT 2 (2010) [hereinafter CIVIC, CIVILIANS IN ARMED CONFLICT]; Mirza Shahzad Akbar, *Pakistan's Civilian Victims of Drone Strikes Deserve Justice*, GUARDIAN (Jun. 29, 2011), [www.theguardian.com/commentisfree/cifamerica/2011/jun/29/cia-drone-strike-civilian-victims](http://www.theguardian.com/commentisfree/cifamerica/2011/jun/29/cia-drone-strike-civilian-victims); Reprieve, *Complaint Against the United States of America for the Killing of Innocent Citizens of the Islamic Republic of Pakistan to the UN Human Rights Council* (Feb. 23, 2012), [www.reprieve.org.uk/wp-content/uploads/2015/03/2012\\_02\\_22\\_PUB-FINAL-UN-HRC-Complaint.pdf](http://www.reprieve.org.uk/wp-content/uploads/2015/03/2012_02_22_PUB-FINAL-UN-HRC-Complaint.pdf); REPRIEVE, *Pakistani Human Rights Group Calls for UN Resolution to End CIA Drone Strikes* (Feb. 1, 2012), [www.reprieve.org.uk/press/2012\\_02\\_01\\_ffr\\_drones\\_pakistan\\_un](http://www.reprieve.org.uk/press/2012_02_01_ffr_drones_pakistan_un); AMNESTY, *WILL I BE NEXT?*, *supra* note 23; CIVILIAN IMPACT OF DRONES, *supra* note 29; COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC, *COUNTING DRONE STRIKE DEATHS* (October 2012), [www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf](http://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf) [hereinafter Columbia, *Counting Drone Strike Deaths*]; INT'L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC, STANFORD LAW SCH. & GLOBAL JUSTICE CLINIC, NYU SCH. OF LAW, *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM U.S. DRONE PRACTICES IN PAKISTAN* (2012) [hereinafter STANFORD & NYU, *LIVING UNDER DRONES*]; HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF U.S. TARGETED KILLINGS IN YEMEN (2013) [hereinafter HRW, *BETWEEN A DRONE AND AL QAEDA*]; HUMAN RIGHTS WATCH, *A WEDDING THAT BECAME A FUNERAL* (2014) [hereinafter HRW, *Wedding Became a Funeral*]; OPEN SOC'Y FOUNDS., *AFTER THE DEAD ARE COUNTED: U.S. AND PAKISTANI RESPONSIBILITIES TO VICTIMS OF DRONE STRIKES* (2014) [hereinafter OPEN SOC'Y FOUNDS., *AFTER THE DEAD ARE COUNTED*]; OSJI & MWATANA, *DEATH BY DRONE*, *supra* note 3; REPRIEVE, *YOU NEVER DIE TWICE: MULTIPLE KILLS IN THE U.S. DRONE PROGRAM* (Nov. 2014), [www.reprieve.org/wp-content/uploads/2014\\_11\\_24\\_PUB-You-Never-Die-Twice-Multiple-Kills-in-the-US-Drone-Program-1.pdf](http://www.reprieve.org/wp-content/uploads/2014_11_24_PUB-You-Never-Die-Twice-Multiple-Kills-in-the-US-Drone-Program-1.pdf).



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87. COLUMBIA, COUNTING DRONE STRIKE DEATHS, *supra* note 69.
88. CIVILIAN IMPACT OF DRONES, *supra* note 29, at 61.

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103. U.N. General Assembly, 27th meeting of the Third Committee, 68th General Assembly, <http://webtv.un.org/meetings-events/general-assembly/watch/third-committee-27th-meeting-68th-general-assembly/2777317047001#full-text> (Pakistan stated that the killing of civilians “undoubtedly raises issues of accountability and transparency;” the European Union stated that “[s]tates should be transparent about their policies on the use of armed drones;” Brazil highlighted that the use of drones runs counter to recommendation made in the report of the Special Rapporteur on counter-terrorism and human rights that “operators must not be placed within a chain of command that requires them to report within institutions that are unable to disclose their operations;” Switzerland stated that “[i]t is fundamental to have more transparency in this area and to ensure that the victims of international rights violations will benefit from effective justice;” Russia stated that it is important to “ensure transparency in the use of drones;” Azerbaijan stated that “we share the concern expressed by a number of States over the lack of transparency over the use of drones”).
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109. Letter from Am. Civ. Liberties Union et al. to President Barack Obama, *Shared Concerns Regarding U.S. Drone Strikes and Targeted Killings* (Apr. 11, 2013), [www.aclu.org/other/letter-president-and-statement-targeted-killing](http://www.aclu.org/other/letter-president-and-statement-targeted-killing). This initial NGO coalition included the American Civil Liberties Union, Amnesty International and Amnesty International USA, Center for Human Rights & Global Justice at NYU School of Law, Center for Civilians in Conflict, Center for Constitutional Rights, Global Justice Clinic at the NYU School of Law, Human Rights Clinic at Columbia Law School, Human Rights First, Human Rights Institute at Columbia Law School, Human Rights Watch, and Open Society Foundations. Other organizations, including The Constitution Project, Defending Dissent Foundation, European Center for Constitutional and Human Rights, Friends Committee on National Legislation, International Commission of Jurists, National Religious Campaign Against Torture, Peace Action West, Reprieve, and Win Without War, have also participated in some of these letters. Since this initial letter in 2013, this same coalition has since written on a number of occasions to reiterate many of the same calls. See, e.g., Letter from Am. Civ. Liberties Union et al., to Senators Thomas Carper & Tom Coburn, *On the Senate Homeland Sec. Comm., Upcoming Confirmation Hearing for Jeh Johnson to be Secretary of the Department of Homeland Security* (Nov. 12, 2013), [www.aclu.org/other/human-rights-and-civil-liberties-coalition-letter-questions-dhs-nominee-jeh-johnsons-role?redirect=human-rights-and-civil-liberties-coalition-letter-questions-dhs-nominee-jeh-johnsons-role-targeted](http://www.aclu.org/other/human-rights-and-civil-liberties-coalition-letter-questions-dhs-nominee-jeh-johnsons-role?redirect=human-rights-and-civil-liberties-coalition-letter-questions-dhs-nominee-jeh-johnsons-role-targeted); Letter from Am. Civ. Liberties Union et al., to President Barack Obama, *Shared Concerns Regarding U.S. Drone Strikes and Targeted Killings* (Dec. 4, 2013), [www.aclu.org/other/coalition-human-rights-and-civil-liberties-organizations-share-concerns-administrations](http://www.aclu.org/other/coalition-human-rights-and-civil-liberties-organizations-share-concerns-administrations).
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192. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 18.
193. *Id.*
194. *Id.*, at 17.
195. *Id.*
196. al-Aulaqi Memorandum, *supra* note 123, at 27; *see also* Ryan Goodman, *The OLC’s Drone Memo and International Law’s Ascendance*, JUST SECURITY (Jun. 24, 2014), [www.justsecurity.org/12142/olc-memo-drones-international-law-goodman/](http://www.justsecurity.org/12142/olc-memo-drones-international-law-goodman/) (discussing OLC footnote).
197. Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, ¶ 9, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).
198. For example, the al-Aulaqi Memorandum and other disclosures rely heavily on the AUMF as permitting targeted killings. al-Aulaqi Memorandum, *supra* note 123; *See also* Charlie Savage, *Was Trump’s Syria Strike Illegal? Explaining Presidential War Powers*, N.Y. Times (Apr. 7, 2017), [www.nytimes.com/2017/04/07/us/politics/military-force-presidential-power.html](http://www.nytimes.com/2017/04/07/us/politics/military-force-presidential-power.html) (writing that the President’s authority to unilaterally use force is limited by the War Powers Resolution of 1973 which provides that the President cannot introduce forces into hostilities without consultation with Congress unless the United States is attacked. The article however, further notes that both President Obama and President Trump have acted “beyond the statute’s purported constraint” where presidential war powers have expanded by overseas counterterrorism actions as witness in Libya and Syria).
199. *See* Annex, in particular regarding how “Associated Forces” is defined.
200. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 5 and 16.
201. *Id.* at 17.



202. *Id.* at 21–23; al-Aulaqi Memorandum, *supra* note 123, at 16–18. *See also* Holder Speech 2012, *supra* note 52 (“But it does mean that the government must take into account all relevant constitutional considerations with respect to United States citizens—even those who are leading efforts to kill innocent Americans. Of these, the most relevant is the Fifth Amendment’s Due Process Clause, which says that the government may not deprive a citizen of his or her life without due process of law.”); Note that President Obama in a 2013 speech said that the “same standards” applied to U.S. citizens as to non-U.S. citizens, which is not the same as explaining in detail the legal application of the Constitution to non-U.S. citizens. Obama NDU Speech, *supra* note 11.
203. *See* DOJ White Paper, *supra* note 132.
204. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 8.
205. In a 2012 speech at Harvard Law School, then CIA General Counsel Stephen Preston stated that the U.S. raid on Osama bin Laden’s compound in Abbottabad, Pakistan was “in complete accordance with applicable U.S. and international legal restrictions and principles,” although he didn’t explicitly state what he believed the applicable legal rules to be. Preston CIA Speech, *supra* note 98.
206. *Id.* at 19–21.
207. *Id.* at 8 (“Moreover, although this portion of the report is focused on the *ius ad bellum*, all U.S. military operations involving the use of military force under any of the justifications noted above [including self-defense] are conducted consistent with the law of armed conflict, also known as the *ius in bello*.”). The Report makes frequent reference to the LAW OF WAR MANUAL as a reference when describing the rules and principles applicable in armed conflict. *Id.*
208. Oona Hathaway, Marty Lederman, & Michael Schmitt, *Two lingering concerns about the forthcoming Law of War Manual amendments*, JUST SECURITY (Nov. 30, 2016), [www.justsecurity.org/35025/lingering-concerns-forthcoming-law-war-manual-amendments/](http://www.justsecurity.org/35025/lingering-concerns-forthcoming-law-war-manual-amendments/); Oona Hathaway, *The Law of War Manual’s Threat to the Principle of Proportionality*, JUST SECURITY (Jun. 23, 2016), [www.justsecurity.org/31631/lowm-threat-principle-proportionality/](http://www.justsecurity.org/31631/lowm-threat-principle-proportionality/); Marty Lederman, *Troubling proportionality and rule-of-distinction provisions in the Law of War Manual*, JUST SECURITY (Jun. 27, 2016), [www.justsecurity.org/31661/law-war-manual-distinction-proportionality/](http://www.justsecurity.org/31661/law-war-manual-distinction-proportionality/).
209. LAW OF WAR MANUAL, *supra* note 185.
210. *Id.* at iii and 1.1.1 (stating that the manual is “a Department of Defense (DoD)–wide resource for DoD personnel—including commanders, legal practitioners, and other military and civilian personnel—on the law of war,” “the purpose of this manual is to provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations” and “this manual represents the legal views of the Department of Defense”).
211. “Operational Law Handbook,” Judge Advocate General’s Legal Center and School, U.S. Army, 2015, at 81, [www.loc.gov/rr/frd/Military\\_Law/pdf/operational-law-handbook\\_2015.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2015.pdf) [hereinafter OPERATIONAL LAW HANDBOOK 2015].
212. U.S. Joint Chiefs of Staff, JOINT TARGETING, Joint Publication 3–60 (Apr. 13, 2007), [www.aclu.org/foia-document/joint-targeting-joint-publication-3-60](http://www.aclu.org/foia-document/joint-targeting-joint-publication-3-60) [hereinafter 2007 JP 3–60] (disclosed pursuant to FOIA litigation by the ACLU). The April 2013 update to Joint Publication 3–60 is also available online at: [www.justsecurity.org/wp-content/uploads/2015/06/Joint\\_Chiefs-Joint\\_Targeting\\_20130131.pdf](http://www.justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf) [hereinafter 2013 JP 3–60].
213. A. Rascoe, *U.S. military probing more possibly civilian deaths in Yemen raid*, REUTERS, (Feb. 2, 2017), [www.REUTERS.com/article/us-usa-trump-commando-idUSKBN15G5RX?feedType=RSS&feedName=newsOne](http://www.REUTERS.com/article/us-usa-trump-commando-idUSKBN15G5RX?feedType=RSS&feedName=newsOne).
214. LAW OF WAR MANUAL, *supra* note 185, at 160, 222–32.
215. *See generally Id.*
216. Christof Heyns, (Special Rapporteur on extrajudicial, summary, or arbitrary executions), *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* U.N. Doc. A/HRC/26/36 (Apr. 1, 2014), ¶ 59.
217. *See, e.g.* Alston Report (A/HRC/14/24/Add.6), *supra* note 55, ¶ 85; Emmerson Report (A/68/389), *supra* note 55, ¶ 60.

218. White House, Office of the Press Secretary, Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Strengthening our Security by Adhering to our Values and Laws (Sep. 16, 2011), [www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an](http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an) [hereinafter Brennan Harvard Speech].
219. Kevin Jon Heller, *The Absence of Practice Supporting the “Unwilling or Unable” Test*, OPINIO JURIS (Feb. 17, 2015), <http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/>; Kevin Jon Heller, *The Seemingly Inexorable March of “Unwilling or Unable” Through the Academy*, OPINIO JURIS (Mar. 6, 2015), <http://opiniojuris.org/2015/03/06/the-seemingly-inexorable-march-of-unwilling-or-unable-through-the-academy/>; Jonathan Horowitz, *Does the Unwilling/Unable Test Hang on Control? A Response to Michael Lewis*, JUST SECURITY (Sept. 12, 2014), [www.justsecurity.org/14953/unwillingunable-test-hang-territorial-control-response-michael-lewis/](http://www.justsecurity.org/14953/unwillingunable-test-hang-territorial-control-response-michael-lewis/).
220. See al-Aulaqi Memorandum, *supra* note 123.
221. Consolidated Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment & in further Support of Plaintiffs’ Motion for Partial Summary Judgment, *ACLU v U.S. Dep’t of Just. et al.*, No 15-CV-01954-CM, at 6-7, 10-14 (S.D.N.Y., Dec. 1, 2015).
222. See, e.g., Gabor Rona, *The Recent Ground Raid in Yemen—What the Public is Entitled to Know*, JUST SECURITY (Feb. 6, 2017), [www.justsecurity.org/37354/ground-raid-yemen-public-entitled/](http://www.justsecurity.org/37354/ground-raid-yemen-public-entitled/).
223. Memorandum of Law in Support of the Defendants’ Motion for Summary Judgment, *ACLU v. Dep’t of Justice et al.*, No. 12-cv-00794-CM, (S.D.N.Y., June 20, 2012) (the U.S. government claimed that “as legal deliberations or legal advice, these documents are (a) pre-decisional, (a) pre-decisional, *i.e.*, were prepared in advance of Executive Branch decisions; and (b) deliberative, *i.e.*, reflect advice, the preparation of advice, or other deliberations by OLC attorneys or other Executive Branch officials in connection with those decisions. Consequently, these documents fall squarely within the deliberative process privilege. Compelled disclosure of these documents would undermine the deliberative processes of the Government and chill the candid and frank communications necessary for effective governmental decision-making.”)..
224. *Tax Analysts v. IRS*, 117 F.3d 607, 619 (D.C. Cir. 1997) (“[A]ttorney-client privilege may not be used to protect this growing body of agency law from disclosure to the public.”) (cited in Goitein, *supra* note 224, at 40).
225. THE DRONE MEMOS: TARGETED KILLINGS, SECRECY AND THE LAW, 47 (Jameel Jaffer Ed. 2016) [hereinafter Jaffer, Drone Memos]; (“The Obama administration’s arguments in court were based in part on memos written by the Office of Legal Counsel, the component of the Justice Department whose central function is to provide controlling legal advice to executive branch agencies. Practically speaking, the OLC’s opinions are often the last word on the legality of whatever action the agencies are contemplating, because many of the issues the OLC considers are never adjudicated by the courts. This is especially true in the national security realm, where the government’s policies and activities are often immunized from judicial review by secrecy and jurisdictional doctrines.”).
226. Jaffer, Drone Memos, *supra* note 225, AT 47 [hereinafter Jaffer, Drone Memos]; Liza Goitein, *The New Era of Secret Law*, BRENNAN CENTER FOR JUSTICE, 2016, at 36-37.
227. President’s Statement on Deaths of Weinstein and Lo Porto, *supra* note 15.
228. The White House Office of the Press Sec’y, Press Briefing by Senior Administration Officials on the Killing of Osama bin Laden (May 2, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/05/02/press-briefing-senior-administration-officials-killing-osama-bin-laden> [hereinafter bin Laden Press Briefing].
229. Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden*, N.Y. TIMES (Oct. 28, 2015), [www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html?\\_r=0](http://www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html?_r=0).
230. bin Laden Press Briefing, *supra* note 228.
231. Dep’t of Defense, Statement by Pentagon Press Secretary Peter Cook on U.S. Airstrikes Against Taliban Leader Mullah Mansur, Release No: NR-183-16 (May 21, 2016), [www.defense.gov/News/News-Releases/News-Release-View/Article/778259/statement-by-pentagon-press-secretary-peter-cook-on-us-airstrike-against-taliba/](http://www.defense.gov/News/News-Releases/News-Release-View/Article/778259/statement-by-pentagon-press-secretary-peter-cook-on-us-airstrike-against-taliba/) [hereinafter Pentagon Mansur Statement].

232. bin Laden Press Briefing, *supra* note 228.
233. Aidan Lewis, *Osama Bin Laden: Legality of killing questioned*, BBC (May 12, 2011), [www.bbc.com/news/world-south-asia-13318372](http://www.bbc.com/news/world-south-asia-13318372).
234. bin Laden Press Briefing, *supra* note 228.
235. Preston CIA Speech, *supra* note 98.
236. President's Statement on Deaths of Weinstein and Lo Porto, *supra* note 15.
237. Press Briefing, The White House, Press Briefing by the Press Secretary (Apr. 23, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/04/23/press-briefing-press-secretary-josh-earnest-4232015> [hereinafter Weinstein & Lo Porto Press Briefing].
238. Pentagon Mansur Statement, *supra* note 231.
239. See, e.g., U.S. AFRICA COMMAND, *U.S. self-defense strikes in Somalia* (Sept. 27, 2016), [www.africom.mil/media-room/pressrelease/28414/u-s-self-defense-strikes-in-somalia](http://www.africom.mil/media-room/pressrelease/28414/u-s-self-defense-strikes-in-somalia); U.S. AFRICA COMMAND, *U.S. Self-Defense Strike in Somalia* (Jan. 10, 2017), [www.africom.mil/media-room/pressrelease/28590/u-s-self-defense-strike-in-somalia](http://www.africom.mil/media-room/pressrelease/28590/u-s-self-defense-strike-in-somalia).
240. U.S. AFRICA COMMAND, *U.S. Africa Command Completes Assessment on Galcayo Strike* (Nov. 15, 2016), [www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike](http://www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike).
241. U.S. AFRICA COMMAND, *UPDATE: U.S. self-defense strikes in Somalia* (Sept. 29, 2016), [www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia](http://www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia).
242. U.S. AFRICA COMMAND, *U.S. Africa Command Completes Assessment on Galcayo Strike* (Nov. 15, 2016), [www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike](http://www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike).
243. See al-Aulaqi Memorandum, *supra* note 123; DOJ White Paper, *supra* note 123.
244. Fonzone and Pomper, *supra* note 7 (“Against such a backdrop, it is essential that the United States take actions pursuant to a playbook [the Presidential Policy Guidance] that not only ensures the lawfulness, legitimacy, and sustainability of operations from the U.S. government’s perspective, but also takes into account what will make them lawful, legitimate, and sustainable from the perspective of our key partners.”). Note: Both Fonzone and Pomper served with the Obama administration on the staff of the National Security Council.
245. See, e.g. Letter from Am. Civ. Liberties Union et al., to Lt. Gen. H.R. McMaster, Jr., *supra* note 152 (“We urge you to strengthen and improve, not weaken, the standards for the use of force contained in the Presidential Policy Guidance adopted in May 2013. This policy, which applies outside “areas of active hostilities,” contains some standards that are contrary to what is legally required outside of armed conflict situations—concerns that many of the undersigned human rights and civil liberties groups have previously detailed elsewhere.”); Naz Modirzadeh, *A Reply to Marty Lederman*, LAWFARE (Oct. 3, 2014), [www.lawfareblog.com/reply-marty-lederman](http://www.lawfareblog.com/reply-marty-lederman). (“The authors knew that they were writing a policy for something they anticipated would be criticized for being unlawful under existing ad bellum rules, so they threw in a lot of nice concepts from IHL and IHRL. The PPG seems to read IHL standards up (going beyond LOAC binding in armed conflict), to read IHRL down (going below the strict limitations on the lethal use of force in peacetime), and to render respect for territorial sovereignty almost entirely at the pleasure of the U.S. President.”); HRW, *US: Counterterrorism Report Sets Standards* (Dec. 6, 2016), [www.hrw.org/news/2016/12/06/us-counterterrorism-report-sets-standards](http://www.hrw.org/news/2016/12/06/us-counterterrorism-report-sets-standards) (“While the PPG includes some important restraints on U.S. targeting operations, many of these situations should instead be covered by international human rights law. This means that outside armed conflict a government may use lethal force only as a last resort to stop an imminent threat to human life. Human Rights Watch has documented instances when the U.S. government has applied lethal force in apparent violation of both the laws of war and international human rights law. In Yemen, for example, Human Rights Watch investigated seven U.S. air strikes where civilians were alleged to have been killed that took place from 2009 to 2013 and found that at least 57 of the 82 people killed were civilians, along with possibly 14 others, 12 of them in a strike on a wedding convoy.”).
246. Obama NDU Speech, *supra* note 11.

247. PPG Fact Sheet, *supra* note 17.
248. PPG, *supra* note 16.
249. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at ii.
250. PPG, *supra* note 16, at 1.
251. REPORT ON PROCESS, *supra* note 144, at 3; DOJ White Paper, *supra* note 132, at 1; al-Aulaqi Memorandum, *supra* note 123, at 27.
252. PPG, *supra* note 16, at 3; DOJ White Paper, *supra* note 132, at 1; REPORT ON PROCESS, *supra* note 144, at 1.
253. PPG, *supra* note 16, at 1; REPORT ON PROCESS, *supra* note 144, at 1.
254. REPORT ON PROCESS, *supra* note 144, at 3; DOJ White Paper, *supra* note 132, at 1-2; PPG, *supra* note 16, at 1.
255. DOJ White Paper, *supra* note 132, at 8; REPORT ON PROCESS, *supra* note 144, at 2; PPG, *supra* note 16, at 1; Exec. Order No. 13,732, 81 Fed. Reg. 44483 (2016).
256. PPG, *supra* note 16, at 1, 3.
257. REPORT ON PROCESS, *supra* note 144, at 5; PPG, *supra* note 16, at 1, 3.
258. The Global Principles on National Security and the Right to Information, at 20–21, Princ. 4 (Tshwane Principles) (June 2013), [www.opensocietyfoundations.org/fact-sheets/tshwane-principles-national-security-and-right-information-overview-15-points](http://www.opensocietyfoundations.org/fact-sheets/tshwane-principles-national-security-and-right-information-overview-15-points) [hereinafter Tshwane Principles].
259. *Memorandum Decision and Order Rescinding the Government's and Plaintiffs' Respective Motions for Summary Judgment*, at 44–65, *Am. Civ. Liberties Union et al. v Department of Justice et al.*, No. 15-CIV-1954-CM (S.D.N.Y. Aug. 8, 2016) (some information was included in the redacted court's decision regarding the government's justification for non-disclosure of: references to certain government officials and components (on the basis that it could endanger these individuals in the context of law enforcement and had never been made public before, both of which the court rejected); intelligence criteria for direct targeting (that it was classified for reasons of national defense or foreign policy, or by other statutes, which the court upheld)).
260. Exec. Order No. 13732, *supra* note 139.
261. “Reduce the likelihood” is a lower standard than that required by international humanitarian law, which requires parties to a conflict to take all feasible precautions to avoid, and in any event to minimize civilian casualties. ICRC Customary IHL Study, *supra* note 165, Rule 15.
262. PPG, *supra* note 16, at 1.
263. DNI SUMMARY 2016, *supra* note 5.
264. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5.
265. *Id.* at 25; THE WHITE HOUSE, LETTER FROM THE PRESIDENT—SUPPLEMENTAL 6-MONTH WAR POWERS LETTER (Dec. 5, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/05/letter-president-supplemental-6-month-war-powers-letter>.
266. Charlie Savage, Eric Schmitt, and Mark Mazzetti, Obama Expands War With Al Qaeda to Include Shabab in Somalia, N.Y. TIMES (Nov. 27, 2016), [www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html](http://www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html).
267. Charlie Savage & Eric Schmitt, *Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules* N.Y. TIMES (Mar. 30, 2017), [www.nytimes.com/2017/03/12/us/politics/trump-loosen-counterterrorism-rules.html](http://www.nytimes.com/2017/03/12/us/politics/trump-loosen-counterterrorism-rules.html); Charlie Savage & Eric Schmitt, *Trump Eases Combat Rules in Somalia Intended to Protect Civilians*, N.Y. TIMES (Mar. 30, 2017), [www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html?\\_r=1](http://www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html?_r=1).
268. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 25; Egan Speech, *supra* note 138.
269. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 25.
270. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5.

271. For example, the DOJ White Paper, *supra* note 132, at 2, appears to state that “imminence” and “feasibility” of capture are legal requirements, while the REPORT ON PROCESS, *supra* note 144, at 6–7, includes these requirements under the heading “Policy Considerations” and the PPG, *supra* note 16, at 1, explicitly states that the prioritization of capture over lethal action is a matter of “policy.”
272. Egan Speech, *supra* note 138.
273. Exec. Order No. 13732, *supra* note 139.
274. LAW OF WAR MANUAL, *supra* note 185, ¶ 5.11.
275. ICRC Customary IHL Study, *supra* note 165 (Rule 15 requires that “All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.” Emphasis added).
276. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5.
277. See U.N. Charter, art. 51; see also Antonio Cassese, INTERNATIONAL LAW 313–16 (2d ed. 2005); Heyns Report A/6/382, *supra* note 8, ¶ 94.
278. UN Charter, arts. 39, 42, 51; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14, ¶¶ 51, 62 (Jun. 27).
279. *Id.* In terms of what “immediately” means, Professor James A. Green states that “Of course, Article 51 does not give any indication as to how the qualifier “immediately” is to be interpreted, but it should be kept in mind that—theoretically at least—when a state is invoking self-defense, it is doing so because it is under attack. Setting the concept of “immediacy” in the context of a state suffering an armed attack, where the procedural requirement to report may understandably not be a priority, a delay of a week or even more would seem to be reasonably “immediate.” It may, therefore, be said that, to the extent that the time taken for a state to report can be identified, reporting commonly occurs within a relatively short period.” State practice before the Security Council largely mirrors this interpretation. See James A. Green, *Article 51 Reporting for Self-Defense Actions*, 55 VIRGINIA J. INT’L L. 564, 596–99 (2015). A failure to report constitutes a breach of a state’s procedural obligations to report under Article 51, but does not invalidate an otherwise meritorious claim of self-defense. See Tom Ruys, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER 72 (2010) (arguing that “The view that the duty to report is a procedural obligation with evidential impact, but not an integral part of the substantive conditions of self-defense is shared by a majority of scholars.”); see also Yoram Dinstein, WAR, AGGRESSION, AND SELF-DEFENSE 191 (2001) (noting that “a failure [. . .] to formally invoke self-defence should not be fatal, provided that the substantive conditions for the exercise of this right are met”).
280. Green, *supra* note 279, at 597. For instance, the Soviet Union and the United States both took the view that the use of force by the United Kingdom against Yemen in 1963–1964 was an act of aggression rather than genuine self-defense, in part because the justification should have been submitted earlier to the Security Council than it was. See The United Nations Yearbook, Political and Security Questions: Questions Concerning the Middle East, at 184 U.N. Sales No. 65:1:1 (1964).
281. See T.D. Gill, *When Does Self-Defense End?*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 748 (Marc Weller ed., 2015) (discussing the potential limits on the use of self-defense from which a corresponding analysis of the reporting requirement can be extrapolated).
282. See Heyns Report (A/68/382), *supra* note 8.
283. Green, *supra* note 279, at 602–03; see also Heyns Report (A/68/382), *supra* note 8.
284. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14, ¶ 200 (Jun. 27); see also Heyns Report (A/68/382), *supra* note 8 (stating that “failure to report will not render unlawful an otherwise lawful action taken in self-defense, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defense”).
285. U.N. Charter, art. 51; see also Green, *supra* note 279, at 602–3.
286. Green, *supra* note 279, at 571–72 (noting that reporting other than the form of a formal written report is now extremely uncommon).

287. *Id.* at 582 (noting that the provision of additional detail in reports submitted by Pakistan regarding its tensions with India over Kashmir usefully highlighted developments in the dispute in intervening years and provided a means by which to assess the conflict).
288. See DOJ White Paper, *supra* note 132, at 2. (stating that “the President’s use of force against al-Qa’ida and associated forces is lawful under other principles of U.S. and international law, including the President’s constitutional responsibility to protect the nation and the inherent right to national self-defense recognized in international law”); see also KOH SPEECH, *supra* note 77 (In March 2010, Koh justified U.S. “targeted killing” operations against Al-Qaeda, the Taliban, and “associated forces” in “response to 9/11 attacks,” and “consistent with the right of self-defense under international law.”); Preston, Legal Framework, *supra* note 30 (affirming that the United States is using “force against ISIL in collective self-defense of Iraq and national self-defense, and [has] notified the U.N. Security Council that it is taking these actions in Syria consistent with Article 51 of the U.N. Charter.”); Egan Speech, *supra* note 138.
289. Samantha Power, Letter dated Oct 15, 2016 from the Permanent Rep. of United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/869 (Oct. 15, 2016), [www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2016\\_869.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_869.pdf) [hereinafter Power, Oct 2016 Letter].
290. John D. Negroponte, Letter dated Oct. 7, 2001, from the Permanent Rep. of the United States of America to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) [hereinafter Negroponte 2001 Letter]. See also Egan Speech, *supra* note 138 (Possibly implying that the United States doesn’t believe additional notifications are required regarding the use of force against an armed group in a new state. “In the view of the United States, once a State has lawfully resorted to force in self-defense against a particular armed group following an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is imminent prior to every subsequent action taken against that group, provided that hostilities have not ended.”).
291. Power, Oct 2016 Letter, *supra* note 289 (“These actions were taken with the consent of the Government of Yemen. Although the United States therefore does not believe notification pursuant to Article 51 of the Charter of the United Nations is necessary in these circumstances, the United States nevertheless wishes to inform the Council that these actions were taken consistent with international law.”). The U.S. government invoked both self-defense and consent as justifications for the use of force in Somalia and Yemen in its December 2016 Report on Legal and Policy Frameworks. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 17-18.
292. Ashley Deeks, *A Call for Article 51 Letters*, LAWFARE (Jun. 25, 2014), [www.lawfareblog.com/call-article-51-letters](http://www.lawfareblog.com/call-article-51-letters) (“Article 51 letters allow international law on the use of force to develop in a clearer, more comprehensive way, and the Security Council should insist on stricter compliance with the Charter’s reporting requirement.”).
293. Egan Speech, *supra* note 138; REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 11.
294. Emmerson Report (A/68/389), *supra* note 55, ¶¶ 53-54; Bronwyn Bruton & Paul D. Williams, *Cut-Rate Counterterrorism: Why America can no longer afford to outsource the war on al-Shabab*, FOREIGN POLICY (Oct. 8, 2013), <https://foreignpolicy.com/2013/10/08/cut-rate-counterterrorism/> (arguing that the U.S. government’s support of corrupt government, incapable of governing, and lacking popularity across the country means that it has had to rely on the African Union Mission in Somalia rather than the government, as a supposedly more reliable local partner to aid in its counterinsurgency effort); Charlene Anne, *US drone strikes resume in Yemen despite power vacuum*, AL-JAZEERA (Feb 5. 2015), [www.aljazeera.com/news/2015/02/drone-strikes-resume-yemen-power-vacuum-150204091536626.html](http://www.aljazeera.com/news/2015/02/drone-strikes-resume-yemen-power-vacuum-150204091536626.html).
295. *Secret memos ‘show Pakistan endorsed US drone strikes’*, BBC (Oct. 24, 2013), [www.bbc.com/news/world-asia-24649840](http://www.bbc.com/news/world-asia-24649840).

296. After reviewing Pakistani practice, public statements, and a Pakistani parliamentary resolution on terms of engagement with the United States, the U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stated in his 2013 report to the U.N. General Assembly, stated that he “considers that the continued use of remotely piloted aircraft in the Federally Administered Tribal Areas amounts to a violation of Pakistani sovereignty, unless justified under the international law principle of self-defence,”. Emmerson Report (A/68/389), *supra* note 55, ¶ 54.
297. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 17–18.
298. THE WHITE HOUSE, PRESIDENTIAL LETTER ON 2012 WAR POWERS RESOLUTION 6-MONTH REPORT, (Jun. 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>.
299. See, e.g., Peter Cook, *Pentagon Press Secretary on Airstrike in Somalia*, Release No: NR-076-16 (Mar. 7, 2016), [www.defense.gov/News/News-Releases/News-Release-View/Article/687305/statement-from-pentagon-press-secretary-peter-cook-on-airstrike-in-somalia](http://www.defense.gov/News/News-Releases/News-Release-View/Article/687305/statement-from-pentagon-press-secretary-peter-cook-on-airstrike-in-somalia); U.S. AFRICA COMMAND, *Update: U.S. self-defense strikes in Somalia* (Sept. 27, 2016), [www.africom.mil/media-room/pressrelease/28414/u-s-self-defense-strikes-in-somalia](http://www.africom.mil/media-room/pressrelease/28414/u-s-self-defense-strikes-in-somalia); U.S. AFRICA COMMAND, *Update: U.S. self-defense strikes in Somalia* (Sept. 29, 2016), [www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia](http://www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia).
300. Erica Gaston, *Do the strikes against al-Shabaab stretch the AUMF or the unit self-defense doctrine?* LAWFARE (Mar. 18, 2016), [www.lawfareblog.com/do-strikes-al-shabaab-stretch-aumf-or-unit-self-defense-doctrine](http://www.lawfareblog.com/do-strikes-al-shabaab-stretch-aumf-or-unit-self-defense-doctrine).
301. Hans Boddens Hosang, *Force Protection, Unit Self-Defence, and Extended Self-Defence*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 422 (Terry D. Gill & Dieter Fleck eds., 2010).
302. See REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 17.
303. Power, Oct 2016 Letter, *supra* note 289. Since 9/11, the United States has reported its use of force operations taken in self-defense or collective self-defense to the UN Security Council and pursuant to Article 51 on just three other occasions:
- On October 7, 2001, the same day the U.S. government commenced an aerial military campaign against Al-Qaeda and the Taliban in Afghanistan, justified as an act of self-defense following the armed attacks carried out against the United States on 9/11. See Negroponete 2001 Letter, *supra* note 290;
  - On June 17, 2014, after the U.S. government seized Abu Khatalla in Libya, justified as an act of self-defense following the 2012 U.S. Embassy attack. See Samantha Power, Letter dated June 18, 2014 from the Permanent Rep. of United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/417 (Jun. 18, 2014), [www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2014\\_417.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_417.pdf); and
  - On September 23, 2014, a day after using force against ISIL in Syria, where the U.S. government claimed a right to “collective self-defense” on behalf of Iraq. See Samantha Power, Letter dated Sept. 23, 2014 from the Permanent Rep. of United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/695 (Sept. 23, 2014). See also Egan Speech, *supra* note 138.
304. Power, Oct 2016 Letter, *supra* note 289.
305. *Id.*
306. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 17–18.
307. See Power, Oct 2016 Letter, *supra* note 289.
308. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5 at 17–18.
309. *Id.*
310. See e.g. PPG, *supra* note 16, at 1–2.

311. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 16-17 (stating that “as a matter of international law, U.S. counterterrorism operations in Somalia, including airstrikes, have been conducted with the consent of the Government of Somalia,” and noting that “as a matter of international law, the United States has conducted counterterrorism operations against AQAP in Yemen with the consent of the Government of Yemen in the context of the armed conflict against AQAP”).
312. Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 309 (7th ed., 2008) (asserting that “a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter”); John Lawrence Hargrove, *Intervention by Invitation and the Politics of the New World Order*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* (L. Damrosch & D. Scheffer eds., 1991).
313. U.N. Int’l Law Comm’n, *Report of the International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, art. 20, U.N. Doc. A/56/10 (2001), [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [hereinafter *Responsibility of States for Internationally Wrongful Acts*]; Vienna Convention on the Law of Treaties (1969), U.N.T.S. vol. 1155, p. 331, art. 51 (providing that “[t]he expression of a State’s consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect). *See also* Cassese, *supra* note 275 (noting that “consent must be freely given (that is, it cannot be wrested by any form of force, coercion, or duress; *coacta voluntas non est voluntas*; it must be real as opposed to merely ‘apparent’”); Heyns Report A/68/382, *supra* note 8 (stating that “consent must be *freely given* and clearly established”) (emphasis added).
314. *See* *Responsibility of States for Internationally Wrongful Acts*, *supra* note 313; Heyns Report A/68/382, *supra* note 8 (stating that “consent must be freely given and clearly established”) (emphasis added).
315. Max Byrne, *Consent and the use of force: an examination of “intervention by invitation” as a basis for US drone strikes in Pakistan, Somalia, and Yemen*, 3 *J. ON THE USE OF FORCE AND INT’L L.* 97, 104-5 (2016). This is a logical extension of the rule that consent must be “actually expressed,” and that consent can be vitiated by “error, fraud, corruption, or coercion.” If the consent does not reflect the intention of the host state, then it is not really the consent of the host state at all. *See* *Responsibility of States for Internationally Wrongful Acts*, *supra* note 311.
316. Heyns Report A/68/382, *supra* note 8 ¶ 82; *see also* *Responsibility of States for Internationally Wrongful Acts*, *supra* note 311. International law presumptively identifies that heads of state and ministers for foreign affairs are capable of expressing a state’s consent as representatives of the state. Where there is disagreement between which agent is empowered to provide consent, the view of the higher official should be seen as determinative. *See* Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/29 (1969), art. 7 (identifying individuals who may represent a state’s consent to be bound to a treaty).
317. *See* Heyns Report A/68/382, *supra* note 8, ¶ 82. (“[S]tates cannot consent to the violation of their obligations under international humanitarian law or international human rights law”); *see also* Louise Oswald-Beck, *Unexpected Challenges: The Increasingly Evident Disadvantage of Considering International Humanitarian Law in Isolation* 11 *SANTA CLARA J. INT’L L.* 1, 11 (2012) (a “state has human rights obligations toward those within its jurisdiction and normally extra-judicial executions are a violation of the right to life”).
318. Emmerson Report (A/68/389), *supra* note 55, ¶¶ 51-54; *International community must heed Pakistan’s concern over drones*, UN News Centre (Mar. 15, 2013), [www.un.org/apps/news/story.asp?NewsID=44397](http://www.un.org/apps/news/story.asp?NewsID=44397) (quoting U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism as saying “U.S. drone campaign in Pakistan is being conducted without the consent of the elected representatives of the people or the legitimate government”); Leila Hudson et al., *Drone Warfare in Yemen: Fostering Enemies through Counterterrorism?* 19 *MIDDLE EAST POL’Y J.* (2012), <http://mepc.org/journal/middle-east-policy-archives/drone-warfare-yemen-fostering-emirates-through-counterterrorism> (arguing that drone operations in Yemen “undermined the weak central government’s legitimacy”).
319. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 11.
320. Obama NDU Speech, *supra* note 11.



321. See DOJ White Paper, *supra* note 132, at 1-2 (stating that the lethal use of force “in a foreign nation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation’s government or after a determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted”); President Barack Obama, Statement by the President (Aug. 7, 2014), [www.whitehouse.gov/the-press-office/2014/08/07/statement-president](http://www.whitehouse.gov/the-press-office/2014/08/07/statement-president) (disclosing that U.S. conducted airstrikes in Iraq following an invitation from the Iraqi government to protect American personnel, as well as Iraqi Yazidi’s fleeing ISIL violence).
322. Brennan Speech 2012, *supra* note 46.
323. Holder Speech 2012, *supra* note 52 (noting that the extraterritorial uses of force were “consistent with international legal principles if conducted ... with the consent of the nation involved”). In the absence of consent, U.S. officials have asserted a right to use force on the territory of another state if that state “is unwilling or unable to take action against the threat.” See, e.g. Brennan Speech 2012, *supra* note 46. The unwilling or unable standard is a sharply contested legal ground that has not received the support of the international community. See Jack Goldsmith, *Fire When Ready*, FOREIGN POLICY (Mar. 19, 2012), [www.foreignpolicy.com/articles/2012/03/19/fire\\_when\\_ready](http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready) (writing that the “unwilling or unable doctrine” under international law is unsettled); Ryan Goodman, *International Law on Airstrikes against ISIS in Syria*, JUST SECURITY (Aug. 28, 2014), [www.justsecurity.org/14414/international-law-airstrikes-isis-syria](http://www.justsecurity.org/14414/international-law-airstrikes-isis-syria) (acknowledging that the “unwilling or unable test,” though a part of the U.S. government’s legal position, is controversial under international law); Kevin Jon Heller, Ashley Deeks’ *Problematic Defense of the “Unwilling or Unable” Test*, OPINIO JURIS (Dec. 15, 2011), [www.opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test](http://www.opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test).
324. Associated Press, *John Kerry says Pakistan drone strikes could end as bilateral talks resume*, GUARDIAN (Aug. 1, 2013), [www.theguardian.com/world/2013/aug/01/john-kerry-us-pakistan-talks-drones](http://www.theguardian.com/world/2013/aug/01/john-kerry-us-pakistan-talks-drones); Jeryl Bier, *Kerry: Drone Program Will End as We Have Eliminated Most of the Threat*, WEEKLY STANDARD (Aug. 2, 2013), [www.weeklystandard.com/kerry-drone-program-will-end-as-we-have-eliminated-most-of-the-threat/article/742497](http://www.weeklystandard.com/kerry-drone-program-will-end-as-we-have-eliminated-most-of-the-threat/article/742497).
325. Greg Miller and Bob Woodward, *Secret memos reveal explicit nature of U.S., Pakistan agreement on drones*, WASH. POST (Oct. 24, 2013), [www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e\\_story.html](http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html).
326. Pentagon Mansur Statement, *supra* note 231; see also Mujib Mashal, *Taliban Chief Targeted by Drone Strike in Pakistan, Signaling U.S. Shift*, N.Y. TIMES (May 22, 2016), [www.nytimes.com/2016/05/23/world/asia/afghanistan-taliban-leader-mullah-mansour.html](http://www.nytimes.com/2016/05/23/world/asia/afghanistan-taliban-leader-mullah-mansour.html); Marty Lederman, *Moves toward greater transparency on the use of lethal force [UPDATED]*, JUST SECURITY (May 24, 2016), [www.justsecurity.org/31218/moves-greater-transparency-lethal-force/](http://www.justsecurity.org/31218/moves-greater-transparency-lethal-force/).
327. Emerson Report (A/68/389), *supra* note 55, ¶¶ 53-54.
328. *Wikileaks: Kayani Wanted More Drone Strikes in Pakistan*, EXPRESS TRIBUNE (May 20, 2011), <https://tribune.com.pk/story/172531/wikileaks-kayani-wanted-more-drone-strikes/>.
329. *Drone Strikes Cast Negative Impact on Relationship with US: Pakistan*, THE EXPRESS TRIBUNE (July 29, 2013), <http://tribune.com.pk/story/583512/drone-strikes-cast-negative-impact-on-relationship-with-us-pakistan/> (citing a statement by the Pakistani Foreign Ministry condemning U.S. drone strikes: “These unilateral strikes are a violation of Pakistan’s sovereignty and territorial integrity. Pakistan has repeatedly emphasized the importance of bringing an immediate end to drone strikes”); *Pakistan Demands US Vacate Air Base after Deadly Strikes*, NBC NEWS (Nov. 27, 2011), [www.nbcnews.com/id/45442885/ns/world\\_news-south\\_and\\_central\\_asia/t/pakistan-demands-us-vacate-air-base-after-deadly-strikes/](http://www.nbcnews.com/id/45442885/ns/world_news-south_and_central_asia/t/pakistan-demands-us-vacate-air-base-after-deadly-strikes/). (“Islamabad called the bloodshed in one of its tribal areas a “grave infringement” of the country’s sovereignty, and it could make it even more difficult for the United States to enlist Pakistan’s help in pushing Afghan insurgents to engage in peace talks.”).
330. *Secret memos show Pakistan endorsed US drone strikes*, BBC (Oct. 24, 2013), <http://www.bbc.com/news/world-asia-24649840>.

331. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 16–17.
332. Greg Jaffe and Karen DeYoung, *U.S. drone targets two leaders of Somali group allied with al-Qaeda*, WASH. POST (Jun. 29, 2011), [http://articles./2011-06-29/national/35234554\\_1\\_qaeda-somalia-strike-drone-strike](http://articles./2011-06-29/national/35234554_1_qaeda-somalia-strike-drone-strike).
333. Josh Rogin, *Somali President Asks for More American Help*, FOREIGN POLICY (Jan 18, 2013), <http://foreignpolicy.com/2013/01/18/somali-presidentasks-for-more-american-help/>.
334. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 16–17.
335. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 16–17. Yemeni President Hadi has explicitly praised U.S. drone strikes in Yemen on a number of occasions. Greg Miller, *Yemeni president acknowledges approving U.S. drone strikes*, WASH POST (Sept. 29, 2012), [https://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-aff-d6c7f20a83bf\\_story.html?utm\\_term=.f88ca23d9b13](https://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-aff-d6c7f20a83bf_story.html?utm_term=.f88ca23d9b13), Wikileaks also exposed how Hadi's predecessor Ali Abdullah Saleh had consented to U.S. strikes while publicly claiming that they were carried out by Yemeni forces. Andy Bloxham, *WikiLeaks: Yemen's president offers US unrestricted access to fight al-Qaeda*, TELEGRAPH (Dec. 4, 2010), <http://www.telegraph.co.uk/news/worldnews/wikileaks/8180596/WikiLeaks-Yemens-president-offers-US-unrestricted-access-to-fight-al-Qaeda.html>.
336. THE WHITE HOUSE, PRESIDENTIAL LETTER ON 2012 WAR POWERS RESOLUTION 6-MONTH REPORT (Jun. 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>.
337. Jim Garamone, *Rescue Mission 'Quick, But Thorough' Official Says*, DoD News (Dec. 6, 2014), [www.defense.gov/News/Article/Article/603767/rescue-mission-quick-but-thorough-official-says/](http://www.defense.gov/News/Article/Article/603767/rescue-mission-quick-but-thorough-official-says/); U.S. Dep't of Defense, *Statement by Secretary of Defense Chuck Hagel on the Death of Luke Somers*, Release No: NR-608-14 (Dec. 6, 2014), [www.defense.gov/News/News-Releases/News-Release-View/Article/605309/statement-by-secretary-of-defense-chuck-hagel-on-the-death-of-luke-somers/](http://www.defense.gov/News/News-Releases/News-Release-View/Article/605309/statement-by-secretary-of-defense-chuck-hagel-on-the-death-of-luke-somers/) (“The rescue attempt took place in central Yemen and was conducted in partnership with the Government of Yemen. I thank President Hadi, the Yemeni government, and Yemen security forces for their assistance and cooperation.”); Obama Change of Office Remarks, *supra* note 84 (“The death of al-Awlaki marks another significant milestone in the broader effort to defeat al Qaeda and its affiliates. Furthermore, this success is a tribute to our intelligence community, and to the efforts of Yemen and its security forces, who have worked closely with the United States over the course of several years.”).
338. U.S. Dep't of Defense, *Statement by Secretary of Defense Chuck Hagel on the Death of Luke Somers*, Release No: NR-608-14 (Dec. 6, 2014), [www.defense.gov/News/News-Releases/News-Release-View/Article/605309/statement-by-secretary-of-defense-chuck-hagel-on-the-death-of-luke-somers/](http://www.defense.gov/News/News-Releases/News-Release-View/Article/605309/statement-by-secretary-of-defense-chuck-hagel-on-the-death-of-luke-somers/).
339. Anne, *supra* note 294.
340. HRW, WEDDING THAT BECAME A FUNERAL *supra* note 69.
341. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 18.
342. Garamone, *Rescue Mission*, *supra* note 337; Obama Change of Office Remarks, *supra* note 84.
343. HRW, WEDDING BECAME A FUNERAL, *supra* note 69, at 6–7; *see also* Ben Emmerson (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 29, U.N. Doc. A/HRC/25/59 (Feb. 28, 2014) [hereinafter Emmerson Report A/HRC/25/59].
344. *See also* Emmerson Report A/68/389, *supra* note 55, ¶ 29.
345. Namir Shabibi and Nasser al Sane, *Nine young children killed: The full details of the botched U.S. raid in Yemen*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 8, 2017), [www.thebureauinvestigates.com/2017/02/08/nine-young-children-killed-full-details-botched-us-raid-yemen/](http://www.thebureauinvestigates.com/2017/02/08/nine-young-children-killed-full-details-botched-us-raid-yemen/).
346. Alex Moorehead, *Yemen's consent for U.S. counterterrorism operations: Questions for the Trump Administration*, JUST SECURITY (Feb. 9, 2017), [www.justsecurity.org/37530/yemens-consent-u-s-counterterrorism-operations-questions-trump-administration/](http://www.justsecurity.org/37530/yemens-consent-u-s-counterterrorism-operations-questions-trump-administration/).

347. As noted above, this report is focused on practice in relation to Pakistan, Somalia, and Yemen, so this benchmark does not include an analysis of U.S. government disclosures on civilian casualties in Afghanistan, Syria, and Iraq, for instance.
348. See, e.g. Brennan Speech 2011, *supra* note 32.
349. Obama NDU Speech, *supra* note 11.
350. See note 52, *supra* (identifying relevant reports). See also, e.g. Drone Wars: The Full Data, *supra* note 6. For a detailed discussion and analysis of the different methodologies employed, see COLUMBIA, COUNTING DRONE STRIKE DEATHS, *supra* note 69.
351. See, e.g. Lee Ferran, U.S.: Report CIA Drones Killed 168 Kids 'Way Off the Mark', ABC NEWS (Aug. 12, 2011), <http://abcnews.go.com/Blotter/us-reported-drone-strike-casualties-off-mark/story?id=14290464>.
352. DNI SUMMARY 2016, *supra* note 5, at 1.
353. DNI SUMMARY 2017, *supra* note 6.
354. DNI SUMMARY 2016, *supra* note 5; DNI SUMMARY 2017, *supra* note 6.
355. Exec. Order No. 13,732, 81 Fed. Reg. 44483 (2016).
356. DNI SUMMARY 2017, *supra* note 6.
357. DNI SUMMARY 2016, *supra* note 5, at 1.
358. Note that each organization had its own methodology, as detailed in the reports they produced, but all involved on the ground investigations and site visits.
359. DNI SUMMARY 2016, *supra* note 5, at 2–3 (when noting its methodology for collection of data, the U.S. government did not mention on-the-ground investigations or site visits).
360. The organizations included in this sample are: Amnesty International; Human Rights Watch; Open Society Foundations; Open Society Justice Initiative; Mwatana Organization for Human Rights; International Human Rights and Conflict Resolution Clinic, Stanford Law School; Global Justice Clinic, NYU School of Law.
361. AMNESTY, WILL I BE NEXT?, *supra* note 23; HRW, BETWEEN A DRONE AND AL QAEDA, *supra* note 69; HRW, WEDDING BECAME A FUNERAL, *supra* note 69; OPEN SOC'Y FOUNDS., AFTER THE DEAD ARE COUNTED, *supra* note 69; OSJI & MWATANA, DEATH BY DRONE, *supra* note 3; STANFORD & NYU, LIVING UNDER DRONES, *supra* note 69. The reports were reviewed to ensure that no incidents were counted twice. Two cases feature in both OSJI/Mwatana and HRW (Between a Drone and Al-Qaeda) reports, and one case features in both the OSF and Amnesty International reports. For these cases the lowest civilian death total was included.
362. This accounts for all of the strikes conducted from January 2009 to December 2015 in Libya, Somalia, Yemen, and Pakistan.
363. This includes strikes conducted in Pakistan and Yemen between 2009 and 2013, and represents about 10 percent of the total number of strikes included in the DNI Summary 2016, *supra* note 5.
364. KOH SPEECH, *supra* note 77.
365. DNI SUMMARY 2016, *supra* note 5, at 3.
366. *Id.* at 1; DNI SUMMARY 2017, *supra* note 6, at 1.
367. Sarah Knuckey, *The Good and Bad in the U.S. Government's Civilian Casualties Announcement*, JUST SECURITY (Jul. 2, 2016), [www.justsecurity.org/31785/good-bad-governments-civilian-casualties-announcement](http://www.justsecurity.org/31785/good-bad-governments-civilian-casualties-announcement).
368. DNI SUMMARY 2016, *supra* note 5 at 1.
369. DNI SUMMARY 2016, *supra* note 5 at 1; DNI SUMMARY 2017, *supra* note 6, at 1.
370. This is discussed in more detail in Benchmark 1 and the Annex. For further details on these concerns, see Gabor Rona, *A Just Security Debate!—What's Wrong with the DNI Report on Civilian Casualties*, JUST SECURITY (Feb. 7, 2017), [www.justsecurity.org/37455/security-debate-whats-wrong-dni-report-civilian-casualties/](http://www.justsecurity.org/37455/security-debate-whats-wrong-dni-report-civilian-casualties/).

371. DNI SUMMARY 2016, *supra* note 5, at 1 (“The assessed range of non-combatant deaths includes deaths for which there is an insufficient basis for assessing that the deceased is a combatant.”); DNI Summary 2017, *supra* note 6, at 1 (“The assessment of non-combatant deaths can include deaths for which there is an insufficient basis for assessing that the deceased is a combatant.”).
372. DNI SUMMARY 2016, *supra* note 5, at 3.
373. DNI SUMMARY 2017, *supra* note 6, at 2.
374. Drone Wars: The Full Data, *supra* note 6.
375. “Acknowledgment” in this report means a strike acknowledgment by a named official or agency statement and excludes anonymous sourcing, such as media reporting of quotes from “unnamed officials.”
376. KOH SPEECH, *supra* note 77. In earlier letters to the U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions, the U.S. government had not commented on specific allegations and only stated in very general terms that “Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances.” See Letter from Jeffrey de Laurentiis, *supra* note 62; Letter from Philip Alston, *supra* note 63.
377. Tara McKelvey, *Covering Obama’s Secret War*, COLUM. JOURNALISM REV., May/June 2011, [www.cjr.org/feature/covering\\_obamas\\_secret\\_war.php?page=all](http://www.cjr.org/feature/covering_obamas_secret_war.php?page=all). The U.S. military also reportedly acknowledged a strike in Somalia in 2008, but this does not seem to have been standard practice at that time. See Eric Schmitt and Jeffrey Gettleman, *Qaeda Leader Reported Killed in Somalia*, N.Y. TIMES, (May 2, 2008), [www.nytimes.com/2008/05/02/world/africa/02somalia.html](http://www.nytimes.com/2008/05/02/world/africa/02somalia.html).
378. Terri Moon Cronk, *DoD Confirms U.S. Strikes Killed Senior Terrorist Operatives* (Dec. 7, 2015), [www.defense.gov/News/Article/Article/633252/dod-confirms-us-strikes-killed-senior-terrorist-operatives](http://www.defense.gov/News/Article/Article/633252/dod-confirms-us-strikes-killed-senior-terrorist-operatives); U.S. Dep’t of Defense, *U.S. Conducts Airstrike Against Terrorist Camp in Somalia* (Mar. 7, 2016), [www.defense.gov/News/Article/Article/687353/us-conducts-airstrike-against-terrorist-camp-in-somalia](http://www.defense.gov/News/Article/Article/687353/us-conducts-airstrike-against-terrorist-camp-in-somalia).
379. See, e.g., U.S. Department of Defense, *U.S. Strikes Al-Qaida Camp in Yemen* (Mar. 23, 2016), [www.defense.gov/News/Article/Article/702148/us-strikes-al-qaida-camp-in-yemen](http://www.defense.gov/News/Article/Article/702148/us-strikes-al-qaida-camp-in-yemen); U.S. CENTRAL COMMAND, *Centcom Announces Yemen Counterterrorism Strikes* (Jun. 3, 2016), [www.defense.gov/News/Article/Article/790791/centcom-announces-yemen-counterterrorism-strikes](http://www.defense.gov/News/Article/Article/790791/centcom-announces-yemen-counterterrorism-strikes).
380. bin Laden Press Briefing, *supra* note 228.
381. Letter from Eric Holder, Att’y Gen. to Members of Cong., *supra* note 15.
382. President’s Statement on Deaths of Weinstein and Lo Porto, *supra* note 15.
383. Statement, The White House, Statement by the Press Secretary (Apr. 23, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/04/23/statement-press-secretary> [hereinafter Weinstein & Lo Porto Statement].
384. Weinstein & Lo Porto Press Briefing, *supra* note 237.
385. Pentagon Mansur Statement, *supra* note 231; see also The White House, Office of the Press Sec’y, Remarks by President Obama and President Quang of Vietnam in Joint Press Conference (May 23, 2016), [www.whitehouse.gov/the-press-office/2016/05/23/remarks-president-obama-and-president-quang-vietnam-joint-press](http://www.whitehouse.gov/the-press-office/2016/05/23/remarks-president-obama-and-president-quang-vietnam-joint-press).
386. See, e.g., Pentagon Mansur Statement, *supra* note 231.
387. *Id.*
388. THE WHITE HOUSE, *Remarks by the President on Osama bin Laden* (May 2, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden>.
389. Letter from Eric Holder, Att’y Gen. to Members of Cong., *supra* note 15.
390. Weinstein & Lo Porto Press Briefing, *supra* note 238.
391. *Id.*
392. Pentagon Mansur Statement, *supra* note 232.

393. President's Statement on Deaths of Weinstein and Lo Porto, *supra* note 15.
394. Weinstein & Lo Porto Press Briefing, *supra* note 238.
395. Pentagon Mansur Statement, *supra* note 232.
396. See, e.g., Chris Woods, *Militants and civilians killed in multiple US Somalia strikes*, BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 22, 2012), [www.thebureauinvestigates.com/2012/02/22/militants-and-civilians-killed-in-up-to-20-us-somalia-strikes-new-study-shows/](http://www.thebureauinvestigates.com/2012/02/22/militants-and-civilians-killed-in-up-to-20-us-somalia-strikes-new-study-shows/).
397. Claudette Roulo, *Somalia Airstrike Targeted al-Shabab Leader, Camp, Official Says*, U.S. Dep't of Defense (Sept. 2, 2014), [www.defense.gov/News/Article/Article/603165/somalia-airstrike-targeted-al-shabab-leader-camp-official-says](http://www.defense.gov/News/Article/Article/603165/somalia-airstrike-targeted-al-shabab-leader-camp-official-says).
398. See, e.g., Roulo, *supra* note 396; U.S. Dep't of Defense, *Pentagon Confirms Death of al-Shabab Co-founder*, U.S. Dep't of Defense (Sept. 5, 2014) [www.defense.gov/News/Article/Article/603193/pentagon-confirms-death-of-al-shabab-co-founder](http://www.defense.gov/News/Article/Article/603193/pentagon-confirms-death-of-al-shabab-co-founder); U.S. Dep't of Defense, *Pentagon Confirms Death of High-Ranking al-Shabab Militant*, U.S. Dep't of Defense (Dec. 31, 2014), [www.defense.gov/News/Article/Article/603870/pentagon-confirms-death-of-high-ranking-al-shabab-militant](http://www.defense.gov/News/Article/Article/603870/pentagon-confirms-death-of-high-ranking-al-shabab-militant); Cheryl Pellerin, *U.S. Attack Kills Key al-Shabab Operative in Somalia*, U.S. Dep't of Defense (Mar. 31, 2014), [www.defense.gov/News/Article/Article/604301/us-attack-kills-key-al-shabab-operative-in-somalia](http://www.defense.gov/News/Article/Article/604301/us-attack-kills-key-al-shabab-operative-in-somalia); Nick Simeone, *U.S. Conducts Counterterrorism Operation in Somalia* U.S. Dep't of Defense (Mar. 13, 2015), [www.defense.gov/News/Article/Article/604274/us-conducts-counterterrorism-operation-in-somalia](http://www.defense.gov/News/Article/Article/604274/us-conducts-counterterrorism-operation-in-somalia); Terri Moon Cronk, *DoD Confirms U.S. Strikes Killed Senior Terrorist Operatives* U.S. Dep't of Defense (Dec. 7, 2015), [www.defense.gov/News/Article/Article/633252/dod-confirms-us-strikes-killed-senior-terrorist-operatives](http://www.defense.gov/News/Article/Article/633252/dod-confirms-us-strikes-killed-senior-terrorist-operatives); U.S. Dep't of Defense, *U.S. Conducts Airstrike Against Terrorist Camp in Somalia* (Mar 7, 2016), [www.defense.gov/News/Article/Article/687353/us-conducts-airstrike-against-terrorist-camp-in-somalia](http://www.defense.gov/News/Article/Article/687353/us-conducts-airstrike-against-terrorist-camp-in-somalia); U.S. Dep't of Defense, *U.S. Military Airstrike in Somalia Targets Senior Terrorist Leader* (Apr. 1, 2016), [www.defense.gov/News/Article/Article/711693/us-military-airstrike-in-somalia-targets-senior-terrorist-leader](http://www.defense.gov/News/Article/Article/711693/us-military-airstrike-in-somalia-targets-senior-terrorist-leader); U.S. Dep't of Defense, *U.S. Airstrike Targets al-Shabab Leader in Somalia* (Jun. 1, 2016), [www.defense.gov/News/Article/Article/788089/us-airstrike-targets-al-shabab-leader-in-somalia](http://www.defense.gov/News/Article/Article/788089/us-airstrike-targets-al-shabab-leader-in-somalia); and U.S. AFRICA COMMAND, *Assessment Confirms Death of Two Senior al-Shabaab Members in Somalia* (Jun. 8, 2016), [www.africom.mil/media-room/pressrelease/28228/assessment-confirms-deaths-of-two-senior-al-shabaab-members-in-somalia](http://www.africom.mil/media-room/pressrelease/28228/assessment-confirms-deaths-of-two-senior-al-shabaab-members-in-somalia); U.S. AFRICA COMMAND, *U.S. Forces Conduct Defensive Fires in Somalia Against al-Shabaab Terrorists in May* (Jun. 18, 2016), [www.africom.mil/media-room/pressrelease/28236/u-s-forces-conduct-defensive-fires-in-somalia-against-al-shabaab-terrorists-in-may](http://www.africom.mil/media-room/pressrelease/28236/u-s-forces-conduct-defensive-fires-in-somalia-against-al-shabaab-terrorists-in-may); U.S. AFRICA COMMAND, *U.S. Self-Defense Strikes in Somalia* (Sept. 7, 2016), [www.africom.mil/media-room/pressrelease/28385/u-s-self-defense-strikes-in-somalia](http://www.africom.mil/media-room/pressrelease/28385/u-s-self-defense-strikes-in-somalia); U.S. AFRICA COMMAND, *U.S. Self-Defense Strikes in Somalia* (Sept. 27, 2016), [www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia](http://www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia); U.S. AFRICA COMMAND, *U.S. Africa Command Completes Assessment on Galcayo Strike* (Nov. 15, 2016), [www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike](http://www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike); U.S. AFRICA COMMAND, *U.S. Self-Defense Strikes in Somalia* (Jan. 10, 2017), [www.africom.mil/media-room/pressrelease/28590/u-s-self-defense-strike-in-somalia](http://www.africom.mil/media-room/pressrelease/28590/u-s-self-defense-strike-in-somalia); U.S. AFRICA COMMAND, *U.S. Service Member Dies During Somalia Operation* (May 5, 2017), [www.defense.gov/News/Article/Article/1174528/us-service-member-dies-during-somalia-operation/](http://www.defense.gov/News/Article/Article/1174528/us-service-member-dies-during-somalia-operation/)
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425. See, e.g. PPG, *supra* note 16, at 17 (stating that reports are prepared, it appears for every strike carried out under the PPG, detailing “number of combatants killed or wounded” and a “description of collateral damage”); Exec. Order No. 13732, *supra* note 139.
426. See, e.g., Airwars, *Limited Accountability: A transparency audit of the Coalition air war against so-called Islamic State* 12-15 (Dec. 2016), [https://airwars.org/wp-content/uploads/2016/12/Airwars-report\\_Web-FINAL1.compressed.pdf](https://airwars.org/wp-content/uploads/2016/12/Airwars-report_Web-FINAL1.compressed.pdf); U.S. CENTRAL COMMAND, *July 28: U.S. Central Command releases Iraq and Syria civilian casualty assessments*, Release No: 16-033 (Jul. 28, 2016), [www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/926164/july-28-us-central-command-releases-iraq-and-syria-civilian-casualty-assessments/](http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/926164/july-28-us-central-command-releases-iraq-and-syria-civilian-casualty-assessments/). For an example of a post-strike report by the U.S. military, see, e.g., U.S. CENTRAL COMMAND, *February 18: Military airstrikes continue against ISIS terrorists in Syria and Iraq*, Release No: 17-072 (Feb. 18, 2017), [www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1088226/february-18-military-airstrikes-continue-against-isis-terrorists-in-syria-and-i/](http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1088226/february-18-military-airstrikes-continue-against-isis-terrorists-in-syria-and-i/).
427. U.S. CENTRAL COMMAND, *Summary of the Airstrike on the MSF Trauma Center in Kunduz, Afghanistan on October 3, 2015; Investigation and Follow-on Actions* (Apr. 28, 2016), [https://www3.centcom.mil/FOIA\\_RR\\_Files/5%20USC%20552\(a\)\(2\)\(D\)Records/1.%20Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015/00.%20CENTCOM%20Summary%20Memo.pdf](https://www3.centcom.mil/FOIA_RR_Files/5%20USC%20552(a)(2)(D)Records/1.%20Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015/00.%20CENTCOM%20Summary%20Memo.pdf); For additional documents related to the same investigation, see U.S. CENTRAL COMMAND, *Airstrike on the MSF Trauma Center in Kunduz Afghanistan – 3 Oct 2015*, U.S. CENTRAL COMMAND FOIA Library, [https://www3.centcom.mil/foia\\_rr/FOIA\\_RR.asp?Path=/5%20USC%20552%28a%29%282%29%28D%29Records&Folder=1.%20Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015](https://www3.centcom.mil/foia_rr/FOIA_RR.asp?Path=/5%20USC%20552%28a%29%282%29%28D%29Records&Folder=1.%20Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015) (last accessed Jun. 3, 2017) [hereinafter U.S. CENTRAL COMMAND, *Kunduz Investigation*]; See also, e.g., U.S. AIR FORCES CENTRAL COMMAND, Shaw Air Force Base, *Re: Executive Summary of Allegations of Civilian Casualties (CIVCAS) Resulting from March 13, 2015 Airstrike in the vicinity of (IVO) Al Hatra, Iraq* (Oct. 8, 2015), [www.airforcemag.com/DRArchive/Documents/2015/November%202015/112015centcom.pdf](http://www.airforcemag.com/DRArchive/Documents/2015/November%202015/112015centcom.pdf) [hereinafter Al Hatra Investigation].
428. Zenko, Numbers, *supra* note 13; Dexter Filkins, *Operators of Drones are Faulted in Afghan Deaths*, N.Y. TIMES (May 29, 2010), [www.nytimes.com/2010/05/30/world/asia/30drone.html](http://www.nytimes.com/2010/05/30/world/asia/30drone.html) describing release of results of investigation of U.S. missile attack in Khod, Afghanistan on February 21, 2010); Al Hatra Investigation, *supra* note 426; U.S. CENTRAL COMMAND, *Kunduz Investigation*, *supra* note 426.

429. See, e.g., U.S. CENTRAL COMMAND, July 28: U.S. CENTRAL COMMAND releases Iraq and Syria civilian casualty assessments, Release No: 16-033 (Jul. 28, 2016), [www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/926164/july-28-us-central-command-releases-iraq-and-syria-civilian-casualty-assessments/](http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/926164/july-28-us-central-command-releases-iraq-and-syria-civilian-casualty-assessments/); U.S. CENTRAL COMMAND, November 9: Iraq and Syria civilian casualty assessments, Release No. 20161109-33 (Nov. 9, 2016), [www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1000893/november-9-iraq-and-syria-civilian-casualty-assessments](http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1000893/november-9-iraq-and-syria-civilian-casualty-assessments).
430. Statement of Rafiq Ur Rehman at Congressional Briefing hosted by Congressman Alan Grayson (D-FL) (Oct. 29, 2013), [www.reprive.org.uk/wp-content/uploads/2015/03/2013\\_10\\_28-PRIV-FINAL-Rafiq-Testimony.pdf](http://www.reprive.org.uk/wp-content/uploads/2015/03/2013_10_28-PRIV-FINAL-Rafiq-Testimony.pdf).
431. Exec. Order No. 13732, *supra* note 139, ¶¶ 2(b)(i)-(ii); see also Brennan Nomination Hearings, *supra* note 111.
432. Exec. Order No. 13732, *supra* note 139, ¶ 2.
433. See, e.g., Pentagon Mansur Statement, *supra* note 231.
434. bin Laden Press Briefing, *supra* note 228.
435. President's Statement on Deaths of Weinstein and Lo Porto, *supra* note 15.
436. Weinstein & Lo Porto Press Briefing, *supra* note 237.
437. President's Statement on Deaths of Weinstein and Lo Porto, *supra* note 15.
438. *Id.*
439. Weinstein & Lo Porto Press Briefing, *supra* note 237 (“What I can say is that these counterterrorism operations that are critical to the national security of the United States and critical to the safety of the American people continue. At the same time, there is an ongoing review both by our national security infrastructure and by an inspector general to review what occurred in this particular operation and to make recommendations about some reforms to the protocols and policies that are in place that would make it less likely that an unintended consequence like this would crop up again. And that’s not -- these kinds of reviews are not unusual; that our national security professionals after every operation try to review what had occurred—even when it’s successful, particularly when it’s successful -- to derive lessons learned and to look for other ways, or changes that could be put in place to strengthen our protocols both in terms of their capabilities, but also in ensuring that they’re living up to the values that are so important to our country.”)
440. Letter from Eric Holder, Att’y Gen. to Members of Cong., *supra* note 15.
441. Weinstein & Lo Porto Press Briefing, *supra* note 237.
442. *Id.*
443. His role as a “spokesperson” indicates a civilian role and that, if it was an armed conflict situation, he may not have been “directly participating in hostilities.”
444. bin Laden Press Briefing, *supra* note 228.
445. *Id.*
446. President's Statement on Deaths of Weinstein and Lo Porto, *supra* note 15; Weinstein & Lo Porto Press Briefing, *supra* note 237.
447. Pentagon Mansur Statement, *supra* note 231.
448. bin Laden Press Briefing, *supra* note 229; Weinstein & Lo Porto Press Briefing, *supra* note 237.
449. bin Laden Press Briefing, *supra* note 228.
450. bin Laden Prebriefing, *supra* note 228.
451. President's Statement on Deaths of Weinstein and Lo Porto, *supra* note 15.
452. Weinstein & Lo Porto Press Briefing, *supra* note 237
453. President's Statement on Deaths of Weinstein and Lo Porto, *supra* note 15.
454. *Id.*



455. See e.g. Terri Moon Cronk, *DoD Confirms U.S. Strikes Killed Senior Terrorist Operatives*, Dep't of Defense (Dec. 7, 2015), [www.defense.gov/News/Article/Article/633252/dod-confirms-us-strikes-killed-senior-terrorist-operatives/](http://www.defense.gov/News/Article/Article/633252/dod-confirms-us-strikes-killed-senior-terrorist-operatives/).
456. U.S. AFRICA COMMAND, *UPDATE: U.S. self-defense strikes in Somalia*, (Sept. 29, 2016), [www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia](http://www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia).
457. U.S. AFRICA COMMAND, *U.S. Africa Command Completes Assessment on Galcayo Strike*, (Nov. 15, 2016), [www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike](http://www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike).
458. U.S. AFRICA COMMAND, *UPDATE: U.S. self-defense strikes in Somalia*, (Sept. 29, 2016), [www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia](http://www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia).
459. U.S. AFRICA COMMAND, *UPDATE: U.S. self-defense strikes in Somalia*, (Sept. 29, 2016), [www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia](http://www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia).
460. U.S. AFRICA COMMAND, *U.S. Africa Command Completes Assessment on Galcayo Strike*, (Nov. 15, 2016), [www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike](http://www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike).
461. *Id.*
462. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 17; THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, Text of a Letter From the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Dec. 5, 2016), at 3.
463. U.S. AFRICA COMMAND, *UPDATE: U.S. self-defense strikes in Somalia* (Sept. 29, 2016), [www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia](http://www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia).
464. U.S. AFRICA COMMAND, *U.S. Africa Command Completes Assessment on Galcayo Strike* (Nov. 15, 2016), [www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike](http://www.africom.mil/media-room/pressrelease/28493/u-s-africa-command-completes-assessment-on-galcayo-strike).
465. See Claudette Roulo, *Somalia airstrike targeted Al-Shabaab leader, Camp, Official says*, Dep't of Defense (Sept. 2, 2014), [www.defense.gov/News/Article/Article/603165/somalia-airstrike-targeted-al-shabab-leader-camp-official-says%20and/](http://www.defense.gov/News/Article/Article/603165/somalia-airstrike-targeted-al-shabab-leader-camp-official-says%20and/); see also Cheryl Pellerin, *U.S. Attack Kills Key al-Shabab Operative in Somalia*, Dep't of Defense (Mar. 18, 2015) [www.defense.gov/News/Article/Article/604301/us-attack-kills-key-al-shabab-operative-in-somalia/](http://www.defense.gov/News/Article/Article/604301/us-attack-kills-key-al-shabab-operative-in-somalia/).
466. Claudette Roulo, *Somalia airstrike targeted Al-Shabaab leader, Camp, Official says*, Dep't of Defense (Sept. 2, 2014) [www.defense.gov/News/Article/Article/603165/somalia-airstrike-targeted-al-shabab-leader-camp-official-says%20and/](http://www.defense.gov/News/Article/Article/603165/somalia-airstrike-targeted-al-shabab-leader-camp-official-says%20and/) (“We certainly believe that we hit what we were aiming at,” the press secretary said.”)
467. *Id.*
468. See, e.g., U.S. CENTRAL COMMAND, *U.S. Central Command Announces Yemen Counterterrorism Strikes*, (May 9, 2016), [www.defense.gov/News/Article/Article/755391/us-central-command-announces-yemen-counterterrorism-strikes](http://www.defense.gov/News/Article/Article/755391/us-central-command-announces-yemen-counterterrorism-strikes).
469. CENTCOM Yemen Raid Statement, *supra* note 416.
470. Votel Testimony, *supra* note 154.
471. *Id.*
472. *Id.*
473. *Id.*
474. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 18; THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, Text of a Letter From the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Dec. 5, 2016), at 3.
475. Cronk, *supra* note 420; allegations of civilian casualties were reported in The Intercept. Iona Craig, *Villagers say Yemeni Child was Shot as he Tried to Flee Navy SEAL Raid*, INTERCEPT (May 28, 2017), <https://theintercept.com/2017/05/28/villagers-say-yemeni-child-was-shot-as-he-tried-to-flee-navy-seal-raid/>.
476. CENTCOM Yemen Raid Statement, *supra* note 416. See also Moorehead, *supra* note 416.

477. *Id.*
478. Votel Testimony, *supra* note 154.
479. U.S. Dep't of Defense, *U.S. Strikes in Yemen Target al-Qaida in the Arabian Peninsula* [www.defense.gov/News/Article/Article/1100266/us-strikes-in-yemen-target-al-qaida-in-the-arabian-peninsula/](http://www.defense.gov/News/Article/Article/1100266/us-strikes-in-yemen-target-al-qaida-in-the-arabian-peninsula/).
480. U.S. Dep't of Defense, *CENTCOM Officials Announce Counterterrorism Strikes in Yemen*, (Jun. 17, 2016) [www.defense.gov/News/Article/Article/802575/centcom-officials-announce-counterterrorism-strikes-in-yemen/](http://www.defense.gov/News/Article/Article/802575/centcom-officials-announce-counterterrorism-strikes-in-yemen/).
481. CENTCOM Yemen Raid Statement, *supra* note 416.
482. Votel Testimony, *supra* note 154.
483. Obama NDU Speech, *supra* note 11.
484. Becker & Shane, *supra* note 27.
485. Benchmark 10 assesses U.S. government transparency in relation to the general procedures for decision-making. This is distinct from an assessment of transparency regarding what process was followed in a specific incident. As set out in Benchmark 13, where a strike merits an investigation, the process followed for that particular strike should ordinarily be disclosed.
486. For a detailed review of the processes in the PPG, see Jonathan Horowitz & John Reed, *The PPG Visualized, What the U.S. Kill and Capture Bureaucracy Looks Like*, JUST SECURITY (Aug. 15, 2016), [www.justsecurity.org/32391/ppg-visualized-kill-capture-bureaucracy](http://www.justsecurity.org/32391/ppg-visualized-kill-capture-bureaucracy).
487. This includes the Deputies and Principals of the Department of State, Department of Defense, Joint Chiefs of Staff, Department of Justice, Department of Homeland Security, Directorate of National Intelligence, Central Intelligence Agency and the National Counterterrorism Center. See PPG, *supra* note 16, section 3.
488. PPG Fact Sheet, *supra* note 17, at 3; PPG, *supra* note 16, section 5.
489. *Id.* (Provision is allowed for “nominating and approving such targets” according to the process set out in a specific “operational plan,” which is not usually disclosed). See also PPG Fact Sheet, *supra* note 17, at 2.
490. DNI SUMMARY 2017, *supra* note 6, at 1.
491. Charlie Savage & Eric Schmitt, *Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules* N.Y.TIMES (Mar. 30, 2017), [www.nytimes.com/2017/03/12/us/politics/trump-loosen-counterterrorism-rules.html](http://www.nytimes.com/2017/03/12/us/politics/trump-loosen-counterterrorism-rules.html); Charlie Savage & Eric Schmitt, *Trump Eases Combat Rules in Somalia Intended to Protect Civilians*, N.Y.TIMES (Mar. 30, 2017), [www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html?\\_r=1](http://www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html?_r=1).
492. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 18.
493. A former official involved in the development of the PPG explained in August 2016 that areas “outside of active hostilities” “was understood as shorthand for places like Yemen and Somalia.” See Hartig, *supra* note 7, at 3.
494. See, e.g., U.S. AFRICA COMMAND, *UPDATE: U.S. self-defense strikes in Somalia*, (Sept. 29, 2016), [www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia](http://www.africom.mil/media-room/pressrelease/28423/update-u-s-self-defense-strikes-in-somalia).
495. PPG, *supra* note 16, section 5.B.
496. Former Deputy Assistant to the President and National Security Advisor to the Vice President, Colin Kahl, remarked on Twitter that the “PPG was applied anywhere that wasn’t an area of active hostilities [*sic*] (e.g., Iraq, Syria, Afghanistan).” @ColinKahl, TWITTER (Mar. 20, 2017 8:37 AM), <https://twitter.com/ColinKahl/status/847472933307994112>.
497. See, e.g., 2007 JP 3-60, *supra* note 211; 2013 JP 3-60 *supra* note 211; U.S. Joint Chiefs of Staff, JOINT TARGETING, Joint Publication 3-60 (Apr. 13, 2007), [www.aclu.org/foia-document/joint-targeting-joint-publication-3-60](http://www.aclu.org/foia-document/joint-targeting-joint-publication-3-60) (disclosed pursuant to FOIA litigation by the ACLU). The April 2013 update to Joint Publication 3-60 is also available online at: [www.justsecurity.org/wp-content/uploads/2015/06/Joint\\_Chiefs-Joint\\_Targeting\\_20130131.pdf](http://www.justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf). See also U.S. Air Force, TARGETING, Annex 3-60 (Jan. 10,

2014), <https://doctrine.af.mil/DTM/dtmtargeting.htm>; U.S. Army, THE TARGETING PROCESS, FM 3-60 (Nov. 2010), [http://usacac.army.mil/sites/default/files/misc/doctrine/CDG/cdg\\_resources/manuals/fm/fm3\\_60.pdf](http://usacac.army.mil/sites/default/files/misc/doctrine/CDG/cdg_resources/manuals/fm/fm3_60.pdf); U.S. Joint Staff Targeting, Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM) (Nov. 10, 2009), ([www.aclu.org/foia-document/joint-targeting-cycle-and-collateral-damage-estimation-methodolog](http://www.aclu.org/foia-document/joint-targeting-cycle-and-collateral-damage-estimation-methodolog) (released pursuant to ACLU FOIA litigation)).

498. See, e.g., CIVILIAN IMPACT OF DRONES, *supra* note 29, at 62-66.

499. Cora Currier, *The Kill Chain: The Lethal Bureaucracy Behind Obama's Drone War*, INTERCEPT (Oct. 15, 2015), <https://theintercept.com/drone-papers/the-kill-chain/>.

500. CIVILIAN IMPACT OF DRONES, *supra* note 29, at 62.

501. This is distinct from saying that these entities actually do exercise oversight, or are even capable of exercising effective oversight. See, e.g. Philip Alston, *The CIA and Targeted Killings Beyond Borders*, HARV. NAT'L SEC. J. 2(2) 405 (2011) (concluding, “[d]espite the existence of a multiplicity of techniques by which the CIA might be held to account at the domestic level, the foregoing survey demonstrates that there is no evidence to conclude that any of them has functioned effectively in relation to the expanding practices involving targeted killings.”).

502. Theoretically, this includes at the executive branch level: for the intelligence services, the Inspector-General of the CIA (see U.S. Central Intelligence Agency, *Offices of CIA: Inspector General*, [www.cia.gov/offices-of-cia/inspector-general](http://www.cia.gov/offices-of-cia/inspector-general)); the National Security Council (The White House, *National Security Council*, [www.whitehouse.gov/nsc](http://www.whitehouse.gov/nsc)). Note that this webpage was blank, with just the statement “Check back soon for more information” on May 24, 2017. Previously, this webpage contained information about the National Security Council. See, e.g., The White House, National Security Council, <https://obamawhitehouse.archives.gov/administration/eop/nsc/>); and the President's Intelligence Advisory Board and Intelligence Oversight Board (The White House, *The President's Intelligence Advisory Board*, [www.whitehouse.gov/piab](http://www.whitehouse.gov/piab)). Note that this webpage was blank, with just the statement “Check back soon for more information” on May 24, 2017. Previously, this webpage contained information about the Intelligence Advisory Board. See, e.g., The White House *The President's Intelligence Advisory Board*, <https://obamawhitehouse.archives.gov/administration/eop/piab>).

Regarding the military, this includes: The Inspector-General for the Department of Defense, (*About Us*, U.S. DEP'T OF DEFENSE OFFICE OF INSPECTOR GENERAL, [www.dodig.mil/About\\_Us/index.html](http://www.dodig.mil/About_Us/index.html)); each of the Inspector Generals for each branch of the military (The U.S. Military has Inspectors General for the Joint Staff (*Joint Staff Inspector General*, JOINT CHIEFS OF STAFF, [www.jcs.mil/About/Joint-Staff-Inspector-General/](http://www.jcs.mil/About/Joint-Staff-Inspector-General/)), Army (*Office of the Inspector General*, U.S. ARMY, [www.daig.pentagon.mil/](http://www.daig.pentagon.mil/)), Navy (Navy Inspector General, U.S. DEP'T OF THE NAVY, [www.secnav.navy.mil/ig/Pages/Home.aspx](http://www.secnav.navy.mil/ig/Pages/Home.aspx)), Marine Corps (*Inspector General of the Marine Corp*, U.S. MARINES CORPS, [www.hqmc.marines.mil/igmcc/](http://www.hqmc.marines.mil/igmcc/)), and the Air Force (*Inspector General Complaints*, U.S. AIR FORCE, [www.af.mil/InspectorGeneralComplaints.aspx](http://www.af.mil/InspectorGeneralComplaints.aspx)); and the Department of Defense Senior Intelligence Oversight Official (*About the Department of Defense Senior Intelligence Oversight Official*, DEP'T OF DEFENSE, <http://dodsioo.defense.gov/About-DOD-SIOO/>).

In addition, there is the Privacy and Civil Liberties Oversight Board (PCLOB) that potentially exercises oversight over both the military and the intelligence services. However, the PCLOB operates with a good degree of transparency, and in its semi-annual reports it does not appear that it has scrutinized the issue of drones. See, e.g., PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, *Semi-Annual Report: October 2015-March 2016* (Aug. 2016), [www.pclob.gov/library/Semi\\_Annual\\_Report\\_August\\_2016.pdf](http://www.pclob.gov/library/Semi_Annual_Report_August_2016.pdf). This is also borne out by a 2015 op-ed by PCLOB's Chairman making a bid for PCLOB to carry out oversight of the drones program. See David Medine, *The United States Needs a Drone Board*, DEFENSE ONE (Apr. 23, 2015), [www.defenseone.com/ideas/2015/04/oversight-targeted-killing-americans-overseas-new-model/110926/](http://www.defenseone.com/ideas/2015/04/oversight-targeted-killing-americans-overseas-new-model/110926/) [hereinafter Medine, Drone Board]. However, this bid was ultimately unsuccessful. As of May 2017, PCLOB is on the verge of becoming defunct, with “too few Senate-confirmed members to function” in its oversight role. See Adam Klein, *Why Trump must save the government's privacy board*, POLITICO (Jan. 4, 2017), [www.politico.com/agenda/story/2017/01/privacy-board-trump-national-security-000264](http://www.politico.com/agenda/story/2017/01/privacy-board-trump-national-security-000264).

- Finally, there is the Department of Justice, to which government agencies and departments are required to report possible violations of federal criminal laws. See Preston CIA Speech, *supra* note 98. For a detailed discussion of national security oversight in the Executive Branch, see Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L.L. REV. 289 (2015); and Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).
503. There are reports that the President's Intelligence Advisory Board, and the related Intelligence Oversight Board, carry out very little in the way of substantive oversight. See Samuel Kramer, *It's Time to Shutter The President's Intelligence Advisory Board*, OVERT ACTION (Jun. 30, 2015), [www.overtaction.org/2015/06/its-time-to-shutter-the-presidents-intelligence-advisory-board/](http://www.overtaction.org/2015/06/its-time-to-shutter-the-presidents-intelligence-advisory-board/).
  504. For example, the authorities and responsibilities of the CIA Inspector General are set out in 50 U.S.C. § 3517. The Department of Defense Office of Inspector General was established pursuant to the Inspector General Act 1978, and its mandate and powers are set out more fully in Department of Defense Directive No. 5106.01 (as amended).
  505. *Supra* note 502.
  506. *Manuals & Guides*, COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, [www.ignet.gov/content/manuals-guides](http://www.ignet.gov/content/manuals-guides) (last accessed Jun. 1, 2017) [hereinafter CIGIE Manuals].
  507. *Id.*; see also ELECTRONIC FRONTIERS FOUNDATION, PATTERNS OF MISCONDUCT: FBI INTELLIGENCE VIOLATIONS FROM 2001–2008, 2–4 (2011), [www.eff.org/files/eff-iob-report.pdf](http://www.eff.org/files/eff-iob-report.pdf); and *supra* note 502.
  508. DEP'T OF DEFENSE DIRECTIVE NO. 5106.01 (AS AMENDED), ¶ 5(r), (2014) [www.dtic.mil/whs/directives/corres/pdf/510601p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/510601p.pdf).
  509. Obama NDU Speech, *supra* note 11.
  510. Medine, *Drone Board*, *supra* note 502.
  511. Senate and House Intelligence Committee members added provisions to the annual intelligence authorization law that restricted the funding and activities of the PCLOB to reviewing only the privacy rights of U.S. citizens, not non-U.S. citizens, and effectively barred the board from overseeing covert operations. These provisions were added to the annual intelligence authorization bill following a 2015 op-ed by David Medine—then Chairman of PCLOB—in Defense One, which called for the establishment of an independent review board to assess and evaluate whether the government's decision to target U.S. citizens was appropriate. See Medine, *Drone Board* *supra* note 502; Letter to Senators Richard Burr and Dianne Feinstein, from Senator Patrick Leahy (Jul. 13, 2016), <https://assets.documentcloud.org/documents/2993819/071316-Leahy-to-Burr-Feinstein-Re-Intel-Auth.pdf>; Charlie Savage, *U.S. Privacy and Civil Liberty Watchdog Faces Limits in Congress*, N.Y. TIMES, (Jul. 14, 2016), [www.nytimes.com/2016/07/15/us/us-privacy-and-civil-liberty-watchdog-faces-limits-in-congress.html](http://www.nytimes.com/2016/07/15/us/us-privacy-and-civil-liberty-watchdog-faces-limits-in-congress.html); see also Ellen Nakashima, *Government privacy watchdog set to lose power to examine covert action*, WASH. POST (Dec. 17, 2015), [www.washingtonpost.com/news/the-switch/wp/2015/12/17/government-privacy-watchdog-set-to-lose-power-to-examine-covert-action/?utm\\_term=.f44f48f8a61f](http://www.washingtonpost.com/news/the-switch/wp/2015/12/17/government-privacy-watchdog-set-to-lose-power-to-examine-covert-action/?utm_term=.f44f48f8a61f).
  512. These two committees are respectively comprised of the House Permanent Select Committee on Intelligence (HPSCI) and House Armed Services Committee (HASC), and the Senate Select Committee on Intelligence (SSCI) and Senate Armed Services Committee (SASC). Other committees can also play a role. The Senate and House Appropriations Committees have funding authority that can function as a form of oversight, other committees “hold authorization powers over select programs or agencies,” and some play a role through their representation on the intelligence committees. See L. ELAINE HALCHIN & FREDERICK M. KAISER, CONG. RESEARCH SERV., RL32525, CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: CURRENT STRUCTURE AND ALTERNATIVES 1–2 (2012). Other committees, such as the House Committee on Government Oversight and Government Reform, the House Foreign Affairs Committee, the Senate Foreign Relations Committee, and the Senate Judiciary Committee, have at times requested information from the executive or hosted hearings related to drone strikes and “targeted killings,” with varying degrees of success. However, calls for oversight by other relevant Congressional committees have largely been ignored or rejected.

513. In 2012, Senator Dianne Feinstein (D-Cal.), Chairperson of the Senate Intelligence Committee, wrote to the Los Angeles Times confirming that the Committee carries out oversight of the “drone program.” See *Letters: Sen. Dianne Feinstein on drone strikes*, L.A. TIMES (May 17, 2012), <http://articles.latimes.com/2012/may/17/opinion/la-le-0517-thursday-feinstein-drones-20120517> (“The Senate Intelligence Committee, which I chair, has devoted significant time and attention to the drone program.”).
514. For military operations, this is covered by the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1036; for CIA operations, this is covered by 50 U.S.C. § 3091 (2016) (describing Congressional oversight provisions).
515. It seems that most of the military’s drone strikes are carried out by JSOC. See CIVILIAN IMPACT OF DRONES, *supra* note 47; and RYAN C. HENDRICKSON, OBAMA AT WAR 33 (2015) (“[I]f the drone is fired by the Department of Defense, [it] normally means that the strike has been carried out by the Joint Special Operations Command.”). See also, Robert Chesney, *Storifying the Oversight System for JSOC Kill/Capture Ops*, LAWFARE (Jun. 19, 2015), [www.lawfareblog.com/storifying-oversight-system-jsoc-killcapture-ops](http://www.lawfareblog.com/storifying-oversight-system-jsoc-killcapture-ops).
516. See, e.g., 10 U.S.C. 130f.
517. CIVILIAN IMPACT OF DRONES, *supra* note 29, at 64–66 (stating that “JSOC’s operations under CIA authority create additional obstacles to oversight. While some commentators suggest that joint CIA–military operations are subject to double scrutiny—meaning they report to both the congressional oversight committees that oversee the CIA and those that oversee the military—members of those committees themselves have voiced concerns.”)
518. 50 U.S.C. § 3093(b).
519. All such covert actions must be authorized by the President through a written declaration that the action is “necessary to support identifiable foreign policy objectives” and “important to... national security” and the President must then report each “finding” to the intelligence committees as soon as possible, before initiating the covert action. See 50 U.S.C. § 3093(a), 3093(c)(1). There are exceptions to these reporting requirements, which grant deference to the president to limit committee access to findings when “extraordinary circumstances affecting vital interests of the United States,” and require only notification to the so-called “gang of eight,” that is comprised of leadership of House and Senate intelligence committees, the Senate majority and minority leaders, and the Speaker and minority leader of the House. 50 U.S.C. § 3093(c)(2). Still, under these so-called “Gang of Eight” protocols, the President must provide a statement of reasons explaining the need for limited access, and within 180 days must provide access to the full intelligence committees or provide a new statement of reasons justifying the continued limited access. 50 U.S.C. § 3093(c)(5).
520. Preston CIA Speech, *supra* note 98 (in the same speech Preston commented that “We are bound by statute to ensure that these two committees [the intelligence oversight committees of the Senate and House of Representatives] are kept, quote, ‘fully and currently informed’ with respect to the entire range of intelligence activities, including covert action. They are afforded visibility into Agency operations that far exceeds the usual scope of congressional oversight of federal agencies. Think about this: during the last Congress, the Agency made, on average, more than two written submissions and two live appearances per day, 365 days a year.”).
521. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1031.
522. This was originally introduced in the National Defense Authorization Act for Fiscal Year 2014. Pub. L. No. 113-66, § 1041-43. For further discussion, see Robert Chesney, *Important New Oversight Legislation for Military Kill/Capture Outside Afghanistan*, LAWFARE (May 9, 2013), <https://lawfareblog.com/important-new-oversight-legislation-military-killcapture-outside-afghanistan>.
523. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 1031, 1036. This also includes, for example, requirements to notify the Committees within 48 hours of the action, and immediate notice requirements in the event of an unauthorized disclosure, *i.e.* a leak, of a “sensitive military operation.”
524. REPORT ON PROCESS, *supra* note 144.

525. DEP'T OF DEFENSE, REPORT ON CONGRESSIONAL NOTIFICATION OF SENSITIVE MILITARY OPERATIONS AND COUNTERTERRORISM OPERATIONAL BRIEFINGS (Mar. 26, 2014), [www.aclu.org/foia-document/report-congressional-notification-sensitive-military-operations-and-counterterrorism-0?redirect=dod-report-congressional-notification-sensitive-military-operations](http://www.aclu.org/foia-document/report-congressional-notification-sensitive-military-operations-and-counterterrorism-0?redirect=dod-report-congressional-notification-sensitive-military-operations).
526. For example, in February 2013, Senate Intelligence Committee Chair Dianne Feinstein stated that: “The committee has devoted significant time and attention to targeted killings by drones. The committee receives notifications with key details of each strike shortly after it occurs, and the committee holds regular briefings and hearings on these operations—reviewing the strikes, examining their effectiveness as a counterterrorism tool, verifying the care taken to avoid deaths to non-combatants and understanding the intelligence collection and analysis that underpins these operations. In addition, the committee staff has held 35 monthly, in-depth oversight meetings with government officials to review strike records (including video footage) and question every aspect of the program.” See Senator Dianne Feinstein, *Feinstein Statement on Intelligence Committee Oversight of Targeted Killings* (Feb. 13, 2013), [www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5b8dbe0c-07b6-4714-b663-b01c7c9b99b8](http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5b8dbe0c-07b6-4714-b663-b01c7c9b99b8). See also, a 2012 letter to the Los Angeles Times, in which Feinstein stated that the Committee “receive[s] notification with key details shortly after every strike, and we hold regular briefings and hearings on these operations. Committee staff has held 28 monthly in-depth oversight meetings to review strike records and question every aspect of the program including legality, effectiveness, precision, foreign policy implications and the care taken to minimize noncombatant casualties.” *Letters: Sen. Dianne Feinstein on drone strikes*, L.A. TIMES (May 17, 2012), <http://articles.latimes.com/2012/may/17/opinion/la-le-0517-thursday-feinstein-drones-20120517>. Rep. Mike Rogers (R-MI), Chair of the House Intelligence Committee, told the House of Representatives in December 2012, if there is any air strike conducted that involves an enemy combatant of the United States outside the theater of direct combat, it gets reviewed by this committee. I am talking about every single one. That’s an important thing. There are very strict reviews put on all of this material.” 158 CONG. REC., H7479–H7485 (daily ed. Dec. 31, 2012) (statement of Rep. Rogers). Rep. Mac Thornberry (R-TX), Chair of the House Armed Services, also said “[t]he Pentagon is pretty good about coming up, and describing some of these operations after they occur, we have evolved to a pretty good briefing relationship, but nothing is required by law, and there have been tremendous hassles back and forth between the executive and legislative branch about that first part, the legal justifications and the authorities they are relying on.” *Mac Thornberry: Drone oversight needed before, during and after use*, WASH. POST (May 14, 2013), [www.washingtonpost.com/video/thefold/mac-thornberry-drone-oversight-needed-before-during-and-after-use/2013/05/14/4de61aba-bc92-11e2-97d4-a479289a31f9\\_video.html](http://www.washingtonpost.com/video/thefold/mac-thornberry-drone-oversight-needed-before-during-and-after-use/2013/05/14/4de61aba-bc92-11e2-97d4-a479289a31f9_video.html) hereinafter THORNBERRY: DRONE OVERSIGHT).
527. PPG, *supra* note 16, at 18.
528. Preston CIA Speech, *supra* note 98.
529. Carrie Johnson, *Sen. Feinstein Says Intelligence Committee Reviews Drone Attacks*, NPR (Feb. 13, 2013), [www.npr.org/sections/thetwo-way/2013/02/13/171904178/sen-feinstein-says-intelligence-committee-reviews-drone-attacks](http://www.npr.org/sections/thetwo-way/2013/02/13/171904178/sen-feinstein-says-intelligence-committee-reviews-drone-attacks).
530. Senator Dianne Feinstein, *Feinstein Statement on Intelligence Committee Oversight of Targeted Killings*, (Feb. 13, 2013), [www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5b8dbe0c-07b6-4714-b663-b01c7c9b99b8](http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5b8dbe0c-07b6-4714-b663-b01c7c9b99b8). See also, Letter to Attorney General Eric Holder, from Senators Wyden, Udall, and Heinrich, (Nov. 26, 2013), [www.wyden.senate.gov/download/?id=C48CD5E5-EF15-4A44-A1BF-2274E5B1929A&download=1](http://www.wyden.senate.gov/download/?id=C48CD5E5-EF15-4A44-A1BF-2274E5B1929A&download=1); Letter to White House Counsel Neil Eggleston from Senators Wyden, Udall, and Heinrich, (Jun. 26, 2014), [www.scribd.com/doc/231427958/Wyden-Udall-Heinrich-Letter-to-the-White-House-on-Transparency-in-Drone-Policy](http://www.scribd.com/doc/231427958/Wyden-Udall-Heinrich-Letter-to-the-White-House-on-Transparency-in-Drone-Policy). Other members of Congress have made similar, and public, demands. See *Members of Congress have Asked for the Targeted Killing Memos 14-15-18 Times 19 Times*, EMPTY WHEEL (Feb. 18, 2013), [www.emptywheel.net/2013/02/08/members-of-congress-have-asked-for-the-targeted-killing-memos-14-times/](http://www.emptywheel.net/2013/02/08/members-of-congress-have-asked-for-the-targeted-killing-memos-14-times/).
531. 10 U.S.C. 130f
532. 50 U.S.C. § 3093.
533. Obama NDU Speech, *supra* note 11.

534. Letter from Eric Holder, Att’y Gen. to Members of Cong., *supra* note 15.
535. *Id.*
536. 50 U.S.C. § 3517(d)(1) (2016). However, the reports of some investigations have been released in a few cases not related to the use of lethal force. See, for example, CIA Inspector General, Report of Investigation: Unauthorized Interrogation Techniques at [redacted], 2003-7123-IG (Oct. 29, 2003), [www.cia.gov/library/readingroom/docs/0006541525.pdf](http://www.cia.gov/library/readingroom/docs/0006541525.pdf) [hereinafter IG Interrogation Techniques Investigation].
537. For a list of reports issued by the Department of Defense, Office of Inspector General, see DEP’T OF DEFENSE, OFFICE OF INSPECTOR GENERAL, *Consolidated List of Reports*, [www.dodig.mil/pubs/index.cfm](http://www.dodig.mil/pubs/index.cfm).
538. See, e.g. H. Rept. 114-885—Report on the Activities of the Committee on Armed Services for the One Hundred Fourteenth Congress (2015-16), [www.congress.gov/congressional-report/114th-congress/house-report/885/1](http://www.congress.gov/congressional-report/114th-congress/house-report/885/1).
539. Senator Dianne Feinstein, *Feinstein Statement on Intelligence Committee Oversight of Targeted Killings* (Feb. 13, 2013), [www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5b8dbe0c-07b6-4714-b663-b01c7c9b99b8](http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5b8dbe0c-07b6-4714-b663-b01c7c9b99b8).
540. *Id.*
541. Letter to Attorney General Eric Holder from Senators Wyden, Udall, and Heinrich (Nov. 26, 2013), [www.wyden.senate.gov/download/?id=C48CD5E5-EF15-4A44-A1BF-2274E5B1929A&download=1](http://www.wyden.senate.gov/download/?id=C48CD5E5-EF15-4A44-A1BF-2274E5B1929A&download=1); Letter to White House Counsel Neil Eggleston from Senators Wyden, Udall, and Heinrich (Jun. 26, 2014), [www.scribd.com/doc/231427958/Wyden-Udall-Heinrich-Letter-to-the-White-House-on-Transparency-in-Drone-Policy](http://www.scribd.com/doc/231427958/Wyden-Udall-Heinrich-Letter-to-the-White-House-on-Transparency-in-Drone-Policy); other members of Congress have made similar, and public, demands, see: *Members of Congress have Asked for the Targeted Killing Memos 44-45-48 Times 19 Times*, EMPTY WHEEL (Feb. 18, 2013), [www.emptywheel.net/2013/02/08/members-of-congress-have-asked-for-the-targeted-killing-memos-14-times/](http://www.emptywheel.net/2013/02/08/members-of-congress-have-asked-for-the-targeted-killing-memos-14-times/).
542. *Letters: Sen. Dianne Feinstein on drone strikes*, L.A. TIMES (May 17, 2012), <http://articles.latimes.com/2012/may/17/opinion/la-le-0517-thursday-feinstein-drones-20120517>.
543. In February 2013, Feinstein was reported to have said that “Right now it is very hard [to oversee] because it is regarded as a covert activity, so when you see something that is wrong and you ask to be able to address it, you are told no,” implying that the secrecy was actually hindering effective oversight. Conor Friedersdorf, *Reports of Congressional Drone Oversight Are Greatly Exaggerated*, ATLANTIC (May 1, 2013), [www.theatlantic.com/politics/archive/2013/05/reports-of-congressional-drone-oversight-are-greatly-exaggerated/275451/](http://www.theatlantic.com/politics/archive/2013/05/reports-of-congressional-drone-oversight-are-greatly-exaggerated/275451/)
544. THORNBERRY: DRONE OVERSIGHT, *supra* note 523.
545. Robert Chesney, *Oversight & JSOC: Withholding Funds to Force Disclosures on Targeting Process?*, LAWFARE (May 6, 2014), <https://lawfareblog.com/oversight-jsoc-withholding-funds-force-disclosures-targeting-process>.
546. See, e.g., *Drone Wars Hearing*, *supra* note 99; U.S. House of Representatives, *Subcommittee on National Security and Foreign Affairs, Subcommittee Hearing: Rise of the Drones: Unmanned Systems and the Future of War*, 111th Cong. (2010), <https://oversight.house.gov/hearing/rise-of-the-drones-unmanned-systems-and-the-future-of-war/>.
547. Preston CIA Speech, *supra* note 98 (“In addition, the Agency would have to discharge its obligation under the congressional notification provisions of the National Security Act to keep the intelligence oversight committees of Congress “fully and currently informed” of its activities. Picture a system of notifications and briefings—some verbal, others written; some periodic, others event-specific; some at a staff level, others for members.”)
548. Conor Friedersdorf, *Reports of Congressional Drone Oversight Are Greatly Exaggerated*, ATLANTIC (May 1, 2013), [www.theatlantic.com/politics/archive/2013/05/reports-of-congressional-drone-oversight-are-greatly-exaggerated/275451/](http://www.theatlantic.com/politics/archive/2013/05/reports-of-congressional-drone-oversight-are-greatly-exaggerated/275451/); Tim Starks, *Unmanned Oversight: How Congress Whiffed on Drones*, NEW REPUBLIC (Feb. 7, 2013), <https://newrepublic.com/article/112347/congress-and-drones-why-has-oversight-been-so-bad>.
549. Carlo Muñoz, *Sens. Feinstein, Leahy push for court oversight of armed drone strikes*, THE HILL (Feb. 10, 2013), <http://thehill.com/policy/defense/282033-feinstein-leahy-push-for-court-oversight-of-armed-drone-strikes-#ixzz2RzPHdGfL>.

550. Burgess Everett and Josh Dawsey, White House orders agencies to ignore Democrats' oversight requests, Politico (Jun. 2, 2017), [www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034](http://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034).
551. Indeed, this overarching benefit of transparency relates back to a core justification for IHL generally, and specifically a state's duty to investigate under IHL, as transparency contributes to one of the fundamental purposes of IHL: "increasing compliance and deterring the commission of future violations." THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 (SECOND REPORT—THE TURKEL COMMISSION), ISRAEL'S MECHANISMS FOR EXAMINING AND INVESTIGATING COMPLAINTS AND CLAIMS OF VIOLATIONS OF THE LAWS OF ARMED CONFLICT ACCORDING TO INTERNATIONAL LAW 134, 149 (Feb. 2013) [hereinafter SECOND TURKEL COMMISSION REPORT].
552. LAW OF WAR MANUAL, *supra* note 185, ¶ 5.11.1.3.
553. Exec. Order No. 13732, *supra* note 139.
554. *Id.* The Executive Order applies to "relevant departments and agencies." Although this is not defined, given the subject matter, and the CIA's involvement in drone strikes and other uses of lethal force, it is hard to see how the CIA is not included as a "relevant agency," even though this is not explicitly stated. The U.S. government could help clarify this by explaining to which agencies the Executive Order applies. Exec. Order No. 13732, *supra* note 139.
555. See e.g. DEP'T OF DEFENSE, DIRECTIVE 2311.01E, May 9, 2006, [www.dtic.mil/whs/directives/corres/pdf/231101e.pdf](http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf) [hereinafter Directive 2311.01E]; "Chairman of the Joint Chiefs of Staff Instruction 5810.01D: Implementation of the DoD Law of War Program," Joint Chiefs of Staff (Apr. 30, 2010); 2015 OPERATIONAL LAW HANDBOOK 2015, *supra* note 211, at 40.
556. It also includes "possible, suspected, or alleged" violations of the law of war, "for which there is "credible information for "conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict." Directive 2311.01E, *supra* note 555.
557. U.S. military manuals demonstrate that assessment is an integral part of the targeting cycle. See S. Joint Chiefs of Staff, JOINT TARGETING, Joint Publication 3-60 (Apr. 13, 2007), [www.aclu.org/foia-document/joint-targeting-joint-publication-3-60](http://www.aclu.org/foia-document/joint-targeting-joint-publication-3-60); See also, e.g., General John R. Allen USMC, COMISAF's Tactical Directive, NATO's INT'L SECURITY ASSISTANCE FORCE (Nov. 30, 2011), [www.pksoi.org/document\\_repository/doc\\_lib/20111105%20nuc%20tactical%20directive%20revision%204%20\(releaseable%20version\)%20r%5B1%5D.pdf](http://www.pksoi.org/document_repository/doc_lib/20111105%20nuc%20tactical%20directive%20revision%204%20(releaseable%20version)%20r%5B1%5D.pdf) [hereinafter COMISAF's Tactical Directive]; *Tactical Directive*, NATO'S INT'L SECURITY ASSISTANCE FORCE, ¶ 6 (Dec. 30, 2008), [www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090114.pdf](http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090114.pdf); Directive 2311.01E, *supra* note 548; see 2015 OPERATIONAL LAW HANDBOOK 2015, *supra* note 211; Brendan Groves, *Civil-Military Cooperation in Civilian Casualty Investigations: Lessons Learned from the Azizabad Attack*, 65 AIR FORCE L. REV. 1, 11 (2010).
558. DEPARTMENT OF THE ARMY, CIVILIAN CASUALTY MITIGATION, 2-21, <https://fas.org/irp/doddir/army/attp3-37-31.pdf> (hereinafter CIVILIAN CASUALTY MITIGATION).
559. LAW OF WAR MANUAL, *supra* note 185, ¶ 5.11.1.3.
560. *Id.*
561. DEPARTMENT OF THE ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (Oct. 2, 2006) [hereinafter AR 15-6].
562. *Id.* at 7.
563. OPERATIONAL LAW HANDBOOK 2015, *supra* note 211 at 356.
564. Preston CIA Speech, *supra* note 98. There have been other *ad hoc* disclosures of this kind. In August 2015, then CIA Director John Brennan wrote an unclassified letter to Senator Wyden to explain in summary form some of the procedures followed by the CIA when they become aware of allegations of human rights abuses against a "liaison service" (*i.e.* this was not in relation to alleged misconduct by the CIA itself). See Letter to Senator Ron Wyden, from CIA Director John Brennan (Aug. 6, 2015), <http://big.assets.huffingtonpost.com/Brennan.pdf>.



565. CIGIE Manuals, *supra* note 506.
566. Exec. Order No. 13732, *supra* note 139; DNI SUMMARY 2016, *supra* note 5.
567. *Id.* DNI SUMMARY 2016, *supra* note 5.
568. PPG, *supra* note 16, at 17-18.
569. Exec. Order No. 13732, *supra* note 139.
570. DNI SUMMARY 2016, *supra* note 5, at 1.
571. Exec. Order No. 13732, *supra* note 139.
572. See OPEN SOCIETY FOUNDATIONS, THE STRATEGIC COSTS OF CIVILIAN HARM: APPLYING LESSONS FROM AFGHANISTAN TO CURRENT AND FUTURE CONFLICTS 55 (2016), [www.opensocietyfoundations.org/sites/default/files/strategic-costs-civilian-harm-20160622.pdf](http://www.opensocietyfoundations.org/sites/default/files/strategic-costs-civilian-harm-20160622.pdf)
573. DNI SUMMARY 2016, *supra* note 5, at 2.
574. U.S. ARMY ADMINISTRATIVE INVESTIGATIONS, H-4 (Apr. 2015), <https://tjaglcpublic.army.mil/documents/27431/37158/2015+Administrative+Investigations+Outline+%283+NOV15%29.pdf/984a858e-cb2d-41a4-a57a-68babb0504e1?version=1.0>.
575. OPERATIONAL LAW HANDBOOK 2015, *supra* note 211, at 352. The Navy and Marine Corps for example, have their own instruction for command investigations, also referred to as “JAGMAN,” which divides administrative investigations into more specific types than AR 15-6 instructions do. See JAGINST 5800.7F, The Manual of the Judge Advocate General (Jun. 26, 2013), [www.marines.mil/Portals/59/Publications/JAGINST%205800.7F.pdf?ver=2012-10-11-163519-947](http://www.marines.mil/Portals/59/Publications/JAGINST%205800.7F.pdf?ver=2012-10-11-163519-947).
576. CIVILIAN CASUALTY MITIGATION, *supra* note 558, at 2-21.
577. *Id.*
578. *Id.*
579. LAW OF WAR MANUAL, *supra* note 185, ¶ 5.11.1.3.
580. *Id.* ¶¶ 18.2 and 18.4.3.
581. DNI SUMMARY 2016, *supra* note 5, at 1.
582. Exec. Order No. 13732, *supra* note 139.
583. *Id.* at 44486.
584. Brennan Nomination Hearings, *supra* note 111 (John O. Brennan responding to post-hearing questions).
585. Exec. Order No. 13732, *supra* note 139.
586. See generally AR 15-6, *supra* note 554; see also Directive 2311.01E, *supra* note 548.
587. Al Hatra Investigation, *supra* note 427.
588. PPG, *supra* note 16, at 17.
589. OPERATIONAL LAW HANDBOOK 2015, *supra* note 211 at 356. Investigations must be retained by the approving authority for a period five years, before such records are destroyed or shipped for permanent storage IAW the Army Records Information Management System (ARIMS) and Record Retention Schedule—Army (RRS-A).
590. CIVILIAN CASUALTY MITIGATION, *supra* note 558, at 2-21.
591. PPG, *supra* note 16, at 17.

592. Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, ¶¶ 15-18, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter HRC, General Comment No. 31]; *Hugh Jordan v United Kingdom*, App. No. 24746/94, Eur. Ct. H.R. (2001), ¶ 109 (“There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.”); *McKerr v. United Kingdom*, App. No. 28883/95, Eur. Ct. H.R. (2011); SECOND TURKEL COMMISSION REPORT, *supra* note 551, ¶¶ 90-94 (“[T]he principle of transparency contributes to achieving a culture of accountability; it requires a sufficient degree of public scrutiny in order to conduct an effective investigation”); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Yemen*, U.N. Doc. CCPR/C/YEM/CO/5, ¶ 15, (Apr. 23, 2012); Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CCPR/C/GBR/CO/7, ¶ 8, (Aug. 17, 2015).
593. Kevin Lilley, *Army: New courts-martial roundup adds transparency*, ARMY TIMES (Feb. 4, 2015), [www.armytimes.com/story/military/crime/2015/02/04/army-new-courts-martial-roundup-adds-transparency-foia/22848713/](http://www.armytimes.com/story/military/crime/2015/02/04/army-new-courts-martial-roundup-adds-transparency-foia/22848713/). For example, monthly summaries of U.S. Army court martials are available at U.S. Army, Court-Martial Results of Trial, U.S. Army Freedom of Information Act Library, [www.foia.army.mil/ReadingRoom/Detail.aspx?id=95](http://www.foia.army.mil/ReadingRoom/Detail.aspx?id=95) (last viewed Jun. 7, 2017).
594. The CIA has released some information regarding investigations into “unauthorized interrogation techniques.” See, e.g. IG Interrogation Techniques Investigation, *supra* note 536.
595. See Common Article 1, Geneva Convention; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (December 10, 1948) (stating that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights”); Basic Principles on the Right to a Remedy, *supra* note 9; Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Report of the Special Rapporteur on extrajudicial, summary or arbitrary Executions*, ¶¶ 56 -58, 84-89, U.N. Doc. A/HRC/14/24 (May 20, 2010).
596. See CIVIC, CIVILIANS IN ARMED CONFLICT, *supra* note 69 (stating “international and national laws do not obligate the United States to pay compensation to civilians harmed in the midst of lawful combat operations.”).
597. CIVIC, *Backgrounder: US “Condolence” Payments* (2011), <http://civiliansinconflict.org/resources/pub/backgrounder-us-condolence-payments>.
598. See Jeremy Joseph, *Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments* 23 Negotiation J. 219, 223-224 (2007); see also Bruce Oswald and Bethany Wellington, *Reparations for Violations in Armed Conflict and the Emerging Practice of Making Amends*, in ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT 532 (R. Liivoja & T. McCormack eds. 2016) (noting the increasing trend in counterinsurgency warfare to win the ‘hearts and minds’ of the local population, and that compensation through condolence payments can garner support for the mission).
599. Yet, even with the official authorization to provide condolence payments in Afghanistan and Iraq, U.S. policies to gather information about civilian harm and make payments remained *ad hoc* and inconsistent, leaving a lack of clarity on how payments should be implemented, and where and how those harmed could receive payment. CIVIC, CIVILIANS IN ARMED CONFLICT, *supra* note 69, at 1-3; Alston Report (A/HRC/11/2/Add.5), *supra* note 70, ¶ 69; Cora Currier, *Our Condolences: How the US paid for death and damage in Afghanistan*, INTERCEPT (Feb. 27, 2015), <https://theintercept.com/2015/02/27/payments-civilians-afghanistan/>.
600. See Brennan Nomination Hearings, *supra* note 111 (stating that “where possible, we work with local governments to gather facts, and, if appropriate, provide condolence payments to families of those killed”); see also Kimberly Dozier, *Report: U.S. drone strike may have killed up to a dozen civilians in Yemen*, ASSOCIATED PRESS (Feb. 20, 2014), [www.pbs.org/newshour/rundown/repor-u-s-drones-may-killed-civilians/](http://www.pbs.org/newshour/rundown/repor-u-s-drones-may-killed-civilians/) (quoting National Security Council spokeswoman Caitlin Hayden as saying, “in situations where we have concluded that civilians have been killed, the United States has made condolence payments where appropriate and possible”).

601. Cora Currier, *Hearts, Minds and Dollars: Condolence Payments in the Drone Strike Age*, PROPUBLICA (Apr. 5, 2013), [www.propublica.org/article/hearts-minds-and-dollars-condolence-payments-in-the-drone-strike-age](http://www.propublica.org/article/hearts-minds-and-dollars-condolence-payments-in-the-drone-strike-age). For example, the same year that John Brennan said that the U.S. government worked to provide condolence payments “where possible,” Pentagon spokesman Bill Speaks stated that the Department of Defense had not made any condolence payments in Yemen or Somalia. Yet in 2013, in response to a ProPublica FOIA request for information about condolence payments, including procedural guidelines for payments, budget data, and records of payments made, the military acknowledged that they possessed a 33-page document containing such information, while refusing to release it. See Letter from Karl R. Horst, Major Gen., U.S. Army, to Cora Currier, ProPublica, CENTCOM Condolence Payment FOIA Response (July 22, 2013), [www.documentcloud.org/documents/746206-centcom-condolence-payment-foia-response.html](http://www.documentcloud.org/documents/746206-centcom-condolence-payment-foia-response.html).
602. See generally OSJI & MWATANA, DEATH BY DRONE, *supra* note 3; HRW, WEDDING BECAME A FUNERAL, *supra* note 69; AMNESTY, WILL I BE NEXT?, *supra* note 23, CIVILIAN IMPACT OF DRONES, *supra* note 47; Cora Currier, *When drone strike victims receive condolence payments*, SALON (Apr. 5, 2013), [www.salon.com/2013/04/05/what\\_do\\_we\\_know\\_about\\_condolence\\_payments\\_for\\_drone\\_strike\\_victims\\_partner/](http://www.salon.com/2013/04/05/what_do_we_know_about_condolence_payments_for_drone_strike_victims_partner/).
603. Basic Principles on the Right to a Remedy, *supra* note 9, ¶ 1(c); see also Theo van Boven (Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights), *Study Concerning the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. ESCOR, Hum. Rts. Comm., 45th Sess., Agenda Item 4, at 347, U.N. Doc. E/CN.4/Sub.2/1993/8 (1993) [hereinafter Study on the Right to Restitution]; Alston Report (A/HRC/11/2/Add.5), *supra* note 70.
604. Exec. Order No. 13732, *supra* note 139.
605. *Id.*
606. Ellen L. Lutz, *After the Elections: Compensation Victims of Human Rights Abuses*, at 556 in TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995); see also Jonathan Tracy, *Responsibility to Pay: Compensating Civilian Casualties of War*, 15 HUM. RTS. BRIEF 16 (2007) (noting that in Ramadi, Iraq, military officials told locals that they could not file claims if the incident occurred over three months before).
607. *Id.*
608. *Id.*
609. Christof Heyns (Special Rapporteur on extrajudicial, summary or arbitrary executions), *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Follow-up Report on United States* (2012) U.N. Doc. A/HRC/20/22/Add.5, ¶¶ 71-2 (stating that Congress has created and allocated money for assistance programs in Afghanistan and Iraq but that these programs have been developed on an *ad hoc* basis.)
610. Tracy, *supra* note 606; see also Oswald and Wellington, *supra* note 598.
611. Alston Report (A/HRC/11/2/Add.5), *supra* note 70, ¶ 69.
612. OPEN SOC’Y FOUNDS., AFTER THE DEAD ARE COUNTED, *supra* note 69.
613. Currier, *supra* note 601; AFP, *Drone attack: ‘Victims’ families to get Rs0.3m each’*, EXPRESS TRIBUNE (Mar. 26, 2011), <https://tribune.com.pk/story/138047/pakistan-to-compensate-us-drone-strike-families-official/>.
614. Kirchgaessner, *supra* note 130.
615. AMNESTY, WILL I BE NEXT?, *supra* note 23, at 39.
616. *Id.*
617. Sarah Holewinski, *Do Less Harm*, 92 FOREIGN AFF. 14, 19 (2013).
618. OSJI & MWATANA, DEATH BY DRONE, *supra* note 3, at 10.
619. See Letter from Karl R. Horst, Major Gen., U.S. Army, to Cora Currier, ProPublica, CENTCOM Condolence Payment FOIA Response (Jul. 22, 2013), [www.documentcloud.org/documents/746206-centcom-condolence-payment-foia-response.html](http://www.documentcloud.org/documents/746206-centcom-condolence-payment-foia-response.html).
620. See generally, OSJI & MWATANA, DEATH BY DRONE, *supra* note 3.

621. See *Factory at Chorzow (Ger. v. Pol.)* (1928) P.C.I.J. (ser. A) No. 17 at 102. See also Responsibility of States for Internationally Wrongful Acts, *supra* note 311, art. 31; Fourth Geneva Convention, art. 146; Basic Principles on the Right to a Remedy, *supra* note 9, ¶ 20; HRC, General Comment No. 31, *supra* note 592.
622. CENTER FOR CIVILIANS IN CONFLICT AND AMSTERDAM INTERNATIONAL LAW CLINIC, Monetary Payments for Civilian Harm in International and National Practice (2013), [http://civiliansinconflict.org/uploads/files/publications/Valuation\\_Final\\_Oct\\_2013pdf.pdf](http://civiliansinconflict.org/uploads/files/publications/Valuation_Final_Oct_2013pdf.pdf); see also Scott T. Paul, *The Duty to Make Amends to Victims of Armed Conflict*, 22 TUL. J. INT'L & COMP. L. 87, 101 (2013).
623. This was expanded to Syria at the end of 2016, although it was not clear as of May 2017 if any payments had actually been made for harm to civilians in Syria. Kate Brannen, *Congress on Track to Extend Condolence Payments to Syrians*, JUST SECURITY (Dec. 5, 2016), [www.justsecurity.org/35200/congress-track-extend-condolence-payments-syria/](http://www.justsecurity.org/35200/congress-track-extend-condolence-payments-syria/); Marla Keenan, EX-GRATIA PAYMENTS IN AFGHANISTAN: A CASE FOR STANDING POLICY FOR THE U.S. MILITARY, CENTER FOR CIVILIANS IN CONFLICT 1 (2015); Sahr Muhammedally, *Making Amends*, in ACKNOWLEDGE, AMEND, ASSIST: ADDRESSING CIVILIAN HARM CAUSED BY ARMED CONFLICT AND ARMED VIOLENCE, 11, 12 (Bonnie Docherty ed., 2015).
624. Larry Lewis, *Drone Strikes in Pakistan: Reasons to Assess Civilian Casualties*, CAN ANALYSIS AND SOLUTIONS 41 (2014).
625. U.S. Senate Select Committee on Intelligence, Nomination of John O. Brennan to be the Director of the Central Intelligence Agency, Responses to Post-Hearing Questions (Feb. 16, 2013), [www.intelligence.senate.gov/sites/default/files/hearings/posthearing%20%281%29.pdf](http://www.intelligence.senate.gov/sites/default/files/hearings/posthearing%20%281%29.pdf); see also Brennan Nomination Hearings, *supra* note 111.
626. Christine Sixta Rinehart, DRONES AND TARGETED KILLING IN THE MIDDLE EAST AND AFRICA: AN APPRAISAL OF AMERICAN COUNTERTERRORISM POLICIES 31 (2016) (noting that most civilians do not receive compensation for their losses after a drone attack); Letter from Am. Civ. Liberties Union et al., to President Barack Obama, *Public Acknowledgment and Investigations of U.S. "Targeted Killings" and Drone Strikes* (May 13, 2015), [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/civil\\_society\\_joint\\_letter\\_to\\_obama\\_on\\_drone\\_strikes\\_-\\_may\\_13\\_2015.pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/civil_society_joint_letter_to_obama_on_drone_strikes_-_may_13_2015.pdf); Letter from Am. Civ. Liberties Union et al., to President Barack Obama, *Implementation of Executive Order of July 1, 2016 Regarding Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force* (Oct. 6, 2016), [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/joint\\_letter\\_re\\_implementation\\_of\\_executive\\_order.pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/joint_letter_re_implementation_of_executive_order.pdf).
627. Weinstein & Lo Porto Press Briefing, *supra* note 237 ("Josh, will the U.S. government provide compensation to the families of the two hostages who were killed?" [White House Press Secretary Josh Earnest]: "Yes"). As of May 2017, the U.S. government had not publicly confirmed whether payment had been made to the Weinstein family.
628. Hina Shamsi, *Obama Apologized for the Drone Killings of Two Western Victims. What About Everyone Else?*, AM. CIV. LIBERTIES UNION (May 13, 2015), [www.aclu.org/blog/speak-freely/obama-apologized-drone-killings-two-western-victims-what-about-everyone-else](http://www.aclu.org/blog/speak-freely/obama-apologized-drone-killings-two-western-victims-what-about-everyone-else) ("But the contrast between the administration's response to the deaths of these Western—and white—civilians and those of the many hundreds of non-Western civilians who have died in the administration's lethal force program is stark and glaring. No other victim's family has received official acknowledgement and an apology, let alone been promised an investigation or compensation.")
629. President's Statement on Deaths of Weinstein and Lo Porto, *supra* note 15.
630. Greg Miller and Greg Jaffe, *U.S. agrees to pay nearly \$3 million to family of Italian killed in CIA strike*, WASH. POST (Sept. 16, 2016), [www.washingtonpost.com/world/national-security/us-agrees-to-pay-nearly-3-million-to-family-of-italian-killed-in-cia-strike/2016/09/16/5c213aff-7c1a-11e6-bd86-b7bbd53d2b5d\\_story.html?utm\\_term=.e9f3901456b2](http://www.washingtonpost.com/world/national-security/us-agrees-to-pay-nearly-3-million-to-family-of-italian-killed-in-cia-strike/2016/09/16/5c213aff-7c1a-11e6-bd86-b7bbd53d2b5d_story.html?utm_term=.e9f3901456b2).
631. *Id.*
632. Currier, *supra* note 601; AFP, *Drone attack*, *supra* note 613.

633. Jack Serle, *Pakistan, Yemen, Somalia, Libya: Obama's Drone Casualty Numbers Conceals Extensive U.S. War Crimes*, Bureau of Investigative Journalism, (July 1, 2016) [www.thebureauinvestigates.com/2016/07/01/obama-drone-casualty-numbers-fraction-recorded-bureau](http://www.thebureauinvestigates.com/2016/07/01/obama-drone-casualty-numbers-fraction-recorded-bureau).
634. Cora Currier, *Hearts, Minds, and Dollars: Condolence Payments in a Drone Strike Age*, PROPUBLICA (April 5, 2013), [www.propublica.org/article/hearts-minds-and-dollars-condolence-payments-in-the-drone-strike-age](http://www.propublica.org/article/hearts-minds-and-dollars-condolence-payments-in-the-drone-strike-age).
635. Feliz Solomon, *Somali officials claim U.S. airstrikes killed civilians, not Al-Shabaab militants*, TIME (Sept 29, 2016), <http://time.com/4514144/somalia-mogadishu-galmudug-puntland-airstrike-al-shabab/> (in responding to claims that civilians had been killed, U.S. AFRICA COMMAND determined reports to be incorrect).
636. Jack Serle, *Obama drone casualty numbers a fraction of those recorded by the Bureau*, BUREAU OF INVESTIGATIVE JOURNALISM (Jul. 1, 2016), [www.thebureauinvestigates.com/2016/07/01/obama-drone-casualty-numbers-fraction-recorded-bureau](http://www.thebureauinvestigates.com/2016/07/01/obama-drone-casualty-numbers-fraction-recorded-bureau).
637. Cora Currier, *Hearts, Minds, and Dollars: Condolence Payments in a Drone Strike Age*, PROPUBLICA (Apr. 5, 2013), [www.PUBLICA.org/article/hearts-minds-and-dollars-condolence-payments-in-the-drone-strike-age](http://www.PUBLICA.org/article/hearts-minds-and-dollars-condolence-payments-in-the-drone-strike-age).
638. Greg Miller, *Yemeni victims of U.S. military drone strike get more than \$1 million in compensation*, WASH. POST (Aug. 18, 2014) [www.washingtonpost.com/world/national-security/yemeni-victims-of-us-military-drone-strike-get-more-than-1-million-in-compensation/2014/08/18/670926f0-26e4-11e4-8593-da634b334390\\_story.html?utm\\_term=.28c502dfee62](http://www.washingtonpost.com/world/national-security/yemeni-victims-of-us-military-drone-strike-get-more-than-1-million-in-compensation/2014/08/18/670926f0-26e4-11e4-8593-da634b334390_story.html?utm_term=.28c502dfee62).
639. Cora Currier, *Does the U.S. Pay Families When Drones Kill Innocent Yemenis?*, PROPUBLICA (Aug. 12, 2013), [www.PUBLICA.org/article/does-the-u.s.-pay-families-when-drones-kill-innocent-yemenis](http://www.PUBLICA.org/article/does-the-u.s.-pay-families-when-drones-kill-innocent-yemenis).
640. Sarah Knuckey, *Did the U.S. drone strike and secretly compensate Yemeni civilians?*, JUST SECURITY (Aug. 19, 2014), [www.justsecurity.org/14119/u-s-drone-strike-secretly-compensate-yemeni-civilians/](http://www.justsecurity.org/14119/u-s-drone-strike-secretly-compensate-yemeni-civilians/).
641. OPEN SOCIETY FOUNDATIONS, *THE STRATEGIC COSTS OF CIVILIAN HARM: APPLYING LESSONS FROM AFGHANISTAN TO CURRENT AND FUTURE CONFLICTS* 55 (2016), [www.opensocietyfoundations.org/sites/default/files/strategic-costs-civilian-harm-20160622.pdf](http://www.opensocietyfoundations.org/sites/default/files/strategic-costs-civilian-harm-20160622.pdf).
642. Votel Testimony, *supra* note 154.
643. Hannah Allam, *When U.S. strikes go wrong, not all civilian lives are equal*, McCLATCHY DC (Apr. 28, 2015), [www.mcclatchydc.com/news/nationa-world/national-security/article24783676.html](http://www.mcclatchydc.com/news/nationa-world/national-security/article24783676.html).
644. Kirchgaessner, *supra* note 130; Greg Miller and Greg Jaffe, *U.S. agrees to pay nearly \$3 million to family of Italian killed in CIA strike*, WASH. POST (Sept. 16, 2016), [www.washingtonpost.com/world/national-security/us-agrees-to-pay-nearly-3-million-to-family-of-italian-killed-in-cia-strike/2016/09/16/5c213af6-7c1a-11e6-bd86-b7bbd53d2b5d\\_story.html?utm\\_term=.ee7589cff7d3](http://www.washingtonpost.com/world/national-security/us-agrees-to-pay-nearly-3-million-to-family-of-italian-killed-in-cia-strike/2016/09/16/5c213af6-7c1a-11e6-bd86-b7bbd53d2b5d_story.html?utm_term=.ee7589cff7d3).
645. Currier, *supra* note 601. Letter from Karl R. Horst, Major General, U.S. Army to Cora Currier, PROPUBLICA (Jul. 22, 2013), <https://assets.documentcloud.org/documents/746206/centcom-condolence-payment-foia-response.pdf>.
646. See Massoud Haydoun, *US paid family of Yemen drone-strike victim \$100K, rights group says*, AL-JAZEERA AMERICA (Nov. 11, 2014) <http://america.aljazeera.com/articles/2014/11/11/drone-yemen-reprieve.html>; see also *US drone operators join lawsuit against Obama over Yemen strike*, MIDDLE EAST EYE (Sept. 8, 2016) [www.middleeasteye.net/news/us-drone-operators-join-lawsuit-against-obama-over-yemen-strike-1795617396](http://www.middleeasteye.net/news/us-drone-operators-join-lawsuit-against-obama-over-yemen-strike-1795617396).
647. Greg Miller, *Yemeni victims of U.S. military drone strike get more than \$1 million in compensation*, WASH. POST (Aug. 18, 2014), [www.washingtonpost.com/world/national-security/yemeni-victims-of-us-military-drone-strike-get-more-than-1-million-in-compensation/2014/08/18/670926f0-26e4-11e4-8593-da634b334390\\_story.html?utm\\_term=.2b440557d3d6](http://www.washingtonpost.com/world/national-security/yemeni-victims-of-us-military-drone-strike-get-more-than-1-million-in-compensation/2014/08/18/670926f0-26e4-11e4-8593-da634b334390_story.html?utm_term=.2b440557d3d6).

648. Lucy Draper, *The wedding that became a funeral: The U.S. still silent one year on from deadly Yemen drone strike*, NEWSWEEK (Dec. 12, 2014), [www.newsweek.com/wedding-became-funeral-us-still-silent-one-year-deadly-yemen-drone-strike-291403](http://www.newsweek.com/wedding-became-funeral-us-still-silent-one-year-deadly-yemen-drone-strike-291403) (citing Letta Tayler at Human Rights Watch: “A payment of this size declares as loudly as a neon sign that the strike killed innocent civilians. Moreover, it’s highly unlikely the impoverished and embattled Yemeni government made such a sumptuous payment on its own, meaning that the cash may have come from the United States—a further admission of guilt. Whoever paid this sum, it’s back-door blood-money, not redress.”).
649. See generally OSJI, DEATH BY DRONE, *supra* note 3; HRW, WEDDING THAT BECAME A FUNERAL, *supra* note 69; AMNESTY, WILL I BE NEXT?, *supra* note 23; CIVILIAN IMPACT OF DRONES, *supra* note 29; see also Zenko, Reforming, *supra* note 24 (noting that “it is unclear whether there is a process [...] in place to provide compensation to the families of unintended victims similar to the process for accidental civilian casualties as a result of U.S. military operations in Afghanistan”).
650. Tshwane Principles, *supra* note 258.
651. Neta Crawford, ACCOUNTABILITY FOR KILLING: MORAL RESPONSIBILITY FOR COLLATERAL DAMAGE IN AMERICA’S POST 9/11 WARS, 382 (2013).
652. ICCPR, *supra* note 8, at art. 2(3); HRC, *General Comment No. 31*, *supra* note 585, ¶¶14–15; Tshwane Principles, *supra* note 256.
653. Tshwane Principles, *supra* note 258.
654. Basic Principles on the Right to a Remedy, *supra* note 9, ¶VII.
655. Lesley Wexler, *The Role of the U.S. Judicial Branch During the Long War: Drone Courts, Damage Suits and Freedom of Information Act (FOIA) Requests* 76, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI JUDICIAL BODIES: INTERNATIONAL AND DOMESTIC ASPECTS (D. Jinks et. al, eds.) (2014) (noting that “while the Supreme Court has spoken to the existence of an armed conflict in Afghanistan and how to conduct a status determination of those detained, U.S. courts have shied away from substantive rulings in targeting cases”).
656. Pardiss Kebriyaii, *The Distance Between Principle and Practice in the Obama Administration’s Targeted Killing Program: A Response to Jeh Johnson*, 31 YALE L. AND POL’Y REV. 151, 169–170 (2012).
657. For further details about the case, see *Al-Aulaqi v Obama—Constitutional Challenge to Proposed Killing of U.S. Citizen*, AM. CIV. LIBERTIES UNION (Oct. 19, 2011), [www.aclu.org/cases/al-aulaqui-v-obama-constitutional-challenge-proposed-killing-us-citizen](http://www.aclu.org/cases/al-aulaqui-v-obama-constitutional-challenge-proposed-killing-us-citizen). The U.S. government made largely the same argument in a subsequent case filed on behalf of the families of Anwar al-Aulaqi, Samir Khan (who was killed in a U.S. drone strike in Yemen in 2011), and Abdulrahman al-Aulaqi, Anwar al-Aulaqi’s 16-year-old son who was killed in a U.S. drone strike in Yemen about two weeks after his father was killed in 2011. *Al-Aulaqi v. Panetta*, No. 12–1192, 2014 WL 1352452 (D.D.C. Apr. 4, 2014).
658. Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendant’s Motion to Dismiss at 49, *Al-Aulaqi v. Obama*, 27 F.Supp.2d 1 (2010).
659. Jaffer, Drone Memos, *supra* note 225, at 54.
660. *Id.*
661. *Id.*, at 50–59.
662. Memorandum Opinion at 82–83, *Al-Aulaqi v. Obama*, 27 F.Supp.2d.
663. G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 134 (Sept. 16, 2005).
664. U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 3, 2004).

665. Charlotte Ku and Harold K. Jacobson, *Introduction*, in *DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW* 3, 8 (Charlotte Ku and Harold K. Jacobson eds., 2003) (“Concern for the rule of law is especially acute with respect to the use of coercive power.”); PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS, *THE GOVERNMENT’S POLICY ON THE USE OF DRONES FOR TARGETED KILLING*, REPORT, 2015–16, HC 574, HL Paper 141, at 21 (UK) (“If the availability of drone technology is not to lead to a significant lowering of the level of protection for the right to life, it is important to ensure that there is absolute clarity about the legal frameworks that apply to the use of drones for targeted killing, and that all those involved understand exactly what those legal frameworks require of them.”).
666. PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS, *THE GOVERNMENT’S POLICY ON THE USE OF DRONES FOR TARGETED KILLING*, REPORT, 2015–16, HC 574, HL Paper 141, at 20 (UK) (“Compliance with the rule of law is vital to maintaining international peace and security and is a prerequisite of the effective protection of human rights both here in the UK and abroad.”); Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, EUR. PARL., Directorate General for External Policies, Policy Department Study, at 4 (2013) (“The resulting uncertainty as to the applicable legal standards, in conjunction with the rapid development and proliferation of drone and robotic technology and the perceived lack of transparency and accountability in current policies, has the potential of polarizing the international community, undermining the rule of law and, ultimately, of destabilizing the international security environment as a whole.”); Christof Heyns & Sarah Knuckey, *The Long-Term International Law Implications of Targeted Killing Practices*, 54 HARV. INT’L L. J. ONLINE 101, 114 (Jan. 2013) (“Should there be an international legal order that permits governments around the world to operate “secret” and unaccountable programs to eliminate their enemies wherever they are with few binding limits and no meaningful international scrutiny? Some officials no doubt hope that they can successfully expand the scope of lawful killings through sheer force of repetition of practice and claims of “legality.” This cannot and should not be accepted. The international community should act to uphold and restore the integrity on the international rule of law, and the protections guaranteed by human rights and international humanitarian law.”); Heyns Report A/68/382, *supra* note *supra* note 8, ¶ 97 (“A lack of appropriate transparency and accountability concerning the deployment of drones undermines the rule of law and may threaten international security.”); United Nations Office for Disarmament Affairs, *Study on Armed Unmanned Aerial Vehicles*, Prepared on the recommendation of the Advisory Board on Disarmament Matters, at 51 (2015) (“Increased transparency in the possession, deployment and use of armed UAVs can build confidence, thereby reducing the risk for the operation of UAVs to exacerbate tension and lead to an increased likelihood for conflict, particularly if such systems result in a greater likelihood for States and non-State armed groups to use force in regions of high tension.”).
667. PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS, *THE GOVERNMENT’S POLICY ON THE USE OF DRONES FOR TARGETED KILLING*, REPORT, 2015–16, HC 574, HL Paper 141, at 20 (UK) (“[I]f the UK appears to be selective in its approach to its international obligations, that would be rapidly seized upon and invoked by other States as an excuse for their record of disrespect for international law.” Accordingly, “the Government therefore urgently needs to demonstrate that it at all times complies with the international legal frameworks that regulate the use of lethal force abroad outside of armed conflict.”). *Id.*
668. JAFFER, *DRONES MEMOS*, *supra* note 225 at 47.
669. U.S. Army, *Field Manual (3-07): Stability Operations* (Oct. 2008) quoted in STIMSON TASK FORCE REPORT, *supra* note 44, at 35.
670. STIMSON TASK FORCE REPORT, *supra* note 44, at 36.
671. *Id.* at 36.
672. Brandeis, *supra* note 2, at 92.

673. WRITINGS OF JAMES MADISON, vol. 6 398 (1906) (“the right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every other right.”); Stephanie P Newbold, *Federalist No. 27: Is Transparency Essential for Public Confidence in Government?* Public Administration Review (December 2011), S 47, at S 50 (noting that government transparency can help ensure “that the government does not violate a citizen’s procedural due process rights or the substantive rights found in the Bill of Rights); Patrick Birkinshaw, *Transparency as a Human Right*, in TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? 47-57, at 47 (Christopher Hood and David Heald eds., 2006) (arguing that transparency is “instrumentally important” to secure substantive rights).
674. See, e.g., EDWARD LIVINGSTON, THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE: CONSISTING OF SYSTEMS OF PENAL LAW FOR THE STATE OF LOUISIANA AND FOR THE UNITED STATES OF AMERICA, 292, 370 (Vol 1., 1873) (describing publicity as “that great safeguard against corruption,” and the United States as “a country where publicity in every department is justly considered as the greatest security for good conduct in those who direct them,” but arguing against full transparency around juror opinions in grand jury proceedings, to encourage honesty, and because they aren’t official office holders); KRISTIN M. LORD, THE PERILS AND PROMISE OF GLOBAL TRANSPARENCY: WHY THE INFORMATION REVOLUTION MAY NOT LEAD TO SECURITY, DEMOCRACY, OR PEACE 126-131 (2006) (“Secrecy breeds abuses of power... It hides abuses of power ... It ... allows those in power to get away with acts of injustice.”); WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE (1913) (“Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety. So, our honest politicians and our honorable corporation heads owe it to their reputations to bring their activities out into the open... You know there is temptation in loneliness and secrecy. Haven’t you experienced it? I have. We are never so proper in our conduct as when everybody can look and see exactly what we are doing. If you are off in some distant part of the world and suppose that nobody who lives within a mile of your home is anywhere around, there are times when you adjourn your ordinary standards.”); Monika Bauhr and Marcia Grimes, *What is Government Transparency? New Measures and Relevance for Quality of Government*, The Quality of Government Institution, 16 Working Paper Series 2012, at 20 (December 2012), (arguing that transparency “increases the likelihood of detecting malfeasance and consequently also punishment, and will thereby deter the abuse of public power,” and noting criticisms of this assumption, but also stating that “the arguments regarding the potential benefits of increased transparency are fairly well-established).
675. Ken Roth, *What Rules Should Govern US Drone Attacks?*, HUMAN RIGHTS WATCH (March 11, 2013), [www.hrw.org/news/2013/03/11/what-rules-should-govern-us-drone-attacks](http://www.hrw.org/news/2013/03/11/what-rules-should-govern-us-drone-attacks) (“Any program that kills on the basis of secret intelligence risks abuse. The administration could go a long way toward minimizing the possibility of illegal killings—and discouraging others from acting in kind—if it explicitly recognized clear limits in the law governing drone attacks and allowed as much independent consideration of its compliance as possible.”); INTERNATIONAL CRISIS GROUP, DRONES: MYTHS AND REALITY IN PAKISTAN 19 (May 21, 2013) (“[W]ithout a comprehensive disclosure of both the facts of the drone program and the legal analysis behind it, [the program] remains vulnerable to constant expansion and abuse.”).
676. David Cole, *The Drone Presidency*, N.Y. REV. BOOKS, (Aug. 18, 2016), [www.nybooks.com/articles/2016/08/18/the-drone-presidency/](http://www.nybooks.com/articles/2016/08/18/the-drone-presidency/) (“With transparency comes accountability; it is no accident that greater openness has resulted in a more restrictive policy, and more restrained deployment of drones.”)
677. JAY ARONSON, BARUCH FISCHHOFF, & TAYLOR SEYBOLT, COUNTING CIVILIAN CASUALTIES: AN INTRODUCTION TO RECORDING AND ESTIMATING NONMILITARY DEATHS IN CONFLICT 25 (2013) (“Accurate and transparent accounts of civilian casualties can disrupt the cycle of violence by establishing a less politicized body of information that holds each side accountable for what its members did and recognizes the suffering both sides endured.”).



678. SECOND TURKEL COMMISSION REPORT, *supra* note 551, ¶ 106 (“The Commission shares the view that complying with the standard of transparency is indeed desirable, as it enhances public scrutiny and contributes to accountability. The accountability via public scrutiny aspect of the requirement of transparency contributes to the realization of some of the purposes that are central to the duty provided in international humanitarian law, namely increasing compliance and deterring the commission of future violations. This aspect of transparency may be achieved, *inter alia*, through publishing guidelines, establishing reporting mechanisms, and making publicly available relevant information such as statistics.”); Emmerson Report (A/68/389), *supra* note 55, ¶ 41 (“Significantly, the Commission considered that the principle of transparency should apply to investigations into alleged war crimes because it enhances public scrutiny and contributes to accountability. As the Commission rightly observed, transparency promotes the central objectives of humanitarian law, namely increasing compliance with the principles of distinction, proportionality and precaution, and deterring the commission of future violations.”)
679. Heyns Report (A/68/382), *supra* note 8, ¶ 96.
680. *Id.* ¶ 98.
681. *Id.* ¶ 98.
682. Emmerson Report (A/68/389), *supra* note 55, ¶ 41 (“The single greatest obstacle to an evaluation of the civilian impact of drone strikes is lack of transparency, which makes it extremely difficult to assess claims of precision targeting objectively”); Sarah Knuckey, *The Good and Bad in the U.S. Government’s Civilian Casualties Announcement*, JUST SECURITY (Jul. 2, 2016), [www.justsecurity.org/31785/good-bad-governments-civilian-casualties-announcement](http://www.justsecurity.org/31785/good-bad-governments-civilian-casualties-announcement) (“The DNI summary provides only the most general information about the methods the United States used to factually investigate non-combatant or combatant status, and the methods it has used to come to its non-combatant death figures. At this level of generality, they are impossible to meaningfully assess or monitor.”).
683. Alston Report (A/HRC/14/24/Add.6), *supra* note 55, ¶ 91 (“In other [situations], because of remoteness or security concerns, it has been impossible for independent observers and the international community to judge whether killings were lawful or not.”).
684. *Id.* ¶ 92 (Emphasizing that without disclosure, “It is not possible for the international community to verify the legality of a killing, to confirm the authenticity or otherwise of intelligence relied upon, or to ensure that unlawful targeted killings do not result in impunity.”); Sarah Knuckey, *Risk, Transparency and Legal Compliance: Autonomous Weapons Systems and Transparency: Towards an International Dialogue*, in AUTONOMOUS WEAPONS SYSTEMS: LAW, ETHICS AND POLITICS (Nehal Bhuta et al. eds., 2016).
685. Heyns Report A/68/382, *supra* note 8, ¶ 96 (“Legal and political accountability are dependent on public access to the relevant information. Only on the basis of such information can effective oversight and enforcement take place.”).
686. JAFFER, DRONE MEMOS, *supra* note 225, at 28–29.
687. Statement by Navi Pillay, United Nations High Commissioner for Human Rights Open Debate on Protection of Civilians in Armed Conflicts Security Council, New York, 19 August 2013, [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13642&LangID=E#sthash.8AY697Do.dpuf](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13642&LangID=E#sthash.8AY697Do.dpuf); Alston Report (A/HRC/14/24/Add.6), *supra* note 55, ¶ 92 “But without disclosure of the legal rationale as well as the bases for the selection of specific targets (consistent with genuine security needs), States are operating in an accountability vacuum.”; Heyns Report A/68/382, *supra* note 8, ¶ 96 (“Legal and political accountability are dependent on public access to the relevant information. Only on the basis of such information can effective oversight and enforcement take place.”).
688. Charlotte Ku and Harold K. Jacobson, *Introduction*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 3, 8 (Charlotte Ku and Harold K. Jacobson eds., 2003).

689. In May 2013, President Barack Obama conceded that “The very precision of drone strikes and the necessary secrecy often involved in such actions can end up shielding our government from the public scrutiny that a troop deployment invites. It can also lead a President and his team to view drone strikes as a cure-all for terrorism.” Obama NDU Speech, *supra* note 11; *see also* Peter Singer, *Do Drones Undermine Democracy?*, N.Y. TIMES (Jan. 21, 2012), [www.nytimes.com/2012/01/22/opinion/sunday/do-drones-undermine-democracy.html](http://www.nytimes.com/2012/01/22/opinion/sunday/do-drones-undermine-democracy.html); Steven Levine, *Drones Threaten Democratic Decision-Making*, 3 QUARKS DAILY (Feb. 25, 2013), [www.3quarksdaily.com/3quarksdaily/2013/02/drones-threaten-democratic-decision-making.html](http://www.3quarksdaily.com/3quarksdaily/2013/02/drones-threaten-democratic-decision-making.html).
690. Steven J. Barela, *Strategic Efficacy: The Opinion of Security and a Dearth of Data*, in LEGITIMACY AND DRONES: INVESTIGATING THE LEGALITY, MORALITY AND EFFICACY OF UCAVS 297 (Steven J. Barela ed., 2015) (“Secrecy of the drone program has rendered the necessary data for full assessment unattainable, and selective disclosures have only distorted an already fragmented picture.”).
691. *Id.*; Jameel Jaffer, *Selective Disclosure about Targeted Killing*, JUST SECURITY (Oct. 7, 2013), [www.justsecurity.org/1704/selective-disclosure-targeted-killing/](http://www.justsecurity.org/1704/selective-disclosure-targeted-killing/).
692. Christian Tomuschat, *Democracy and the Rule of Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 488 (Dinah Shelton ed., 2013) (“From a general perspective, one may view the combination of the rule of law and democracy as a structural device designed to ensure the rationality of the law. Law should be the outcome of a well-pondered process involving the population in its entirety. Statutes that parliamentary assemblies adopt have necessarily gone through a process of public scrutiny where the pros and cons of the planned regulation have been scrutinized. The parliamentary process permits of no concealment. Thus, the combination of the rule of law and democracy is not only directed against secret law-making, but also against traditional rules that have never been put to the test of rational reflection, deriving their authority from their traditional and historical roots.”). *See also* World Summit Outcome, *supra* note 663.
693. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 29–30 (2005); *see also* Philip Alston (Special Rapporteur on extrajudicial, summary, or arbitrary executions), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶ 23, E/CN.4/2006/53 (Mar. 8, 2006) [hereinafter Alston Report (E/CN.4/2006/53)] (citing Kingsbury).
694. STIMSON TASK FORCE REPORT, *supra* note 44, at 37 (“But U.S. practices also set a dangerous precedent that may be seized upon by other states.”).
695. PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS, THE GOVERNMENT’S POLICY ON THE USE OF DRONES FOR TARGETED KILLING, REPORT, 2015–16, HC 574, HL Paper 141, at 20 (UK) (noting the “potential damage that is done to the [European Court of Human Rights] system for the collective protection of human rights if one of its members is perceived to be openly breaching its international obligations, and all the more so when the State is as influential internationally as the UK.”).
696. HUMAN RIGHTS FIRST, HOW TO ENSURE, *supra* note 94, at 4 (arguing that the United States has a national interest in “maintaining the integrity of international law” and that it must both follow and *be seen to* follow those rules).
697. Statement of Farea al-Muslimi, in KNUCKEY, DRONES AND TARGETED KILLINGS, *supra* note 43, at 71 (“Instead of first experiencing America through a school or a hospital, most people in Wessab first experienced America through the terror of a drone strike. What radicals had previously failed to achieve in my village, one drone strike accomplished in an instant: there is now an intense anger and growing hatred of America.”).
698. *A Less Gloomy Mood in Pakistan: Sharif Gets High Marks, while Khan’s Ratings Drop*, PEW RESEARCH CENTRE (Aug. 27 2014), [www.pewglobal.org/2014/08/27/a-less-gloomy-mood-in-pakistan/](http://www.pewglobal.org/2014/08/27/a-less-gloomy-mood-in-pakistan/).
699. Ryan Goodman, *Obama Admin: Only One Civilian Killed by U.S. Outside of War Zones in 2016*, JUST SECURITY (Jan. 20, 2017), [www.justsecurity.org/36579/obama-admin-civilian-killed-2016-war-zones/](http://www.justsecurity.org/36579/obama-admin-civilian-killed-2016-war-zones/).
700. *Id.*

701. John B. Bellinger III, *Will Drone Strikes Become Obama's Guantanamo?*, WASH. POST (Oct. 2, 2011), [http://washingtonpost.com/opinions/will-drone-strikes-become-obamas-guantanamo/2011/09/30/gIQA0ReIGL\\_story.html](http://washingtonpost.com/opinions/will-drone-strikes-become-obamas-guantanamo/2011/09/30/gIQA0ReIGL_story.html) (in a piece published shortly after the killing of Anwar al-Aulaqi, noting growing human rights community criticism of the program, and correctly predicting that al-Aulaqi's killing would lead to more criticism, arguing that "the administration needs to work harder to explain and defend its use of drones as lawful and appropriate—to allies and critics—if it wants to avoid losing international support ... it should try to ensure that [its allies] understand and agree with the U.S. policy and legal justification. Otherwise, the administration risks having its largely successful drone program become as internationally maligned as Guantanamo."); Zenko, *Reforming*, *supra* note 24 at 3. (arguing as a key point, that U.S. secrecy could undermine the program to such an extent that "operational restrictions" might become necessary, and that secrecy "threatens so limit U.S. freedom of action").
702. Laurie R. Blank, *Drones, Transparency and Legitimacy*, THE HILL, (May 28, 2014), <http://thehill.com/blogs/pundits-blog/defense/207352-drones-transparency-and-legitimacy> ("The effect, however, is that in a very short time, the touchstone of legitimacy has shifted from international law compliance to openness and transparency about the application of international law.").
703. U.N. Charter art. 51; Heyns Report A/68/382, *supra* note 8.
704. U.N. Charter art. 51.
705. Human Rights Committee, *General Comment No. 34*, *supra* note 8, ¶ 3.
706. ICCPR, *supra* note 8, at art. 19(2); HRC, *General Comment No. 34, Article 19*, *supra* note 8, ¶ 11; American Declaration of the Rights and Duties of Man art. IV, *opened for signature* Apr. 1948, O.A.S. Res. XXXIV OEA/Ser.L./V.II.23, doc. 21, rev. 6 [hereinafter American Declaration]; Org. of Am. States, *Inter-American Declaration of Principles on Freedom of Expression* (Oct. 19, 2000).
707. Abid Hussein (Special Rapporteur on Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/1995/32, ¶ 35 (Dec. 14, 1994).
708. HRC, *General Comment No. 34, Article 19*, *supra* note 8, ¶ 18; In 1999, the Special Rapporteurs for Freedom of Expression of the UN, OSCE, and the OAS stated: "Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented." Joint Declaration by U.N. Special Rapporteur on Freedom of Opinion and Expression, O.S.C.E. Representative on Freedom of the Media, and O.A.S. Special Rapporteur on Freedom of Expression, International Mechanisms for Promoting Freedom of Expression (Nov. 26, 1999), [www.oas.org/en/iachr/expression/showarticle.asp?artID=141&lID=1](http://www.oas.org/en/iachr/expression/showarticle.asp?artID=141&lID=1).
709. *Claude Reyes et al. v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 92 (Sept. 19, 2006); Joint Declaration by U.N. Special Rapporteur on Freedom of Opinion and Expression, O.S.C.E. Representative on Freedom of the Media, and O.A.S. Special Rapporteur on Freedom of Expression, International Mechanisms for Promoting Freedom of Expression (Dec. 6, 2004), [www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1](http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1); Tshwane Principles, *supra* note 258.
710. HRC, *General Comment No. 34*, *supra* note 8, ¶ 19.
711. U.S. government lawyers have themselves conceded that "issues related to the U.S. government's use of lethal force are a matter of public concern." Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *ACLU v. U.S. Dep't of Just. et al.*, 915 F.Supp. 2d 508 (S.D.N.Y. 2013) (No.12 Civ. 794 CM), *aff'd in part, rev'd in part*, 752 F.3d 123 (2d Cir. 2014), and *aff'd in part, rev'd in part and remanded* 756 F.3d 100 (2d Cir. 2014).
712. ICCPR, *supra* note 8, at art. 25; Universal Declaration of Human Rights, adopted and proclaimed by the U.N. General Assembly resolution 217 A (III) of 10 December 1948; American Convention on Human Rights, art. 23.

713. Rep. of the Office of the High Commissioner for Human Rights, *Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them*, ¶ 41, U.N. Doc. A/HRC/30/26 (Jul. 23, 2015).
714. Human Rights Committee, *General Comment No. 25, Nature of the General Legal Obligation on States Parties to the Covenant Article 25 (Participation in Public Affairs and the Right to Vote)* *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Jul. 12, 1996).
715. *Id.* ¶ 8.
716. See, e.g., Decision of the UN Human Rights Committee, *Baboeram Adhin v Suriname*, U.N. doc CCPR/C/24/D/154/1983 ¶¶ 14.1 to 15 (4 April 1985). See also Alston Report, *supra* note 55, ¶¶ 87-92.
717. *McCann v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R. (1995); hereinafter HRC, *General Comment No. 31, supra* note 585; Heyns Report (A/68/382), *supra* note 8, ¶ 95; Emmerson Report (A/68/389), *supra* note 55, ¶¶ 41-45; Minnesota Lawyers International Human Rights Committee, *The Minnesota Protocol: Preventing Arbitrary Killing Through an Adequate Death Investigation and Autopsy*, Minnesota Lawyers International Human Rights Committee (1987). OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, *THE MINNESOTA PROTOCOL ON THE INVESTIGATION OF POTENTIALLY UNLAWFUL DEATH*, ¶ 8(c) (2016), www.ohchr.org/Documents/Issues/Executions/MinnesotaProtocolInvestigationPotentiallyUnlawfulDeath2016.pdf.
718. HRC, *General Comment No. 31, supra* note 592, ¶¶ 15-18; *Hugh Jordan v United Kingdom*, App. No. 24746/94, Eur. Ct. H.R. (2001), ¶ 109 (“There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.”); *McKerr v. United Kingdom*, App. No. 28883/95, Eur. Ct. H.R. (2011); SECOND TURKEL COMMISSION REPORT, *supra* note 551, ¶¶ 90-94 (“[T]he principle of transparency contributes to achieving a culture of accountability; it requires a sufficient degree of public scrutiny in order to conduct an effective investigation”); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Yemen*, U.N. Doc. CCPR/C/YEM/CO/5, ¶ 15, (Apr. 23, 2012); Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CCPR/C/GBR/CO/7, ¶ 8, (Aug. 17, 2015).
719. See “*Mapiripán Massacre*” v. Colombia, Judgment of 15 September 2005, Inter-Am. Ct. H.R. ¶ 238; Basic Principles on the Right to a Remedy, *supra* note 9, at VII; SECOND TURKEL COMMISSION REPORT, *supra* note 544, ¶ 94; ; Heyns Report (A/68/382), *supra* note 8, ¶ 100.
720. See, e.g., Al-Skeini, 2011-IV Eur. Ct. H.R. ¶ 174; Inter-American Court of Human Rights, “*Mapiripán Massacre*” v. Colombia, Judgment of 15 September 2005, ¶ 238.
721. Emmerson Report (A/68/389), *supra* note 55, ¶¶ 36, 45.
722. Responsibility of States for Internationally Wrongful Acts, *supra* note 311; *Factory at Chorzow (Ger. v. Pol.)* (1928) P.C.I.J. (ser. A) No. 17; Basic Principles on the Right to a Remedy, *supra* note 9.
723. *Tax Analysts v. IRS*, 117 F.3d 607, 619 (D.C. Cir. 1997) (“[A]ttorney-client privilege may not be used to protect this growing body of agency law from disclosure to the public.”) (cited in Goitein, *supra* note 224, at 40).
724. HRC, *General Comment No. 34, Article 19, supra* note 8, ¶ 21.
725. *Id.* at Principle 4.
726. *McKerr v. United Kingdom*, App. No. 28883/95, Eur. Ct. H.R. (2011), ¶ 160.
727. TSHWANE PRINCIPLES, *supra* note 258, Principle 10.
728. *Id.*
729. ICCPR, *supra* note 8, at art. 4. Derogations are, by their nature, exceptional and temporary. Any derogation must be strictly limited to the exigencies of the situation—constraining the duration, geographical coverage and material scope of the state of emergency and measures taken pursuant to it—and must not be inconsistent with a State’s other legal obligations. See Human Rights Committee, *General Comment No. 29: Article 4: Derogations During a State of Emergency*, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31 2001).

730. ICCPR, *supra* note 8, at art. 2(3); Basic Principles on the Right to a Remedy, *supra* note 9, ¶¶ 2(b), 3(c), 11(1)-(2), 12, 13 and 24.
731. ICCPR, *supra* note 8, at art. 2(3).
732. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, ¶ 60, U.N. Doc. A/HRC/10/3, (Feb. 4, 2009).
733. Basic Principles on the Right to a Remedy, *supra* note 9, ¶¶ 11(c), 12(a), 24; Study on the Right to Restitution, *supra* note 595 (“Every State shall make known, through the media and other appropriate mechanisms, the available procedures for reparations.”).
734. *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09, Eur. Ct. H.R. (2012); Basic Principles on the Right to a Remedy, *supra* note 9, ¶ 22; *Concluding Observations on U.S.*, *supra* note 9.
735. Basic Principles on the Right to a Remedy, *supra* note 9, ¶¶ 11, 24.
736. *Lenahan (Gonzales) v. United States of America*, Merits, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 193 (Jul. 21, 2011); *see also*, e.g., *Husayn v Poland*, App. No. 7511/13, Eur. Ct. H.R. (2014) ¶ 489 (“Furthermore, where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.”).
737. Responsibility of States for Internationally Wrongful Acts, *supra* note 313; *Factory at Chorzow (Ger. v. Pol.)* (1928) P.C.I.J. (ser. A) No. 17; Basic Principles on the Right to a Remedy, *supra* note 9.
738. *Ignacio Ellacuría et al. v El Salvador*, Merits, Case 10.488, Inter-Am. Comm’n H.R., Report No. 136/99, ¶ 226 (22 Dec., 1999); *Bámaca-Velásquez v Guatemala*, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 77 (Feb. 22, 2002).
739. HRC, *General Comment No. 31*, *supra* note 592, ¶ 15; HRC, *Concluding Observations on U.S.*, *supra* note 9, ¶ 9; *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99, ¶ 92.
740. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 24 (July 9); HRC, *General Comment No. 31*, *supra* note 592; *Al-Skeini*, 2011-IV Eur. Ct. H.R. ¶ 22; G.A. Res. 60/147, ¶ 22; SECOND TURKEL COMMISSION REPORT, *supra* note 551, at 79-92. Alston Report (A/HRC/14/24/Add.6), *supra* note 55, ¶¶ 87-92. While the fact of an armed conflict may make the logistics of investigating an alleged violation more difficult, and that will be taken into account, the core substantive obligations persist, including in terms of transparency. As the then-Special Rapporteur on extrajudicial, summary or arbitrary executions said in 2006, “It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate—this would eviscerate the non-derogable character of the right to life—but they may affect the modalities or particulars of the investigation.” Alston Report (E/CN.4/2006/53), *supra* note 685, ¶ 40.
741. SECOND TURKEL COMMISSION REPORT, *supra* note 551, Annex C; *Khashiyev and Akayeva v. Russia*, App. Nos. 57942/00 and 57945/00, Eur. Ct. H.R. (Feb. 24, 2005), ¶ 177; HRC, *General Comment No. 31*, *supra* note 592, ¶¶ 15-18.
742. Heyns Report (A/68/382), *supra* note 8, ¶ 101.
743. *Id.*; Emmerson Report (A/68/389), *supra* note 55, ¶ 45.
744. Additional Protocol I, art. 32 and ICRC, Commentary on article 32 of Additional Protocol I, ¶ 1197; Additional Protocol I, art. 33 and ICRC, Commentary on article 33 of Additional Protocol I, ¶ 1222; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 138.
745. Ryan Goodman & Thomas Earnest, *10 Years of Drone Strikes in Pakistan—But Do You Know Whether It’s an “Area of Active Hostilities”?*, JUST SECURITY (June 18, 2014), [www.justsecurity.org/11828/drone-strikes-pakistan-fata-area-active-hostilities](http://www.justsecurity.org/11828/drone-strikes-pakistan-fata-area-active-hostilities).
746. Egan Speech, *supra* note 138.

747. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 25.
748. *Id.* at 25.
749. DNI SUMMARY 2017, *supra* note 6, at 1.
750. For a discussion of some of the perils of this obfuscation, see Naz Modirzadeh, *A Reply to Marty Lederman*, LAWFARE (Oct. 3, 2014), available at: [www.lawfareblog.com/reply-marty-lederman](http://www.lawfareblog.com/reply-marty-lederman).
751. See Charlie Savage & Eric Schmitt, *Trump Eases Combat Rules in Somalia Intended to Protect Civilians*, N.Y.TIMES (Mar. 30, 2017), [www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html](http://www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html).
752. Ken Gude, *It's All About the Associated Forces*, JUST SECURITY (Jan. 28, 2016), [www.justsecurity.org/29036/its-about-associated-forces/](http://www.justsecurity.org/29036/its-about-associated-forces/) [hereinafter Gude, *Associated Forces*]; Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT'L L., (forthcoming 2017).
753. Ryan Goodman, *Obama's Forever War Starts*, FOREIGN POL'Y (Feb. 12, 2015), <https://foreignpolicy.com/2015/02/12/obamas-forever-war-starts-now-aumf-isis-islamic-state>. See also Ryan Goodman, *AUMF, "Associated Forces," and Slippery Slopes: Two More Data Points*, JUST SECURITY (Feb. 18, 2015), [www.justsecurity.org/20163/aumf-associated-forces-slippery-slopes-data-points](http://www.justsecurity.org/20163/aumf-associated-forces-slippery-slopes-data-points) [hereinafter Goodman, *AUMF, "Associated Forces," and Slippery Slopes*]; Gude, *Associated Forces*, *supra* note 752.
754. Ryan Goodman, *Does the President's Proposed AUMF Authorize Force Against ISIL "Wannabes"?*, JUST SECURITY (Mar. 12, 2015), [www.justsecurity.org/21002/ashton-carter-presidents-proposed-aumf-apply-isis-wannabes](http://www.justsecurity.org/21002/ashton-carter-presidents-proposed-aumf-apply-isis-wannabes).
755. Preston, Legal Framework, *supra* note 30.
756. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 4-5. REPORT ON ASSOCIATED FORCES 2014, *supra* note 113, at 65.
757. Kevin Jon Heller, "The Use and Abuse of Analogy in IHL" 273-75 in *Theoretical Boundaries of Armed Conflict and Human Rights* (ed. Jens David Ohlin 2015); Rebecca Ingber, *Co-Belligerency*, 42 YALE J. OF INTERNAT'L L., (forthcoming 2017); Deborah Pearlstein, *Still on that Syrian IAC*, OPINIO JURIS (Oct. 17, 2016), <http://opiniojuris.org/2016/10/17/still-on-that-syrian-iac/>.
758. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 4-5.
759. See Goodman, *AUMF, "Associated Forces," and Slippery Slopes*, *supra* note 745 (describing response of U.S. National Counterterrorism Center Director Nicholas Rasmussen to questions by Sen. Roy Blunt (Rep-MO) at the Senate Intelligence Committee, on Feb. 12, 2015).
760. REPORT ON ASSOCIATED FORCES 2014, *supra* note 113, at 1.
761. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 10.
762. Egan Speech, *supra* note 138.
763. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 10.
764. See Ryan Goodman, *International Law Strikes against ISIS in Syria*, JUST SECURITY (Aug. 28, 2014), [www.justsecurity.org/14414/international-law-airstrikes-isis-syria/](http://www.justsecurity.org/14414/international-law-airstrikes-isis-syria/); see also Jonathan Horowitz, *Does the Unwilling/Unable Test Hang on Territorial Control? A Response to Michael Lewis*, JUST SECURITY (Sept. 12, 2014), [www.justsecurity.org/14953/unwillingunable-test-hang-territorial-control-response-michael-lewis/](http://www.justsecurity.org/14953/unwillingunable-test-hang-territorial-control-response-michael-lewis/); Rita Siemion & Heather Brandon, *Thoughts on Brian Egan's ASIL Speech*, LAWFARE (April 9, 2016), [www.lawfareblog.com/thoughts-brian-egans-asil-speech](http://www.lawfareblog.com/thoughts-brian-egans-asil-speech).
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766. See THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, Remarks by President at the National Defense University, (May 23, 2013), [www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university](http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university); see also Brennan Speech 2012, *supra* note 46.

767. REPORT ON PROCESS, *supra* note 144 at 3.
768. Noam Lubell, *The Problem of Imminence in an Uncertain World* in OXFORD HANDBOOK ON USE OF FORCE IN INTERNATIONAL LAW (Weller, ed. 2015); Human Rights Council, Res. 45/166, *Basic Principles on Use of Force and Firearms by Law Enforcement Officials*, Principle 9 (Aug. 27, 1990); Heyns Report (A/68/382), *supra* note 8, ¶¶ 32–39; Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), [http://avalon.law.yale.edu/19th\\_century/br-1842d.asp#web2](http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2).
769. See, e.g., Alston Report (A/HRC/14/24/Add.6), *supra* note 55, ¶ 74; Heyns Report (A/68/382), *supra* note 8, ¶ 92.
770. See below under “Imminent threat” under the *jus ad bellum*.
771. See below under “Direct participation in hostilities” and determination that someone is “part of a belligerent party to an armed conflict.”
772. PPG, *supra* note 16 at 1 and 3; REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 27 and 30.
773. DOJ White Paper, *supra* note 132, at 8.
774. PPG, *supra* note 16, at 3.
775. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 5, at 27.
776. Horowitz & Reed, *supra* note 486.
777. *Id.*
778. See, e.g., DOJ White Paper, *supra* note 132, at 8 (stating that “where the al-Qa’ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member’s involvement in al-Qa’ida’s continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat.”).
779. *The Caroline*, 11 U.S. (7 Cranch) 496, 3 L. Ed. 417 (1813);
780. REPORT ON PROCESS, *supra* note 144 at 9.
781. For example, a number of commentators criticized the United Kingdom position for a lack of clarity following the U.K. Attorney General’s speech of January 11, 2017, in which he advanced a similar view to the U.S. government position of “imminence” under international law. See, e.g. Monica Hakimi, *The UK’s Most Recent Volley on Defensive Force*, EJIL: TALK! (Jan. 12, 2017), [www.ejiltalk.org/the-uks-most-recent-volley-on-defensive-force/](http://www.ejiltalk.org/the-uks-most-recent-volley-on-defensive-force/); Marko Milanovic, *What Is An Imminent Armed Attack? A Hopefully Helpful Hypo*, EJIL: TALK! (Jan. 12, 2017), [www.ejiltalk.org/what-is-an-imminent-armed-attack-a-hopefully-helpful-hypo/](http://www.ejiltalk.org/what-is-an-imminent-armed-attack-a-hopefully-helpful-hypo/); Adil Haque, *The United Kingdom’s “Modern Law of Self-Defence”—Part I*, JUST SECURITY, (Jan. 12, 2017), [www.justsecurity.org/36235/united-kingdoms-modern-law-self-defence-part/](http://www.justsecurity.org/36235/united-kingdoms-modern-law-self-defence-part/); Adil Haque, *The United Kingdom’s “Modern Law of Self-Defence”—Part II*, JUST SECURITY, (Jan. 13, 2017), [www.justsecurity.org/36257/united-kingdoms-modern-law-self-defence-part-ii/](http://www.justsecurity.org/36257/united-kingdoms-modern-law-self-defence-part-ii/).
782. Adil Haque, *The United Kingdom’s “Modern Law of Self-Defence”—Part II*, JUST SECURITY (Jan. 13, 2017), [www.justsecurity.org/36257/united-kingdoms-modern-law-self-defence-part-ii/](http://www.justsecurity.org/36257/united-kingdoms-modern-law-self-defence-part-ii/).
783. See, e.g. DNI SUMMARY 2017, *supra* note 6, at 1. (See above for the other two categories, individuals “directly participating in hostilities” and/or “part of a belligerent party to an armed conflict”).
784. See, e.g. John C. Dehn, *Whither International Martial Law?: Human Rights as Sword and Shield in Ineffectively Governed Territory* 334 in THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS (Jens David Ohlin ed. 2015) (stating that the category of an “individual who is targetable in the exercise of national self-defense” is “not defined” in either international humanitarian law, nor international human rights law); Rona, *supra* note 369; Charles Kels, *Civilian Casualties and the Law-Policy Conundrum*, OPINIO JURIS (Jun. 7, 2016), <http://opiniojuris.org/2017/06/07/civilian-casualties-and-the-law-policy-conundrum/>.
785. Geoffrey S. Corn, *Self-Defense Targeting: Blurring the Lines between Jus ad Bellum and the Jus in Bello*, 88 INT’L L.STUD. 57, 58 (2012).

786. PPG, *supra* note 16, at 3; THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, Remarks by President at the National Defense University (May 23, 2013), [www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university](http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university).
787. PPG, *supra* note 16, at 3.
788. Brennan Speech 2012, *supra* note 46.
789. PPG, *supra* note 16, at 3.
790. Exec. Order No. 13,732, 81 Fed. Reg. 44483 (2016).
791. ICRC Customary IHL Study, *supra* note 165, Rule 15.
792. PPG, *supra* note 16, at 4.
793. DNI Summary 2016, *supra* note 5, at 1; DNI Summary 2017, *supra* note 6, at 1; PPG, *supra* note 16, at 3.
794. PPG, *supra* note 16, at 1.
795. See above under “Individual who is targetable in the exercise of U.S. national self-defense,” and “Direct participation in hostilities” and determination that someone is “part of a belligerent party to an armed conflict.”
796. DNI Summary 2017, *supra* note 6, at 1.
797. Notably, the formulation for the civilian casualty figures released in July 2016 was actually slightly clearer, even if still slightly ambiguous, where it stated: “The assessed range of non-combatant deaths includes deaths for which there is an insufficient basis for assessing that the deceased is a combatant.” DNI Summary 2016, *supra* note 5, at 1.
798. Gabor Rona, *Reasons to Distrust Intelligence Report on Civilian Casualties*, JUST SECURITY (Feb. 23, 2017), [www.justsecurity.org/38031/debate-reasons-distrust-dni-report-civilian-casualties/](http://www.justsecurity.org/38031/debate-reasons-distrust-dni-report-civilian-casualties/).





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