NOTE

THE ROLE OF INTERNATIONAL LAW IN TARGETED KILLINGS: FROM THE BUSH ADMINISTRATION TO THE BIDEN ADMINISTRATION

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ABSTRACT

Since the terrorist attacks that occurred on September 11, 2001, the United States has been engaged in a global war to defeat terrorism, i.e., the war on terror. As part of this conflict, the US government conducts targeted killing operations, in which it singles out and kills certain individuals it deems a threat to civilian lives. There are several US statutes that govern the use of lethal force, both generally and in the specific context of targeting terrorists. Additionally, there is a wide body of international laws that govern this form of extrajudicial killing. It is questionable, however, whether the US government complies with international law when carrying out targeted killing operations. The executive branch is responsible for the decisions made with respect to such operations, and a lack of transparency regarding international law compliance pervades throughout different presidential administrations. This Note explains the applicable US and international laws, and then analyzes four different presidential administrations, starting with President George W. Bush and ending with President Biden. The analysis examines different materials from these presidents' administrations to determine how each one complied—or did not comply—with international law in conducting

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targeted killing operations. This Note concludes that incorporating targeted killing into the Universal Periodic Review offers a solution to the lack of transparency problem that plagues US presidential administrations.

I. INTRODUCTION

At its core, targeted killing is a relatively simple concept. It is "a method of warfare whereby individuals are selected and confirmed as

so called 'High Value Targets,' followed by a separate and individual targeting process which ultimately leads to the execution of a military operation aimed at killing these individuals." [1] The complexities associated with targeted killing do not arise from difficulties in understanding how—or even why—this particular version of lethal force exists. Rather, the heart of the debate surrounding targeted killing is the *justifications* for its use, from both American and international legal standpoints.

There are several US laws that govern the use of lethal force, specifically in the context of applying such force against terrorists.[2] This Note aims, however, to analyze the role that international law plays in different presidential administrations' approaches toward targeted killing and—based on this analysis—address the problems that are prevalent in each administration. Part II examines the different legal standards that guide targeted killings. While this Note briefly considers certain US standards, it focuses mainly on international legal principles and laws. Part III explores four different US presidential administrations, beginning with President Bush and ending with President Biden, and their justifications, or lack thereof, for targeted killings under international law. Part IV of this Note concludes that although some administrations claim to heed international standards more than others, a lack of transparency that pervaded across all administrations contributes to a failure to address international law in justifications for targeted killing. To confront this conclusion, Part IV proposes an international solution: a review of targeted killing through the Universal Periodic Review ("UPR"), which will create a consistent reporting mechanism for targeted killing procedures. This solution increases transparency and thus heightens governments' global accountability, thereby encouraging adherence to international law.

1. Sascha-Dominik Bachmann, *Targeted Killings: Contemporary Challenges, Risks and Opportunities*, 18 J. OF CONFLICT AND SEC. L. 259, 263 (Summer 2013).

2. *See infra* Part II (discussing the US Constitution and statues such as: The War Crimes Act, Foreign murder of United States nationals, and the Authorization for the Use of Military Force).

II. LEGAL STANDARDS FOR THE USE OF LETHAL FORCE

A. United States Law

It is important to note that some criticisms surrounding the legality of targeted killings stem from notions that such killings are illegal under US law. For example, when the United States targets a US citizen, as it did with Anwar al-Aulaqi,[3] critics raise constitutional concerns.[4] These concerns include the citizen's loss of Fourth Amendment privacy rights and Fifth Amendment Due Process rights.[5]

Certain US statutes incorporate international law concepts.[6] A notable example is the War Crimes Act of 1996.[7] This law makes it a federal offense to commit a "war crime," and draws its definition of such crimes from the international conventions signed at Geneva on August 12, 1949 ("the Geneva Conventions") and the Hague Convention.[8]

In addition to the War Crimes Act, the Foreign Murder of United States Nationals statute[9] states that it is a criminal offense for a national of the United States "to kill or attempt to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country."[10] This suggests that the statute applies to the United States killing a US national in a targeted operation. However, various administrations have posited that the "well-accepted" public authority justification applies in such circumstances; thus the targeted killing is lawful if the government conducts it in a manner "consistent with the applicable law of war principles governing the non-international conflict."[11] The statute and this justification,

3. *See* Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 58 (D.D.C. 2014).

4. *See id*.

5. *See id*.

6. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW, at Summary (2018) ("Some domestic U.S. statutes directly incorporate customary international law, and therefore invite courts to interpret and apply customary international law in the domestic legal system.").

7. 18 U.S.C. § 2441 (1996).

8. *Id*.

9. 18 U.S.C. §1119 (1994).

10. *Id.*

11. U.S. DEP'T OF JUST., 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, 10 (2011) [hereinafter *DOJ White Paper*].

which intersect with international law principles, are discussed in Part III of this Note.

Meanwhile, the Authorization for Use of Military Force ("AUMF") effectively authorized the United States' war on terror.[12] The Bush administration enacted the statute in the days following 9/11.[13] It provided a "green light for sprawling, unnamed powers for the president,"[14] allowing for the use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[15] Future administrations used this joint resolution to justify the use of lethal force against opponents in the war on terror.[16] Its broad and imprecise language created "a global battlefield with no end to the struggle in sight."[17]

The AUMF highlights the United States' right to self-defense,[18] a standard quite relevant in the sphere of international law. The concept of self-defense appears in the United Nations ("UN") Charter,[19] which "codifies the major principles of international relations."[20] Unlike the War Crimes Act, the AUMF makes no explicit incorporation of international law or standards.[21] It nonetheless demonstrates another instance of overlap among US statutes and international law principles.

B. International Law

This Note focuses on a select number of international laws and norms. Critics cite these laws and norms—and the principles they embody—in asserting that the US government violates international

12. *See* KAREN J. GREENBERG, SUBTLE TOOLS: THE DISMANTLING OF AMERICAN DEMOCRACY FROM THE WAR ON TERROR TO DONALD TRUMP 13 (2021).

13. *See* JENNIFER DASKAL & STEPHEN I. VLADECK, AFTER THE AUMF 1 (2013).

14. GREENBERG, *supra* note 12, at 15.

15. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 STAT. 224 (2001).

16. *See infra* Part III.

17. GREENBERG, *supra* note 12, at 15.

18. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 STAT. 224 (2001) ("Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad.").

19. *See* U.N. Charter art. 2, ¶ 4.

20. *Uphold International Law*, United Nations, un.org/en/our-work/uphold-international-law#:~:text=As%20such%2C%20it%20is%20an,of%20force%20in%20international%20relations [https://perma.cc/QZ8T-X7M9].

21. *See id*.

law when carrying out targeted killings.[22] Presidential administrations use these same principles to justify such conduct.[23] The different interpretations and applications of these international laws and norms obfuscate the discourse surrounding targeted killing.

1. The Geneva Conventions

On August 12, 1949, a conference in Geneva, Switzerland produced four of the most critical conventions in international law.[24] Essentially every State in the world is a contracting party to the Geneva Conventions,[25] which focus on the protection of victims of armed conflict.[26] The four conventions are concerned with the treatment of, respectively, the wounded and sick in armed forces in the field, the sick and wounded at sea, prisoners of war, and civilians during war time.[27] Of particular importance to the topic of targeted killings in the war on terror is Article 3, which is common to all four Geneva Conventions.[28] Article 3 discusses "conflicts not of an international character," and the rules that are to be applied in such circumstances,[29] stating that "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms . . . shall in all circumstances be treated humanely."[30] It continues by prohibiting "murder of all kinds" with respect to the "above-mentioned persons," i.e., those who do not take an active role in a non-international conflict.[31] Thus, if the government conducts targeted killings in a conflict not of international character, Article 3 applies. A non-international armed conflict is a "situation of violence involving

22. *See infra* pp. 7, 20-21, 31, 33-35. For further discussion of different criticisms, US officials' responses to such criticisms, and a list of additional sources on the topic, *see Legality of Targeted Killing under International Law*, LAWFARE (Mar. 19, 2023), https://www.lawfareblog.com/legality-targeted-killing-program-under-international-law [https://perma.cc/CAV9-43J2].

23. *See infra* Part III.

24. *See The Geneva Conventions of 1949 and their Additional Protocols*, INT'L COMM. RED CROSS (Jan. 1, 2014), https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols [https://perma.cc/8NMC-FXHE].

25. *See* ROLAND OTTO, TARGETED KILLINGS AND INTERNATIONAL LAW: WITH SPECIAL REGARD TO HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW, 209 (2011).

26. *See id*. at 207.

27. *See id*. at 208–09.

28. *See id*. at 210.

29. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

30. *Id*. at 91.

31. *Id*. at 91–92.

protracted armed confrontations between government forces and one or more organized armed groups, or between such groups themselves, arising on the territory of a State."[32]

2. The United Nations Charter

Article 2(4) of the UN Charter addresses limitations on the uses of force by Member States: such states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[33] However, one of the most common justifications for targeted killing also comes from the UN Charter.[34] Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."[35] Professor Mary Ellen O'Connell notably points out that targeted killing justifications under Article 51 tend to omit the Charter's prerequisite of "an armed attack," and instead merely emphasize the principle of self-defense.[36]

Yet, international law's principles of self-defense are generally more expansive than those of Article 51, providing a nation with the ability to anticipatorily respond to "'imminent threats' of armed attack that have not yet materialized" rather than limiting nations to responding only to *past* armed attacks.[37] Administrations often invoke this notion of imminence, within the broader context of self-defense, as another justification for targeted killing.[38] Thus, questions of what properly constitute both "self-defense" and "imminent threat" pervade the debate surrounding the legality of targeted killings, as

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32. Kathleen Lawand, *Internal Conflicts or Other Situations of Violence – What Is the Difference for Victims?*, INT'L COMM. RED CROSS (Oct. 12, 2012), https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm [https://perma.cc/N6MY-HKZ2].

33. U.N. Charter art. 2, ¶ 4.

34. *See* Mary Ellen O'Connell, *Targeted Killings*, *in* ELGAR ENCYCLOPEDIA HUM. RTS. 1, 3 (Christina Binder et al. eds., 2022) ("[T]he United States made a determined effort . . . to justify targeted killings . . . by invoking Article 51 of the UN Charter.").

35. U.N. Charter art. 51.

36. O'Connell, *supra* note 34, at 3. *See also* LYNN E. DAVIS ET AL., CLARIFYING THE RULES FOR TARGETED KILLING: AN ANALYTICAL FRAMEWORK FOR POLICIES INVOLVING LONG-RANGE ARMED DRONES 3 (2016) ("[T]aken at face value, the language suggests that a nation can respond with forceful, extraterritorial military action when targeted by *violent aggression"*) (emphasis added).

37. DAVIS ET AL., *supra* note 36, at 3.

38. *See infra* Part III.

noncompliance with the UN Charter and its related rules is a violation of international law.[39]

3. International Humanitarian Law

Customary international law, as its name suggests, is law that derives from custom. It is "a general practice" granted the status of law due to widespread global acceptance.[40] There is overlap among treaty law and customary law—the 1949 Geneva Convention IV, for example, "is widely regarded as a codification of customary international law."[41] Customary international law embodies certain human rights, both through the help of treaties or by virtue of international acceptance and practice.[42]

The right to life, "a norm of customary international law," is one such right.[43] Article 3 of the Universal Declaration of Human Rights, an instrument the international community regards as enshrining customary law,[44] establishes both the right to life, and the right to live in freedom and safety.[45] Thus, broadly speaking, any government conducting a targeted killing must act within the boundaries of this expansive right.[46]

Narrowly speaking, states carrying out lethal force in the context of an armed conflict must also comply with International Humanitarian Law ("IHL"), also known as the law of armed conflict ("LOAC").[47] This body of law largely reflects customary international law.[48] IHL is "the branch of international law that seeks to impose limits on the destruction and suffering caused by armed conflict."[49] It applies to

39. DAVIS ET AL., *supra* note 36, at 4.

40 . *Customary Law*, INT'L COMM. RED CROSS, https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law [https://perma.cc/4P3T-PTJA] (last visited Nov. 29, 2022).

41. *See* OTTO, *supra* note 25, at 209.

42. *See id*. at 183.

43. *Id*. at 184.

44. *See id*.; *see also* O'Connell, *supra* note 34, at 2.

45. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

46. *See* O'Connell, *supra* note 34, at 2.

47. *See* DAVIS ET AL., *supra* note 36, at 4.

48. *See International Humanitarian Law*, INT'L JUST. RES. CTR., *https*://ijrcenter.org/international-humanitarian-law/ [https://perma.cc/2R59-XD63] (last visited Nov. 28, 2022).

49 . *Fundamental Principles of IHL*, INT'L COMM. RED CROSS, https://casebook.icrc.org/glossary/fundamental-principles-ihl [https://perma.cc/5S22-74DX] (last visited Dec. 5, 2022).

armed conflicts, wars between nation-states, and, notably, wars between nation-states and non-state actor groups—groups such as Al-Qaeda.[50] Consequently, for IHL to apply, there needs to be an "armed conflict" of sorts.[51] No clear-cut standard exists for making the threshold determination of whether an armed conflict exists; thus, there is much room for interpretation and "considerable judgment."[52]

In the event an armed conflict does exist and IHL applies, any targeted killing the US government conducts within this context must abide by the four fundamental principles of the LOAC to be considered lawful: (1) necessity; (2) humanity; (3) proportionality; and (4) distinction.[53] While definitions for these principles do exist, "interpretive judgment" is necessary in determining whether the standards are met.[54] This means that there remains room for presidential administrations' own judgments and interpretations of international law, and such interpretations consequently define the role international law plays in the administrations' carrying out of targeted lethal force.

The first principle, necessity, stresses that the amount of force a state uses against its enemy must not exceed the amount that is necessary to achieve its purpose, in degree and in kind.[55] The humanity principle requires "restraining, to the greatest extent possible, the effects of armed violence on people's security and health."[56] The notion behind this principle is that once the government achieves the military purposes of its mission or operation, any additional infliction of suffering is unwarranted.[57] The proportionality principle holds that attacks are legal so long as the casualties "are not excessive in relation to the concrete and direct military advantage anticipated."[58] Finally, the principle of distinction ensures that the military only targets individuals who are involved in the conflict; it strictly emphasizes avoiding the targeting of civilians.[59]

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50. *See* DAVIS ET AL., *supra* note 36, at 4.

51. *Id*.

52. *Id*. at 5.

53. *See* Bachmann, *supra* note 1, at 275.

54. DAVIS ET AL., *supra* note 36, at 5.

55. *See* OTTO, *supra* note 25, at 216. *See also id*. at 199 (explaining that the force "must be the mildest means capable of addressing the threat").

56. DAVIS ET AL., *supra* note 36, at 7.

57. *See* OTTO, *supra* note 25, at 217.

58. *Id*.

59. *See id*. at 218.

4. International Human Rights Law

While IHL governs armed conflicts, International Human Rights Law ("IHRL") regulates a sovereign state's use of force when an armed conflict does not exist.[60] Although there is notable overlap among IHL principles and IHRL standards, the latter's interpretation of the obligations under this standard is more restrictive: "A state killing [under IHRL] is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or nonlethal incapacitation, of preventing that threat to life (making lethal force *necessary*)."[61] The concept of imminence arises in the context of IHRL, but differently than it does under self-defense. Here, an analysis of imminence pertains to IHRL's necessity prong; "by definition, the lack of alternatives under IHRL implies that a violent threat is both immediate and unavoidable."[62] As such, imminence in the IHRL context arguably equates to immediacy, whereas imminence in the national self-defense context does not necessarily imply the same level of immediacy.[63] Instead, an analysis of imminence in the self-defense realm focuses on the *type* of armed attack that the non-state actor involved in the conflict threatens to carry out.[64]

C. Which Law Controls?

Part of what makes the debate surrounding targeted killing so complex is the fact that there is no clear answer as to how controlling international law is on such operations.[65] Commentators and courts "have arrived at widely differing . . . and largely irreconcilable . . . answers" on the question of whether US law governs rules of customary international law.[66] Throughout the history of the United States, its courts and officials understood customary international law to be binding on American law in the absence of a controlling executive

60. *See* DAVIS ET AL., *supra* note 36, at 7.

61. *Id*. (citing Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Study on Targeted Killings*, Human Rights Council, ¶ 11, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

62. DAVIS ET AL., *supra* note 36, at 7.

63. *See id*.

64. *See id*.

65. *See generally* Gary Born, *Customary International Law In United States Courts*, 92 WASH. L. REV. 1641 (2017). *See also* MULLIGAN, *supra* note 6, at 2 ("The effects of customary international law upon the United States are . . . ambiguous and difficult to decipher").

66. Born, *supra* note 65, at 1642.

or legislative act.[67] This leads to the conclusion that if there is a federal statute that conflicts with international law, the statute prevails.[68] However, even if a conflict of this nature exists, customary international law still affects how courts interpret US law.[69] Under a canon of statutory construction[70] known as the *Charming Betsy* canon, when there are two possible constructions of an ambiguous statute—one that is consistent with international law and one that is not—courts will generally adopt the former interpretation.[71]

Regarding international agreements such as the Geneva Conventions, countries that violate the Conventions "can be held accountable for charges of war crimes."[72] However, the United States can technically reinterpret parts of the Geneva Conventions under American law.[73] US courts have final authority to interpret the meaning of an international agreement when applied to national matters.[74] Due to the President's role in international affairs, much weight is given to the executive branch's interpretation of such applications.[75] However, the Supreme Court has declined to follow the executive branch's interpretation on some occasions;[76] particularly relevant to this Note is the way the Supreme Court interpreted Article 3 of the Geneva Conventions differently than the executive branch.[77] In sum, "issues concerning the status of international law in the US legal system have never been fully resolved."[78] Perhaps the lack of resolution regarding international law applicability plays a role in administrations' lack of transparency with respect to their adherence of international law. This Note, however, does not focus on the reasons for such non-

67. *See* MULLIGAN, *supra* note 6, at 29.

68. *See id*. at 30 (citing Guaylupo-Moya v. Gonzales, 423 F.3d 121, 136 (2d Cir. 2005)).

69. *See id*.

70. Canons of statutory construction are rules for construing text and interpreting statutes.

71. *See* MULLIGAN, *supra* note 6, at 30-31.

72. Lionel Beehner, *The United States and the Geneva Conventions*, COUNCIL FOREIGN REL.'S, https://www.cfr.org/backgrounder/united-states-and-geneva-conventions#:~:text=The%20Conventions%20have%20been%20ratified,for%20charges%20of%20war%20crimes [https://perma.cc/954N-PC92] (last updated Sept. 20, 2006).

73. *See id*.

74. *See* MULLIGAN, *supra* note 6, at 21.

75. *See id*. at 22.

76. *See id*.

77. *See infra* Part III (discussing that the judicial branch's interpretation of Article 3, rather than the executive branch's interpretation, ultimately determined the Geneva Conventions' applicability to the treatment of detainees in the war on terror).

78. MULLIGAN, *supra* note 6, at 32 (citing CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 36-39 (2d ed. 2015)).

transparency; rather, it demonstrates that a lack of transparency does in fact exist, and offers a solution to the problem.

III. PRESIDENTIAL ADMINISTRATIONS' JUSTIFICATIONS, OR LACK THEREOF, FOR TARGETED KILLINGS UNDER INTERNATIONAL LAW

Each presidential administration, from the Bush era to the current Biden era, referred to the international laws discussed in Part II of this Note in their justifications for targeted killing. Some administrations loosely referred to the concept of international law. Others directly acknowledged certain principles but provided no further explanation. None were as transparent as they should have been.

A. The Bush Administration

The Bush administration's number of targeted air strikes, a popular method of targeted killing, was drastically lower than succeeding administrations.[79] However, President Bush and his response to the events of September 11, specifically his administration's interpretations of key international legal standards, set the stage for future administrations' justifications for targeted killing. The first monumental decision coming out of the Bush administration was to label the response to 9/11 "a *war* on terror."[80] The administration treated Al-Qaeda's attacks as acts of war,[81] and in promising that the United States would retaliate with arms,[82] President Bush defined the scope of the conflict by branding it an armed conflict. The importance of this definition cannot be understated, as it determined which set of international legal principles governed the conflict. The Bush administration's Authorization for Use of Military Force, referred to in Part II of this Note, is the first notable example of the imprecision surrounding the war on terror—imprecision that paved the way for broad interpretations of US and international legal

79. *See* Jessica Purkiss & Jack Serle, *Obama's Covert Drone War in Numbers: Ten Times More Strikes Than Bush*, BUREAU INVESTIGATIVE JOURNALISM (Jan. 17, 2007), https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush [https://perma.cc/VZ8C-MRK7].

80. Gregory Kastas, *Targeted Drone Killings: Legal Justifications Under the Bush and Obama Administrations*, 2 HARV. J.L. & PUB. POL'Y 251, 252 (2015).

81. *See* GREENBERG, *supra* note 12, at 11.

82. *See id.*

principles to justify both targeted killings and inhumane treatment of prisoners.

While this Note focuses on targeted killings as opposed to unlawful and inhumane detention, the Bush administration's application, or lack thereof, of Article 3 to prisoners influenced its later application of Article 3 to targeted killings. Guantanamo Bay is the detention facility the Bush administration opened in 2002 for the purpose of holding detainees from the war on terror.[83] The use of the word "detainees" is especially crucial, as it is yet another arguable example of "the determination to evade both US and international law."[84] Article 3 of the Geneva Conventions dictates the standards for humane treatment of prisoners of war; thus, by designating the individuals held at Guantanamo "detainees" and later "enemy combatants" rather than "prisoners,"[85] the administration strategically assured that the protections of the international treaty would not apply.[86]

In 2006, the Supreme Court of the United States heard the case of Salim Ahmed Hamdan, an individual captured by the US government and charged with one count of conspiracy to commit "offenses triable by military commission" in connection with 9/11.[87] Hamdan argued that the military commissions under which the government was holding and trying him were unconstitutional and a violation of international law.[88] The government argued that the Geneva Conventions did not apply in Hamdan's case because there existed some international armed conflicts outside the scope of the Conventions.[89] This argument, that Article 3 governs internal armed conflicts like civil wars rather than a conflict with non-state actors, was a legal maneuver by the Bush administration's lawyers to avoid the application of international law to the situation at hand.

The Court ruled against the government and in favor of Hamdan by holding that the military commissions were violations of

83. *See Guantanamo Bay Detention Camp*, ACLU, https://www.aclu.org/issues/national-security/detention/guantanamo-bay-detention-camp [https://perma.cc/JB2N-SWBW] (last visited Apr. 15, 2023).

84. GREENBERG, *supra* note 12, at 19.

85. *Id*. ("Defense Secretary Donald Rumsfeld went further and forbade the word 'prisoner' to be used to refer to the war on terror captives held there.").

86. *See id*.

87. Hamdan v. Rumsfeld, 548 U.S. 557, 566 (2006).

88. *See generally id*.

89. *See id*. at 630.

international law.[90] For the purposes of this Note, however, the critical piece of *Hamdan v. Rumsfeld* is its discussion of Article 3 of the Geneva Conventions. The way the Court ruled on Hamdan's rights to a trial is immaterial for the sake of a targeted killings analysis. Of vast importance, however, is the way the Court defined the conflict with Al-Qaeda, and its interpretation that the scope of Article 3 is "as wide as possible."[91] By expanding the scope of Article 3 to conflicts that do not involve an explicit "clash between nations,"[92] the Court interpreted the war on terror to be a non-international armed conflict—one where Article 3 protections apply. However, the Court's interpretation of the conflict itself as one of armed conflict laid the groundwork for the targeted killing justifications used by both Bush and Obama administrations. Thus, the judicial interpretation of a case related to inhumane treatment of prisoners eventually became a basis for sanctioning targeted killings.

Indeed, former Deputy Secretary of Defense Gordon England signed a two-page memorandum in July of 2006 that stated: "[t]he Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al-Qaeda."[93] Additionally, Former Legal Adviser for the US Department of State and the National Security Council John Bellinger further clarified the Bush administration's adoption of the Supreme Court's ruling in a weblog from 2007. [94] He explicitly wrote: "the Administration reads the *Hamdan* decision to accept that the US is in an *armed conflict*—and therefore that the laws of war are appropriate to apply—but that the armed conflict is not of an international character." [95] The significance of this label is noteworthy, as the recognition of an armed conflict triggers the application of IHL and the four LOAC principles (distinct from IHRL, which governs in the *absence* of an armed conflict).

Bellinger stressed the United States' commitment to abiding by international law, and followed his discussion of the Geneva

90. *See generally id*.

91. *Id*. at 631.

92. *Id.* at 630.

93. Memorandum from Gordon England, Deputy Sec'y of Def., to Sec'ys of the Mil. Departments (Jul. 7, 2006) [https://sgp.fas.org/othergov/dod/geneva070606.pdf].

94 . *See generally* John Bellinger, *Armed Conflict With Al Qaida: A Response*, OPINIOJURIS (Jan. 16, 2007), http://opiniojuris.org/2007/01/16/armed-conflict-with-al-qaida-a-response/ [https://perma.cc/7U4D-KCFA].

95. *Id*.

Conventions with a paragraph on the concept of self-defense.[96] He explained that the administration acknowledges the distinction between imminent and non-imminent threats, but asserted that the principles of self-defense must be understood in the context of the threats that the United States faces, threats of "terrorism and proliferation of weapons of mass destruction."[97] He concluded that imminence is not a "live" issue, i.e., a disputable issue, considering Al-Qaeda did in fact attack the United States, rather than the United States merely anticipating an attack.[98] This explanation sheds more light on the way the Bush administration understood and applied the international principle of self-defense as a justification for targeted killing.

Yet, a two-page memorandum from the Office of the Secretary of Defense and a weblog are not nearly enough to provide adequate justification for targeted killings under international law. There are, of course, more materials from the Bush administration on the topic of the war on terror than the ones this Note examines.[99] However, it is critical to acknowledge that many of the documents from the Bush era—documents related to the administration's policies on the war on terror—were released by the Obama administration, not the Bush administration itself.[100] This resistance to publicizing information—and the underlying notion of secrecy—is perhaps the most notable way the Bush administration shaped the scope of the war on terror. Critics refer to this particular form of policy as "secret law;"[101] it includes tactics such as marking Justice Department memos classified, and keeping the full legal reasoning and detail of Foreign Intelligence

96. *See id*.

97. *Id*.

98. *Id*.

99. *See generally*, Auth. of the President Under Domestic and Int'l Law To Use Military Force Against Iraq, 26 Op. O.L.C. 143 (2002)(detailing the United States justification under international law to direct military action against Iraq if the President determines Iraq provided assistance to the perpetrators of the 9/11 terrorist attacks); Memorandum from George W. Bush, President of the United States, to the Vice President, the Sec'y of State, the Sec'y of Def., the Att'y Gen., Chief of Staff to the President, Dir. of Cent. Intel., Assistant to the President for Nat'l Sec. Affs., Chairman of the Joint Chiefs of Staff, on Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002) (discussing the application of Article 3 to the conflict with al Qaeda); President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2011) (stating that the war on terror begins with al Qaeda, but will not end until every terrorist group of global reach "has been found, stopped, and defeated.").

100. *See* KAREN J. GREENBERG, ROGUE JUSTICE: THE MAKING OF THE SECURITY STATE 252 (2015).

101. *Id*. at 223.

Surveillance Court proceedings secret.[102] This legacy of non-transparency, which began with President Bush's declaration that the United States' war with Al-Qaeda—"an enemy without borders or uniforms"—necessitated "unprecedented levels of secrecy"[103] persists even in today's current presidential administration.[104]

In sum, although the Bush administration carried out only fifty-seven strikes,[105] a number far lower than future administrations', it was vital in framing the conflict as a *war* on terror. It thus provided future administrations with justifications for targeted killing based on the scope of the conflict—a scope the administration itself created. Crucially, it created the precedent of secrecy surrounding the conflict, specifically surrounding the government's conduct.

B. The Obama Administration

Of the four administrations this Note examines, the Obama administration was the most transparent with respect to its targeted killing policies and its justifications for the use of lethal force.[106] To be clear, this does not mean the administration was as transparent as it could or should have been throughout its duration. Nonetheless, there are a plethora of materials from the Obama era that provide an understanding of the role international law played in his administration's justifications for targeted killings.

On September 30, 2011, the United States used a drone strike to intentionally target and kill Anwar al-Aulaqi, a terrorist leader of Al-Qaeda and a citizen of the United States.[107] The US Joint Special Operations Command ("JSOC") placed al-Aulaqi on a military kill list over a year before the drone strike occurred.[108] Nasser al-Aulaqi, Anwar's father, sued the President, CIA Director, and Secretary of Defense on behalf of Anwar upon hearing of his son's placement on the kill list.[109] He sought to enjoin the US government from conducting the killing unless Anwar "presented a concrete, specific, and imminent threat to life, and that there were no reasonably available measures

102. *See id*.
103. *Id*.
104. *See infra* III.D (discussing the current Biden administration).
105. *See* Purkiss & Serle, *supra* note 79.
106. *See* discussion *infra* Parts III.B, III.C, III.D.
107. *See* Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 58 (D.D.C. 2014).
108. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 11 (D.D.C. 2010).
109. *See generally id*.

short of lethal force that could be expected to address that threat—"[110] i.e., IHRL standards. In 2014, about three years after the killing of al-Aulaqi, a federal court released a memorandum from the Department of Justice, dated July 16, 2010, on the applicability of federal criminal laws and the Constitution to contemplated lethal operations against al-Aulaqi.[111]

The memo began with a legal analysis of §1119(b), the Foreign Murder of United States Nationals statute, stating that there are long recognized justifications and excuses to statutes criminalizing "unlawful" killings,[112] including the public authority justification.[113] Assistant Attorney General David Barron, the memo's author, held that Congress did not intend for the same criminal penalties for murder and manslaughter to apply to government officials acting in their official capacity—i.e., utilizing "the lawful conduct of war"—as they do to average citizens.[114] The lawful conduct of war, Barron wrote, is a "well-established variant of the public authority exception."[115] Thus, this assertion, in addition to stating that the AUMF justifies targeted killing, consequently implicated international law principles. Consequently, the question becomes whether the operation in question is lawful conduct of war—that is, "whether the operation would comply with the international law rules to which it would be subject."[116]

The Justice Department concluded that if the Department of Defense ("DOD") carried out such an operation, it would do so as part of the non-international armed conflict between the United States and Al-Qaeda.[117] As such, the operation would adhere to international law if it complied with the applicable laws of war.[118] The memo cited *Hamdan* as its basis for stating that the United States and Al-Qaeda are involved in a non-international armed conflict, using the Supreme

110. *Id*. at 8.

111. *See Federal Court Releases DOJ Memo Justifying Targeted Killing of Anwar al-Aulaqi*, HOMELAND SEC. DIGIT. LIBR. (June 25, 2014), https://www.hsdl.org/c/federal-court-releases-doj-memo-justifying-targeted-killing-of-anwar-al-aulaqi/ [https://perma.cc/8L2C-HS55] (last visited Jan. 27, 2023).

112. Memorandum from David J. Barron, Acting Assistant Att'y Gen., to the Att'y Gen., on Applicability of Federal Criminal Law and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi, 12 (Jul. 16, 2010).

113. *See id*.

114. *Id*. at 20.

115. *Id*. at 32.

116. *Id*. at 23.

117. *See id.* at 24.

118. *See id*.

Court's language of the applicable scope of Article 3 being as wide as possible.[119] The memo continued by introducing the four fundamental norms of the LOAC, and then asserted that the DOD would conduct its operation against al-Aulaqi in accordance with these norms.[120] The problem, however, was that there was little to no explanation as to *how* the operation would comply with the four principles.[121] Thus, it is quite difficult to assess whether the Obama administration's key justification of IHL compliance was true. Referring to the DOD's *Implementation of the Law of War Program,* which states that it is DOD policy for its members comply with the law of war during armed conflicts,[122] does not reveal anything about the way in which members of the DOD do in fact comply. Such justifications are, in essence, the opposite of transparent—they are evasive.

Barron did specifically point to the principle of distinction, stating that "the targeted nature of the operation" ensures compliance with this law of armed conflict norm.[123] He further cited DOD policy that states "[a]ny official in the chain of command has the authority and duty to abort a strike if he or she concludes that civilian casualties will be disproportionate."[124] Again, the same issue arises: merely stating that members of the government have a duty to do something does not mean they effectively abide by such duties. Data from the Bureau of Investigative Journalism shows that at the time of this memo, the Obama administration conducted air strikes that killed fifty-five people—twenty-one of whom were children—in Yemen alone.[125] Such statistics do not necessarily imply that the administration did not comply with the principles of distinction and proportionality to the best of its abilities. However, it is difficult to assess the degree to which fundamental norms of international law did play a role in these targeted killing operations when Justice Department Lawyer Lisa Monaco made clear that "intelligence concerns, and the legal secrecy the

119. *See id*.

120. *See id*. at 28–29.

121. *See generally id*.

122. *See id*. (citing Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DOD Law of War* Program ¶ 4.a, at 1 (Apr. 30, 2010) ("It is DOD policy that . . . [m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.")).

123. *Id.*

124. *Id.* at 26 n. 31.

125. *See* Purkiss & Serle, *supra* note 79.

administration claimed they demanded, would continue to dominate the work of the Justice Department and its national security hub."[126]

Further assurances that the administration complied with international law came on March 25, 2010, when Harold Koh—legal adviser to the Department of State in the Obama administration—delivered a speech on the Obama administration and international law.[127] On the topic of conducting post-9/11 armed conflicts, he stated: "Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts."[128] He explained that there were limits on what he could publicly share, but ensured that the United States' targeting practices complied with all applicable law, including the laws of war.[129] He continued, articulating that the United States has an inherent right to self-defense under international law and may use force consistent with this right in response to attacks that occur in an armed conflict.[130] He then addressed the LOAC norms; much like other materials from this administration, the acknowledgment that these principles exist was not followed with an explanation as to how the administration adhered to them.[131]

The Obama administration faced criticisms for its lack of transparency with respect to its response to the war on terror.[132] Professor O'Connell condemned both the Bush administration and the Obama administration for the definitions they promulgated for terms key to the war on terror—definitions that, in essence, provided the government with unfettered discretion to conduct targeted killings.[133] Notably, she highlighted faulty definitions assigned to terms such as

126. GREENBERG, *supra* note 100, at 224.

127. *See* Harold Hongju Koh, Legal Advisor, Dep't of State, Remarks at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) [hereinafter *Koh Remarks*].

128. *Id*.

129. *See id*.

130. *See id*.

131. *See id*.

132. *See generally* Mary E. O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845 (2009), https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2786&context=lawreview [https://perma.cc/97U6-NTM3]; Letter from Kenneth Roth, Exec. Dir., Hum. Rts. Watch, to President Obama (Nov. 11, 2010), https://www.hrw.org/news/2010/11/11/letter-president-obama-us-comprehensive-strategy-lords-resistance-army [https://perma.cc/QWA6-FFGG].

133. *See generally* O'Connell, *supra* note 132.

"combatant" and "armed conflict."[134] These are terms that, due to their role in the law of armed conflict, would lead to nonconformance of international law if misinterpreted or misconstrued.

Further, Kenneth Roth, the former executive director of Humans Rights Watch, issued a letter to President Obama on targeted killings and drones in December 2010.[135] Roth conceded that such operations may be lawful under certain circumstances, and that the administration faced challenges in having to respond to threats outside of a traditional conflict zone.[136] Yet, he wrote that "the notion . . . that the entire world is a battleground in which the laws of war are applicable undermines the protections of international law."[137] The letter honed in on the areas where the administration lacked transparency—namely, ensuring compliance with the laws of war.[138] Roth underscored the government's lack of explanation as to how it designated targets as militants, or how it measured proportionality in areas where drone strikes kill unknown numbers of civilians.[139]

The letter to President Obama highlights the secrecy surrounding the administration's procedures and operations.[140] Roth specifically pointed to the administration's reluctance to release information on targeted killings in northwest Pakistan and its desire to keep such information private for the sake of national security.[141] He argued that more transparency would not implicate national security interests; he wrote: "it would simply help establish that this administration recognizes that there are legal limits on its actions and good strategic reasons to embrace those limits."[142]

Perhaps in part to address these transparency concerns, the Department of Justice issued a White Paper on the lawfulness of a lethal force operation against an Al-Qaeda operational leader or associated force in November 2011.[143] The White Paper set forth three circumstances that are sufficient to make lawful a lethal operation in another country directed against a US citizen: (1) where the

134. *Id*.
135. *See* Roth, *supra* note 132.
136. *See id*.
137. *Id*.
138. *See id*.
139. *See id*.
140. *See generally id*.
141. *See id*.
142. *Id*.
143. *See generally DOJ White Paper*, *supra* note 11.

government informedly determines the targeted individual poses an imminent threat of violence against the United States; (2) where capturing the targeted individual would be infeasible—and remains infeasible throughout the operation; and (3) where the operation abides by applicable international law, i.e., the law of war principles.[144] The White Paper addressed the first circumstance, imminence, by vastly expanding the meaning of the word. Rather than its traditional meaning, defined in dictionaries as "impending" or "likely to occur at any moment,"[145] the Obama administration interpreted the word to incorporate "considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans."[146] Essentially, the White Paper "conflat[ed] *continuous* with *imminent*."[147] According to this explanation, the government need not possess explicit evidence that a particular attack will occur in the immediate future in order to comply with this new standard. Rather, by virtue of being a member of Al-Qaeda, an individual poses an imminent threat to the United States.[148] Accordingly, the Obama administration utilized the tool of interpretation to justify its actions under the concept of imminence—a concept central to international law.

After a brief explanation of how the second circumstance, feasibility, is a fact-specific and time-sensitive inquiry, the White Paper addressed compliance with international law. The lack of transparency pervaded once more: the administration listed the four LOAC principles, elaborating slightly on avoiding excessive civilian casualties, but did not indicate how it would abide by such principles.[149] It justified the use of certain technology, such as pilotless aircraft or smart bombs, by stating the laws of war do not bar the use of these weapons so long as those who utilize the weapons employ them in compliance with the laws of war.[150]

Another application of international law to the conflict with Al-Qaeda was the White Paper's explanation of how the targeted killing operations are lawful under the Geneva Conventions. It stated that the

144. *See id*. at 6.

145 . *Imminent*, DICTIONARY.COM, https://www.dictionary.com/browse/imminent (last visited Dec. 5, 2022).

146. *DOJ White Paper*, *supra* note 11, at 7.

147. GREENBERG, *supra* note 100, at 219.

148. *See id*.

149. *See DOJ White Paper*, *supra* note 11, at 8.

150. *Id*. at 9 (citing *Koh Remarks*, *supra* note 127).

language of Article 3 holds that members of an enemy's armed forces "are considered as 'taking no active part in the hostilities' only once they have disengaged from their fighting function . . . mere suspension of combat is insufficient."[151] Borrowing from the logic that imminence equates to continuous, the administration held that Al-Qaeda leaders, by definition, were continuously engaged in active hostilities,[152] and that targeting them was thus legal under the Article 3.[153]

President Obama actively discussed the issue of transparency in a speech he made at the National Defense University in 2013.[154] He reaffirmed that the United States is indeed at war with Al-Qaeda, though not a war in the traditional sense.[155] Almost directly addressing Roth's concern, President Obama stated: "we must define our effort not as a boundless 'global war on terror,' but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America."[156] He firmly held that the United States' actions were legal, and continued to state that the government narrowly targeted its actions so as to avoid loss of innocent life to the highest degree it could.[157] To "facilitate transparency and debate on this issue," President Obama authorized the declassification of both the al-Aulaqi operation and the actions that resulted in the deaths of three other Americans in drone strikes.[158]

Ending on a high note, the Obama administration produced a framework in December of 2016: the "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations" ("Obama Framework").[159] The sixty-six-page document detailed the efforts of the administration to "refine, clarify, and strengthen the standards and processes pursuant to which the United States conducts its national security operations."[160]

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151. *DOJ White Paper, supra* note 11, at 16.

152. *See* GREENBERG, *supra* note 100, at 219.

153. *See DOJ White Paper*, *supra* note 11, at 16.

154. *See generally* President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) [hereinafter *Obama Remarks*].

155. *See id.*

156. *Id*. President Obama stated that the United States chooses the course of action "least likely" to result in the loss of innocent life. *See id*.

157. *See id*.

158. *Id*.

159. *See generally* WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (Dec. 2016) [hereinafter *Obama Framework*].

160. *Id*. at i.

President Obama made clear that the aim of the framework was to reinforce the public's understanding of the legality surrounding these operations.[161] In short, the framework's mission was transparency.

The document began its discussion of applicable international law by explaining the rights of States to resort to force in self-defense against an armed attack, and expanded on the concept of imminence.[162] It reaffirmed that, once a State has resorted to force in self-defense against a particular group, reassessing whether an armed attack is imminent or occurring before taking subsequent action against that group is not needed as a matter of international law.[163] It then proceeded to apply US and international legal principles to six specific theaters: Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen.[164] These applications were rather short and almost all of them emphasized the concept of self-defense pursuant to UN Charter 51.[165]

The next part of the Obama Framework discussed targeting. The document further restated the same legal justifications that the administration previously used—i.e., complying with the law of armed conflict. There was, however, much more detail in this framework than in the other materials this Note examines, such as the memos or speeches. For example, in its explanation of how the administration complies with the principle of distinction, the framework stated explicit factors that the government uses to help determine whether an individual is a "functional" member of an armed group.[166] Additionally, the framework elaborated upon US policies regarding incidental civilian casualties. It referenced Executive Order 13732: US Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in US Operations Involving the Use of Force, issued by the Obama administration on July 1, 2016.[167] Section 3 of the Order requires the Director of National Intelligence to obtain information about the number of strikes the US government undertook, in addition to

161. *See id*. at ii.

162. *See id*. at 9.

163. *See id*. at 11.

164. *See generally id.* Part V.

165. *See id*. at 15-18.

166. *Id*. at 20 ("Determining that someone is a 'functional' member of an armed group may include looking to, among other things, the extent to which that person performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country's armed forces; whether that person is carrying out or giving orders to others within the group; and whether that person has undertaken certain acts that reliably connote meaningful integration into the group.").

167. *See id*. at 26-27.

assessments of all deaths resulting from the strikes, and annually release an unclassified report of this information.[168]

In essence, the Obama Framework addressed both the content of decision-making procedure and good governance practices.[169] It emphasized "the observance of in-depth consideration of each decision and each policy as they evolved."[170] Importantly, it directed future administrations to update the report at least annually, and to release the report to the public.[171] While future administrations failed to strictly comply with this instruction, its mere existence reflects the Obama administration's dedication to transparency. As President Obama left office in January 2017, the American public was left with access to the conclusive number of strikes his administration carried out: 563.[172] These strikes killed an estimated number of 3,797 people, including 324 civilians.[173] Despite President Obama's significant expansion of President Bush's targeted killing program, the former saw "a much lower civilian casualty rate,"[174] indicating there was possibly some truth behind his framework. Indeed, it bolsters the notion that increased transparency may influence government behavior.

In sum, the Obama administration made public commitments to transparency and outwardly pledged to be different than its predecessor; Koh stated in his speech that the most important difference between the Obama and Bush administrations was the former's "approach and attitude toward international law."[175] Nonetheless, it is questionable, perhaps debatable, whether the Obama administration effectively demonstrated compliance with international law, and whether it succeeded in its mission of transparency. Far less debatable is how its successor administration approached these same missions, with civilian deaths in Afghanistan increasing 330 percent

168. *See* Exec. Order No. 13732, 81 Fed. Reg. 44483 (Jul. 1, 2016).

169. *See* GREENBERG, *supra* note 12, at 133.

170. *Id*.

171. *See Obama Framework*, *supra,* note 159, at ii.

172. Amandla Thomas-Johnson, *Obama Defends Deadly Drone Campaign in New Book*, MIDDLE E. EYE (Nov. 16, 2020), https://www.middleeasteye.net/news/obama-defends-deadly-drone-campaign-new-book [https://perma.cc/D9CN-3K36].

173. *Id*.

174. Hillel Ofek, *The Tortured Logic of Obama's Drone War*, NEW ATL. (2010), https://www.thenewatlantis.com/publications/the-tortured-logic-of-obamas-drone-war [https://perma.cc/E27W-7WLY].

175. *Koh Remarks*, *supra* note 127.

upon President Trump taking office.[176] Put differently, "where President Obama sought to signal policy constraint, regulation, and layers of internal executive branch oversight for his killing policies, Trump explicitly signaled that the gloves were off to 'further US national security interests.'"[177]

C. The Trump Administration

The imprecision surrounding the war on terror that pervaded the Bush administration increased exponentially throughout the Trump administration.[178] New America operates a website that contains different pages with statistics for each of the United States' current wars against terrorism: i.e., the War in Yemen, the Drone War in Pakistan, the War in Somalia, etc.[179] The data for the War in Yemen reveals that President Obama averaged around twenty-three operations in Yemen per year (180 total operations divided by his eight years in office).[180] New America reports that President Trump averaged forty-seven targeted killing operations per year in Yemen (188 total operations divided by four years)—an increase of over 200 percent.[181]

In one of the first notable acts regarding targeted killings, the Trump administration ignored the Obama Framework requirement[182] that called upon future administrations to produce an updated report

176. John Haltiwanger, *Trump Pledged to Stop 'Endless Wars' but His Airstrikes in Afghanistan Increased Civilian Deaths by 330% Since 2016*, INSIDER (Dec. 7, 2020), https://www.businessinsider.com/trump-afghanistan-airstrikes-increased-civilian-deaths-by-330-since-2016-2020-12 [https://perma.cc/63BB-DEGG].

177. Hina Shamsi, *Trump's Secret Rules for Drone Strikes and Presidents' Unchecked License to Kill*, ACLU (May 5, 2021), https://www.aclu.org/news/national-security/trumps-secret-rules-for-drone-strikes-and-presidents-unchecked-license-to-kill [https://perma.cc/554Q-JC79].

178. *See* Peter Bergen et al., *America's Counterterrorism Wars*, NEW AM., https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/ [https://perma.cc/PVW4-JVG5] (last visited Feb. 1, 2023).

179. *See id*. New America is a community of policy experts and public intellectuals, a "civic platform that connects a research institute, technology lab, solutions network, media hub and public forum." *Our Story*, NEW AM., https://www.newamerica.org/our-story/ [https://perma.cc/UV8F-LGKG] (last visited Apr, 15 2023).

180. *The War in Yemen*, NEW AM., https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/the-war-in-yemen [https://perma.cc/7RXJ-ENBX] (last visited Feb. 1, 2023).

181. *Id*.

182. And, more broadly, to ignore requirements regarding the use of force and national security as a whole.

within their first year.[183] On October 20, 2020, it publicly released its report, but provided no explanation as to why it did not meet the statutorily required deadline.[184] The report ("Trump Framework") itself was far from satisfactory. It was a mere nine pages in length compared to President Obama's sixty-six, in addition to the fact that the Obama Framework contained an appendix that provided readers with additional speeches and statements from President Obama and his administration's officials on the topics discussed in the document.[185]

The portion of the Trump Framework dedicated to targeting was one paragraph long, and it inadequately stated that the United States was dedicated to the four fundamental LOAC norms, without any further elaboration on *how* it was dedicated to such norms.[186] It asserted that the United States continued to "apply heightened targeting standards that are more protective of civilians than are required under the law of armed conflict," and went on to state that such heightened policy standards were reflected in a plethora of materials.[187] The Trump Framework did not, however, cite any of these materials in footnotes, nor refer to any by name.[188] In a very nontransparent fashion, it concluded by stating that the classified annex contains additional information on the topic.[189] The brevity of the report, coupled with the fact that it merely reused segments from the Obama Framework, demonstrates that the Trump administration viewed publishing the report "more as a nuisance than a task of any import."[190] In other words, it communicates disinterest for adhering to international law.

183. GREENBERG, *supra* note 12, at 133.

184. *See* Scott R. Anderson & Benjamin Wittes, *Trump Administration Releases Overdue War Powers Report in Response to Lawsuit*, LAWFARE (Oct. 20, 2020), https://www.lawfareblog.com/trump-administration-releases-overdue-war-powers-report-response-lawsuit [https://perma.cc/X768-8TLR]. The referred statute is the "Report on and notice of changes made to the legal and policy frameworks for the United States' use of military force and related national security operations," which states that "[n]ot later than March 1 of each year, the President shall submit to the appropriate congressional committees a report on the legal and policy frameworks for the United States' use of military force and related national security operations." *See* 50 U.S.C. § 1549 (2018).

185. WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 1, 7 (Oct. 20, 2020) [hereinafter *Trump Framework*]. *See also Obama Framework*, *supra* note 159.

186. *See Trump Framework*, *supra* note 185, at 7.

187. *Id*.

188. *See id*.

189. *See id*.

190. GREENBERG, *supra* note 12, at 134.

The document provided essentially no legal justifications—under either US or international law—for the legality of targeted killings, which paved the way for the administration to carry out its killing of Qasem Soleimani in January 2020.

Soleimani, an Iranian nationalist and former head of the Quds force,[191] initially allied with the United States after 9/11 to defeat the Taliban.[192] Nevertheless, concerns surrounding his relationship with the United States arose: he made efforts to destabilize Iraq, supported regimes against US allied forces, and worked alongside terrorist groups such as Hezbollah.[193] This behavior on the part of Soleimani was not new in the years of the Trump administration; both Presidents Bush and Obama contemplated a targeting killing operation against him.[194] Yet, both concluded that an attack on Soleimani, a leading general of a country, "would constitute an unprecedented expansion of the war on terror . . . blurring the distinction between counterterrorism and attack on a nation-state."[195] This is a reflection of these previous administrations' defining the scope of the war on terror as one with a non-state actor[196]—a scope President Trump exceeded.

The US military attacked Soleimani and his convoy in a targeted killing operation on January 3, 2020.[197] The decision to carry out this strike did not abide by any of the practices or regulations the Obama Framework recommended, recommendations that would help ensure future administrations complied with US and international law.[198] For instance, there was a lack of "proper interagency review" leading up to the operation, leaving no room for the National Security Council staff to supervise or raise concerns.[199] Following the operation, there existed

191. The Quds force, a part of Iran's Revolutionary Guard, "defends the Islamic Republic of Iran" and performs "operations external to Iran to advance the Islamic Revolution." Henry Austin, *What is Iran's Secretive Quds Force?*, NBC NEWS (Jan. 3, 2020), https://www.nbcnews.com/news/world/who-are-iran-s-secretive-quds-forces-n1110156 [https://perma.cc/896A-TYP4].

192. *See* GREENBERG, *supra* note 12, at 127.

193. *See id*. at 128.

194. *See id*.

195. *Id*.

196. *See* discussion *supra* Parts III.A, III.B.

197. *See Qasem Solaimani: US Strike on Iran General Was Unlawful, UN Expert Says*, BBC (July 9, 2020), https://www.bbc.com/news/world-middle-east-53345885 [https://perma.cc/C2HH-EJ5N].

198. *See* GREENBERG, *supra* note 12, at 135.

199. *Id*. The National Security Council ("NSC") is the US President's main forum for deliberating foreign national security and policy decision making with national security advisors and cabinet officials. *See National Security Council*, WHITE HOUSE,

immense imprecision regarding both the labels assigned to Soleimani in order to justify the strike, and the actual legal justifications themselves.[200]

On March 10, 2020, the Office of Legal Counsel issued a memorandum on the airstrike against Soleimani.[201] The Justice Department released a redacted version of the memo in July 2021,[202] and it was redacted to such a degree that it is difficult to glean any legal basis for the killing under international law.[203] It began by referencing the AUMF, and then provided a brief factual background on ISIS, Soleimani, and the US relationship with Iran, with a strong emphasis on why Soleimani posed such a danger.[204] While there are mentions of the president's power to conduct such operations under the Constitution early in the memo,[205] there is no mention of any international law standard or principle until more than halfway through the document.[206] Even then, the unredacted writing simply provided that the operation was targeted and "designed to avoid civilian casualties or substantial collateral damage, and intended to prevent future attacks against Americans in Iraq and throughout the region."[207] This sentence alluded to the IHL principles of distinction and proportionality, and the concept of self-defense. But this statement alone far from justified the operation under these norms.

Indeed, the quoted sentence is the only mention of international law throughout the entire memo, and it is merely an allusion rather than

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https://www.whitehouse.gov/nsc/ [https://perma.cc/MU4F-WKJV] (last visited May 1, 2023). In "the kind of robust, interagency, national security decision-making process that the National Security Council staff is supposed to supervise," participating members reach a consensus on how to inform presidential action with respect to the national security matter at hand. Jonathan Stevenson, *American Foreign Policy Is Broken. Soleimani's Killing Proves It*, N.Y. TIMES (Jan. 4, 2020), https://www.nytimes.com/2020/01/04/opinion/trump-soleimani-strike.html [https://perma.cc/SP7D-EJR6]. Thus, NSC review is largely critical to ensure a system of checks and balances exists regarding the President's national security policies.

200. *See* GREENBERG, *supra* note 12, at 139 ("In subsequent days, the administration went back and forth on the explanation for the strike.").

201. *See generally* Memorandum from Steven A. Engel, Assistant Att'y Gen., Off. Of Legal Couns., to John A. Eisenberg, Legal Advisor to the Nat'l Sec. Council, on January 2020 Airstrike in Iraq Against Qassem Soleimani (Mar. 10, 2020) [hereinafter *Soleimani Memo*].

202. *See* Scott R. Anderson, *Justice Department Releases OLC Memo on Soleimani Strike*, LAWFARE (Jul. 19, 2021), https://www.lawfareblog.com/justice-department-releases-olc-memo-soleimani-strike [https://perma.cc/RB8F-TETE].

203. *See generally Soleimani Memo*, *supra* note 201.

204. *See id*. at 2-8, 14.

205. *See id*. at 11.

206. *See id*. at 18.

207. *Id*. at 18.

an explicit justification. It is possible, of course, due to redactions, that the administration further elaborated upon the principles of distinction and proportionality and how it complied with these core international law norms, and that such information is not public. In this sense, it is difficult to gauge the role international law played in the Trump administration, as there could be hidden information on the matter. But this concept of potential hidden information—the secrecy—contributes to the notion that the role international law played in the Trump administration's approach toward targeted killing was, in fact, nonexistent. Further materials from the administration make this abundantly clear.

A speech by President Trump on January 3, 2020, the day his administration conducted its Soleimani operation, provided no legal justifications for the strike.[208] Instead, it focused on the harms Soleimani reaped upon countries worldwide.[209] The issue, however, is that "few in the national security community disputed the danger Soleimani posed and the death and destruction he had caused."[210] Thus, the administration needed not address who Soleimani was and the evils he perpetrated—what it needed to address was the fact that "the path to the decision to kill him was laden with confusion over the aims and authorities underlying the act."[211]

Instead, President Trump took the opportunity to designate Soleimani as "the number-one terrorist anywhere in the world"[212] after announcing that the US military executed a "flawless precision strike."[213] By assigning these labels, rather than acknowledging Soleimani's role in Iranian leadership, "the distinction between state and non-state actor seemed poised to vanish."[214] Abolishing this distinction through such imprecise language is yet another demonstration of the disinterest toward adhering to international law that existed in this administration; it emphasizes the power of an

208. *See* President Donald Trump, Remarks by President Trump on the Killing of Qasem Soleimani (Jan. 3, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/) [https://perma.cc/G9L7-2XM3] [hereinafter *Trump Remarks*].

209. Trump mentions that Soleimani contributed to terrorist plots in New Delhi and London, in addition to perpetrating acts of terror in the Middle East. *See id*.

210. GREENBERG, *supra* note 12, at 250.

211. *Id.* at 250-51.

212. *See Trump Remarks*, *supra* note 208.

213. *Id*.

214. GREENBERG, *supra* note 12, at 139.

administration's interpretation of international law. Namely, it is language that expands the scope of the war on terror, the scope that the Bush and Obama administrations crafted to justify and authorize American actions under international law.

Such imprecision and overall secrecy by the Trump administration did not go uncriticized. In 2017, the New York Times reported that President Trump replaced President Obama's rules for the use of lethal force with secret policies, standards and procedures ("PSP") of his own.[215] The administration initially refused to make the PSP public; it denied its existence.[216] In response, the American Civil Liberties Union ("ACLU") filed a lawsuit seeking its release.[217] The Southern District of New York held that the DOD may no longer deny that the rules exist and ordered the release of the policies.[218] Upon the release of the PSP, the ACLU responded saying that President Trump's rules "stripped down even the minimal safeguards" that President Obama's rules established for lethal strikes.[219]

An examination of the PSP reveals that this criticism is warranted. Like many other materials this Note examines, the PSP recited the four LOAC principles but failed to acknowledge how the administration abided by these principles in its targeted killing operations.[220] Regarding the minimization of civilian causalities, it simply stated that the United States self-imposes standards that exceed those required by the LOAC, with no elaboration of what these standards are.[221] Further, the PSP ended the Obama era requirement that lethal action be taken only against targets posing a "continuing, imminent threat to US persons."[222] The document additionally delegated substantially more

215. *See ACLU v. DOD – FOIA Case Seeing Trump Administration's Secret Rules for Lethal Strikes Abroad*, ACLU (Oct. 6, 2020), https://www.aclu.org/cases/aclu-v-dod-foia-case-seeking-trump-administrations-secret-rules-lethal-strikes-abroad [https://perma.cc/JS5G-B8R3].

216. *See ACLU Comment on Release of Trump Administration Lethal Force Rules*, ACLU (May 1, 2020), https://www.aclu.org/press-releases/aclu-comment-release-trump-administration-lethal-force-rules [https://perma.cc/9YPL-3SMM] [hereinafter *ACLU Comments*].

217. *See generally* ACLU v. DOD, 492 F. Supp. 3d 250 (S.D.N.Y. 2020). *See also id*.

218. *See DOD*, 492 F. Supp. 3d at 250.

219. *See ACLU Comments*, *supra* note 216.

220. *See* NAT'L SEC. COUNCIL, PRINCIPLES, STANDARDS AND PROCEDURES FOR U.S. DIRECT ACTION AGAINST TERRORIST TARGETS 1 (Apr. 30, 2021) [hereinafter *Trump PSP*].

221. *See id*. at 2.

222. Luke Hartig, *The Biden Drone Playbook: The Elusive Promise of Restrained Counterterrorism*, JUST SEC. (Oct. 17, 2022), https://www.justsecurity.org/83586/assessing-bidens-counterterrorism-rules/ [https://perma.cc/4AP9-LL98].

authority to operating agencies to "conduct operations without interagency review."[223] The administration did write that each set of operating principles would undergo legal review by the General Counsel of the department or agency that submits them to ensure the action is lawful under US and international law.[224] But there was nothing indicating that the public had access to such review, thus making it difficult, once again, to accurately assess the essentially nonexistent role international law played in the Trump administration.

Whether this nonexistent role is a result of the administration not releasing information, or its lack of transparency surrounding the information it did release, what is clear is that the Trump administration ignored international law. While numbers alone are not enough to make this conclusion definitive, it is worth noting that the Trump administration authorized 238 drone strikes in Yemen, Somalia, and Pakistan in its first two years, as compared to 186 in the first two years of the Obama administration.[225] Arguably more noteworthy than the sheer increase in operations, however, is the fact that New America, in its statistics page,[226] lists two different categories for the operations President Trump conducted in Yemen: those with "insufficient detail," i.e., those where New America "was unable to identify specific location and date information," and those with sufficient detail.[227] Presidents Bush, Obama, and Biden have no such categories. Eighty-two of President Trump's operations in Yemen, almost half of his total number in this country, were "insufficiently detail[ed]," thus highlighting the imprecision and lack of transparency his administration exhibited with respect to targeted killing operations.[228]

Numbers aside, a tweet by President Trump after the Soleimani strike, in which he posted that a future attack by Soleimani being imminent "doesn't really matter because of his horrible past,"[229]

223. *Id*.

224. *See Trump PSP*, *supra* note 220, at 5.

225. *See* Simon Frankel Pratt, *US Killing by Drone: Continuity and Escalation,* INTERPRETER (Dec. 11, 2018), https://www.lowyinstitute.org/the-interpreter/us-killing-drone-continuity-escalation [https://perma.cc/V5ND-ANPX].

226. *The War in Yemen*, NEW AM., *supra* note 180.

227. *Id*.

228. *Id*.

229. @realDonaldTrump, TWITTER (Jan. 13, 2020, 11:09 AM), https://twitter.com/realDonaldTrump/status/1216754098382524422?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1216754098382524422%7Ctwgr%5E49f412382a5df70d4cd220bec47e56170b60f76d%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.com

indicated that his administration did in fact ignore international law. Indeed, by understanding the importance of imminence in international law, this tweet can be read as an assertion that international law itself "doesn't really matter." This perception of the role of international law, coupled with the administration's lack of transparency, allowed targeted killings to thrive and continue largely unchecked.

D. The Biden Administration

The Bush legacy of secrecy pervades today, and the lack of transparency in this arena is common across political parties. In October of 2022, the Biden administration reportedly signed new classified rules that govern lethal force outside of recognized international warzones.[230] The nonpublic nature of the rules once again makes it difficult to assess the administration's approach toward international law. The *Times* reported that the rules largely resemble Obama era policy, requiring that strikes be conducted only against targets posing a "continuing, imminent threat to US persons,"[231] a concept Trump's administration addressed only through "imprecise, generalized claims."[232] The new rules supposedly tighten the Trump era rules, taking away the latitude President Trump's PSP allotted to commanders in the field.[233] President Biden's homeland security advisor stated: "The president's guidance on the use of lethal action and capture operations outside areas of active hostilities requires that US counterterrorism operations meet the highest standards of precision and rigor, including for identifying appropriate targets and minimizing civilian casualties."[234] As was the case with every other administration, criticism regarding the lack of transparency arose. The ACLU stated that the classification of the new lethal force policy is "unacceptable,"

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mondreams.org%2Fnews%2F2020%2F01%2F14%2Fafter-days-claiming-soleimani-posed-imminent-threat-us-trump-finally-declares-it [https://perma.cc/H7MV-NGTE].

230. *See ACLU Statement on President Biden's New Rules on Drone Strikes and Lethal Force*, ACLU (Oct. 7, 2022), https://www.aclu.org/press-releases/aclu-statement-president-bidens-new-rules-drone-strikes-and-lethal-force [https://perma.cc/5NTC-VKKH] [hereinafter *ACLU Biden Statement*].

231. Hartig, *supra* note 222.

232. GREENBERG, *supra* note 12, at 140.

233. *See* Charlie Savage, *White House Tightens Rules on Counterterrorism Drone Strikes*, N.Y. TIMES (Oct. 7, 2022), https://www.nytimes.com/2022/10/07/us/politics/drone-strikes-biden-trump.html [https://perma.cc/4TYK-A83M].

234. *Id*.

as "secrecy prevents public oversight and democratic accountability."[235]

A few months prior to the reports of the new Biden era rules, the Biden administration carried out a targeted killing operation against Ayman al-Zawahiri, Osama bin Laden's successor to Al-Qaeda's leadership.[236] Several law and policy blogs address the legality of the strike under international law,[237] but, rather notably, the administration itself does not. In a speech President Biden delivered a few days after the strike, he failed to use the words "international law" even once.[238] He provided a brief overview of the dangers al-Zawahiri posed and his promise to protect the American people from terrorism.[239] President Biden emphasized that the United States "did not seek this war against terror," but that the country nevertheless has answered with "the same principles and resolve that have shaped us for generation upon generation."[240] Perhaps this would have been the place to elaborate upon such principles, to outwardly commit to protecting Americans from terrorism in accordance with international law. It is possible that these principles, and this commitment, are part of the Biden administration's new rules, and as such can be analyzed upon the policy's declassification. But for now, the problem remains: "We do not know exactly what the policy is. . . [and] that fact alone should concern us."[241]

On a positive note, however, figures indicate that President Biden's operations involved fewer civilian causalities throughout his

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235. *ACLU Biden Statement, supra* note 230.

236. *See* Robert Chesney, *On the Legality of the Strike That Killed Ayman Al-Zawahiri*, LAWFARE (Aug. 3, 2022), https://www.lawfareblog.com/legality-strike-killed-ayman-al-zawahiri [https://perma.cc/3AQK-MWBH].

237. *See id*.; *Top Experts Raise Questions Regarding Legal Basis of Zawahiri Strike*, JUST SEC. (Aug. 4, 2022), https://www.justsecurity.org/82584/top-experts-raise-questions-regarding-legal-basis-of-zawahiri-strike/ [https://perma.cc/A9XW-URLF]; Michael N. Schmitt & William Casey Biggerstaff, *The Al-Zawahiri Strike and the Law of Armed Conflict*, LIEBER INST. (Aug. 5, 2022), https://lieber.westpoint.edu/al-zawahiri-strike-law-of-armed-conflict/ [https://perma.cc/5TFZ-MK99].

238. President Joe Biden, Remarks by President Biden on a Successful Counterterrorism Operation in Afghanistan (Aug. 1, 2022, 7:33 PM).

239. *See id*.

240. *Id*.

241. Shannon Roddel, *The Future of US Drone Policy: A Conversation With International Law Professor Mary Ellen O'Connell*, NOTRE DAME NEWS (Oct. 14, 2022), https://news.nd.edu/news/the-future-of-us-drone-policy-a-conversation-with-international-law-professor-mary-ellen-oconnell/ [https://perma.cc/4HUD-5PXU] (last visited Jan. 27, 2023).

administration's first year than any other administration.[242] Indeed, President Biden authorized 10 total strikes in Somalia in his first year, with zero recorded civilian casualties.[243] Perhaps such figures indicate that the President's new rules truly underscore key tenets of international law, i.e., the principles of distinction and proportionality. Nevertheless, while these figures are commendable, they are a small sample size and do not outweigh more than two decades of a lack of transparency.

IV. A PERVASIVE LACK OF TRANSPARENCY SHOULD BE ADDRESSED THROUGH AN INTERNATIONAL SOLUTION

This Note illustrates how each administration's approach to the United States' obligations under international law can drastically vary; the nature of targeted killings creates a tendency for secrecy that results in confusion on the strength of compliance with these international obligations. There are several important points to address before concluding that the United States must do a better job in its counterterrorism mission. First, from a national security standpoint, there are certainly limits on the information that should be made public, as "intelligence requires secrecy."[244] By no means is a call for *more* transparency a request for *complete* transparency. Second, the criticism surrounding the way administrations have conducted these operations under international law does not equate to a belief that counterterrorism operations are entirely unlawful or unnecessary; it does not promote a softness on terrorism. Rather, it stems from a view that there would be less mistrust surrounding the way the government carries out its missions if such missions were sufficiently transparent with respect to their proper legal justifications. An emphasis on secrecy paves the way for the criticism that "solid, lawful policies are public,"[245] and by consistently keeping policies secret, administrations fuel the doubts the

242. *See* Tom O'Connor, *Biden Killed Fewer Civilians in First Year Than Any U.S. Leader This Century*, NEWSWEEK (Jan. 20, 2022), https://www.newsweek.com/biden-killed-fewer-civilians-first-year-any-president-century-1668123 [https://perma.cc/SY3F-4ME4].

243. *Id.*; *See also The War in Somalia*, NEW AM., https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/the-war-in-somalia [https://perma.cc/J3DC-S2F9] (last visited Apr. 15, 2023) (revealing that as of January 25, 2023, there have been no civilian causalities from Biden administration strikes in Somalia).

244. GREENBERG, *supra* note 100, at 223.

245. Roddel, *supra* note 241.

public and the international community have with respect to their legality.

The United States prides itself on being an example to countries around the world. President Obama, in his acceptance speech for the Nobel Peace Prize, stated:

> Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength.[246]

Yet, it is often difficult for the American public to truly understand and accept this sentiment when much of these standards—the ones that supposedly make the United States' conduct so moral—are not available for the public to analyze and assess.

A. A National Versus an International Solution

The crux of the problem is not necessarily the fact that the US government conducts targeted killings: it is that there is a disregard for international law within the context of such killings, exemplified by the inconsistency and lack of transparency throughout different presidential administrations. At first look, the solution seems simple enough: impose mechanisms to increase transparency. But this solution raises the complicated question of how to implement these mechanisms and whether such implementation should occur at a national or an international level. An analysis of other countries that conduct targeted killings assists in answering this question; if other countries face the same problem as the United States, a transparency mechanism implemented on an international scale is likely the appropriate solution. Yet, even a comparative analysis that demonstrates other countries do not face this problem reveals that a solution at the international level would be most effective.

246. President Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009).

B. Comparative Analysis Reveals the Necessity of an International Solution

It is sensible to compare the State of Israel to the United States in a comparative analysis of targeted killing methods. While there are major differences between the types of threats and enemies the two countries face, Israel, alongside the United Kingdom and the United States, is one of the three most active States engaged in this practice.[247] Israel's targeted killing policies are "surprisingly transparent."[248] The Israel Security Agency, known as the Shin Bet, works with Israeli media to guarantee public awareness of what targeted killing operations involve.[249] Although the Israeli government does not offer specific intelligence, there is still a "robust public debate on the policy" and the "targeting criteria are understood by all."[250] Several non-governmental organizations ("NGOs") within the State of Israel monitor targeted killing numbers, and there are examples of public challenges to the policy both in the media and courts.[251] The Israeli model of judicial review, i.e., regulation of counterterrorism approaches by the Judiciary as opposed to the Executive in the United States and Parliament in the United Kingdom,[252] is the only model to produce "a binding, comprehensive, and sufficiently transparent legal scheme for regulating the use of force for counterterrorism, which it made available for the public eye."[253]

On a national level, perhaps the United States could adopt some of the smaller-scale solutions for transparency that exist in Israel, such as media involvement and public debates. An even more drastic solution at the national level would be to shift toward judicial control of targeted killing policies, rather than executive control. The fact of the matter is, however, that the "defining feature of the United States'

247. *See* Elad D. Gil, *Institutional Choice and Targeted Killing: A Comparative Perspective*, 94 Tul. L. Rev. 711, 716-17 (2020).

248. Daniel Byman, *Do Targeted Killings Work?*, 85 FOREIGN AFFS. 95, 110 (2006).

249. *See id*.

250. Daniel Byman, *Targeted killing, American-style*, BROOKINGS (Jan. 20, 2006), https://www.brookings.edu/opinions/targeted-killing-american-style/ [https://perma.cc/6FWU-NUTA] (last visited Jan, 23, 2023).

251. *See* Byman, *supra* note 248, at 110. Byman explains that Israel's practice of transparency with respect to its targeted killing operations strengthened the Israeli public's support for such operations, as it "highlight[s] the policy's risks and difficulties and educate[s] the public about its practical and moral tradeoffs." *Id*. at 110.

252. *See* Gil, *supra* note 247, at 711.

253. *Id*. at 761.

use of targeted killing is not the regulatory scheme or underlying legal theory adopted by any particular president, but rather the *predominance of the executive branch* in decision making."[254] It is for this reason that solutions at the national level, even those that gain success in other countries, are unlikely to evoke any true change under the system currently present in the United States. Domestic efforts are insufficient because, as this Note demonstrates, policies and approaches toward targeted killing vary from administration to administration. A lasting solution to the transparency problem at the international level takes this inconsistency and instability out of the equation by limiting the amount of discretion presidential administrations possess with respect to extrajudicial killing.

C. The International Solution: Universal Periodic Review

The UPR is a UN mechanism that assesses Member States' human rights records.[255] The UPR is the only form of universal human rights review of this nature that currently exists,[256] and it operates through the UN Human Rights Council.[257] Its purpose is to allow Member States to communicate the steps they took to improve certain human rights situations in their countries.[258] The UPR also shares the best human rights practices around the world.[259]

The UPR utilizes a number of documents in its review of a country.[260] One of the strengths of the UPR is the fact that NGOs can

254. Gil, *supra* note 247, at 714 (emphasis added).

255. *See Universal Periodic Review*, U.N HUM. RTS. COUNCIL, https://www.ohchr.org/en/hr-bodies/upr/upr-main [https://perma.cc/B6WN-TY5E] (last visited Jan. 27, 2023).

256. *See id*.

257. *See Basic Facts About the UPR*, U.N HUM. RTS. COUNCIL, https://www.ohchr.org/en/hr-bodies/upr/basic-facts [https://perma.cc/8AT2-6F2B] [hereinafter *Basic Facts*] (last visited Jan. 27, 2023).

258. *See id*. "The ultimate goal of UPR is the improvement of the human rights situation in every country with significant consequences for people around the globe. The UPR is designed to prompt, support, and expand the promotion and protection of human rights on the ground." *Id*.

259. *See id*.

260. *See Universal Periodic Review Process*, U.S. DEP'T. OF. STATE, https://www.state.gov/universal-periodic-review-process/ [https://perma.cc/3XDE-ST6M] (last visited Jan. 27, 2023) ("(1) a report submitted by the national government of the country under review; 2) a report compiled by the Office of the UN High Commissioner for Human Rights (OHCHR) consisting of information contained in the reports of treaty bodies and special procedures concerning the country, including its observations and comments, and other relevant official UN

submit information to be considered during review.[261] The participation of non-governmental entities symbolizes the transparency of the process, as the review is not conducted solely between governments behind closed doors.[262] The country under review then engages in a question and answer session, during which other UN Member States ask questions and make recommendations.[263] Portions of this session are dedicated to: a presentation of the country's report by its national government; a response from the country to questions that other Member States submitted before the review; a response to oral questions, comments, and recommendations during the review; and a presentation of the country's conclusions.[264] After this session, a group of three Human Rights Council members and a member of the Secretariat—rapporteurs—produce the review's report.[265] The country's national government has the primary obligation to undertake the recommendations or decline those it does not want to implement.[266] After a correction of errors and an opportunity for countries to follow up on recommendations, the Human Rights Council debates and adopts the final Outcome Report of the UPR of a national government.[267] The country under review is responsible for implementing the recommendations per the final report.[268]

The United States, in its 2020 national report, divided the recommendations from its 2015 UPR into thematic areas and structured its report based on these areas.[269] These thematic areas covered civil rights and non-discrimination, the US criminal justice system, gun violence, and

documents; and 3) an OHCHR compilation of information that is credible and reliable from other stakeholders, including NGOs and national human rights institutions").

261. *See Basic Facts*, *supra* note 257. The information from NGO's gets added to the "other stakeholders" report, which gets considered during a country's review process. *Id*.

262. *See Universal Periodic Review (UPR)*, AUSTRIAN EMBASSY WASHINGTON, https://www.austria.org/universal-periodic-review-upr [https://perma.cc/K78S-6RJ7] ("The UPR provides for a transparent procedure . . . as well as for close cooperation between states and civil society.").

263 . *See Universal Periodic Review Process*, U.S. DEP'T OF STATE, https://www.state.gov/universal-periodic-review-process/ [https://perma.cc/8GM9-E84C] (last visited Jan. 23, 2023).

264. *See id.*

265. *See id.*

266. *See id.*

267. *See id.*

268. *See id*. The international community works to assist national governments with the implementation of recommendations and conclusions. *See id*.

269. *See* Hum. Rts. Council, Nat'l Rep. Submitted in Accordance with Paragraph 5 of the Annex to Hum. Rts. Council Resol. 16/21, U.N. Doc. A/HRC/WG.6/36/USA/1, at 4 (2020) [hereinafter *US National Report*] [https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/204/16/PDF/G2020416.pdf?OpenElement].

the death penalty, to list just a few.[270] Notably, however, targeted killings were not part of the United States' most recent UPR report.[271] "National security and other matters" was one of the thematic areas, but the closest connection to targeted killing in this area was a subsection on Guantanamo Bay, without a single mention of extrajudicial killing.[272]

Thus, the solution this Note proposes to the United States' lack of transparency problem is to include targeted killing procedures as a subsection within the National Security category: to make extrajudicial killings a part of the United States' human rights record that the Human Rights Council reviews as part of the UPR process. The kind of international attention that the UPR garners will hold the United States more accountable for its actions; the publication is a vehicle for forced transparency with respect to human rights issues. Indeed, the US report from 2020 explicitly addressed the concept of transparency, stating that the United States is a participant in the Universal Periodic Review process because its "commitment to human rights rests on a firm political and moral commitment to individual and corporate accountability and transparency."[273]

Critics of this solution will likely point to the fact that—as this Note demonstrates—presidential administrations flout international law and thus a solution at the international level rather than the national level will not achieve the intended effects. Surely, even with the inclusion of targeted killings within the UPR, the United States can still refuse to abide by any recommendations. While perhaps increasing transparency at the international level will not outright ban procedures that disregard international law, it will certainly discourage and possibly prevent administrations from engaging in such procedures. The statistics from the Obama administration, which had the highest degree of transparency related to targeted killings among the four administrations discussed in this Note, revealed far fewer civilian causalities than any other administration, exemplifying that increased transparency may influence changes in action.[274] The United States is "committed to the principle that leadership

270. *See generally id*.

271. *See generally id*. The United States' report from 2015 also does not include information on targeted killing, despite the fact that National Security and Counterterrorism efforts are a theme in this report, as well. U.N. High Commissioner for Human Rights, Report of the United States of America, at 17-18, U.N. Doc. 237460 (2015) [https://2009-2017.state.gov/documents/organization/237460.pdf].

272. *Id*. at 15.

273. *Id*. at 3.

274. *See supra* p. 25.

in the field of human rights is by example." [275] Increasing global accountability on the world scale through the UPR inherently increases and heightens transparency. Since the United States is devoted to leading by example, it would be in the country's best interests to commit to sustainable practices that comply with international law, as its actions would then be on greater display for the world to monitor and learn from. Indeed, "unless the procedures for targeted killings are made transparent, they are unlikely to be sustainable."[276]

V. CONCLUSION

The executive branch asserts power over international affairs. Consequently, the vast majority of action the United States takes in the war on terror, a global counterterrorism campaign and international affair, is conducted and authorized by US presidential administrations. When administrations carry out targeted killings as a part of the war on terror, certain American and international laws apply. Of particular relevance are the Geneva Conventions, the United Nations Charter, International Humanitarian Law, i.e., the law of armed conflict, and International Human Rights Law.

Since the war on terror began, there have been four different presidents in the White House: Presidents Bush, Obama, Trump, and Biden. Each of these presidents orchestrated dozens of targeted killing operations. A close examination of materials and data from all four eras reveals that a lack of transparency regarding international law compliance pervades throughout each administration's justifications for targeted killing operations. It is true that some presidents were less evasive than others. Nonetheless, all four administrations' failures to provide thorough explanations of international law compliance creates room for criticism and doubt regarding the legality of these extrajudicial killings.

The United States is a participant in the UPR, a means for the UN to assess Member States' human rights records. The United States' national security procedures undergo review as part of the UPR process, but targeted killing policies are not part of this analysis. It would greatly increase global accountability—and, consequently, transparency—if the Human Rights Council, UN Member States, and NGOs assessed US targeted killing operations as part of the UPR. The

275. *US National Report*, *supra* note 269, at 3.

276. Byman, *supra* note 248, at 109.

inclusion of this topic for review will result in the United States abiding by its international obligations in a more transparent and direct manner.