TARGETING DECISIONS IN THE CROSSHAIRS OF HUMANITARIAN LAW AND HUMAN RIGHTS LAW

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“War is in fact, a means, the ultimate means, whereby a State can bend another to its will. . . . All violence which is not indispensable for achieving that object is therefore without purpose. It then becomes merely cruel or stupid.”

I. INTRODUCTION

Under international humanitarian law (“IHL”), if an individual meets the technical criteria for targeting, there is no obligation for the opposing force to attempt to detain him or her before employing lethal force as long as the targeting is otherwise in compliance with the fundamental principles of IHL: necessity, distinction, humanity, and proportionality. As international human rights law (“IHRL”) becomes more influential, however, the question arises, whether principles of IHRL fill a complementary function in armed conflict and require the use of less than lethal force where available, imposing further limitations on the use of lethal force than IHL alone. This paper assesses the applicable standards of IHL and IHRL as established in treaty law and customary international law and interpreted through recent international and domestic precedents and state practice. Such an analysis allows the identification of a framework of law for application to the United States’ current targeting activities and recommendations for shaping legal targeting policy in the future.

The increasingly asymmetrical character of armed conflict has brought the problem of which laws govern targeting activities to the vanguard of international attention. Asymmetrical armed

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2 Commonly referred to as the “law of war” or the “law of armed conflict.”

3 Either he or she is a privileged combatant or is a civilian directly participating in hostilities. See infra notes 119–23 and accompanying text.


6 See infra notes 132–54 and accompanying text.

7 Andrew Altman, Introduction, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 2 (Claire Finkelstein et al. eds., 2012). Asymmetrical warfare departs substantially from the traditional model of
conflict most often takes the form of a highly organized state actor engaged with a non-state actor either within a given state or across multiple borders.8 These conflicts are characterized by opposing forces with access to drastically different types and avenues of resources generally employing substantially divergent tactics to achieve their objectives.9 It is within this new model of armed conflict that the question of IHRL’s role in targeting must be addressed.

Recent scholarship on the issue has produced two primary paradigms through which to approach the issue: the war paradigm—in which IHL provides the exclusive legal framework for the use of lethal force, allowing lethal force against any targetable individual with minimal restraints—and the law enforcement paradigm—in which IHRL allows only the minimum force necessary, permitting lethal force only as a last resort.10 Most scholars premise their arguments regarding the appropriate legal regime for targeting in asymmetrical conflicts on the application of either the war paradigm or the law enforcement paradigm exclusively.11 This paper, however, contends that the degree to which IHRL affects targeting decisions is more complicated than either paradigm is capable of comprehending independently.12 Accordingly, this paper proposes that the current nature of armed conflict globally demands a departure from the standard dichotomous rhetoric and a close examination of the

uniformed armed forces marching openly towards an opposing force of relatively equal resources on a clearly demarcated battlefield. See id. In asymmetric warfare, the less well-organized and provisioned non-State group has little incentive to adhere to the principles of IHL and often resorts to targeting civilian objectives and use of terrorist tactics in an attempt to counter a State actor’s more sophisticated weaponry and expansive resources. Id. at 2–3.

8 Id. at 2. Today’s armed conflicts almost exclusively resemble the guerrilla style warfare of Vietnam with a traditional uniformed force on one side facing a loosely organized, most often politically and occasionally ideologically fractured non-State force. Id.

9 Id. at 2.


11 See Russell Christopher, Imminence in Justified Targeted Killing, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD, supra note 7, at 253, 255 (“[T]argeted killings of terrorists do not fit easily within any of these paradigms. Terrorists are neither legally recognized combatants nor mere civilians, nor domestic criminals, nor ordinary aggressors. If such targeted killings are to be justified, either they must be demonstrated to somehow fit within the exiting paradigms or a new, more appropriate, paradigm must be developed.”); see also Jens David Ohlin, Targeting Co-Belligerents, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD, supra note 7, at 60, 60–61.

12 See Christopher, supra note 10 at 255 (“[T]argeted killings of terrorists do not fit easily within any of these paradigms. Terrorists are neither legally recognized combatants nor mere civilians, nor domestic criminals, nor ordinary aggressors. If such targeted killings are to be justified, either they must be demonstrated to somehow fit within the exiting paradigms or a new, more appropriate, paradigm must be developed.”); see also Ohlin, supra note 10, at 60–61.
rationale underlying application of IHL and IHRL principles individually. Following from such analysis, this paper submits that current jurisprudence supports a sliding scale model based on a mixed paradigm as the most appropriate model to govern targeting decisions in asymmetrical warfare.

Part II of this paper provides a brief overview of the governing principles of IHL, the applicable standards of IHRL, the relevant portions of the International Committee of the Red Cross’s (“ICRC”) publication on customary international law, and a summary of Israeli precedent in the field. Part III uses the principles of IHL and standards of IHRL as interpreted through international and domestic jurisprudence to analyze the emergence of a mixed paradigm and propose support for a sliding scale approach to the additional restraints imposed on targeting by IHRL. Part IV assesses the impact of such an approach on the targeting practices of the United States given its increased reliance on targeted killing operations, addressing both the legality of current U.S. practice as well as options for a legally compliant policy framework going forward. Part V concludes.

II. LEGAL FOUNDATIONS OF IHL AND IHRL AND INTERPRETING PRECEDENT

A. INTERNATIONAL HUMANITARIAN LAW

In 1863 Abraham Lincoln commissioned Francis Lieber to draft a set of guidelines for the conduct of armed hostilities in order to disseminate both legal and strategic principles among the Union’s largely volunteer forces. The resulting document, the Lieber Code—generally recognized as the first official code of the modern law of war—establishes the foundation for contemporary IHL.

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14 See infra notes 77–155 and accompanying text.

15 See infra notes 19–76 and accompanying text.

16 See infra notes 77–131 and accompanying text.

17 See infra notes 132–54 and accompanying text.

18 See infra notes 156–57 and accompanying text.

19 GANESH SITARMAH, THE COUNTERINSURGENT’S CONSTITUTION: LAW IN THE AGE OF SMALL WARS, 25 (2013). The Lieber Code defined military necessity as measures that are indispensable to securing the ends of the war, prohibiting cruelty, but permitting expansive kill or capture operations. Id. Though Lieber’s concept of cruelty was slightly different from what would likely be considered cruel and inhuman under current standards of IHL. See id.

i. Bodies of Law Constituting IHL: Hague and Geneva Conventions

The primary bodies of law comprising IHL are the Hague Conventions of 1899 and 1907 and the four Geneva Conventions ("GCs") of 1949 with their two Additional Protocols ("APs"). The GCs establish rules for the treatment of persons in the power of the enemy. Primarily limited to international armed conflicts ("IAC")—applicable when two state parties engage on opposite sides of the hostilities—the GCs contain only one common article governing non-international armed conflicts ("NIAC"). API and APII expand the scope of the original conventions and in particular APII provides substantially more guidance regarding protections afforded during NIACs. Hague Law is the subset of IHL that governs how actors may conduct armed conflict (commonly referred to as the means and methods of warfare).

ii. Governing Principles of IHL

It is from these bodies of law that IHL draws the four governing principles for the use of force in armed conflict as refined by customary international law ("CIL"). The principles of military

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22 The common article is Article 3 of the GCs and accordingly NIACs are often referred to as Common Article 3 conflicts. See GCI, art. 3; GCII, art. 3; GCIII, art. 3; GCIV, art. 3.

23 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 [hereinafter API]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977 [hereinafter APII]. The GCs also establish judicial guarantees, but as they are only applicable in IAC situations, such guarantee in NIACs must be derived primarily from IHRL as they are not covered specifically in CA3 or APII. See sources cited supra note 21, at CA3(1)(d) (affording all the judicial guarantees which are recognized as indispensable by civilized peoples). APII is particularly relevant given that NIACs make up a substantial majority of the asymmetrical conflicts of the modern age. See Andrew Altman, Introduction, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD, supra note 19, at 1, 1-3.


25 See Meyer, supra note 19, at 194–95 (drawing on analyses of the conventions in examining and applying the governing principles of IHL).
necessity, distinction (or discrimination), proportionality, and humanity (or the avoidance of unnecessary suffering) dictate how force may be employed during an armed conflict. Military necessity requires that the use of force be necessary to advance a military objective. Distinction compels commanders to adequately distinguish legitimate military personnel or objects from civilian personnel or objects. Proportionality demands that any anticipated civilian damage—either to persons or objects—not be disproportionate in relation to the expected military advantage to be achieved. Finally, the principle of humanity requires that the use of force not cause unnecessary suffering to enemy combatants or to civilians.

IHL is universally applicable in armed conflict. Due to the complexity and scope of conflict classification questions, and the

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27 Id. at art. 1.
28 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(5)(b), June 8, 1977 [hereinafter API].
31 See Hague Convention IV, supra note 23 (requiring a military objective to justify uses of force and noting that force is not unlimited in times of war).
32 API, supra note 22, at arts. 48, 51(2), 52(2); see also Hague Convention IV, supra note 23, at art. 25 (prohibiting “[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended”).
33 See API, supra note 22, at art. 51(5)(b) (prohibiting attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”).
34 See Hague Convention IV, supra note 23, at arts. 22, 23, 25 (limiting the means available in warfare by restricting those known to cause unnecessary suffering).
35 Virtually every nation has signed and ratified the GCs and the Hague Conventions and both sets of laws are generally considered to be customary international law as well along with many provisions of the APs, which are not unanimously ratified. See ICRC Hails Ratification of Geneva Conventions, SWISSINFO.CH (Aug. 22, 2006, 21:58), http://www.swissinfo.ch/eng/ICRC_hails_ratification_of_Geneva_Conventions.html?cid=3716 (recognizing the importance of unanimous signature of the Geneva Conventions while acknowledging that the Additional Protocols do not enjoy the same approval). This applicability criterion obviously raises significant issues with regard to conflict classification as well as the legal parameters for determining the geographic and temporal scope of an armed conflict. See generally Noam Lubell & Nathan Derejko, A Global Battlefield? Drones and the Geographic Scope of Armed Conflict, 11 J. INT’L CRIM. JUST.
resulting fundamental alteration of the applicable legal regime, for purposes of the analysis in this paper targeting decisions will be assumed to take place in a NIAC unless otherwise stated.  

B. INTERNATIONAL HUMAN RIGHTS LAW

IHRL is the set of minimum standards agreed upon by states through treaties and customary international law that guarantees individual rights and requires that states respect and protect such rights. IHRL is fundamentally different from IHL, as IHRL is based on an individual-centric approach, addressing state action against and responsibility to individuals.

i. Foundations of IHRL

The Universal Declaration of Human Rights (“UDHR”) provides the foundation for modern IHRL. The UDHR was the first instance of global recognition of a set of basic rights and fundamental freedoms that are “inherent to all human beings, inalienable and equally applicable to everyone.” The various and proliferative human rights treaties, both bilateral and multilateral, developed and ratified over the last half century have mostly been inspired by the UDHR.

65 (2013) (discussing the geographical limitations of IHL in modern armed conflict). Fascinating as they are, these issues are outside of the scope of this paper. 


38 Colonel Mark “Max” Maxwell, Rebutting the Civilian Presumption: Playing Whack-A-Mole Without a Mallet?, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD, supra note 19, at 31, 45. The individual-centric nature of IHRL is the product of more recently developed legal principles than IHL, which is premised on reciprocity of State conduct with regard to other States. See ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT 143–64 (2011) (addressing the evolution of IHRL by examining the role of debates over jurisdiction and legitimacy in the development of the modern nation State). A central tenant of IHRL, which is not without controversy, is that States have obligations that apply to more than just the State’s own citizens or those within its borders. Id. at 164. This serves as the foundation of the development of the concept of the responsibility to protect (R2P) principle. Id. at 210–12.


40 Id.

41 Id.
ii. Applicability of IHRL

IHRL is applicable both inside and outside of armed conflict, but certain provisions are derogable according to specific treaty provisions.\(^{42}\) Additionally, the obligations of a given state regarding IHRL rights are dependent on the interpretation of the treaty language as well as derogability provisions.\(^{43}\) Article 2 of The International Convention on Civil and Political Rights (“ICCPR”), for example, states that “[e]ach state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”\(^{44}\) The applicability of the ICCPR then depends on the interpretation of this clause and more specifically, the reading of the word “and.”\(^{45}\) If, for example, a state chooses to read “and” as meaning that parties are required to ensure the Covenant’s guarantees to individuals who are at once both within its territory and subject to its jurisdiction, then the ICCPR is applicable to states only within their territorial borders.\(^{46}\)

If, however, a state chooses to read “and” as meaning that the parties are to ensure the Covenant’s guarantees to individuals within its territory and to individuals not within its territory but otherwise subject to its jurisdiction, then the ICCPR is applicable to state action both within and outside of the state’s physical borders.\(^{47}\) Article 1 of the European Convention on Human Rights (“ECHR”) dispenses with the entire issue by eliminating the territorial language, asserting that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” binding states more fully to compliance with IHRL.\(^{48}\)


\(^{44}\) ICCPR, supra note 41, art. 2 (emphasis added).


\(^{46}\) The United States, for example, has used this language to object to the extraterritorial application of its human rights obligations. See id. at 122–27.

\(^{47}\) This is the commonly accepted interpretation of the text outside of the United States. See generally id. (discussing the various approaches to the extraterritoriality and complementarity of IHRL treaties).

\(^{48}\) European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 (formerly Convention for the Protection of Human Rights and Fundamental Freedoms) [hereinafter ECHR] (emphasis added). While this may suggest that the latter, consistent interpretation of the ICCPR language is the more correct, the United States’ position has remained unyielding. See Dennis, supra note 44, at 122–27.
iii. Guarantees of IHRL

Many of the IHRL treaties have guarantees relevant to a targeting analysis. Article 6 of the ICCPR holds that “no one shall be arbitrarily deprived of life.”\(^{49}\) Articles 9, 14, and 15 of the ICCPR also provide judicial guarantees that lethal targeting precludes.\(^{50}\) Article 2 of the ECHR provides that “no one shall be deprived of his life intentionally.”\(^{51}\) Where these standards are imposed, states have an obligation to take a greater degree of care in ensuring that individuals are not arbitrarily deprived of life through application of appropriate due process mechanisms, as opposed to under a strictly IHL standard, which allows the use of lethal force in the absence of judicial due process.\(^{52}\)

C. ICRC ON CUSTOMARY INTERNATIONAL LAW AND STATE PRACTICE

The ICRC holds a unique position in IHL as the only non-governmental organization to operate under the direct commission of the Geneva Conventions.\(^{53}\) The ICRC has recently updated its database on customary IHL and has also issued an interpretive guidance on the loss of civilian protection through direct participation in hostilities (DPH), which has particular relevance to targeting decisions in asymmetrical warfare.\(^{54}\)

The ICRC’s interpretive guidance on DPH proposes that the principle of military necessity may itself limit targeting decisions before “other branches of international law” are even addressed.\(^{55}\)

\(^{49}\) ICCPR, supra note 41, at art. 6.
\(^{50}\) ICCPR, supra note 41, at arts. 9, 14, 15.
\(^{51}\) ECHR, supra note 47, art. 2.
\(^{52}\) ICCPR, supra note 41, art. 6; see generally Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).
\(^{53}\) ICRC’s Mandate and Mission, INTERNATIONAL COMMITTEE OF THE RED CROSS (Oct. 29, 2010), http://www.icrc.org/eng/who-we-are/mandate/overview/icrc-mandate-mission.htm. The ICRC’s ability to maintain neutrality is crucial to its mission of overseeing the enforcement, development, and dissemination of IHL. Id. As a result, the ICRC is highly respected throughout the international community and its publications on the governing law carry significant weight. Id.
\(^{55}\) Nils Melzer, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 77–82 (ICRC, 2009), http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf. [hereinafter Melzer, Interpretive Guidance] (“In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”).
The proposed legal theory is based on treaty language as well as state practice. The ICRC argues that the degree of force used against a legitimate military target must comply with the IHL principles of military necessity and humanity, as these principles “underlie and inform the entire normative framework of IHL and therefore shape the context in which its rules must be interpreted.”

Drawing on state practice, the ICRC finds that military necessity permits only the type and degree of force that is required to achieve the military objective, requiring restraint where less than lethal force would achieve the same objective as lethal force. The ICRC contends that the principle of humanity further supports this heightened standard for assessing the necessity of the use of force. Under the ICRC’s guidance then, the principles of necessity and humanity prohibit any use of force, which while not expressly

56 Hague Convention IV, supra note 23, art. 22; API, supra note 27, art. 35.
57 Melzer, Interpretive Guidance, supra note 54, at 77–78.
58 Melzer, Interpretive Guidance, supra note 54, at 78.
61 Melzer, Interpretive Guidance, supra note 54, at 79. This is a significant departure from the traditional understanding of the principle of necessity, which required only that the use of force generally was required to achieve the objective: a threshold hurdle, which once satisfied played no further role in dictating the amount or type of force warranted. See Nils Melzer, Targeted Killing in International Law 397–98 (2008). During expert meetings on the law of war related to conventional weapons held during the ICRC 1974–1975 Diplomatic Conference, Pictet argued that “if [a combatant] can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed: and if he can be put out of action, grave injury should be avoided.” Weapons that may Cause Unnecessary Suffering or have Indiscriminate effects: Report on the work of experts, ICRC 13 (1973). While Pictet’s argument was largely ignored during the conference, his perspective has gained recent traction in State practice and developments in customary international law. See Melzer, Targeted Killing in International Law, 397–98.
62 Melzer, Targeted Killing in International Law, supra note 60, at 397–98.
prohibited by IHL, is not actually necessary to achieve the military objective.63

D. ISRAELI PRECEDENT

The Supreme Court of Israel has spoken directly to the same issues addressed in the ICRC publication on customary IHL, issuing a number of opinions largely consistent with the ICRC’s interpretation of the increased restraints on the use of force in certain armed conflict situations.64 The Israeli Supreme Court, however, employs a slightly different rationale to reach the conclusion that lethal force is not unlimited even against otherwise targetable individuals, relying on principles of IHRL in addition to those of IHL.65

i. Why afford Weight to Israeli Precedent?

The Israeli precedent on these issues is of particular relevance because of Israel’s most often overwhelmingly liberal interpretation of IHL.66 As Israel is most often criticized for applying IHL too loosely, the Israeli Supreme Court’s opinion determining that standards of IHRL are concurrently applicable for targeting purposes—imposing additional restraints on Israel’s military efforts—should be read with significant weight.67

ii. Israeli Targeted Killing Case

In The Public Committee against Torture in Israel v. The Government of Israel68 ("Israeli Targeted Killing case"), the Israeli Supreme Court sought to clarify the conditions under which a

63 Id. This is not currently a widely accepted view and there is disagreement on the point even among ICRC scholars themselves. Compare Melzer, Targeted Killing in International Law, supra note 60, at 397–98, with Marko Milanovic, Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case, 89 INT’L REV. OF THE RED CROSS 373, 390 (2007) (noting that IHL imposes no obligation to use less than lethal force against combatants, regardless of its feasibility or practicality).


65 See id.


67 See From Legal Theory to Policy Tools: International Humanitarian Law and International Human Rights law in the Occupied Palestinian Territory, supra note 42, at 11–12.

suspected terrorist could be targeted with lethal force. The court elaborated on the criteria necessary for an individual to be targetable as directly participating in hostilities, asserting that loss of civilian protection under the DPH analysis requires: (1) that the individual be engaged in hostilities or acts by which their nature and purpose are intended to cause actual harm; (2) that the individuals involvement be direct such as collecting intelligence, operating weapons, or participating in a chain of command; and (3) that the loss of protection persists for such a time as the individual is engaged in such hostilities or for the duration of a chain of hostilities with only short periods of rest in between. The court’s interpretation of this last element represents the liberal view of what had previously been considered the most restrictive requirement for targeting civilians directly participating in hostilities, allowing targeting of those individuals previously falling into the category of “revolving door” fighter.

The court went on to find, however, that where a suspected terrorist can be detained rather than killed, the Israeli forces were obligated to use the lesser degree of force. The court premised its finding on the necessity requirement of IHL informed by principles of IHRL as required under a law enforcement paradigm given the nature and circumstances of the Israeli occupation. Under the court’s approach, killings taking place in armed conflicts in which one party has a distinct advantage over the other are subject to a greater degree of IHRL protections under the principle of military necessity where the objective to be achieved can be accomplished with less than lethal force. The rational and ultimate holding offered by the Israeli Supreme Court lends significant weight and clarity to the consequences of IHRL on targeting decisions in an armed conflict and

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69 Marko Milanovic, Norm Conflicts, International Humanitarian Law, and Human Rights Law, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 95, 101–02 (Orna Ben-Naftali ed., 2011) [hereinafter Milanovic, Norm Conflicts].

70 Public Committee Against Torture in Israel, supra note 66, ¶¶ 34–40.

71 Id.

72 See supra notes 52–62 and accompanying text. The ICRC has noted the need for development of a category of individuals eligible for targeting under a “continuous combat function” in its most recent publications on DPH and customary IHL. See Melzer, Interpretive Guidance, supra note 54, at 70–73, 77–82 (explaining IHL’s inability to address the targetability of those individuals rotating between temporary combat roles and civilian lives).

73 Public Committee Against Torture in Israel, supra note 67, at ¶ 40.

74 See id. ¶ 18; see also Milanovic, Norm Conflicts, supra note 68, at 120.

75 Milanovic, Norm Conflicts, supra note 68, at 120–21. This of course means that in almost all circumstances of armed conflict in the modern era, the heightened standard will apply. See Altman, supra note 22, at 2 (noting the assymetrical nature of modern armed conflict). See generally Kristen E. Eichensehr, On Target? The Israeli Supreme Court and the Expansion of Targeted Killings, 116 Yale L.J. 1873 (2007) (providing further analysis of the Israeli court’s rationale).
should necessarily be considered when assessing the appropriate approach to such issues going forward.\textsuperscript{76}

III. SLIDING SCALE APPLICATION OF A MIXED PARADIGM THEORY BASED ON THE COMPLEMENTARITY OF IHL AND IHRL

With regard to the relationship between IHL and IHRL, “there are thus three possible situations: some rights may be exclusively matters of [IHL]; others may be exclusively matters of [IHRL]; yet others may be matters of both these branches of international law.”\textsuperscript{77} Establishing where targeted killing falls within the spectrum is a critical threshold issue for assessing the legality of any targeted killing activity.\textsuperscript{78} An analysis of the erosion of the rigid application of \textit{lex specialis} in armed conflict and the emergence of three trends supporting the complementarity of IHL and IHRL is useful to making this threshold determination.

A. COMPETING APPROACHES TO THE APPLICABLE LAWS: IS IHL EXCLUSIVE OR COMPLEMENTARY?

\textit{i. Lex specialis (the specific over the general)}

The traditional theory of the interplay between IHL and IHRL is that the principle of \textit{lex specialis} dictates that the existence of the specific body of IHL precludes the application of the more general standards of IHRL.\textsuperscript{79} In recent years, however, the IHRL movement has begun to erode the absolutist view of \textit{lex specialis}, replacing the bright-line rule with a principle of complementarity under which actors use standards of IHRL in circumstances where IHL is ambiguous or in dispute.\textsuperscript{80}

\textsuperscript{76} See Milanovic, \textit{Norm Conflicts}, supra note 68, at 120–21 (discussing the Court’s imposition of the more restrictive approach to targeted killings as a policy decision necessitated by the circumstances and which has precedential value only in similar conditions and circumstances).

\textsuperscript{77} Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 204 I.C.J. 136, ¶ 106 (2004).


\textsuperscript{79} Colonel Mark “Max” Maxwell, \textit{Rebutting the Civilian Presumption: Playing Whack-A-Mole Without a Mallet?}, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 31, 45 (Claire Finkelstein et al. eds., 2012).

The bright line rule of *lex specialis* is further challenged by the predominance of asymmetrical warfare and the prevalence of terrorist groups as the primary form of opposing belligerent force in the twenty-first century. These trends highlight the tension between the competing law enforcement and wartime paradigms, illustrating the increasing relevancy and necessity of using both IHRL and IHL in the formulation of a hybrid approach.

### ii. Complementary Applicability

A second theory is that IHRL overlays IHL and is concurrently applicable. This theory, which seeks to close the gap between the law enforcement and wartime paradigms, is premised on three legal developments currently emerging in international law: (1) adoption of a mixed legal framework bridging the wartime and law enforcement paradigms, (2) increasing emphasis of the commonalities between the war paradigm (IHL) and the law enforcement paradigm (IHRL), and (3) acceptance of IHRL as a gap-filler for IHL. The result of this recent development is “a reversal of the *lex specialis* rule: IHL with its greater tolerance of operational mistakes committed during the fog of war is cast aside, and human rights law, which arguably imposes a more exacting standard of care is selected as the principle legal framework for the imposition of liability.”

#### a. International Precedent


82 *Id.*

83 *See* Legality of the Threat of Use of Nuclear Weapons (Advisory Opinion), ICJ rep. 226, ¶ 25 (1996); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), ¶ 106 (2004); Democratic Republic of the Congo v. Uganda, ¶ 216 (ICJ, 2005).


85 *Id.* at 31.

86 *See* Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law, in International Humanitarian Law and International Human Rights Law*, supra note 82, at 95, 100–01 [hereinafter
example, the European Court of Human Rights has invoked a mixed paradigm theory for addressing armed response to terrorist activity. In *Isayeva v. Russia,* the court found that the Russian Military—in employing lethal force against Chechen rebels—was bound by the European Convention on Human Rights to undertake a stricter standard of care in making necessity and proportionality determinations than is required under IHL alone. The United Nations has also reinforced a mixed paradigm theory through the UN Human Rights Council’s *Goldstone Report* on Israel’s counterterrorism operation in Gaza, key components of which relied on a mixed paradigm approach to the application of IHL.

Furthermore, the theory of IHRL as a gap-filler for IHL in armed conflict can be seen in the International Court of Justice’s (‘ICJ”) advisory opinion on the threat or use of nuclear weapons. The ICJ found that, in armed conflict, IHL serves as the controlling standard by which to determine compliance with IHRL. Specifically, the court held that IHRL’s guarantee that individuals shall not be arbitrarily deprived of life was appropriately assessed using the principles established in IHL. The court went on, in its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (“Wall case”) to broaden this theory, asserting that unless IHRL provisions are specifically derogated from, such standards govern even in armed conflicts.

In addition to international jurisprudence, the commonalities between the IHRL and IHL treaty instruments themselves supports a mixed paradigm as is particularly clear with regard to the specific

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88 Id.


91 See *supra* notes 48–51 and accompanying text.

92 *Legality of the Threat or Use of Nuclear Weapons,* Advisory opinion, 1996 I.C.J. 226 (discussing the IHL principles relevant to this analysis): see *supra* notes 26–33 and accompanying text.

93 Advisory Opinion, 2004 I.C.J. 136, ¶ 106. Notably unhelpful, however, was the ICJ’s failure to provide any clear guidance on when on how such a complementary regime is to be applied in practice. See Milanovic, *Norm Conflicts,* supra note 84, at 99–100.
rights guaranteed by the separate legal regimes, such as the universal prohibition on torture. Further evidencing a mixed paradigm theory is the fact that many IHRL treaties contain derogation clauses and even those that do not are widely understood to be derogable to a certain extent under exigent circumstances, often encompassing armed conflict. For example, Article 15 of the European Convention on Human Rights, Article 27 of the American Convention on Human Rights, and Article 2 of the Convention against Torture make express mention of “war” or “armed conflict” with respect to the derogability or non-derogability of certain rights guaranteed by the treaties. In contrast, Article 4 of the International Covenant on Civil and Political Rights, which contains the treaties derogation clause, makes no express mention of armed conflict. Such silence, however, should not imply that the drafters intended that the ICCPR not apply in armed conflict as the drafting history indicates that there was contemplation that certain provisions of the covenant would in fact be applicable in armed conflicts.

b. Domestic Precedent

The complementary nature of IHL and IHRL is also well founded in domestic law and state practice as evidenced by reliance in these forums on the three supporting emerging trends. The Israeli

96 Droge, supra note 93, at 318: see also ECHR, supra note 93, at art. 15; American Convention on Human Rights, supra note 93, at art. 27.
97 Droge, supra note 93, at 318: see also ICCPR, supra note 93, at art. 4. In excluding to contemplate the possibility of derogation in armed conflict, the drafting parties sought to adhere to the dogmatic denial of the possibility of war prevalent following the adoption of the UN Charter. Droge, supra note 95, at 318–19.
98 See Droge, supra note 93, at 319 (“For instance there was a conscious decision not to include the prohibition of non-discrimination on the ground of nationality into Article 4 because some States insisted that it was impossible to treat enemy aliens on the same basis as citizens during periods of armed conflict.”).
Supreme Court adopted the ICJ’s gap-filling rationale from the Wall case in its opinion in the Israeli Targeted Killing case, providing further evidence of the acceptance in domestic as well as international jurisprudence of the complementary role of IHRL during armed conflict. Specifically, the Israeli Supreme Court determined that even though IHL permits targeted killing, IHRL dictates that where you could arrest a person instead, you should.

Additionally, State practice in regard to the derogability of IHRL in times of armed conflict presupposes a common set of legal norms operating concurrently in IHL and IHRL and further supports the complementarity of IHL and IHRL. While procedurally, derogation generally requires an official proclamation of the state’s intention to derogate as well as notification to the other state parties to the treaty, states have generally not undertaken these measures when engaged in armed conflict and where states have chosen to derogate from certain provisions of the human rights treaties it is not always clear whether the state has done so on the grounds that there was an armed conflict. In these circumstances, there have even been instances in which states will deny the existence of an armed conflict and derogate instead under a law enforcement rationale. Accordingly, while many IHRL provisions may be derogable, states do not treat them as suspended by default during armed conflict, indicating a view at the domestic level that IHRL governs concurrently with IHL.

B. TARGETING ON A SLIDING SCALE UNDER THE MIXED PARADIGM THEORY

It is not enough at the present time to simply conclude, however, that IHL and IHRL are complementary as confirmed by international and domestic precedent and state practice. For any framework of law to be legitimate, it must be clear and practicable, requiring definition of the boundaries of the framework’s application as well as guidance as to the implications of the framework’s applicability.

i. Extent to which Targeting is Limited under a Complementary Regime

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100 See supra notes 65–66 and accompanying text.
102 See id.
103 See Shany, supra note 82, at 319.
104 Id. at 320.
105 See JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW (2010).
106 See supra notes 94–95 and accompanying text.
Under a sliding scale approach, the arbitrariness of the deprivation of life through direct targeting, which IHRL guarantees against, would be determined by IHL principles. Targeting decisions, then may be limited by the principles of IHL themselves, most likely necessity and humanity, as dictated by where the specific targeting determination falls on the scale between wartime and law enforcement paradigms.

ii. Continued Requirement of the Existence of and Nexus to Active Armed Conflict

Of the factors to be considered when applying the sliding scale, first and foremost is whether there is an active armed conflict to which the specific targeting event is connected. Allowing the application of IHL to justify the resort to lethal force completely unrelated to an armed conflict would undermine the most fundamental legal basis for the application of IHL. Furthermore, such a departure from the underlying objectives of human rights law would only serve to weaken its utility outside of armed conflict.

a. Geographic Scope of the Application of IHL and IHRL

While IHL applies everywhere that armed conflict is taking place—meaning that IHL has no strict geographic boundaries—there is less consensus about the geographic scope of the application of IHRL. The sliding scale approach necessarily requires consideration for the geographic location of the proposed targeting in

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109 See Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, 1996 I.C.J. 226. This approach premises the application of specific provisions of IHRL on principles of IHL. Id.

110 JEAN-MARIE HENckaerts & LOUISE DOSwald-BECk, CUSTOMary INTERNATIONAL HUMANITARIAN LAW, Vol. I, Ch. 5, 398 (ICRC, 2005), available at http://www.icrc.org/customary-ihl/eng/docs/v1: see also infra notes 126–27 and accompanying text; see also supra note 61 and accompanying text.

111 Shany, supra note 82, at 28.

112 See Milanovic, Norm Conflicts, supra note 84, at 97–98.

113 Id. at 97 (“For instance, allowing states to kill combatants or insurgents under human rights law without showing an absolute necessity to do so or to detain preventively during an armed conflict, might lead to allowing the state to do the same outside armed conflict, with one precedent leading to another, and then another, and yet another.”).

114 Id. at 229–30. The U.S. holds that the International Covenant on Civil and Political Rights (ICCPR)—the main IHRL treaty to which the U.S. is a party—only applies within its own territory. See Initial Report of State Parties Due 1993: United States of America, UNITED NATIONS HUMAN RIGHTS COMMITTEE paras. 4, 8 (Aug. 24, 1994), available at http://www.state.gov/documents/organization/133836.pdf. Which would mean that while IHRL applies to detainees held on U.S. soil and theoretically if a conflict were occurring in American territory, but that actions undertaken by the U.S. in the middle-east or elsewhere are not constrained in any way by IHRL. See id. The EU, on the other hand, holds that States’ IHRL obligations extend wherever a country has a presence, making IHRL virtually applicable everywhere. See supra note 48 and accompanying text.
relation to the active armed conflict in order to address these concerns and to take into account the legal complications raised by targeting individuals physically located outside of the territory where the armed conflict is ongoing.\textsuperscript{115}

While armed conflicts need not be limited to a specific geographic scope, reading the existing IHL framework to permit targeted killings far from what could arguably be considered the “battlefield” has the potential to create a slippery-slope scenario reminiscent of the assassination policies of the cold war.\textsuperscript{116} Contrary to a “global battlefield” theory and its inherent vulnerability to abuse, these circumstances are more appropriately addressed with a hybrid approach relying on both IHL and IHRL based on a sliding scale balancing the relevant aspects of both the law enforcement paradigm and the wartime paradigm under the mixed paradigm theory.\textsuperscript{117} This scale allows the greatest degree of legality without requiring significant changes to the existing legal regimes, requiring that as the targeting moves further away from the traditional wartime paradigm, the use of lethal force becomes more limited by IHRL and less permissible under IHL.\textsuperscript{118}

b. Direct Participation in Hostilities

Direct participation in hostilities is one of the most crucial issues in assessing the legality of targeted killings as the principle determines whether an individual, otherwise protected as a civilian by the GCIV and the APs may be targeted with lethal force.\textsuperscript{119} While the DPH concept has come under significant criticism in the international legal community due to its failure to address the problem of “revolving door” fighters,\textsuperscript{120} the concept still bears substantial weight in the targeting debate.

\textsuperscript{115} See Blum & Heyman, supra note 79, at 168. Such as U.S. drone strikes in Yemen, Pakistan, and Somalia. Id.
\textsuperscript{116} See id. Some scholars embrace such a notion of a global battlefield, citing the war on terror as justification for the application of IHL anywhere in the world where Al-Qaeda or its associated forces are found. See Noam Lubell & Nathan Derejko, A Global Battlefield? Drones and the Geographical Scope of Armed Conflict, 11 J. Int’l Crim. Justice 65, 76–88. A comprehensive discussion of the pitfalls of this theory is beyond the scope of this paper.
\textsuperscript{117} Id. at 169.
\textsuperscript{118} See id. at 170. The pure law enforcement model only permits lethal force where there is no other way to prevent significant harm. Id.
\textsuperscript{119} See Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 3(1), Geneva, 12 Aug. 1949 [hereinafter GCIV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51, §3, June 8, 1977 [hereinafter API].
\textsuperscript{120} Eric Talbot Jensen, Direct Participation in Hostilities: A Concept Broad Enough for Today’s Targeting Decisions, in New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare 85, 95 (William C. Banks ed., 2011).
The ICRC’s interpretive guidance on direct participation in hostilities proposes that use of lethal force must not necessarily be applied on a bipolar basis—under which either all force is permissible or no force is permissible—but must be utilized in a multipolar range based on the restraints imposed by IHL in NIACs when dealing with nontraditional belligerents. While opponents of such an interpretation of IHL as applied to civilians directly participating in hostilities find the multipolar approach legally unfounded, such an approach allows the most flexibility in applying traditional IHL principles to modern asymmetrical warfare. Furthermore, the multipolar approach to DPH offers the most viable legal framework to preserve existing IHL in a way, which makes it adaptable to the broad range of challenges faced by many countries in combating global terrorism and lends itself to the sliding scale assessment of the legality of targeted killings.

iii. Practicability of a Complementary Regime under Israeli Precedent

In the Israeli Targeted Killing case, the court found that under the governing principles of IHRL and IHL, a civilian directly participating in hostilities cannot be targeted with lethal force if less harmful means can be employed, an approach consistent with the

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121 See supra notes 52–62 and accompanying text.
122 See Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, Part IX (ICRC, 2009): Maxwell, supra note 87, at 44. Hays Parks refers to this as an adoption of Pictet’s “use-of-force continuum,” based on the premise that “humanity demands capture rather than wounds, and wounds rather than death; that non-combatants shall be spared as much as possible; that wounds shall be inflicted as lightly as circumstances permit, in order that the wounded may be healed as painlessly as possible; and that captivity shall be made as bearable as possible.” W. Hays Parks, Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect, 42 N.Y.U. J. INT’L L. & POL. 769, 785 (2010).
123 Parks, supra note 120, at 785. Hays Parks notes that this argument was largely rejected during the 1974–1975 diplomatic conference as inconsistent with the existing principles of IHL. Id. at 44–45 (“[T]he [ICRC Interpretive Guidance] resurrects and offers Pictet’s unaccepted use-of-force continuum theory as if it were an internationally accepted, binding legal formula. It is neither.”).
124 Jensen, supra note 118, at 104–05.
125 Jensen, supra note 118, at 105.
126 Public Committee Against Torture in Israel, supra note 99; see also supra notes 68–69, 73–75 and accompanying text. It should be noted, however, that critics of the broad application of the Israeli opinion contend that the reasoning is limited to the narrow factual circumstances of the Israeli occupation. Parks, supra note 120, at 791–92 (2010) (“Carefully read, the court’s decision was narrow in its scope of application in its consideration of the Israeli Defense Forces’ [IDF] practice of (as termed by the Government of Israel) ‘the policy of targeted frustration of terrorism’ and (as termed by President (Emeritus) Aharon Barak in the court’s opinion) ‘preventative strike’ against terrorist threats in the area in immediate proximity to Israel, and within the borders of Israel, from which terrorist attacks against Israeli civilians were planned, prepared, and launched.”). Parks argues that by holding that the Israeli Defense Force’s actions were part of an armed
mixed paradigm approach. The Israeli opinion supports the sliding scale approach to the legality of targeted killings by allowing the targeted killing of terrorists in Gaza under the wartime paradigm while at the same time placing heightened constraints on such targeting activities consistent with a law enforcement paradigm with particular emphasis on a requirement of capture where feasible. Accordingly, the Israeli approach is entirely consistent with the increased restraints imposed on targeting decisions and can be used as a practical model for assessing the legality of targeting under such a model. The practical relevance of this approach as invoked by the Israeli Supreme Court is of particular significance as military operations move towards the law enforcement end of the sliding scale and require more heightened restraints.

The Israeli Supreme Court’s criteria for targeting civilians taking a direct part in hostilities requires that: (1) the targeting authority have “thoroughly verified information regarding the identity and activity” of the target individual, imposing a heavy burden of proof on the State; (2) where less harmful means than lethal targeting can be employed, the targeting authority must attempt such means; and (3) following the lethal targeting of an individual, a “thorough and independent investigation must be conducted regarding the precision of the identification of the target and circumstances of the attack.

IV. IMPACT ON U.S. ACTIVITIES

The recent legal developments in support of a sliding scale approach to the application of IHL and IHRL to targeting decisions under a mixed paradigm theory and their practical implementation with guidance from the Israeli context provide a framework for assessing current U.S. practice as well as guidance for shaping a U.S. targeting policy which is consistent with international law. Targeted conflict, rather than law enforcement, the Israeli Supreme Court limited its ruling to military operations in areas “within or adjacent to” an operating State’s territory in the face of a continuous terrorist threat of the magnitude which Israel faced at the time. Furthermore, Parks asserts that the Israeli Court’s acknowledgement that where there is a lacuna in IHL, the gap may be filled with applicable principles of IHRL, the court was not inherently concluding that such a gap does in fact exist.

Opponents of any application of the Israeli opinion in other contexts argue that the ruling can only be rationalized within the laws of belligerent occupation, which is inherently more amenable to capture and detention rather than automatic resort to lethal force. Maxwell, supra note 77, at 43. The Israeli opinion has also been used by critics of the application of IHRL generally in armed conflict in support of restraints imposes by military necessity itself on the use of lethal force in targeted killing. Melzer, supra note 120, at 399.

\[127\] See supra notes 87–88 and accompanying text.

\[128\] See Blum & Heyman, supra note 79, at 170.

\[129\] See id.

\[130\] See Melzer, supra note 120, at 80–81.

\[131\] The Public Committee against Torture in Israel, supra note 99, at ¶ 40.
killing by U.S. forces is not a new phenomenon, but the tactic fell out of favor as congressional findings in the mid-1970s brought to light the extent of the Nixon administration’s assassination plots against global political leaders.132 United States military involvement in Iraq and now in Afghanistan, as well as its anti-terrorism efforts globally, have prompted a resurgence of targeted killing as a mainstream practice and has thrust U.S. activities into the center of the international legal debate regarding the legality of such practices.133

A. THE UNITED STATES’ INCREASING RELIANCE ON TARGETED KILLING POLICIES AND PRACTICES

The Department of Defense (“DOD”) as well as the Central Intelligence Agency (“CIA”) have rapidly expanded their covert operations since 9/11, including significantly increasing the quantity and frequency of targeted killings, primarily carried out through “kill-or-capture” raids or unmanned aerial vehicle strikes (also known as drone strikes).134 Targeted killings are typically carried out under a policy of researching, tracking, and eventually killing individuals identified on the Joint Prioritized Effects List (“JPEL”).135 The JPEL is a classified list of individuals determined to be targetable based on their importance to the opposing unprivileged belligerent force as well as the threat they pose to domestic interests.136

The specifics of the targeted killing operations of both the CIA and the DOD, including the criteria for inclusion on the JPEL, are shielded from meaningful legal analysis by the level of confidentiality necessary to protect national security; and as a result, measuring either entity’s compliance with international legal obligations under international law is virtually infeasible.137 Though recent publication

134 Id.
135 Claire Finkelstein, Targeted Killing as Preemptive Action, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 156, 160 (Claire Finkelstein et al. eds., 2012). The JPEL is updated weekly with intelligence from the National Directorate of Security and the CIA. Id. at 163. The agency then assigns a serial number and code name to each individual on the list. Id.
136 Id. JPEL includes “bomb makers, commanders, financiers, people who coordinate the weapons transport and even [public relations] people.” Id. at 160–61.
137 Alston, supra note 131, at 284. The congressionally mandated commission tasked with investigating 9/11 and the U.S. response “concluded in 2004 that the DOD should take ‘[l]ead responsibility for directing and executing paramilitary operations, whether clandestine or covert,’” recommending that legal authority be concentrated in a single entity. Id. at 284–85. This recommendation was partially premised on the commission’s recognition of the need to facilitate effective oversight in order to ensure compliance with domestic law. See id. at 285. Notably, neither the CIA nor
of the Department of Justice ("DOJ") “White Paper” on the legality of the targeted killing of Anwar Al-Awlaki sheds some light on the executive branch’s legal premise for its targeting operations, there remains insubstantial information regarding any established standards or guidelines for selection criteria, intelligence methods, planning considerations, and authorization channels, to allow effective oversight.

B. UNITED STATES TARGETING ACTIVITIES ON THE SLIDING SCALE OF A MIXED PARADIGM THEORY

Even under a pure wartime paradigm—applying the principles of IHL exclusively—to the extent that U.S. targeting activities are directed at individuals who cannot be classified as directly participating in hostilities or maintaining a continuous combat function, the practice is illegal as a violation of the principle of distinction. The more difficult question, however, concerns individuals who qualify as legitimate military targets under IHL, but who could otherwise be brought under submission without requiring greater expenditure of lives or resources. However, current available information unfortunately fails to adequately address this question.

Insofar as the White Paper avoids enumerating any additional limitations on the use of force where the targeting occurs far outside of the geographic scope of an armed conflict, it is difficult to determine whether the practice complies with international law. The White Paper repeatedly acknowledges that a party to an armed conflict has a right to target individuals who are

the DOD operate with even close to the degree of accountability anticipated by the post-9/11 congressional mandate. Id.


139 Kevin H. Govern, Operation Neptune Spear: Was Killing Osama Bin Laden a Legitimate Military Objective?, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD, supra note 133 at 347, 357.

140 Finkelstein, supra note 133, at 174. Though beyond the scope of this paper, such killings may arguably be justified under a “preemptive killing” theory as applied to a narrow set of circumstances. Govern, supra note 137, at 162.

141 See JOINT SERVICE

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf (noting that the ICRC finds that military necessity permits only the type and degree of force that is required to achieve the military objective).

142 See Alston, supra note 131, at 352–65.

143 Asserting only the circumstances in which targeting would in fact be permissible outside of the geographic scope of the conflict. See White Paper, supra note 138, at 3–5.

144 See supra notes 114–118 and accompanying text.
part of an enemy’s armed forces, but fails to address with any specificity whether and how the scope—geographic, temporal, or otherwise—of any specific targeting decision impacts the necessary legal analysis.

The requirement that capture is not otherwise feasible on its face certainly satisfies the legal requirements of a complementary regime under the mixed paradigm. The absence of specificity with regard to the process for assessing whether or not capture is feasible, however, makes imprudent a definitive determination regarding compliance with international law. Accordingly, while current U.S. targeting practice appears mostly consistent with a mixed paradigm approach to the complementarity of IHL and IHRL, there are meaningful measures that can and should be taken to address the possible shortcomings.

C. PROPOSED FRAMEWORK FOR MAINTAINING LEGAL COMPLIANCE WITHIN A MIXED PARADIGM

Where the U.S. targets individuals lawfully targetable under traditional IHL principles, the U.S. must first and foremost improve its transparency to ensure accountability in its targeting practices consistent with a mixed paradigm. There can be no determination of meaningful compliance when all significant information regarding targeting criteria and practice, particularly

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146 See White Paper, supra note 136, at 16. Admittedly, the paper is intended to focus only a narrow hypothetical circumstance—the targeting of a U.S. citizen deemed to be a member of Al-Qaeda and is therefore limited the factual circumstances directly at issue, but this leaves many questions to be answered regarding the legal basis for targeting in a variety of other circumstances such as: What legal analysis would apply where an individual is targeted based on status as an Al-Qaeda member as opposed to direct participation in hostilities constituting a continuous combat function or direct participation falling short of a continuous combat function?

147 White Paper, supra note 136, at 1.

148 See supra notes 109–30 and accompanying text.


150 Insofar as U.S. practice in targeted killing includes individuals not classifiable as belligerents under traditional IHL principles, the practice can only be legally justifiable under an alternative legal theory such as a hybrid “preemptive killing” theory, which is outside of the scope of the analysis here. Finkelstein, supra note 133, at 178–79 (“In these cases . . . despite the fact that neither of the standard justifications of killing the enemy combatant under the laws of war, or self-defense against an imminent or immediate threat of serious bodily injury or death is applicable, I shall claim that the use of targeted killing as an instance of preemptive force renders the practice justifiable, subject to certain more restrictive conditions having to do with the apprehension of suspects and avoidance of collateral damage.”).

151 Alston, supra note 131, at 352–65.
with regard to the CIA’s targeting, remain classified.\textsuperscript{152} To this end, the U.S. should go beyond the broad rationale offered in the White Paper and more thoroughly explicate its legal basis for targeting specific categories of individuals as well as its decisions to kill rather than capture.\textsuperscript{153} The U.S. should also make meaningful attempts to specify what procedural safeguards, if any, are in place to ensure continued compliance with international legal principles, particularly as targeting moves further away, either geographically or temporally, from the confines of an armed conflict.\textsuperscript{154} Substantively, to ensure compliance with the mixed paradigm of asymmetrical warfare, the U.S. should establish a comprehensive set of necessary criteria for targeting decisions, and for classifying individuals for placement on the JPEL, which allows decisions to be made along the sliding scale between the wartime and law enforcement models.\textsuperscript{155}

V. CONCLUSION

While current U.S. targeting practice remains significantly cloaked in secrecy, given the information available and the appearance of the practices as evident through their effects, it seems that, while possibly not fully in compliance with the mixed paradigm regime of complementarity between IHL and IHRL, the U.S.’s activities are not as far outside of compliance as many would suggest.\textsuperscript{156} Ultimately, the U.S. should not need to compromise security in order to ensure that its practices are fully consistent with international law. The mixed paradigm approach allows a sliding scale application of the increased restraints imposed on lethal targeting. It permits less restraint where the circumstances meet more of the criteria for a wartime paradigm and only requires more restraint where the circumstances more closely relate to a law enforcement paradigm. This approach is consistent with current trends in IHL and IHRL, as indicated by customary international law and international precedent,\textsuperscript{157} and provides the greatest responsiveness to the current challenges posed by the asymmetrical nature of modern warfare.\textsuperscript{158}


\textsuperscript{153} Id.

\textsuperscript{154} Id. In an ideal world, this would include the post-facto review procedures for targeting decisions, which are intended to ensure the accuracy of the targeting entity’s legal and factual analysis, as well as the measures in place to address any shortcomings. Id.

\textsuperscript{155} See Amos N. Guiora, The Importance of Criteria-Based Reasoning in Targeted Killing Decisions, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD, supra note 133, at 305.

\textsuperscript{156} See supra notes 140–47 and accompanying text.

\textsuperscript{157} See supra notes 83–89 and accompanying text.

\textsuperscript{158} See supra notes 8–13 and accompanying text.