

II. Ensuring Transparency in the Use of Force

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

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

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

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

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

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

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

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

4. The Government Discloses Information about Accountability Measures

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

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