

## ARTICLE

# Strategic Choices: Four Legal Models for Counterterrorism in Pakistan

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### I. Introduction

In 2004, the 9/11 Commission made clear the need for a comprehensive and sustained U.S. counterterrorism strategy in Pakistan. “It is hard to overstate the importance of Pakistan in the struggle against Islamist terrorism,” the Commissioners wrote, urging U.S. policymakers to “make the difficult long-term commitment to the future of Pakistan.”<sup>1</sup>

They went on to note both the particular challenge posed by Pakistan and the need for cooperation with the Pakistani government.<sup>2</sup> Accordingly, the Commission recommended the development of “a realistic strategy to keep possible terrorists insecure and on the run, using all elements of national power.”<sup>3</sup>

This kind of all-fronts counterterrorism policy in Pakistan had begun to take shape even before the 9/11 Commission issued its recommendations. Abu Zubaydah and Khalid Sheikh Mohammed were apprehended in 2002 and 2003 as part of a joint effort between Pakistan and U.S. intelligence agencies, and the Pakistani military began an offensive in the Federally Administered Tribal Areas in 2004.<sup>4</sup> In subsequent years,

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<sup>1</sup> NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, FINAL REPORT 369 (2004) [hereinafter 9/11 COMMISSION REPORT].

<sup>2</sup> *Id.* at 368.

<sup>3</sup> *Id.* at 367.

<sup>4</sup> Tim McGirk, *Anatomy of a Raid*, TIME, Apr. 8, 2002, <http://www.time.com/time/magazine/article/0,9171,227584,00.html>; Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, N.Y. TIMES, June 22, 2008, <http://www.nytimes.com/2008/06/22/washington/22ksm.html>; Owais Tohid, *Pakistan*

the United States has continued to develop and refine its approach along with its Pakistani partners.

What has emerged today in Pakistan is a collection of different practices involving various combinations of Pakistani and U.S. military forces, law enforcement officers, intelligence personnel, and prosecutors. These operational models rest on different legal footing and employ different methods, but together they are broadly aimed at the same outcome: neutralizing terrorist organizations in Pakistan and bringing their leaders to justice.

In general, the practice of counterterrorism in Pakistan can be divided into at least four operational models. They are:

1. Local Prosecution
2. International Extradition
3. Rendition
4. Direct action

The first model refers to arrests and investigations conducted primarily by Pakistani authorities, followed by prosecutions of terrorism suspects in Pakistani courts. The second refers to arrests made in Pakistan followed by a formal extradition process so that suspects may be tried elsewhere. The third involves rendition — a practice that is often imprecisely described<sup>5</sup> — followed by detention or prosecution of terrorism suspects in the United States, while the fourth model involves direct targeting of individuals by the United States, either through the use of unmanned aerial vehicles or special operations forces.<sup>6</sup>

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*Launches New Tribal Offensive*, CHRISTIAN SCIENCE MONITOR, June 14, 2004, <http://www.csmonitor.com/2004/0614/p06s02-wosc.html>.

<sup>5</sup> See Daniel Benjamin, *Rendition at Risk*, SLATE, Feb. 2, 2007, <http://www.slate.com/id/2159017/>.

<sup>6</sup> “Direct action” is a term often used by officials in the U.S. intelligence community to describe such operations. See, e.g., Ellen Nakashima, *Intelligence Chief Acknowledges U.S. May Target Americans Involved in Terrorism*, WASH. POST, Feb. 4, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/03/AR2010020303968.html>. These covert activities have also been referred to by various authors as “targeted killing.” See, e.g., Gabriella Blum & Phillip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L. SEC. J. 145 (2010).

To be sure, these four models do not occupy the field of methods that may be used in counterterrorism operations.<sup>7</sup> But they represent a fairly broad treatment of the set of choices on which U.S. policymakers have seemed to rely in recent years.

From the U.S. government perspective, each model involves a different array of government agencies, meaning that there is a need for coordination and always the potential for miscommunication. Each model also involves a different legal framework with varying standards for action and a different set of requirements imposed by U.S. law, Pakistani law, and international law.

Looking at these efforts as a whole, it is worth asking whether there is an overall strategy for the use of these different tools, and if so, whether they are being used in the most effective combination. Looking forward, it is important to make a judgment about which models are effective, sustainable, and consistent with the long-term U.S. interests in Pakistan.

The case of slain U.S. State Department employee David Foy provides an example of how these counterterrorism tactics might work together in practice. From 2005 to 2006, Foy worked as the facilities manager at the U.S. consulate in Karachi.<sup>8</sup> The father of four daughters, Foy served 23 years in the Navy before taking a job with the State Department in 2003. On March 2, 2006, he was killed along with three others when a 23-year-old suicide bomber named Raja Tahir rammed Foy's armor-plated diplomatic vehicle with a stolen Toyota Corolla packed with explosives. Pakistani officials believe Foy had been specifically targeted as a

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<sup>7</sup> For example, traditional military operations by Pakistan's armed forces may target terrorist organizations and individuals and certainly play a role in the broader counterterrorism mission. See David E. Sanger & David Rohde, *U.S. Pays Pakistan to Fight Terror, but Patrols Ebb*, N.Y. TIMES, May 20, 2007, <http://www.nytimes.com/2007/05/20/world/asia/20pakistan.html?pagewanted=1>; Gordon Lubold, *How Gates, Mullen Are Building U.S. Military's Ties with Pakistan*, CHRISTIAN SCIENCE MONITOR, Jan. 21, 2010, <http://www.csmonitor.com/USA/Foreign-Policy/2010/0121/How-Gates-Mullen-are-building-US-military-s-ties-with-Pakistan>. A discussion of the legal framework for such domestic military operations is outside the scope of this article.

<sup>8</sup> Dave Hughes, *Pakistan Bomb Victim Well-Liked by Colleagues*, ARKANSAS DEMOCRAT-GAZETTE, Mar. 4, 2006.

U.S. official and that the timing of the attack was meant to send a message, coming just two days before President Bush's arrival in the country.<sup>9</sup>

Three men were sought by Pakistani and U.S. authorities in connection with the attack. Two of them, Anwar ul-Haq and Usman Ghani, were arrested by Pakistani police in Karachi in August 2006.<sup>10</sup> They were tried before one of Pakistan's special Anti-Terrorism Courts. At the trial, prosecutors presented evidence that Haq and Ghani, along with the deceased bomber Tahir, were involved with the Pakistani terrorist organization Jaish-e-Mohammed. Haq was portrayed as the operational planner with evidence showing that he stood lookout on the day of the attack and signaled the suicide driver by cell phone. At the conclusion of the trial, the judge sentenced Haq to death, but acquitted Ghani for lack of evidence.<sup>11</sup>

The third wanted man was Mohammed Qari Zafar, described as the mastermind of the attack and himself a local leader of another active Pakistani terrorist organization, Lashkar-e-Jhangvi.<sup>12</sup> Following Foy's death, the U.S. State Department put out a \$5 million reward through its Rewards for Justice program for any information leading to the capture of Zafar. Despite the bounty on his head, at the time of Haq and Ghani's trial, Zafar was still at large and believed by Pakistan's home secretary to be hiding somewhere in Waziristan.<sup>13</sup>

The hunt for Zafar ended in late February 2010 when he was killed by a missile fired from an unmanned aerial vehicle in the Dargah Mandi area of North Waziristan.<sup>14</sup>

The effort to bring David Foy's killers to justice was pursued in many venues — from a Pakistani courtroom in Karachi to a CIA office in

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<sup>9</sup> Carlotta Gall, *Blast that Killed U.S. Diplomat Tied to Qaeda*, N.Y. TIMES, Feb. 24, 2007, <http://www.nytimes.com/2007/02/24/world/asia/24pakistan.html>.

<sup>10</sup> *Pakistan Police Arrest 2 Militants in Connection with Attacks That Killed U.S. Diplomat*, ASSOCIATED PRESS, Aug. 21, 2006, <http://www.foxnews.com/story/0,2933,209592,00.html>.

<sup>11</sup> *Militant in 2006 Blast Sentenced*, L.A. TIMES, Mar. 6, 2008, <http://articles.latimes.com/2008/mar/06/world/fg-briefs6.S3>.

<sup>12</sup> Gall, *supra* note 9.

<sup>13</sup> *Id.*

<sup>14</sup> *Suspect in Consulate Attack Dies in Strike, Pakistani Source Says*, CNN, Feb. 25, 2010, <http://www.cnn.com/2010/WORLD/asiapcf/02/25/pakistan.militant.killed/index.html>.

Langley, Virginia — and involved a variety of players. It serves as a microcosm of the larger effort in which the United States is engaged in Pakistan and illustrates some of the questions that arise in assessing how this multifaceted strategy works. Why were two of the suspects tried while one was the target of a covert action? Why were the suspects tried in a Pakistani courtroom rather than a U.S. courtroom? Were both prongs of this approach consistent with international law? Were there carry-over effects — in terms of domestic opinion or development of the rule of law — associated with either course of action that should be taken into account?

The reality is that the United States faces choices in how to pursue its counterterrorism objectives in Pakistan. Now in its ninth year, the U.S. campaign against extremism in Pakistan will likely continue for the foreseeable future. U.S. policymakers should therefore take a hard look at the varied tools that have been employed to date and determine which among them will be most effective and sustainable over the next decade.

The purpose of this article is neither to provide an exhaustive legal treatment of each of the models and tactics, nor to survey the field of methods that have been used in the war on terror.<sup>15</sup> Rather, the article sets out a more limited and pragmatically motivated goal: to describe some of the operational models through case studies and to draw conclusions about which models are most effective in strategic terms.

The article will proceed in four Parts. Part II will examine the local prosecution model, particularly looking at the case study of Omar Saeed Sheikh, the kidnapper of *Wall Street Journal* reporter Daniel Pearl. Part III will examine the legal framework for extradition in Pakistan and consider whether it is a viable model for handling the prosecution of terrorism suspects in the future. Part IV will look at several case studies of rendition and explore both its legality as well as the unique kind of cooperation that has developed between the United States and Pakistan in this area. Part V will look at U.S. options for direct action and how these options have reportedly been employed against certain terrorist targets.

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<sup>15</sup> For example, the Special Task Force on Interrogations and Transfer Policies, set up pursuant to Executive Order 13491 in January 2009, considered seven types of transfers of individuals in custody: extradition, immigration removal, transfers pursuant to the Geneva Conventions, transfers from Guantanamo Bay, military transfers within or from Afghanistan, military transfers within or from Iraq, and transfers pursuant to intelligence authorities. Only two (extradition and transfers pursuant to intelligence authorities) are considered here.

The article will conclude by offering recommendations about what mix of methods should be employed by the United States as part of a comprehensive counterterrorism strategy in Pakistan going forward.

## II. Local Prosecution

In thinking about the tools available in the counterterrorism toolkit, a natural starting point is Pakistan's domestic law enforcement system.<sup>16</sup> Setting aside for a moment the problem of weak governmental control over tribal regions on the country's northwest border, the fact remains that Pakistan's provincial police and courts deal regularly with terrorism cases.<sup>17</sup> And though U.S. policymakers have at times expressed frustration with the Pakistani government's willingness to challenge particular terrorist organizations operating within its borders,<sup>18</sup> the record of the Pakistani courts over the past several years — as shown below — indicate that this model should not be discounted as a key tool in the counterterrorism arsenal.

In practice, the local prosecution model can take a number of variations. Certainly not all arrests in this domain are the result of the work of Pakistani police alone. They are often assisted in high profile terrorism investigations by the Pakistani intelligence service — the ISI — as well as by the American FBI, CIA, and other foreign law enforcement and intelligence agencies.<sup>19</sup> Conceiving the model in this way facilitates an examination of how well a criminal justice system operated entirely inside Pakistan's borders handles terrorism — from investigation to arrest, detention, and prosecution of suspects — regardless of the outside assistance involved.

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<sup>16</sup> Counterinsurgency principles suggest that preference should be given to prosecuting captured insurgents in local courts in order to undermine public support for the insurgency and to build the host-nation's rule of law capabilities. See THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL (2006), available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf>.

<sup>17</sup> See *Pakistan Conflict Map*, BBC NEWS, June 22, 2009, [http://news.bbc.co.uk/2/hi/south\\_asia/8046577.stm](http://news.bbc.co.uk/2/hi/south_asia/8046577.stm); see also *infra* notes 38–57 and accompanying text.

<sup>18</sup> See Julian E. Barnes, Matthew Rosenberg, & Habib Khan Totakhil, *Pakistan Urges on Taliban*, WALL ST. J., Oct. 5, 2010, [http://online.wsj.com/article/SB10001424052748704689804575536241251361592.html?mod=WSJ\\_World\\_LeadStory](http://online.wsj.com/article/SB10001424052748704689804575536241251361592.html?mod=WSJ_World_LeadStory).

<sup>19</sup> See *infra* note 33 and accompanying text.

In particular, examining the specific procedures and legal protections associated with Pakistan's Anti-Terrorism Courts — where these cases are often handled — will be useful in evaluating the strategic implications of relying on this method of counterterrorism. The case of Omar Saeed Sheikh, who was arrested, tried, and convicted in Pakistan, helps to illuminate costs and benefits of this model as part of a comprehensive counterterrorism strategy. With a series of motions and interlocutory appeals occurring over a relatively short timeframe — just five months from arrest to conviction—the trial suggests that the Anti-Terrorism Courts offer the benefit of a speedy adjudication while providing a fairly robust set of procedural protections. Though far from perfect, these courts appear to offer a reasonable option for handling a piece of the counterterrorism mission in Pakistan.

*A. Case Study: The Trial of Omar Saeed Sheikh*

The kidnapping and murder of *Wall Street Journal* reporter Daniel Pearl has been recounted in many arenas.<sup>20</sup> Pearl was first reported missing on January 23, 2002, when he failed to contact his editors for a routine check-in. Pakistani police, with the help of the FBI, engaged in an exhaustive search across Karachi over the next week while simultaneously trading e-mails with the group claiming to have captured him in order to glean information on his location.<sup>21</sup> On February 1, 2002, Pearl was beheaded by his captors. A videotape of his gruesome death was delivered to the U.S. consulate later that month.

Omar Saeed Sheikh was quickly identified by Pakistani police as the alleged ringleader of the kidnapping operation.<sup>22</sup> Accounts differ on how his arrest occurred. According to the version of events recounted in Pakistani

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<sup>20</sup> See, e.g., BERNARD HENRI LEVI, WHO KILLED DANIEL PEARL? (2003); PERVEZ MUSHARRAF, IN THE LINE OF FIRE (2006); THE JOURNALIST AND THE JIHADI: THE MURDER OF DANIEL PEARL (HBO 2006); A MIGHTY HEART (Paramount Vantage 2007).

<sup>21</sup> *Timeline: Daniel Pearl Kidnap*, BBC NEWS, July 15, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1835065.stm](http://news.bbc.co.uk/2/hi/south_asia/1835065.stm).

<sup>22</sup> *Suspect Named in Reporter's Kidnap*, BBC NEWS, Feb. 6, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1804709.stm](http://news.bbc.co.uk/2/hi/south_asia/1804709.stm). Sheikh was a recidivist in the field of terrorism against Western targets, having previously spent five years in an Indian prison in connection with a plot to kidnap tourists. He was reluctantly freed by the Indian government in 1999 in exchange for the release of hostages on a hijacked Indian Airlines flight. *Id.*

President Pervez Musharraf's autobiography, Sheikh voluntarily turned himself in to Home Secretary Ejaz Shah on February 5, 2002. His arrest was then formalized one week later on February 12 and at that time was announced publicly.<sup>23</sup> Others claim that Pakistani intelligence captured Sheikh on February 5 and used the intervening week to both interrogate Sheikh and fabricate evidence against him.<sup>24</sup>

Regardless, Sheikh was quickly moved into Pakistan's criminal justice system. Along with three other men, he was formally charged with murder, kidnapping, and terrorism in a special Anti-Terrorism Court in Karachi on March 22, 2002. The trial opened just two weeks later.<sup>25</sup>

At trial, lawyers for Sheikh, as well as those for the prosecution, both engaged in a series of motions that delayed the presentation of evidence. Somewhat curiously, Sheikh's lawyers first moved to hold Pakistani President Musharraf in contempt of court, objecting to comments Musharraf had made to the German magazine *Der Spiegel*, in which he said that he wanted to see Sheikh receive the death penalty.<sup>26</sup> That motion was unsuccessful.

However, on April 19, the defense did succeed in having the case's presiding judge, Ashad Noor Khan,<sup>27</sup> removed by arguing that he had been tainted after hearing Omar Sheikh's confession — subsequently retracted — at an earlier hearing.<sup>28</sup> One week later, the prosecution moved successfully to request yet another new judge, arguing to the Sindh High Court that the judge who had been appointed as a replacement, Abdul Ghafoor Memon, had allowed the creation of an intimidating courtroom atmosphere by

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<sup>23</sup> MUSHARRAF, *supra* note 20, at 224.

<sup>24</sup> See Alex Hannaford, 'The Toughest Boy in School', THE GUARDIAN, Feb. 23, 2005, <http://www.guardian.co.uk/world/2005/feb/23/alqaida.usa>.

<sup>25</sup> *Timeline*, *supra* note 21.

<sup>26</sup> *Musharraf Accused of Pearl Case Contempt*, BBC NEWS, Apr. 12, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1924466.stm](http://news.bbc.co.uk/2/hi/south_asia/1924466.stm). One possible explanation for why they opened with such a motion is that Sheikh's lawyers, who later joined a nationwide lawyers' strike protesting Musharraf's plans to extend his presidency by another five years, were simply seeking to embarrass the president politically. See *Pearl Trial Lawyers Request New Judge*, BBC NEWS, Apr. 25, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1950243.stm](http://news.bbc.co.uk/2/hi/south_asia/1950243.stm).

<sup>27</sup> See *Pearl Trial Lawyers Request New Judge*, *supra* note 26.

<sup>28</sup> *Pearl Trial Judge Removed*, BBC NEWS, Apr. 19, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1938960.stm](http://news.bbc.co.uk/2/hi/south_asia/1938960.stm).

failing to restrain defendants from making threatening gestures toward witnesses and court officers.<sup>29</sup>

Out of further concern for courtroom safety, the prosecution also won a change of venue from Karachi to Hyderabad.<sup>30</sup> The chief prosecutor, Raja Qureshi — who had earlier told journalists that he feared for his life because of his involvement in the case — argued to the Sindh court that the government had received credible reports that Sheikh's supporters were planning to attack the Karachi jail where the trial was being held.<sup>31</sup> The defense appealed the change of venue but was ultimately rebuffed by Pakistan's Supreme Court.<sup>32</sup>

Once in Hyderabad, the presentation of the prosecution's case began in earnest. The court heard testimony from, among others, two FBI agents who had participated in the investigation of Pearl's kidnapping.<sup>33</sup> The court also viewed the videotape of Daniel Pearl's murder, although defense lawyers later attempted to challenge the video's authenticity in another appeal to the Sindh High Court.<sup>34</sup>

Following the close of evidence, defense attorneys began their summations on July 5, 2002. Judge Ali Ashraf Shah, the third judge in the case, announced his verdict on July 15. He found Sheikh guilty of kidnapping, murder, and terrorism, and found Sheikh's co-defendants guilty of engaging in a criminal conspiracy. Consistent with the mandatory sentences imposed by Pakistan's Anti-Terrorism Act at the time,<sup>35</sup> Shah imposed the death penalty on Sheikh, while ordering 25-year sentences for

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<sup>29</sup> *Pearl Trial Lawyers Request New Judge*, *supra* note 26.

<sup>30</sup> *Pearl Trial Lawyers Win New Venue*, BBC NEWS, Apr. 30, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1959409.stm](http://news.bbc.co.uk/2/hi/south_asia/1959409.stm).

<sup>31</sup> *Id.*

<sup>32</sup> *Pearl Suspects' Plea Rejected*, BBC NEWS, May 9, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1977228.stm](http://news.bbc.co.uk/2/hi/south_asia/1977228.stm).

<sup>33</sup> During the search for Pearl in February 2002, Agents John Folgon and Ronald Joseph had assisted Pakistani police in tracing e-mails that they had received from Pearl's kidnapers. *FBI Agent Testifies at Pearl Trial*, BBC NEWS, May 12, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1981158.stm](http://news.bbc.co.uk/2/hi/south_asia/1981158.stm).

<sup>34</sup> *Sindh Court Defers Pearl Video Ruling*, BBC NEWS, June 4, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/2024673.stm](http://news.bbc.co.uk/2/hi/south_asia/2024673.stm).

<sup>35</sup> Zaffar Abbas, *Analysis: Pearl Trial Doubts Remain*, BBC NEWS, July 16, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/2129120.stm](http://news.bbc.co.uk/2/hi/south_asia/2129120.stm).

each of his three co-defendants.<sup>36</sup> All told, the trial took just over three months from start to finish and involved a series of interlocutory appeals both to the Sindh High Court, which had appellate jurisdiction over courts in both Karachi and Hyderabad, as well as the Pakistani Supreme Court. As of April 2010, Sheikh's death sentence was still on appeal.<sup>37</sup>

### B. *The Anti-Terrorism Courts*

The Anti-Terrorism Courts (ATCs) that Sheikh was tried in — first in Karachi, and later in Hyderabad — were a relatively recent innovation in Pakistan's legal framework for fighting terrorism. They were first introduced as part of the Anti-Terrorism Act (ATA) of 1997, under the government of Prime Minister Nawaz Sharif. The ATA was in part a response to the case of Mehram Ali, the bomber of a district court building in Lahore, whose lengthy trial had been an embarrassment to Pakistani officials.<sup>38</sup> It was thought that a separate system of courts designed solely to handle terrorism cases would offer both speedy justice and serve as a deterrent for terrorism.<sup>39</sup>

Under the ATA, all terrorism trials were required to be completed in just seven days.<sup>40</sup> Neither the defense nor the prosecution were permitted to recall any witnesses or move for an adjournment longer than two days. The law also allowed for trials of suspects *in absentia*, and the only appeals from the verdict of an Anti-Terrorism Court would lie in a special Anti-Terrorism appellate system.

The Pakistani Supreme Court responded the same year by declaring many parts of the original 1997 ATA unconstitutional. Though ruling that the government was permitted to set up a separate expedited court system for terrorism cases, the Court held that such a system must hew closely to the procedural protections offered in other Pakistani courts, including the rules of evidence. The court also held that all those convicted must possess

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<sup>36</sup> *Timeline*, *supra* note 21.

<sup>37</sup> Hannaford, *supra* note 24.

<sup>38</sup> Charles H. Kennedy, *The Creation and Development of Pakistan's Anti-terrorism Regime 1997-2002*, in RELIGIOUS RADICALISM AND SECURITY IN SOUTH ASIA 387, 389 (Satu P. Limaye, Mohan Malik, and Robert G. Wirsing eds., 2004).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 390-91.

the same right of appeal through the provincial High Courts and ultimately to the Pakistani Supreme Court if warranted.<sup>41</sup>

The ATA went through several more revisions in succeeding years in order to bring the act into compliance with both the 1997 decision as well as later reviews by the Pakistani Supreme Court. In 1998, the Act was amended to remove the provision for trials *in absentia* and to allow appeals through civilian courts.<sup>42</sup> Also in 1998, the government attempted in a related statute — the Pakistan Armed Forces Acting in Aid of Civil Power Ordinance — to set up a system of military commissions across the country capable of trying Pakistani civilians. This was also rejected by the Supreme Court.<sup>43</sup> After Musharraf seized power in 1999, the ATA was amended again, expanding the jurisdiction of the antiterrorism courts to cover a wider class of crimes.<sup>44</sup>

Just one month prior to 9/11, the Act was amended again. It expanded the definition of “terrorism” — and thereby the jurisdiction of the ATCs — and gave the government the authority to ban certain terrorist groups if a specific Presidential finding was made that the group presented a danger to the country.<sup>45</sup> In the months that followed the al Qaeda attack on the United States, Musharraf’s government moved to establish eleven new ATCs to handle the increased caseload of terrorism cases; made further arrests of those terrorist organizations that had already been banned; and added six more to the list of banned organizations including such notables as Jaish-e-Mohammed, Lashkar-e-Taiba, and Harakat-ul-Mujahidin.<sup>46</sup>

This series of revisions does not appear to have yet reached an endpoint. As one prosecutor in Lahore explained to the group Human Rights Watch, “The ATA is subject to constant modification. Every few years the government feels that the definition is insufficient to accommodate

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<sup>41</sup> *Id.* at 391 (citing *Mehram Ali v. Federation of Pakistan*, (1998) 50 PLD (SC) 1445 (Pak.)).

<sup>42</sup> *Id.* at 393.

<sup>43</sup> *Id.* at 395.

<sup>44</sup> *Id.* at 398–400. Somewhat ironically, this was done in part to allow Nawaz Sharif, who had been the author of the original ATA, to be tried in front of an Anti-Terrorism Court for his alleged crimes against Pakistan, though ultimately a political settlement was reached that sent him into exile.

<sup>45</sup> *Id.* at 403–04.

<sup>46</sup> *Id.* at 405–07.

offenses so new offenses are added.”<sup>47</sup> As recently as October 2009, the ATA was amended again to permit preventive detention of terrorism suspects for up to 90 days. In addition, confessions made before either police or military officers would henceforth be deemed admissible.<sup>48</sup>

Over this period, however, the original goal of speedy justice in the Anti-Terrorism Courts seems to have been compromised. One commentator explained that by 2004 the original seven-day limit on trials was “largely ignored,” and that “delays of several months in the disposition of cases were the norm rather than the exception.”<sup>49</sup>

The ATCs also continue to face criticism both within and outside of Pakistan for their record on human rights. During the Sheikh trial, an official with the Human Rights Commission of Pakistan (HRCP), a local non-governmental organization, commented that, “We are opposed to the use of Anti-Terrorism Courts because they do not equate with the due process of law.”<sup>50</sup> A 2006 report also issued by the HRCP characterized the ATA and similar legislation in Pakistan as “a long and ill-conceived project signified by inferior trial process, questionable evidentiary standards and extensive human rights violations.”<sup>51</sup> Further, the HRCP report, though recognizing the validity of the government’s desire for instituting speedy justice in terrorism cases, noted that “[d]espite the trade-off between basic rights of the accused for the sake of expeditious case disposal, justice under the ATA is not expeditious by any definition of the word.”<sup>52</sup> “So much for speedy justice,” the report concluded.<sup>53</sup>

The Belgium-based International Crisis Group (ICG) had similar criticism for Pakistan’s ATCs. The ICG called the ATCs examples of a

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<sup>47</sup> HUMAN RIGHTS WATCH, DESTROYING LEGALITY: PAKISTAN’S CRACKDOWN ON LAWYERS AND JUDGES (2007), available at <http://www.hrw.org/en/reports/2007/12/18/destroying-legality?print>.

<sup>48</sup> HUMAN RIGHTS WATCH, WORLD REPORT 2010, available at <http://www.hrw.org/en/world-report-2010/pakistan>.

<sup>49</sup> Kennedy, *supra* note 38, at 401.

<sup>50</sup> Susannah Price, *Rights Groups Question Pearl Murder Trial*, BBC NEWS, Apr. 12, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1926387.stm](http://news.bbc.co.uk/2/hi/south_asia/1926387.stm).

<sup>51</sup> NAJAM U. DIN, HUMAN RIGHTS COMMISSION OF PAKISTAN, TERRORIST UNLESS PROVEN OTHERWISE: HUMAN RIGHTS IMPLICATIONS OF ANTI-TERROR LAWS AND PRACTICES 37, available at [http://ejp.icj.org/IMG/Briefing\\_paper\\_HRCP.pdf](http://ejp.icj.org/IMG/Briefing_paper_HRCP.pdf).

<sup>52</sup> *Id.* at 13.

<sup>53</sup> *Id.*

preference by the Pakistani government to bypass traditional notions of justice by setting up “parallel judiciaries.”<sup>54</sup> The ICG concluded that the “procedural shortcuts” available in the ATCs “make them too attractive to overzealous police and prosecutors,” and therefore called for them to be absorbed back into the regular Pakistani court system.<sup>55</sup>

Even the U.S. State Department has been critical on this issue. Its 2008 Human Rights Country Report for Pakistan expressed concern with the provisions of the ATA that allowed coerced confessions to be admitted against the accused and allowed search and seizures by police without a warrant. However, the State Department’s criticism was not limited to the ATCs. In reference to Pakistan’s judiciary, the 2008 report cited “antiquated procedural rules,” “weak case management systems,” and “extensive case backlogs” as undermining citizens’ right to effective remedies and fair hearings in court.<sup>56</sup> “Lower courts remained corrupt, inefficient, and subject to pressure,” the report concluded.<sup>57</sup>

### C. *Assessing Model One*

The somewhat detailed account of Omar Saeed Sheikh’s trial in Pakistan’s Anti-Terrorism Courts is meant to provide a glimpse into the operation of Pakistan’s internal system for handling the adjudication of terrorist suspects. It offers a mixed assessment of how well the “local prosecution” model works as part of a comprehensive counterterrorism strategy in Pakistan.

On the one hand, Sheikh’s trial, though extending beyond the time limits notionally set in the Anti-Terrorism Act, was still relatively rapid. The criticism by observers both inside and outside of Pakistan of the failure of ATCs to deliver speedy justice indicates that Sheikh’s case may have been something of an anomaly, however.

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<sup>54</sup> INTERNATIONAL CRISIS GROUP, BRINGING JUDICIAL INDEPENDENCE TO PAKISTAN (2004), available at <http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/086-building-judicial-independence-in-pakistan.aspx>.

<sup>55</sup> *Id.*

<sup>56</sup> U.S. DEP’T OF STATE, 2008 HUMAN RIGHTS COUNTRY REPORTS: PAKISTAN (2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119139.htm>.

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

On the other hand, despite criticism of the human rights record of ATCs, Sheikh's trial indicates that they should be considered as something more legitimate than mere "kangaroo courts." The series of appeals both to the Sindh High Court and to the Pakistani Supreme Court, and the fact that even in 2010, eight years later, Pakistan's civilian judiciary was still reviewing the legality of his death sentence, both tend to suggest that at least in this case, the ATCs demonstrated an ability to preserve and advance the rule of law in Pakistan.<sup>58</sup>

Ultimately, the greatest advantage of the continued use of this model in the U.S.'s counterterrorism strategy in Pakistan is that it helps to further develop Pakistan's own internal processes for dealing with terrorism. It is certainly a desirable outcome to eventually have Pakistan advance to a place where its internal security system can handle terrorism in a routine fashion.<sup>59</sup> With this as the goal, prosecutions in Pakistan's ATCs should be viewed favorably by U.S. policymakers as a tool that accomplishes short-term counterterrorism objectives in a manner that is likely to also be self-sustaining over the longer term.

### III. International Extradition

A second legal process that may be employed as part of a comprehensive counterterrorism strategy in Pakistan is one that is nearly as old as international diplomacy itself: extradition. One advantage of extradition as a tool in the counterterrorism toolkit is that it allows courts and prison systems in other countries to essentially be drafted into service in handling suspects apprehended in Pakistan, thereby taking pressure off of Pakistan's justice system. In recent years, the United States, the United Kingdom, and India have all sought extraditions of terrorism suspects from Pakistan.<sup>60</sup> Their lack of notable successes may be one reason why extradition does not appear to currently be a preferred model for dealing with terrorism in Pakistan.<sup>61</sup>

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<sup>58</sup> It should be noted that there is disagreement over whether Pakistani officials had the right man in Omar Saeed Sheikh. *The Washington Post* reported at the time of Sheikh's conviction in 2002 that Pakistan had two other suspects in custody whose arrests had not been made public allegedly out of concern by some in the Pakistani government that doing so would jeopardize the chances of convicting Sheikh. See Kamran Khan, *Pakistani Court Finds 4 Guilty in Pearl's Death*, WASH. POST, July 15, 2002, at A01.

<sup>59</sup> See *supra* note 16.

<sup>60</sup> See *infra* notes 74–86 and accompanying text.

<sup>61</sup> *Id.*

Generally speaking, extradition involves a request made by one state (the “requesting state”) to another state (the “requested state”) to either arrest a fugitive or to surrender an individual already in custody. Extradition is based upon consent between contracting states, and represents a commitment to and respect for both the sovereignty and territoriality of the police powers of nations. Accordingly, extradition is a process largely governed by treaty, though states often develop their own internal legal processes for handling requests.<sup>62</sup>

Extradition treaties take two general forms: either as enumerated acts treaties, which specify a certain list of crimes for which the countries agree to grant extradition, or as dual criminality treaties, which allow extradition for any crime which has a similar analog in the other country. Among the extradition treaties in force for the United States, the older ones tend to be enumerated acts treaties. It was not until the 1970s when the United States began to move to the more modern dual criminality agreements.<sup>63</sup>

The United States and Pakistan continue to operate according to an extradition treaty concluded between the United States and Great Britain in 1932,<sup>64</sup> which was extended to cover Great Britain’s colonial holding of India (and modern-day Pakistan) in 1942. When it gained independence in 1947, Pakistan elected to continue to be bound by this prior treaty commitment.<sup>65</sup>

The 1932 treaty is of the enumerated act variety, and though it does not specifically list terrorism as an extraditable offense, it does include such

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<sup>62</sup> See, e.g., 18 U.S.C. §§ 3181–3196 (2006) (providing the statutory framework for U.S. extradition practices); Extradition Act, No. 21 of 1972, PAK. CODE, available at: <http://www.oecd.org/dataoecd/2/54/39365414.pdf> (providing the statutory framework for Pakistani extradition practices).

<sup>63</sup> See, e.g., Treaty of Extradition Between the United States of America and the Kingdom of Albania, U.S.-Alb., Mar. 1, 1933, 49 Stat. 3313; Treaty Between the United States and Chile Providing for the Extradition of Criminals, U.S.-Chile, Apr. 17, 1900, 32 Stat. 1850; Extradition Treaty Between the United States of America and the Republic of Peru, U.S.-Peru, July 26, 2001; Extradition Treaty Between the United States of America and the Argentine Republic, U.S.-Arg., June 10, 1997, 2159 U.N.T.S 129.

<sup>64</sup> U.S. DEPT OF STATE, TREATIES IN FORCE 209 (2010), available at <http://www.state.gov/documents/organization/143863.pdf>.

<sup>65</sup> *Id.* at 207; see also *In re* Extradition of Tawakkal, 2008 WL 3895578, at \*1 (E.D. Va. Aug. 22, 2008).

crimes as murder, conspiracy to murder, manslaughter, kidnapping, and arson.<sup>66</sup> The treaty also provides for such standard extradition practices as the “rule of specialty” (meaning that a state that receives a prisoner may only prosecute for the crimes for which they requested extradition in the first place),<sup>67</sup> a probable-cause hearing (which takes place in the requested state prior to transfer to the requesting state),<sup>68</sup> and a limited period of preliminary detention (in which the requesting state may have time to assemble its case and submit evidence in support of extradition, in this case, two months).<sup>69</sup> In addition, the treaty provides that extradition in each state “shall be carried out . . . in conformity with the laws regulating extradition,” a reference to any internal statutory requirements that either country may set up.<sup>70</sup>

In Pakistan, the domestic legal processes applied when there is a request for extradition are prescribed by the Extradition Act of 1972. In particular, the Act provides that a magistrate’s inquiry is to investigate the evidence submitted by the requesting country, and that it must allow the defense an opportunity to offer contradictory evidence. If the magistrate finds *prima facie* evidence of criminality, the magistrate must certify the extradition to the Federal Government, which then has discretion whether to honor or refuse the request by the foreign state.<sup>71</sup> The 1972 Act also allows fugitives in limited cases the right to seek a hearing in a provincial High Court, analogous to U.S. *habeas* proceedings.<sup>72</sup> Finally, the Act by its terms applies both to requests from countries that have extradition treaties with Pakistan and to those that do not,<sup>73</sup> in the latter case providing its own list of extraditable offenses that largely mirrors those in the 1932 treaty.

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<sup>66</sup> Extradition Treaty Between the United States and the United Kingdom art. 3, U.S.-U.K., July 29, 1932, 47 Stat. 2122 [hereinafter U.S.-U.K. Extradition Treaty]. Perhaps reflecting the law enforcement priorities of the time, the drafters of the treaty also chose to enumerate such crimes as “bigamy,” “procuration: that is to say the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes,” and “administering drugs or using instruments with intent to procure the miscarriage of women.” *Id.* arts. 3(11), 3(10), 3(3).

<sup>67</sup> *Id.* art. 7; see also U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL ch. 9-15.500 (1997) available at

[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/15mcrim.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrim.htm).

<sup>68</sup> U.S.-U.K. Extradition Treaty, *supra* note 66, art. 9.

<sup>69</sup> *Id.* art. 11.

<sup>70</sup> *Id.* art. 8.

<sup>71</sup> Extradition Act, *supra* note 62, ch. II, § 10(b).

<sup>72</sup> *Id.* ch. II, § 12.

<sup>73</sup> *Id.* ch. I, § 1(4).

*A. Case Studies: Successful and Unsuccessful Extraditions*

Though today a practice of prisoner surrender operating outside of the traditional extradition regime has developed between the United States and Pakistan (see Part IV below), the United States has on various occasions used extradition as a tool to seek custody of certain criminal offenders from Pakistan.<sup>74</sup>

In 1993, the Ninth Circuit Court of Appeals considered the extradition of Zulquarnan Khan, accused of narcotics smuggling into the United States, and recounted in detail the process by which his extradition was effected.<sup>75</sup> The case provides a useful window into how the extradition process between the two countries has historically operated. In August 1984, a federal grand jury in Las Vegas returned an indictment charging Khan, a Pakistani citizen, with various drug related offenses. The indictment was largely based on information obtained by a wiretap conducted by the U.S. Drug Enforcement Agency of one of Khan's co-conspirators in the United States.<sup>76</sup> Later that month, Khan was arrested in Pakistan on unrelated charges, and in October 1984, the United States formally requested Khan's extradition.<sup>77</sup> This first request was denied by the Pakistani government, which instead prosecuted Khan based on the Pakistani offenses, sentenced him to one year in prison, and subsequently released him. It was not until five years later that Khan was arrested in response to a second extradition request from the United States, based on the same 1984 indictment.<sup>78</sup> His extradition process this time took two years, and he was finally transferred to the United States on April 12, 1991.<sup>79</sup>

U.S. allies — notably the United Kingdom and India — have recently attempted to use extradition as a tool in pursuing their own counterterrorism cases. Great Britain sought the extradition of Rashid Rauf, accused of involvement in an August 2006 liquid explosives plot against several transatlantic air carriers that later resulted in a U.S. ban on liquid

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<sup>74</sup> See, e.g., *United States v. Khan*, 993 F.2d 1368 (9th Cir. 1993); *United States v. Khattak* 273 F.3d 557, 559 (3d Cir. 2001).

<sup>75</sup> *Khan*, 993 F.2d at 1370–71.

<sup>76</sup> *Id.* at 1370.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1371.

<sup>79</sup> *Id.*

bottles on all flights. According to the 2007 State Department Counterterrorism Report on Pakistan, Rauf's arrest in Pakistan, timed to coincide with raids in London aimed at disrupting the plot, was the result of "close cooperation between Pakistani, British, and American law enforcement agencies."<sup>80</sup> Britain subsequently requested his extradition back to the United Kingdom, and was aided in its case by the fact that Rauf was wanted in Birmingham, England, for his involvement in the unrelated homicide of his uncle.<sup>81</sup>

Though the United Kingdom did not have an extradition treaty with Pakistan, the Pakistani government had initially expressed willingness to use its Extradition Act of 1972 as the legal instrument to effect the surrender of Rauf.<sup>82</sup> In addition, British Prime Minister Tony Blair was at the time attempting to negotiate a formal extradition treaty with President Musharraf in order to smooth the transfer of Rauf and others, though talks were stalled in a dispute over the death penalty, which Pakistan allowed and which Britain had outlawed.<sup>83</sup> The Blair government was also reportedly offering the exchange of certain individuals wanted by the Pakistani government in return for Rauf.<sup>84</sup> Nevertheless, before any agreement could be reached to hand over Rauf under either the Pakistani statute or a new extradition agreement, Rauf escaped from police custody in December 2007.<sup>85</sup>

India, for its part, requested extradition of some of those accused of involvement in the 2008 terrorist attack on Mumbai and was similarly frustrated with the result. Like the United Kingdom, India also did not have an extradition agreement with Pakistan. Acting in accordance with the procedures laid out in the Extradition Act of 1972, India as a non-treaty country made a request to Pakistan for twenty-two individuals wanted in

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<sup>80</sup> U.S. DEPT OF STATE, COUNTRY REPORTS ON TERRORISM 2007: PAKISTAN (2008), available at <http://www.state.gov/s/ct/rls/crt/2007/103709.htm>.

<sup>81</sup> Carlotta Gall, *Suspect in Bomb Plot Escapes in Pakistan*, N.Y. TIMES, Dec. 17, 2007, <http://www.nytimes.com/2007/12/17/world/asia/17pakistan.html>.

<sup>82</sup> NAJAM U. DIN & SAIRA ANSARI, HUMAN RIGHTS COMMISSION OF PAKISTAN, STATE OF HUMAN RIGHTS IN 2007 41 (2008), available at <http://www.hrcp-web.org/pdf/Archives%20Reports/AR2007.pdf>.

<sup>83</sup> James Kirkup, *Deadlock Over Extradition Treaty*, THE SCOTSMAN, Nov. 20, 2006, at 14.

<sup>84</sup> Sandra Laville & Declan Walsh, *Secret Talks to Get Airline Bomb Suspect Back to UK*, THE GUARDIAN, Mar. 28, 2007, <http://www.guardian.co.uk/uk/2007/mar/28/pakistan.terrorism>.

<sup>85</sup> Gall, *supra* note 81.

connection with the 2008 Mumbai attacks and presented a corresponding dossier of evidence to support its request. Pakistan declined to act on the request, instead trying the suspects in its own Anti-Terrorism Courts.<sup>86</sup>

### B. *Assessing Model Two*

In assessing the international extradition model, it should be noted that the United States actually sought extradition of Omar Saeed Sheikh in the case described in Part II above, but was turned down by Pakistan's government. A federal grand jury in New Jersey had indicted Sheikh in March 2002 under U.S. statutes that extend jurisdiction extraterritorially for acts of hostage-taking that result in the death of an American. Sheikh had by that time already been under a separate sealed indictment for his involvement in a 1994 kidnapping of an American citizen, and the U.S. government had requested Pakistan arrest him in November 2001, before he ever encountered Daniel Pearl.<sup>87</sup> However, the Pakistani government had not acted on that earlier request.<sup>88</sup>

The second time around the U.S. government made clear, at the highest levels, its desire that Pakistan transfer Sheikh. White House spokesman Ari Fleischer said, "The United States would very much like to get our hands on Omar Sheikh," and President Bush himself suggested that Sheikh ought to face justice in the United States.<sup>89</sup> Nevertheless, all U.S. requests in the case were ultimately rebuffed. Pakistani President Pervez Musharraf, commenting on Sheikh, said in May 2002 that, "[h]e's done a terrible act in Pakistan. . . . He must be punished in Pakistan. I want the people of Pakistan to know that we will move against terrorism."<sup>90</sup>

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<sup>86</sup> *Seven Indicted for Planning, Aiding Mumbai Attack*, DAWN, Nov. 25, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/03-pakistan-court-indicts-seven-over-mumbai-attacks-lawyer-ss-09>.

<sup>87</sup> Douglas Jehl, *U.S. Is in Talks on Handing Over of Suspect in Reporter's Killing*, N.Y. TIMES, Feb. 26, 2002, <http://www.nytimes.com/2002/02/26/world/nation-challenged-journalists-us-talks-handing-over-suspect-reporter-s-killing.html>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> George Jahn, *Musharraf Rejects Extradition Request*, ASSOCIATED PRESS, May 5, 2002, <http://community.seattletimes.nwsourc.com/archive/?date=20020505&slug=musharraf05>.

In general, the advantage to international extradition is that it is a judicial process that is well established under international law and seen as a legitimate law enforcement tool.<sup>91</sup> This is significant in terms of public perception and in expressing confidence in the operation of the Pakistani courts and its administrative processes.

However, its disadvantages — highlighted in the examples with the United States, United Kingdom, and India recounted above — appear to be possible reasons why this option has not been widely employed in the war on terror. Though extradition is legally mandated when two countries have a treaty relationship, in practical terms there is some level of discretion as to whether or not a particular request for extradition will ever be acted upon.<sup>92</sup> In addition, the common complaint about extradition is the length of time associated with it, and evidence of just how long it can take is found in the pre-9/11 example of drug-smuggler Zulquarnan Khan. Finally, extradition requires that the domestic government be able to hold the requested fugitive safely, which, as demonstrated in the case of Rashid Rauf, may not always be the case.

#### IV. Cooperative and Uncooperative Rendition

A third model that also allows terrorism suspects to be tried or detained outside of Pakistan involves rendition. Rendition actually encompasses a number of different practices under one heading, which is perhaps why it has often been misreported in the press. Distinguishing among these is helpful in assessing both the legality and desirability of rendition as a tactic in the U.S. counterterrorism campaign in Pakistan.

At the outset, a rendition from Pakistan begins with locating and detaining a suspect. This can come in the form of an arrest made by the Pakistani government on its own, an arrest made in a joint operation between the Pakistanis and the United States, or, in some cases, a capture made directly by U.S. personnel.

In the first two scenarios, if the government of Pakistan determines that it wants to transfer the suspect that it has arrested to U.S. custody, it has two options. It can await a request from the United States, and then go through its domestic judicial process for extradition laid out above in Part

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<sup>91</sup> See Restatement (Third) Foreign Relations Law of the United States §§ 475, 476 (1987).

<sup>92</sup> See *supra* note 90 and accompanying text; see also *supra* note 71 and accompanying text.

III.<sup>93</sup> Alternatively, the Pakistani government can simply elect to voluntarily transfer the suspect into United States custody, either because it believes it cannot safely detain the individual in Pakistan, or because it would rather the suspect face prosecution in the United States.<sup>94</sup>

This practice of cooperative rendition is quite different from what is known as extraordinary rendition. An extraordinary rendition involves no cooperation from, and possibly no prior notification to, the government where the suspect is located.<sup>95</sup> It amounts to a forcible abduction of an individual inside the sovereign territory of another state, followed by the delivery of that individual back to the United States, or into a third country's custody.<sup>96</sup>

According to Daniel Benjamin, who served on the National Security Council during the Clinton administration and as the State Department's Coordinator for Counterterrorism in the Obama administration, the United States had never conducted an extraordinary rendition in a terrorism case prior to 9/11.<sup>97</sup> During the Bush administration, it soon became the subject of controversy when it was alleged that, in cases where individuals were rendered not to the United States but to third countries, it was for the purpose of torture.<sup>98</sup> In addition to contravening U.S. commitments under various human rights instruments, this practice violates the principle of *non-refoulement*, a long-settled rule in international law that holds that a country may not deliver an individual to a state where it has reason to believe he or she would be tortured.<sup>99</sup>

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<sup>93</sup> See *supra* notes 71–73 and accompanying text.

<sup>94</sup> Benjamin, *supra* note 5.

<sup>95</sup> DANIEL BENJAMIN & STEPHEN SIMON, *THE NEXT ATTACK* 256 (2006).

<sup>96</sup> Benjamin, *supra* note 5.

<sup>97</sup> *Id.* (noting that with regard to extraordinary rendition in the pre-9/11 era, “I am aware of only one, and that was in a drug case.”).

<sup>98</sup> Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005,

<http://www.nytimes.com/2005/03/06/politics/06intel.html?pagewanted=1&r=2>.

<sup>99</sup> MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., *RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE* 16–17 (2009), available at <http://www.fas.org/sgp/crs/natsec/RL32890.pdf>.

A. *What is the Legal Status of Rendition?*

Some have argued that cooperative rendition, as distinguished from extraordinary (i.e. uncooperative) rendition, and divorced from the practice of handing over a suspect to a third country for the purposes of interrogation or torture, is not necessarily inconsistent with international law. The European Commission on Human Rights (predecessor to the European Court of Human Rights), for example, ruled in 1996 that France's rendition of the international terrorist known as Carlos the Jackal from Sudan did not violate principles of international law embodied in the European Convention on Human Rights.<sup>100</sup> In that case, however, as noted by Terry Davis, Secretary General of the Council of Europe, there was an outstanding arrest warrant for the suspect, and he was immediately placed into the civilian court system in France.<sup>101</sup>

Secretary of State Condoleezza Rice expressed a similar assessment of the legality of rendition in remarks she made in Turkey in 2005, at a time when the United States was embroiled in a controversy with its European allies over allegations of torture in its extraordinary rendition program. "For decades, the United States and other countries have used renditions to transport terrorist suspects." She went on:

In some situations a terrorist suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make the sovereign choice to cooperate in a rendition. Such renditions are permissible under international law and are consistent with the responsibilities of those governments to protect their citizens.<sup>102</sup>

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<sup>100</sup> Terry Davis, *Carlos the Jackal and the Extraordinary Renditions*, WALL ST. J., June 27, 2006, [http://www.coe.int/t/secretarygeneral/sg/Oped/2006/Carlos\\_and\\_extraordinary\\_renditions\\_EN.asp](http://www.coe.int/t/secretarygeneral/sg/Oped/2006/Carlos_and_extraordinary_renditions_EN.asp).

<sup>101</sup> *Id.*

<sup>102</sup> Remarks by Secretary of State Condoleezza Rice Upon Her Departure for Europe (Dec. 5, 2005), available at [http://turkey.usembassy.gov/statement\\_12052005.html](http://turkey.usembassy.gov/statement_12052005.html).

However, Amnesty International, in a statement submitted to the House Foreign Affairs Committee in 2007, expressed strong disagreement with this view of the propriety of even the cooperative rendition described by Secretary Rice. “Rendition is sometimes presented simply as an efficient means of transporting terror suspects from one place to another without red tape,” they write. Yet “[s]uch benign characterizations conceal the truth about a system that puts the victim beyond the protection of the law, and sets the perpetrator above it.”<sup>103</sup>

The Human Rights Committee of Pakistan indicated a similar view, stating on the question of whether the government of Pakistan is empowered to bypass its own extradition procedures in favor of a cooperative rendition of a suspect to the United States, “[e]xtradition . . . is not a matter of the requested state’s whim.”<sup>104</sup>

Much more clear is the settled principle that rendition does not present a problem for later prosecution under U.S. domestic law. The Supreme Court in *United States v. Alvarez-Machain*, a case involving a Mexican national forcibly abducted and brought to the United States to stand trial for the murder of a DEA agent, held that the fact of one’s forcible abduction in another sovereign country “does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.”<sup>105</sup> The U.S. Attorneys’ Manual, a publication of the U.S. Department of Justice, countenances the possible use of rendition as a prosecutorial tool in some situations, stating that “prosecutors may not take steps to secure custody over persons outside the United States . . . by means of *Alvarez-Machain* type renditions, *without advance approval by the Department of Justice.*”<sup>106</sup> Indeed, the acceptability of rendition is even expressly acknowledged in U.S. statute at 10 U.S.C. § 374(b)(1)(D), which directs that: “the Secretary of Defense may, upon request from the head of a Federal law

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<sup>103</sup> *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: Joint Hearing Before the Subcommittee on International Organizations, Human Rights, and Oversight and the Subcommittee on Europe of the House Committee on Foreign Affairs*, 110th Cong. (2007) (prepared statement of Amnesty International).

<sup>104</sup> DIN, *supra* note 51, at 31.

<sup>105</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992). The Court also acknowledged, without expressing a view, that on the question of rendition’s legality under international law, *Alvarez-Machain*’s abduction “may be in violation of general international law principles.” *Id.* at 669.

<sup>106</sup> U.S. ATTORNEYS’ MANUAL, *supra* note 67, ch. 9-15.610 (1997) (second emphasis added).

enforcement agency, make Department of Defense personnel available to operate equipment . . . with respect to . . . a rendition of a suspected terrorist from a foreign country to the United States to stand trial.”<sup>107</sup>

*B. Case Studies: Renditions from Pakistan*

Since 9/11, such high-profile al Qaeda figures as Khalid Sheikh Mohammed and Abu Zubaydah have been rendered from Pakistan into U.S. custody. They are among some 369 individuals who, according to Pakistani President Pervez Musharraf, were rendered or otherwise transferred to the United States under his administration.<sup>108</sup> Musharraf even boasted in his book that Pakistan had collected “bounties totaling millions of dollars”<sup>109</sup> from the CIA for handing over these individuals, though he later retracted the comment when he was criticized for implying that Pakistan’s government was operating in the role of hired-gun for the United States.<sup>110</sup>

The pre-9/11 rendition of two individuals, Mir Aimal Kansi and Ramzi Yousef, provide useful examples as well. Both were involved in acts of terrorism in 1993 and both were rendered to the United States in 1995, when, according to testimony by former CIA operative Michael Scheuer, the Clinton administration’s rendition program against al Qaeda began in earnest.<sup>111</sup> Mir Aimal Kansi was a Pakistani national who in 1993 drove up to the entrance of CIA headquarters in Langley, Virginia, and gunned down several employees who were waiting at the front gates. Kansi was arrested two years later in Pakistan, on a tip from an individual who had seen a notice for the \$5 million reward offered by the U.S. State Department printed on a matchbook cover. Though the State Department contends on its Rewards for Justice website that Kansi was extradited to the

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<sup>107</sup> 10 U.S.C. § 374(b)(1)(D) (2006).

<sup>108</sup> MUSHARRAF, *supra* note 20, at 237.

<sup>109</sup> *Id.*

<sup>110</sup> DIN, *supra* note 51, at 32.

<sup>111</sup> *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: Joint Hearing Before the Subcommittee on International Organizations, Human Rights, and Oversight and the Subcommittee on Europe of the House Committee on Foreign Affairs*, 110th Cong. (2007) (statement of Michael Scheuer) [hereinafter Scheuer Testimony].

United States following his arrest,<sup>112</sup> news reports make clear that Kansi was in fact transferred to the United States via rendition.<sup>113</sup>

Ramzi Yousef, nephew of 9/11 plotter Khalid Sheikh Mohammed, was wanted in the United States for his involvement in the 1993 bombing of the World Trade Center. He was captured in a joint operation by Pakistani and American law enforcement officers and flown to the United States.<sup>114</sup> According to Daniel Benjamin and Stephen Simon, “[t]he government of Pakistan agreed to have Yousef moved in this way without legal proceedings, as it has done in many cases involving terrorists, out of a recognition that holding someone like Yousef for a protracted period of time would be politically difficult and the legal outcome would be uncertain.”<sup>115</sup> Though in recounting the facts of his case, the court in the Southern District of New York said that Yousef had been transferred from Pakistani custody “pursuant to an extradition request by the United States,”<sup>116</sup> Secretary Rice confirmed in her comments in Turkey in 2005 that Yousef was in fact the subject of a rendition.<sup>117</sup>

### C. *Assessing Model Three*

The apparent evolution of the practice of rendition from the Clinton administration to the George W. Bush administration is instructive in making an assessment of cooperative rendition as a possible model for the future. Michael Scheuer, the former CIA operative, described these changes in rendition policy in testimony before the House Foreign Affairs Committee in 2007. During the Clinton administration, according to Scheuer, the CIA was under strict guidelines to only render captured al Qaeda figures to those countries that had outstanding warrants or indictments against them.<sup>118</sup> As Scheuer testified: “This was a hard-and-fast rule which greatly restricted CIA’s ability to confront al-Qaeda because we

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<sup>112</sup> See *Rewards For Justice, Convicted: Ramzi Ahmed Yousef*, U.S. DEP’T OF STATE, <http://www.rewardsforjustice.net/index.cfm?page=Yousef&language=english> (last visited Oct. 28, 2010).

<sup>113</sup> See, e.g., Stephen Grey, *Five Facts and Five Fictions About CIA Renditions*, PBS FRONTLINE WORLD, <http://www.pbs.org/frontlineworld/stories/rendition701/updates/updates.html> (last visited Oct. 28, 2010).

<sup>114</sup> BENJAMIN & SIMON, *supra* note 95, at 256.

<sup>115</sup> *Id.*

<sup>116</sup> *United States v. Yousef*, 925 F.Supp. 1063, 1066 (S.D.N.Y. 1996).

<sup>117</sup> See *supra* note 102.

<sup>118</sup> Scheuer Testimony, *supra* note 111, at 12.

could only focus on al-Qaeda leaders who were wanted somewhere for a legal process. As a result, many al-Qaeda fighters we knew of and who were dangerous to America could not be captured.”<sup>119</sup>

After 9/11, however, those al-Qaeda operatives captured and transported via rendition were mainly to be kept in U.S. custody.<sup>120</sup> Said Scheuer, “[t]his decision by the Bush administration allowed CIA to capture al-Qaeda fighters we knew were a threat to the United States without on all occasions being dependent on the availability of another country’s outstanding legal process.”<sup>121</sup>

It seems clear that the shift of rendition practice, from sending captured suspects to their home countries or third countries seeking to prosecute them to detaining them in U.S. custody, has coincided with the corresponding growth in the extraterritorial reach of U.S. terrorism statutes.<sup>122</sup> This therefore allows the United States itself to render suspects back to its territory with at least the jurisdictional basis on which a future prosecution could proceed. Notwithstanding the difficulty that the United States has had in making determinations about whether and how to proceed in prosecutions against such rendered individuals, the fact remains that the shift in U.S. law — allowing prosecutions based on terrorism statutes that apply extraterritorially — means that lawful renditions from Pakistan to the United States have become a more viable option for U.S. counterterrorism policy in the future.

The difficulty, however, is that rendition continues to be associated with the most egregious abuses of the practice in the past — torture, transfers for the purpose of interrogation rather than prosecution, and so-called “black sites.”<sup>123</sup> This means that continued use of cooperative, lawful

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 13.

<sup>122</sup> See, e.g., 18 U.S.C. § 2339B (2006) (extending extraterritorial jurisdiction for providing material support for a foreign terrorist organization); *id.* § 1512 (extending extraterritorial jurisdiction for witness tampering); *id.* § 1091 (extending extraterritorial jurisdiction for genocide if committed by a U.S. national). For a full listing of federal criminal statutes that have extraterritorial application today, see CHARLES DOYLE, CONG. RESEARCH SERV., EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 37–60 (2010), available at [www.fas.org/sgp/crs/misc/94-166.pdf](http://www.fas.org/sgp/crs/misc/94-166.pdf).

<sup>123</sup> See Nicholas Kulish & Scott Shane, *Flight Data Show Rendition Planes Landed in Poland*, N.Y. TIMES, Feb. 22, 2010,

rendition as a counterterrorism tool in Pakistan should be viewed as carrying with it a public diplomacy cost. This cost is reflected in statements such as those in a report released by the Human Rights Commission of Pakistan in 2006:

A preference for unlawfully transferring individuals to other States without due process leads to the presumption that either there is no convincing evidence against those whose extradition is sought or that Pakistan and the requesting state prefer [rendition] instead of risking the possibility of unfavourable results following a judicial assessment.<sup>124</sup>

Such expressions of discontent from within Pakistan must be considered in evaluating the long-term sustainability of a practice that, as indicated by the case studies above, appears to have been an effective tool in the U.S. counterterrorism arsenal.

#### V. Direct Action

There has developed in recent years a great deal of interest in the use of unmanned aerial vehicles, or “drones,” inside Pakistan as part of the covert campaign by the United States against al Qaeda and members of the Taliban. In fact, the use of drones is but one piece of a collection of covert activities carried out by U.S. personnel in furtherance of the counterterrorism mission in Pakistan.<sup>125</sup> This section will attempt to compare the use of these so-called “direct action[s]”<sup>126</sup> with those methods examined previously that involve either a formal judicial process (local prosecution or extradition) or that can eventually lead to a formal prosecution in some venue (in the case of renditions).

As Katherine Tiedemann and Peter Bergen of the New America Foundation have catalogued, the number of drone strikes in Pakistan has

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[http://www.nytimes.com/2010/02/23/world/europe/23poland.html?ref=extraordinary\\_rendition](http://www.nytimes.com/2010/02/23/world/europe/23poland.html?ref=extraordinary_rendition).

<sup>124</sup> DIN, *supra* note 51, at 35.

<sup>125</sup> See *infra* notes 153–155 and accompanying text.

<sup>126</sup> See Scott Shane, *U.S. Approves Killing of American Cleric*, N.Y. TIMES, Apr. 6, 2010, <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>; Ellen Nakashima, *Intelligence Chief Acknowledges U.S. May Target Americans Involved in Terrorism*, WASH. POST, Feb. 4, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/03/AR2010020303968.html>.

expanded substantially from the Bush to the Obama administrations.<sup>127</sup> Their use has been criticized on both legal and policy grounds.<sup>128</sup> The case of the strike on Mohammed Qari Zafar, the accused mastermind of the attack that killed U.S. State Department employee David Foy, illustrates how drone strikes actually occur in practice.

*A. Case Study: The Strike on Mohammed Qari Zafar*

As noted in the introduction, Zafar was one of three individuals sought in connection with the murder of David Foy. While the other two were apprehended quickly and tried in Pakistani courts, Zafar remained at large for nearly four years.<sup>129</sup> This was due in part, no doubt, to the fact that he was hiding under the protection of Lashkar-e-Jhangvi in Waziristan, a region that in many ways lies beyond the reach of the police powers of the Pakistani government.<sup>130</sup>

It has not been reported how the U.S. government ultimately acquired information regarding Zafar's precise whereabouts. It may have been through its own technological intelligence gathering methods or simply through the help of a local tipster seeking the \$5 million reward offered by the State Department.<sup>131</sup> Regardless, the next steps in the process likely followed what has apparently become a standard procedure.<sup>132</sup> Given his existing record and his potential to further threaten U.S. interests, Zafar's name would likely already have been on CIA's list of high value targets, his addition the result of a memo drafted in CIA's Counterterrorist Center

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<sup>127</sup> PETER BERGEN & KATHERINE TIEDEMANN, NEW AMERICA FOUNDATION, *THE YEAR OF THE DRONE* (2010), <http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergenticdemann2.pdf>.

<sup>128</sup> See *infra* notes 139–148 and accompanying text.

<sup>129</sup> See *supra* note 12–14 and accompanying text.

<sup>130</sup> *Id.*; see also *Pakistan Conflict Map: South Waziristan*, BBC NEWS, June 22, 2009, [http://news.bbc.co.uk/2/hi/south\\_asia/8046577.stm](http://news.bbc.co.uk/2/hi/south_asia/8046577.stm).

<sup>131</sup> See *supra* note 13; see also *Rewards for Justice, Wanted: Qari Mohammed Zafar*, U.S. STATE DEP'T, <http://www.rewardsforjustice.net/index.cfm?page=Zafar&language=english> (last visited Oct. 23, 2010). Though no announcement was made that the \$5 million reward had been paid for Zafar, it is often the case that the United States will decline to publicize the payment of an award in order to protect the individual who provided the information. See *Rewards for Justice: Frequently Asked Questions*, U.S. STATE DEP'T, <http://www.rewardsforjustice.net/index.cfm?page=faq&language=english#q3> (last visited Oct. 23, 2010).

<sup>132</sup> Greg Miller, *From Memo to Missile: the CIA's Hit List*, L.A. TIMES, Jan. 31, 2010, at A1.

summarizing the available intelligence on him and the case for why he should be targeted.<sup>133</sup> The decision to add him to the list would have been reviewed both by policymakers at the Agency and by attorneys, who would have assessed whether Zafar was “deemed to be a continuing threat to U.S. persons or interests.”<sup>134</sup>

With his location known, Agency officials would then have reviewed the circumstances of the proposed strike on Zafar in light of the details of his surroundings and location. State Department Legal Adviser Harold Koh described the process this way in a March 2010 speech to the American Society of International Law: “[W]hether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.”<sup>135</sup> Koh went on to explain that the Administration had taken great care to set up rules consistent with the laws of war:

In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.<sup>136</sup>

Once approved, the operation would have then been executed by a remote pilot, operating the unmanned aerial vehicle most likely in Langley, Virginia, with others, including military personnel and intelligence analysts in various locations, watching along with the video feed.<sup>137</sup> The decision to actually fire the missile would have been made in Langley, having been

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Harold Koh, The Obama Administration and International Law, Keynote Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

<sup>136</sup> *Id.*

<sup>137</sup> Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009* 6 (Notre Dame Law Sch. Legal Studies Research Paper No. 09-43).

delegated to the head of the Counterterrorist Center by the President of the United States.<sup>138</sup>

### B. Assessing Model Four

As noted, operations such as the one that targeted Zafar have been criticized for their alleged illegality under international law. The arguments run a number of different ways. Apart from expressing skepticism about the factual matter of whether principles such as distinction and proportionality are indeed followed in the targeting process,<sup>139</sup> academic commentators have criticized the targeting program on various other legal grounds. Mary Ellen O’Connell, a law professor at Notre Dame, argues that such strikes are illegal because in the period of 2004 to 2009, when the drone program first got off the ground, there was no state of armed conflict in Pakistan, and international law does not recognize the right to kill outside of an actual armed conflict.<sup>140</sup> Georgetown University law professor Gary Solis has made the argument that CIA employees, who actually carry out the lethal operations in many cases, are not lawful combatants under the laws of war because they do not wear uniforms as required under the Geneva Conventions.<sup>141</sup>

Though he did not address the issue of whether CIA employees must wear uniforms, Koh did address many of the arguments against the drone program in his speech. To those who suggested that the act of targeting particular individuals was unlawful under the laws of war, Koh answered that individuals who are part of an armed group such as al Qaeda or the Taliban are belligerents, and therefore lawful targets. To those who argued that such lethal strikes constituted extrajudicial killing because they did not afford the targets adequate legal process, Koh responded that, “a

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<sup>138</sup> Jane Mayer, *The Predator War*, NEW YORKER, Oct. 26, 2009, available at [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer?printable=true](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer?printable=true).

<sup>139</sup> See *infra* note 143.

<sup>140</sup> O’Connell, *supra* note 137, at 16–18. O’Connell acknowledges that the Pakistani military’s spring 2009 offensive against various elements of the Taliban in Buner Province did represent a state of armed conflict, though she argues that even at that time, since Pakistan did not expressly request U.S. assistance in repelling the Taliban, the strikes were still unlawful under the laws of war. *Id.* at 17.

<sup>141</sup> *Id.* at 8; see also Gary Solis, *CIA Drone Attacks Produce America’s Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html>.

state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force.”<sup>142</sup>

Koh’s speech was the first effort by a U.S. government official to articulate publicly the legal rationale for the drone program. It came less than six months after calls for greater transparency by the UN Special Rapporteur for Extrajudicial Killings, Philip Alston, who in October 2009 had suggested that the strikes “may well violate international humanitarian law and international human rights law.”<sup>143</sup> However, shortly after Koh’s speech, Alston indicated that while it was a good start, he was still unsatisfied. “There needs to be more disclosure,” he said, “[w]e need to know more details about the legal analysis . . . [a]nd we need to start getting some real information on how these programs of targeted killings are actually being implemented, what exactly the rules are, what sort of follow up they do, for example.”<sup>144</sup>

Apart from the legal arguments, drone strikes have also been criticized on policy grounds for their lack of practical effectiveness. Counterinsurgency specialists Andrew Exum and David Kilcullen, in a 2009 op-ed in the *New York Times*, argued that drone strikes are counterproductive to U.S. interests in Pakistan, in that they create more problems than they solve.<sup>145</sup> Exum and Kilcullen stressed the psychological impact of the drone strikes on a Pakistani population that had largely turned against the Taliban, arguing that, “[w]hile violent extremists may be unpopular, for a frightened population they seem less ominous than a faceless enemy that wages war from afar.”<sup>146</sup> They noted that opposition to the attacks not only stokes anti-Americanism in Pakistan, a crucial ally, but also contributes to Pakistan’s internal instability.<sup>147</sup> Furthermore, in subsequent comments, Exum has stressed that regardless of the precision and care that the U.S. exercises in ensuring that as few civilians as possible are injured or killed in a covert strike, it is the *perception*, not the reality, of

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<sup>142</sup> Koh, *supra* note 135.

<sup>143</sup> *US Warned on Deadly Drone Attacks*, BBC NEWS, Oct. 28, 2009, <http://news.bbc.co.uk/2/hi/8329412.stm>.

<sup>144</sup> *UN Special Rapporteur Philip Alston Responds to U.S. Defense of Drone Attacks’ Legality*, DEMOCRACY NOW (Apr. 1, 2010), <http://www.democracynow.org/2010/4/1/drones>.

<sup>145</sup> David Kilcullen & Andrew Exum, *Death from Above, Outrage Down Below*, N.Y. TIMES, May 16, 2009, [http://www.nytimes.com/2009/05/17/opinion/17exum.html?\\_r=1](http://www.nytimes.com/2009/05/17/opinion/17exum.html?_r=1).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

civilian casualties which drives the backlash against drone strikes and which should concern U.S. policymakers.<sup>148</sup>

Taking into account both sets of arguments, how are we to assess the desirability of these covert targeting operations in the overall U.S. counterterrorism strategy? It seems clear that the success of any covert action depends upon the presence or absence of good intelligence. Furthermore, accurate intelligence is not just necessary in order to locate the individuals in question; it is also crucial to being able to carry out an operation that is consistent with the laws of war in minimizing civilian casualties.<sup>149</sup>

However, since it is also the case that “dead men tell no tales,” these lethal operations themselves should properly be viewed as net consumers of intelligence, rather than net neutral or net producers of intelligence.<sup>150</sup> In that sense, then, lethal targeting operations appear to be a less sustainable model in terms of the intelligence that they use versus the intelligence that they generate as compared with methods involving arrest or capture of suspects.

They also may be unsustainable in terms of their status under international law, which should not be assumed to remain static over the timeframe of the U.S. campaign in Pakistan. UN Special Rapporteur Philip Alston’s dissatisfaction with the Obama administration’s efforts to begin to articulate a legal rationale for drone strikes is likely just the leading edge of what will be an international outcry for greater accountability in years to come. And as more countries continue to acquire drone technology, the calls for an international reckoning on drone operations will only grow louder. Israel has used armed UAVs in the same manner as the United

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<sup>148</sup> Abu Muqawama, *The Wall Street Journal, and Drones*, CENTER FOR A NEW AMERICAN SECURITY (Jan. 9, 2010, 9:28 AM), <http://www.cnas.org/blogs/abumuqawama/2010/01/wall-street-journal-and-drones.html>.

<sup>149</sup> Daniel Byman, *Do Targeted Killings Work?* FOREIGN POLICY, July 14, 2009, available at [http://www.foreignpolicy.com/articles/2009/07/14/do\\_targeted\\_killings\\_work](http://www.foreignpolicy.com/articles/2009/07/14/do_targeted_killings_work) (“To reduce casualties, superb intelligence is necessary. Operators must know not only where the terrorists are, but also who is with them and who might be within the blast radius.”).

<sup>150</sup> See Marc A. Thiessen, *Dead Terrorist Tell No Tales*, FOREIGN POLICY, Feb. 8, 2010, available at [http://www.foreignpolicy.com/articles/2010/02/08/dead\\_terrorists\\_tell\\_no\\_tales](http://www.foreignpolicy.com/articles/2010/02/08/dead_terrorists_tell_no_tales).

States for several years,<sup>151</sup> and Northrop Grumman, the producer of the Global Hawk (an unarmed UAV) has said that the countries considering adding the technology to their arsenal include Japan, South Korea, Australia, Singapore, the United Kingdom, Spain, New Zealand, and Canada.<sup>152</sup> One could imagine a range of outcomes, but the United States should at least be prepared to confront the possibility of a new treaty restricting the use of UAVs within the next several years.

Finally, in the debates over both the legality and the effectiveness of drones, it should be noted that drones are but one of the covert action capabilities utilized by the U.S. government in Pakistan for CT purposes. U.S. special operations forces have also been involved in conducting more traditional covert actions in Pakistan. For example, it was reported that in September 2008, U.S. special forces conducted a cross-border raid from Afghanistan into Pakistan targeting al Qaeda and Taliban targets. The operation centered on Jalal Khel, a village in South Waziristan less than a mile from the Afghan Border. According to one account, the attack involved three U.S. helicopters. Two hovered overhead, while special operators landed in the other, executing their mission on foot.<sup>153</sup> Accounts differ on the extent of civilian casualties associated with the operation.<sup>154</sup>

Like drone strikes, however, it is the perception, not necessarily the reality, of civilian casualties that ultimately matters for the U.S.-Pakistani relationship, and the assault was criticized by Pakistani officials for just that reason. A spokesman for the Pakistani military said that, following the raid, there was a greater risk of uprising by tribesman who had previously been supportive of Pakistani soldiers stationed in the border area. "Such actions are completely counterproductive and can result in huge losses, because it gives the civilians a cause to rise against the Pakistani military," he told the *New York Times*.<sup>155</sup>

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<sup>151</sup> Mayer, *supra* note 138.

<sup>152</sup> Eric Talmadge, *Aircraft Maker Pushing Exports of Spy Drones*, ASSOCIATED PRESS, Apr. 2, 2010.

<sup>153</sup> Pir Zubair Shah, Eric Schmitt, & Jane Perlez, *American Forces Attack Militants on Pakistani Soil*, N.Y. TIMES, Sept. 4, 2008, <http://www.nytimes.com/2008/09/04/world/asia/04attack.html>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

## VI. Aligning Legal Tactics with National Strategy

This article has focused on the legal tactics available in the U.S. counterterrorism campaign in Pakistan. However, whether employed separately or in combination, none of the four legal models discussed constitute a comprehensive strategy for Pakistan. They must be part of a more broad-based approach that includes financial assistance, capacity building, and support for Pakistan's democratic development.

Nevertheless, it is incumbent upon policymakers to make a choice, within the narrow portion of the strategy that concerns neutralizing individual terrorist leaders, as to what the right mix of tactics should be. This determination should be made in light of the requirements of international law, the effect on Pakistan's government and Pakistani public opinion, and the practical limitations on effectiveness of each tactic in a range of situations. As the case studies above have hopefully made clear, each model carries both costs and benefits along each of these dimensions.

Clearly in the near term some combination of the current menu of tactics would be most appropriate. This article has begun to discern the outlines of how the responsibility for various targets should be divided among the different models. For high-value targets located in certain agencies and regions of the Federally Administered Tribal Areas, direct action appears to be the only option currently available, though to the extent that the Pakistani military can execute these operations rather than U.S. special forces or CIA-piloted drones, they would likely engender less U.S. backlash and be on a more broadly accepted international law footing.<sup>156</sup> As one commentator has argued, drone strikes are at present the least-bad alternative the United States has in many situations.<sup>157</sup> But it is important to develop better alternatives in the future.

For those terrorist leaders living and operating in the Pakistani provinces, the Pakistani police and Pakistani courts appear to be an acceptable option, given the present difficulties involved in extradition and

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<sup>156</sup> It should also be noted that the use of American drones is geographically restricted to a limited set of areas, or "boxes," by the Pakistani government. BOB WOODWARD, *OBAMA'S WARS* 366-67 (2010).

<sup>157</sup> Daniel Byman, *Taliban v. Predator: Are Targeted Killings Inside Pakistan a Good Idea?*, FOREIGN AFFAIRS, Mar. 18, 2009, available at <http://www.foreignaffairs.com/articles/64901/daniel-byman/taliban-vs-predator>.

the unresolved question, for those brought to the United States via rendition, of whether the United States would prosecute in a criminal court, military tribunal, or not at all.

Over the longer term, however, the United States should work to transition to a fully prosecution-based approach for all of Pakistan — involving both Pakistani courts as well as U.S. courts utilizing extraterritorial terrorism statutes. This will best avoid the backlash that appears to be growing among the UN and others against the use of unmanned aerial vehicles and other covert methods. It will also likely lower the temperature on opposition within the Pakistani public against drone strikes and show support for Pakistan’s governance processes, thereby creating conditions for further internal stability. Finally, and perhaps most importantly, it will likely reduce the actual civilian casualties associated with lethal operations.<sup>158</sup>

Such a shift toward a prosecution-based approach is consistent with the principles underlying the U.S. military’s counterinsurgency doctrine. The Counterinsurgency Field Manual identifies as a key lesson from past insurgencies that “the host nation doing something tolerably is normally better than us doing it well.”<sup>159</sup> Thus, even if there are drawbacks to the use of Anti-Terrorism Courts for local prosecutions in Pakistan, as there surely are, it is likely a better long-term strategic decision to seek their use than to continue to pursue a U.S.-centric counterterrorism strategy.

Furthermore, as the United States continues the arduous process of untangling the knot of Guantanamo and prosecutions in the United States, there will likely be more confidence about shifting toward rendition and extradition as acceptable tactics, because there will be greater clarity about how to handle the subsequent prosecutions in the United States. For this reason, among many others not mentioned, it is vital to building a sustainable Pakistan counterterrorism policy that the United States reach a final disposition on these unsettled issues.

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<sup>158</sup> The Bergen and Tiedemann study estimated that from 2004–2009 the average civilian fatality rate for drone strikes in Northwest Pakistan was 32%. However, their study concluded that the rate in 2009 had dropped to 24%. See Bergen and Tiedemann, *supra* note 127, at 3.

<sup>159</sup> COUNTERINSURGENCY FIELD MANUAL, *supra* note 16, ¶¶ 1–154.

There are barriers to making such a shift toward a joint-prosecution strategy, not least the continued reality of weak Pakistani government control over the tribal areas along its Northwest border. However, the possibility that it cannot be immediately implemented does not mean there should not be a strategic vision in place. The key is sustainability. As David Kilcullen has noted, viewed broadly, “Al Qaeda’s strategy is fundamentally based on trying to soak us up in a series of unsustainable interventions in various places around the world.”<sup>160</sup> Instead what is needed is “an approach of local solutions to local problems, working through a capacity building and local partnership.”<sup>161</sup> Over the next several years of its counterterrorism campaign in Pakistan, the United States should organize the legal tactics available to it in order to best develop these local solutions.

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<sup>160</sup> Aziz Haniffa, *Pakistan May Collapse in Three Months, Warns Expert*, REDIFF NEWS, May 7, 2009, <http://news.rediff.com/report/2009/may/07/pakistan-may-collapse-within-three-months-warns-expert.htm>.

<sup>161</sup> *Id.*