Chapter 1
Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force

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Contents

1.1 Introduction

Anwar al-Awlaki is a dual Yemeni-American citizen who has emerged in recent years as a leading English-language proponent of violent *jihad*, including explicit calls for the indiscriminate murder of Americans. According to the US government, moreover, he also has taken on an operational leadership role with the

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organization al Qaeda in the Arabian Peninsula (AQAP), recruiting and directing individuals to participate in specific acts of violence.

Does international law permit the US government to kill al-Awlaki in these circumstances? The larger issues raised by this question are not new, of course. The use of lethal force in response to terrorism—especially the use of such force by the United States and Israel—has been the subject of extensive scholarship, advocacy, and litigation over the past decade,[1] just as earlier uses of force in response to terrorism spawned their own literatures on this subject.[2] Yet we remain far from consensus. The al-Awlaki scenario accordingly provides an occasion for fresh analysis.

Part 1.2 opens with a discussion of what we know, based on the public record as reflected in media reports and court documents, about AQAP, about al-Awlaki himself, and about the US government's purported decision to place him on a list of individuals who may be targeted with lethal force in certain circumstances.[3] The analysis that follows largely assumes the accuracy of—and depends upon—these asserted facts.

Parts 1.3 and 1.4 review two distinct sets of international law-based objections that might be raised to killing al-Awlaki. Part 1.3 explores objections founded in the UN Charter's restraints on the use of force in international affairs, emphasizing Yemen's potential objections under Article 2(4) of the Charter. I conclude that a substantial case can be made, at least for now, both that Yemen has consented to the use of such force on its territory and that in any event the conditions associated with the right of self-defense enshrined in Article 51 can be satisfied. As to the latter, any attack must conform to the constraints of necessity and proportionality inherent in the self-defense right, and therefore an attack would not be permissible if Yemen is both capable and willing to incapacitate al-Awlaki.

Against that backdrop, Part 1.4 considers whether an attack on al-Awlaki would best be understood as governed by International Humanitarian Law (IHL) or

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[1] The recent scholarly literature on this topic is substantial. See e.g., Lubell 2010; Melzer 2008; O'Connell 2010; Paust 2010; Blum and Heymann 2010; Anderson 2009; Murphy and Radsan, 2009; Murphy 2009; Cassese 2007b; Kretzmer 2005; Guiora 2004. Reports and statements on the topic from advocacy groups and non-governmental organizations also are numerous. See e.g., Letter from Kenneth Roth, Executive Director of Human Rights Watch, to Barack Obama, President of the United States of America, *Targeted Killings and Unmanned Combat Aircraft Systems (Drones)*, 7 December 2010, available at http://www.hrw.org/sites/default/files/related_material/Letter%20to%20President%20Obama%20-%20Targeted%20Killings%20(1).pdf; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, Study on Targeted Killings, UN Doc. A/HRC/14/24/Add.6, at 3, 54, 85-86 (May 28, 2010). There has been at least one judicial decision directly addressing the topic, from the Israeli High Court's decision in the *Targeted Killings* Case. See HCJ 769/02 *Public Comm. Against Torture in Israel* v *Government of Israel* (*Targeted Killings* Case) [2005], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

[2] See e.g., Sharp 2000; Reisman 1999; Wedgwood 1999; Military Responses to Terrorism 1987, p 287 (transcript of debate sparked by US airstrikes in Libya in 1986); Paust 1986.

[3] Neither this nor any other part of the paper relies in any way upon classified information that may have been released into the public domain by Wikileaks.

International Human Rights Law (IHRL), and whether and when either body of law would actually permit the use of lethal force. Turning first to IHL, I begin with the question whether an attack on al-Awlaki would fall within IHL's field of application. That question is not easily resolved, but I conclude that the better view is that the threshold of armed conflict has been crossed in two relevant respects. First, it has been crossed in Yemen itself as between AQAP on one hand and the US and Yemeni governments on the other. Second, it has been crossed as well with respect to the United States and the larger al Qaeda network—and not only within the geopolitical borders of Afghanistan. Building from these premises, I then proceed to consider whether al-Awlaki could be targeted consistent with IHL's principle of distinction. I conclude that he can be if he is in fact an operational leader within AQAP, as this role would render him a functional combatant in an organized armed group.

Insofar as IHL is indeed applicable to an attack on al-Awlaki, I conclude that IHRL has no separate impact. In recognition of the fact that many critics will not accept the field-of-application analysis noted above, however, I do provide a stand-alone IHRL analysis. The central issues in the IHRL context, I argue, both concern the requirement of necessity inherent in IHRL's protection for the right-to-life, and in particular the notion of temporal necessity. First, does necessity require a strict approach to temporality, such that deadly force can be used only where the target is moments away from killing or seriously injuring others, or instead can the requirement of imminence be relaxed in the limited circumstance in which (i) there is substantial evidence that the individual is planning terrorist attacks, (ii) there is no plausible opportunity to incapacitate the individual with non-lethal means, and (iii) there is no reason to believe a later window of opportunity to act will arise. I conclude the case for the latter approach is compelling. A second question arises, however. Must the state's evidence link the person to a specific plot to carry out a particular attack, or is it enough that the evidence establishes that the person can and will attempt or otherwise be involved in attacks in the future, without specificity as to what the particulars of those attacks might be? The former approach has the virtue of clarity, yet could rarely be satisfied given the clandestine nature of terrorism. The latter approach necessarily runs a greater risk of abuse and thus perhaps justifies an especially high evidentiary threshold, but in any event it is a more realistic and more appropriate approach (particularly from the point of view of the potential victims of future terrorist attacks). Coupled with a strict showing of practical necessity in the sense that there is no realistic opportunity to instead arrest an individual, this analysis leads to the conclusion that al-Awlaki could indeed be targeted consistent with IHRL.

A final note before turning to the substance. This paper does not address the important domestic law questions raised by al-Awlaki's status as an American citizen, such as whether the US Constitution's Fifth Amendment entitles him to certain procedural protections before the government may attempt to kill him or whether AQAP falls within the scope of the September 18, 2001 Authorization for Use of Military Force (though the analysis that follows has implications for the latter question). Nor does it address policy considerations such as whether the use

of lethal force by the United States against al-Awlaki or others in Yemen would do more harm than good from a strategic perspective. Finally, this paper is not about drones as such; I do not address the legality of selecting any particular weapons platform—such as an MQ-1 Predator or an MQ-9 Reaper—to carry out an attack.

1.2 Why Might the US Government Target Anwar al-Awlaki?

Before coming to grips with the legal issues, a close review of the underlying fact pattern is in order. I begin below with a sketch of AQAP and its relationship with what we might call 'core al Qaeda' or, simply, 'al Qaeda', a topic that takes on significance in light of the US government's claim that a state of armed conflict exists between it and al Qaeda. Next, I review Anwar al-Awlaki's background and activities. Last, I survey what is known about the use of force by the United States in Yemen in relation to AQAP in general and al-Awlaki in particular.

1.2.1 AQAP in relation to al Qaeda

What is the relationship of the entity now known as AQAP to the entity we label al Qaeda? This is a difficult question for several reasons. As an initial matter, we lack access to the classified intelligence that would be most useful to answering it. Second, it is in any event difficult to map familiar notions of organizational structure on to al Qaeda. It might best be described as a network blending elements of hierarchy and centralization with elements of disaggregation, fluid individual relationships, and franchise-like connections to separate organizations, all against the backdrop of a larger, multi-faceted movement associated with violent Islamist extremism.[4]

For some entities that today bear the al Qaeda 'brand', the relationship is a relatively new phenomenon in which a previously-independent organization has for whatever reason decided to at least portray itself as part of the al Qaeda network. This appears to be the case, for example, with al Qaeda in the Islamic Maghreb (AQIM), which emerged in Algeria in the 1990s under the name the Salafist Group for Preaching and Combat and which aimed to overthrow the Algerian government.[5] The Salafist Group had no particular ties to al Qaeda until a few years ago when under pressure from declining membership and having a new leader, it reached out to al Qaeda.[6] An alliance was announced in September 2006,

[4] For a discussion, see Chesney 2007, pp 425, 437-445 (distinguishing al Qaeda from the larger 'global jihad' movement). See also Waxman 2010, pp 447-451 (arguing that disagreements about how to understand al Qaeda's structure complicate efforts to apply IHL).

[5] See Schmitt and Mekhennet 2009.

[6] See Whitlock 2007.

and by January the group had changed its name and reoriented its activities away from just Algeria.[7]

Contrast that with al Qaeda's history of direct involvement in Yemen. According to the 9/11 Commission Report,[8] the key figure in al Qaeda's early relationship to Yemen was Abd al Rahim al Nashiri, a citizen of Saudi Arabia who had fought against the Soviets in Afghanistan and then returned there in the mid-1990s with a group of fighters whom Osama bin Laden attempted to recruit into al Qaeda. Nashiri initially resisted swearing an oath of loyalty to bin Laden, and for a time went to live in Yemen. He later returned to Afghanistan, however, and eventually agreed to join al Qaeda. Sometime in 1998, Nashiri proposed to bin Laden that al Qaeda attack a US Navy vessel in Yemen, and bin Laden agreed. Eventually this resulted in the failed attack on the USS *The Sullivans* in January 2000 and the successful attack on the USS *Cole* in October 2000. Nashiri subsequently became 'chief of al Qaeda operations in and around the Arabian Peninsula', and continued to orchestrate attacks (including the bombing of a French ship) until he was captured in the United Arab Emirates in November 2002.

In the years immediately following Nashiri's capture, al Qaeda's operational activities in Yemen were limited. From roughly 2003 to 2006, al Qaeda focused its efforts on the Arabian Peninsula instead on Saudi Arabia, with Yemenis encouraged to travel to Iraq to fight.[9] Things began to change after some 23 imprisoned al Qaeda members escaped from a jail in Sanaa.[10] Many were recaptured, but two who were not—Nasser Abdul Karim al-Wuhayshi and Qasim al-Raymi—went on to establish 'al Qaeda in Yemen' in order to renew operations there. Wuhayshi had joined al Qaeda in the late 1990s, serving as a 'personal assistant' to bin Laden. Under his leadership, al Qaeda in Yemen began a series of attacks, including the murder of western tourists and an attack on the US embassy in Sanaa in 2008. At the beginning of 2009, moreover, Wuhayshi pronounced that al Qaeda operations in Saudi Arabia and Yemen were merging, and henceforth would operate under the collective heading of AQAP.[11] AQAP has, since then, been remarkably active, including but not limited to its attempt to destroy a US passenger jet bound for Detroit on Christmas Day 2009 and its 'cargo jet' plot in 2010 involving explosives hidden in packages shipped via overnight delivery services. As a Carnegie Endowment report emphasizes, however, the 'raised profile of the current incarnation of the organization should not detract from an awareness of al-Qaeda's enduring presence in Yemen'.[12]

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[7] See ibid.

[8] The account in this paragraph is drawn from the Final Report of the National Commission on Terrorist Attacks Upon the United States, at pp 152–153.

[9] See e.g., Harris 2010, p 3.

[10] BBCNews, Profile: al-Qaeda in the Arabian Peninsula (31 October 2010), available at http://www.bbc.co.uk/news/world-middle-east-11483095.

[11] See ibid.

[12] See Harris 2010, p 2.

The picture that emerges from this brief sketch is complicated. AQAP appears to be merely the latest iteration of al Qaeda's long-standing operational presence in Yemen, contrasting sharply with the lack of historical ties to al Qaeda when it comes to some other current al Qaeda franchises such as AQIM. On the other hand, AQAP appears to operate without direct lines of control running to bin Laden or other senior al Qaeda leaders. Whether it is best perceived as part-and-parcel of al Qaeda, then, or instead simply an affiliated but independent franchise, would depend on how one defines organizational boundaries in this context in the first place and how one interprets the information available as to this question.

1.2.2 Anwar al-Awlaki in relation to AQAP

At the time of the 9/11 attacks, Anwar al-Awlaki was an imam at a mosque in Northern Virginia. He soon became a public figure of sorts thanks to his public pronouncements condemning the 9/11 attacks from an Islamic perspective.[13] Over time, however, his publicly-stated views appeared to change, taking on an increasingly anti-Western tinge.[14] He left the United States, first for the UK and then later for Yemen. Today al-Awlaki is in hiding in Yemen, and far from denouncing indiscriminate violence he has emerged as a prominent English-language propagandist for violent *jihad*, calling for the indiscriminate murder of Americans and others.[15] According to the US government, moreover, he also has

[13] See e.g., Shane and Mekhennet 2010; Washington Post Live Online, 'Understanding Ramadan: The Muslim Month of Fasting With Imam Anwar al-Awlaki, Falls Church Dar Al-hijrah Islamic Center' (19 November 2001), available at http://www.washingtonpost.com/wp-srv/liveonline/01/nation/ramadan_awlaki1119.htm. See also Matthew T. Hall, *Former Local Cleric Seen as 'Bin Laden of the Internet'; Al-Awlaki Headed Mosque on S.D.-La Mesa Border* (Jan. 10, 2010) (noting that al-Awlaki had told *National Geographic* that '[t]here is no way that the people who did this [i.e., the 9/11 attacks] could be Muslim, and if they claim to be Muslim, then they have perverted their religion').

[14] See e.g., Brian Fishman, Anwar al-Awlaki, the Infidel, Jihadica Blog (20 November 2009), available at http://www.jihadica.com/anwar-al-awlaki-the-infidel/ (discussing al-Awlaki's 'personal ideological evolution' with reference to a pre-9/11 episode in which Abdullah al-Faisal, perhaps the most prominent English-language proponent of extremist *jihad,* sharply criticized al-Awlaki's relatively moderate views, as well as a 2004 interview with National Public Radio in which al-Awlaki cited the 2003 invasion of Iraq as having put western Muslims in a position where they are 'torn between solidarity with their religious fellowmen and their fellow citizens'). See also Rob Gifford, National Public Radio All Things Considered, *U.K. Muslims Struggle With Cleric's Radicalization* (24 December 2009) (noting that al-Awlaki was known as a relatively moderate cleric but that his views had grown 'increasingly hostile' to 'the West' over the years), available at http://www.npr.org/templates/story/story.php?storyId=121880241.

[15] See Shane and Mekhennet 2010. See also Alexander Meleagrou-Hitchens, Voice of Terror, www.foreignpolicy.com (18 January 2011) (arguing that al-Awlaki has become the most significant English-language propagandist of *jihad* in terms of Western audiences in particular), available at http://www.foreignpolicy.com/articles/2011/01/18/voice_of_terror. For a collection of al-Awlaki's videos, some with English subtitles or transcripts, see www.memritv.org.

become part of AQAP,[16] and not just as an ideologue or propagandist. The government asserts that he has taken on an operational leadership role in connection with specific attacks.[17]

The government's attention actually had been drawn to al-Awlaki much earlier. The FBI became interested in him in 1999 in light of a position he had held at an Islamic charity suspected of channeling money to extremists and because he had been in at least brief contact with individuals indirectly linked to both bin Laden and Omar Abdel Rahman, the so-called 'Blind Sheik' associated with the 1993 World Trade Center bombing and the 1995 landmarks-and-tunnels plot in New York City.[18] Two of the future 9/11 hijackers had attended a mosque in San Diego where al-Awlaki had been the imam, and apparently spent a substantial amount of time in conference with him.[19] The FBI ultimately concluded that these contacts were innocent, but not everyone involved in the investigation agreed.[20]

In any event, al-Awlaki's extremist views—whether pre-existing or newly developed—would not become widely known to the general public until media reports in late 2009 began to emphasize that the perpetrator of the Fort Hood massacre, Major Nadal Malik Hasan, had been in touch with al-Awlaki by email.[21] Soon thereafter, al-Awlaki gained still further notoriety when media reports asserted that he had been involved with Umar Farouk Abdulmutallab, the would-be 'Christmas Day bomber' who unsuccessfully attempted to ignite an underwear bomb on a flight in 2009.[22]

More recently, the US government has set forth its view that al-Awlaki is not merely a propagandist of *jihad*, but an active member of AQAP. In a declaration filed by the government in connection with the aforementioned ACLU lawsuit, the Director of National Intelligence asserts that:

> 'Anwar al-Aulaqi has pledged an oath of loyalty to AQAP emir Nasir al-Wahishi, and is playing a key role in setting the strategic direction for AQAP. al-Aulaqi has also recruited individuals to join AQAP, facilitated training at camps in Yemen in support of acts of terrorism, and helped focus AQAP's attention on planning attacks on US interests.'[23]

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[16] See *al-Aulaqi* v *Obama*, No. 10-cv-1469 (D.D.C. 25 September 2010), Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, Exhibit 1, Unclassified Declaration in Support of Formal Claim of State Secrets Privilege by James R. Clapper, Director of National Intelligence ('Clapper Declaration'), at § 14, available at http://www.lawfareblog.com/wp-content/uploads/2010/09/Exhibit-1.pdf.

[17] See e.g., Hsu 2010 ('Officials say Aulaqi … was an operational planner in last year's failed Christmas Day bomb plot against a jetliner over Detroit').

[18] See Shane and Mekhennet 2010.

[19] See ibid.

[20] See ibid.

[21] See Shane 2009.

[22] See Johnson et al. 2009.

[23] Clapper Declaration, supra n 16, at § 14.

The declaration adds that al-Awlaki personally instructed Abdulmuttalab 'to detonate an explosive device aboard a US airplane', as part of a larger shift toward an operational leadership role with AQAP.[24]

In May 2010, al-Awlaki for the first time in a public setting expressly endorsed the use of violence not just against American military targets but also against American civilians.[25] When asked whether he supports operations 'target[ing] what the media calls 'innocent civilians,' al-Awlaki responded:

> 'Yes. … The American people in its entirety takes part in the war, because they elected this administration, and they finance this war. In the recent elections, and in the previous ones, the American people had other options, and could have elected people who did not want war. Nevertheless, these candidates got nothing but a handful of votes. We should examine this issue from the perspective of Islamic law, and this settles the issue—is it permitted or forbidden? If the heroic *mujahid* brother Umar Farouk could have targeted hundreds of soldiers, that would have been wonderful. But we are talking about the realities of war. …
>
> For 50 years, an entire people—the Muslims in Palestine—has been strangled, with American aid, support, and weapons. Twenty years of siege and then occupation of Iraq, and now, the occupation of Afghanistan. After all this, no one should even ask us about targeting a bunch of Americans who would have been killed in an airplane. Our unsettled account with America includes, at the very least, one million women and children. I'm not even talking about the men. Our unsettled account with America, in women and children alone, has exceeded one million. Those who would have been killed in the plane are a drop in the ocean.'[26]

According to analyst Thomas Hegghammer, al-Awlaki is 'not a top leader in AQAP's domestic operations, but he is arguably the single most important individual behind the group's efforts to carry out operations in the West'.[27] Hegghammer explains that al-Awlaki 'is most likely part of a small AQAP cell—the Foreign Operations Unit—which specializes in international operations and keeps a certain distance to the rest of the organization'.[28] Indeed, he believes al-Awlaki may be the head of that cell, arguing that 'intelligence analysts familiar with his e-mail communications' have long suspected as much:

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[24] See *al-Aulaqi* v *Obama* (D.D.C. 25 September 2010) (Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss) (hereinafter Government's Brief), at 1 (asserting that 'since late 2009, Anwar al-Aulaqi has taken on an increasingly operational role in AQAP, including preparing Umar Farouk Abdulmutallab in his attempt to detonate an explosive device … on Christmas Day 2009'), 6 ('Since late 2009, Anwar al-Aulaqi has taken on an increasingly operational role in the group, including preparing Umar Farouk Abdulmutallab, who received instructions from Anwar Al–Aulaqi to detonate an explosive device aboard a US airplane over US airspace and thereafter attempted to do so aboard a Northwest Airlines flight from Amsterdam to Detroit on Christmas Day 2009, for his operation.'), 24 (referring to al-Awlaki as a 'senior operational leader') 29 n. 14 (same), available at http://www.lawfareblog.com/wp-content/uploads/2010/09/usgbrief.pdf.

[25] See Lipton 2010. For the video, see http://www.memritv.org/clip/en/2480.htm.

[26] Translation available at http://www.memritv.org/clip_transcript/en/2480.htm.

[27] Hegghammer 2010.

[28] Ibid.

> 'In public, Awlaki cast himself as an ideologue who supports armed struggle against the West, but is not directly involved in operations. In private, however, he has spent the past year actively recruiting prospective terrorists by e-mail and taking part in face-to-face indoctrination of operatives in Yemen.'[29]

1.2.3 The United States and the use of lethal force in Yemen

It is tempting to begin a discussion of the US government's use of lethal force in Yemen with the November 2002 incident in which, it appears, a US-operated drone fired a Hellfire missile into a vehicle traveling through the desert, killing the occupants.[30] Because of the lengthy fallow period that seems to have followed that attack, however, I will confine the discussion in this subsection to events beginning in late 2009.

The week prior to Abdulmutallab's unsuccessful attempt to take down a passenger jet on Christmas Day 2009, the government of Yemen claimed credit for conducting a pair of attacks on AQAP targets, including an airstrike meant to kill Wuhayshi, al-Shihri, and al-Awlaki.[31] The media reported that the United States also was involved (at least in terms of providing intelligence, but possibly more directly), and this prompted al-Awlaki's father to argue that it is illegal for the United States to attack its own citizens and that his son 'should face trial if he's done something wrong.'[32] Journalists near this time began to focus on whether the United States had orchestrated the attack to kill al-Awlaki and what legal grounds might support such a policy.[33] Then, a few weeks later Dana Priest of the *Washington Post* wrote an article asserting that:

> 'US military and intelligence agencies are deeply involved in secret joint operations with Yemeni troops who in the past six weeks have killed scores of people, among them six of 15 top leaders of a regional al-Qaeda affiliate, according to senior administration officials.'[34]

Priest described President Obama as having signed off on the December 24th attack on al-Awlaki's house, with the caveat that al-Awlaki was 'not the focus of

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[29] Ibid.

[30] See infra n 59 and accompanying text.

[31] See Raghavan and Jaffe 2009.

[32] Ibid.

[33] At a press conference in early January 2010, a reporter asked White House Press Secretary Robert Gibbs whether the government viewed al-Awlaki as merely inspirational or actually an operational figure, and whether the plan was to arrest, capture, or kill him. Gibbs declined to answer, citing intelligence concerns. See Briefing by White House Press Secretary Robert Gibbs, 8 January 2010, 2010 WLNR 525020.

[34] Priest 2010.

the strike'.[35] She went on to reveal, however, that al-Awlaki 'has since been added to a shortlist of US citizens specifically targeted for killing or capture by the [Joint Special Operations Command]'.[36] According to Priest's account:

> 'After the Sept. 11 attacks, Bush gave the CIA, and later the military, authority to kill US citizens abroad if strong evidence existed that an American was involved in organizing or carrying out terrorist actions against the United States or US interests, military and intelligence officials said. The evidence has to meet a certain, defined threshold. The person, for instance, has to pose 'a continuing and imminent threat to US persons and interests,' said one former intelligence official. The Obama administration has adopted the same stance. If a US citizen joins al-Qaeda, 'it doesn't really change anything from the standpoint of whether we can target them,' a senior administration official said. 'They are then part of the enemy.'[37]

Subsequently, Scott Shane of the *New York Times* reported that al-Awlaki had been added to a similar list maintained by the CIA on the ground that he had become personally involved in operational planning, that 'international law permits the use of lethal force against individuals and groups that pose an imminent threat to a country', and that the individuals on the CIA list 'are considered to be military enemies of the United States' within the scope of the Congressional authorization for the use of military force enacted after 9/11.[38]

In late March, State Department Legal Advisor Harold Koh gave a much-noted speech to the American Society of International Law in which he addressed in more detail the legal argument in favor of using lethal force in circumstances such as this.[39] Koh endorsed the propositions that 'the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces' and that the

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[35] Ibid.

[36] Ibid.

[37] Ibid. The Post subsequently posted a correction with the article: 'The article referred incorrectly to the presence of US citizens on a CIA list of people the agency seeks to kill or capture. After The Post's report was published, a source said that a statement the source made about the CIA list was misunderstood. Additional reporting produced no independent confirmation of the original report, and a CIA spokesman said that The Post's account of the list was incorrect. The military's Joint Special Operations Command maintains a target list that includes several Americans. In recent weeks, US officials have said that the government is prepared to kill US citizens who are believed to be involved in terrorist activities that threaten Americans.' Ibid. (posted at the top of the page).

[38] See Shane 2010. Invoking the principle that an unnamed government official explained that this 'was the standard used in adding names to the list of targets'. Ibid. Testifying before Congress 2 months earlier, Director of National Intelligence Dennis Blair had addressed this topic briefly. He explained that when an element of the Intelligence Community intends to take 'direct action against terrorists' in circumstances involving a US citizen, the relevant official seek 'specific permission' in light of factors including 'whether that American is involved in a group that is trying to attack us, [and] whether that American is a threat to other Americans'. Lake 2010.

[39] See Speech by Harold Hongju Koh, Legal Advisor, US Department of State, to the Annual Meeting of the American Society of International Law, *The Obama Administration and International Law* (25 March 2010), available at http://www.state.gov/s/l/releases/remarks/139119.htm.

United States 'may use force consistent with its inherent right of self-defense under international law'.[40] He then addressed the factors that the United States considers in connection with specific targeting decisions, describing this as a case-by-case process turning on such considerations as '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'.[41] Koh added that the proposed attack must also conform to 'law of war principles' including the principle of '*distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of attack', and the principle of '*proportionality,* which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated'.[42]

As Ken Anderson observed, Koh's comments seemed to affirm not just the existence of an armed conflict between the United States and al Qaeda, but also a long-standing US government position regarding the right to use force in self-defense even absent connections to an existing armed conflict.[43] The *Washington Post* editorial page subsequently praised the speech on similar grounds.[44] Others found his analysis unpersuasive.[45] The American Civil Liberties Union (ACLU), for example, wrote a letter to the President expressing 'profound concern about recent reports indicating that you have authorized a program that contemplates the killing of specific terrorists—including US citizens—located far away from zones of actual armed conflict. If accurately described, this program violates international law …'[46] Meanwhile, the UN's 'Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions'—Professor Philip Alston of New York University School of Law—produced a report for the UN Human Rights Council that advanced legal arguments relating to the use of force that in many ways appeared to conflict with the views of the US government, above all in connection with the use of force in response to terrorism in locations physically removed from conventional battlefields.[47] As Alston summarized things in a separate statement published on the ACLU's website:

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[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Anderson 2010a, b.

[44] Editorial 2010.

[45] See e.g., Heller 2010; Johnson 2010, (citing the ACLU's concern that Koh failed to explain the geographic boundaries of the authority to use force or the criteria for distinguishing legitimate targets from civilians); Milanovic 2010.

[46] Letter from Anthony D. Romero, Executive Director of the American Civil Liberties Union, to Barack Obama, President of the United States, 28 April 2010, at p 1, available at http://www.aclu.org/files/assets/2010-4-28-ACLULettertoPresidentObama.pdf.

[47] See Alston 2010.

> 'The United States has endorsed 'a broad and novel theory that there is a 'law of 9/11' that enables it to legally use force in the territory of other States as part of its inherent right to self-defence on the basis that it is in an armed conflict with al-Qaeda, the Taliban and undefined 'associated forces'. This expansive and open-ended interpretation of the right to self-defence threatens to destroy the prohibition on the use of armed force contained in the UN Charter, which is essential to the rule of law.'[48]

For a time in the fall of 2010, it appeared that the legality of killing al-Awlaki might be put to the test in a judicial forum. In late August, the ACLU joined forces with the Center for Constitutional Rights (CCR) to represent al-Awlaki's father in a suit against President Obama, CIA Director Leon Panetta, and Secretary of Defense Robert Gates, requesting, among other things, (i) a declaratory judgment to the effect that international law forbids the use of lethal force outside of armed conflict except insofar as the targets 'present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats',[49] and (ii) an injunction forbidding the use of lethal force against al-Awlaki except on those terms. The suit proved short-lived, however. Ultimately, the court did not reach the merits. Instead, it granted the government's motion to dismiss on the grounds that al-Awlaki's father lacks standing to invoke al-Awlaki's asserted rights and that the arguments in any event present 'political questions' that are not justiciable in the American legal system.[50]

That decision might yet be reversed on appeal, but in the meantime the legal questions generated by the decision to target al-Awlaki remain burning in the realms of policy and academic debate. All of which brings us to the question at hand: how best to think through the many threads of argument woven together under the heading of the international law applicable in the al-Awlaki scenario? A useful first step is to disaggregate those threads, distinguishing among those concerning the UN Charter's restraints on the use of force in international affairs, those involving IHL's *jus in bello* norms, and those involving IHRL.

1.3 Objections Founded in the UN Charter

Would the use of force by the US government against al-Awlaki in Yemen violate the UN Charter rules regarding the use of force in international affairs? The better view is that it would not.

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[48] Statement of UN Special Rapporteur on US Targeted Killings Without Due Process (3 Augustus 2010, at http://www.aclu.org/national-security/statement-un-special-rapporteur-us-targeted-killings-without-due-process.

[49] *Al-Aulaqi* v *Obama* (D.D.C. 30 August 2010) (Complaint) at 11, available at http://www.aclu.org/files/assets/alaulaqi_v_obama_complaint_0.pdf.

[50] See *Al-Aulaqi* v *Obama*, 727 F.Supp.2d 1 (D.D.C. 2010), available at http://www.lawfareblog.com/wp-content/uploads/2010/12/Al-Aulaqi-Decision-Granting-Motion-to-Dismiss-120710.pdf.

Article 2(4) of the United National Charter provides that member states 'shall refrain in their international relations from the … use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations' (which purposes are defined in Article 1 to include, among other things, the goal of 'maintain[ing] international peace and security').[51] Article 2(4) is subject to exceptions, however, including Article 51's preservation of the right of self-defense and the Chapter VII mechanism whereby the Security Council may authorize the use of force.[52] Commentators debate the efficacy of the resulting system,[53] but we can at least say that the general aim was to sharply constrict the circumstances in which force lawfully could be employed across borders.

1.3.1 Has Yemen consented to the use of force?

The legality of a US strike in Yemen at first blush might seem to turn on the plausibility of an Article 51 self-defense argument, there being no applicable Chapter VII Security Council resolution in this setting. But the need to make such an argument drops out if Yemen has effectively consented to the strike.[54] In that circumstance, there is no infringement of Article 2(4) in the first instance—no offense to Yemen's territorial integrity or its political independence, no threat to international peace and security insofar as the rights of member states are concerned—and hence no need to make exculpatory arguments under Article 51.[55]

The public record provides considerable reason to believe that the government of Yemen has given at least some form of consent to at least some uses of lethal force by the United States—or at least to the use of lethal force by US and Yemeni forces acting in cooperation—on Yemen territory. Whether that consent suffices

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[51] UN Charter, Arts. 1(1), 2(4).

[52] See UN Charter Arts. 39, 42, 51.

[53] Whether it has served this purpose in actual practice has long been the subject of debate. Compare e.g., Franck 1970, pp 809–810, with Henkin 1971, pp 544–545.

[54] See e.g., Alston 2010, p 12 § 37 ('The proposition that a State may consent to the use of force on its territory by another State is not legally controversial.'); Byers 2003, p 9 (asserting, in connection with a 2002 drone strike by the United States in Yemen, that the 'right to intervene by invitation is based on the undisputed fact that a state can freely consent to having foreign armed forces on its territory'); Murphy 2009, p 118; Dinstein 2005, pp 112–114.

[55] My position on the doctrinal role played by consent differs from that described by Melzer. Melzer refers to a general consensus to the effect that consent is an 'exculpatory circumstance' justifying action that infringes Article 2(4). See Melzer 2008, pp 41, 75. I argue, in contrast, that where a state consents there is no infringement of Article 2(4) in the first instance and hence no need for exculpation. See also Dinstein 2005, p 112. The result is the same in either case, of course.

for purposes of a UN Charter analysis, and whether in any event it extends to the al-Awlaki scenario are more difficult questions.[56]

Priest reports that '[s]hortly after the Sept. 11, 2001, attacks, [then-CIA Director George] Tenet coaxed [Yemen's President] Saleh into a partnership that would give the CIA and US military units the means to attack terrorist training camps and al-Qaeda targets.'[57] Pursuant to this agreement, the United States provided the Yemen security services with equipment and training, and Saleh in turn gave 'approval to fly Predator drones armed with Hellfire missiles over the country.'[58] This appears to explain how it then came to pass, in November 2002, that a Predator drone was in position to strike and kill a group of al Qaeda suspects—including one who was an American citizen—in a car moving through an isolated stretch of desert in Yemen.[59]

Even if we assume that some degree of consent to lethal strikes existed as of 2002, the extent to which it continues to exist today is subject to some uncertainty in light of the Yemen government's understandable desire to minimize the public's appreciation for the extent of American-Yemeni security cooperation—i.e., its desire for plausible deniability. As Priest recently summarized the situation, the 'broad outlines of the US involvement in Yemen' had become public knowledge at least by the end of 2009 but the full 'extent and nature of the operations' did not become known until she reported in early 2010 that:

> '[i]n a newly built joint operations center, the American advisers are acting as intermediaries between the Yemeni forces and hundreds of US military and intelligence officers working in Washington, Virginia and Tampa and at Fort Meade, Md., to collect, analyze and route intelligence. The combined efforts have resulted in more than two dozen ground raids and airstrikes.'[60]

These revelations put the Saleh administration in a difficult position, as Priest acknowledged:

> 'The far-reaching US role could prove politically challenging for Yemen's president, Ali Abdullah Saleh, who must balance his desire for American support against the possibility

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[56] I do not mean to suggest that demonstration of effective consent—or of the applicability of self-defense under Article 51—suffices to resolve all the international law questions associated with the al-Awlaki scenario. Part 1.4 below takes up a series of additional concerns sounding in human rights and humanitarian law. Some commentators may object to this sequencing, but I believe it to be the clearest way to proceed. Cf. Statement of Mary Ellen O'Connell, US House of Representatives, Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs (28 April 2010) (objecting to arguments involving Yemen's consent to a 2002 drone strike on the ground that 'States cannot … give consent to a right they do not have'); O'Connell 2010, pp 16–17 (arguing that consent to use military force in the form of a drone strike would be *ultra vires* absent the existence of armed conflict permitting the consenting state itself to carry out such an attack).

[57] Priest 2010.

[58] Ibid.

[59] See ibid. For an assertion that Yemen's government consented to that attack, see Fisher 2003.

[60] Priest 2010.

> of a backlash by tribal, political and religious groups whose members resent what they see as US interference in Yemen.'[61]

Indeed, just a few weeks earlier Yemen's Deputy Prime Minister for Security and Defense, Rashad al-Alimi, had insisted at a rare press conference 'that there are limits to [Yemen's] military cooperation with the United States, warning that any direct US action in this impoverished Middle East nation could bolster the popularity of Islamic militants.'[62] He conspicuously did not exclude the possibility of further U.S.-directed airstrikes or drone strikes, however.

By late summer 2010, the actual state of affairs became somewhat clearer. The *New York Times* in August published an article describing a 'shadow war' in Yemen in which at least four attacks ostensibly carried out by Yemeni government forces from late 2009 onward in fact had been conducted on a clandestine basis by US military personnel and assets, including cruise missiles and Harrier fighter jets, with the consent in each instance of the Yemeni government.[63] And though these strikes in one instance apparently involved significant civilian casualties, and in another the death of a provincial deputy governor, American officials asserted to the *Times* that President Saleh was 'not so angry as to call for a halt to the clandestine American operations'.[64]

Notably, the same report suggested that an internal US government debate was underway at that time with respect to the possibility of complimenting or even replacing the military's clandestine strikes—which are disclosed to and approved by Yemeni officials—with a CIA covert action program, at least in part in order to 'allow the United States to carry out operations even without the approval of Yemen's government.'[65] Then, after a failed attempt by AQAP to put bombs aboard cargo jets bound for the United States in October 2010, the media reported a new round of debate at the White House concerning the desirability of launching (or in this case, reviving[66]) a CIA-operated drone strike program in Yemen—including the possibility of seeking Yemeni government approval for such

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[61] See ibid.

[62] Yemen Warns US on Direct Intervention, Washington Post (7 January 2010). 'The statement underscored the rising concern among Yemen's leadership of a domestic backlash that could politically weaken the government and foment more instability. In recent days, top Yemeni officials have publicly downplayed their growing ties to Washington, fearing they will be perceived by their opponents as weak and beholden to the United States'. Ibid.

[63] See Shane, Mazzetti and Worth 2010. The article notes that the White House would have preferred to employ drones for these attacks, in light of their capacity to minimize deaths to innocent bystanders, but that the CIA's compliment of armed drones were tied up with operations in Pakistan. See ibid.

[64] Ibid.

[65] Ibid.

[66] The first new story to break this topic observed that drones had been absent from Yemen for years, apparently because of both the demands of combat elsewhere and the since in the mid-2000s that the presence of al Qaeda in Yemen had diminished. Miller et al. 2010.

strikes.[67] Insofar as this reflected a decision not to use force without notification to the Yemeni government, it might well have stemmed from the fact that President Saleh, according to two anonymous government officials, 'ha[d] shown a willingness to break off cooperation if the US undertakes operations on Yemeni territory without his approval.'[68] A separate, contemporaneous account added that drones actually had been redeployed to Yemen already, albeit under the military rather than the CIA's control, and that Yemen already had consented to their use should appropriate targets be located.[69]

Taken as a whole, these accounts provide substantial support for the following conclusions. First, the government of Yemen is eager for a host of understandable reasons to keep its cooperation with the United States out of the public's eye. Second, the government of Yemen nonetheless not only cooperates closely with US personnel in mounting its own counterterrorism operations but also permits US forces (the CIA in 2002, the military more recently) to use force directly, though subject to some form of notification-and-approval system. In those circumstances, it seems likely that the United States could make out a case for having consent to use force in the al-Awlaki scenario. A final consideration requires attention, however.

Let us assume that the United States government does receive *private* consent from the government of Yemen with respect to using force on its territory to kill al-Awlaki. Is a government's private consent, meant to be withheld from its own public, adequate to discharge the Article 2(4) concern?[70] Or does international law somehow require that consent be public?[71] Some scholars have argued that, as a matter of policy even if not legal obligation, consent ought to be given publicly and explicitly.[72] There are virtues to this position from a normative viewpoint,

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[67] See e.g., Cloud 2010; Barnes and Entous 2010. The Wall Street Journal account, notably, added the possibility of placing US special forces units under CIA authority in Yemen expressly in order to establish a capacity to conduct ground operations without disclosure to the Yemeni government. See ibid.

[68] See ibid. See also Barnes and Entous 2010, (noting the view of a US official to the effect that the Yemen government 'limit[s] us when we are getting too close,' and reporting that the Yemenis had 'delayed or objected to US operations' in some instances over the past year).

[69] See Miller 2010.

[70] Another issue that can arise with consent is fabrication – as when the request for intervention is made by a puppet government acting under the direction of the intervening state. Dinstein suggests that fabricated consent is invalid. See Dinstein 2005, p 114. There does not appear to be a basis for treating Yemen's consent as an American fabrication, however. Dinstein also notes that a separate issue arises to the extent that consent is coerced, and he specifically notes that there may be a sense of coercion in the scenario in which the intervening state is attempting to suppress terrorism and makes clear that it will intervene in any event on self-defense grounds if consent is not forthcoming; he does not claim, however, that this scenario would actually amount to coercion to the point of invalidating the consent. See ibid.

[71] See Murphy 2009, pp 118–120, for a thorough discussion of this question in the context of Pakistan.

[72] See Alston 2010, p 27 ('If a State commits a targeted killing in the territory of another State, the second State should publicly indicate whether it gave consent, and on what basis.'); National

including that it would remove doubt as to whether consent had been given.[73] This is, after all, an evidentiary issue that proved problematic in the context of the ICJ's consideration of the collective self-defense argument in the *Nicaragua* decision.[74] Requiring public and explicit consent would also tend to make the government of the consenting state more accountable—both domestically and internationally—for such decisions. Such accountability certainly can be viewed in positive terms, yet it also can have a substantial and undesirable cost where, as in both Yemen and Pakistan, it is likely that the domestic response would render cooperation impossible or at least far more difficult. In any event, neither the Charter nor any other instrument addresses this issue, and the case has not been made that state practice supported by *opinio juris* establishes any such requirement; the argument sounds in policy, not legal obligation.[75]

1.3.2 Does the right of self-defense apply?

In the event that a consent argument is unavailing—or becomes so in the future[76]—the question becomes whether the United States nonetheless may act in Yemen pursuant to the right of self-defense preserved in Article 51.

We might begin by asking: self-defense against whom? Certainly not the government of Yemen, which is America's ally (however imperfect or

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[73] See Murphy 2009, pp 118–119 (discussing the options for and difficulty of proving private or implicit consent in the context of Pakistan); O'Connell 2010b, p 18 (offering a similar warning).

[74] See Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua* v *US*), Jurisdiction and Admissibility, Judgment, 1984 ICJ 392 (26 November) §§ 165–166 (questioning whether the United States had indeed received a request for assistance from El Salvador, Costa Rica, and Honduras), § 199 (concluding that customary law requires an attacked state to actually request assistance from another state where the latter intervenes on the ground of collective self-defense), §§ 232–236 (concluding that El Salvador had not formally requested assistance until some period after the US intervention in Nicaragua began, and though the court conceded that 'no strict legal conclusions may be drawn from the date' it nonetheless took this as evidence of whether El Salvador previously believed itself to be the subject of an armed attack from Nicaragua).

[75] In the context of Pakistan, Professor O'Connell has raised an important and distinct concern as to the provenance of the host state's consent. Specifically, she has argued that whatever else might be true of consent, it must be the case that consent has been given by the proper domestic authorities rather than, say, some subordinate entity such as a military commander or security service official who may be acting contrary to the preferences of civilian authorities. See O'Connell 2009, ('Pakistani intelligence services or the military have apparently cooperated with the United States on strikes, but under international law, it should be the elected civilian officials who provide a state's consent for foreign military operations'). For present purposes, it suffices to note that the media accounts related above indicate that consent in the Yemeni context flows directly from Yemen's president.

[76] At the time of this writing, a wave of popular protests against authoritarian rule is sweeping through a number of Arab states, prompting President Saleh to declare in early February 2011 that neither he nor his son would seek the presidency in the 2013 election. See Kasinof and Bakri 2011.

constrained) in this endeavor. Rather, the argument is that the United States seeks to engage in self-defense against either al Qaeda or AQAP. But even if we assume that the United States has suffered an armed attack triggering Article 51 self-defense rights against al Qaeda or AQAP, does it follow that the United States can exercise those rights in Yemen's territory without Yemen's consent? I consider these issues in sequence below.

1.3.2.1 Self-defense against al Qaeda

If the United States invokes the right to act in self-defense in the al-Awlaki scenario, is it best to understand this in terms of defense against AQAP in particular or, instead, against al Qaeda more generally? From the US perspective, emphasizing core al Qaeda has advantages and disadvantages. The advantage is the relative ease of establishing that the United States has suffered an armed attack from that group. There seems to be widespread agreement that al Qaeda's 9/11 attacks constituted an 'armed attack' against the United States,[77] notwithstanding much-criticized suggestions by the International Court of Justice in other contexts to the effect that Article 51 should be read atextually to refer only to armed attacks committed by states.[78] Combined with overwhelming reason to believe that al Qaeda intends further attacks (and thus that a responsive use of force would not be

[77] See e.g., UN Sec. Council Res. 1368, S/RES/1368 (12 September 2001) (recognizing, in connection with the 9/11 attacks, 'the inherent right of individual or collective self-defence in accordance with the Charter); Murphy 2009, p 129; Meeting Summary, 'International Law and the Use of Drones,' Summary of the International Law Discussion Group Meeting Held at Chatham House (21 October 2010) (remarks of Michael Schmitt) at pp 5–6, available at http://www.chathamhouse.org.uk/files/17754_il211010drones.pdf; Paust 2009; Jinks 2003b. Mary Ellen O'Connell has argued that '[t]errorist attacks are generally treated as criminal attacks and not as the kind of armed attacks that can give rise to the right of self-defense,' but noting Israel's situation circa 2006 notes exceptions for circumstances in which the pace and nature of the attacks make then 'more than crime' and capable of implicating Article 51. O'Connell 2010, p 5. This raises the question whether the 9/11 attacks (or earlier al Qaeda operations), being part of a considerably more episodic pattern, would count as an armed attack on this model. Cf. ibid., p 3 n.4 (stating that Resolution 1368 'was useful in making a finding that the 9/11 attacks could give rise to a right of self-defense').

[78] The ICJ suggested as much in *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004 [2004] ICJ Rep, § 139 ('Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.'). See also Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of Congo* v *Uganda*) 19 December 2005 [2005] ICJ 116 §§ 146–147 (treating the question of the DRC's state responsibility as if dispositive, yet also explicitly reserving decision as to whether and when the right of self-defense extends to 'irregular forces'). For a thorough debunking based on text, state practice, logic, and policy, see Lubell 2010, pp 30–35. See also Wilmshurst 2006, pp 965–971 ('There is no reason to limit a state's right to protect itself to an attack by another state. The right of self-defence is a right to use force to avert an attack. The source of the attack, whether a state or a non-state actor, is irrelevant to the existence of the right.').

a mere matter of revenge), these circumstances suffice to trigger the right of the United States to use force in self-defense vis-a-vis al Qaeda. Focusing on al Qaeda as such also presents a difficulty in the al-Awlaki scenario, however, in that it requires not just linking al-Awlaki to AQAP but also linking AQAP to al Qaeda.

In light of the facts recounted in Part 1.2, there is room for debate regarding AQAP's status as 'part of' al Qaeda. Coming to grips with the organizational structure of a clandestine, non-state actor network of this kind is famously difficult, and international law does not necessarily provide a substantive standard by which to resolve this inquiry.[79] Even if the standard to be applied were clear, moreover, the most pertinent evidence relevant to that task is not likely a matter of public record. In these conditions, it is simply not possible to say that the US government is mistaken when it asserts that AQAP in indeed part-and-parcel of al Qaeda itself.

That said, focusing on AQAP as an extension of al Qaeda does not provide the strongest foundation for concluding that the United States may have Article 51 rights in this context. As I explain below, the argument is stronger when one focuses directly on the course of dealings between the United States and AQAP itself.

1.3.2.2 Self-defense against AQAP

Set aside self-defense arguments based on core al Qaeda and the 9/11 attacks. Can a distinct self-defense argument be mounted based directly on AQAP's own activities? This approach avoids the difficulty of establishing an adequate link between al-Awlaki and core al Qaeda, but it introduces the need to point to AQAP-specific activities as sufficient triggers for Article 51.

Has AQAP engaged in an armed attack against the United States *already*, such that there is no need to broach the question of whether international law permits the *anticipatory* use of force in self-defense in this context? Here we are assuming a categorical distinction between AQAP and core al Qaeda, and hence must focus attention on a much narrower set of attacks. Yet questions of attribution still arise. For example, may we add to AQAP's account the bombing of the *USS Cole* in Yemen in 2000, or the mortar attacks on and car bombing of the US embassy in Yemen conducted by AQAP prior to its adoption of this name? In light of the lineage discussed above in Part 1.2, it seems entirely appropriate to do the latter, and at least defensible to do the former. Combined with AQAP's attempts to destroy both passenger and cargo jets bound for the United States in 2009 and

[79] An argument might be made for borrowing the standards provided in international law for attribution to a state of a non-state entity's actions. It is not obvious that it makes sense to transpose such a test to this context, however, and in any event the rules for attribution of state responsibility are not entirely settled themselves. Cf. Cassese 2007a, p 649 (discussing the contrast between the 'effective control' test set forth in *Nicaragua* and the 'overall control' test set forth in *Tadić*).

2010,[80] the United States has a strong case for claiming that it has experienced multiple armed attacks at AQAP's hands. To be sure, none have reached the intensity of the 9/11 attacks in terms of the number of resulting deaths. That is hardly dispositive, however, unless one thinks that the 9/11 attacks somehow constant a floor in terms of the necessary number of casualties involved in the armed attack calculus. The successful attacks emanating out of al Qaeda's Yemen operations have themselves been quite deadly, and those that were foiled would have been at least as destructive. This should suffice.

1.3.2.3 What of Yemen's territorial interests?

What has been said thus far supports no more than the claim that the United States has the right to act in self-defense against both al Qaeda and AQAP in *some* location. It does not automatically follow, however, that the United States can exercise this right in any location whatsoever without respect to the rights of the state in whose territory it proposes to act. Could Yemen properly object under Article 2(4) if it were to withdraw or refuse its consent but the United States nonetheless reached into its territory to kill al-Awlaki?

On current conditions, the answer is no. To be sure, some have argued that a defending state acting under Article 51 may not attack a non-state actor in the territory of another state unless that other state is in a legal sense responsible for the predicate attack.[81] Mary Ellen O'Connell, for example, has written that '[e]stablishing the need for taking defensive action can only justify fighting on the territory of another state if that state is responsible for the on-going attacks,' and that '[i]t may well be that … a group launching significant, on-going attacks has no link to a state and so no state can be the target of defensive counter-attack'.[82] Let us call this the 'strict' position.

Critics of the strict position, in contrast, argue either that (i) there is no need to prove that the host state is legally responsible for the actions of a non-state actor on its territory so long as the defending state confines its response to the personnel or assets of the non-state actor rather than the host state or (ii) the responsibility of the host state is established in any event if it fails to take reasonable steps to suppress

[80] That these attempts failed at the last minute should in no way impact their characterization.

[81] See e.g., Meeting Summary, 'International Law and the Use of Drones', Summary of the International Law Discussion Group Meeting Held at Chatham House (21 October 2010) (remarks of Mary Ellen O'Connell) p 3 ('The ICJ has held on several occasions that the armed attack must be attributable to a state where any counterattack in self-defence occurs.'), 4 (The ICJ held in *Congo* v *Uganda* that Congo's failure or inability to take action against militants carrying out sporadic armed attacks in Uganda did not give rise to any right by Uganda to cross the border and attack the groups themselves.'). For additional sources for and against the strict position, see Brunnee and Toope 2010, p 295.

[82] O'Connell 2002, p 899.

the threat posed by the non-state actor.[83] The Chatham House Principles of International law on the use of force in self-defense provide an illustration:

> 'It may be that the state is not responsible for the acts of the terrorists, but it is responsible for any failure to take reasonable steps to prevent the use of its territory as a base for attacks on other states. Its inability to discharge the duty does not relieve it of the duty. … Thus, where a state is *unable or unwilling* to assert control over a terrorist organisation located in its territory, the state which is a victim of the terrorist attacks would, as a last resort, be permitted to act in self-defence against the terrorist organisation in the state in which it is located.'[84]

This position, notably, is consonant in important respects with the law of neutrality. Under the laws of neutrality, 'the region of war does not include the territories of neutral States, and no hostilities are permissible within neutral boundaries.'[85] Among other things, this means that participants in hostilities must not use the territory of a neutral for troop transit, communications, or recruiting, while the neutral state itself has a corollary obligation to stop the parties from using its territory for operational purposes.[86]

In a similar spirit, Michael Schmitt emphasizes that a state's right of territorial inviolability must be construed in light of its corresponding duty to the international community to ensure that its territory is not used as a base from which to cause harm to others.[87] On this view, the resulting capacity of the victim state to exercise its Article 51 rights on the territory of the host state is narrow, arguably requiring an ultimatum or *demarche* with a reasonable time period for response (though one can readily imagine circumstances where time does not permit this) and certainly requiring that force be limited if possible to the non-state actor rather than the institutions of the host state itself (though the defending state would have to be able to respond with proportional force if the host state used its military to

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[83] See e.g., Schmitt, supra n 77, p 6 ('It is true that the ICJ, in the *Wall* and the *Congo* cases, appears to have rejected the notion that the right to self-defence arises against an armed attack by a nonstate actor. Yet, those decisions were highly controversial and widely criticized. Indeed, strong dissenting opinions correctly pointed out that not only was the Court ignoring post 9/11 state practice, but that there was nothing in the text of the Article 51 which would indicate that an armed attack cannot be launched by a nonstate actor.'). See also Lubell 2010, pp 36–42; Paust 2010; Kreß 2010, p 248 (arguing that even prior to 9/11 self-defense extended to attacks from non-state actors) (citing, inter alia, Kreß 1995); Schmitt 2008a, pp 145–149; Dinstein 2005.

[84] Wilmshurst 2006, p 12 (emphasis added). The Chatham House statement expressly rejects a reading of *Democratic Republic of Congo* v *Uganda* that would preclude the use of force against a non-state actor on the territory of the host state absent evidence of the host state's legal responsibility for that non-state actor. It argues that the decision instead supports no more than the conclusion that absent legal responsibility the defending state's self-defense right does not extend to the host state as such. See ibid., at n 81. See also Schmitt, supra n 77, p 5.

[85] Dinstein 2005, p 26.

[86] See ibid. See also Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907), Art. 5.

[87] See Schmitt, 'Change Direction', supra n 83, pp 159–162 (citing, inter alia, *Corfu Channel (United Kingdom* v *Albania*), 1949 ICJ 4 (9 April)). See also Schmitt 2008b, pp 20–27.

attempt to stop the Article 51 action).[88] At the risk of oversimplification, in any event, we might collect these views under the heading of the 'broad' position.[89]

Significantly, the strict and broad approaches may not be as far apart as seems at first glance. To be sure, the strict state-responsibility position appears to preclude resort to force under Article 51 in another state's territory except in circumstances of state-sponsored terrorism or its practical equivalent, thus problematically failing to account for the need of states to respond militarily in some circumstances involving genuinely independent terrorist entities.[90] Yet at least some advocates of the strict state-responsibility position endorse a critical exception to that rule. As Mary Ellen O'Connell writes, a defending state may *also* use force against a non-state entity on another state's territory where that state 'cannot control the acts of groups on its territory', even if the state would not otherwise bear legal responsibility for the non-state actors actions.[91] This exception—which she refers to as the 'failed or impotent state'[92]—has direct application to Yemen's Shabwa province, where al-Awlaki is thought to be. The writ of the central government does not truly run there, thus providing ample grounds for the United States to argue that the 'failed or impotent' state exception applies and that it can as a consequence use force in self-defense against AQAP even if one demands satisfaction of the strict state-responsibility standard in other contexts.

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[88] See Schmitt 2008a, p 27. Note the difficult question of whether the defending state could avoid the obligation of an ultimatum or *demarche* to the host state in circumstances where the defending state suspects the host state will tip off the non-state actor or even use the warning to enhance its own capacity to repel an attack.

[89] The broad state-responsibility position, as described above, could be viewed simply as a very flexible substantive standard for demonstrating state responsibility or, instead, as an argument against requiring state responsibility in the first instance. The difference matters greatly, in that a finding of state responsibility opens the doors to actions directly targeting the state itself, whereas the point of arguing that state responsibility need not be shown is simply to explain why it is justified to attack the non-state actor within the state's borders, no more and no less. Cf. Schmitt 2008a, p 27 ('It may not strike any targets of the 'host' government, nor anything else unconnected with the terrorist activity.').

[90] See O'Connell 2002, p 900 (arguing that a state is responsible for a non-state actor's armed attack if (i) 'agents of that state were involved', (ii) the state 'sends persons to carry out the attack even if those persons are not the state's officials or agents', and (iii) the state 'has developed sufficiently close links with the group even if it does not control them', (citing the example of 'organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group') (quoting *Prosecutor* v *Tadić*, Opinion and Judgment, No. IT-94-1-T, § 137 (7 May 1997)). Cf. Jinks 2003a, pp 144–146 (observing that the US government chose to justify its actions against the Taliban in Afghanistan on grounds of state responsibility resting on a 'harboring'/'supporting' theory rather than the 'overall control' standard of the ICTY in *Tadić* or the 'effective control' standard of the ICJ in *Nicaragua*, and raising objections to this approach).

[91] See supra n 78, p 900–901 (citing the examples of Israeli actions against Hezbollah in Lebanese territory and Turkish and Iranian action against Kurdish entities in the Kurdish regions of Iraq during the interwar period).

[92] See ibid., p 901.

Even with the failed/impotent state exception, of course, important gaps remain between the strict and broad positions. First, the failed/impotent state exception does not necessarily encompass capable-but-unwilling host states (i.e., states that in theory could take effective action but choose not to do so out of sympathy, fear, or otherwise).[93] Even this difference may drop away, however, should one adopt the view that harboring or supporting a terrorist organization in any event suffices to satisfy any state responsibility requirement that might then attach; that is, the difference does not matter if one moves away from the control tests advanced in *Nicaragua* and *Tadić*.[94]

Second, and more problematically, evidentiary disagreements inevitably will arise as to whether the relevant conditions have been satisfied, whatever those conditions may be. As applied to the hypothetical scenario in which Yemen reduces or eliminates its cooperation with the United States, for example, the US government no doubt would argue that Yemen's writ does not effectively run to the Shabwa province and that it is not truly interested in suppressing AQAP in any event, whereas Yemen surely would deny both claims and would point to various actions undertaken against AQAP in that province as evidence. All of which would drive home the point that such disputes ultimately may turn on who if anyone gets to decide them, what standard of proof that decision-maker brings to bear, and what evidence is available. For better or worse, however, '[i]nternational law has no generally-accepted law of evidence' in this circumstance,[95] nor an authoritative forum for addressing such debates (except perhaps in the limited circumstances where the Security Council overcomes obstacles to its involvement or the International Court of Justice can properly assert jurisdiction).

1.3.2.4 Necessity and proportionality as inherent constraints on self-defense in the Article 51 setting

Assume for the sake of argument that the right of the United States to act in self-defense under Article 51 has been triggered (whether by core al Qaeda, AQAP, or both) and that any objection Yemen may have under Article 2(4) has been resolved. The next question is whether the manner in which the United States exercises that right is constrained by any considerations inherent in the self-

[93] Cf. Schmitt 2008b, p 1. See also Waxman 2009, pp 57–77 (discussing the absence of evidentiary legal standards with respect to use of force, including burdens of proof and their allocation).

[94] Cf. Jinks 2003a, pp 145–146 (discussing, and critiquing, the arguable post-9/11 shift away from 'control' to 'harboring' or 'supporting' as a standard for state responsibility). See also Henderson 2010, p 403 (contending that the Obama administration has carried forward the harboring standard).

[95] O'Connell 2002, p 895. O'Connell argues for adoption of a clear-and-convincing evidence standard in this context, as a matter of both law and policy. See ibid., pp 895–899.

defense concept itself (separate and apart from the IHL and IHRL considerations discussed below).

Neither Article 51 nor any other aspect of the Charter specifies such restraints. There is substantial consensus, however, that the *customary* right to self-defense enshrined in Article 51 requires compliance with conditions of necessity and proportionality.[96] Just what these elements require, however, and how they relate to identically-named requirements associated with IHL's *jus in bello* provisions and with IHRL, is less clear.

Consider first necessity. In the context of the customary right to self-defense, this element arguably entails two distinct inquiries. According to Murphy, 'the International Court of Justice and scholars typically first consider whether there are peaceful alternatives to self-defense, such as pursuing available diplomatic avenues'.[97] This aspect of the necessity inquiry is primarily a function of both the host state's *willingness* and its *actual capacity* to act effectively to suppress the threat. Both conditions must be satisfied. In most states they would be insofar as al Qaeda is concerned; France, for example, is both perfectly capable and willing to act against any al Qaeda threat that might turn out to be lurking within its borders, and hence the United States could not exercise Article 51 rights there. But not every state is both willing and capable of suppressing threats. Pre-9/11 Afghanistan provides an example of a government (albeit only a de facto regime) arguably able but certainly unwilling to act against al Qaeda. Current-day Somalia provides an example of a government (such as it is) that presumably is willing yet is entirely unable to act against al Qaeda. Pakistan arguably is a mixed case, with difficult questions regarding the extent of its willingness to act in the Federally Administered Tribal Areas and, in any event, substantial doubts surrounding its capacity to do so.[98]

Even if this first aspect of the necessity inquiry is satisfied, at least some observers contend that the analysis must continue with an inquiry into whether

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[96] See e.g., Oil Platforms (*Iran* v *US*) 2003 ICJ (6 November) pp 161, 198; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ (8 July) pp 226, 245; *Nicaragua*, 1986 ICJ, p 94. See also Alston 2010, p 14; Murphy 2009, p 127; Statement of Kenneth Anderson, US House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs (18 March 2010) p 5, available at http://www.fas.org/irp/congress/2010_hr/032310anderson.pdf. Note that I do not discuss arguments for an additional requirement of imminence where there has not yet been an actual armed attack and the 'defending' state is acting in an anticipatory mode. That is an important issue, but not one presented here given the attacks that already have been directed at the United States.

[97] Murphy 2009, p 127 (citing Dinstein 2005, p 237).

[98] See e.g., DeYoung 2010, (discussing conclusion in US government report to the effect that 'Pakistan still has not 'fundamentally changed its strategic calculus' regarding insurgent sanctuaries on its territory' and noting that 'Pakistan has long resisted US urging to launch all-out attacks against Taliban and al-Qaeda redoubts in the [FATA]'), available at http://www.washingtonpost.com/wp-dyn/content/article/2010/12/14/AR2010121407420.html.

attacking a particular target would be useful as a means of preventing further attacks.[99] This inquiry at least partially overlaps with the separate requirement of proportionality, however, and is better dealt with under that heading. Proportionality in self-defense does not require a precise identity between the scale of the predicate attack and the scale of the force the defending state intends to use,[100] but it does require some reasonable degree of relationship between them.[101] Furthermore, some take the view that as time goes by the 'proper *referent* of *ad bellum* proportionality changes with the nature and scope of the conflict.'[102] On this view, the measure of proportionality at some point becomes not the original attack but, rather, 'the object legitimately to be achieved.'[103]

How might one analyze the killing of al-Awlaki under this framework? Consider first whether killing al-Awlaki would be 'necessary' in both the senses described above—i.e., necessary in the sense that Yemen is unable or unwilling to act effectively to suppress the threat he poses, and separately in the sense that targeting him would advance the goal of preventing further attacks. The case for necessity at the *individual* level is relatively strong, assuming that one credits the US government's claims regarding al-Awlaki's 'operational' role in AQAP's violent activities. The more difficult inquiry is the case for necessity in the broader sense in which we examine Yemen's willingness and capacity to suppress AQAP. It is unclear whether the Yemeni government actually is willing to arrest al-Awlaki and otherwise to act to suppress the threat of AQAP.[104] Even if we assume that it is willing, however, that it is not enough without a corresponding capacity to effectuate the arrest. At least for the time being Yemen's weak central government appears to lack the capacity to enforce its will reliably in Shabwa (the province where al-Awlaki and other AQAP members are thought to be) and other relatively

[99] See Murphy 2009, p 127 (citing Judith Gardam, Necessity, Proportionality and the Use of Force by States 4–8 (2004)).

[100] See ibid., at p 129 ('"Proportionality" does not require that the force be a mirror image of the initial attack, or that defensive actions be restricted to the particular geographic location in which the initial attack occurred'.).

[101] See Sloane 2009, p 52 ('ad bellum proportionality asks whether the initial resort to force or particular quantum of force used is proportional to the asserted casus belli').

[102] Ibid., at p 68.

[103] Ibid. (citing Higgins 1994). See also Murphy 2009, p 128. But see Anderson 2009, p 5 (referring to the 'customary law standards of necessity and proportionality' in terms of 'necessity in determining whom to target, and proportionality in considering collateral damage,' adding that 'standards in those cases should essentially conform to military standards under the law of war, and in some cases the standard should be still higher').

[104] See Hendawi and al-Haj 2010, (indicating that 'some analysts' believe that Yemen is giving only a 'half-hearted effort' to capture al-Awlaki). Cf. 'Yemen Sentences Awlaki in Absentia,' al Jazeera (Jan. 17, 2011) (noting that Yemen has prosecuted al-Awlaki *in absentia*, sentencing him to ten years' imprisonment), available at http://english.aljazeera.net/news/middleeast/2011/01/201111713355833996 9.html.

remote provinces where AQAP members enjoy the protection of local tribes.[105] Ironically, if the United States succeeds over time in its efforts to improve the capacities of Yemen's security forces, this answer could change, undermining the self-defense argument under Article 51 in the scenario in which Yemen continues to pursue AQAP but withdraws or refuses to give its consent to some particular uses of force by the US[106]

Next consider the proportionality question. As an initial matter, targeted killing of particular individuals is a relatively small-scale form of self-defense in comparison to, say, regime change and occupation, and certainly in proportion to the violence AQAP has directed and attempted to direct against the United States. But what of the objection that such strikes might be counterproductive in that they might generate sympathy for AQAP and hostility toward both the US and Yemeni governments (because they generate collateral damage, for example)?[107] This is a crucial consideration from a *policy* perspective, but it is difficult if not impossible to see how it could be operationalized with any degree of rigor as a *legal* constraint. Direct US uses of force in Yemen—not to mention resulting civilian deaths—no doubt stoke local grievances and play into extremist propaganda narratives, but it is far from clear how one would translate the existence of this dynamic into a quantifiable output, let alone an output that could be compared with rigor to whatever benefits flow from such attacks.[108] None of this is to say that decisionmakers should ignore the possibility that short-term benefits may be outweighed by long-term costs, of course. That is an entirely appropriate consideration of policy judgment.

Establishing that the United States has the right to use force against al-Awlaki in Yemen by virtue of consent or Article 51 self-defense does not by any means end the analysis. It only resolves objections belonging to Yemen itself under the UN Charter. It remains to be considered whether international law considerations focused on al-Awlaki himself, whether founded in IHL or IHRL, prohibit the United States from killing him.

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[105] See e.g., *Yemeni Forces Kill Suspected al-Qaeda Militant*, CBC News (Assoc. Press) (13 January 2010) ('The San'a government has little control over Shabwa and large swaths of Yemen…. Powerful, well-armed tribes dominate extensive areas and bitterly resent intrusion by security forces.').

[106] See e.g., Baldor 2010, (discussing military and other aid to Yemen and the 'need to bolster that country's ability to track and battle militants').

[107] Mary Ellen O'Connell makes this argument in the context of drone strikes in Pakistan (though she does so under the rubric of the distinct proportionality inquiry required by IHL's *jus in bello* rules, which I discuss in Part 1.4). See O'Connell 2010, Testimony, supra n 72, p 5.

[108] Cf. Waxman 2008, pp 1365, 1387 and n 76 (citing Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (1999) § 48).

1.4 Objections Founded in Anwar al-Awlaki's Own Rights

Setting aside objections associated with Yemen's sovereignty, does international law permit the United States to use lethal force against al-Awlaki? In the pages that follow, I first consider whether such an act would fall within IHL's field of application and, if so, to what effect. I then turn to a discussion of the same issues under the heading of IHRL.

Note that I do not also provide in this Part a distinct treatment of self-defense as a separate paradigm potentially governing this question, above and beyond the discussion of self-defense already provided in Part 1.3 above. This is not to suggest that there are no circumstances in which targeted killing is governed in international law primarily by the necessity and proportionality considerations entailed by the self-defense paradigm.[109] On the contrary, those considerations will be the most significant ones (alongside any applicable domestic law) in circumstances where IHL is not applicable and where IHRL has either limited or no applicability (in light of, for example, extraterritoriality considerations). Self-defense, on this view, is not a *substitute* lens through which to consider a particular targeting decision, but rather a *supplemental* one.

1.4.1 Does IHL apply and, if so, to what effect?

Two overarching questions arise under the IHL heading. First, is the al-Awlaki scenario actually within IHL's field of application? Second, would IHL if applicable authorize or forbid killing in this circumstance?

1.4.1.1 Is the al-Awlaki scenario within IHL's field of application?

Writing in the *International Review of the Red Cross*, Sylvain Vite laments that IHL 'does not include a full definition of those situations that fall within its material field of application'.[110] Nonetheless, it is possible to describe conditions that appear to be generally accepted as predicates to recognition of an 'armed conflict' rendering IHL applicable. With respect to IHL governing *international* armed conflict, in Vite's words, 'the level of intensity required for a conflict to be subject to [that law] is very low'; it suffices that there has been a purposeful 'resort

[109] Cf. Anderson 2010a, b.

[110] Vité 2009, p 70. See also Melzer 2008, p 245 (noting absence of definitions for armed conflict and hostilities in IHL treaties).

to armed force between States,' however brief or limited the violence may be.[111] In the *non-international* setting, in contrast, a higher 'threshold of intensity' applies before the label 'armed conflict' attaches, in order to exclude circumstances of mere internal disturbance.[112] Building on the ICTY's *Tadić* decision, among other things, Vite concludes that this threshold breaks down into two key elements: '(a) the intensity of the violence and (b) the organization of the parties'.[113] Both must be 'evaluated on a case-by-case basis by weighing up a host of indicative data.'[114] Intensity, for example, might be assessed by factors including but not limited to the 'duration of the conflict, the frequency of the acts of violence and military operations, the nature of the weapons used, displacement of civilians, territorial control by opposition forces, the number of victims (dead, wounded, displaced persons, etc.)'.[115] Melzer adds that 'the threshold of violence that can be handled with law enforcement must be exceeded, and the use of military means and methods required', but cautions against treating sustained duration as a necessary condition.[116] Organization, in turn, might take into account the existence of a command structure, recruiting capacity, internal rules, and so forth.[117] Other analyses reach comparable conclusions.[118]

It may be that the US government adheres to a broader understanding of IHL's field of application, one encompassing even a single armed attack.[119] But even under a more restrictive approach, the argument that IHL governs the potential use of lethal force against al-Awlaki is strong. There are at least two arguments that should be addressed under this heading. First, one might argue that a stand-alone non-international armed conflict has come into existence in Yemen recently as a result of the increasing intensity of hostilities involving the US and Yemeni governments, on one hand, and AQAP on the other. Second, one might argue in the alternative that an attack on al-Awlaki would in any event be encompassed by a larger, long-running non-international armed conflict between the United States

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[111] Vité 2009, p 72 and sources cited therein. But see International Law Association Use of Force Committee, 'Final Report on the Meaning of Armed Conflict in International Law', 2010, p 18 ('Use of Force Committee Report), available at http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87. See also Melzer 2008, p 251.

[112] See Vité 2009, p 76; Melzer 2008, p 256.

[113] Vité 2009, p 76 (citing *Prosecutor* v *Tadić*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 70). See also ICRC Opinion paper 2008.

[114] See Vité 2009, p 76.

[115] See ibid.

[116] Melzer 2008, pp 256–257 (observing that 'even an isolated incident can exceptionally demand the application of IHL relative to non-international armed conflicts, in the instant case due to the particular intensity of the hostilities coupled with the high degree of military organization of the insurgents and the direct involvement of governmental armed forces') (citing the Inter-American Commission on Human Rights decision in *Abella (La Tablada)*.

[117] See Vité 2009, p 77.

[118] See e.g., Use of Force Committee Report, supra n 108.

[119] Cf. Sassoli 2006, pp 7–8.

and al Qaeda, the geographic boundaries of which derive solely from the Article 2(4) and Article 51 considerations discussed previously in Part 1.3.

A. Is there an armed conflict with AQAP in Yemen?

When the US began airstrikes and other, clandestine military interventions in Afghanistan in the fall of 2001, there were few if any who would deny that the circumstances amounted to armed conflict or that IHL governed those particular uses of force (though there was, famously, considerable disagreement as to whether that armed conflict should be categorized as a 'Common Article 2' international armed conflict implicating the full range of IHL, a 'Common Article 3' non-international armed conflict implicating the limited subset of IHL rules applicable in that context, or perhaps something else altogether).[120] In comparison, how do the interactions among the US government, the Yemen government, and AQAP compare?

As described above in Part 1.3, the US military beginning at least in late 2009 and continuing into 2010 on at least four occasions appears to have used airstrikes or ship-launched missiles to attack AQAP targets in Yemen (in addition to the 2003 drone strike attributed in the media to the CIA),[121] and the government of Yemen has to an unclear extent used its own military and security services to carry out attacks against AQAP targets during the same period.[122] AQAP, for its part, has sustained a relatively substantial pace of violence directed at the Yemeni government as well as foreign targets (including but not limited to US targets both within and outside Yemen). AQAP's attacks on US-specific targets are discussed above in Part 1.2.1. In addition, a recent statement from AQAP claimed responsibility in just the second half of 2010 for some 49 violent attacks on Yemeni security and government personnel and installations, including an attack on a regional governor that resulted in the death of eight soldiers in one instance.[123] Of course, one must take such claims with a grain of salt, mindful that they may be

[120] See e.g., Corn 2007, p 295; Chesney 2006, pp 708–713; Rona 2003, pp 58–63. For a review of the history of the international/non-international divide in IHL, see Bartels 2009, p 35.

[121] In a recent letter from President Obama to Congress provided 'consistent with' the reporting requirements of the War Powers Resolution, the President wrote that he 'has deployed US combat-equipped forces to assist in enhancing the counterterrorism capabilities of our friends and allies, including special operations and other forces for sensitive operations in various locations around the world'. See 'Letter from the President Regarding the Consolidated War Powers Report' (15 December 2010), available at http://www.whitehouse.gov/the-press-office/2010/12/15/letter-president-regarding-consolidated-war-powers-report. Yemen is not specifically mentioned, though the above-quoted section of the letter concludes by noting that a 'classified annex to this report provides further information'. Ibid. Of course, air and missile strikes in 2009 and 2010 presumably were not launched from within Yemen.

[122] See e.g., Jamjoom 2010.

[123] See 'AQAP Announces Responsibility for 49 Attacks in Yemen During 2010', Yemen Post (1 January 2010), available at http://yemenpost.net/Detail123456789.aspx?ID=3&SubID=2936.

exaggerated, perhaps substantially so. That said, the level of political violence in Yemen is substantial, and AQAP bears responsibility for at least some percentage of it.[124]

Allowing for uncertainties of attribution as to all of the violence described above, the case for satisfaction of the intensity criterion is substantial. Factors cutting in favor of satisfying the intensity criterion include the nature of the weaponry employed by the governments involved (especially the US military's use of air power), the extended period during which this violence has occurred, the frequency with which AQAP has engaged in attacks,[125] and the volume of deaths and injuries as a result of attacks by all parties. Other factors are indeterminate, and at least do not cut *against* a finding of adequate intensity. For example, it is difficult to decide what to make of the frequency-of-attack consideration with respect to uses of force by both governments: we lack good information on the operations of the Yemeni security services, and the frequency of attacks conducted by US forces (four attacks over 1 year that we know of) is a relatively small number in comparison to operations in, say, Afghanistan. Yet these numbers are far from *de minimis*. Similarly, the question of territorial control is a difficult one in this setting. The government's control over Shabwa and other provinces appears to be limited, but it does not follow that AQAP controls that territory; rather, it seems more accurate to say that various tribes control it and that some of these tribes harbor AQAP.[126] Whether that distinction should matter, so long as the state is excluded from control over its territory, is unclear.[127]

The case for satisfaction of the separate criterion of organization likewise is strong despite being subject to debate. This factor is exceedingly difficult to judge from the public record, an inherent problem when it comes to developing an understanding of the organizational structure of a clandestine non-state actor operating in a remote location, not to mention the conceptual uncertainty surrounding the very meaning of organization in such a setting. On one hand, AQAP plainly has a formal leadership structure. As noted in Part 1.2., Wuhayshi functions as the emir, and al-Shihri as his deputy. Other key figures include its military chief (Qassim al-Raymi), its chief bombmaker (Ibrahim Hassan Asiri), its chief ideologue (Ibrahim Suleiman al-Rubaysh), and its chief theologian (Adil al-Abab).[128] AQAP also has a discernible membership structure rooted in the requirement of an oath of allegiance (*bayat*) to Wuhayshi.[129] Gregory Johnsen, who has frequently

[124] Cf. Curran et al. 2011, (listing and sourcing dozens of instances of political violence in Yemen in 2010).

[125] Cf. Melzer 2008, p 270 (explaining that the concept of 'attack' encompasses the emplacement of explosive devices).

[126] See e.g., *Al-Awlaki* v *Obama*, No. 10-cv-01469 (D.D.C. Oct. 7, 2010) (Declaration of Prof. Bernard Haykel) § 8.

[127] One might also argue, though, that territorial control is a poor proxy for the 'intensity' inquiry, and should at most be used instead as a loose proxy for the 'organizational' inquiry.

[128] See Johnsen 2010a.

[129] See Johnsen 2010b.

criticized the US government's fixation on AQAP in general and al-Awlaki in particular,[130] nonetheless depicts AQAP as an increasingly cohesive and threatening organization:

> 'The organization, already the most regionally and economically representative of any group in the country, has only grown stronger over the past 3 years. Once disorganized and on the run, today al Qaeda members are putting down roots by marrying into local tribes and *establishing a durable infrastructure that can survive the loss of key commanders*. They have also launched a two-track policy of persuasion and intimidation, first by constructing a narrative of jihad that is broadly popular in Yemen, and second by assassinating or executing security officials who prove too aggressive in their pursuit of al Qaeda fighters.'[131]

To be sure, others take a different view. In a declaration submitted in support of the lawsuit filed by the ACLU on behalf of al-Awlaki's father, Bernard Haykel argues that AQAP 'is a fragmented group … best understood as … consisting of separate distinct gangs with different interests and no unified strategy.'[132] AQAP, Haykel continues, 'does not have an organizational chart that lays out its various levels of leadership, command and control or the various committees that manage [its] different affairs'.[133] On this view, AQAP is simply a 'movement', one that 'is not sufficiently coherent to be organized in a stable fashion'.[134]

Which of these views one finds most persuasive would seem to go far in determining whether one thinks that the organization criterion is satisfied in the AQAP scenario. But how to judge between them without additional information, such as classified intelligence available only to the government? In a litigation setting, of course, the allocation and nature of the burden of proof would come into play, as would evidentiary and other procedural rules that might impact the universe of information that a party would be able or willing to put forward to the decisionmaker. Outside that context, however, scholars, government officials, and other participants in the debate are left to grapple with the available information as best they can en route to reaching their own judgments as to whether the substantive legal standard has been satisfied. Ultimately, the most we can reliably say without additional information may simply be that the argument for satisfaction of the organizational criterion is strong yet contested.

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[130] See ibid.

[131] Johnsen Jan./Feb. 2010, (emphasis added).

[132] *Al-Awlaki* v *Obama*, No. 10-cv-01469 (D.D.C. 7 October 2010) (Declaration of Prof. Bernard Haykel) § 7.

[133] Ibid.

[134] Ibid. Haykel elsewhere has observed, on the other hand, that 'Al Qaeda has always had a presence in Yemen. The first attack was in 1992, in Aden, against American troops en route to the relief effort in Somalia. … Al Qaeda has a longstanding presence in Yemen through marital and ancestral connections. Its members have taken advantage of those links and the protection offered through the tribal system.' See Interview with Bernard Haykel on Yemen, The Browser: Writing Worth Reading (19 January 2011), available at http://thebrowser.com/interviews/bernard-haykel-on-yemen. Haykel's interview does make clear his view that Yemen should not be viewed through an al Qaeda prism. See ibid.

In sum, there is at this time a plausible argument for categorizing the relationship among AQAP and the US and Yemeni governments as a state of armed conflict (of a non-international character).[135] This in not, however, the only argument available for asserting the relevance of IHL to an attack on al-Awlaki.

B. Does IHL apply in Yemen by extension of an armed conflict with al Qaeda in Afghanistan or otherwise?

Imagine that in the midst of the Second World War, the United States learned that an aircraft carrier of the Imperial Japanese Navy was cruising in a remote region of the Pacific Ocean, one that had heretofore seen no hostilities of any kind. Imagine further that by sheer luck the United States had a carrier of its own within striking distance, and dispatched bombers to destroy the Japanese ship. No one would deny that IHL would govern that attack, notwithstanding its geographic remoteness from locations in which America and Japan were then engaged in sustained combat operations. Nor would the analysis change if the United States were to attack a Japanese vessel or military unit that for whatever reason had entered neutral territory in circumstances in which the neutral state proved unable or unwilling to enforce its neutrality.[136] In both cases, the nature and affiliation of the targets compels the conclusion that IHL would govern an attack on them; questions of geopolitical boundaries would enter into the discussion only insofar as the law of neutrality or other host-state sovereignty concerns might arise.

Nonetheless, questions of geography have become increasingly significant to debates over IHL's field of application in recent years thanks to anxieties associated with post-9/11 claims of a 'global war on terror'.[137] When the United States intervened in Afghanistan in the fall of 2001, no one seriously disputed the US government's claim that a state of armed conflict with the Taliban had arisen and that al Qaeda in at least some respects was involved in *that* conflict in *that*

[135] The US government largely avoided discussing merits questions in its brief in the *al-Awlaki* litigation. Notably, however, it did not explicitly advance the view that the United States, Yemen, and AQAP are enmeshed in a separate armed conflict (though it did refer to AQAP as a 'co-belligerent' of al Qaeda, as an alternative in the event the court did not accept that AQAP is part-and-parcel of al Qaeda itself; the co-belligerent characterization, arguably, is tantamount to an argument that conditions of armed conflict would be met vis-à-vis AQAP even if analyzed in isolation). See Government's Brief, supra n 24.

[136] These examples are inspired by Professor Michael Lewis, who emphasizes the example of the German pocket battleship the *Graf Spee*, which was penned by the British into the neutral port of Montevideo and then scuttled by her Captain when Uruguay's enforcement of its neutrality obliged him to put to sea. See 'Drone Warfare, Targeted Killings and the Law of Armed Conflict', Panel Discussion at the University of Virginia School of Law (2 November 2010), available at http://www.law.virginia.edu/html/news/2010_fall/drones.htm.

[137] See Waxman 2010, p 443 ('If the non-state terrorist threat is internationally dispersed, how far does self-defense authority extend? Answering these questions depends again on some critical assumptions about the organizational structure of transnational terrorist threats.').

location. But the US government's claim of a distinct armed conflict vis-à-vis al Qaeda alone—one that traced back as far as al Qaeda's 1998 'declaration of war' and that was relevant in contexts well-beyond Afghanistan—proved to be exceptionally controversial; perceptions that the US government claimed the existence of armed conflict not just with al Qaeda but with terrorism in general further aggravated such concerns.[138] The prospect that the United States might on this basis claim authority to kill or detain in circumstances physically removed from Afghanistan itself—as eventually occurred in locations such as Yemen and Somalia[139]—was deeply disturbing to many observers.[140]

The proper way to address such anxieties would be to insist upon rigorous adherence to the Article 2(4) and Article 51 considerations discussed above in Part 1.3. (thereby precluding the US government from resorting to force at its discretion on any state's territory), as well as rigorous adherence to IHL rules governing who may be targeted as an individual matter. Some observers, however, have pursued a different or at least additional line of argument, arguing that IHL's field of application should be geographically confined within the borders of the state(s) in which the predicate conditions for armed conflict (intensity and organization) are at any given moment satisfied[141]—thereby presumably (though not necessarily) leaving the use of force in other locations subject to IHRL.[142] On this model, IHL would govern American uses of force against al Qaeda in Afghanistan but not against al Qaeda in Yemen or anywhere else (so long as we assume that events

[138] Melzer's discussion of the Bush Administration's post-9/11 position illustrates both this perception and this concern. See Melzer 2008, pp 262–267. It is worth emphasizing, however, that the US government in its litigation positions in an array of post-9/11 cases has not claimed such broad authority, but rather has consistently referred to 'al Qaeda, the Taliban, and associated forces.' For a review, see Chesney 2011.

[139] See e.g., Priest 2010, ('Obama has sent US military forces briefly into Somalia as part of an operation to kill Saleh Ali Nabhan ….'); Lake 2010, ('One American … was killed by a US missile strike in Somalia.').

[140] See e.g., Balendra 2008; Vöneky 2007, p 747; Brooks 2004, p 675. Cf. Arimatsu 2009, p 157, (addressing similar issues in the context of Israel's Gaza Strip operations in 2008–2009).

[141] Consider, for example, Mary Ellen O'Connell's argument that IHL 'has a territorial aspect. It has territorial limits. It exists where (but only where) fighting by organized armed groups is intense and lasts for a significant period'. *Al-Awlaki* v *Obama*, No. 10-cv-01469 (D.D.C. 7 October 2010) (Declaration of Prof. Mary Ellen O'Connell) § 13. Thus the United States may well be able to act under color of IHL against al Qaeda in Afghanistan (given the manifest circumstances of armed conflict there) but it simply does not follow 'that the United States can rely on [IHL] to engage suspected associates of al Qaeda in other countries' such as Yemen without an independent determination of armed conflict in those locations. Ibid., § 14. See also ibid. ('The application of the law of armed conflict [i.e., IHL] depends on the existence of an armed conflict. Armed conflict exists in the territorially limited zone of intense armed fighting by organized armed groups.'). See also Roth Letter, supra n 1 (setting forth the position of Human Rights Watch in opposition to any claim of a geographically-unrestricted definition of an armed conflict with al Qaeda).

[142] As discussed in more detail below in Part 1.4.2, this may be an unsafe assumption insofar as key IHRL conventions are, in the views of some states, inapplicable extraterritorially, leaving IHRL to apply solely on the level of customary law.

there lack the intensity or organization required to make an independent case for the existence of armed conflict), even if we accept for the sake of argument that AQAP is part-and-parcel of al Qaeda or if we assume that undisputed members or leaders of al Qaeda are present elsewhere. On this model, notably, the eventual withdrawal of American forces from Afghanistan sooner or later would remove IHL from the equation even there.

This formalistic approach to IHL's field of application is problematic for several reasons. As an initial matter, the legal foundation for the position is unclear. It cannot easily be derived from treaty language, for example. State practice on this point is indeterminate at best. There are endless examples of a party to an existing armed conflict using force in the territory of another state which until then was not experiencing hostilities within its own borders, in order to prevent establishment of a safe haven.[143] In some such cases, the extraterritorial use of force standing alone was of such intensity as to independently satisfy any requirement that armed conflict exist within the other state's boundaries, making it impossible to say whether application of IHL would rest on that ground or instead on the ground that IHL governs all hostilities among the parties without regard to location.[144] On the other hand, in other instances the level of intensity of the extraterritorial hostilities may be too low to provide an independent foundation for recognition of an armed conflict (consider, e.g., the American special forces raid on an insurgent smuggling operation located in a Syrian village near the border with Iraq in October 2008).[145] Under the strict geographic model, IHL would not govern such raids, yet there is no basis for concluding that states apply or believe they should apply that approach in such circumstances.[146]

Caselaw, meanwhile, does speak to the issue indirectly, but in an indeterminate way. For example, several ICTY Trial Chamber decisions rejected arguments to

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[143] See Melzer 2008, pp 259–261 and examples cited therein. Melzer's treatment addresses a distinct issue—i.e., whether a non-international armed conflict necessarily loses its 'non-international' character in such circumstances.

[144] See ibid. p 260 (giving the example of Ugandan attacks on the Lord's Resistance Army in the Sudan (undertaken with Sudan's consent), and noting that 'both the intensity of the confrontation and the extent of the devastation remained those of an armed conflict').

[145] See e.g., Scott Tyson and Knickmeyer 2008.

[146] Ken Anderson summarizes this critique of the pedigree of the strict-geography model: 'I cannot say that these claims—although heroically urged by the advocacy groups and their academic allies—have a basis in the law of war as the US (or really, leading war-fighting states) has traditionally understood it. Certainly the State Department, under Harold Koh, no less, does not even entertain it. And even military lawyers who are very far from defending the Bush administration's war on terror do not endorse the "geographical" limitation. … Rather, the customary view of the US—and the traditional view of war-fighting states—has always been that the fight can lawfully go wherever the participants go. It goes where they go. "Battlefield" and "theatre of conflict" are not legal terms in the treaty law of war, not as limitations on the armed conflict itself. The law of war accepts as a practical reality that the armed conflict is where hostilities happen to take place, which means, of course, that the armed conflict is a reflection of hostilities and hostilities can be undertaken as a matter of jus in bello where the participants are.' Anderson 2010c.

the effect that IHL should be strictly confined to zones of geographic proximity to the actual conduct of armed activities, concluding instead that it applied throughout territory controlled by a party to the conflict no matter how remote from conflict.[147] On one hand, these decisions rejected the notion that proximity to actual hostilities is the relevant consideration for IHL's application, but on the other hand they did emphasize geographic borders (*de jure* or *de facto*) instead—but only in order to *expand* rather than contract IHL's field of application. These cases simply did not confront the question of whether IHL should also apply when parties to an armed conflict use lethal force against one another in new locations beyond their own respective borders.[148]

Nor is the policy argument for shifting to a strict-geographic model persuasive. On one hand, this approach is simply not necessary in order to prevent states outright from asserting the right to intervene military at their discretion on the territory of others. Article 2(4), in combination with the requirement of necessity entailed in the right of self-defense protected by Article 51, see to that concern adequately; the United States could not use force on a non-consensual basis in France, for example, as there is no basis for questioning France's capacity and will to act against al Qaeda members on its territory. Nor is the strict-geographic approach a sensible way to address concerns about the *individual* scope of targeting authority; such concerns can and should be addressed by a application of the principle of distinction and related concepts from within IHL itself, discussed below. On the other hand, the strict-geographic model does entail certain costs of its own, or at least certain risks. Most problematically, it invites parties to hostilities to position personnel and assets in the territory of other states in order to cloak them with the (potentially) more-protective regime of IHRL,[149] while simultaneously suggesting to states that any attacks they launch on such personnel or assets are more likely to be governed by IHL if the attacks are sustained and of high-intensity. At the same time, we should not assume that the actual effect of limiting IHL's field of application will be to expand the independent field of application of IHRL. The United States, it bears emphasizing, does not accept that its ICCPR obligations apply extraterritorially; removing Common Article 3 and the customary law of war from the analysis of lethal force in places like Yemen or Somalia accordingly may do more to undermine than enhance the goal of subjecting force to legal and humanitarian constraints (though the US military as a matter of policy conducts all operations in view of IHL even when not formally required).

The better view, then, is that when a state of armed conflict exists, attacks carried out by one armed force on the personnel of another should be governed by

147 For an overview, see Cullen 2010, pp 140–141.

148 See ibid.

149 'The reason for this traditional rule is obvious—if the armed conflict is arbitrarily limited in this way, then it invites combatants to use territory outside of the "armed conflict" as a haven.' Anderson 2010c.

IHL without respect to geography. Thus, if one begins from the assumptions that (i) the United States and al Qaeda are engaged in armed conflict at least in Afghanistan and (ii) AQAP is part-and-parcel of al Qaeda, it follows that IHL governs US attacks directed at AQAP in Yemen even if circumstances in Yemen in isolation otherwise would not amount to armed conflict. And conversely, IHL would *not* apply to those same attacks if either (i) the United States and al Qaeda are not engaged in armed conflict in some location or (ii) AQAP is not part-and-parcel of al Qaeda for this purpose.

Notably, this last scenario could well arise in the near future, depending on how events develop in Afghanistan. Just as combat operations in Iraq have drawn down and American forces are likely to be gone by the end of 2011, conventional combat operations in Afghanistan eventually will cease. Though the United States may well continue beyond that point to use drones, special forces, and other means to carry out strikes on al Qaeda targets in various locations including Afghanistan and Pakistan, it is of course possible that the tempo of such operations may be so limited as to raise doubt as to the continued existence of a state of armed conflict with al Qaeda. As discussed in more detail in Part 1.4.1.1, it would depend on how strictly one construes the intensity requirement. Similarly, were the nature of al Qaeda to change such that it cannot be said to satisfy the requirement of minimal organizational coherence, this too could unwind the basis for asserting the existence of armed conflict. None of which is to say that the United States would lose its right to act in self defense under Article 51 (or with the consent of a host state government). It would follow that IHL would no longer govern, however, leaving uses of force subject only to the necessity and proportionality requirements inherent in the right of self-defense (assuming the use of force was an exercise of that right) and, to the extent applicable, IHRL.

I discuss IHRL in considerable detail in Part 1.4.1 below. For the remainder of this subsection, however, I proceed on the assumption that an attack on al-Awlaki would indeed fall within IHL's field of application. But would an attack directed at al-Awlaki then be permitted?

1.4.1.2 Does IHL authorize or forbid killing al-Awlaki?

IHL regulates the use of force within armed conflict in numerous ways, most of which need not be addressed here.[150] One consideration that must be addressed, however, is the principle of distinction.

[150] IHL addresses the permissible means and methods of carrying out an attack, for example, including prohibitions on the use of indiscriminate weaponry or perfidious methods. See Dinstein 2010, pp 126–128, 229–234; Henckaerts and Doswald-Beck 2005, pp 244–250 (Rule 71 on indiscriminate weapons), ibid., pp 221–26 (Rule 65 on perfidy). IHL also requires that any specific attack satisfy the requirements of proportionality, meaning that an attack must not be expected to cause harm to civilians or civilian objects that 'would be excessive in relation to the concrete and direct military advantage anticipated'. Henckaerts and Doswald-Beck ibid., p 46

The principle of distinction is fundamental to IHL.[151] As summarized by the ICRC in its study of customary IHL, the principle requires that 'parties to the conflict must at all times distinguish between civilians and combatants', meaning that '[a]ttacks may only be directed against combatants' and not against civilians—though civilians lose this immunity so long as they are directly participating in hostilities.[152] The question, then, is whether al-Awlaki can be categorized as a combatant, and if not, whether he nonetheless can be said to be a civilian directly participating in hostilities in at least some circumstances.

The task of answering that question is more complicated than one might expect, for four reasons. First, there is disagreement as to whether the combatant category, or some functional equivalent to it, even exists in the context of non-international armed conflict. Second, assuming that the category does exist in the non-international setting at least for purposes of the principle of distinction, there is disagreement as to the conduct or status that places one within it. Third, there is disagreement as to whether combatants may be killed at any time (so long as not *hors de combat*) or if, instead, a 'least harmful means' constraint might apply in at least some circumstances as a result of the requirement of military necessity. And fourth, as to the civilian category, there is disagreement regarding the precise substantive scope and temporal bounds of the direct-participation concept. I consider each of these issues below, mapping them on to the al-Awlaki scenario along the way.

A. Functional combatants in NIAC

IHL draws a sharp distinction between international armed conflict (IAC) and non-international armed-conflict (NIAC). A conflict falls into the IAC category when at least one of the parties on each side of the conflict is a state.[153] The NIAC category, in contrast, encompasses armed conflicts pitting a state against a non-state actor or those pitting non-state actors against one another. Much turns on the distinction, at least in terms of IHL treaty law. Categorization as an IAC brings to bear the full range of provisions contained in the 1949 Geneva Conventions (and, for those

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[151] The ICJ identified it as one of two 'cardinal principles' of IHL in its 1996 *Nuclear Weapons* opinion, [1996] ICJ Rep., p 257.

[152] Henckaerts and Doswald-Beck 2005, p 3 (Rule 1).

[153] See Common Article 2. Additional Protocol I seeks to expand the range of the IAC category so as to include those NIACs 'in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the charter of the United Nations and the declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.' Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 1(4). The United States is not party to AP I, in no small part for this reason. See Newton 2009, pp 323, 349–350.

states party to it, the full range of Additional Protocol I as well). Categorization as a NIAC, in contrast, compels application only of Common Article 3 of the 1949 Conventions (and Additional Protocol II as well, if the state in question is party to that instrument and its higher threshold of application is met).

All of this matters for present purposes because NIAC is the category most likely to apply in relation to the al-Awlaki scenario (assuming one accepts that there is a relevant armed conflict in the first place),[154] and it is often asserted that combatant status does not exist in the NIAC context.[155] As summarized by the ICRC in its study of customary IHL: 'Combatant status … exists only in international armed conflicts.'[156] It might seem, then, that there is no need to tarry with a discussion of combatancy in the al-Awlaki scenario. But the situation proves more complex on closer inspection.

It certainly is true that states have traditionally resisted recognition of the *combatant's privilege* and eligibility for POW status for non-state actors who take up arms to challenge the state, thereby giving rise to a NIAC. Such armed resistance generally is deemed a criminal act under domestic law, and states have no desire to immunize or legitimize such conduct. As David Kretzmer explains:

> '[s]tates were, and still are, unwilling to grant the *status* of combatants to insurgents and other non-state actors who take part in [NIACs], as doing so would not only afford them an element of legitimacy, but would mean that they enjoy the two 'privileges' of combatants—immunity from criminal liability for fighting, and prisoner-of-war status when apprehended.'[157]

Combatancy has a further consequence, however, one that accrues to the *detriment* rather than the benefit of the combatant. Under the principle of distinction, a combatant lacks immunity from targeting and thus, unlike a civilian, can be targeted without reference to whether he or she is directly participating in hostilities at the time. States have no interest in resisting application of this rule to those who fight on behalf of a non-state actor; on the contrary, they have a tremendous incentive to insist upon it, lest one side of the conflict be deemed targetable at all times while the other enjoys immunity when not actually engaging in the fight.

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[154] If one takes the view that a stand-alone armed conflict exists involving the US and Yemeni governments on one hand and AQAP on the other, there is no doubt that it would constitute a NIAC. If one instead takes the view that the United States and al Qaeda are engaged in armed conflict (whether just in Afghanistan or more broadly) and that AQAP is part and parcel of al Qaeda for this purpose, the situation is still best described as a NIAC. See e.g., Roberts 2002, pp 204, 211 n. 36 (citing International Committee of the Red Cross, Aide Memoire to United States (19 November 2002) (concluding that the armed conflict in Afghanistan changed from an IAC to a NIAC as of the creation of a new government in June 2002)); *Hamdan* v *Rumsfeld*, 558 US 557, 629–630 (2006) (holding that Common Article 3 applied in relation to an al Qaeda detainee captured in Afghanistan).

[155] See e.g., Olson 2009, pp 197, 208.

[156] Henckaerts and Doswald-Beck 2005, p 11 (Rule 3).

[157] Kretzmer 2005, p 197.

And thus the question arises: can these distinct strands of combatancy—the combatant's privilege, eligibility for POW status, and lack of immunity from targeting—be disaggregated?

The ICRC's recently-published study of customary IHL calls for precisely this approach, and indeed suggests that it is customary law applicable in a NIAC setting. In the very same paragraph that states that there is no 'combatant status' in NIAC, the study expressly asserts that certain individuals nonetheless may be treated as combatants '[f]or purposes of the principle of distinction'.[158] To be sure, the study at this point begins to waffle, stating that this disaggregated approach is indeed the rule for the members of the State's armed forces, yet that state practice somehow 'is not clear as to the situation of members of armed opposition groups'.[159] Other observers, however, have no doubts on this point. Kretzmer argues that it 'seems almost self-evident that in [NIACs] there are indeed combatants, who, as opposed to civilians, may legitimately be targeted by the other side', and that these include the 'members of both the armed forces and the organized armed group' involved in that conflict.[160] Both sets of individuals, he says, may be attacked consistent with the principle of distinction, though it does not follow that they have the combatant's privilege or the right to POW status upon capture.[161] Notably, the ICRC's original commentary on Additional Protocol II expressed much the same view some years ago: 'Those who belong to armed forces *or armed groups* may be attacked at any time.'[162]

Melzer goes further. He not only endorses the disaggregated view—the 'functional combatant' model, in his parlance—as to both the state and non-state forces engaged in NIAC but also characterizes the contrary view (i.e., that all members of organized armed groups in the NIAC setting constitute civilians who may only be targeted while directly participating in hostilities) as 'a misconception of major proportions', one that 'necessarily entails a distortion of the fundamental concepts of 'civilian', 'armed forces' and 'direct participation in hostilities' and, ultimately, leads to irreconcilable contradictions in the interpretation of these terms'.[163] He also makes an important contribution by identifying the foundation of the disaggregated view in state practice. Explicitly rejecting the ICRC study's

[158] Henckaerts and Doswald-Beck 2005, p 11 (Rule 3).

[159] Ibid. p 12. The same section of the study notes that the UN General Assembly and other multilateral bodies have used the word 'combatant' in the NIAC setting, and observes that this reflects the view 'that these persons do not enjoy the protection against attack accorded to civilians' (but not that they also are entitled to the combatant's privilege or POW status). Ibid.

[160] Kretzmer 2005, pp 197–198.

[161] See ibid.

[162] ICRC, Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, at § 4789 (emphasis added).

[163] Melzer 2008, p 316.

conclusion that state practice on this issue is indeterminate,[164] Melzer argues instead that:

> 'even a cursory glance at almost any non-international armed conflict—be it in South East Asia in the 1960 and 1970s, in Central America in the 1980s, or in Colombia, Sri Lanka, Uganda, Chechnya or the Sudan today—is sufficient to conclude that governmental armed forces do not hesitate to directly attack insurgents even when [the latter] are not engaged in a particular military operation. In practice, these attacks are neither denied by the operating State nor are they internationally condemned as long as they do not cause excessive 'collateral damage.''[165]

The proposition that a 'functional combatant' category exists in NIAC received substantial further support with the publication of the *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, a document written by Melzer under the formal auspices of the ICRC.[166] The *Interpretive Guidance* emerged after a multi-year process involving consultations with a large body of IHL experts from a number of countries in coordination with the ICRC and the TMC Asser Institute. According to the notes from the 2008 experts' meeting, the 'functional membership approach [was] discussed extensively in previous Expert Meetings, and a certain consensus had emerged among many of the participating experts with respect to this issue'.[167] A 'few experts' had objected to recognition of a membership standard in this context, the notes indicate, but by this stage the debate nonetheless had come to focus on the details of how to define membership and certain question of verbiage.[168] Ultimately, an approach tracking Melzer's 'functional combatant' model was adopted in the *Interpretive Guidance*. At least some persons who are members of an 'organized armed group' belonging to the non-state party in a NIAC, on this view, are functional combatants subject to targeting without regarding to direct participation.[169]

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[164] See ibid., (observing that the customary IHL study appears to rest this conclusion on statements contained in military manuals, and pointing out that states are at pains not to suggest that insurrection and other forms of non-state violence can be legitimate and hence may be expected not to say anything in a manual that might be interpreted otherwise).

[165] Ibid., p 317, Melzer notes that there may be objections to such attacks also on the ground that the targets were not part of the 'military wing' of the enemy entity, but distinguishes this from objecting on the ground that no one should be attacked except while directly participating in hostilities.

[166] See International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009) (hereinafter Interpretive Guidance).

[167] Summary Report, Fifth Expert Meeting on the Notion of Direct Participation in Hostilities (Geneva, 5/6 February 2008), p 45.

[168] Ibid., pp 45–59.

[169] See Interpretive Guidance, supra n 166, pp 31–35.

Of course the organized armed group-approach does not enjoy universal approval.[170] It is sound, however, in light of its foundation in state practice and the absence of affirmatively contrary treaty language.[171]

What then follows from this approach when applied in the al-Awlaki scenario? If one proceeds from the assumption that AQAP (or al Qaeda) is an organized armed group engaged in an armed conflict with the United States—and that is the working assumption of this section—then at least *some* of its members may constitute functional combatants for the limited purpose of the principle of distinction and, hence, may be targeted without any showing that they are directly participating in hostilities at the time. Indeed, this appears to be precisely the view of the US government, which conspicuously states 'that AQAP is an organized armed group' in its brief in the *al-Awlaki* litigation.[172]

Even if we assume this analysis to be correct, however, it does not automatically follow that *all* AQAP members are functional combatants. Which of them would constitute functional combatants, and would al-Awlaki fall within that group?

B. The indeterminacy of functional combatant status

As noted above in the discussion of the conditions for recognition of an armed conflict, some degree of organizational coherence is necessary in order to be able to say in the first place that a non-state actor constitutes a party to such a conflict. Just because that organizational threshold is crossed, however, does not mean it will be easy to specify which persons associated with that party should be treated as functional combatants for purposes of the principle of distinction. Particularly where the non-state actor employs a decentralized network structure, and does its best to keep its membership and activities secret, difficult sorting questions are bound to arise.[173]

There are several models that could be used to resolve this issue. Melzer, to take one prominent example, argues for adoption of a 'continuous fighting function'

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[170] Cf. Lubell 2005, pp 737, 748, (noting existence of the arguments for functional combatancy in NIAC and commenting, with or without intended understatement, that 'although they might seem highly controversial, these views nevertheless do still exist and there is not yet enough consensus for them to be ruled out completely').

[171] One might object that it also lacks affirmative *approval* in treaty language, yet it is not clear why that should matter so long as one accepts Melzer's assessment of the relevant customary practice. In this regard, bear in mind Melzer's implied caution against neglect of *customary* IHL: 'the fact that IHL has become one of the most densely codified fields of international law … has given rise to a predominantly positivist approach to the determination of lawful conduct in situations of armed conflict'. Melzer 2006, p 100.

[172] Government's Brief, supra n 24, p 1.

[173] See e.g., Waxman 2010, pp 447–451.

(CFF) test,[174] and in the *Interpretive Guidance* we see this standard adopted under the slightly-more-familiar label 'continuous combat function' (CCF). On this model, not all persons associated with the non-state party would count as combatants for purposes of distinction. Rather, only those members who directly participate in hostilities on a regular base would so qualify; other group members would remain civilian.[175] From a policy perspective, the desirability of this approach of course depends entirely on how one interprets the concept of 'direct participation' and the requirement of continuity. As I will discuss in detail in Part 1.4.1.2 D., below, there is a substantial amount of controversy on this very question. Melzer argues, for example, that the CFF standard would exclude members or an organized armed group who function as 'political and religious leaders, instigators or militants[,] … financial contributors, informants, collaborators, and other service providers',[176] Kenneth Watkin, on the other hand, objects to an approach that would exclude those who perform support functions that routinely are performed by uniformed servicemembers in the regular armed forces.[177] The law on point, unfortunately, is simply not determinate enough to resolve that dispute. It is worth emphasizing, however, that both appear to accept that persons involved in actual operational planning may be covered.[178]

Other models are possible, aside from the CFF/CCF approach. One might, for example, treat all members of a non-state party as functional combatants rather than civilians, regardless of their particular function (either on the theory that function is malleable in such groups or that all functions are sufficiently related to violence for at least some groups). This approach presumably would be most tempting where the entity involved simply lacks fixed organizational divisions or where the entity in any event has little purpose other than to engage in violence. Again, however, IHL at this time does not appear to compel a definitive answer to the question. What is needed is a thorough account of state practice regarding targeting parameters in past NIACs. It may or may not be possible to construct such an account; to the best of my knowledge it has not yet been attempted.

What then is there to say about the al-Awlaki fact pattern, in light of this indeterminacy? One can still offer relative judgments. As an initial matter, the case for targeting him on combatant or combatant-equivalent grounds would be exceptionally weak if he is merely a supporter but not in some sense a member of AQAP or al Qaeda. If the government is correct that he has sworn an oath to

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[174] More specifically, he argues for resort to this approach in circumstances where it does not make sense from an organizational perspective to analogize the non-state actor's fighting forces to the state's regular armed forces, see Melzer 2008, p 321. The CFF test is, of course, much the same as the 'continuous combat function' (CCF) standard to which the ICRC refers in the Interpretive Guidance, see supra n 166.

[175] Melzer 2008, pp 320–321.

[176] Ibid.

[177] See Watkin 2010.

[178] This implies a relatively flexible conception of direct participation insofar as operational planning activity causes harm, by definition, indirectly.

follow AQAP, however, this will not be the case. If instead the facts show that he has *some* form of membership relationship but is engaged solely in propaganda and generalized recruiting, the case for targeting is stronger yet still relatively weak in the sense that such conduct would fail the CFF/CCF test and probably also most close variations of it. Again, however, the facts described in Part 1.2. suggest that this is not the case. On the contrary, they suggest that al-Awlaki has taken on an operational planning function. Insofar as this is correct, and insofar as it is a recurring function rather than an isolated incident, this would satisfy the CFF/CCF standard.

C. When if ever does a least harmful means test apply?

Let us assume for the sake of argument both that a form of combatancy exists in the NIAC setting and that al-Awlaki's operational role with AQAP suffices to place him in that status. Does it now follow that he may be targeted at any time under IHL? There is one further obstacle to consider. Does IHL in this context require a least-harmful-means test, such that the United States could not attempt to kill al-Awlaki so long as it might instead be possible to arrest him?

The suggestion that IHL might contain such an obligation has been sharply criticized,[179] but the matter became less certain in 2006 when the Israeli Supreme Court (sitting as the High Court of Justice) issued an opinion which could be read as asserting that IHL does indeed impose a least-harmful-means test in some contexts.[180]

In the *Targeted Killings* judgment, the court concluded that the relevant conflict was international in nature and that the non-state actors in question were not combatants but rather civilians who, by virtue of both being members of terrorist groups and having a continuing function involving violent acts, had lost their usual immunity from targeting.[181] That is to say, the court in *Targeted Killings* effectively applied a functional combatant test, but without embracing the language of combatancy. It nonetheless concluded that IHL in this setting imposes a least-

[179] See e.g., Hays Parks 2010, (explaining that 'no government has employed a use-of-force continuum with respect to the conduct of its soldiers in engaging enemy combatants or civilians taking a direct part in hostilities. Governments have accepted the treaty prohibitions against perfidy and on denial of quarter, but for very sound reasons have not seen the need for a use-of force continuum in armed conflict.'). Cf. Waxman 2008, pp 1387, 1413–1418 (discussing obligations to consider alternate means during military operations, and arguing that targeting law has evolved towards 'reasonable care' standard and methodologies 'to deal with the practical and moral problems of protecting innocent civilians from injury amid clouds of doubt and misinformation').

[180] See *The Public Committee Against Torture* v *Israel* (HCJ 769/02), Judgment of 14 December 2006 (hereinafter Targeted Killings judgment). Parks argues that the better reading of the opinion is that the court grounded the least-harmful-means test in Israeli domestic law alone. See Hays Parks 2010, p 793.

[181] See ibid., §§ 21, 26, 28, 30, 39.

harmful-means test, however, relying primarily on principles and doctrines derived from Israeli *domestic* law rather than sourcing deriving the principle from an independent IHL source.[182] This approach has generated considerable criticism,[183] but also an attempt at rehabilitation by Nils Melzer in both an article and in his treatise on targeted killing.[184]

Melzer's basic argument is straightforward. The least-harmful-means test, he asserts, follows from the IHL principle of military necessity.[185] Military necessity, in Melzer's view, is an undertheorized and oft-misunderstood principle.[186] It is widely-appreciated that claims of military necessity are *not* a justification for violations of IHL, of course.[187] In contrast, the distinct prohibitory aspect of military necessity—summarized in the US Army Field Manual on the Law of War as 'requir[ing] that [a] belligerent refrain from employing any kind or degree of violence which is not actually necessary for military purposes'[188]—is less well understood.[189] Properly conceived, Melzer argues, it entails a principle of humanity 'which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes'.[190] Thus the absence of immunity from targeting—whether for civilians who directly participate in hostilities or for combatants—'does not permit the senseless slaughter of persons not entitled to protection against direct attack where there manifestly is no military necessity to do so'.[191] Rather, it simply means that the attacker has the authority 'to use that kind and degree of force … which is reasonably necessary to achieve a legitimate military purpose with a minimum expenditure of time, life and physical resources'.[192] And by extension, Melzer contends, there is an obligation to attempt an arrest rather than to kill when the circumstances indicate a reasonable probability of success without undue risk.

This claim has been sharply criticized.[193] Even if we assume for the sake of argument that IHL *does* require a least-harmful-means analysis, however, this would not preclude an effort to kill al-Awlaki so long as he remains in remote areas of Yemen beyond the effective writ of the government yet within the

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[182] See ibid. § 60.

[183] See e.g., Ben-Naftali 2007, p 322; Schondorf 2007, p 301.

[184] See Melzer 2008, p. 317.

[185] See ibid., pp 95–112. Melzer also suggests that the test finds at least a degree of support in the maux superflus principle, see ibid., pp 96–97.

[186] See ibid., pp 100–101.

[187] See e.g., ibid., p 280, (discussing the discrediting of Kriegsraison geht vor Kriegsmanier).

[188] US Army Field Manual 27-10 (1956), § 3 (quoted in Melzer 2008, p 283).

[189] See ibid., pp 280–281.

[190] Ibid., p 108, (quoting Department of the Air Force, Air Force Pamphlet (AFP 110-31), 'International Law—The Conduct of Armed Conflict and Air Operations' (19 November 1976) § 1–3(2)) (quotation marks omitted).

[191] Melzer 2008, p 109.

[192] Iibd.

[193] See e.g., Hays Parks 2010. For Melzer's response, see Melzer 2010, pp 896–912.

protective—and well-armed—embrace of local tribes. Both the original *Targeted Killings* decision and Melzer's reformulation deny that the least-harmful-means obligation forces armed forces to run inappropriate risks, and both specifically note that the risks to be considered involve not just the prospect of harm to the attacking force but also the possibility that an attempted arrest could put surrounding civilians at greater risk.[194] In al-Awlaki's circumstances, it seems highly likely on the current understanding of the facts that an attempted arrest would be met with armed resistance that almost certainly would result in casualties for the arresting force (and quite possibly for bystanders as well). The US could resort to lethal force in that circumstance even under a least-harmful-means standard.[195] Should al-Awlaki be discovered in an area where the prospects for an arrest were manifestly different, of course, this analysis too would differ.

D. Civilians directly participating in hostilities

Some observers no doubt will reject the threshold proposition that a form of combatancy can exist in NIAC. From their perspective, al-Awlaki necessarily is a civilian whom IHL permits to be targeted only for such time as he directly participates in hostilities (DPH). Could the United States kill al-Awlaki under that paradigm?

The substantive and temporal bounds of DPH are not entirely agreed, unfortunately. As noted above, the ICRC's *Interpretive Guidance* document sought to bring clarity to the DPH issue.[196] But it did not entirely succeed. Many of the experts who participated in the consultations over the years declined to permit their names to be listed in the document, as they did not agree with certain positions it took.[197] Some have since published substantial criticisms.[198]

All that said, at least the basic outlines of DPH are clear enough and adequately identified in the *Interpretive Guidance*. At bottom, DPH refers to 'specific hostile acts carried out by individuals as part of the conduct of hostilities between parties

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[194] See Melzer 2008, pp 110–111. See also Targeted Killings Judgment supra n 180, § 40; Melzer 2010, pp 902–903.

[195] Melzer argues that states should be held to a higher standard of certainty regarding the need to resort to lethal force in lieu of a capture attempt where the circumstances resemble a non-combat scenario. See Melzer 2008, p 112. I am doubtful that IHL actually requires this even assuming that it otherwise does entail a least-harmful-means standard as a general proposition. But even so, the al-Awlaki scenario would likely satisfy that standard based on current factual assumptions.

[196] The papers of the working group convened by the ICRC and the TMC Asser Institute are collected online at http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm.

[197] See Hays Parks 2010, pp 784–785.

[198] See for example, the collection of critical essays published in Volume 42 of the New York University Journal of International Law and Politics (2010).

to an armed conflict.'[199] Unpacking that a bit, the *Interpretive Guidance* elaborates that an act of DPH must (i) be likely to cause harm (an adverse effect on military operations or injury to civilians), (ii) involve direct rather than indirect causation of that harm, and (iii) be carried out in support of one party to the conflict and to the detriment of another.[200]

Could al-Awlaki ever be said to have directly participated in hostilities under this standard? Propaganda and ideological activity on behalf of AQAP would not suffice, as the causal link between such activity and harm is, by nature, attenuated. But recall that al-Awlaki is not merely said to be a propagandist. The allegation is that he has taken on an operational leadership position within AQAP, enticing and directing individuals to engage in specific violent acts. The *Interpretive Guidance* states that 'where persons are specifically recruited and trained for the execution of a predetermined hostile act … such activities [can] be regarded as an integral part of the act and, therefore, as direct participation in hostilities'.[201] It is not precisely clear whether this language means to refer to the act of being so trained alone, or also encompasses providing such training as well. That said, there is not much logic in including the former while excluding the latter, and hence the better reading is the inclusive one. Under it, even if al-Awlaki constitutes a civilian, he might be targeted at least for some period of time (again, assuming the existence of a relevant armed conflict and the accuracy of the allegation of operational leadership).[202] But for precisely how long?

Defining the temporal parameters of such plot-specific leadership activity is almost a metaphysical endeavor. The act of 'participation' could be defined strictly with reference to the moment that al-Awlaki is interacting with the person who actually will carry out an attack, or might at the other end of the spectrum be extended to the entire period during which an operation is conceived, orchestrated, and executed. But however it is measured, al-Awlaki presumably is not engaged in such conduct at *all* times, and perhaps only is engaged in it for brief periods when it does occur. Thus the question arises whether he merely loses civilian immunity from targeting for such times as he is so engaged, or if instead a recurring pattern of engaging in DPH might divest him from targeting immunity on a sustained basis.

The general rule associated with DPH is that one loses immunity from targeting only for such time as the activity constituting DPH lasts.[203] Absent some exception, then, al-Awlaki could be targeted while involved in directing particular plots,

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[199] Interpretive Guidance, supra n166, p 45.

[200] See ibid., p 46.

[201] Ibid., p 53.

[202] Note, however, that there is no good argument for targeting al-Awlaki so long as one understands DPH to refer solely to conduct the temporally-immediate consequence of which is to cause death or injury to others.

[203] See ibid., p 70.

but during interim periods would be immune from targeting. There would be, for him, a revolving door of immunity.

Is there, or should there be, an exception to this revolving-door dynamic?[204] The revolving door feature of DPH is relatively unproblematic so long as one accepts the view that a non-state party's armed forces are not civilians but functional combatants for purposes of the principle of distinction; in that case, the revolving-door phenomenon arises only to a limited extent (i.e., in cases involving individuals not associated with the non-state party to the conflict) and might therefore be defended as a worthy price to pay in order to ensure maximum protection for the broader civilian population. And the functional combatant approach is, of course, precisely the approach taken by the ICRC in the *Interpretive Guidance*, as well as by me in Part 1.4.1.2 A., above. If one refuses to recognize a functional combatant category for the armed forces of a non-state party to a NIAC, however, then strict adherence to the revolving-door rule becomes considerably more problematic. If every single person who fights for a non-state party to a NIAC is a civilian who can only be targeted while engaged in DPH, and continuously benefits from revived immunity no matter how routinely they return to the fight, the resulting unlevel playing field would prove untenable in practice, undermining adherence to IHL in general and thereby decreasing protections for genuine civilians. Thus some have argued that at least some if not all members of the armed forces of a non-state party to a NIAC should be deemed to be directly participating at all times (either by expanding the range of conduct qualifying as direct participation so as to encompass some or all kinds of membership, by significantly expanding the temporal duration of the loss of immunity from more discrete acts of DPH, or both).[205] This argument makes sense from a policy perspective, but it remains to be seen whether IHL, *lex ferenda,* will move in that direction. In terms of IHL as it currently exists, the case for targeting al-Awlaki as a civilian direct participant in hostilities would seem to stand or fall on whether one accepts that planning activity can qualify as DPH—an argument that certainly is colorable, though not beyond dispute.

1.4.2 Does IHRL apply and, if so, to what effect?

If as argued above IHL is applicable to an attack on al-Awlaki, then there is no need for a distinct IHRL analysis; pursuant to the *lex specialis* principle, any applicable IHRL right would in that circumstance need to be construed in

[204] See ibid.

[205] The Interpretive Guidance rejects such expansions of DPH, but of course it does so while also embracing the functional combatant concept as an alternative means of addressing this issue. See supra n 166.

conformity with IHL.[206] But if facts were to change, or if one did not accept that IHL applies even on the facts asserted above, a stand-alone IHRL analysis would then be necessary.

As an initial matter, there is no question that IHRL constrains the ability of states to kill. Article 6 of the International Covenant on Civil and Political Rights (ICCPR), for example, provides that '[e]very human being has the inherent right to life,' that '[t]his right shall be protected by law', and that '[n]o one shall be arbitrarily deprived of his life'. The direct relevance of the ICCPR in the al-Awlaki scenario is doubtful, however, since the action at issue would take place in Yemen and the United States has long taken the position that the ICCPR has no extraterritorial application.[207] Others take a different view on the territoriality question, but the persistence of the US interpretation—not to mention its consistency with the plain language of the ICCPR—undermines any claim that the United States somehow has become bound to a broader understanding against its wishes. In light of this, the case for subjecting an attack on al-Awlaki to an IHRL analysis is much stronger if one proceeds instead from the premise that the right to life is a customary norm. Whether this move suffices to escape the extraterritoriality objection is not entirely clear,[208] but for the sake of argument the discussion proceeds as if it does.

Commentators summarizing the conditions that must be satisfied in order to use lethal force under an IHRL right-to-life paradigm typically emphasize three requirements: legality, proportionality, and necessity.[209] I address each in turn.

1.4.2.1 Legality and the domestic law foundation for an attack

Consider first the legality criterion, which requires that there be a domestic law foundation for using lethal force.[210] In al-Awlaki's case, the US government has identified two such foundations, one explicitly and the other only indirectly.

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[206] For a discussion of *lex specialis* in this context, see Hays Parks, pp 797–798, and sources cites therein at nn 85 and 86.

[207] See e.g., See UN Hum. Rts. Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Reports of States Parties Due in 1993, Addendum: United States of America, 12–25, UN Doc. CCPR/C/81/Add.4 (24 August 1994) (considering US report submitted 29 July 1994) (hereinafter UN Hum. Rts. Comm.).

[208] The 'Law of War Handbook' states that '[i]f a specific human right falls within the category of customary international law, it should be considered a 'fundamental' human right' and as a result 'it is binding on US forces during all overseas operations. See Law of War Handbook 2004, p 279. See also Lubell 2005, pp 737, 741 (noting similar statement in another US military advisory manual). Cf. Hansen 2007, pp 32–33 (arguing that 'if states have agreed that a given human rights treaty applies only within a state's own borders, no party should be forced to provide rights enumerated in the treaty outside its borders' unless the right in question has obtained the status of a 'fundamental' right constituting a 'peremptory norm').

[209] See Melzer 2008, pp 174–175, see also 100–102. Melzer also discusses a requirement of precaution. The precaution requirement arguably could be encompassed by the necessity inquiry, however.

[210] See ibid., p 225.

In a brief submitted in the lawsuit filed by al-Awlaki's father, the government explicitly asserted that an attack on al-Awlaki would be justified under domestic law by the September 18, 2001 Authorization for Use of Military Force statute (AUMF), which authorized the use of 'all necessary and appropriate force' against those entities determined by the president to have been responsible for the 9/11 attacks.[211] As the brief explained, the AUMF would apply in al-Awlaki's case because (i) al-Awlaki has become an operational leader of AQAP and (ii) 'AQAP is an organized armed group that is either part of al Qaeda, or is an associated force, or co-belligerent, of al-Qaeda …'[212]

Whether this argument persuades depends on two considerations. First, are these factual predicates accurate? I proceed on the assumption that they are, based on the review provided in Part 1.2 above, but note that the argument for legality based on the AUMF would collapse if either al-Awlaki proved not to be part of AQAP or AQAP proved not sufficiently related to al Qaeda so as to come within the AUMF's substantive scope; in that case, it would be necessary to resort to the alternative domestic legal foundation discussed below. In the meantime, however, assuming that the requisite relationship exists, the argument for legality under the AUMF raises a second question: Does the AUMF actually convey (as a matter of domestic law) the authority to use lethal force? If one takes the view that there is an underlying armed conflict with al Qaeda or with AQAP sufficient to implicate IHL, it is easy to answer that question in the affirmative. One can simply argue that the AUMF incorporates IHL by implication (whether as directly controlling law or simply as a source for interpretive insights).[213] But what if one does not believe there is a relevant armed conflict? That is, after all, the working assumption of *this* subsection.

In that case, one could no longer point to IHL as directly relevant. Yet the sweeping delegation of authority to use military force in the plain language of the AUMF would remain, and it is simply not plausible to read that language as conveying *no* authority to use military force or to convey such authority only insofar as the executive branch might choose to use it on a scale sufficient to clearly implicate IHL. Put simply, the AUMF's plain language suffices to convey domestic law authority to use lethal force without an implied precondition that such force be used only if there happens to be a preexisting state of armed conflict or the government is prepared to use force on such a sustained basis so as to generate one; particularly given the recent memory of the Clinton Administration's episodic use of military force against al Qaeda in 1998, the more plausible assumption is that the broad language conferred on the President the authority to engage in both low- and high-intensity uses of force.

What if one rejects this analysis, or if the facts change such that the AUMF no longer remains sufficiently relevant to provide domestic legal authority for an

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[211] See Government's Brief, supra n 24, p 4.

[212] Ibid., p 1.

[213] Cf. Bradley and Goldsmith 2005, pp 2088–2101 (discussing the interpretive relevance of IHL for the AUMF).

attack on al-Awlaki?[214] In that case, the requirement of legality would have to be satisfied by some *other* domestic law source. Perhaps anticipating such an argument, the government in its brief in *al-Awlaki* writes that:

> '[i]n addition to the AUMF, there are other legal bases under US and international law for the President to authorize the use of force against al Qaeda and AQAP, including the inherent right to national self-defense recognized in international law (see e.g., United Nations Charter Article 51).'[215]

The brief does not elaborate the point, leaving a question as to the alternative 'US' law foundation its authors had in mind. One plausible reading is that they meant for the reference to self-defense under Article 51 to be an example of *both* an international and a US law basis for an attack. This is not an implausible reading, insofar as the UN Charter is deemed to be 'supreme law of the land' under the Supremacy Clause.[216] Even if one rejects it, however, it is not difficult to guess what the authors may otherwise have had in mind. National self-defense is not merely an international law concept under the Charter, but also a domestic constitutional law concept concerning the circumstances in which the President has not just the power but also the duty under Article II of the Constitution to use at least some degree of military force without awaiting legislative authorization.[217] In light of AQAP's repeated attacks on the United States and the certainty that more such attacks will follow, a very strong argument can be made that the President's duty to use force to defend the nation has been implicated, much as was the case when in 1998 when the Clinton Administration, despite lacking any affirmative and explicit legislative authority, used missile strikes in Afghanistan in response to al Qaeda's bombing of two US embassies in Africa. To be sure, AQAP's two most notable attempts to attack the US homeland failed thanks to last-minute interventions. Such good fortune should not, however, enter into the assessment of whether self-defense rights have been triggered at either the domestic or international levels. We should indeed be wary of arguments about self-defense premised on considerably more inchoate threats, but the AQAP threat at least seems more than adequately realized. The legality condition thus is satisfied.[218]

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[214] Cf. Goldsmith 2010.

[215] Government Brief, supra n 24, pp 4–5.

[216] For a discussion of the complex issues surrounding this point, see Bradley 2008, pp 173–176.

[217] See e.g., The Brig *Amy Warwick* (The Prize Cases), 67 US (2 Black) 635 (1863) (declaring both the right and the duty of the President to use force in defense of the nation when attacked, without awaiting legislative authorization, pursuant to the Constitution). This is not the same, of course, as arguing that the President also may act *contrary* to affirmatively-enacted legislative constraints.

[218] Lubell notes debate as to whether a targeted killing might violate the prohibition on 'assassination' contained in Executive Order 12,333. See Lubell 2010, p 175 and n 35. The better view is that an attack carried out pursuant to an authorization for use of military force or pursuant to Constitutional authority to defend the nation does not constitute an act of 'assassination' even if targeting a specific individual.

1.4.2.2 Proportionality

The next question is whether killing al-Awlaki could be squared with the requirement of proportionality. Proportionality in the IHRL right-to-life context considers whether the 'harm caused is proportionate to the sought objective'.[219] That is, is the benefit to be gained comparable to the taking of a human life? As Lubell wryly—and correctly—notes, 'firing a lethal weapon at someone attempting to avoid a parking ticket can hardly be said to be proportionate'.[220]

In order to satisfy the proportionality requirement, then, the government's 'objection should be the prevention of a real threat to life …'[221] This appears to be the US government's asserted interest in the al-Awlaki scenario, given the government's claim that al-Awlaki has become personally involved in the recruiting and direction of personnel to carry out particular violent attacks. That is to say, the US government's purpose appears to be to save the lives of those who might otherwise become the victims of an al-Awlaki-directed attack. Absent reason to doubt this purpose, the proportionality requirement appears satisfied.

1.4.2.3 Necessity and the problem of imminence

The final and most vexing question in the IHRL analysis concerns necessity.

In contrast to the IHL discussion above, there is little dispute that a least-harmful-means test does apply here. Melzer, for example, disaggregates necessity into three constituent elements —qualitative, quantitative, and temporal necessity—and weaves the least-harmful-means standard through each.[222]

Qualitative necessity forbids reliance on potentially lethal force unless 'other means remain ineffective or without any promise of achieving the purpose of the operation'.[223] Put another way, qualitative necessity precludes resort to killing where an arrest is plausible. By and large, this IHRL model of necessity tracks the similar aspect of necessity as used in the Article 51 self-defense setting, and by the same token it appears to be satisfied—at least on current factual assumptions—in the al-Awlaki scenario.

Quantitative necessity, in Melzer's formulation, is closely-related. It refers to the requirement that the target should not be killed purposefully where it would be possible instead to 'incapacitate the targeted individual by the use of force which may or may not have lethal consequences'.[224] Again, the al-Awlaki scenario as

[219] Ibid., p 173.
[220] Ibid.
[221] Ibid.
[222] Melzer 2008, p 228.
[223] Ibid.
[224] Ibid.

described in Part 1.1 appears compatible with this standard; it does not appear that a non-lethal option for incapacitating him exists at the current time.

The final strand and most difficult strand in the analysis involves what Melzer calls 'temporal' necessity. Melzer defines this as a requirement that 'at the very moment of [the] application [of lethal force,] it is *not yet* or *no longer* absolutely necessary to achieve the desired purpose in both qualitative and quantitative terms'.[225] Here we come to the real obstacle to justifying an attack on al-Awlaki as compatible with the right to life. It is frequently said that a threat to life must be 'imminent' in order to serve as the predicate for the use of lethal force consistent with IHRL—a consideration best placed under the temporal necessity heading.[226] And since no one alleges that al-Awlaki himself is in the business of pulling triggers, triggering detonations, or otherwise doing anything that would in a strictly immediate since cause death or serious injury, it certainly is not obvious that he poses an 'imminent' threat to life even if one assumes the truth of all the government's allegations against him. But should the temporal aspect of necessity be so strictly construed?

On one hand, deviation from a strict imminence standard threatens to unwind IHRL's protection for the right to life insofar as situations lacking genuine imminence necessarily introduce at least some degree of factual uncertainty as to the individual's future actions.[227] On the other hand, however, enforcement of a strict imminence standard in the context of terrorism very likely would preclude the state from acting—and hence raise questions of both compliance and desirability—in circumstances where (i) there is strong evidence that a person is planning a terrorist attack, (ii) there is little reason to believe the state will know when the point of strict imminence has been reached in connection with a future attack, and (iii) a fleeting opportunity to attack the individual has arisen in the meantime.[228] In that case, the inability to act at that moment most likely would eliminate the possibility of preventing the attack, which is itself a human rights cost in terms of the right to life of the victims of that attack. The scenario is akin to that which Michael Schmitt calls the 'last window of opportunity' in the distinct but related *jus ad bellum* context involving preventive uses of force.[229]

Kretzmer, though expressing deep concern about the risks of alleviating the imminence requirement to any degree, ultimately concludes that there is an irresistible logic to the last window of opportunity concept, at least in contexts where a terrorism suspect operates in another state in circumstances that appear to preclude resort to an attempted arrest. He summarizes:

> '[T]argeting of suspected terrorists must be restricted to cases in which there is credible evidence that the targeted persons are actively involved in planning or preparing further

[225] Ibid.

[226] See e.g., Letter from Roth, supra n 1.

[227] See Kretzmer 2005, p 182.

[228] See ibid.

[229] See e.g., Schmitt 2004, p 756.

> terrorist attacks against the victim state and no other operational means of stopping those attacks are available. As there is always a risk that the persons attacked are not in fact terrorists, even in such a case lethal force may be used against the suspected terrorists only when a high probability exists that if immediate action is not taken another opportunity will not be available to frustrate the planned terrorist attacks.'[230]

Tom Malinowski of Human Rights Watch expressed a similar understanding recently, explaining that:

> 'I don't think that the "imminence" rule would require the US to show that an al Qaeda planner was literally on his way to the airport to put a bomb on a plane to Chicago before launching a strike. But it would require an individualized determination that the target is actively involved in planning future attacks (as against simply having been involved in terrorism in the past).'[231]

This strikes an appropriate compromise between the right to life of the potential victims of an anticipated terrorist attack and the right to life of the target of the state's preventive attack. Or at least it may do so, depending on how one construes the requirement that the state have substantial grounds to believe the individuals is planning future terrorist attacks. Does this mean that the state must have proof the person is plotting a specific attack, or is it enough to prove that the person is likely to plot *some* violent attack in the future?

Consider how this issue might be cashed out in relation to an historical example: the US attack on Osama bin Laden and other al Qaeda members in 1998. If we assume for the sake of argument that an IHRL model governed that attack, the question eventually would arise whether the strike satisfied the temporal necessity requirement. On one hand, so far as the public record suggests, there was no claim by the United States that al Qaeda was on the verge of or even contemplating any one particular attack at that moment. On the other hand, it was perfectly obvious that al Qaeda planned to continue to engage in attacks of *some* variety in the future. In short, no one knew then that the attack on the *USS Cole* was forthcoming, still less the attacks of 9/11, yet it was quite clear that *something* would occur sooner or later.

The circumstances today with AQAP and al-Awlaki at least arguably are much the same. To insist upon plot-specific knowledge in this context would be to provide only an illusory exception to strict imminence, which is to say no exception at all. The temporal necessity inquiry should be read with a degree of flexibility; the state must have substantial evidence to support the belief that the person in question will in fact be involved in further attacks, but the state should not be expected to stay its hand until plot-specific details emerge.

Al-Awlaki, on this view, can be killed consistent with IHRL so long as the US government does indeed have substantial reason to believe that he will continue to play an operational leadership role in planned attacks against the United States and that he cannot plausibly be incapacitated with sub-lethal means. IHRL in this

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[230] Kretzmer 2005, p 203.

[231] Wittes 2010.

specific respect produces much the same result as would IHL, thereby reducing the significance of determining which model controls in the first place.

1.5 Conclusion

The al-Awlaki scenario is a powerful device for coming to grips with international law principles governing lethal force, bringing us face-to-face with that which is determinate and that which is not. As we have seen, a substantial number of important questions fall into the latter camp, though not so many as to preclude the conclusion that the US government most likely could use lethal force against al-Awlaki without violating international law.

At the same time, the case study also brings home the critical role that contested factual predicates play in resolving IHL and IHRL disputes, as well as the collateral point that much of the information most relevant to resolving such disputes consists of classified information available only to the government. This is both inevitable and troubling. The absence of transparency creates an obvious risk of abuse or at least self-serving mistakes, one that will not likely be checked by pre- or post-hoc judicial oversight domestically or internationally. In the final analysis, the power to decide whether the predicates are met as a practical matter lies with the government itself, for good or ill. In that scenario, the extent to which the government has developed internal procedures to vet targeting decisions in accordance with applicable legal rules comes to matter immensely. Of course, those procedures themselves might be wrapped in the cloak of classification, making it impossible to assess them. The US government would do well to maximize their transparency, as so many have urged, if only by providing better information to the public about the abstract nature of and standards associated with its use of lethal force outside of conventional combat contexts.

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