Targeting Anwar al-Aulaqi: A Case Study in U.S. Drone Strikes and Targeted Killings

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Targeting Anwar al-Aulaqi: A Case Study in U.S. Use of Force Justifications

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Not every efficient means is also legal. The ends do not justify the means.1

On May 5, 2011, a missile fired from an unmanned aerial vehicle (drone) struck a car traveling through a remote Yemeni governorate.2 Though it killed two members of Al Qaeda in the Arabian Peninsula (AQAP), that strike missed its reported target: Anwar al-Aulaqi.3

Anwar al-Aulaqi is a natural born American citizen of Yemeni descent who was reportedly added to U.S. targeted killing lists in early 2010. Following the revelation that al-Aulaqi had been added to the U.S. Central Intelligence Agency’s targeted kill list,4 al-Aulaqi’s father filed a lawsuit seeking to block the United States from targeting his son.5 The United States responded to that suit by claiming, among other things, that al-Aulaqi is a lawful target due either to his role in an ongoing armed conflict between the United States and Al Qaeda or under the auspices of self-defense.6 In fact, the United States relies on self-defense and armed conflict in general to justify the lawfulness of its targeted killing programs.7 When applicable,

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1 HCJ 769/02 Public Comm. Against Torture in Israel v. Gov’t of Israel (Targeted Killings Case) [2006] IsrSC at ¶63.
5 Memorandum in Support of Defendants’ Motion to Dismiss at 5, 8-9, Al-Aulaqi v. Obama, No. 10-1469 (D.D.C. Sept. 25, 2010).
6 See, e.g., Harold Koh, Legal Adviser, U.S. Dep’t of State, International Law and the Obama Administration, Keynote Address Before the American Society of International Law (Mar. 25, 2010).
each of these frameworks provides legal authority for a state to use force against an individual. However, neither framework provides a blanket justification—or a blanket prohibition—on the use of targeted killing. Instead, each framework provides authority for use of force, including targeted killings, when that framework’s particular requirements are satisfied.

Unlike most scholarship addressing targeted killing, this article does not argue that targeted killings are generally lawful or generally unlawful. Instead, this article argues that, although both self-defense and armed conflict provide authority for a state’s use of force when their respective parameters are satisfied, self-defense fails to justify the continuous targeting of Anwar al-Aulaqi and other individuals on U.S. targeted killing lists. Rather, al-Aulaqi is likely justifiably targetable on a continuous basis due only to his direct participation in an ongoing armed conflict between AQAP and Yemen in which the United States is intervening.

To reach these conclusions, this article analyzes the potential use of force against Anwar al-Aulaqi under both frameworks. Part I provides background information on Anwar al-Aulaqi, Al Qaeda in the Arabian Peninsula, and the United States’ targeted killing programs. Part II explores several potential armed conflicts in which both the United States and al-Aulaqi are participating, and that would vest the United States with authority to kill al-Aulaqi. Finally, Part III analyzes whether the United States is able to rely on self-defense to justify its targeting of al-Aulaqi.

I. Background

A. Anwar al-Aulaqi

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8 For a discussion of targeted killings within the debate over whether counterterrorism should be governed by the law enforcement paradigm or the “war” paradigm, see CHARLES A. SHANOR, COUNTERTERRORISM LAW 642–674 (2011). See also GABRIELLA BLUM & PHILIP B. HEYMANN, LAWS, OUTLAWS, AND TERRORISTS 69–91 (2010).
Anwar Al-Aulaqi is an American-born Islamic cleric currently in hiding in Yemen. Although he emerged as a voice of moderate Islam in the aftermath of the 9/11 attacks, he has since been linked to the 9/11 hijackers, as well as to several recent attempted and consummated terrorist attacks against the United States by Al Qaeda in the Arabian Peninsula.

Although the exact nature of al-Aulaqi’s involvement with AQAP is unclear, he appears to have evolved from an inspirational to an operational leader within the organization. As late as January 2010, TIME quoted senior U.S. officials as saying, “[T]he best way to describe him is inspirational rather than operational.” More recently, though, U.S. officials have described him as both a “recruiter” and as having “gotten involved in plots.” He is reportedly responsible for AQAP’s interest in attacking targets within the United States. He has even been described as

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10 Scott Shane, Born in U.S., a Radical Cleric Inspires Terror, N.Y. TIMES, Nov. 18, 2009; Bobby Ghosh, U.S. Targets Radical Cleric Anwar al-Aulaqi, TIME, Jan. 13, 2010 (“Indeed, [al-Aulaqi] spoke out against radicals, prompting the New York Times in October 2001 to label him as one of a ‘new generation of Muslim leader capable of merging East and West.’”).
11 Scott Shane, Born in U.S., a Radical Cleric Inspires Terror, N.Y. TIMES, Nov. 18, 2009.
15 Scott Shane, U.S. Approves Targeted Killing of American Cleric, N.Y. TIMES, Apr. 6, 2010; Greg Miller, U.S. Citizen in CIA’s Cross Hairs, L.A. TIMES, Jan. 31, 2010 (“Over the past several years, [al-Aulaqi] has gone from propagandist to recruiter to operational player,’ said a U.S. counterterrorism-official.”).
16 See, e.g., LYDIA KHALIL, AUSTRALIAN STRATEGIC POLICY INSTITUTE, THE NEXT BASE: CONCERNS ABOUT SOMALIA AND YEMEN 5 (2011) (attributing the increase in AQAP attacks targeting the West to al-Aulaqi’s role in the organization); Thomas Hegghammer, The Case for Chasing al-Awlaki, FOR. POL.Y, Nov. 24, 2010 (“[Al-Aulaqi] is arguably the single most important individual behind the group’s efforts to carry out operations in the West . . . .”)).
being more dangerous than Osama bin Laden, “‘probably the most significant risk to the U.S. homeland.’”\textsuperscript{17}

Al-Aulaqi was reportedly added to the Joint Special Operations Command’s list of targets for kill or capture in January 2010.\textsuperscript{18} On April 6, 2010, Obama administration leaks revealed that al-Aulaqi had been placed on the CIA’s separate targeted killing list. According to U.S. officials, he was added to the list because he is “believed to have shifted from encouraging attacks to directly participating in them.”\textsuperscript{19} In July 2010, the U.S. Treasury Department designated al-Aulaqi a terrorist.\textsuperscript{20} Finally, on May 5, 2011, the United States launched its first drone strike in Yemen specifically targeting al-Aulaqi.\textsuperscript{21}

B. Al Qaeda in the Arabian Peninsula

Al Qaeda in the Arabian Peninsula (AQAP) was formed in January 2009, through the merger of Al Qaeda in Yemen and the remnants of an Al Qaeda cell that operated in Saudi Arabia.\textsuperscript{22} Both of these local cells were formed following the so-called Yemeni Great Escape of

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\textsuperscript{18} Dana Priest, \textit{U.S. Military Teams, Intelligence Deeply Involved in aiding Yemen on Strikes}, WASH. POST, Jan. 27, 2010, at A01.
\textsuperscript{22} JOHN ROLLINS, CONG. RESEARCH SERV., R41070, \textit{Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy} 10 (2010). AQAP should
On February 3, 2006, twenty-three inmates escaped from Yemen’s Political Security Organization (PSO) headquarters in Sana’a by tunneling 460 feet from their basement cell to a neighboring mosque. Two of these escapees emerged as the leaders of Al Qaeda in the Southern Arabian Peninsula or Al Qaeda in Yemen.

Al Qaeda in the Arabian Peninsula is structured as an organization distinct from Al Qaeda proper. It has its own emir, currently Nasir al-Wahayshi. It maintains its own propaganda arm, which produces a bimonthly magazine entitled Salah al-Malahim. It has earned a place unto itself on the United States’s list of designated terrorist organizations. It has also been described as having “eclipsed al-Qa’ida central as the primary threat to U.S. national security.”

AQAP’s goals, though, are similar in scale to those of Al Qaeda. Like Al Qaeda, AQAP attempts to launch attacks on a global scale. Also like Al Qaeda, AQAP seeks to establish an Islamic caliphate. Since its founding, AQAP has launched attacks targeting both the Yemeni
and Saudi states. AQAP and its pre-merger Yemen predecessor have also targeted Western diplomats and installations in Yemen.

C. Targeted Killings

A targeted killing is the “intentional, premeditated and deliberate use of lethal force by [a] State[... ] or by an organized armed group[... ] against a specific individual who is not in the physical custody of the [State employing the targeted killing].” Targeted killings have been embraced by a handful of states and employed in a variety of contexts, including international armed conflict, non-international armed conflict, and non-conflict situations. Though once critical of targeted killings—particularly Israel’s use of targeted killings—since September 11, 2001, the United States has vigorously embraced the tactic.

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30 Joel Greenberg, Israel Affirms Policy of Assassinating Militants, N.Y. TIMES, July 5, 2001, at A1 (“‘The United States government is very clearly on the record as against targeted assassinations,’ [Amb. Martin Indyk] said. ‘They are extrajudicial killings, and we do not support that.’”);

The United States’ first targeted killing outside of Afghanistan occurred on November 3, 2002 in Yemen. Since that first strike, the United States has engaged in targeted killing in Yemen, Somalia, and Pakistan. In Pakistan, U.S. drone strikes, which are presumably part of the U.S. targeted killing program, have increased from just 9 strikes between 2002 and 2007, to 34 in 2008, 53 in 2009, and 118 in 2010. While the frequency of drone strikes in Pakistan is unparalleled, the United States has deployed drones to Yemen and threatened to emulate its Pakistan campaign there.

The United States maintains at least two targeted killing lists. The specific criteria for inclusion on either list are not publically known. However, reports indicate that the inclusion of a target on the CIA’s list is contingent on the target being “‘deemed . . . a continuing threat to U.S. persons or interests.’” According to news reports, individuals are nominated for addition to the CIA’s targeted kill list by counterterrorism analysts who circulate brief memoranda making the

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37 Scott Shane, U.S. Approves Targeted Killing of American Cleric, N.Y. TIMES, Apr. 6, 2010. Inclusion on one list does not necessarily indicate inclusion on the other list. For example, al-Aulaqi was added to the U.S. military’s targeted kill list at least by the end of January 2010; at that point, al-Aulaqi had not yet been added to the CIA’s targeted kill list. Greg Miller, U.S. Citizen in CIA’s Cross Hairs, L.A. TIMES, Jan. 31, 2010.
38 Id.
case for the inclusion of an individual on the list. News reports also indicate that, once targeted, an individual is continuously eligible for killing.

II. Can the United States Rely on an Armed Conflict to Justify Its Targeting of Anwar al-Aulaqi?

The United States claims that it may lawfully target Anwar al-Aulaqi because of his participation in an ongoing armed conflict. The existence of an armed conflict triggers the application of international humanitarian law—the body of law that defines the rights and obligations of parties to a conflict. The scope of that body of law applicable to any given armed conflict is determined by whether that conflict is of an international or a non-international character. Thus, while an international armed conflict is subject to the full panoply of the Geneva Conventions of 1949 and customary international humanitarian law, a non-international armed conflict is subject only to the less restrictive provisions of Common Article 3 and the customary international law governing non-international armed conflict. Regardless of an armed conflict’s character, when an armed conflict occurs, international humanitarian law vests a state with the authority to use force as a first resort against the enemy with which it is fighting.

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39 Id.
40 Tara McKelvey, Inside the Killing Machine, NEWSWEEK, Feb. 13, 2011, http://www.newsweek.com/2011/02/13/inside-the-killing-machine.html. McKelvey quotes former Acting General Counsel for the CIA, John A. Rizzo, as saying, “It’s [the list of targets] basically a hit list.” Id. The program Rizzo describes is one in which CIA staffers produce memoranda justifying the targeting of particular individuals. The CIA General Counsel then approves those individuals for targeting. At that point, the target joins a group of “individuals [the United States is] searching for [that the United States has determined] it is better now to neutralize the threat [those individuals pose].” Id. It is this process—the nomination for targeting followed by the search for that target—that suggests targeted individuals become continuously subject to lethal force.
Thus, the first step in determining whether the United States may rely on international humanitarian law for authority to kill Anwar al-Aulaqi is to determine whether there exists an armed conflict in which both the United States and al-Aulaqi are participating.

A. Locating an Armed Conflict common to Anwar al-Aulaqi and the United States

The Geneva Conventions of 1949 categorize all armed conflicts as armed conflicts of an international character (international armed conflict) or armed conflicts not of an international character (non-international armed conflict). Common Article 2 of the Geneva Conventions of August 1949 states that the conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”\(^{42}\) Common Article 3 of the Geneva Conventions of August 1949 sets forth minimum provisions applicable “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”\(^{43}\)

Although the Geneva Conventions adopted the term “armed conflict” in lieu of the term “war,” neither Common Article 2 nor Common Article 3 provides a definition of armed conflict. Instead, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia articulated the most commonly cited contemporary definition of armed conflict in *Prosecutor v. Tadić*. There, the Tribunal held that an armed conflict exists whenever “there is a resort to armed

\(^{41}\) INT’L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 26 (Oscar M. Uhler & Henri Coursier eds., 1958) [hereinafter GC IV COMMENTARY] (“Born on the battlefield, the Red Cross called into being the First Geneva Convention to protect wounded or sick military personnel. Extending its solicitude little by little over other categories of war victims, in logical application of its fundamental principle, it pointed the way, first to the revision of the original convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle in all cases of armed conflicts, including those of an internal character.”).

\(^{42}\) Article 2 common to the Geneva Conventions of 1949.

\(^{43}\) Article 3 common to the Geneva Conventions of 1949.
force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” 44 The Tadic definition separates the two categories of armed conflict recognized by international humanitarian law: international armed conflict—“resort to armed force between States”—and non-international armed conflict—“protracted armed violence between governmental authorities and organized armed groups or between such groups.”

According to the authoritative Commentary to the Geneva Conventions, “[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.” 45 The duration of the hostilities or the number of wounded or killed does not impact the characterization as armed conflict. Though foreign armed forces have intervened in Yemen, there is no indication that these interventions have been driven by “difference[s] arising between” those states. The hostilities that are taking place in Yemen are not taking place between Yemen and another state—the presence of U.S. armed forces in Yemen, and the conduct of U.S. operations in Yemen, is with the consent and collaboration of the government of Yemen. Thus, it is clear that any armed conflict taking place in Yemen is not one of an international character.

If there is an armed conflict taking place in Yemen, then, it must be an armed conflict not of an international character. The Tadic Trial Chamber explained that the inquiry to determine the existence of a non-international armed conflict “focuses on two aspects of a conflict: the intensity of the conflict and the organization of the parties involved.” 46 These two factors “are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry,

44 Prosecutor v. Tadic ¶ 69.
45 GC IV Commentary, supra note 40, at 20.
46 Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 562 (May 7, 1995); INT’L COMM. RED CROSS, TYPOLOGY OF ARMED CONFLICT 75-76 (2009).
unorganized and short-lived insurrections, or terrorist-activities, which are not subject to international humanitarian law.”

For a non-international armed conflict to exist, the intensity of armed hostilities must exceed those associated with banditry or mere internal disturbances. To determine whether hostilities between a state and a non-state actor rise to the level of an armed conflict, the ICTY has looked to the duration and intensity of individual confrontations; the frequency of clashes; the duration of the conflict overall; the types of weapons and other military equipment used; whether regular armed forces were deployed against the non-state actor, the geographic and temporal distribution of the clashes; and the number of casualties.

Additionally, for a non-international armed conflict to exist, the putative parties to that armed conflict need possess only “some degree of organisation.” Factors considered in examining the organization of an armed group for determining the existence of an armed conflict have included: whether the non-state actor possessed an hierarchal structure; whether it controlled and administered territory; its ability to recruit and train fighters; its ability to launch attacks using military tactics; its ability to enter into cease-fire or peace agreements.

Applying the law of non-international armed conflict to the situation in Yemen strongly suggests that Yemen and AQAP are engaged in a non-international armed conflict. It also indicates that hostilities between the United States and AQAP are not alone sufficient to place the United States and AQAP in an armed conflict. However, U.S. intervention in Yemen’s armed conflict—on behalf of Yemen—likely does place the United States in a non-international armed conflict.

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47 Tadic, supra note 104, at ¶ 562.  
48 Haradinaj, at ¶ 49; Limaj, at ¶¶ 135-143; Tadic, at ¶¶ 564-565.  
49 Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 89 (Nov. 30, 2005).  
conflict with AQAP. Alternatively, the United States may be engaged in an armed conflict with AQAP based on AQAP’s relationship with al-Qaeda and the ongoing armed conflict between the United States and al-Qaeda. The following sections first examine whether Yemen and AQAP are engaged in a non-international armed conflict. Second, hostilities between AQAP and the United States are analyzed in isolation of the hostilities taking place between AQAP and Yemen to determine whether they rise to the level of a non-international armed conflict. Third, U.S. operations in Yemen are examined within the context of Yemen-AQAP hostilities to determine if they constitute a foreign armed intervention in an ongoing non-international armed conflict. Fourth, AQAP’s relationship with Al Qaeda is explored to determine whether that relationship impacts the characterization of hostilities between the United States and AQAP.

1. The Armed Conflict Between Yemen and Al Qaeda in the Arabian Peninsula

Yemen and Al Qaeda in the Arabian Peninsula are engaged in a non-international armed conflict. AQAP’s hierarchical structure, its ability to—and focus upon—recruiting fighters, and its use of military tactics indicate that it is sufficiently organized to constitute a party to an armed conflict. Moreover, the ongoing hostilities between Yemen and AQAP surpass the level of violence associated with banditry or riots, rising to the level of armed conflict.

(a) Organizational Capacity of Al Qaeda in the Arabian Peninsula

AQAP is sufficiently organized to constitute a party to an armed conflict. For an armed group to be a party to an armed conflict it must possess a degree of organization, though that level of organization need not rise to the level required to establish command responsibility. The degree of organization required to be a party to an armed conflict must be sufficient to

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51 Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 90 (ICTY Nov. 30, 2005).
distinguish an organized armed group from a mob engaged in a riot.\textsuperscript{52} Reports indicate that AQAP possesses a hierarchical structure, recruits and trains fighters, and launches attacks employing military tactics. Taken together, these factors suggest that AQAP is sufficiently organized to constitute a party to an armed conflict.

\textit{Hierarchy}

AQAP does not apparently possess the rigid hierarchy generally associated with regular armed forces. Instead, it mimics the al-Qaeda model of “centralization of decisions and decentralization of execution.”\textsuperscript{53} Importantly, this structure does not appear to be indicative of organizational failings on the part of AQAP but rather a response to the nature of the conflict in which AQAP is involved.\textsuperscript{54} Thus, Nahir al-Wihayshi, \textit{emir} of AQAP, is responsible for approving all AQAP suicide strikes in Yemen and attacks abroad—with input from a senior council of advisers\textsuperscript{55}—but AQAP’s various operational units are “an alliance of components,”\textsuperscript{56} drawn together through either tribal or ideological linkages.\textsuperscript{57} This structure is designed to lend

\begin{footnotesize}
\begin{enumerate}
\item Corn, The War on Terror and the Laws of War at 16-17; see also Richard A. Falk, \textit{Janus Tormented: The International Law of Internal War}, \textit{in INTERNATIONAL ASPECTS OF CIVIL STRIFE} 197–99 (James N. Rosenau ed., 1964)
\item Gregory D. Johnsen, \textit{The Impact of Bin Laden’s Death on AQAP in Yemen}, CTC SENTINEL, May 2011, at 9, 9.
\item \textit{Cf.} Prosecutor v. Limaj at ¶ 132 (“In the Chamber’s finding, the evidence does not establish the non-existence of a KLA organisational structure. Rather, it reflects the conditions under which the KLA operated at the time. The KLA was effectively an underground organisation, operating in conditions of secrecy out of concern to preserve its leadership, and under constant threat of military action by the Serbian forces.”).
\item Gregory D. Johnsen, \textit{The Impact of Bin Laden’s Death on AQAP in Yemen}, CTC SENTINEL, May 2011, at 9, 9.
\item Jane’s World Insurgency and Terrorism, AQAP
\item Jane’s World Insurgency and Terrorism, AQAP; Ryan Evan, \textit{From Iraq to Yemen: Al-Qa’ida’s Shifting Strategies}, CTC SENTINEL, October 2010, at 11, 13–14.
\end{enumerate}
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the group robustness so that it might survive a decapitation strike in contrast to the al-Qaeda cell that operated in Yemen immediately following the 9/11 attacks.\textsuperscript{58}

The operational decentralization of AQAP makes its structure analogous to the structure employed by the Kosovo Liberation Army (KLA), found by the ICTY to be sufficiently organized to constitute a party to an armed conflict.\textsuperscript{59} Like AQAP, the KLA possessed a central command but devolved operational responsibility to local commanders responsible for fairly large portions of territory.\textsuperscript{60} In fact, the KLA arguably devolved more operational responsibility to local commanders than does AQAP. Whereas al-Wihayshi reportedly personally approves AQAP operations, local KLA commanders were merely obligated “to inform the General Staff about all developments in their respective areas of responsibility.”\textsuperscript{61}

The ICTY also emphasized the increasing organizational strength of the KLA over time in its analysis.\textsuperscript{62} Similarly, over the last four years, AQAP has “transformed itself from a fractured and fragmented group of individuals into an organization that is intent on launching attacks throughout the Arabian Peninsula.”\textsuperscript{63} At the same time, AQAP attacks within Yemen

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\item \textsuperscript{58} Gregory D. Johnsen, \textit{The Impact of Bin Laden’s Death on AQAP in Yemen}, CTC SENTINEL, May 2011, at 9, 9; Gregory D. Johnsen, \textit{The Expansion of Al-Qa’ida in the Arabian Peninsula}, CTC SENTINEL, Jan. 2010, at 4, 6 (“[A]l-Qa’ida [in the Arabian Peninsula] has been working single-mindedly to create a durable infrastructure that can withstand the loss of key leaders and cells.”).
\item \textsuperscript{59} Prosecutor v. Limaj
\item \textsuperscript{60} Prosecutor v. Limaj at ¶ 95 (“[T]he territory of Kosovo was divided by the KLA into seven zones . . . . Each zone had a commander and covered the territory of several municipalities. The level of organisation and development in each zone was fluid and developing and not all zones had the same level of organisation and development . . . .”).
\item \textsuperscript{61} Prosecutor v. Limaj at ¶ 97; \textit{see also id.} at ¶ 98 (noting that KLA commanders generally—but not absolutely—complied with directions from the KLA’s General Staff).
\item \textsuperscript{62} Prosecutor v. Limaj.
\item \textsuperscript{63} Gregory D. Johnsen, \textit{The Expansion of Al-Qa’ida in the Arabian Peninsula}, CTC SENTINEL, Jan. 2010, at 4, 4.
\end{itemize}
have been “strikingly consistent”64 with the group’s stated objectives, targeting foreigners, the Yemeni state, and oil infrastructure while avoiding Yemeni civilians,65 exhibiting strong operational coordination and consistency—a factor the ICTY found significant when assessing the KLA’s organizational capacity.66 Indeed, AQAP may well have evolved from primarily a terrorist organization to “an insurgent group willing to wage guerrilla war and contest control of portions of the Yemeni hinterland with the Yemeni government.”67 Though the ability to contest control of Yemeni territory does not rise to the KLA’s ability to exert administrative control over portions of Kosovo,68 it certainly distinguishes AQAP from a riotous mob.

Also like the KLA, AQAP maintains a propaganda and public relations operation.69 Upon its formation, AQAP released a statement describing its goals, objectives and leadership structure.70 Since then, it has operated both Arabic- and English-language publications that extol the group’s operations and seek to inspire potential recruits to join AQAP, including both Sada al-Malahim and Inspire. Additionally, AQAP consciously and, according to one observer, “shrewd[ly]”71 employs “soft power” to strengthen its position in Yemen while avoiding the

66 Prosecutor v. Limaj at ¶ 112.
68 Limaj. Note, however, that AQAP’s ability to administer territory is in flux. As the strength of the Yemeni state recedes, AQAP reportedly polices the territory that it has taken and held.
69 See, e.g., Christopher Boucek, The Evolving Terrorist Threat in Yemen, CTC SENTINEL, Sept. 2010, at 5, 6 (describing AQAP’s media strategy as “highly sophisticated”).
70 Jane’s World Insurgency and Terrorism, AQAP
71 Barak Barfi, AQAP’s Soft Power Strategy in Yemen, CTC SENTINEL, Nov. 2010, at 1, 1.
pitfalls that have plagued other al-Qaeda-linked groups such as alienating the local civilian population or internecine fighting.\textsuperscript{72}

\textit{Recruits Fighters}

The ICTY emphasized the KLA’s “consistent effort to persuade people to join the organization.”\textsuperscript{73} AQAP has similarly mounted a concerted effort to recruit fighters to its cause. It publishes Arabic- and English-language magazines online, in an effort to reach out to both local and foreign fighters.\textsuperscript{74} As such—and due in part to its media-wing’s ability to capitalize on a botched US airstrike—AQAP is in a stronger position today than it was on Christmas Day 2009.\textsuperscript{75} AQAP has also bolstered its ranks by co-opting local, Yemeni concerns and through strategic intermarriage with various Yemeni tribes. In particular, AQAP has concentrated on recruiting secessionist-minded southern Yemenis, disaffected by the Saleh regime.\textsuperscript{76} These strategies have allowed AQAP to grow from a few dozen fighters to several hundred since the group’s reformation.\textsuperscript{77}

AQAP’s efforts in these respects have benefited from an AQAP strategy of attacking Yemeni government targets that collocated in the region of Yemen influenced by the secessionist


\textsuperscript{73} Prosecutor v. Limaj at ¶118.


\textsuperscript{75} Gregory D. Johnsen, \textit{The Impact of Bin Laden’s Death on AQAP in Yemen}, CTC SENTINEL, May 2011, at 9, 9.


\textsuperscript{77} Dana Priest, \textit{U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes}, WASH. POST, Jan. 27, 2010.
Southern Movement. AQAP attacks incite a heavy-handed and coarse Yemeni government response, which in turn enrages local civilians who already oppose the Yemeni state, encouraging them to join AQAP.

*Employ Attacks Using Military Tactics*

Beginning in late 2009, AQAP began a gradually intensifying campaign targeting the state of Yemen. AQAP now regularly attacks targets associated with the state of Yemen. While some of these attacks have involved the use of suicide bombers or other acts of perfidy, many have employed common military tactics like ambushes and small arms as well as mortar and rocket propelled grenades. These AQAP attacks have targeted convoys of Yemeni troops, military checkpoints and headquarters, as well as infrastructure. For example: on May 13, 2011, AQAP militants fired a rocket propelled grenade at an army vehicle, killing five Yemeni soldiers; on April 26, 2011, AQAP militants ambushed a Yemeni Republican Guard convoy, killing eight Republican Guard soldiers; and on March 26, 2011, AQAP militants sacked a weapons factory and seized control of two towns, a presidential palace, and a radio station. Importantly, these attacks have not just been harassment operations but have resulted in AQAP

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78 W. ANDREW TERRILL, THE CONFLICT IN YEMEN AND U.S. NATIONAL SECURITY 59-60 (Strategic Studies Institute 2011).
79 W. ANDREW TERRILL, THE CONFLICT IN YEMEN AND U.S. NATIONAL SECURITY 16 (Strategic Studies Institute 2011).
control of Yemeni towns and, in some cases, whole districts—in fact, on March 31, 2011, AQAP seized control of Abyan governorate and declared it an Islamic emirate.\(^8^5\)

These tactics—targeting police and security forces, laying ambushes, and making use of small arms and mortars or rocket propelled grenades—are the same tactics the ICTY found sufficient indicia of organizational strength in the \textit{Limaj} case. Also like the KLA, AQAP conducts operations over a wide swath of territory. AQAP attacks have occurred in nine of Yemen’s twenty-one governorates,\(^8^6\) governorates that cover some 366,269 square kilometers—some 30 times as much area as the total operating area of the KLA. The ability of AQAP to consistently launch attacks over such a large amount of territory is another indication of its organizational capacity.\(^8^7\)

Based on its structure, concerted effort to recruit fighters, and its employment of military tactics in launching attacks, AQAP is sufficiently organized to constitute a party to an armed conflict.\(^8^8\)

\textbf{(b) Intensity of Hostilities between Yemen and Al Qaeda in the Arabian Peninsula}

The intensity of individual clashes; the rate of hostilities between the Yemeni government and AQAP militants; Yemen’s resort to use of its regular armed forces; the weapons employed on both sides; the duration of the conflict as a whole, as well as individual confrontations; the flight of civilians; and AQAP’s capture of Yemeni territory all suggest that the hostilities between Yemen and al-Qaeda in the Arabian Peninsula are sufficiently intense to rise to the level of an armed conflict.

\(^{85}\) \url{http://www.eurasiareview.com/yemen-al-qaeda-declares-south-province-as-islamic-emirate-31032011/}
\(^{86}\) AQAP attacks have taken place in Abyan, Adan, Bayda, Hadramaut, Jawf, Lahij, Ma’rib, Sana’a, and Shabwah governorates. AEI, Critical Threats.
\(^{87}\) \textit{Cf.} Prosecutor v. Limaj at \textit{¶} 172.
\(^{88}\) \textit{Cf.} Prosecutor v. Limaj at \textit{¶} 171.
The conflict between AQAP and the government of Yemen has been ongoing since 2009. Individual confrontations have been both sustained and sudden. For example, on June 12, 2010, AQAP gunmen reportedly attacked and killed a senior security official outside his home and drive-by assassinations of security service officials have become commonplace. 89 Other clashes, though, have involved large-scale Yemeni military operations, sieges of towns held by AQAP, and the displacement of thousands of civilians 90—for example, a five-day Yemeni offensive in September 2010 displaced at least 15,000 civilians. 91

The rate of hostilities between the Yemeni government and AQAP militants has increased steadily between 2009 and 2011. While there were only a handful of clashes between Yemen and AQAP in all of 2009 and fewer than twenty in the first half of 2010, there were nearly eighty reported clashes in the second half of 2010, and nearly fifty so far in 2011. 92 In these attacks, AQAP has demonstrated “operational boldness and sophistication.” 93 In these operations, AQAP has successfully captured and held Yemeni territory, including at least two towns in May-June 2011. The Yemeni government has been forced to “declare[] war on

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AQAP”\textsuperscript{94} and attempt to recapture these towns and other territory from AQAP. In its attempts to oust AQAP, Yemen has deployed its regular armed forces alongside its civilian security forces. Those forces have employed heavy weapons indicative of an armed conflict including tanks, artillery, and the Yemeni air force.\textsuperscript{95}

The increase in the hostilities between AQAP and the Yemeni government, the frequency with which they occur,\textsuperscript{96} the government’s use of its regular armed forces, as well as the government’s “declaration of war” all indicate that the government of Yemen and Al Qaeda in the Arabian Peninsula are engaged in a non-international armed conflict.

2. Armed Conflict Between the United States and AQAP Alone

Viewed in isolation, it is unlikely that the United States and AQAP are engaged in an armed conflict. Whether the United States is engaged in an isolated armed conflict with AQAP turns on whether AQAP is sufficiently organized to be a party to an armed conflict and whether

\textsuperscript{94} Yemen Declares War on AQAP, UPI, Jan. 7, 2010, http://www.upi.com/Top_News/Special/2010/01/07/Yemen-declares-war-on-AQAP/UPI-16041262890800/; Mona el-Naggar & Robert F. Worth, Yemen’s Drive on Al Qaeda Faces Internal Skepticism, N.Y. TIMES, Nov. 3, 2010 (“One thing is clear: Yemen’s president, Ali Abdullah Saleh, has stepped up his commitment to fighting Al Qaeda in the past year, with far more military raids and airstrikes, including some carried out by the American military. His government has paid a price. On Saturday, a day after the discovery of the air freight bomb plot, Mr. Saleh said during a news conference that Al Qaeda had killed 70 police officers and soldiers in the past four weeks. That is a sharp increase over previous years, and some analysts have taken it as proof that Al Qaeda’s Yemen-based branch is growing.”).


the hostilities between AQAP and the United States are sufficiently intense to constitute an armed conflict. Assuming that AQAP is sufficiently organized to constitute a party to a non-international armed conflict, the intensity of the hostilities between the United States and AQAP likely do not rise to the level necessary for an armed conflict.

In examining the intensity of hostilities, international humanitarian law seeks to separate the violence of armed conflict from the violence associated with riots or banditry. As such, the intensity analysis is an examination of the seriousness of the hostilities that looks to such factors as the number, duration, and intensity of individual confrontations; the types of weapons employed; the number of persons and types of forces engaged in clashes; whether territory has been captured and held; the number of casualties; the extent of material destruction; and the number of civilians who have fled fighting. Other relevant factors include whether the U.N. Security Council has taken notice of the fighting; whether the state has resorted to its regular armed forces; the duration of the conflict; and the frequency of acts of violence.

While U.S. strikes against AQAP targets involved the deployment of regular armed forces and the use of weapons generally associated with armed conflicts, these airstrikes have been infrequent and sporadic—not sustained and prolonged. Similarly, Al Qaeda in the Arabian Peninsula has only infrequently attacked—or attempted to attack—the United States. Since 2009, the United States has reportedly conducted just a handful of airstrikes in Yemen. During the same period, only three AQAP-linked operations have been reportedly directed at targets within the United States. AQAP has not captured any territory possessed by the United States and,

97 See Part II.A.1.a supra.
98 Scott Shane, Mark Mazzetti & Robert Worth, Secret Assault on Terrorism Widens on Two Continents, N.Y. TIMES, Aug. 14, 2010 (describing the May 25, 2010 airstrike in Yemen as the fourth U.S. airstrike in Yemen since December 17, 2009). Instead, the U.S. efforts have focused on providing intelligence, logistic, and materiel support to the Yemeni government. Recently, however, the United States has threatened to emulate its Pakistani drone campaign in Yemen.
likewise, the United States has not reportedly ousted AQAP from any territory it has captured in Yemen. AQAP attacks have not resulted in widespread destruction, nor have U.S. airstrikes against AQAP resulted in extensive damage. There are no reports of civilians in either the United States or Yemen fleeing fighting between the United States and AQAP.

Unlike the cases in which the ICTY found an armed conflict to exist, these infrequent airstrikes by the United States and disparate attempted terrorist attacks by AQAP do not rise to the level of intense hostilities associated with an armed conflict. However, when U.S. operations against AQAP are considered within the context of the ongoing armed conflict between Yemen and AQAP, it is likely that the United States is intervening in that armed conflict and, through that intervention, the hostilities between the United States and AQAP are transformed into an armed conflict.

3. Armed Conflict Between the United States and AQAP through U.S. intervention in Yemen

United States operations in Yemen, including airstrikes targeting AQAP on behalf of the Yemeni government, constitute an armed intervention into Yemen’s non-international armed conflict. Such an intervention places the United States in a non-international armed conflict with Al Qaeda in the Arabian Peninsula, just as Yemen is engaged in a non-international armed conflict with AQAP.

Armed intervention by a third-party state into an ongoing non-international armed conflict complicates the character of that armed conflict, affecting the scope of the applicable

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99 See generally ANTONIO TANCA, FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT (1993).
international humanitarian law.\textsuperscript{100} Depending on the configuration of the parties to the armed conflict, intervention will have one of two possible effects. Armed intervention in support of a non-state actor against the territorial state will internationalize an armed conflict, placing the intervening state and the territorial state in an international armed conflict.\textsuperscript{101} For example, many view the U.S. invasion of Afghanistan in the aftermath of the September 11th attacks as an intervention of a third state on behalf of a non-state actor. The Northern Alliance, a non-state actor, had been engaged in a civil war against the Taliban regime of Afghanistan since the mid-1990s.\textsuperscript{102} Once the United States intervened in early October 2001, the armed conflict was internationalized because two states—the United States and Afghanistan—were engaged in hostilities with each other.\textsuperscript{103}

Alternatively, armed intervention in support of the government of the territorial state against a non-state actor puts the intervening state and the non-state actor in a non-international

\begin{itemize}
\item \textsuperscript{102} Although the Taliban government of Afghanistan was only recognized by three states, it was, at least, the \textit{de facto} government of Afghanistan. US recognition of its initial invasion of Afghanistan as an international armed conflict indicates that the United States accepted that the Taliban government was the government of Afghanistan. Geoffrey S. Corn, \textit{What Law Applies to the War on Terror?}, \textit{in The War on Terror and the Laws of War: A Military Perspective} 1, 4 (Michael Lewis et al. eds., 2009).
\item \textsuperscript{103} See \textit{id.} (noting that the United States ultimately conceded that the conflict between the United States and the Taliban government of Afghanistan was an interstate armed conflict); Yoram Dinsein, \textit{The Conduct of Hostilities under the International Law of Armed Conflict} 14 (2004).
\end{itemize}
armed conflict. Thus, following the Taliban’s ouster and the establishment of the Karzai government, the conflict between the United States and the now-insurgent Taliban became a non-international armed conflict with the United States intervening on behalf of the Karzai government.

Such was also the case when, in 1979, the Soviet Union intervened in Afghanistan on behalf of the government of Afghanistan against the mujahideen placed the Soviet Union in a non-international armed conflict with the mujahideen. Notwithstanding significant complicating circumstances, the Soviet intervention was clearly in opposition to the mujahideen and in defense of the Soviet-style government then in place in Afghanistan, even if the Soviet Union had orchestrated a change in that government’s leadership. Thus, the Soviet intervention is most often viewed as an intervention on behalf of a government against the non-

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104 See Bindschedler-Robert, supra note 100, at 52; Geoffrey S. Corn, What Law Applies to the War on Terror?, in THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 1, 1–2 (Michael Lewis et al. eds., 2009). See also Yoram Dinstein, War, Aggression, and Self-Defense 7 (2005); Jelena Pejic, Status of Armed Conflicts, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 92 (Elizabeth Wilmshurst & Susan Breau eds., 2007).


state actor challenging it, placing the USSR in a non-international armed conflict with the mujahideen.

Though this bifurcated approach to the characterization of armed conflicts in which foreign states intervene is—and has long been—disputed,\(^{108}\) it is the majority view and the one endorsed by International Committee for the Red Cross and, implicitly, by the International Court of Justice. Indeed, in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, the ICJ separately characterized the armed conflict between Nicaragua and the contras, and the potential armed conflict between Nicaragua and the United States:

The conflict between the contras’ forces and those of the government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.\(^{109}\)

As was the case with the Soviet intervention in Afghanistan, U.S. operations in Yemen target members of an organized armed group engaged in a non-international armed conflict with government of the territorial state. Though the scale of the U.S. intervention in Yemen is markedly different than the scale of the Soviet intervention in Afghanistan, this difference in degree is irrelevant. Instead, the relevant considerations here are whether Yemen is engaged in a non-international armed conflict with AQAP and whether the United States is employing force in support of the government of Yemen in that armed conflict. Both of these conditions are satisfied. Thus, the United States is intervening in Yemen’s non-international armed conflict with AQAP in support of Yemen. And, due to that intervention, the United States is in a non-

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\(^{108}\) For example, Bindschedler-Robert notes that “[t]his distinction between the international and internal aspects of the conflict [in which a foreign state has intervened] is disputed. It is often difficult to apply in practice . . . .”

\(^{109}\) *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 219 (June 27)
international armed conflict with AQAP even though the hostilities between the United States and AQAP, standing alone, are insufficient to constitute an armed conflict.

4. Armed Conflict Between the United States and AQAP because of the U.S.-Al Qaeda Armed Conflict

The United States is engaged in a non-international armed conflict with al Qaeda. If the relationship between al Qaeda and AQAP can be characterized as co-belligerency, then hostilities between the United States and AQAP would be an extension of that armed conflict.

In international armed conflict, co-belligerency describes the relationship among states cooperatively engaged in an armed conflict against one or more opposing states. An armed conflict between two states places each state in an armed conflict with its opposing state’s co-belligerents. States may achieve co-belligerency through formal processes such as treaties of alliance. A state may also become a co-belligerent through an informal process of “provid[ing] help and succor only in a limited way to a principal belligerent” or by “mak[ing] common cause” with a belligerent.

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111 GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW 693-695 (1968); L. OPPENHEIM, 2 INTERNATIONAL LAW 206 (1935); see also HENRY HALLECK, INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 3 (1908).
112 See, e.g., HENRY HALLECK, INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 3 (1908) (“We have the same rights of war against co-allies or associates as against the principal belligerent.”).
113 Cf. L. OPPENHEIM, 2 INTERNATIONAL LAW 206 n.3 (1935).
114 L. OPPENHEIM, 2 INTERNATIONAL LAW 206 (1935); HENRY HALLECK, INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 11-12 (1908).
115 HENRY HALLECK, INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 11-12 (1908) (citing Vattel); see also Prosecutor v. Blaskic (abjuring the formalized relationship between Croatia and Bosnia-Herzegovina in favor of an examination of the actual interactions between the armed forces of the two states to determine whether they were co-belligerents).
Co-belligerency is unknown in non-international armed conflict. However, Bradley and Goldsmith have suggested that the Authorization for the Use of Military Force against Al Qaeda and its Associates should be interpreted in light of the customary principles of co-belligerency. That is, they suggest grafting the concept of co-belligerency onto non-international armed conflict. Bradley and Goldsmith’s approach was rejected in obiter dicta by a recent panel decision from the Court of Appeals for the District of Columbia Circuit. Moreover, it has yet to gain much traction among international law scholars.

Yet, there may be good reason to extend the concept of co-belligerency to non-international armed conflict. Currently, a state that intervenes in support of a state engaged in a non-international armed conflict is similarly placed in a non-international armed conflict. A state that intervenes in support of a non-state actor against another state is placed in an international armed conflict with that state. Moreover, two states supporting opposing non-state actors engaged in a non-international armed conflict are placed in an international armed conflict.

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116 Cf. L. Oppenheim, 2 International Law 203 (1935) (“According to the Law of Nations, full sovereign States alone possess the legal qualification to become belligerents.”)
118 Al-Bihani v. Obama, 590 F.3d 866, 873 (2010) (“[E]ven if Al-Bihani’s argument were relevant to his detention and putting aside all the questions that applying such elaborate rules to this situation would raise, the laws of co-belligerency affording notice of war and the choice to remain neutral have only applied to nation states. The 55th clearly was not a state, but rather an irregular fighting force present within the borders of Afghanistan at the sanction of the Taliban. Any attempt to apply the rules of co-belligerency to such a force would be folly, akin to this court ascribing powers of national sovereignty to a local chapter of the Freemasons.”).
119 But see David Mortlock, Definite Detention: The Scope of the President’s Authority to Detain Enemy Combatants, 4 Harv. L. & Pol’y Rev. 375, 395 (2010).
120 Jelena Pejic, Status of Armed Conflicts, in Perspectives on the ICRC Study on Customary International Humanitarian Law 77, 92
conflict if those two states engage in hostilities against each other. However, similar intervention or support by a non-state group on behalf of another non-state group engaged in a non-international armed conflict does not necessarily place the intervening non-state group in an armed conflict. In some sense, then, extending co-belligerency to non-international armed conflict merely recognizes the realistic dimensions and configurations of modern armed conflict.\(^{122}\)

Additionally, extending the concept of co-belligerency to non-international armed conflict would not be as radical a shift as the D.C. Circuit intimates. Oppenheim’s restriction of co-belligerency—really, belligerency—to States was not made in contradistinction to non-states but instead to “half and part sovereign States.”\(^{123}\) Oppenheim even recognized that those “half and part” states, disqualified from becoming de jure belligerents, could become belligerents in fact.\(^{124}\) It follows logically, then, that “half and part” states could become co-belligerents in fact.

If co-belligerency were applicable to non-international armed conflicts, then the United States would almost certainly be placed in a non-international armed conflict with AQAP due to the ongoing non-international armed conflict between Al Qaeda and the United States. AQAP has made common cause with Al Qaeda—they have overlapping if not identical goals. There is evidence that individuals who have fought with Al Qaeda have subsequently fought with the AQAP and there is evidence that they share information, and expertise. These are indicators of

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\(^{123}\) L. OPPENHEIM, 2 INTERNATIONAL LAW 203-04 (1935)

\(^{124}\) L. OPPENHEIM, 2 INTERNATIONAL LAW 204 (1935)
the organizations providing each other “help and succor,” similar in kind if not degree to a state paying subsidies or sending a certain number of troops to a principal belligerent.125

B. Targeting Anwar al-Aulaqi

The existence of an armed conflict triggers the application of international humanitarian law—the body of law that defines the rights and obligations parties to the conflict. The scope of that body of law applicable to any given conflict is determined by whether that conflict is of an international or non-international character. Thus, while an international armed conflict is subject to the full panoply of the Geneva Conventions of 1949 and customary international humanitarian law, a non-international armed conflict is subject only to the less restrictive provisions of Common Article 3 and the customary international law governing non-international armed conflict. Regardless of a particular conflict’s characterization, international humanitarian law’s “cardinal principle”126 demands that armed forces distinguish between combatants and civilians.127 Combatants may be targeted at any time and in any place, so long as they have not been rendered hors de combat by “by sickness, wounds, detention, or any other cause.”128 Civilians, on the other hand, are protected from being directly targeted “unless and for such time as they take a direct part in hostilities.”129 In both international and non-international armed conflicts, civilians who take a direct part in hostilities forfeit their protected status under international humanitarian law while they directly participate in hostilities.

125 See L. Oppenheim, 2 International Law 206-07 (1935)
126 Threat of Nuclear Weapons at ¶ 78.
127 Combatants include members of the armed forces of a state as well as militia or members of volunteer corps who are subject to responsible command; have a fixed distinctive emblem recognizable at a distance; carry their arms openly; and conduct their operations in accord with the laws and customs of war. Hague Regulations ¶1; see also Targeted Killing Case at ¶ 24; Customary International Humanitarian Law Rule 3.
128 Common Article 3.
129 AP I at art. 51 (3); AP II at art. 13 (3); see also ICRC, Customary International Humanitarian Law Rule 6.
Although there is no precise definition of direct participation in hostilities,\textsuperscript{130} it is generally accepted that direct participation in hostilities requires some act that is likely to result in a harm to the adversary,\textsuperscript{131} a sufficient causal relationship between the act and the harm; and a nexus between the act and ongoing hostilities. There is no precise and generally accepted definition of a sufficiently close causal connection between an act and a harm to render the actor to be directly participating in hostilities.\textsuperscript{132} Instead, acts are assessed on a case-by-case basis. Similarly, there is no precise or generally accepted definition for the temporal component of direct participation in hostilities.\textsuperscript{133} Instead, there is wide agreement over the extreme cases and vigorous debate over the close ones. Thus, for example, there is wide agreement that a civilian who picks up a weapon and fires it at enemy armed forces is directly participating in hostilities. Additionally, there is agreement that the individual who directed that civilian to pick up and fire that weapon is directly participating in hostilities.\textsuperscript{134} But there is less agreement as to whether a civilian driving a truck loaded with munitions for delivery to the front line is directly participating in hostilities. Likewise, there is wide agreement that “a civilian who has joined a terrorist organization which has become his ‘home,’ and within the framework of his role in

\textsuperscript{130} Prosecutor v. Stugar, IT-01-42-A at ¶175.
\textsuperscript{131} Prosecutor v. Stugar, IT-01-42-A at ¶178. \textit{But see} Schmitt Deconstructing the Interpretive Guidance at 727 (arguing that acts that confer a benefit on one party should be considered direct participation in hostilities).
\textsuperscript{132} Targeted Killing Case at ¶ 34.
\textsuperscript{133} Targeted Killing Case at ¶ 39.
\textsuperscript{134} See, \textit{e.g.}, Targeted Killing Case at ¶ 37 (“In our opinion, the ‘direct’ character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take ‘a direct part’. The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities.”); Schmitt, Direct Participation in Hostilities by Private Contractors or Civilian Employees at 543.
that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack.”

Anwar al-Aulaqi is not a combatant. He is not a member of any state’s regular armed forces. Nor is Al Qaeda in the Arabian Peninsula a militia or volunteer corps belonging to a party of a conflict that is subject to responsible command, whose members where a fixed distinctive sign, carry their arms openly, and conduct their operations in accord with the laws and customs of war.

There is likewise little doubt that Anwar al-Aulaqi is directly participating in hostilities—and, therefore, a legitimate target. Although al-Aulaqi is perhaps best known for his accessible, colloquial English-language calls for *jihad*, the United States argues—and open-source reporting suggests—that al-Aulaqi is not a mere *agent provocateur* but an operational leader of AQAP. The distinction is significant. As an operational leader, al-Aulaqi is most certainly directly participating in hostilities:

> [P]lanning at the operational level entails decisions about the conduct of particular military campaigns or operations, whereas tactical planning encompasses individual battles or engagements. All tactical level planning, such as mission planning for aerial operations, amounts to direct participation because specific military operations could not occur but for that planning.

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135 Targeted Killing Cast at ¶ 39.
136 Cf. Targeted Killing Case (description of Palestinian terrorists falling short of these criteria). Even if members of AQAP were subject to a responsible command, carried arms openly, and wore a fixed distinctive sign, its operations—some of which, like the printer cartridge bombs, rely on perfidy or sabotage, and directly target civilians—clearly do not accord with the laws or customs of war.
138 Schmitt, Direct Participation in Hostilities by Private Contractors or Civilian Employees at 543.
Moreover, as an operational leader, al-Aulaqi has made AQAP his “home” and, in so doing, he has made himself continuously targetable.\textsuperscript{139} Were he merely a propagandist, al-Aulaqi would not be a legitimate target no matter how vile his message.\textsuperscript{140}

Thus, al-Aulaqi’s high-profile role as author and producer of AQAP’s English-language \textit{Inspire} magazine does not amount to direct participation in hostilities. However, al-Aulaqi’s role as a leader of AQAP, responsible for that organization’s recent emphasis on attacking the United States and the recruitment of attackers like Umar Farouk Abdulmutallab,\textsuperscript{141} does amount to direct participation in hostilities. By directly participating in hostilities, al-Aulaqi loses the protection accorded civilians and is subject to use of force. Therefore, the United States’ targeting of Anwar al-Aulaqi is lawful to the extent that it is occurring within the context of a non-international armed conflict.

\textbf{III. Self-Defense}

\textsuperscript{139} Targeted Killing Case. \textit{Cf.} ICRC, Interpretive Guidance on Direct Participation in Hostilities (establishing that membership in an organized armed group, based on assumption of a continuous combat function, renders an erstwhile civilian continuously targetable) \textit{with} Schmitt, The Interpretive Guidance: A Critical Analysis 1 Harv. Nat’l Security J. 5, 16–25 (criticizing the ICRC’s “continuous combat function” criteria on numerous grounds but agreeing that members of an organized armed group should be continuously targetable).

\textsuperscript{140} Prosecutor v. Stugar, IT-01-42-A at ¶177 (“Examples of indirect participation include . . . expressing sympathy for the cause of one of the parties to the conflict.”); Targeted Killing Case at ¶ 34. \textit{See also} Interpretive Guidance on the Notion of Direct Participation in Hostilities under \textit{International Humanitarian Law}, 90 \textit{INTERNATIONAL REVIEW OF THE RED CROSS} 991, 1006 (2008) (“As with State parties to armed conflicts, non-State parties comprise both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. The term organized armed group, however, refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense.”)

The United States also justifies its targeting of Anwar al-Aulaqi—as well as its targeted killing program generally—on the basis of self-defense. International law imbues states with an inherent right of self-defense. Self-defense provides states with the right to use force as a response to a particular wrongful use of force by another state or a non-state actor. A state may rely on self-defense to justify its use of force even when it is not engaged in an armed conflict. And, though it is a matter of some debate, a state may invoke self-defense in anticipation of an imminent armed attack.

The classical parameters of self-defense are famously described in an exchange of diplomatic notes between the United States and United Kingdom in the Caroline incident. The Caroline incident took place during the Mackenzie Rebellion in Canada. Citizens on the US side of the Niagara River who sympathized with the Canadian rebels ferried supplies to the rebels using the steamship Caroline. After the United Kingdom’s diplomatic protests failed to stop the provision of supplies to the rebels, British soldiers crossed into the United States, captured and set fire to the Caroline, killing and wounding American citizens in the process. The United States filed a protest but the United Kingdom claimed it had acted in self-defense. The United States responded famously that Britain, to make out its justification, must show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation. It will be for [Britain] to show, also . . . supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity.
Caroline incident elucidated the three limiting requirements of lawful self-defense: necessity, proportionality, and immediacy. The victim state’s use of force must be necessary to disrupt the harmful attack it faces. The victim state’s use of force must be proportional to the harm it faces. The victim state’s use of force must either anticipate an imminent armed attack or immediately follow that attack. These three factors combine to differentiate self-defense, a fundamentally responsive and preventative action, from armed reprisal, a responsive but fundamentally punitive action. Notably, all three parameters of self-defense are defined in relationship to a particular opposing armed attack.

Under customary international law, anticipatory self-defense—the resort to force to stymie an impending attack—was presumed to be valid. However, the United Nations Charter’s codification of the right to self-defense called into question the validity of anticipatory self-defense. Article 51 of the UN Charter declares that “[n]othing in the present Charter shall impair the inherent right of . . . self-defence if an armed attack occurs against a Member of the United Nations.”

The inclusion of the “armed attack” predicate for the invocation of self-defense in the UN Charter has led some scholars to argue that self-defense is only valid after an armed attack. The better view, though, is that Article 51 embraces the customary practice of self-defense in

Webster’s rebuttal may not have reflected international law at the time it was written but its clear articulation that self-defense only justifies the use of force when it is necessary, immediate, and proportional to the threat necessitating its use, has become the standard employed by customary international law.

148 D.W. Bowett, SELF-DEFENSE IN INTERNATIONAL LAW 184 (1958)
149 U.N. Charter at art. 51.
anticipation of an imminent armed attack.\textsuperscript{151} To hold otherwise would lead to the absurd result of compelling a state to suffer an armed attack of which the state was aware and able to disrupt—the very essence of self-defense.\textsuperscript{152}

Though the International Court of Justice has explicitly refused to consider the lawfulness of anticipatory self-defense,\textsuperscript{153} state practice since the adoption of the UN Charter indicates that self-defense in anticipation of an imminent armed attack is lawful.\textsuperscript{154} The anticipatory Israeli strike against the Egyptian air force in June 1967 provides the classical example of justified

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\textsuperscript{153} See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 222 (Dec. 19) (“As was the case also in \textit{Military and Paramilitary Activities in and against Nicaragua} case, ‘reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to an imminent threat of armed attack has not been raised’ (I.C.J. Reports 1986, p. 103, para 194). . . . ‘[A]ccordingly [the Court] expresses no view on that issue.’”) [hereinafter Congo v. Uganda]. The Court determined that there had been no armed attack attributable to the Democratic Republic of the Congo. \textit{Id}. The Court did not consider the criteria of self-defense beyond the armed attack predicate. See \textit{id}.
\end{flushright}
anticipatory self-defense. In that case, Egypt requested the UN force deployed in the Sinai as a buffer between Egypt and Israel to withdraw. At the same time, Syrian troops massed on the Syria-Israel border. In light of these circumstances, the June 5, 1967, Israeli strike against the Egyptian air force was viewed as a lawful use of anticipatory self-defense: the strike was necessary; the threat posed by Egypt and Syria was immediate; and Israel’s initial strike—attacking the Egyptian air force to deprive Egypt of air cover—was proportionate to the threat it faced.

In contrast, the Israeli raid on the Iraqi nuclear reactor at Osirak in 1981 was widely condemned for failing to satisfy the criteria of self-defense.\(^{155}\) In that case, the threat to Israel

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\(^{155}\) Notably, the United States apparently seemingly adopted Israel’s self-defense justification—that facilities for developing weapons of mass destruction changes the imminence calculus for self-defense—in its 2002 national Security Strategy:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

. . . We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

. . . The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

. . . The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.
was speculative and remote. The Iraqi nuclear reactor was not finished and the Iraqi government
was not close to constructing a weapon, let alone commencing an armed attack with that
hypothetical weapon. Similarly, the U.S. invasion of Iraq in 2003 failed to satisfy the criteria
governing self-defense. 156 Thus, anticipatory self-defense is lawful in the face of an imminent
armed attack but the mere threat of force will not justify self-defense. 157

The armed attack predicate of Article 51 has also given rise to a debate over what level of
force qualifies as an armed attack. 158 In the Case Concerning Military and Paramilitary
Activities in and against Nicaragua, the International Court of Justice impliedly adopted the
notion that there is a threshold between the mere use of force and that level of force rising to an
armed attack. There, the Court stated that it saw

no reason to deny that, in customary law, the prohibition of armed attacks may
apply to the sending by a State of armed bands to the territory of another State, if
such an operation, because of its scale and effects, would have been classified as
an armed attack rather than a mere frontier incident had it been carried out by
regular armed forces. 159

For the purposes of this paper, though, it is sufficient to note that there is widespread agreement
that the bombing of a state’s civilian aircraft qualifies as an armed attack against that state. 160

157 Yoram Dinstein, War, Aggression, and Self-Defense 182-86 (2006);
159 Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), 1986 I.C.J. 14, 103 (June 27) (emphasis added) [hereinafter Nicaragua v. United States].
160 See, e.g., Tom Ruys, ‘Armed Attack’ and Article 51 of the UN Charter: Evolutions in Customary International Law 204-12 (2010); Sean D. Murphy, Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter, 43 Harv. Int’l L.J. 41, 47-50
attack like that attempted on Christmas Day 2009 could have resulted in the destruction of at least a civilian airliner and the deaths of nearly 200 civilians.\textsuperscript{161} As such, continued attacks by al-Aulaqi and AQAP against U.S. aircraft constitute armed attacks against the United States.

Here, the United States invokes self-defense as a justification for its placing Anwar al-Aulaqi on a targeted kill list.\textsuperscript{162} It also relies on self-defense as a justification for its use of targeted killings generally.\textsuperscript{163} The United States claims that “there are . . . legal bases under . . . international law for the President to authorize the use of force against al-Qaeda and AQAP, including the inherent right to self-defense.”\textsuperscript{164} This statement is uncontroversial, so far as it goes. Self-defense is an inherent right of states under international law and self-defense does justify otherwise unlawful uses of force. The United States must, however, demonstrate that its killing of Anwar al-Aulaqi satisfies the requirements of necessity, proportionality, and immediacy. Those three requirements are addressed in turn.

A. Necessity

Under self-defense, necessity means that the “measures taken . . . must never be excessive or go beyond what is strictly required for the protection of the substantive rights which

\begin{footnotesize}
\textsuperscript{162} Memorandum in Support of Defendants’ Motion to Dismiss at 9, Al-Aulaqi v. Obama, No. 10-1469 (D.D.C. Sept. 25, 2010).
\textsuperscript{163} Harold Koh, Legal Adviser, U.S. Dep’t of State, International Law and the Obama Administration, Keynote Address Before the American Society of International Law (Mar. 25, 2010)
\textsuperscript{164} Memorandum in Support of Defendants’ Motion to Dismiss at 4-5, 8-9, 24, Al-Aulaqi v. Obama, No. 10-1469 (D.D.C. Sept. 25, 2010).
\end{footnotesize}
are endangered.” Practically, this means that the state must be compelled to use force to disrupt an ongoing or impending armed attack because no other effective means of redress are available. In the *Nicaragua* case, the United States justified its arming of anti-Nicaraguan rebels and its mining of Nicaraguan waters in part as a self-defense response to Nicaragua’s arming of anti-Salvadorian rebels. The International Court of Justice (ICJ) found this invocation of self-defense unavailing because the U.S. actions in question had taken place months after the anti-Salvadorian offensive had been commenced and repulsed. Thus, armed force was unnecessary to repulse or prevent an attack already defeated. Similarly, the international community rejected Israel’s invocation of self-defense to justify its bombing of Iraq’s Osirak nuclear facility. There, the absence of an actual or imminent armed attack deprived Israel of its self-defense justification—force was not necessary to defeat a merely hypothetical armed attack.

In contrast, the Israeli invasion of Lebanon in 1982 was at least initially necessary in the face of Palestinian Liberation Organization (PLO) freedom of action in Lebanon and attacks

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166 Christopher Greenwood, *International Law and the United States Air Operation Against Libya*, 89 W. Va L. Rev. 945 (1987) (“The question is whether [other means short of armed force] would have been as effective as an air strike in preventing the imminent terrorist onslaught.”); Dinstein at 209-210 (“Utopia must ascertain that there exists a necessity to rely on force—in response to the armed attack—because no realistic alternative means of redress is available. In other words, ‘force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile.’”)); Michael N. Schmitt, “Change Direction” 2006: Israeli Operations in Lebanon and the International Law of Self-Defense, 29 Mich. J. Int’l L. 127, 151 (2008).

167 *Nicaragua v. United States* at 122.

against Israel. The Lebanese government’s inability or unwillingness to restrain PLO attacks on Israel is particularly important when considering whether Israeli action was lawful self-defense. 169 Notably, Israel targeted the PLO and not the Lebanese armed forces during its invasion. 170

In the case of Anwar al-Aulaqi and Al Qaeda in the Arabian Peninsula, it may well be that use of force against al-Aulaqi on a given day will disrupt an impending armed attack. However, whether that use of force is necessary turns on whether other non-forceful actions are available to disrupt that attack—including whether the State of Yemen is willing and able to take action again al-Aulaqi and AQAP. In this regard, it is to be noted that Yemen is actively pursuing AQAP 171 and, indeed, Anwar al-Aulaqi. 172 Moreover, the United States is cooperating with Yemen, providing it military, intelligence, and logistical support, and even carrying out air strikes in coordination with Yemen. 173

However, “necessity . . . does not require naivety.” 174 As such, the examination of the necessity of U.S. use of force against al-Aulaqi and AQAP must consider the efficacy of Yemeni

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170 Id. at 247-248. But see Thomas Mallison, Aggression or Self-Defense in Lebanon in 1982?, 77 Am. Soc. Int’l L. Proc. 174, 177-80 (1983) (questioning Israel’s self-defense claim on the basis that there was no actual or imminent armed attack).
172 Mohammed Hatim, Yemen Militant Cleric Al-Awlaki’s Arrest Ordered by State Security Court, Bloomberg, Nov. 6, 2010.
efforts against to counter AQAP and capture or kill al-Aulaqi. While Yemen is not a failed state, it is a failing state. Its government is weak and currently confronting not only AQAP in southern Yemen but also a tribal rebellion in northern Yemen and a separate secessionist movement in the south. Additionally, since January 2011, the Yemeni government, like many autocratic governments in the region, has faced a broad-based and growing popular uprising that has inspired tribal factions to defect from the Saleh regime, further weakening the state. These multifaceted challenges call into question Yemen’s ability to effectively pursue AQAP and Anwar al-Aulaqi—in stark contrast to its highly effective post-September 11 campaign against Al Qaeda proper.

Importantly, the United States claims self-defense in relation to Anwar al-Aulaqi individually and not simply AQAP. Invoking self-defense to justify the use of force against Anwar al-Aulaqi himself requires that he be responsible for an actual ongoing or imminent armed attack. Yet, if neither threats nor even use of force short of an armed attack will justify self-defense, it seems that mere calls for jihad will similarly fail to satisfy the armed attack predicate of self-defense—regardless of the accessibility or inspirational quality of those calls for jihad. That said, al-Aulaqi’s history of planning actual attacks against the United States—like

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178 See, e.g., Gregory D. Johnsen, AQAP in Yemen and the Christmas Day Terrorist Attack, CTC SENTINEL SPECIAL REPORT 1, 1-2 (2010) (“During . . . the first phase of the war against al-Qa’ida in Yemen, the U.S. and Yemeni governments cooperated quite closely, even working together to kill head of al-Qa’ida in Yemen, Abu Ali al-Harithi, in an unmanned CIA drone strike in November 2002. Yemeni forces arrested his replacement, Muhammad Hamdi al-Ahdal, a year later. The successive losses of two key leaders as well as numerous other arrests effectively crippled the organization in Yemen.”).
Christmas Day bombing attempt or the printer cartridge bombing attack—makes it likely that al-
Aulaqi is continuing to plot attacks on the United States. If one such plot advances to the point of
becoming an imminent armed attack, then at that point, use of force against al-Aulaqi in self-
defense is appropriate—so long as that use of force is necessary and proportionate.

**B. Proportionality**

For use of force to be lawful under self-defense, that force must be proportionate. In the
context of self-defense, proportionality demands that the force used be no more than required to

In the case of self-defense against non-state actors, Dinstein provides a useful discussion of proportionality:

> [W]hen Utopia sends an expeditionary force into Arcadia, the operation is to be
directed exclusively against the armed band or terrorists, and it must not be
confused with defensive armed reprisals. Surely, no forcible action may be taken
against the Arcadian civilian population. Furthermore, even the Arcadian armed
forces and installations ought not to be harmed.\footnote{Yoram Dinstein, War, Aggression and Self-Defence 250 (2005).}

It is clear from Dinstein’s discussion that a state’s use of force in self-defense against attacks by
a non-state actor must be directed at that non-state actor, leaving the host state free from harm,

Thus, in the *Congo* case the ICJ noted, “The Court cannot fail to observe . . . that the taking of airports and towns many hundreds of
kilometers from Uganda’s border would not seem proportionate to the series of transborder attacks [Uganda] claimed had given rise to the right of self-defence.”\textsuperscript{182} Similarly, in the \textit{Oil Platforms} case, the ICJ remarked that, had the Iranian anti-ship attack originated from the oil platforms attacked by the United States, the U.S. use of force may have been proportionate:\textsuperscript{183} the United States destruction of an anti-ship missile position would have been a reasonable level of force to counter anti-ship attacks. However, U.S. use of force against oil platforms from which no attack could be linked did not satisfy the proportionality requirement of self-defense because it was not reasonably calibrated to deter or defeat an attack.\textsuperscript{184}

It is clear that any force used against Anwar al-Aulaqi or AQAP under the rubric of self-defense must be tied to an imminent armed attack for which either al-Aulaqi or AQAP is responsible. The level of force lawfully permitted is no more than that which is required to disrupt the impending attack. Additionally, it is clear that the force must be directed against al-Aulaqi or AQAP and not the State of Yemen, its civilian population, its infrastructure, or its security services.

\textbf{C. Immediacy}

The final requirement of lawful use of force under self-defense is that of immediacy. Immediacy refers to the closeness in time of a wrongful act and the responsive use of force. When force is used in self-defense in anticipation of an armed attack, immediacy requires that

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  \item \textsuperscript{182} Congo v. Uganda, at 223.
  \item \textsuperscript{183} Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 198 (Nov. 6).
the wrongful act be imminent.\textsuperscript{185} When self-defense occurs in response to an armed attack, there must not be an undue lag in time between the wrongful act and the corresponding use of force.

As is the case with proportionality, it is difficult to determine hypothetically whether prospective U.S. use of force against Anwar al-Aulaqi satisfies the immediacy requirement of self-defense. The requirement, though, demands that there be a clear temporal relationship between a state’s use of force and a particular ongoing or imminent armed attack. Like the other parameters of self-defense, immediacy is a limiting principle.

It may well be that when the United States launched a drone strike targeting Anwar al-Aulaqi on May 5, 2011, it reasonably believed that al-Aulaqi was responsible for an imminent armed attack. It is of no moment that such an attack failed to materialize despite the failure of the U.S. strike to kill al-Aulaqi.

More troubling, however, is the apparent continuous targeting of al-Aulaqi due to his presence on the CIA’s targeted kill list. On its face, such continuous targetability seems to violate self-defense’s fundamental principle relating a particular use of force to a particular armed attack and not merely the desire or hope of a state or armed group to launch an attack in the future. Some 208 days passed between al-Aulaqi’s addition to the CIA’s targeted kill list and the next publicly known attempted AQAP attack on the United States. It is possible that AQAP and al-Aulaqi were on the verge of an imminent armed attack against the United States each of those intervening 208 days. It is also possible, however, that during some of those 208 days al-

\textsuperscript{185} Christopher Greenwood, \textit{International Law and the United States Air Operation Against Libya}, 89 W. Va L. Rev 945 (1987) (“It would not be enough, therefore, that the United States anticipated further attacks by Libya at some unspecified future date. To remain within the limits of self-defence, as they have been interpreted by the Security Council, the air strike against Libya must have been a response to a threat of terrorist attacks against the United States which could reasonably have been described as imminent by [the date of the U.S. air strike on Libya].”).
Aulaqi and AQAP lay dormant, that they then planned the attack, recruited participants in the attack, prepared the attack, and then finally carried out the attempted attack. During at least some of this period, neither al-Aulaqi nor AQAP would have been lawful targets under self-defense because the attack would not have been imminent.\(^\text{186}\)

One answer to the apparent immediacy problem may be that Anwar al-Aulaqi and AQAP are avowed threats to the United States—even if they only carry out attacks sporadically. They have targeted the United States previously; they inspire others to target the United States; and al-Aulaqi provides religious justification for the killing of Americans. Moreover, AQAP’s organizational capacity and access to resources may give it the ability to launch attacks on targets of opportunity. For those reason, then, AQAP and al-Aulaqi continuously present immediate threats to the United States, justifying their targeting under self-defense.

Yet, consider Israel’s airstrike on the Iraqi Osirak nuclear reactor in 1981 and the Israeli strike against the Egyptian air force in 1967. In 1981, Iraq was an avowed enemy of Israel.\(^\text{187}\) Iraq had repeatedly threatened Israel.\(^\text{188}\) Iraqi army units had even fought against Israel in 1948, 1967, and 1973. Despite Iraq’s threatening posture towards Israel, the international community rejected Israel’s invocation of self-defense to justify its airstrike,\(^\text{189}\) subjecting Israel to a unanimous Security Resolution condemning its action.\(^\text{190}\) Israel’s 1981 invocation of anticipatory self-defense failed because Iraq was a \textit{mere} threat—even assuming it possessed the will and

\(^{186}\) Compare the Israeli airstrike on Egypt in 1967 with the Israeli airstrike on Iraq’s Osirak nuclear reactor in 1981.

\(^{187}\) Indeed, following Israel’s attack on Osirak, Yehuda Blum, Israel’s Permanent Representative to the United Nations described Iraq as “one of Israel’s most implacable enemies.” S/P.V. 2280.

\(^{188}\) In fact, Israel also claimed to be in a continuous state of war with Iraq.


\(^{190}\) S.C. Res. 487 (June 19, 1981) (\textit{“Strongly condemns the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.”}).
desire to use a nuclear weapon against Israel, it lacked the means to do so. It could not be argued that Iraq was on the verge of launching an armed attack against Israel—at least not with a nuclear weapon manufactured at the then-incomplete Osirak nuclear facility.

In contrast, Israel’s strike against the Egyptian air force in 1967 is a paradigmatic example of anticipatory self-defense. In that case—as in the case of Iraq in 1981—Egypt was an avowed threat to Israel. Egypt had repeatedly threatened Israel. And Egyptian and Israel had already fought two wars. However, unlike with Iraqi in 1981, in 1967, Israel reasonably believed that Egypt was on the verge of launching an armed attack against it. The difference in proximity and concreteness of the anticipated attack is the critical difference between Israel’s justified invocation of self-defense in 1967 and its failed invocation of self-defense in 1981. This difference in outcomes between 1967 and 1981 suggests that even a dedicated, continuous threat will not justify self-defense in the absence of an imminent or ongoing armed attack.

Thus, while Anwar al-Aulaqi and AQAP may continuously threaten the United States, their continuous desire to harm the United States alone does not satisfy the immediacy requirement of self-defense—and does not justify their continuous targeting as self-defense. Instead, al-Aulaqi (or AQAP) may only be attacked by the United States on the basis of self-defense when he (or it) is responsible for an ongoing or imminent armed attack against the United States. Notably, though this analysis suggests that self-defense is an inappropriate basis

for any targeted killing program in which a listed individual is continuously subject to use of force, the actual use of force on a particular day may still be lawful. That is, it may be that the drone strike on May 5, 2011 against al-Aulaqi was lawful self-defense but that a similar hypothetical strike on May 1, 2011 or March 1, 2011 would not have been.

Conclusion

That Anwar al-Aulaqi presents a threat to the United States of America is beyond argument. He recruits and encourages individuals to take part in jihad against the United States. He has been directly involved in the planning of operations directed against the United States. Capturing or killing al-Aulaqi will almost certainly improve the security of the United States.

However, al-Aulaqi’s status as a threat to U.S. national security does not necessarily render him subject to use of force on the basis of self-defense. Self-defense requires that al-Aulaqi be more than a mere threat—he must be responsible for an ongoing or imminent armed attack against the United States. Use of force as self-defense must be responsive to that armed attack. Thus, it is the nature of self-defense that undermines its use as a justification for a broad targeted killing program in which targets, once selected, are continuously subject to the use of force.

Instead, in the case of al-Aulaqi at least, the United States is better served by relying on international humanitarian law and al-Aulaqi’s conduct as an operational leader of AQAP. As such a leader, al-Aulaqi has forfeited his protected status by directly participating in hostilities in a non-international armed conflict between Yemen and AQAP. The United States is intervening in that armed conflict, placing it similarly in a non-international armed conflict with AQAP. The United States may thus use force against Anwar al-Aulaqi so long as he directly participates in hostilities—something he appears to be doing continuously.