"To Kill a Cleric?: The al-Awlaki Case and the Chaplaincy Exception under the Laws of War"

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Anwar al-Awlaki, frequently described by the media as an “American-born cleric,” was the first American citizen to be targeted for extrajudicial assassination by the Obama administration as part of the Global War on Terror (GWOT). While there have been scholarly works considering the legality of his killing under domestic law, none have examined his status as a chaplain under International Humanitarian Law (IHL), what this designation could mean for the legality of Anwar al-Alwaki’s killing, or for the GWOT in general. This paper provides a necessarily brief history of Al Qaeda in the Arabian Peninsula (AQAP) and Anwar al-Awlaki’s journey thereto before discussing the Bush and Obama Administrations’ positions on pertinent legal issues. After establishing that IHL applies in the case of the al-Awlaki killing, I argue that al-Awlaki conformed to the standard of religious personnel due to his position as a “cleric,” rendering his killing unlawful. The precedent set by his killing therefore has important ramifications for other clerics working in cases where IHL applies.

KEYWORDS: IHL, law, terror, GWOT, security, Anwar al Awlaki

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Can a "TERRORIST GROUP" LIKE AQAP HAVE ITS OWN “CHaplains”?
I. Introduction: Anwar al-Awlaki and the Global War on Terror

Ten years before he was killed by an American drone strike in Yemen, so-called “radical, American-born cleric”\(^1\) Anwar al-Alwaki was a key liaison between reporters and the world of “moderate Islam,” holding a question and answer session on Islam for the Washington Post, conducting prayers for Muslim staffers in Congress, and even attending a luncheon at the Pentagon. By 2010, however, Reuters was reporting that he had been put on a capture or kill list by the Obama administration, who claimed that Mr. al-Awlaki was not only acting as a recruiter for al Qaeda,\(^2\) but also that he was directing other individuals to engage in violent acts against Americans. A year later, Mr. al-Alwaki was killed by a U.S. drone while traveling in Yemen with another American Muslim, Samir Khan, an event considered sufficiently important to merit a presidential speech marking the occasion. His 16-year old son, also an American citizen, would be killed by another U.S. drone strike a few weeks later. Mr. al-Awlaki was the first American citizen known to be targeted for extra judicial assassination in pursuit of the Global War on Terror (GWOT).

This paper will consider the question of whether the government was permitted to target and kill Anwar al-Awlaki under the rules of International Humanitarian Law (IHL), arguing that as he was a “cleric,”\(^3\) he was considered religious personnel and thus an inappropriate target for assassination under IHL’s principles of distinction. The death of Mr. al-Awlaki thus has broad implications for the chaplaincy exemption under IHL, and for the GWOT in general.

A. The US, Al Qaeda, and the GWOT: the Threat of Terrorism

Before proceeding further it should be noted that release of classified or top secret information might extensively impact the following discussion, particularly if Mr. al-Awlaki is found to have had a primary function oriented around planning or directing attacks, or if evidence came to light suggesting that he offered tactical training to potential combatants on a regular basis. Additionally, it should also be stressed that my discussion of Mr. al-Awlaki as a “chaplain” refers solely to his designation under IHL, and in no way suggests or implies that Mr.

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\(^2\) Scott Shane supra

\(^3\) “Cleric” is framed in quotation marks because there is no official clergy in Islam, nor an official hierarchy like those that exist, for example, in the Catholic and Episcopal churches.
al-Awlaki was speaking on behalf of Muslims, nor in a manner consistent with the central tenets of Islam.

Clearly, the U.S. has a well-established interest in protecting its citizens from terrorism and terrorist activities, and al Qaeda has a well-established history of inflicting violence on civilians in a manner inconsistent with the Geneva Conventions or the laws of war. That al Qaeda is a threat to the United States, that it actively seeks to do harm to innocent people, and that its ideology is morally problematic is not in dispute. It also should be stressed that this paper is not an attempt to minimize the harm caused by terrorist groups, nor of the threat they pose to the United States. Rather, this paper simply proposes to explicate gaps in the existing framework for handling armed conflict, and identify areas of concern both to state actors and individuals whose actions fall under its umbrella. Finally, this paper does not address the domestic law issues raised by Mr. al-Awlaki’s status as a citizen, nor the legality neither of CIA-operated drone strikes, nor of drones themselves. These are certainly important issues but do not figure into the scope of this analysis.

B. Problems in Existing Legal Frameworks

This paper argues that two gaps exist in the legal frameworks relevant to the GWOT. First, the legal doctrine developed by the Bush Administration and its current application under the Obama Administration has blurred the distinction between combatants and non-combatants, potentially criminalizing activities that are legal under the framework of the IHL. A great deal of uncertainty therefore exists in terms of establishing who in fact is a target to whom legal lethal force can be applied.

Second, IHL’s definition of a “Chaplain” is underdeveloped and vague. Chaplains are to be respected and protected at all times, and are thus not appropriate targets for lethal force. The problem is, however, that there exists no clear definition of a Chaplain under IHL. State and non-state actors alike are free to supervise and designate their own Chaplains; given that identified terrorist actors often self-legitimate through religiously charged discourse, the line between Chaplains, propagandists, and combatants has been blurred. This is particularly true for Muslim Chaplains, given that there is no clergy in Islam, and no central authority to apply checks and balances to those claiming to speak in Islam’s name.

C. Scope of the Paper

I will begin with a short background on Anwar al-Alwaki and then move to a discussion of the challenges posed by transnational armed groups to the framework of IHL. After a necessarily brief overview of AQAP, I will demonstrate that IHL applies to American operations in Yemen, thus triggering a mandate for distinguishing between civilians and combatants. I then discuss the Obama and Bush positions on these issues before I treat at length the principle of distinction and then move on to argue that Mr. al-Awlaki conforms to the definition of religious personnel set forth under IHL. Finally, I end by discussing the ramifications of this classification.

II. From “Moderate Islam” to “American Born Cleric:” Anwar al-Awlaki and His Journey to al Qaeda in the Arabian Peninsula
The media often refers to Mr. al-Awlaki as “American born,” implying that he was not truly American but for an accident of birth, however his childhood and adolescence was in many was as “American” as anyone’s. Born in New Mexico in 1961, he lived there until returning to Yemen, Sana’a in 1978 with his family as a teenager where he completed his secondary education. After his graduation from high school in Yemen, he applied to several colleges in the U.S., enrolling in Colorado State University and graduating with a degree in engineering, and then going on to earn an M.A. in education at San Diego State University. By his late twenties, Mr. al-Awlaki had married, and had become an Imam and spiritual leader, first in San Diego, where his sermons were attended by future 9/11 hijackers Khalid al-Midhar and Nawaf al-Hazmi, and then at a mosque in Falls Church, VA, near Washington, D.C.

Reports indicate that he was on the government’s radar screen as early as 1999, when the FBI investigated him for possible connections to Osama bin Laden. His telephone number was also found when police raided the Hamburg, Germany apartment of Ramzi Binalshibh, who was believed to have played a part in the 9/11 attacks, and he had met and developed a relationship with two of the future 9/11 hijackers while preaching in San Diego.

Even so, no solid evidence has ever linked Mr. Al-Awlaki to the 9/11 attacks. In fact, he was invited to a Pentagon luncheon in Virginia shortly after 9/11 as “the secretary of the Army redacted was eager to have a presentation from a moderate Muslim” and at the time, Mr. al-Awlaki was seen as a “moderate Muslim.” In the months after 9/11, Mr. al-Awlaki even became a “go-to Muslim cleric for reporters scrambling to explain Islam” and he hosted an on line discussion about the meaning of Ramadan for the Washington Post on November of 2001. In this conversation, his views included moderate, if not relatively liberal, stances on inter-faith relations, women, and the Taliban, inviting “our non-Muslim friends” to read the Qur’an to

9 Jason Burke, id.
11 Sean Alfano supra
12 Scott Shane and Souad Mekhennet, supra
better understand Islam, and acknowledging that “[Muslims and Christians] definitely need more mutual understanding.”\(^{14}\)

Absent in this on-line discussion was a stated or even implied interest in violence of any kind, as well as any sympathy towards al Qaeda; furthermore, it is clear that Mr. al-Awlaki identified as an American, rather than, say, a Muslim American, or an American of Yemeni descent. For example, to one commenter who asked what the U.S. should have done in response to the 9/11 attacks, Mr. al-Awlaki responded,

… Our government could have dealt with the terrorist attacks as a crime against America rather than a war against America. So the guilty would be tried and only them \(\text{sic}\) would be punished rather than bombing an already destroyed country. I do not restrict myself to US media. I check out Aljazeera \(\text{sic}\) and European media such as the BBC. I am seeing something that you are not seeing because of the one-sidedness of the US media. I see the carnage of Afghanistan. I see the innocent civilian deaths. That is why my opinion is different. \textit{Keep in mind that I have no sympathy for whoever committed the crimes of Sep 11th} \(\text{sic}\). But that doesn’t mean that I would approve the killing of my Muslim brothers and sisters in Afghanistan. Even though this is a dissenting view nowadays \textit{but as an American} I do have the right to have a contrary opinion \textit{[emphases mine]}\(^{15}\).

Mr. al-Awlaki’s social attitudes were similarly moderate, and he stressed the inherently peaceful nature of Islam. In response to a question about forcing women to wear a chador or burqa and prohibiting girls from going to school, he implicitly criticized the Taliban and the Saudi governments, highlighting a progressive interpretation of Islam when he answered:

The imposing of the Burqa \(\text{sic}\) on women by a government never happened in the 1400 year history of the Muslim world. the Taliban \(\text{sic}\) have no precedence in this. The Prophet along with his companions who ruled over the Muslims after him never did that. According to Prophet Muhammad: Education is mandatory on \(\text{sic}\) every Muslim male and female. That is the teaching of Islam and if anyone does otherwise they have disobeyed the Prophet of Islam himself. About killing, the greatest sin in Islam after associating other gods besides Allah is killing an innocent soul.\(^{16}\)

In 2002, Mr. al-Awlaki conducted a prayer service at the U.S. Capital for the Congressional Muslim Staff Association\(^{17}\) but by the end of that year, he moved to the U.K., giving lectures at mosques, universities, and closed study circles across Britain as part of a

\(^{14}\) Anwar al-Awlaki \textit{supra}

\(^{15}\) Anwar al-Awlaki \textit{supra}

\(^{16}\) Anwar al-Awlaki \textit{supra}

campaign by the Muslim Association of Britain.\textsuperscript{18} His reasons for moving out of the country are not well known. There is no publicly available information suggesting that he became the subject of any sort of FBI or DHS investigation, or that he experienced any particularly traumatic event. Whatever the reason, it was at this time that he seemed to have experienced a shift in his thinking. At the East London Mosque in Tower Hamlets, for example, he told his audience “not to turn in fellow Muslims to the police” at their “Stop Police Terror” event\textsuperscript{19, 20} and in 2003, he released a lecture series on jihad.

He did not, however, spend much time in Britain and it is unclear as to what prompted him to move to Yemen in 2004. Some reports indicate he was banned from living in Britain\textsuperscript{21} while others allege that he moved because he was ultimately “unable to support himself.”\textsuperscript{22} In any case, he moved with his wife and five children to his ancestral village in the southern province of Shabwa in Yemen\textsuperscript{23} and became a lecturer at al-Iman University, a Sunni religious school in the capital city of Sana’a where his father had once worked. In late 2006, Mr. al-Awlaki was arrested on kidnapping and terrorism charges and imprisoned until 2007, when he was released after senior members of his tribe intervened on his behalf.\textsuperscript{24} Although his imprisonment was in Yemen, it has been alleged that it was as a result of coordination between Yemeni and U.S. authorities, and furthermore, that Mr. al-Awlaki was tortured while in prison.\textsuperscript{25} Furthermore, these charges do not, at least from publicly available information, seem to figure in to the Obama Administration’s reasons for targeting Mr. al-Awlaki for extrajudicial assassination.

In early February of 2010, Al Jazeera conducted an English-language interview with Mr. al-Alwaki, asking him, among other things, about his role in the failed attempt to blow up a commercial airplane on Christmas of 2009, and whether he was involved in the Ft. Hood shooting. He denied direct involvement in either incident, saying that although he supported the attempt to bomb the plane, he had not issued a fatwa\textsuperscript{26} condoning the attack. Even so, his


\textsuperscript{20} Duncan Gardham \textit{supra}

\textsuperscript{21} Duncan Gardham \textit{supra}


\textsuperscript{23} \textit{Obituary supra}

\textsuperscript{24} Jason Burke \textit{supra}

\textsuperscript{25} Paul Sperry \textit{Jihad, Va: Awlaki May Be Dead, But His Radical American Mosque Remains} New York Post (Oct. 9, 2011) http://www.nypost.com/p/news/opinion/opedcolumnists/jihad_va_2UmOJEP1NQHzF6g9OgWYfi

\textsuperscript{26} A fatwa (fatawa pl.) is a non-binding, non-compulsive legal responsa. In Sunni Islam, Muslims are not obliged to follow the directions given in a fatwa --they are only considered binding on their authors. A person qualified to issue a fatwa is called a mufti. The fact that
answers indicate a profound shift in outlook compared to the one he held in his earlier on-line chat with the Washington Post. Whereas he previously had self-identified as American, he now referred to the United States as a “tyrant;” whereas he had previously condemned any type of violence, he now dismissed the seriousness of 300 American deaths:

Yes, I support what Umar Farouk [Abdulmuttalib] has done after I have been seeing my brothers being killed in Palestine for more than 60 years, and others being killed in Iraq and in Afghanistan. And in my tribe too, US missiles have killed 17 women and 23 children, so do not ask me if al-Qaeda has killed or blown up a US civil jet after all this. The 300 Americans are nothing comparing to the thousands of Muslims who have been killed…I have said in an earlier interview with Al Jazeera's Yusri Fouda that the United States is a tyrant, and tyrants across history have all had terrible ends. I believe the West does not want to realise this universal fact. Muslims in Europe and America are watching what is happening to Muslims in Palestine, Iraq and Afghanistan, and they will take revenge for all Muslims across the globe [emphases mine].

A few months after he completed this interview, the president’s Office of Legal Counsel issued a 50-page memo, likely completed at or around June 10. It concluded that Mr. al-Awlaki could be legally killed if it was not feasible to capture him because intelligence agencies said he was taking part in the war between the United States and Al Qaeda, posed a significant threat to Americans, and because “Yemeni authorities were unable or unwilling to stop him.” The legality of his killing, according to sources in the Obama administration, hinged in part on the fact that he had “taken on an increasingly operation role” in AQAP since late 2009, including preparing Umar Farouk Abdulmutallib in his attempt to detonate an explosive device on Christmas Day 2009,29 issues that will be addressed in the following sections.

On September 30, a CIA drone strike killed Mr. al-Awlaki and his traveling companion, another American citizen named Samir Khan. In order to determine whether or not IHL applied

Anwar al-Awlaki had no formal training in theology, Islamic law, Islamicate history or traditions, or Islamic jurisprudence means that he was not technically qualified to issue *fatawa*. 27


to this operation, we must first determine whether or not this drone strike took place within the wider context of an international or non-international armed conflict.

First, however, we will turn to a brief history of the organization with which he was allegedly affiliated before engaging in the broader questions of whether or not IHL applies, and what this means for the legality of his killing.

III. Al Qaeda in the Arabian Peninsula (AQAP) and the GWOT: Background and Overview

AQAP is a result of a January 2009 merger of two regional factions of al Qaeda: one in Yemen and one in Saudi Arabia.30 The first of these, al Qaeda in Saudi Arabia (AQSA), emerged in 1990 after Osama bin Laden returned from Afghanistan.31 Capitalizing on public dissatisfaction with Saudi Arabia’s rampant socioeconomic inequality, as well as widespread perceptions of significant corruption within the Saudi ruling family, bin Laden advocated for overthrowing the regime. For this, he was eventually exiled to Sudan. His followers, however, remained in Saudi Arabia and carried out attacks under his direction.32 In 2003, Saudi fighters returned from Afghanistan to join local cells and together, they planted car bombs in Western housing compounds in Riyadh, killing 34, and on a separate occasion drove a police van full of explosives into a residential compound, killing 17.33

Al Qaeda in Yemen, meanwhile, was founded by a cadre of bin Laden associates who had fought in Afghanistan, and was originally called Yemen Islamic Jihad.34 In the late 1980s, the Saleh regime “helped incubate jihad”35 by welcoming home thousands of fighters from Soviet-occupied Afghanistan. Originally focused on aiding President Saleh to defeat a socialist secessionist movement in South Yemen, some of these fighters were eventually incorporated into the ruling regime;36 others, however, turned their attention to U.S. targets, bombing two Aden hotels in 1992 that housed U.S. soldiers.37 The group evolved into al Qaeda in Yemen (AQY) under the direction of bin Laden associate Abu ali Al-Harithi,38 who had had fought the Soviets in Afghanistan and then joined bin Laden in Sudan in 1991. Under al Harithi’s leadership, AQY also orchestrated the attacks on the USS Cole in October of 2000. Al-Harithi was killed in Yemen in 2002 by an American drone strike.39

32 Samuel Lindo, Michael Schoder, and Tyler Jones supra 3
33 Samuel Lindo, Michael Schoder, and Tyler Jones supra 3
34 Samuel Lindo, Michael Schoder, and Tyler Jones supra 3
36 Jonathan Masters Al Qaeda in the Arabian Peninsula (AQAP)
37 Samuel Lindo, Michael Schoder, and Tyler Jones supra 3
38 Samuel Lindo, Michael Schoder, and Tyler Jones supra 3
39 Samuel Lindo, Michael Schoder, and Tyler Jones supra 4
Joint operations between Yemeni and American forces led to a reduction in AQY forces, however, AQY fighters regrouped after 23 al Qaeda members escaped from a Sana’a prison in 2006. ⁴⁰ In late 2008, the Saudi Arabian branch of al Qaeda had been similarly weakened through a combination of crackdowns and propaganda campaigns. ⁴¹ When the two groups merged and became AQAP in 2009 under the leadership of Nasir Wuhaishi ⁴² the mission was to serve as a “hub for regional operations targeting local government and Western interests both in Yemen and Saudi Arabia.” The group’s goals have since shifted in pursuit of a “global strategy” ⁴³ with an ultimate interest in establishing a “global caliphate.” ⁴⁴ AQAP also maintains a stated interest in such diverse goals as overthrowing the Saleh regime, assassinating Western nationals, and attacking Western embassies and assets in the region. ⁴⁵ Although AQAP has not been able to gain control of significant amounts of territory in Yemen, ⁴⁶ a counterterrorism adviser to the Obama administration has called it “the most active operational franchise” beyond Pakistan and Afghanistan ⁴⁷ and according to publicly available sources, AQAP “has orchestrated high profile attacks” ⁴⁸ from its base in Yemen, including a failed attempt to down an airliner jet on Christmas 2010, ⁴⁹ the first “homeland attack by an al Qaida affiliate since 11 September 2001.” ⁵⁰

While this brief sketch might fill in some of the historical details behind the formation of AQY, AQSA, and AQAP, it arguably does little to clarify the relationship between these affiliates and al Qaeda proper. Much information about al Qaeda remains classified, however, available sources allow us to conclude that Yemen has neither direct nor effective control over AQAP, and shows that AQY and AQSA initially concerned themselves with local goals that diverged considerably from Al Qaeda’s stated objective of “rid[ding] Muslim countries of...the profane influence of the West and replac[ing] their governments with fundamentalist Islamic regimes.” ⁵¹ The AQAP goal of establishing a “global caliphate”, ⁵² as described on a US government counterterrorism website, also differs considerably from that of al Qaeda. Finally, the degree to which al Qaeda’s core exerts control over AQAP, be it operational, financial, ideological, or otherwise, is not clear in publicly available sources.

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⁴⁰ Samuel Lindo, Michael Schoder, and Tyler Jones supra 4
⁴¹ Jonathan Masters supra
⁴³ Al Qa’ida in the Arabian Peninsula: AQAP The National Counterterrorism Center (last visited Dec. 9, 2011) http://www.nctc.gov/site/groups/aqap.html
⁴⁴ BBC Profile: Al Qaeda in the Arabian Peninsula supra
⁴⁵ Jonathan Masters supra
⁴⁶ Jeremy Scahill Washington’s War in Yemen Backfires The Nation Magazine (March 5, 2012) http://www.thenation.com/article/166265/washingtons-war-yemen-backfires
⁴⁷ The National Counterterrorism Center supra
⁴⁸ The National Counterterrorism Center supra
⁴⁹ The National Counterterrorism Center supra
⁵⁰ The National Counterterrorism Center supra
⁵² Al Qa’ida in the Arabian Peninsula: AQAP The National Counterterrorism Center
Al Qaeda, as it is widely known, took responsibility for the events of 9/11 and as a result, al Qaeda and affiliates is the primary, declared enemy in the GWOT. This does not, however, mean that IHL and the laws of war are automatically applicable whenever al Qaeda or an al Qaeda affiliate finds itself in an armed conflict with the U.S. For the laws of war to be applicable, either an international or a non-international conflict must be taking place—thus necessitating the following section, which considers whether or not the operation that killed Mr. al-Awlaki took place within the wider context of an armed conflict.

It also should be noted that although the United States has classified the GWOT as a single, worldwide, international armed conflict against al Qaeda and its affiliates, armed conflicts falling under the umbrella of the GWOT still remain subject to classification as either international or non-international under IHL. In short, the GWOT is a political, rather than a legal label, and IHL is still the relevant legal framework in armed conflicts whether or not the armed conflict is part of the GWOT, or a party to the armed conflict is an al Qaeda affiliate. A later section will explore the Obama and Bush Administrations’ legal analysis of these issues, but first, we will determine if a standalone conflict exists between AQAP and the U.S., thus triggering IHL.

IV. Do US Drone Strikes in Yemen Rise to the Level of Armed Conflict?

Hostilities directed at a transnational armed group can be governed by IHL, but even if IHL applies in one situation involving a particular armed group, it does not necessarily apply in all cases involving this armed group. Put differently, IHL might apply in an armed conflict between American troops and al Qaeda forces in Afghanistan, but this does not mean that IHL thus automatically applies wherever al Qaeda forces or its affiliates and American troops might find themselves. For IHL to apply to a transnational armed group like al Qaeda or its affiliates, such a group either must be involved in an armed conflict, or alternatively, an armed conflict between other parties must exist where the armed group acts. The four 1949 Geneva Conventions and the two 1977 Additional Protocols apply only to armed conflicts and distinguish between international and non-international armed conflicts. Armed conflicts may be of a mixed character in that they can incorporate aspects of both inter-state hostilities (between two or more states) and intra-state hostilities (between two or more groups within the territory of one of the belligerent states in the midst of a civil war). This was, for example, the case in Afghanistan in 2001, wherein the Taliban, having just fought an interstate war with the Northern Alliance, became a party to an inter-state war with an American-led coalition for their protection of al Qaeda.

In the case of Yemen, U.S. operations have been taking place with the consent of the Yemeni government. According to ICTY’s Tadić decision, the threshold for determining that a non-international conflict (NIAC) is at hand breaks down into two elements: “(a) the intensity of the violence and the (b) the organization of the parties.” Both must be “evaluated on a case by case basis.”

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54 Marco Sassóli supra 5
55 Yoram Dinstein The Conduct of Hostilities Under the Law of International Armed Conflict 2004 p 14
56 Dinstein supra 14
case basis by weighing up a host of indicative data.”  Protocol II excludes “situations of internal disturbances and tensions...and other acts of a similar nature”; relevant factors that contribute to designating an armed conflict as such include intensity, number of active participants, duration and protracted character of the violence, organization and discipline of the parties, capacity to respect IHL, the collective, open, and coordinated character of the hostilities, direct involvement of governmental armed forces, and de facto authority by the non-state actor over potential victims.  

In considering these criteria, it is tempting to source the current conflict in Yemen back to 2002, when unmanned Predator drones were flying over Yemeni airspace and firing at suspected al Qaeda fighters in an attempt to kill the alleged leader of AQAP, Ali Qaed Salim Sinan al-Harethi.  However, a lengthy period of inactivity followed; we will therefore limit our analysis to the drone strikes and joint operations between Yemeni and American authorities that began in 2009.

The Washington Post reported in early 2010 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.” The Post also reported, “American advisers are acting as intermediaries between the Yemeni forces and hundreds of US military and intelligence officers... The combined efforts have resulted in more than two dozen ground raids and airstrikes [in Yemen].” The New York Times corroborated the existence of such raids, and characterized American operations in Yemen as part of a “shadow war” involving American personnel, cruise missiles, and fighter jets.  

After October of 2010, the Obama administration debated on the possibility of launching a CIA-operated drone strike program in Yemen, available evidence indicates that they moved forward with this program, launching drones from an American military base in Djibouti known as the U.S. Africa Command. Created by President Bush in 2007, it is also home to a U.S. Air Force/CIA Predator drone detachment and listening station that serves as a staging ground for launching drones into East Africa, Pakistan, and the Arabian peninsula. By January of 2010, the Washington Post was reporting that “U.S. military teams and intelligence agencies are deeply involved in secret joint operations with Yemeni troops who in the past week have killed scores of people, among them six of fifteen top leaders of a regional al Qaeda affiliate.”

Therefore, given the frequency of drone strikes and other military operations against AQAP in the tribal areas of Yemen for nearly two years, there can be little doubt that U.S.

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58 Marco Sassóli supra 6
59 Frank Gardner CIA ’Killed al-Qaeda Suspects’ in Yemen BBC.com (Nov. 5, 2002) http://news.bbc.co.uk/2/hi/2402479.stm
60 Scott Shane, Mark Mazzetti, and Robert F. Worth supra
62 Spencer Ackerman East Africa is the New Epicenter of America’s Shadow War Wired (Jan 26, 2012) http://www.wired.com/dangerroom/2012/01/battleground-africa/
63 Spencer Ackerman East Africa is the New Epicenter of America’s Shadow War Wired (Jan 26, 2012) http://www.wired.com/dangerroom/2012/01/battleground-africa/
activities in Yemen rise to the level of an armed conflict. The fact that these activities are at the invitation and cooperation of the Yemeni government, or at the very least occur with their permission, renders the conflict non-international. Furthermore, given that AQAP has a formal leadership structure, and is “hierarchical, compartmentalized, and highly decentralized, allowing it to withstand attacks and arrests,” and continues to engineer several high-profile attempted attacks against European and American targets, it can be argued that this non-international armed conflict is a stand-alone conflict against AQAP, thus triggering IHL, and with it, principles of distinction.

V. The Principle of Distinction Under IHL: Who May Be Killed?

In a NIAC, each party is bound to apply, as a minimum, the fundamental provisions contained in Article 3 common to all four Geneva Conventions, which are further developed in the Geneva Protocol II of 1977. Both Common Article 3 and Geneva Protocol II apply with equal force to all parties to an armed conflict, government and transnational armed groups alike. The rules of customary international law as well as the basic principles of distinction, military necessity, and proportionality similarly apply.

Article 52§ 1 and § 2 of Protocol I of 1977 authorizes armed attacks only if they are directed towards military objectives, and grants general protection to civilian objects. The US Air Force Pamphlet (1976) states, for example: “the requirement to distinguish between combatants and civilians, and between military objectives and civilian objects, imposes obligations on all the parties to the conflict to establish and maintain the distinctions.” Although a number of states (including the U.S.) are not party to the Additional Protocol, this general principle of distinction is widely recognized as binding customary international law, meaning that states that have not signed the treaty are bound to the aspects recognized as customary. State Department Legal Advisor Harold Koh agrees in theory with this principle, stating in a speech that the U.S. is in an “armed conflict” with forces associated with al Qaeda, and that attacks taking place within the scope of this “armed conflict” must conform to “law of war principles” including those of “distinction.” Finally, he stated that attacks must also conform to “law of war principles” including those of distinction and proportionality; these are issues to which we will return. In practice, however, the Obama Administration has taken a very different position in the applicability of this principle; this will be discussed in detail in a following section.

To be sure, the laws of war in NIAC are not necessarily perfectly suited for handling the unique challenges posed by the rise of transnational armed groups in the GWOT. States have consistently rejected proposals for parity between the law that governs NIAC and the law

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64 Jonathan Masters supra
66 IHL and Civilian Participation in Hostilities in the OPT 4 https://docs.google.com/viewer?a=v&q=cache:B8iXmwtkjkJ:www.hpcrresearch.org/sites/default/files/publications/ParticipationBrief.pdf+&hl=en&gl=us&pid=bl&srcid=ADGEESj1DYZCGA1xyZxrphQDFC76B6CNSfxHnXn3lyZX5r1cs5-6DZJDgc8wT0xvoW2dZ9oBJj4MBZHLINTtNGpwY6tUa3Tj_ZqnnzN7-od0qyqxHvLaujS99YpIIW-lZrA1EuEWaryD&sig=AHIEtbfTkwn4Ka7KjXwblgvF7tejOKdgg
67 See Speech by Harold Hongju Koh, supra
68 See Speech by Harold Hongju Koh supra
governing IAC, and have preferred to regulate NIAC through their domestic legal systems; laws governing NIAC have therefore been characterized as “underdeveloped.” A resolution adopted in 1970 by the UN Assembly, however, speaks of “combatants in all armed conflicts,” suggesting that attacks on transnational armed groups should be carried out in a manner consistent with the principles of distinction. Additionally, the principles of customary international law have been recognized as applicable to non-international armed conflicts, making the principle of distinction apply to the armed forces of a state using force within the context of NIAC.

The principle of distinction refers, of course, to the classifications of combatant and civilian, and ability to distinguish between them when pursuing military objectives. These classifications are hardly rhetorical, and the stakes are high: being designated as a combatant, lawful or otherwise, allows parties to the conflict to use all force necessary to achieve military goals unless such acts are prohibited by law. Combatants may be attacked at any time: while planning an attack, while engaging in active hostilities on a battlefield, when they are on their way to a battlefield, or when they are sleeping in their barracks. Civilians, on the other hand, are regarded as impermissible military targets, and have traditionally been negatively defined as those who are not participating in hostilities.

The language of Article 51(3) clearly states: “civilians shall enjoy the protections afforded by this Section unless and for such time as they take a direct part in hostilities.” In order for an action to qualify as direct participation in hostilities, the following cumulative criteria must be fulfilled:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

In sum, a given actor becomes a legitimate target due not to his or her official membership status in an organization, but because of his or her role in the organization as determined by actual activities. Furthermore, the idea of “membership” cannot be established simply through affiliations, family ties, or mere association; within the context of IHL,

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70 Jonathan Masters supra
72 IHL and Civilian Participation in Hostilities in the OPT article p. 5
73 Nils Melzer supra p. 2
74 ICRC lesson 10 unit for relations with armed and security forces p 20
“combatants” are only those who are members in a transnational group’s armed forces. According to the International Committee of the Red Cross,

For the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-state party to the conflict. Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: “continuous combat function”) [emphases mine].

Worth noting is repeated use of words like “function” and “act.” In other words, there must be an action and it must contribute to a continuous role in the group; “plotting” to kill Americans does not necessarily make someone a lawful target under IHL. Pledging to “uphold and support the violent and murderous theories of al Qaeda” and “exhort[ing] violence” also falls outside the scope of direct participation given that specific acts may constitute part of the hostilities even if they are not likely to adversely affect the military operations or military capacity of a party to the conflict. In the absence of such military harm, however, a specific act must be likely to cause at least death, injury, or destruction.

As YouTube sermons do not cause death, injury, or harm, they cannot rightly be categorized as “direct participation” under IHL. Such activities may, however, be constitutive of propaganda, which are still not held to be directly participative under IHL, or alternatively, might be considered recruitment. Recruiters for transnational armed groups, however, are not considered combatants according to the ICRC. Once again, it is a “continuous combat function” that would render Mr. al-Awlaki a member of the armed forces and thus a permanent lawful target for the duration of hostilities.

75 Nils Melzer, supra p. 33
79 Nils Melzer supra p 49
80 Nils Melzer supra p 34
81 Nils Melzer supra p 65
82 Nils Melzer supra p 2
The abovementioned requirement for “continuous combat function” further means that “direct involvement in plots” would only have rendered Mr. al-Awlaki a target during the “immediate execution of the act and the preparatory measures forming an integral part of that act.” If evidence emerges that his primary role was that of “plotting,” he might then become a combatant; otherwise, he remains a civilian who is only vulnerable to attack while he is executing a plot, or preparing to execute it.

Rule 6 of Customary International Humanitarian Law further establishes that transnational armed groups, like state organizations, are entitled to medical and religious personnel. Rule 27 furthermore states that “Religious personnel exclusively assigned to religious duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy.” The loss of this protection, however, only lasts while they are engaged in “immediate execution” of this act or in “preparatory measures” for it.

Finally, the Administration has also alleged that Mr. al-Awlaki was involved in recruitment even though Mr. Abdulmuttalib’s testimony makes it clear that Mr. Abdulmuttalib sought out Mr. al-Awlaki, rather than the other way around; this will be explored in detail in a later section. However, for now, suffice it to say that even if Mr. al-Awlaki had reached out to Mr. Abdulmuttalib for the purposes of recruitment, he would still have remained a civilian under IHL given that “recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-state party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities.”

The definition of a lawful target under binding customary law therefore differs not only from the arguments advanced by the Obama and Bush Administrations, both in theory and in practice. Having established the criterion for direct participation under IHL, as well as engaged in a general overview of controlling law, we will turn now to an overview of the Obama and Bush Administrations’ position on these issues in order to compare and contrast.

VI. The World is a Battlefield: International Humanitarian Law (IHL) and the Global War on Terror (GWOT)

We will pause here to address the Obama and Bush Administrations’ positions on the GWOT and relevant issues. As aforementioned, the Obama Administration, like the Bush Administration, has not agreed with many of the doctrines in IHL, including the method for distinguishing between combatants and civilians. Furthermore, American courts have by and large agreed with the Bush and Obama Administrations’ interpretation of the law, resulting in a profound disconnect between American law and IHL and contributing to the legal codification of categories that are in fact merely political or discursive,
The American legal system’s obfuscation of civilians and combatants, as well as the development of a unique legal framework for handling the GWOT, can be traced to the 2001 AUMF, a Joint Resolution passed on September 18 of 2001 authorizing the use of force. This Resolution, which is still cited in *habeus corpus* cases, cast a broad net, authorizing the president “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001...”\(^8\)

Those who “aided” in the September 2011 attacks, as well as those who “harbored” the perpetrators of the act itself, were thus swept into the same category and are subject to “necessary and appropriate force” contrary to the principle of distinction under IHL.

Furthermore, the 2001 AUMF allowed the President to use “necessary and appropriate force” against those “organizations he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”\(^8\)

Those “organizations” include al Qaeda and affiliates such as AQAP, allowing the President to use “appropriate” force against them and their members, regardless of their role in the group.

The use of the term “unlawful enemy combatant” first appeared in 2002, when Bush Administration determined that while Taliban detainees were covered by the Geneva Conventions, al Qaeda detainees were not, and furthermore, that as members of both groups did not qualify for POW status, they were “unlawful enemy combatants.”\(^9\)

Although this term originally applied only to members of al Qaeda and the Taliban,\(^9\) the Pentagon broadened the scope of “enemy combatancy” in 2005 to include not only those who had participated in the September 11 attacks, but also to apply to:

… an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.\(^9\)

Individuals who were “part of” or “supported” the Taliban, al Qaeda, or associated forces were again rendered a type of combatant, regardless of their functions within the organization; additionally, the difference between “lawful” and “unlawful” combatants was collapsed into a single category.

As aforementioned, one of the most problematic aspects of this legislation from the perspective of IHL is the application of political categories as though they exist in a legal framework. Above sections have demonstrated the guiding principle of distinction in detail to

\(^9\) Lyle Denniston, *supra*
show that in the world of IHL, an individual is either a combatant or a civilian, and that these categories depend on one’s function or role in a transnational armed group. In other words, the categories of “terrorist” and “enemy combatant” simply do not exist. Therefore, characterizing someone as a “terrorist” does not necessarily render him or her a “combatant” given that “in non-international armed conflict, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (continuous combat function).”

It will be stressed repeatedly in this paper, a given actor is classified as a combatant or a civilian by virtue of his or her actions or function, not by group affiliation; furthermore, determining whether or not an individual is a member of a transnational armed group is subject to a narrower definition under IHL. A “terrorist” is therefore only a legitimate target if he a) has a continuous combat function or b) is a civilian directly participating in hostilities, during such time as he is doing so; the 2001 AUMF is clearly contrary to these principles.

The 2006 Military Commissions Act attempted to clarify the concepts of lawful and unlawful enemy combatancy for the purposes of the GWOT. This Act declares that an unlawful enemy combatant is a person who “has engaged in hostilities or has purposely and materially supported hostilities against the United States or its co-belligerents who is not a lawful combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” A lawful enemy combatant, on the other hand, was defined as someone who is:

A) A member of the regular forces of any State party engaged in hostilities against the United States

B) A member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable from a distance, carry their arms openly, and abide by the laws of war or

C) A member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

While IHL recognizes the difference between “lawful” and “unlawful combatants,” there are neither “lawful enemy combatants” nor “unlawful enemy combatants” in IHL. Furthermore, the determination that someone who has “materially supported” hostilities is a combatant is contrary to principles of distinction as outlined in an above section. An “unlawful combatant” is a civilian who directly engages in hostilities; other terms used in IHL treaties include “unprivileged belligerents” and “unprivileged combatants.” If an “enemy combatant,” lawful or otherwise, has been captured in international or non-international armed conflict, the provisions

94 Mark David Maxwell and Sean M. Watts supra 20
and protections of IHL remain applicable.\(^97\) If individuals so designated are captured outside of an armed conflict, they are still to be protected by domestic law and human rights law, regardless of if they are “lawful” or “unlawful enemy combatants.”\(^98\)

Although the designations of “lawful” and “unlawful enemy combatant” are therefore legally suspect under IHL, the power of these terms is hardly rhetorical given that persons so categorized can be subjected to detention for an indefinite period, or to appropriate force, however defined. Furthermore, the Bush Administration characterized its power to detain as global in reach, extending beyond the battlefield to any time, and any place. In fall of 2008, U.S. District Judge Richard J. Leon became the first federal court to give a fixed legal definition of “enemy combatant.”\(^99\) Detainees’ lawyers had advocated for a definition that would only include someone who was a member of a foreign government’s armed forces engaged in hostilities, and civilians who directly participated in hostilities as part of an organized armed force;\(^100\) Judge Leon, however, sided with the Pentagon’s 2005 definition rather than engage in “judicial craftsmanship.”\(^101\)

Although the Obama Administration reportedly has officially jettisoned the use of the phrase “enemy combatant,” it has more or less adhered to the premises advanced by the Bush Administration, characterizing the world as a battlefield and any member of al Qaeda or its affiliates as a legitimate target regardless of his or her actual function in the group, and without reference to his or her precapture conditions. In March of 2009, the Obama Justice Department clarified that they would only reserve the right to detain those who had provided “substantial” support to al Qaeda or the Taliban, however, the power to do so remained global in reach.\(^102\)

The legal memos justifying the assassination of Mr. al-Awlaki still remain secret, but an administration official leaked some of their contents to the New York Times’ Charlie Savage, in October of 2011. According to Mr. Savage, the memos indicate that Mr. al-Awlaki had been designated an “enemy combatant”-- making him a lawful target under the 2001 AUMF--\(^103\) though the Obama administration officially stopped using this term.

The Guardian, on the other hand, describes these memos as focusing primarily on justifying the practice of “targeted killing,” wherein individuals are killed by bombs, drones, or other means, even though they might be far away from any battlefield.\(^104\) The Guardian also suggested that the 2001 AUMF is the legal framework that justifies targeted killings in these

\(^{97}\) International Committee of the Red Cross \textit{The Relevance of IHL in the Context of Terrorism} (Jan. 1, 2011) http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm


\(^{100}\) Lyle Denniston, \textit{supra}

\(^{101}\) Lyle Denniston, \textit{supra}


\(^{103}\) Kevin Drum \textit{Obama Defends the Awlaki Assassination} Mother Jones (Oct. 9, 2011) http://motherjones.com/kevin-drum/2011/10/obama-defends-awlaki-assassination

\(^{104}\) Mary Ellen O’Connell \textit{Why Obama’s ‘Targeted Killing’ is Worse Than Bush’s Torture} The Guardian (Jan 20, 2012) http://www.guardian.co.uk/commentisfree/cifamerica/2012/jan/20/why-obama-targeted-killing-is-like-bush-torture
memos, given that, as aforementioned, it empowers the president to use “all necessary and appropriate force [emphasis mine] in pursuit of those deemed responsible for the 9/11 attacks,” or the organizations deemed responsible,\(^\text{105}\) a power that was reaffirmed by the National Defense Authorization Act of Fiscal Year 2012.\(^\text{106}\)

It is not clear as to whether or not an individual has to be designated as an “enemy combatant” to become a suitable target for assassination. However, by characterizing politically motivated violence as an act of war, rather than as a crime, the government claims it is not beholden to the domestic constraints of due process, nor to the ban on political assassinations first approved by President Ford.\(^\text{107}\)

When commenting on Mr. al-Awlaki’s death in particular, Bush and Obama administration officials have also more or less agreed on the basic idea that any member of al Qaeda or its affiliates is a lawful target in any time or place, no matter what he is doing, and whether or not he is far from any battlefield. Furthermore, it is not clear how “membership” in these organizations is determined. In the days after Mr. al-Awlaki’s killing, an Obama administration official stated that:

As a general matter, it would be entirely lawful for the United States to target high-level leaders of enemy forces, regardless of their nationality, who are plotting to kill Americans both under the authority provided by Congress in its use of military force in the armed conflict with al-Qaeda, the Taliban, and associated forces as well as established international law that recognizes our right of self-defense.\(^\text{108}\)

As aforementioned, however, “plotting” is not necessarily grounds for direct participation, and an individual’s mere membership in al Qaeda and associate forces does not trigger the right of self-defense as articulated in IHL. Furthermore, it is worth repeating that under IHL, the standard for determining “membership” to a transnational armed group is far more stringent. According to the ICRC, “individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL. Instead, they remain civilians assuming support functions, similar to private contractors and civilian employees accompanying state armed forces [emphasis mine.]”\(^\text{109}\)

In voicing reserved approval of the decision to kill Mr. al-Awlaki, former Justice Department lawyer for the Bush Administration John Yoo, however, stated that “Every member of the enemy armed forces and leadership is a legitimate target in wartime, regardless of whether they can be caught or whether they pose an imminent threat.”\(^\text{110}\) Similarly, two Obama

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\(^{105}\) Jonathan Masters Targeted Killings

\(^{106}\) Jonathan Masters Targeted Killings

\(^{107}\) Jonathan Masters Targeted Killings


\(^{109}\) Melzer supra p. 34

administration officials, Chief Counterterrorism Advisor John O. Brennan and legal advisor Harold Koh, asserted that deadly force is legal under the 2001 AUMF, and claiming further that the United States is not limited to the battlefield when pursuing terrorists that pose an imminent threat. An argument can perhaps be made that an “imminent threat” is contiguous with “direct participation” in hostilities, but as Mr. al-Awlaki was killed when driving in a car with another American citizen, and it has not been alleged that he was in hors de combat at the time, it is not clear what is meant by “imminent threat” here.

In December of 2011, President Obama signed the National Defense Authorization Act for Fiscal Year 2012 (NDAA) in spite of “serious reservations” about certain provisions that “regulate the detention, interrogation, and prosecution of suspected terrorists.” Although the President affirmed he would not authorize the indefinite military detention without trial of American citizens, he did take issue with Congress’ attempts to limit or regulate counterterrorism efforts. In his signing statement, the President said that

…some in Congress continue to insist upon restricting the options available to our counterterrorism professionals and interfering with the very operations that have kept us safe. My Administration has consistently opposed such measures…Moving forward, my Administration will interpret and implement the provisions described below in a manner that best preserves the flexibility on which our safety depends and upholds the values on which this country was founded… Section 1021 affirms the executive branch’s authority to detain persons covered by the 2001 Authorization for Use of Military Force (AUMF) (Public Law 107-40; 50 U.S.C. 1541 note). This section breaks no new ground and is unnecessary. The authority it describes was included in the 2001 AUMF, as recognized by the Supreme Court and confirmed through lower court decisions since then. Two critical limitations in section 1021 confirm that it solely codifies established authorities. First, under section 1021(d), the bill does not “limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.” Second, under section 1021(e), the bill may not be construed to affect any “existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States” …Moreover, I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation. My Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law.

113 Legum supra
This signing statement was issued after Mr. al-Awlaki had been killed in a drone strike; although this Comment will not be addressing matters pertaining to domestic law, it is worth noting that the President pledged he would not “authorize the indefinite military detention without trial of American citizens” in spite of the fact that he had authorized the killing of an American citizen without trial less than a year earlier. Additionally, the NDAA does not revisit the problematic categories of combatancy established by the 2001 AUMF, nor its noncompliant definition of group membership.

According to Obama Administration officials, the C.I.A. and the military both maintain lists of “terrorists” linked to al Qaeda and its affiliates; because Mr. al-Awlaki is an American, his inclusion on those lists had to be approved by the National Security Council. The possibility that Mr. al-Awlaki appeared on these lists was first reported by the Los Angeles Times in January of 2010, and Reuters reported in April of that same year that he had been approved for “capture or killing,” placed there in early 2010 after “intelligence and counterterrorism officials” claimed that he had “shifted from encouraging attacks on the United States to directly participating in them [emphasis mine].” Unnamed officials also claimed that he had “become a recruiter for the terrorist network, feeding prospects into plots aimed at the United States and at Americans abroad.”

First, it is worth noting that Mr. Abdulmuttalib’s testimony makes it clear that he sought out Mr. al-Awlaki, rather than the other way around, casting doubt on the degree to which Mr. al-Awlaki was actively involved in the process of recruiting. Even so, as aforementioned, placing Mr. al-Awlaki on the capture-or-kill list for his activities as a recruiter would violate principles of distinction under IHL.

Attempts to gain access to legal memos, or to the evidentiary basis for including Mr. al-Awlaki on these lists have not been fruitful: shortly after the fall 2011 drone strikes that killed Mr. al-Awlaki, his son, and another American citizen named Samir Khan, the ACLU filed a FOIA request for records that would illuminate these and other issues. The C.I.A and the DOJ Office of Legal Counsel responded by “refusing to confirm or deny the existence or nonexistence of records responsive to this request.” The C.I.A. drone program additionally remains officially classified in spite of widespread reporting about it in the mainstream media.

In response to mounting pressure from journalists and human rights activists, the Obama Administration signaled in late January of 2012 that Attorney General Eric Holder would make an address on national security issues. According to Newsweek,

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114 Quotes around the word “terrorist” reflect the fact that this category does not exist in IHL, and this paper is, as stressed repeatedly, concerned with the legality of Mr. al-Awlaki’s killing under IHL, and the precedent it sets.
116 Scott Shane supra
117 Scott Shane supra
118 Scott Shane supra
119 Mr. Abdulmuttalib is the so-called “Underwear Bomber,” who attempted to bring down a plane on Christmas Day 2009 by lighting an explosive device in his undergarments.
120 United States of America vs Umar Farouk Abdulmuttalab supra
121 Nils Melzer supra p. 34
Embedded in the speech will be a carefully worded but firm defense of its right to target U.S. citizens. Holder’s remarks will draw heavily on a secret Justice Department legal opinion that provided the justification for the Awlaki killing. The legal memorandum, portions of which were described to The New York Times last October, asserted that it would be lawful to kill Awlaki as long as it was not feasible to capture him alive—and if it could be demonstrated that he represented a real threat to the American people. Further, administration officials contend, Awlaki was covered under the congressional grant of authority to wage war against al Qaeda in the wake of 9/11… An early draft of Holder’s speech identified Awlaki by name, but in a concession to concerns from the intelligence community, all references to the al Qaeda leader were removed. As currently written, the speech makes no overt mention of the Awlaki operation, and reveals none of the intelligence the administration relied on in carrying out his killing.

As recently as 2001, the US ambassador to Israel stated on Israeli television that “the United States government is very clearly on the record as against targeted assassinations. They are extrajudicial killings, and we do not support that;” Nonetheless, targeted killings have since become an “essential tactic” in the GWOT, deployed in Afghanistan, Iraq, Pakistan, Yemen, and Somalia. Since President Obama assumed office in 2009, targeted killings have escalated, and according to the Council on Foreign Relations, “The successful killing of Osama bin Laden in a U.S. Navy SEAL raid in May 2011 and the September 2011 drone strike on Anwar al-Awlaki, an American-born Yemeni cleric and AQAP propagandist, are prime examples of this trend.”

Although “targeted killing” or “targeted assassination” is not a term that has been defined under international law, both the Bush and Obama Administrations have used a combination of domestic and international law to justify their use of this tactic. On March 5, 2012, Attorney General Eric Holder addressed this and other issues when he spoke in front of an audience at Northwestern Law School. Attorney General Holder argued that targeted assassinations are by definition unlawful and therefore, “The US Government’s use of lethal force in self-defense against a leader of al Qaeda, or an associated force, who presents an imminent threat of violent attack would not be unlawful,” he said, “and therefore would not violate the executive order banning targeted assassinations.”

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121 I can find no reason for Newsweek’s decision to refer to Mr. al-Awlaki as “Awlaki” rather than “al-Awlaki” or “al Awlaki.”
123 Mary Ellen O’Connell supra
124 Jonathan Masters Targeted Killings
125 Jonathan Masters Targeted Killings
126 Jonathan Masters Targeted Killings
127 Jonathan Masters Targeted Killings
128 Jonathan Masters Targeted Killings
The killing, he continued, would have to meet at least three conditions for the administration to consider it lawful. First, the individual would have to pose an “imminent threat of violent attack against the United States.” 130 Second, the administration would have to determine that “capture is not feasible.” 131 And third, the “operation would be conducted in a manner consistent with applicable Laws of War principles.” 132

There are several problems, however, with squaring this justification under the aegis of IHL, some of which should already be clear by this point in the Comment and need little explication. One issue worth exploring, however, arises from the invocation of self-defense. The U.S. has claimed that the use of lethal force against al Qaeda et al is consistent with the universally recognized principle of self defense, as stated in the U.N. charter in Article 51. 133 State Department Legal Adviser Harold Koh gave a speech to the American Society of International Law in early 2010 in which he expressed agreement with the view that the US is in an armed conflict with al Qaeda, the Taliban, and associated forces and added that the U.S. is permitted to use force consistent with the right of self-defense under international law. 134

Although Article 51 of the U.N. Charter does not assert that an armed attack must be perpetrated by a state, it is somewhat problematic to assert the right of self-defense against a non-state actor 135 such as AQAP or al Qaeda proper, and moreover to assert that the right of self-defense is in play during all operations against these non-state actors, wherever they are, and whatever they may be doing. While the 2001 Joint Resolution of Congress authorizing force (referred to herein as the 2001 AUMF) made mention of those who “planned, authorized, committed, or aided the terrorist attacks...or harboured such organizations,” the US used different language in its letter to the Security Council under Article 51 136 when it claimed that it had obtained “clear and compelling information” that al Qaeda, supported by the Taliban, had played a central role in the attacks. 137

The second issue arises with the Administrations apparent definition of what constitutes an “imminent threat,” given that Mr. al-Awlaki did not appear to be in hors de combat at the time of his killing, and it has not been alleged that he planned or assisted with any other plot after the Christmas 2009 attempt to blow up an airliner headed to Detroit.

Third, Attorney General Holder says “a senior operational leader of al Qaeda or associated force” is a legitimate target; this might in theory be correct under IHL, however, Mr. al-Awlaki’s role as presented to the public does not satisfy the definition of a member of AQAP under IHL, and it is only a member, as defined by IHL, that is a lawful target. We will now move to considering Mr. al-Awlaki’s activities within AQAP as alleged by the Obama Administration before determining his function.

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130 Terry Friedmen supra
131 Terry Friedmen supra
132 Terry Friedmen supra
135 Christine Gray International Law and the Use of Force 2008 p. 200
136 Gray supra 200
137 Gray supra 200
VIII. Anwar al-Awlaki: “Internet Ideologue” or “AQAP Operative?”

It bears repeating that the public has not been given access to many documents pertaining to Mr. al-Awlaki’s role in AQAP.\(^{138}\) It is therefore difficult to determine the precise nature of Mr. al-Awlaki’s involvement with the group with absolute accuracy. Drawing from White House and other official communications, however, we can determine several aspects of Mr. al-Awlaki’s relationship with AQAP that are relevant in determining his role for the purposes of this Article.

Originally, the White House spoke of Mr. Awlaki primarily, if not solely, in terms of his role as an internet ideologue, waffling on the issue of his formal affiliation with al Qaeda. In early 2010, for example, the White House referred to him as “somebody who has sought over the Internet to spread that sort of hate and perversion, and obviously to do harm in spreading that hate”\(^{139}\) and in May of 2010, he was referred to as someone who “use[s] the Internet and extremist websites to exhort people already living in the United States to take up arms and launch terrorist attacks from within.”\(^{140}\) This is the case even though, as aforementioned, Mr. al-Awlaki was reported to have been placed on the capture or kill list as early as April of 2010.

By August of 2010, the White House was hinting that Mr. al-Awlaki had al Qaeda affiliations, however, they still maintained a focus on his YouTube videos:

The United States hasn’t decided that Anwar al-Awlaki is aligned with a terrorist group, Anwar al-Awlaki has in videos cast his lot with al Qaeda and its extremist allies. Anwar al-Awlaki is acting as a regional commander for al Qaeda in the Arabian Peninsula….and …has on countless times in video pledged to uphold and support the violent and murderous theories of al Qaeda…I think the notion that somehow anybody in this country confuses traveling overseas and the role that Anwar al-Awlaki has in inciting violence -- they’re not even in the same ballpark [emphases mine].\(^{141}\)

Mr. al-Awlaki’s relationship to the Christmas Day Bomber and the Ft. Hood shooter, it should be noted, were initially solely described as one wherein he “inspired” those responsible, rather than directed or trained them.\(^{142}\) In early 2010, the administration began to use language suggesting that Mr. al-Awlaki was recruiting English-speakers to the ranks of al Qaeda and its affiliates through these videos and through his familiarity with American culture. Alternatively, the administration referred to him as an “ideologue” responsible for “propaganda.”

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\(^{141}\) Robert Gibbs supra

For example, in early March of 2011, the Deputy Director National Security Advisor to the President, Denis McDonough, made a speech wherein he put Mr. al-Awlaki in the same category as Adam Gadahn and Omar Hammami, saying,

There’s Adam Gadahn, who grew up in California and now calls himself an al Qaeda spokesman. There’s Anwar al-Awlaki, who was born in the United States and now *exhorts Americans to violence* from hiding in Yemen as part of al Qaeda in the Arabian Peninsula. And there’s Omar Hammami, an Alabama native who joined the terrorist group al-Shabaab in Somalia and uses rap and hip hop in an attempt to reach young Americans.\(^\text{143}\)

In other portions of the speech, McDonough refers to “propaganda videos”—though he does not refer to Mr. al-Alwaki himself as a “propagandist”—and in his discussion of the Ft. Hood attacks, McDonough seems to imply that while Mr. al-Awlaki was not a culprit, he may have provided some sort of impetus for the attack to occur: “In our review of the Fort Hood attack, we deepened our understanding of the tactics that extremists *like* al-Awlaki use to push people toward violence, as well as how an individual becomes radicalized.\(^\text{144}\)

In early 2011, the director of the National Counterterrorism Center, Michael Leiter, said "[Anwar al-Awlaki] certainly is the most well-known English speaking *ideologue who is speaking directly to folks here in the homeland*. There are several others who we’re concerned with, but I think Awlaki *[sic]* probably does have the greatest audience on the Internet and the like.\(^\text{145}\)

As late as June of 2011, the administration was still referring to Mr. al-Awlaki in terms of his role as a public speaker, saying,

…And it is al-Qa’ida’s adherents—individuals, sometimes with little or no direct physical contact with al-Qa’ida, who have succumbed to its hateful ideology and who have engaged in, or facilitated, terrorist activities here in the United States. These misguided individuals *are spurred on* by the likes of al-Qaida’s Adam Gadahn and Anwar al-Awlaki in Yemen, who speak English and *preach violence in slick videos over the Internet*. And we have seen the tragic results, with the murder of a military recruiter in Arkansas two years ago and the attack on our servicemen and women at Fort Hood.\(^\text{146}\)


\(^{144}\) Denis McDonough *supra*


By his death in September 2011, however, the White House was no longer speaking of his “connections,” “links,” or “affiliations” to the Ft. Hood shooter, the 9/11 hijackers, or the Christmas Day Bomber, asserting that “[Mr. Al-Awlaki] directed the failed attempt to blow up an airplane on Christmas Day in 2009. [And] he directed the failed attempt to blow up U.S. cargo planes in 2010.” White House Press Secretary Jay Carney additionally alleged in October 2011 that he “was an operational leader of al Qaeda in the Arabian Peninsula” and that he was “directly involved in plots...that would have resulted in terrorist acts against the United States.”

Even so, his activities as an “ideologue” remained salient in White House communications about him: in a speech given on the occasion of Anwar al-Awlaki’s death on September 30, President Obama stated that he “repeatedly called on individuals in the United States and around the globe to kill innocent men, women, and children to advance a murderous agenda.

Once again, it is not possible to assess claims that Mr. Al-Awlaki was involved in the Ft. Hood shootings; details about his role in the Detroit Christmas Day bombings are slowly emerging, however, they remain vague. A justice department memo indicates that Umar Farouk Abdulmutallab “was committed to his mission, seeking out and finding Al Qaeda and Anwar al Awlaki, and then becoming involved in planning and training for a significant amount of time.” The Supplemental Appendix to the report elaborates on this further, stating that:

Once in Yemen, defendant [Mr. Abdulmutallab] visited mosques and asked people he met if they knew how he could meet Awlaki [sic]. Eventually, defendant made contact with an individual who in turn made Awlaki [sic] aware of defendant’s desire to meet him. Defendant provided this individual with the number for his Yemeni cellular telephone. Thereafter, defendant received a text message from Awlaki [sic] telling defendant to call him, which defendant did. During their brief telephone conversation, it was agreed that defendant would send Awlaki [sic] a written message explaining why he wanted to become involved in jihad. Defendant took several days to write his message to Awlaki [sic], telling him of his desire to become involved in jihad, and seeking Awlaki’s [sic] guidance. After receiving defendant’s message, Awlaki [sic] sent defendant a response, telling him that Awlaki [sic] would find a way for defendant to become involved in jihad. Thereafter, defendant was picked up and driven through the Yemeni desert. He eventually arrived at Awlaki’s [sic] house, and stayed there for three days. During that time, defendant met with Awlaki [sic] and the two men discussed martyrdom and jihad… by the end of his stay, Awlaki [sic] had accepted defendant for a martyrdom mission. Defendant left

147 R. Stickney supra
Awlaki’s [sic] house, and was taken to another house, where he met AQAP bombmaker Ibrahim Al Asiri… Thereafter, Al Asiri discussed a plan for a martyrdom mission with Awlaki, who gave it final approval, and instructed Defendant Abdulmutallab on it. For the following two weeks, defendant trained in an AQAP camp, and received instruction in weapons and indoctrination in jihad…Ibrahim Al Asiri constructed a bomb for defendant’s suicide mission and personally delivered it to Defendant Abdulmutallab. This was the bomb that defendant carried in his underwear on December 25, 2009. Al Asiri trained defendant in the use of the bomb, including by having defendant practice the manner in which the bomb would be detonated; that is, by pushing the plunger of a syringe, causing two chemicals to mix, and initiating a fire (which would then detonate the explosive)…Awlaki told defendant that he would create a martyrdom video that would be used after the defendant’s attack. Awlaki [sic] arranged for a professional film crew to film the video. Awlaki [sic] assisted defendant in writing his martyrdom statement, and it was filmed over a period of two to three days. The full video was approximately five minutes in length…Although Awlaki [sic] gave defendant operational flexibility, Awlaki instructed defendant that the only requirements were that the attack be on a U.S. airliner, and that the attack take place over U.S. soil. Beyond that, Awlaki [sic] gave defendant discretion to choose the flight and date. Awlaki [sic] instructed defendant not to fly directly from Yemen to Europe, as that could attract suspicion. As a result, defendant took a circuitous route, traveling from Yemen to Ethiopia to Ghana to Nigeria to Amsterdam to Detroit. Prior to defendant’s departure from Yemen, Awlaki’s [sic] last instructions to him were to wait until the airplane was over the United States and then to take the plane down.151

Mr. Abdulmutallab described the above activities during several debriefing statements he gave to FBI agents between January and April 2010. It remains unclear as to whether or not it was this information that led to the targeting of Mr. al-Awlaki in September of 2011. An administration official would not tell the Washington Post about the specific intelligence behind the decision to target Mr. al-Awlaki, but said that this information was a “piece of the puzzle.” Additionally, when peaking in front of an audience at Northwestern on March 3, 2012, Attorney General Eric Holder referred to Mr. Abdulmutallab’s relationship with Mr. al-Awlaki before going on to give the administration’s justification for engaging in targeted killings of American citizens, saying, “Umar Farouk Abdulmutallab described to FBI agents in detail how he became “inspired to carry out an act of jihad,” and in pursuit of doing so, “traveled to Yemen, and made contact with Anwar al-Awlaki, a U.S. citizen, and a leader of al Qaeda in the Arabian Peninsula.”

The sum total of his activities, as described to the public by the Obama Administration, does not fulfill the criterion of “continuous combat function” as set forth under IHL. Rather, his activities, as per the Administration, consist of creating and disseminating sermons over

151 United States of America vs Umar Farouk Abdulmuttalab supra
153 Peter Finn supra
YouTube, and offering counseling of a religious nature to troubled persons like the Fort Hood shooter and Mr. Abdulmuttalib. To be sure, while the nature of this counseling was distasteful at best and harmful at worst, this doesn’t render the act of counseling one of direct participation under IHL. Furthermore, although he is described as a “leader” of AQAP, there is no unclassified evidence of his doing much of any leading; nor is there publicly available evidence of him actively recruiting anyone, given that Attorney General Holder states above that Mr. Abdulmuttalib sought out Mr. al-Awlaki, rather than the other way around. It would seem that the Western media was correct when they referred to him as a “cleric,” in spite of the Administration’s insistence that he was an “ideologue” or a “propagandist.” Furthermore, the Press Secretary and other administration officials did not correct reporters who referred to him as a “cleric:”

Q[UESTION]: What is your assessment of the situation in Yemen now as a terror hotbed, if you will, a source of the kind of plots that we saw on Christmas, especially considering the comments that have come out of there in the past couple of days from the President of Yemen and from a leading cleric there talking about foreign intervention and what it would be bring?

MR. GIBBS: Well, look, as you well know, this has been on the President and the national security team’s radar for quite some time. The security situation there obviously remains quite perilous. There are vast areas of largely ungoverned space that have attracted al Qaeda in the Arabian Peninsula and other extremist allies in Yemen and throughout the region. I think the President and his team have been and still are acutely aware of the threats that could be emanating and are emanating from that region.

And on a later occasion, after the Ft. Hood shootings, a journalist again referred to Mr. al-Awlaki as a “cleric” during a Q and A session with the White House Press Secretary, and was not corrected:

Q[UESTION] Mr. Brennan, I want to pick up on something that General Jones said in his interview with USA Today. He referred to the Fort Hood massacre as strike one, and I'm curious if you can explain the to American public why things that were learned after Fort Hood -- Yemen, a cleric who has quite a visible role in advocating for terrorism -- didn't create within the intelligence community and the larger apparatus a higher sensitivity to the kinds of things also visible in the Abdulmutallab case. And how much does that disturb you? [emphases mine]...

MR. BRENNAN: On the issue of Mr. Awlaki, yes, we were very concerned after the Fort Hood shooting about what else he might be doing here. And that's why there was a very determined and concerted effort after that to take a look at what else he might be trying to accomplish here in the homeland. Now, remember, Mr. Abdulmutallab was a much different story in terms of a Nigerian who traveled to Yemen and then came over here. But what it clearly indicates is that there is a seriousness of purpose on the part of al Qaeda in the Arabian Peninsula to carry out attacks here in the United States -- whether they're reaching people through the Internet, or whether or not, in fact, they are sending people abroad [emphases mine].155

Moreover, administration officials lent their comments to a vast number of newspaper articles and blog posts that referred to Mr. al-Awlaki as a “cleric” without offering any corrections. For example, US officials warned of possible retaliation in a CNN article titled “U.S. Officials Warn of Possible Retaliation After an al Qaeda Cleric is Killed,” and Attorney General Eric Holder gave an interview to ABC News wherein he is reported to have said that many al Qaeda converts are linked to “radical cleric Anwar al Awlaki himself.”

We will now move to consider this possibility in detail.

IX. The Religious Personnel Exception Under IHL: Is Anwar al-Awlaki a “Chaplain” Under IHL?

First, it cannot be stressed enough that this paper in general, and this section in particular, should in no way be construed as implying that Mr. al-Awlaki was speaking on behalf of Muslims, for Muslims, or in a manner consistent with the tenets of Islam. Rather, this section solely considers whether or not Mr. al-Awlaki conforms to the definition of a chaplain under IHL, the resulting ramifications for the legality of his killing, and the degree to which the GWOT challenges the framework of IHL in general by providing such a vague definition of what is or isn’t a Chaplain. Groups that self-legitimize and recruit using religious discourse operate in the same space of legal liminality: they cause damage to the opposing party’s military effort while technically conforming to the definition of religious personnel. Killing them is thus technically illegal under IHL in spite of their positive impact on the morale, recruiting efforts, and perceived legitimacy of the group to which they are attached. Second, in comparing Mr. al-Awlaki’s activities within AQAP to those of chaplains in other armed forces, I am not suggesting that the AQAP is on the same moral or legal footing as those armies under consideration, nor that Mr. al-Awlaki’s ideas should be regarded as morally equivalent. The armies of Great Britain, Ireland, and Israel, the U.S., and other mentioned states have well-established and legitimate interests. Their motivations and activities are not to be confused on a moral or tactical level with al Qaeda. They are mentioned, however, so that I may draw attention to the limitations of IHL and its definition of a Chaplain.

Mentions of holy men working side-by-side with fighters to inspire them as they charged into battle can be found in the Bible; this relationship developed and eventually became the norm through much of subsequent history. The designation of “chaplain” can be traced to a fourth century Gallic legend wherein Saint Martin of Tours gave half of his cloak to a freezing beggar, and was inspired thereafter to abandon his military career to become a man of the cloth. The part of his cloak that remained became a sacred relic, and the officer assigned to guard it was called the “chaplain”—guardian of the cloth.

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159 Albert Isaac Slomovitz supra p. 2
160 Albert Isaac Slomovitz supra p. 2
military service, and their presence on the battlefield often resulted in a temporary cease-fire.161 As feudal forces grew into modern armies, a permanent corps of military chaplains emerged in France, Spain, Britain, and colonial America.162 The Geneva Convention of 1864 in fact mentions chaplains, and states that they “shall have the benefit of the same neutrality [as military hospitals and ambulances] when on duty, and while there remain any wounded to be brought in or assisted.” The designation of chaplain carries with it a heavy significance as religious personnel are non-combatants that must be “respected and protected in all circumstances;” this applies “at any time throughout the duration of an armed conflict, at any place, and in any case where chaplains are retained by the adversary, whether temporarily or for a prolonged period of time.”163 The Annotated Supplement to the US Naval Handbook (1997) notes, for example: “the United States supports the principle in [Article 15 of the 1977 Additional Protocol I] that civilian … religious personnel be respected and protected and not be made the objects of attack.”164 The Israel Defense Forces (IDF) similarly “do not have a policy of targeting the religious personnel of their adversaries” subject to the “personnel being clearly recognizable and not participating in hostile activities;” pursuant to this principle, the 2006 IDF manual on the rules of warfare states that “As long as they do not participate in the fighting, it is forbidden to attack [ministers of religion] or to take them into captivity.”165

In considering whether or not Mr. al-Awlaki was a “chaplain,” I will consider his activities as described by the Obama Administration, as well as potential objections pertaining to his classification as such.

Can a “Terrorist” Group Like AQAP Have its Own “Chaplains”?  

According to IHL, a “chaplain” does not necessarily need to be an adequate or even competent representation of his or her faith to qualify as such; rather, chaplains are personnel “exclusively engaged in the work of their ministry.”166 Chaplains are furthermore still chaplains even if they belong to a militia, a volunteer corps, or an organized resistance movement whose members are combatants,167 meaning that Mr. al-Awlaki may still be considered a chaplain even though his duties were carried out for the benefit of AQAP. As he was allegedly working with the AQAP, and the content of Mr. al-Awlaki’s sermons and his interpretations of Islamic doctrine were accordingly distasteful, it is difficult to say with any certainty that he “violate[d] the religious practices of [his] religious organization” given that the “religious organization” with which identified espoused views similar to his own, and engaged in “religious practices” in keeping with those views.

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161 Solis supra 193  
162 Albert Isaac Slomovitz supra p. 3  
163 Dieter Fleck and Michael Bothe The Handbook of Humanitarian Law in Armed Conflict 802 (1995)  
164 Customary IHL: Rules Relating to Rule 27: Religious Personnel ICRC.org  
165 http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule27  
166 http://www.icrc.org/customary-ihl/eng/docs/v2_cou_il_rule27  
168 Dieter Fleck and Michael Bothe The Handbook of Humanitarian Law in Armed Conflict 802 (1995)
This brings us to the fact that Mr. al-Alwaki encourages violence against innocent people. While there is not an overwhelming amount of precedent for military chaplains enabling or encouraging violence, there are some indications that this too would not necessarily disbar him from being religious personnel. During the North Ireland conflict, for example, some Irish priests refused to explicitly condemn the tactics of the IRA, regarding such violence as a “reaction against the source of the present injustice” and arguing that “these people have had every non-violent means of resistance or amelioration of conditions cut off from them.”\textsuperscript{168} It would therefore be difficult to argue that expressions supporting, excusing, or condoning violence, or using religious discourse to enable the application of distress, would automatically disbar Mr. al-Awlaki from the status of chaplain. In other words, the violent content in many of Mr. al-Awlaki’s YouTube sermons would allow him to remain a chaplain according to the standards set by the U.S. Navy so long as he retains the endorsement of his “faith community;” so too would the fact that he encouraged Mr. Abdulmuttalib to blow up an airliner.\textsuperscript{169}

The fact that Mr. al Awlaki hundreds of YouTube sermons were at times explicitly political, rather than religious, also might not pose a problem according to customary law, given that there exists some precedent for military chaplains expressing controversial political views in public. For example, the Supreme Court ruled in Rigdon vs. Perry that American military chaplains are not subject to the same restrictions on speech as other members of the armed services, who are, among other things, prohibited from participation in partisan political activities and solicitation of votes.\textsuperscript{170} American military chaplains have “rank without command” as they are considered “on loan from their faith community” and are separated from the military if they lose their religious endorsement.\textsuperscript{171} Religious officiants in the American military therefore hold a “right to autonomy in determining the religious content of their sermons” and would “suffer irreparable harm to their statutory and constitutional right to preach without being censored.”\textsuperscript{172} The Former Chief IDF Rabbi Shlomo, Goren also injected himself into a politically controversial issue when he responded to the Oslo Accords with by giving a “Torah ruling that an IDF soldier may not participate in the tearing down of a community or camp in the Land of Israel, and if he does receive such an order he must refuse it.”\textsuperscript{173}

### B. Can Anwar al-Awlaki be Considered a Chaplain Even if he Engaged in Non-Religious Activities?

Chaplains are furthermore still considered as such under international law even if they engage in activities that are not explicitly religious in nature, if they briefly take up arms, or if they act in an advisory capacity to military or state leadership. While regulations are in place to limit a U.S. Navy chaplain’s duties to religious service “while assigned to a combat area during a

\textsuperscript{168} Irish American Information Service *British Violence Ignored by Church, Say Irish Priests* The Green Left (July 20, 1994) http://www.greenleft.org.au/node/8568

\textsuperscript{169} Id.

\textsuperscript{170} Steven H. Aden *The Navy’s Perfect Storm: Has a Military Chaplaincy Forfeited its Constitutional Legitimacy by Establishing Denominational Preferences?* 31 Wisconsin State University Law Review 185 2003-2004 at 198

\textsuperscript{171} Rigdon vs. Perry 962 F. Supp. 150, 159 (D.D.C. 1997)

\textsuperscript{172} Rigdon vs. Perry 962 F. Supp. 150, 162 n. 12 (D.D.C. 1997)

\textsuperscript{173} http://www.israelnationalnews.com/News/News.aspx/134931#.T0F6FM1ENbw
period of armed conflict,” the only prohibited activities outside of a combat area during an armed conflict are those that would “violate the religious practices of the chaplain’s religious organization.”174 Priests, for example, played a critical role during the disarming of all Northern Irish paramilitaries in 2005, confirming to the Independent International Commission on Decommissioning that the guerrillas had destroyed their weapons.175 It is therefore possible for chaplains to take on important tasks that are not strictly within the purview of the ministry.

Standards for the treatment of religious personnel set forth by the IDF and the U.S. Navy would not disbar Mr. al-Awlaki from being a “minister of religion,” given that there is no publicly available information suggesting that he at any time “participate[d] in fighting,” nor any that suggests his primary function was something other than sermonizing. In his aforementioned March 3 speech, Attorney General Eric Holder identified Mr. al Awlaki as a “senior operational leader of al Qaeda or associated forces.” However, even though Mr. al Awlaki may have played a role in the failed Christmas Day 2009 bombing, there is no evidence that his primary role was tactical or operational in this event or in any other. Mr. Abdulmutallib’s testimony indicates that Mr. al Awlaki “discussed martyrdom and jihad” with Mr. Abdulmutallib for a period of days, “told [Mr. Abdulmutallib] that jihad requires patience but comes with many rewards,” and “assisted [Mr. Abdulmutallib] in writing his martyrdom statement.”176

It was only after Mr. Abdulmutallib returned from tactical training at an unspecified location under the tutelage of unspecified persons, with a bomb made by Mr. Al Asiri and with instructions for its use provided by Mr. Al Asiri that Mr. al Awlaki became involved. At this point, he “instructed defendant that the only requirements were that the attack be on a U.S. airliner, and that the attack take place over U.S. soil,” the nature of his mission—that of suicide bombing on an airliner with the U.S. as a target—apparently already having been decided at the AQAP training camp, rather than by Mr. al-Alwaki himself. These activities, their distasteful message notwithstanding, would seem to fall under the scope of providing religious guidance to Mr. Abdulmutallib, rather than tactical or operational training, and it is difficult to conclude that Mr. al Awlaki’s primary role in this mission was that of providing operational or tactical training.

Furthermore, there have, in fact, been precedents set by American chaplains who either briefly took up weapons, or assisted in so-called harsh interrogation of detainees while still remaining “chaplains” according to the American military. For example James Yee, a Muslim US army chaplain stationed at Guantánamo, was instructed to “advise the commander of the detention operation...how the religious practices of the prisoners affected the operation” to make the interrogation procedure more effective,177 and in November of 2011, Israel Defense Forces’ Chief Rabbi told students in a pre-army yeshiva program that “In times of war, whoever doesn’t fight with all his heart and soul is damned - if he keeps his sword from bloodshed, if he shows mercy toward his enemy when no mercy should be shown.”178

174 William A. Wildhack supra 241
175 Jim Dee Securing the Irish Peace Foreign Policy in Focus (Oct. 9, 2006) http://www.fpif.org/articles/securing_the_irish_peace
176 U.S. vs Farouk Abdulmuttalab supra
On “rare occasions,” American chaplains in Iraq have disregarded the prohibition that they carry weapons, claiming that they are empowered to declare an exception in the “most extreme circumstances” although the Chaplain Corps “discourages” it. In 2003, for example, a U.S. Army Chaplain in Baghdad “picked up a weapon and started firing at the enemy,” later explaining that he “[has] no problem with that in [his] conscience.” There is, in fact, no such exception, however this particular chaplain was not the first to bear arms in combat; a Civil War Chaplain was actually awarded a Medal of Honor for “voluntary[ily] carrying a musket in the ranks of his regiment and render[ing] heroic service in retaking the Federal Works which had been captured by the enemy.” Of course, if captured while in the act of fighting, or engaged in preparation to fight, a chaplain would be subjected to treatment in keeping with his precapture conditions, rendering him an unlawful combatant.

Participating in “indoctrination” at training camps or otherwise might also not disqualify Mr. al Awlaki from being a chaplain, given that IDF Chief Rabbis are heavily involved in the “indoctrination and education” of IDF troops. While American chaplains, on the other hand, are not expected to indoctrinate troops, they are expected to provide a religious belief that would convince soldiers of the moral, ethical, and religious soundness of dying in battle. For example, at a funeral service held after the battle of Fallujah in Iraq, Chaplain Bill Devine comforted those in attendance by saying that “there is nothing more Christian than what we are doing here.”

Chaplains also may be regarded as such even if they are taking on a “leadership role” or offering advice to leaders. In North Ireland, observers initially believed that the warring groups were led by ministers and priests. Even so, the UK LOAC specifically prohibited attacking Chaplains associated with armed groups. Giving advice to military command on religious and other matters is also not unprecedented: during preparations for the military offensive in 1967, Ariel Sharon, who at the time was a general in the IDF, sought advice from IDF Chief Rabbi Shlomo Goren as to the proper rites to observe when taking the Old City; additionally, after the conclusion of the war, Rabbi Goren sent a confidential memo to the Prime Minister demanding that the entry to the Temple Mount be closed to both Jews and gentiles. Although the conflict is not explicitly of a religious nature from the perspective of American forces, it arguably has a religious dimension to AQAP, given that they have called for the establishment of a "global caliphate" and justify their continued engagement with American targets using religious discourse; additionally, all members presumably share a common faith,

179 Gary D. Solis The Law Of Armed Conflict: International Humanitarian Law In War 194 (2010)
180 Gary Solis supra 194
181 Gary Solis supra 194
182 Menachem Mautner Law and the Culture of Israel 189 (2011)
183 Dale Roy Herspring Soldiers, Commissars, and Chaplains Civil-Military Relations Since Cromwell 47 2001
and a common interpretation of that faith. This does not mean, however, that all chaplains for AQAP are therefore combatants, or that all AQAP combatants are therefore chaplains. During the conflict in Northern Ireland, which had religious as well as political roots, Irish Catholic priests, as aforementioned, were not considered combatants by the United Kingdom and Northern Ireland. This was the case even though priests at times excused the violent tactics of the IRA (as noted above); additionally, this was true in spite of the fact that a priest associated with the Irish Republican Army (IRA) may have been involved in an attack that killed nine people, and that the Catholic Church colluded in protecting him from prosecution by moving him to another parish.188 Even so, the UK 1981 LOAC manual explicitly states that “Chaplains attached to the armed forces have protected status and may not be attacked … They may not be armed”189 and the 2004 UK LOAC manual prohibits attacks on chaplains in non-international armed conflicts.190 Differently put, the fact that AQAP self-identifies in terms of religious, rather than nationalist discourse, does not nullify the non-combatant status of chaplains. Finally, if Mr. al-Alwaki played a pivotal role in AQAP by virtue of his activities as a religious functionary, he still may remain religious personnel and not a combatant: American military commanders, for example, feel that chaplains play an important role because they “contribute to the task of winning the war”191 and the Army website characterizes chaplains as “crucial to the success of the Army’s mission.”192 By raising morale, fighting spirit, and by providing a justification for some of the more challenging aspects of military service, their mission has been characterized as “indispensable.”193 The IDF places a similar importance on the contribution of its own religious personnel, given that Brig. Gen. Avichai Rontzki told the students in November of 2011 that “religious individuals made better combat troops.”194 Mr. al-Awlaki’s YouTube sermons and other activities may, as the administration alleges, have played an important role in AQAP’s mission; that alone, however, does not mean he is not a chaplain according to international law.

C. Can a “Chaplain” Retain This Designation Under IHL Even if He or She Has No Formal Religious Training?

As aforementioned, Mr. al-Awlaki had no formal religious training, but religious training is not necessarily required of chaplains in all armed forces, and there is no mention of formal training in the International Committee of the Red Cross’ materials devoted to customary rules.

190 Rule 27 supra
191 Dale Roy Herspring supra 42
193 Dale Roy Herspring supra 47
194 Anshel Pfeffer supra
about chaplaincy. To be sure, a vast majority of American army chaplains, for example, are Muslim, Jewish, or Christian and benefit from formal training. However, the Air Force Academy has recently built a worship center in Colorado to cater to adherents of “Earth-based” religions such as Wiccans, Pagans, and Druids; Chaplain Maj. Darren Duncan, branch chief of cadet faith communities at the academy, oversees worship. Additionally, the Netherlands, Belgium, and Norway have allowed secular humanist chaplains to serve atheists. A lack of formal training is therefore not grounds to exclude him from the status of chaplain.

X. Anwar al-Awlaki May Have Been a Chaplain Under IHL

Once again, it bears mentioning that the release of classified information about Mr. al-Awlaki might significantly affect this analysis. It also cannot be stressed enough that the above section in no way offers support for his ideas, nor for the notion that his interpretation of Islam was consistent with the central tenets of that faith.

Even so, according to publicly available information, it appears that he did not deviate from IHL’s standard for religious personnel, and that there is precedent not only for chaplains engaging in political speech, but also for condoning violence, taking up arms in the heat of combat, participating in interrogations, indoctrinating troops, giving advice to military commanders, and performing important functions that are not explicitly related to the ministry. The difference between an ideology and a particular expression of religious belief is often in the eye of the beholder; furthermore, there is no such category as an “ideologue” in IHL. The result is that there is no practical category available—other than chaplain—for describing a person whose primary function involved the production of ideology.

Although the Administration was careful not to refer to Mr. al-Awlaki as a “cleric,” much was made of his YouTube sermons, his interest in the religious concept of jihad (however understood) and his mobilization of religious discourse to inspire others to engage in violence. Furthermore, reporters and news outlets were not from using the term “cleric,” even in front of such persons as Attorney General Eric Holder or the White House Press Secretary (see above), and it appears that no effort was made to counter the widely-applied moniker of “American Born Cleric.” Therefore, given the description of his activities as supplied by the Obama Administration, and given that Mr. al-Awlaki deployed religious discourse in service of AQAP’s agenda, gave hundreds of sermons that he made available on YouTube, was a “midlevel religious functionary” according to an expert on Yemen, and was repeatedly referred to as a “cleric”
by reporters without any correction from the Obama administration, it is difficult to place him in any other category under IHL other than “chaplain.”

Penultimately, Anwar al-Awlaki is dead, the issues raised in this paper are not moot: it should also be clear at this point that the criterion for determining whether an individual is religious personnel is largely undefined in IHL, meaning that there exists no clear guideline as to who is an “ideologue” (as Anwar al-Awlaki was often called by the administration) and who is a “cleric” (as he was called by the press). While each military has its own unique regulations in place to guide the behavior of its officers—including, but not limited to, chaplains—the international legal standard for chaplaincy is merely one wherein an individual is solely employed for religious purposes either permanent or temporary, and, although he may engage other activities, is primarily a religious officiant. The nature of a chaplain’s employment has been left up to individual states, and the manner in which a chaplain chooses to express himself, as it turns out, is not necessarily grounds for a chaplain losing his non-combatant status, nor is it even clearly grounds for losing his position as a chaplain.

As I have pointed out in this Article, the GWOT has challenged the framework of IHL, particularly insofar as the principles of distinction and group membership are concerned. The existence of groups that self-legitimate and recruit using religious discourse has further blurred the line between civilians and combatants, technically functioning outside the definitions of Chaplain while still doing harm to American military efforts. Additionally, the designation of who is and who isn’t religious personnel, particularly within the context of a conflict that has arguably taken on religious dimensions from the perspective of one or more players, may be another aspect of IHL that deserves serious scrutiny in terms of its applicability to the GWOT.

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201 See, for example, Sean Alfano supra as one of the many examples wherein he is referred to as a “cleric”