CALIFORNIA WESTERN
INTERNATIONAL LAW JOURNAL

VOLUME 44 SPRING 2014 NUMBER 2

AN EVALUATION OF THE U.S. POLICY OF "TARGETED KILLING" UNDER INTERNATIONAL LAW: THE CASE OF ANWAR AL-AULAQI (PART II)†

JAKE WILLIAM RYLATT*

(RE)INTRODUCTION

On September, 30, 2011, the U.S. policy of "Targeted Killing" against individuals linked with terrorist activities extended for the first reported time to one of its own citizens: United States born Anwar Al-Aulaqi.[1] In doing so, the United States reignited the debate surrounding the legality of its policy, a debate to which this article aims to contribute.

Part I of this two-part article laid the foundations for the overall argument, via an analysis of the legal justifications for targeted killing forwarded by the United States, before addressing the first set of legal

† Part I of this article was published in 44 CAL. W. INT'L L.J. 39 (2013-2014).

* LLB (Leeds), LLM Candidate, Faculty of Law and Queens' College, University of Cambridge. I am deeply grateful for the invaluable guidance and support of Professor Surya P. Subedi OBE, Dr. Anthony Cullen, and Dr. Amrita Mukherjee. The views presented, and any errors or omissions, are solely those of the author.

1 *Obituary: Anwar al-Awlaki*, BBC NEWS, Sept. 30, 2011.

issues identified under the framework of *jus ad bellum*. Under this framework it was concluded that, on the known facts of the Al-Aulaqi strike, there are strong arguments to suggest illegality on the part of the United States. This illegality arose due to the lack of an imminent armed attack to allow the United States to claim it responded in self-defense.

The analysis in Part II develops the overall thesis proposed by this author, namely that the targeted killing of Anwar Al-Aulaqi must be evaluated under both *jus ad bellum* and the "law enforcement" paradigm of International Human Rights Law (IHRL). In doing so, this article analyzes the United States' invocation of a non-international armed conflict (NIAC) to encompass the Al-Aulaqi strike, consequently triggering the more permissive rules of International Humanitarian Law (IHL).

After concluding that the strike may not be justified as falling within the scope of any armed conflict in which the United States was engaged at that time, this Article continues to consider whether the strike is justifiable under the true applicable law, IHRL. In doing so, a final conclusion as to the legality of the Al-Aulaqi strike will be reached; a conclusion that may have far-reaching implications for the legality of the U.S. policy of conducting "Targeted Killings" within States such as Yemen, Pakistan, and Somalia.

III. JUS IN BELLO: THE CLASSIFICATION OF ARMED CONFLICT

There is a complete separation between *jus ad bellum* and *jus in bello*;[2] wherever there is a *de facto* armed conflict, IHL applies.[3] Legality under one framework does not equate to legality under the other. Following *jus ad bellum*, the analysis of the Al-Aulaqi strike faces a juncture of two paradigms. If the strike can be brought within the context of an armed conflict, the 'normative paradigm of

2. Marko Milanovic & Vidan Hadzi-Videanovic, *A Taxonomy of Armed Conflict*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO AND JUS POST BELLUM 264-68 (Nigel D. White & Christian Henderson eds., 2013) [hereinafter Milanovic & Hadzi-Videanovic].

3. 1 MARCO SASSOLI & ANTOINE BOUVIER, INT'L COMM. OF THE RED CROSS [ICRC], HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 103 (2d ed. 2006).

hostilities' featuring the complementary regimes of IHL and IHRL will be triggered. If, at the time of the strike,[4] there is no armed conflict to which the strike is referable, the law enforcement paradigm of IHRL must apply. As stated in the introduction, the overall thesis forwarded by this article is that the strike against Al-Aulaqi was outside of the context of armed conflict. This chapter will begin by analyzing the *lex lata* surrounding the classification of conflicts, before applying the framework to the circumstances prevailing during the Al-Aulaqi strike.

A. The Classification of Armed Conflicts

The authoritative[5] definition of an armed conflict is from the International Criminal Tribunal for the Former Yugoslavia (ICTY) decision in *Tadić*.[6] There, the court stated, "that an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[7] However, "armed conflict" is not a generic concept.[8] Preserved in this

---

4. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); *see, e.g.,* Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82-T, Judgment, ¶¶ 173-174 (Int'l Crim. Trib. for the former Yugoslavia July 10, 2008) (showing that the threshold question for establishing the application of IHL is that there must be an armed conflict, and that armed conflict must exist at the time of the event in question).

5. The ICTY reiterated this authoritative definition in several cases. *See, e.g.*, Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002); Prosecutor v. Limaj et al., Case No. IT-03-66-T, Judgment, ¶¶ 83-84 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 30, 2005); Prosecutor v. Naletilic & Martinovic, Case No. IT-98-34-T, Judgment, ¶ 225 n.597 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003); Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Judgment, ¶¶ 37-38 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008); ILC Draft Articles on Effects of Armed Conflict on Treaties, Article 2(b), Int'l Law Comm'n, U.N. Doc. A/CN.4/L.777 (May 11, 2011).

6. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70.

7. *Id.*

8. That is to say that a situation is not established as "an armed conflict," and then classified further, but it is initially classified as either an international or non-

definition is the recognition of the two types of armed conflict enunciated in the four Geneva Conventions of 1949:[9] international armed conflict (IAC) and non-international armed conflict (NIAC), which will briefly be outlined before application.

1. International Armed Conflict

The definition of an IAC is derived from Common Article 2(1) to the Geneva Conventions, which states that the Geneva Conventions "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by them."[10] IAC also includes national liberation movements.[11] While IAC requires no real threshold of violence or duration,[12] and is merely a "resort to armed

---

international armed conflict. Milanovic & Hadzi-Videanovic, *supra* note 2, at 269-72.

9. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] [collectively hereinafter Geneva Conventions].

10. Geneva Conventions, *supra* note 9, at art. 2(1). Also including, "all cases of total or partial occupation of the territory of a High Contracting Party." *Id.* at art. 2(2).

11. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(4), June 8 1977, 1125 U.N.T.S. 3. Although, Anthony Cullen notes that Article 1(4) "has never positively enabled the application of the Protocol." ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 85 (2010).

12. I INT'L COMM. OF THE RED CROSS [ICRC], COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet, ed., 1952) [hereinafter Pictet].

force between States,"[13] it is clear from the text of Common Article 2 that the provision only applies to conflicts *between States*.[14]

2. *Non-International Armed Conflict*

Common Article 3 to the Geneva Conventions provides minimum protections[15] granted to participants "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[16] Deliberately, no threshold to establish a NIAC was provided by the Convention.[17] However, the ICTY judgment in *Tadic* posited that:

> The test applied . . . to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.[18]

---

13. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70.

14. "Any difference arising *between two States* and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war." Pictet, *supra* note 12, at 32 (emphasis added); *see also* Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 28 (2d ed., 2010); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 95-96 (1st ed. 2010) [hereinafter LUBELL, EXTRATERRITORIAL USE OF FORCE]; NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 251 (1st ed. 2008); Jens David Ohlin, *Is Jus in Bello in Crisis?*, 11 J. INT'L CRIM. J. 27, 30 (2013); Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Study on Targeted Killings*, Int'l Law Comm'n, U.N. Doc. No. A/HRC/14/24/Add. 6, ¶ 51 (May 28, 2010) (by Philip Alston) [hereinafter Alston]; ICRC, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, at 5 (Mar. 17, 2008), http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf.

15. It has been described as a "Convention in miniature." Pictet, *supra* note 12, at 48.

16. Second Geneva Convention, *supra* note 9, at art. 3.

17. Pictet, *supra* note 12, at 49.

18. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf.

This test received endorsement as authoritative in the ICTY,[19] ICTR,[20] and ICC,[21] and requires the fulfilment of two criteria: 1) a level of organization in the parties, and 2) a threshold of intensity to the hostilities.[22] The substantive content and interpretation of these requirements will be considered further during application.

B. Identifying an Armed Conflict for the Strike Against Al-Aulaqi

Prima facie, extraterritorial drone strikes against transnational non-State actors do not fit neatly into either of the pre-existing legal categories.[23] The drafters of the Geneva Conventions could hardly have foreseen the advances in modern warfare. However, the *lex lata* appears to have maintained, for now, the traditional dichotomy of IAC and NIAC.[24] The key question remaining is whether these existing concepts allow the strike against Al-Aulaqi to be subsumed within an identifiable armed conflict. There are three potential scenarios that must be examined.

---

19. *E.g.*, Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 184 (Int'l Crim. Trib. for the former Yugoslavia Nov. 16 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf.

20. *E.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 619 (Int'l Crim. Trib. for Rwanda Sept. 2 1998); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Trial Judgment, ¶ 92 (Dec, 6, 1999).

21. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 223 (Jan. 29, 2007).

22. Cullen, *supra* note 11, at 191.

23. Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. INT'L CRIM. JUST. 65, 65-67 (2013) [hereinafter Lubell & Derejko]; LUBELL, EXTRATERRITORIAL USE OF FORCE, *supra* note 14, at 93-94.

24. While a small minority of jurists have posited the emergence of a "transnational armed conflict" as a recognized *legal* concept in addition to IAC and NIAC, the dominant viewpoint among jurists is that these are the only types of armed conflicts recognized in the current *lex lata*. Naom Lubell, *The War (?) Against Al-Qaeda, in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 421, 431 (Elizabeth Wilmshurst, ed., 2012) [hereinafter Lubell, *The War (?)*]; LUBELL, EXTRATERRITORIAL USE OF FORCE, *supra* note 14, at 421-39; Milanovic & Hadzi-Vidanovic, *supra* note 1, at 43; MELZER, *supra* note 14, at 269 (1st ed. 2008); JENNIFER K. ELSEA, CONG. RESEARCH SERV., 7-5466, ISSUES RELATED TO THE LETHAL TARGETING OF U.S. CITIZENS SUSPECTED OF TERRORIST ACTIVITIES 5 (2012).

1. The Al-Aulaqi Strike as Part of an Armed Conflict With Al-Qaeda

The first scenario requires consideration of whether the United States is engaged in a global IAC or NIAC against Al-Qaeda, which includes the Al-Aulaqi strike. Applying this framework, it is clear that Al-Qaeda is not a State. Therefore, it can briskly be concluded that the purported armed conflict with Al-Qaeda is not an IAC.[25] However, a NIAC is not so quickly dismissed.

In the Department of Justice White Paper, the United States justified its global strikes as part of a NIAC with Al-Qaeda.[26] However, there are two primary difficulties with this justification that must be addressed. First, this justification misappropriates the U.S. Supreme Court's ruling in *Hamdan v. Rumsfeld*.[27] While the decision in *Hamdan* found the existence of a NIAC against Al-Qaeda in Afghanistan, the judgment cannot be used as sole authority for a *global* armed conflict beyond "hot" battlefields such as Afghanistan. Second, the reasoning in *Hamdan* is clearly open to criticism.[28] The court merely asserted a NIAC by deletion. In other words, because the conflict between the United States and Al-Qaeda was not an IAC,

---

25. Alston, *supra* note 14, at 17 n.99; *see also* Arabella Thorpe, *Drone Attacks and the Killing of Anwar Al-Aulaqi*, House of Commons Standard Note 06165 3 (Dec. 20, 2011); Lubell, *The War (?)*, *supra* note 24, at 431.

26. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 628-31 (2006). In *Hamdan*, the U.S. Supreme Court held that a conflict between a nation and a transnational non-state actor, occurring outside the nation's territory, is an armed conflict "not of an international character." *Id.* at 628-31 (as cited in U.S. DEP'T OF JUSTICE, WHITE PAPER, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 3 (2011) [hereinafter DOJ WHITE PAPER], *available at* http://www.justice.gov/oip/docs/dept-white-paper.pdf); *see* Jake W. Rylatt, *An Evaluation of the U.S. Policy of "Targeted Killing" Under International Law: The Case of Anwar Al-Aulaqi* (pt. 1), 44(1) CAL. W. INT'L L.J. 39, 47-48 (2013) (explaining that the DOJ White Paper was "leaked" to the press in March 2013, and outlines the United States' legal justification for its policy of targeted killings).

27. *Hamdan*, 548 U.S. 557.

28. *See, e.g.*, Michael Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, 16(2) J. CONFLICT & SEC. LAW 385, 390 (2011).

it *must* be a NIAC.[29] Indeed, the decision was purely based on a broad interpretation of Common Article 3, relying on the commentaries to the Geneva Conventions.[30] While previous commentators embarking on an analysis of the Al-Aulaqi strike have taken the U.S. Supreme Court's word as definitive authority,[31] doing so compounds the failure of the *Hamdan* decision to consider the true geographical scope of a NIAC.

Therefore, it must be analyzed whether, conceptually speaking, a NIAC between the United States and a transnational non-State actor is possible, where it spans the hot battlefield of Afghanistan as well as the countries of Pakistan, Somalia, and most pertinently, Yemen.[32] Is there a legal geography of war?[33]

The basis of this analysis[34] is Common Article 3 to the Geneva Conventions. Read literally, Common Article 3 speaks of an armed conflict "occurring in the territory of *one* of the High Contracting Parties."[35] Such a reading gives rise to the argument that non-

29. *Id.* at 390 (citing John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. 175, 190-91 (2011)).

30. *Hamdan*, 548 U.S. at 631.

31. Farley takes as settled that "[t]he United States is engaged in a non-international armed conflict with Al-Qaeda." Benjamin R. Farley, *Targeting Anwar Al-Aulaqi: A Case Study in U.S. Drone Strikes and Targeted Killing*, 2(1) AM. UNIV. NAT'L SEC. L. BRIEF 57, 73 (2012).

32. Lubell & Derejko, *supra* note 23, at 82-83.

33. *See generally* Kenneth Anderson, *The Targeted Killing and Drone Warfare: How We Came to a Debate Whether There is a 'Legal Geography of War,' in* FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW (Peter Berkowitz ed., 2011).

34. As the Unites States is not party to Additional Protocol II, analysis of its scope of application will be outside this article. However, it is noted that Article 1(1) explicitly limits its application to conflicts taking place in the territory of a State between its own armed forces and non-State actors. ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, Article 1(1); ICRC, *Customary Int'l Humanitarian Law* (2005) (Jean-Marie Henckaerts & Louise Doswald-Beck).

35. Second Geneva Convention, *supra* note 9.

international must be equated with *internal*,[36] which is a view that finds support in the original commentaries.[37]

In addition, recourse to the *travaux préparatoires* of the Geneva Conventions is instructive as a subsidiary means of interpretation.[38] The original draft of Common Article 3 was applicable "in all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties."[39] Melzer has posited the argument that the drafters' intent did not change with the amendment, stating that the phrase "was probably lost in the subsequent attempts to restrict the application of the conventions."[40] However, in such a controversial Article, it is difficult to imagine that such a change was anything less than intentional. As such, a stronger argument, also drawing on the *travaux*, is that of Murphy,[41] who submits that the drafting history of Common Article 3 contemplated an armed conflict between State and non-State actors "largely in the context of the classic civil war."[42] Upon inspection, the statements made by delegates appear to support this claim.[43] Thus, there is a strong argument that Common Article 3 speaks exclusively to

---

36. Christopher Greenwood, *Scope of Application of Humanitarian Law*, *in* DIETER FLECK, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 39-63 (Dieter Fleck et al. eds.1995).

37. Various statements such as "internal convulsions," "internal in character," and "dealings with internal enemies," can be used to identify a common thread of the internalization of NIAC. Pictet, *supra* note 12, at 43, 45, 50.

38. Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331.

39. Geneva Convention, Apr. 26-Dec. 8, 1949, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B at 107, 120.

40. MELZER, *supra* note 14, at 258 n.83.

41. Sean Murphy, *Evolving Geneva Convention Paradigms in the "War on Terrorism:" Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants,"* 75 GEO. WASH. L. REV. 1105, 1116 (2007).

42. *Id.* at 10.

43. For example, the Soviet delegate referred to "colonial conflicts, civil wars or any other conflicts of a non-international character" and the Mexican delegates spoke of "all non-international wars of whatever character, whether civil wars, wars of resistance or wars of liberation" These examples reflect that the delegates to the Diplomatic Conference viewed Common Article 3 of the Geneva Conventions as being of use purely in civil wars and other conflicts within the territory of one State. Final Record of the Diplomatic Conference of Geneva of 1949, *supra* note 39, at 327, 333.

conflicts of an internal character.[44] However, it must be examined whether such an intention has been displaced by operation of the maxim *lex posterior derogat priori.*[45]

The jurisprudence of international criminal tribunals is vital to interpreting the geographical scope of a NIAC. The authoritative decision of the ICTY's decision in *Tadic* specifically defines a NIAC as "protracted armed violence between governmental authorities and organized armed groups or between such groups *within a state.*"[46] A similar view is evident in the jurisprudence of the ICTR. For example, the *Musema* case stated "non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups *within the territory of a single State.*" [47] The cumulative effect of such decisions, particularly noting the authority of *Tadić*, supports the submission that the NIAC between the United States and Al-Qaeda in Afghanistan is confined to the territory of that State, and that State alone.[48]

---

44. Cullen, *supra* note 11, at 49; LINDSEY MOIR, THE LAW OF INTERNAL ARMED CONFLICT (2008); David Wippman, *Do New Wars Call for New Laws?*, *in* NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 1-28 (David Wippman & Matthew Evangelista eds., 2005); Greenwood, *supra* note 36, at 47.

45. Vienna Convention on the Law of Treaties, *supra* note 38, at art. 31(3)(b).

46. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (emphasis added); *see also* Krnojelac, *supra* note 5, ¶ 51; Case No. IT-03-66-T, Judgment, ¶¶ 83-84; Prosecutor v. Naletilic, Case No. IT-98-34-T, Judgment, ¶ 225; Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶¶ 37-38; Int'l Law Comm'n Draft Articles on Effects of Armed Conflict on Treaties, art. 2(b).

47. Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 248 (Jan. 27, 2000) (emphasis added).

48. Further support for this approach can be found in the San Remo Manual, stating that, "[n]on-international armed conflicts are armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government." MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, INT'L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT, WITH COMMENTARY 2 (2006), *available at* http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf.

Nevertheless, such a viewpoint is not without contention, particularly in the context of drones. Citing *Tadic*,[49] *Rutaganda*[50] and *Akaseyu*,[51] Lubell recently argued that there is a common thread throughout jurisprudence that the scope of IHL is "independent from the concept of hostilities, and extends to the geographical borders of the relevant state(s)."[52] This progressive interpretation appropriates the traditional "nexus" requirement, used to bring an individual's actions within the scope of armed conflict for the purpose of a war crimes prosecution,[53] to extend IHL to individuals targeted in a third State, in our case Al Aulaqi. *Tadic* is perhaps most instructive in identifying his key argument, stating that "IHL continues to apply . . . in the case of internal conflicts, [in] the whole territory under the control of a party, whether or not actual combat takes place."[54] However, such dicta followed the aforementioned passage confirming that a NIAC takes place "*within a State.*"[55] Consequently, while the "broad geographical scope"[56] required in the application of IHL is evident in such dicta, nothing suggests a contrary intention that IHL is applicable *beyond* the territorial confines of a single State.[57] For IHL

49. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70.

50. Rutaganda, Case No. ICTR-96-3-T, Trial Judgment, ¶ 101 (stating that "IHL extends throughout the territory of the State where the hostilities are occurring").

51. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 635-636 (holding that IHL "must be applied to the whole territory of the state engaged in the conflict").

52. Lubell & Derejko, *supra* note 23, at 70.

53. *See, e.g.,* Prosecutor v. Kunarac, Kovac & Vukovic, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 402 (Int'l Crim. Trib. for the former Yugoslavia Feb. 22, 2001).

54. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (emphasis added); Reiterated in Prosecutor v. Kunarac, Kovac and Vukovic, Case Nos. IT-96-23 & IT-96-23/1-A, Appeal Judgment, ¶ 57 (Int'l Crim. Trib. for the former Yugoslavia June 12, 2002).

55. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (emphasis added).

56. Cullen, *supra* note 11, at 141.

57. Declaration of Prof. Mary Ellen O'Connell at 7, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (2010) (No. 10-cv-01469).

to be applicable outside Afghanistan, the *Tadic* threshold of NIAC must have been met specifically in that third State.

2. *Localized NIAC in Yemen between the United States and Al-Qaeda in the Arabian Peninsula (AQAP)*

The second possibility of situating the strike against Al-Aulaqi within the context of an armed conflict is to invoke the traditional, territorially confined view of a NIAC, and ask whether the hostilities between the United States and AQAP, as opposed to the wider network of Al-Qaeda, have met the *Tadić* threshold to be classified as a NIAC.[58]

AQAP emerged in 2009 from a merger between Saudi militants and militants associated with Al-Qaeda based in Yemen.[59] Since this merger, AQAP has claimed responsibility for numerous attacks against both the United States and the Yemeni government.[60] The United States designated AQAP a "Foreign Terrorist Organization" in January 2010.[61]

In terms of the parties' organization, AQAP can make a far stronger claim than Al-Qaeda to be sufficiently organized as a party to the conflict. Following the U.S. invasion of Afghanistan, Al-Qaeda decentralized to become merely a network of semi-autonomous cells across the world under the Al-Qaeda ideology.[62] However, AQAP is more than an ideology, or network, and it may cogently be argued that it possesses the requisite level of organization. However, such a statement cannot simply be asserted.

---

58. A possibility mentioned, albeit not investigated, by Ashley S. Deeks. Ashley S. Deeks, *Pakistan's Sovereignty and the Killing of Osama Bin Laden*, Vol. 15 Issue 11, AM. SOC. OF INT'L LAW (May 5, 2011), http://www.asil.org/insights/volume/15/issue/11/pakistans-sovereignty-and-killing-osama-bin-laden.

59. JOHN ROLLINS, CONG. RESEARCH SERV., R41070, AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY 14 (2011).

60. *Id.* at 16-17.

61. Press Statement of Philip J. Crowley, Assistant Sec'y, Bureau of Pub. Affairs, U.S. Dep't of State, Designations of Al-Qa'ida in the Arabian Peninsula (AQAP) and Senior Leaders (Jan. 19, 2010), http://www.state.gov/r/pa/prs/ps/2010/01/135364.htm.

62. *See* Rollins, *supra* note 59, at Summary Page.

The *Tadić* threshold merely states that armed conflict occurs whenever there is "protracted armed violence between governmental authorities and organized armed groups."[63] Two key sources provide further guidance. First, the authoritative commentaries to the Geneva Conventions state that a party to a NIAC must be identifiable based on objective criteria, including: having an organization structure with the characteristics of a State; the use of regular military force by the State; and a sufficient command structure that grants it the capabilities of applying the Geneva Conventions.[64] Second, the ICTY in the *Limaj* and *Others* cases, confirms that parties only require "some degree of organization"[65] to be recognized as parties to a NIAC under international law. However, while *prima facie* such a standard seems low, closer inspection reveals a number of findings that appear to suggest a greater sophistication than initially apparent. In *Limaj*, the ICTY made a number of findings that cumulatively revealed that the Kosovo Liberation Army (KLA) was a party to an armed conflict.[66] These included the facts, *inter alia*, that zone commanders "acted in accordance with directions from the General Staff"[67] and "authorized the movement of soldiers.[68] Alongside this command chain, the court also relied on the findings that the KLA participated in political negotiations,[69] issued political statements,[70] and had its own group regulations and disciplinary procedures.[71]

Similar to the KLA, as discussed in the *Limaj* case, AQAP had previously been described as "compartmentalized and hierarchical, with a distinct division of labor,"[72] thus evidencing a chain of

---

63. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70.

64. Pictet, *supra* note 12, at 49-50.

65. Limaj, Case No. IT-03-66-T, Judgment, ¶ 89; *see also* Boskoski & Tarculovski, Case No. IT-04-82-T, Judgment, ¶ 197.

66. Limaj, Case No. IT-03-66-T, Judgment, ¶ 134.

67. *Id.* ¶ 98.

68. *Id.* ¶107.

69. *Id.* ¶¶ 125-129.

70. *Id.* ¶¶100-101.

71. *Id.* ¶110-111.

72. Barak Barfi, *Yemen on the Brink? The Resurgence of al Qaeda in Yemen*, NEW AMERICA FOUNDATION 2 (Jan. 25, 2010), http://www.newamerica.net/sites/newamerica.net/files/policydocs/Barfi.pdf.

command; a leader, or *emir*, had been consistently identifiable;[73] and it was releasing political statements via the *Inspire* magazine.[74] These combined factors may indeed be sufficient to qualify AQAP as a party to a NIAC.[75]

However, it is questionable whether the hostilities reach the requisite standard of "protracted armed violence." The standard of protracted armed violence is used to "distinguish[] an armed conflict from banditry, unorganized and short lived insurrections, or *terrorist activities*, which are not subject to international humanitarian law,"[76] and has been almost uniformly approved in the jurisprudence of the ICTY,[77] ICTR,[78] and the ICC Statute.[79] In assessing this threshold, Vite has argued that a number of factors must be accounted for, including "the duration of the conflict, the frequency of the acts of violence and military operations, the nature of the weapons used, displacement of civilians, territorial control by opposition forces [and] the number of victims (dead, wounded, displaced persons, etc.)".[80]

Applied to the specific hostilities between the United States-AQAP, thus negating armed attacks such as 9/11 and U.S. action in Afghanistan, there are a number of factors that strongly militate against finding that the threshold to be considered protracted armed violence has been reached. First, AQAP has only claimed responsibility for a small number of attempts against U.S. persons or

---

73. *Al-Qa'ida in the Arabian Peninsula*, NAT'L COUNTERTERRORISM CTR., http://www.nctc.gov/site/groups/aqap.html (last visited Apr. 16, 2013).

74. *Id.*

75. Beth Van Schaack, *The Killing of Osama Bin Laden & Anwar Al- Aulaqi: Uncharte Legal Territory,* 14 Y.B. OF INT'L HUMANITARIAN L. 254, 290 (2012).

76. Prosecutor v. Tadić, Case No. IT-94-1, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

77. Delalic, Case No. IT-96-21-T, Judgment, ¶ 183.

78. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 619 (reflecting the almost uniform approval of the Tadic test of "protracted armed violence").

79. Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002). Although, Melzer notes that the minor lexical change to "protracted armed conflict" in the ICC Statute may prove unhelpful in interpretation. MELZER, *supra* note 14, at 257.

80. Sylvain Vite, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. RED CROSS 69, 76 (2009) (emphasis added).

interests.[81] This is reflected in reports from both the Congressional Research Service[82] and the National Counterterrorism Center,[83] citing only the Christmas Day 2009 failed 'shoe-bomber' in U.S. airspace and the 2010 "parcel bombs" sent to the United States via airfreight, as an exhaustive list of AQAP attacks up to the critical date. Under *Tadic,* surely two, concealed attempts on U.S. interests are prime examples of sporadic terrorist activities, as opposed to acts of hostilities under an armed conflict.[84] With regards to the transformation from terrorism to armed conflict, the Supreme Court of Israel in the *Targeted Killings Case* found a NIAC on the basis of a "constant, continual and murderous wave of terrorist attacks . . ."[85] While such a judgment may prove too inconsistent with the much-lower established threshold of "protracted armed violence" to be taken verbatim, it highlights a heightened sensitivity to triggering the more lenient law enforcement paradigm.

Second, on the opposing side of the hostilities, the strike against Al-Aulaqi was reportedly only the 13th drone strike by the United States against AQAP in Yemen from strikes commencing in December 2009 and the killing of Al-Aulaqi in September 2011.[86] It is submitted that 13 strikes in 21 months would face great difficulties to meet even the generous threshold of "protracted."[87]

Third, the asymmetrical nature of the drone warfare utilized by the United States militates against finding an armed conflict.

---

81. BRUCE RIEDEL, THE SEARCH FOR AL QAEDA: ITS LEADERSHIP, IDEOLOGY AND FUTURE 155-58 (2d ed. 2010).

82. JEREMY SHARP, CONG. RESEARCH SERV., RL34170, Yemen: Background and U.S. Relations 8 (2012).

83. *See* Nat'l Counterterrorism Ctr., *Al-Qa'ida in the Arabian Peninsula (AQAP)*, TERRORIST GROUPS http://www.nctc.gov/site/groups/aqap.html (last visited Jan. 17, 2014).

84. O'Connell submits that only when terrorism is carried out "so continuously as to be the equivalent of armed conflict" will it be recognised as such. Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POL'Y 343, 356 (2010).

85. HCJ 769/02 Public Comm. Against Torture in Israel v. Gov't of Israel, ¶ 16 [2006], *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

86. New America Foundation, *Drone Wars Yemen: Analysis*, YEMEN STRIKES, http://natsec.newamerica.net/drones/yemen/analysis (last visited Feb. 13, 2014).

87. Ramsden, *supra* note 28, at 390.

Fundamental to the definition of both IAC and NIAC is the existence of hostilities *between parties*.[88] Therefore, it is "highly questionable as to whether a one-sided drone strike can meet the threshold of intensity for armed conflict".[89]

Consequently, despite the cogent arguments that the organizational capabilities of AQAP meet the requisite threshold to be classified as a party to a NIAC, there are strong arguments to conclude that the level of hostilities had not yet reached the threshold of protracted armed violence to establish an independent NIAC between the United States and AQAP in Yemen.

3. NIAC between AQAP and Yemen, with U.S. Intervention

Finally, it is possible that the strike is encompassed within NIAC between AQAP and Yemen, in which the United States is intervening. A small number of jurists have supported this claim;[90] however, such arguments seemingly fail to consider the underlying rationales behind each party's actions, and merely assume that an equation can be drawn between U.S. counter-terrorism operations and the internal conflict between AQAP and the Yemeni government.[91]

Assuming, *arguendo*, that the threshold of a NIAC was met between AQAP and the Yemeni military, there are strong arguments militating against finding that the United States was intervening in this conflict. While the United States was, at the material time, providing economic aid to the Yemeni government,[92] no evidence suggests it was providing military aid in the form of drone strikes. A sharp contrast can be drawn with the present situation, where the recently

88. *See* Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction..

89. Lubell & Derejko, *supra* note 23, at 78.

90. *See* Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3, 33-34 (2010); Benjamin R. Farley, *Targeting Anwar Al-Aulaqi: A Case Study in U.S. Drone Strikes and Targeted Killing*, 2 AM. UNIV. NAT'L SEC. L. BRIEF 57, 71-73 (2012).

91. *See, e.g.*, Chesney, *supra* note 90, at 31 (Chesney considers the clashes between AQAP and the Yemeni military, and the four occasions of airstrikes or missiles used by the United States against AQAP between 2009-2010, but fails to consider whether there is a causal link, or even the intentions of each party).

92. SHARP, *supra* note 82, at 12-20.

elected[93] President Hadi of Yemen openly declared his support for U.S. drone strikes.[94]

Furthermore, the U.S. rationale for targeting Al-Aulaqi was clear; he was adjudged a threat against the homeland as part of a wider perceived conflict with Al-Qaeda. This position is evident from the forwarded U.S. legal justifications; particularly the DOJ White Paper, which justifies strikes against "a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans".[95] There is no mention of Yemeni interests in the DOJ White Paper. Therefore, there is a clear argument that, in lieu of any clear statements from United States or Yemeni officials, the strike was conducted as a U.S. counter-terrorism operation for U.S. interests, as opposed to being part of a NIAC between the Yemen and AQAP.

C. Conclusion

The preceding analysis demonstrates that there are strong arguments militating against accepting the U.S. legal justification that all drone strikes are encompassed within an overarching armed conflict with the transnational State actor Al-Qaeda and its associated groups. The traditional geographical scope of armed conflict may be under pressure from the unique nature of transnational terrorism, but there is no clear *lex posterior* to override the intent of the drafters of the Geneva Convention.

Alternative arguments, while not pursued by the United States, have also struggled to find rational support, unable to cross the threshold from sporadic acts of terrorism and counter-terrorism into the realm of a NIAC. This conclusion is made with the proviso that such an argument is, by necessity, temporally linked to the circumstances prevailing at the time of the Al-Aulaqi strike. The classification of a conflict and the consequential determination of

---

93. "Yemen held a presidential 'election' in February 2012 with one consensus candidate on the ballot—former Vice President Abed Rabbo Mansour al Hadi." *Id.* at 4.

94. Amal Al-Yarisi, *Drone Strike Kills Three Al-Qaeda Terror Suspects in Marib Governorate*, YEMEN TIMES (Jan. 24, 2013), http://www.yementimes.com/en/1645/news/1889/Drone-strike-kills-three-Al-Qaeda-terror-suspects-in-Marib-governorate.htm.

95. DOJ WHITE PAPER, *supra* note 26, at 1.

applicable law must occur at the time of the strike.[96] Cogent of this fact, it may now be that the situation has evolved. However, in the circumstances prevailing on September 30, 2011, this argument cannot reasonably be maintained.

Therefore, this Article's final chapter considers the various issues surrounding the framework which governs the killing of Al-Aulaqi; the 'law enforcement' paradigm of IHRL.

IV. INTERNATIONAL HUMAN RIGHTS LAW: TARGETING ANWAR AL-AULAQI UNDER THE 'LAW ENFORCEMENT' PARADIGM

As noted in Chapter I, at no point over the last ten years has the United States attempted to consider IHRL,[97] even in the DOJ White Paper.[98] However, upon previously establishing that it would be difficult for the United States to justify the killing of Al-Aulaqi in the context of an armed conflict, the IHRL's "law enforcement paradigm" provides the sole legal framework under which the analysis of targeted killings is considered.[99] While the law enforcement paradigm may seem like an unlikely match for extraterritorial operations involving drones, far removed from the traditional "shoot-to-kill" policies normally associated with the paradigm, it does not only apply "to police forces or in times of peace."[100]

Prima facie, under the law enforcement paradigm, the targeted killing of Al-Aulaqi breached the right to life. The right to life is enunciated in every major international human rights instrument,[101]

---

96. Boskoski & Tarculovski, Case No. IT-04-82-T, Judgment; Rutaganda, Case No. ICTR-96-3-T, Trial Judgment, ¶¶ 92-93; Limaj, Case No. IT-03-66-T, Judgment.

97. JENNIFER ELSEA, CONG. RESEARCH SERV., Legal Issues Related to the Lethal Targeting of U.S. Citizens Suspected of Terrorist Activities 20 (2012).

98. *See* David Kaye, *International Law Issues in the Department of Justice White Paper on Targeted Killing*, 17 AM. SOC'Y OF INT'L L. (Feb. 15, 2013) *available at* http://www.asil.org/insights/volume/17/issue/8/international-law-issues-department-justice-white-paper-targeted-killing.

99. MELZER, *supra* note 14, at 278.

100. Alston, *supra* note 14, at 10; *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 104-106 (July 9) [hereinafter Wall Advisory Opinion].

101. African Charter on Human and Peoples' Rights art. 4, June 27, 1981, 21 I.L.M. 58; American Convention on Human Rights art. 4, Nov. 22 1969, 1144

and is conventionally binding on the United States as a signatory to the International Covenant on Civil and Political Rights (ICCPR),[102] taking the form of a non-derogable right, even in times of public emergency.[103] Article 6 provides that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[104]

However, two highly contentious areas require evaluation before reaching a final conclusion on legality: first, whether the ICCPR applies to operations conducted outside of the United States; second, whether the substantial obligation to respect and ensure the right to life in Article 6 allows, in the circumstances, for the killing of Al-Aulaqi.

U.N.T.S. 143, O.A.S.T.S. No. 36; International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 1916 U.S.T. 521, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; Universal Declaration of Human Rights art. 3, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(iii) (Dec. 10, 1948).

102. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION DATABASE (Jan. 11, 2014), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

103. Article 4(1) provides that:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

ICCPR, *supra* note 101. However, article 4(2) provides that the right to life (article 6) is non-derogable. *Id.* "State parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law[.]" U.N. Human Rights Comm., General Comment No. 29: Article 4: Derogations during a State of Emergency ¶ 11, CCPR/C/21/Rev.1/Add.11 (2001). Non-derogable rights are those rights listed in Article 4(2) ICCPR which may never be suspended, even in times of emergency that threaten the life of the nation.

104. ICCPR, *supra* note 101, art. 6.

A. The Extraterritorial Application of Human Rights Treaties

The U.S. position is, and always has been, that the ICCPR does not apply extraterritorially.[105] Accepting this premise would mean that the domestic authority of the AUMF would solely govern an extraterritorial strike outside the context of armed conflict. Support for the U.S. position is derived from the text of Article 2(1) of the ICCPR, which provides that "[e]ach State Party to the present Covenant undertakes to respect and ensure to all individuals *within its territory and subject to its jurisdiction* the right recognised in the present Covenant."[106]

The United States has argued that the wording of Article 2(1) "restricted the scope of the Covenant to persons under U.S. jurisdiction and U.S. territory,"[107] reading the two phrases conjunctively. However, this position has been rejected on numerous occasions, with the interpretative guidance of the UN Human Rights Committee, stating that Article 2(1) requires that "State parties . . . respect and ensure the Covenant rights to all persons who may be within their territory *and* to all persons subject to their jurisdiction."[108] This interpretation, reading Article 2(1) disjunctively to include State actions affecting individuals both "within its territory" *and/or* "subject to its jurisdiction,"[109] has found support in the Inter-American

105. Kevin Jon Heller, *'One Hell of a Killing Machine': Signature Strikes and International Law*, 89 J. INT'L CRIM. JUSTICE 89, 112 (2003); Matthew Waxman, Statement before the U.N. Human Rights Comm. (July 17, 2006), http://2001-2009.state.gov/g/drl/rls/70392.htm (last visited Apr. 7, 2013) [hereinafter Heller, '*One Hell of a Killing Machine*']; Thorpe, *supra* note 25, at 13.

106. ICCPR, *supra* note 101, art. 2(1) (emphasis added).

107. Conrad Harper, Legal Adviser, Dept. of State, Statement to U.N. Human Rights Comm., 20 U.N. Doc. CCPR/C/SR.1405 (1995), *quoted in* Meagan S. Wong, Comment, *Targeted Killings and the International Legal Framework: With Particular Reference to the US Operation against Osama bin Laden*, 11 CJIL 127, 158 n.103 (2012).

108. U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004) (emphasis added).

109. *Id.*

Commission on Human Rights[110] and individual UN Human Rights Committee communications.[111]

Additional support for the rejection of this interpretation is found in the ICJ's judgment in its *Wall Opinion*, which stated in relation to Article 2(1) that, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised *outside* the national territory."[112] The United States' purely territorial reading of Article 2(1) has also been rejected throughout academia,[113] with Milanovic making the particularly pertinent argument that such a reading would be contrary to the "object and purpose" of the ICCPR.[114] Such overwhelming authority against the U.S. interpretation has resulted in calls for the United States to abandon "a stance which is increasingly isolated from the international community."[115]

However, even accepting that the ICCPR binds the United States during operations against an individual "subject to its jurisdiction," it remains to be established that Al-Aulaqi fell within this concept. "Subject to its jurisdiction" can be summarized as "the concept that by *exercising control and authority* over an individual, the person is

---

110. Alejandre et al v. Cuba, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OAS/Ser.L/V/II.104, doc. 10 ¶¶ 24-25 (1999).

111. U.N. Office of the U.N. High Commissioner for Human Rights, *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, ¶¶ 12.1-12.3, 52/1979, CCPR/C/13/D/52/1979 (July 29, 1981).

112. Wall Advisory Opinion, 2004 I.C.J. 136, ¶ 109 (emphasis added); *see also*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 219.

113. Heller, '*One Hell of a Killing Machine*', *supra* note 105, at 112-13; Theodor Meron, *The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties* 89 AM. J. INT'L L. 78, 79 (1995); MELZER, *supra* note 14, at 125; Orna Ben-Naftali & Yuval Shany, Living in Denial: *The Application of Human Rights in the Occupied Territories,* 37 ISR. L. REV. 17, 118 (2004), rejecting the similar Israeli position with regards to the application of human rights obligations in the occupied Palestinian Territories.

114. MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY 222-228 (2011) applying Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331; *see also* LUBELL, EXTRATERRITORIAL USE OF FORCE, *supra* note 14, at 204-05.

115. Ramsden, *supra* note 28, at 393.

brought within the jurisdiction of the State."[116] From the jurisprudence of the European Court of Human Rights (ECtHR) we can cautiously extrapolate guidance on the concept, owing to the appearance of the phrase "within their jurisdiction" within Article 1 of the European Convention on Human Rights (ECHR).[117] The jurisprudence reveals that the acts of diplomatic and consular staff, and the detention of individuals, fall within a State's extraterritorial jurisdiction,[118] although great controversy has surrounded measures outside this scope, as would be the case for targeted killings. The notorious *Bankovic* case,[119] concerning the NATO air strikes in the Federal Republic of Yugoslavia in 1999, excluded extraterritorial air strikes from the purview of State jurisdiction for purposes of Article 1 of the ECHR,[120] although the crux of the decision can arguably be distilled from the ECtHR's analysis of the ECHR:

> In short, the Convention is a multi-lateral treaty operating . . . in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.[121]

As such, there is a strong argument that the decision can be distinguished from consideration of an ICCPR standard of "authority and control" due to the global, as opposed to the regional, reach of the ICCPR. The ICCPR is heralded as part of the "International Bill of Rights," and currently has 167 State parties.[122] On this basis, it is submitted the decision is of limited utility.

---

116. LUBELL, EXTRATERRITORIAL USE OF FORCE, *supra* note 14, at 211 (emphasis added).

117. ECHR, *supra* note 101, art. 1.

118. MELZER, *supra* note 14, at 135-36.

119. Bankovic v. Belgium, App. No. 52207/99, Eur. Ct. H.R. (2001).

120. *Id.* ¶¶ 74-82.

121. *Id.* ¶ 80.

122. United Nations Treaty Collection Database. Last accessed 17/4/13 at <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

Furthermore, recent case law in the ECtHR has witnessed a change in direction. Following the revocation of the *Bankovic* "*espace juridique*" limitation in the *Öcalan* Case,[123] the landmark case of *Al-Skeini and Others v. United Kingdom*[124] truly compounded the ECtHR's willingness to progressively interpret the Convention in light of the challenge of globalization. The court here found a sufficient jurisdictional nexus to bring the killings of six Iraqi civilians by British soldiers in Iraq within the protection of the right to life enunciated in Article 2 of the ECHR.[125] Jurisdiction was not restricted to the one individual, Baha Mousa, who was physically detained.[126]

The approach to extraterritorial jurisdiction advocated by the ECtHR is instructive of how human rights treaties must be purposively interpreted in the modern era. Challenges to the utility of IHRL in relation to recent drone strikes can be convincingly countered. While Paust has argued that the ICCPR was inapplicable to the Bin Laden operation because the Navy Seals "did not have effective control of Bin Laden while he was alive,"[127] thus equating control with *detention*, the response has been that such a position is absurd because targeting someone with the intention to take their life is the very definition of controlling an individual, body and fate, even for the split second before their life ends.[128] Requiring physical custody for effective control "offers a perverse loophole for states to avoid their human rights violations by operating remotely."[129] Support for a broader, purposive interpretation of the extraterritorial applicability of the ICCPR for targeted killings has gathered increasing support from jurists such as Scheinin,[130] Ramsden,[131]

123. Öcalan v. Turkey, 2005-IV Eur. Ct. H.R. at 91.

124. Al-Skeini and Others v. United Kingdom, Eur. Ct. H.R. (2011).

125. *Id.* ¶¶ 149-150.

126. As was the finding in the UK House of Lords. Al-Skeini v. Secretary of State for Defence, [2007] 1 A.C. 253.

127. Jordan Paust, Comment, *Permissible Self Defense Targeting and the Death of Bin Laden*, 39 DENV. J. INT'L L. & POL'Y 569, 581 (2011).

128. Wong, *supra* note 107, at 159.

129. Schaack, *supra* note 75, at 299-300.

130. Martin Scheinin, *The Extraterritorial Effect of the International Covenant on Civil and Political Rights, in* Extraterritorial Application of Human Rights Treaties 73, 77-78 (Fons Coomans & Menno T. Kammingaeds. eds., 2004).

131. Ramsden, *supra* note 28, at 393.

Lubell,[132] and Melzer.[133] Melzer conducted a comprehensive analysis of international jurisprudence and concluded that "[a] State exercising sufficient factual control or power to carry out a targeted killing will also exercise sufficient factual control to assume legal responsibility for its failure to 'respect' the right to life of the targeted person."[134]

It is therefore submitted that there are two convincing reasons for the extraterritorial application of the ICCPR to the Al-Aulaqi targeted killing. First, the UN Human Rights Committee, ICJ, Inter-American Commission on Human Rights, and numerous jurists have categorically rejected the U.S. position regarding the conjunctive reading of Article 2(1). Second, the notion of what is "within their jurisdiction" has developed, through analogous case law of international tribunals, to encompass the phenomenon of targeted killings; a view that has received substantial support from a number of distinguished jurists.

B. Application of the Substantive Obligation to Respect the Right to Life

On the basis that the United States is bound by the ICCPR extraterritorially, the killing of Al-Aulaqi is automatically unlawful under the Article 6 prohibition for two reasons. First, the ICCPR provides that the right must be "protected by law," therefore there must be a sufficient legal basis under domestic law for the deprivation of life.[135] Second, even if there is an existing sufficient legal basis, the provision is limited to preventing an individual from being "arbitrarily deprived on his life."[136] While the word "arbitrary" is vague and undefined,[137] it is accepted that a killing is not arbitrary if it conforms to the criteria of necessity and proportionality.[138]

---

132. LUBELL, EXTRATERRITORIAL USE OF FORCE, *supra* note 14, at 223.

133. MELZER, *supra* note 14, at 138-39.

134. *Id.*

135. MELZER, *supra* note 14, at 225-27.

136. ICCPR, *supra* note 101, at art. 6.

137. MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 110-11 (2d ed. 2005); MELZER, *supra* note 14, at 92-93.

138. UN Study on Targeted Killings, *supra* note 13, 11.

1. Sufficient Legal Basis

As highlighted in Chapter 1, the domestic justification given by the United States is the AUMF, providing:

> That the President is authorized 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, 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.[139]

A key problem that emerges from attempting to invoke the AUMF is the need to establish a connection between Al-Aulaqi, a member of AQAP, and those responsible for 9/11, namely Al-Qaeda.[140] While this question can be circumvented in a *jus ad bellum* analysis by invoking the concept of anticipatory self-defense solely against AQAP, the domestic legal basis here is clear; there must be a link with 9/11. As argued throughout, there are inherent difficulties in establishing sufficient links between those operating under the Al-Qaeda umbrella, with some arguing that Al-Qaeda has merely become an ideology for aspiring jihadists.[141]

There is a distinct paucity of facts in the public domain surrounding Al-Aulaqi's potential involvement in 9/11, with recent media reports suggesting the possibility that Al-Aulaqi bought flight tickets for the 9/11 hijackers.[142] While the evidentiary value of such media reports is highly questionable, it must be noted that the AUMF gives the President broad discretion to use force against "*persons he determines* [ ] aided" in the 9/11 terrorist attacks.[143] Because of this wide-reaching discretion, coupled with the distinct lack of

---

139. Authorization for Use of Military Force, Pub. L. No.107-40 [S.J. Res 23] (2001) [hereinafter "AUMF"].

140. Ramsden, *supra* note 28, at 396.

141. Rollins, *supra* note 59, Summary Page.

142. Catherine Herridge, *FBI refutes claims it suspected al-Awlaki role in purchasing 9/11 hijackers' tickets*, Fox News, Jan. 4, 2013, http://www.foxnews.com/politics/2013/01/04/fbi-refutes-claims-it-suspected-al-awlaki-role-in-purchasing-11-hijackers/.

143. AUMF, *supra* note 139, at s2(a).

accountability measures to challenge targeted decisions,[144] the evidential burden is practically non-existent. The President could have had sufficient evidence to make such a determination. However, without public evidence, the answer remains unclear and unsatisfying.

2. *Necessity*

The UN Special Rapporteur on Extrajudicial Killings states that "[t]he necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate . . ."[145] This requirement imposes a two-fold duty: first, to exhaust all non-lethal measures before resorting to lethal force; and second, to only use lethal force in response to an ongoing or imminent attack.[146]

In applying the requirement of exhausting non-lethal measures, the UN Human Rights Committee in *Suarez de Guerrero v. Colombia*[147] found that the killing of seven suspected kidnappers, by police officers at point blank range and without warning or an opportunity to surrender, was "arbitrary" for the purposes of Article 6 of the ICCPR.[148] On the known facts about the Al-Aulaqi strike, while the United States cites the impossibility of capture as a pre-requisite for a drone strike against a U.S. citizen,[149] there is no evidence that such an attempt was made, or even that Al-Aulaqi was given a warning or opportunity to surrender at the time of the incident.

However, there is an emerging view in the literature surrounding targeted killings that when capture or incapacitation is not feasible, the duty to employ non-lethal means is fulfilled.[150] While this view is far

144. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C., 2010) (noting that targeting decisions are non-justiciable).

145. Alston, *supra* note 14, at 11.

146. Ramsden, *supra* note 28, at 400-05.

147. Husband of Maria Fanny Suarez de Guerrero v. Colombia, Judgments U.N. Admin. Trib., No. 40, at 137, U.N. Doc. AT/37/40 (1982).

148. *Id.* ¶¶ 13.1-13.3.

149. DOJ WHITE PAPER, *supra* note 26, at 1.

150. Alston, *supra* note 14, at 28; Heller, *'One Hell of a Killing Machine'*, *supra* note 105, at 116-17; Ramsden, *supra* note 28, at 404-05. This could also be equated with Melzer's concept of 'qualitative necessity,' requiring that 'other means remain ineffective or without any promise of achieving the purpose of the operation.' MELZER, *supra* note 14, at 5, 228.

from established in international law, it provides a means of combating those connected with terrorist activities that are able to frustrate law enforcement operations by intentionally taking refuge in States that are "unwilling or unable" to bring them to justice. Even accepting this view, it could be argued that capturing Al-Aulaqi was feasible. While it was reported that for much of 2009 and 2010, capturing Al-Aulaqi was "nearly impossible" due to his integration into a powerful Yemeni tribe,[151] the strike against Al-Aulaqi was in a remote area of Yemen,[152] away from the potential of causing civilian casualties (except Samir Khan),[153] and away from the dangers of catastrophic losses to the U.S. armed forces. In this scenario there is a strong argument that the United States could have captured Al-Aulaqi, opposed to the instant use of lethal force.

The question regarding imminence is equally controversial, and two approaches can be extrapolated from the current discourse. The traditional approach is one of absolute temporal necessity,[154] where "imminence encompasses a person literally in the process of using deadly force."[155] This view reflects the origins of the law enforcement paradigm, whereby a police officer would be faced with an individual who is directly posing a threat to life, such as Ewald K., who was killed during a standoff with Swiss Police in 2000.[156]

A more progressive approach, adapting the law enforcement paradigm to accommodate the phenomenon of terrorism and the planning of potentially devastating attacks, is advocated by Ramsden.

---

151. Mark Mazzetti, Eric Schmitt & Robert Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Sept. 30, 2011, *available at* http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all.

152. *Id.*

153. The Israeli Supreme Court made clear that a State must take into account the potential for civilian casualties when considering the feasibility of an operation to capture. HCJ 769/02 Public Committee Against Torture v. Israel, Judgment, ¶ 40 [2005].

154. McCann v. United Kingdom, Eur. Ct. H.R. at 149 (1995); Alejandre v. Cuba, Case 11,580, Inter-Am. Comm'n H.R., Report No. 86/99, OAS/Ser.L/V/II.104, doc. 10 ¶ 42.

155. Ramsden, *supra* note 28, at 403; *see also* Heller, *'One Hell of a Killing* Machine, *supra* note 105, at 116.

156. See the full description of the incident in MELZER, *supra* note 14, at 437-38.

He submits that "[t]he concept of imminence will vary taking into account the gravity of the threat, the limited opportunity to incapacitate a known terrorist leader, and a pattern of previous attacks providing a *strong inference that future attacks are planned.*"[157]

Similar accounts are identifiable throughout academia,[158] with Chesney arguing the slightly stricter construction that "the state must have *substantial evidence* to support the belief that the person in question will in fact be involved in further attacks, but the state should not be expected to stay its hand until plot-specific details emerge."[159] The common denominator among such views is that a relaxation of the imminence criterion is necessary to take account of the perpetual difficulties and limited opportunities available in combating terrorism. However, all appear to agree that there must be a reasonable evidential burden on the State.

The U.S. formulation of imminence "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future".[160] Therefore, evidence that an individual is continually planning attacks against the United States, and has not renounced his intention to continue planning attacks, is sufficient to fulfill the criterion of imminence.[161] While far beyond the traditional approach, this view is somewhat reconcilable with the progressive approach taken to imminence. However, it must be questioned how far below the standard of "clear evidence" the U.S. position slides. Should the United States authorize attacks without a "strong inference that future attacks are planned,"[162] then the U.S. view would even surpass the progressive interpretation.

The paucity of information in the public domain surrounding the intelligence informing the Al-Aulaqi strike is once more an obstacle in analysis. However, the United States would have a strong argument under the progressive conception of imminence that it had the subjective belief, reasonably deduced from objective evidence of past

157. Ramsden, *supra* note 28, at 406 (emphasis added).

158. Heller, '*One Hell of A Killing Machine*', *supra* note 105, at 116; Chesney, *supra* note 90, at 55.

159. Chesney, *supra* note 90, at 55.

160. DOJ WHITE PAPER, *supra* note 26, at 7; Rylatt, *supra* note 26.

161. *Id.* at 8.

162. Ramsden, *supra* note 28, at 406.

attacks and a failure to repudiate his role, that the killing of Al-Aulaqi was necessary. Nevertheless, such a final conclusion should not be hastily reached. The progressive approach is, as of yet, purely academic, containing a distinct paucity of hard law.

3. Proportionality

With regards to the final requirement of justifying the targeted killing of Al-Aulaqi, the UN Special Rapporteur has stated that "the proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others."[163] The threat posed by Al-Aulaqi was clear. As an alleged senior operational leader of Al-Qaeda, Al-Aulaqi was tied to various attempts on U.S. lives, including the attempted Christmas Day "Shoebombing," which would have resulted in significant civilian casualties.[164] Ramsden argued prior to the killing that the United States is further entitled to take into account factors such as AQAP claims that it has "conducted extensive research and trials into thwarting airport screening,"[165] and the "strategy of a thousand cuts" to attack the United States with small, yet frequent, operations revealed in *Inspire* magazine.[166] On the basis of such facts, there is a strong argument that the Al-Aulaqi strike was proportionate to the continuing threat he posed to U.S. persons and interests.

Before concluding, a key distinction must be made between proportionality under IHRL and *jus in bello*. While it may cautiously be stated that a level of "collateral damage" is acceptable under the latter,[167] this concept is foreign to IHRL.[168] The death of any

---

163. Alston, *supra* note 14, at 11.

164. 278 passengers were aboard the targeted Northwest Airlines Flight 253. Anahad O'Connor and Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y TIMES (Dec. 26, 2009), http://www.nytimes.com/2009/12/26/us/26plane.html.

165. Ramsden, *supra* note 28, at 399 (citing Khaled Wassef, *Al Qaeda in Yemen Touts "Anti-Detectable" Bomb,* CBS NEWS (Feb.16, 2010), http://www.cbsnews.com/8301-503543_162-6212340-503543.html).

166. Ramsden, *supra* note 28, at 399 (citing *Factbox: Qaeda Unveils "Strategy of A Thousand Cuts",* REUTERS (Nov. 21, 2010, 4:39 PM) http://www.reuters.com/article/2010/11/21/us-yemen-qaeda-plot-idUSTRE6AK2CU20101121).

167. "Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof,

individual other than the target would be a breach of IHRL.[169] The result of this distinction is that in the Al-Aulaqi strike, the death of Samir Khan would *prima facie* breach IHRL. While Samir Khan was the editor of the AQAP magazine *Inspire*, the United States openly admitted that he was not a sufficiently significant target to be targeted individually.[170] As such, the killing of Samir Khan was a breach of IHRL as an indiscriminate extra-judicial killing.

C. Conclusion

In conclusion, there are strong arguments to rebut the U.S. position that the ICCPR does not apply extraterritorially, evidenced by the interpretative comments of the HRC and the progressive jurisprudence of the ECtHR discussing the application of the lexically identical provision enunciated in the ECHR. Consequently, the view that the United States is bound by the obligation to respect the right to life in extraterritorial drone strikes is reverberating around academia as logical and necessary.

In applying the substantive obligation of Article 6, the law once again displays a sharp divide between those favoring either a traditional or progressive approach to concepts such as imminence and necessity. Underlying the application of Article 6 are the recurring evidential difficulties apparent from the *jus ad bellum* analysis with regards to the 'imminence' of a potential attack. Nevertheless, there are substantial arguments to suggest that the United States would find it difficult to justify the strike under all three triggers of sufficient legal basis, necessity, and proportionality.

---

which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited;" *see* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 46 (2005).

168. Heller, '*One Hell of a Killing Machine,*' *supra* note 105, at 114.

169. *Id.*

170. Mark Mazzetti et al., *How A U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?_r=0.

CONCLUSION

The preceding analysis has sought to advocate an approach requiring the application of the frameworks of *jus ad bellum* and IHRL to the targeted killing of Anwar Al-Aulaqi. In each framework, the broader inherent tensions between pre- and post-9/11 conceptions of the legal issues have been investigated, before narrowing the investigation to focus on the application of the *lex lata* to the Al-Aulaqi killing itself.

Chapter 1 analyzed the legal justifications of the United States, revealing both the domestic and international justifications for the Al-Aulaqi strike, identified from administration remarks and policy documents, such as the controversial DOJ White Paper. While accepting the applicability of *jus ad bellum* and providing justifications under self-defense, it was clear that the United States viewed the strike as part of the global NIAC with Al-Qaeda under the *jus in bello* regime, thus excluding the applicability of IHRL. The analysis identified fundamental questions permeating all three legal frameworks, most notably the geographical scope of NIAC and the U.S. conception of imminence, to provide a basis for analysis in further chapters.

Chapter 2 analyzed the framework of *jus ad bellum* to establish whether self-defense could be successfully invoked to justify an incursion into Yemeni territory. Post-9/11 academic discourse witnessed the emergence of a deep doctrinal divide between those who favor a traditional inter-State approach, based around the UN Charter and those who posit a wider customary right of self-defense, which may be invoked against non-State actors. While the jurisprudence of the ICJ supports the prior position, substantial State practice and *opinio juris* spanning 175 years was identified to suggest the contrary approach might in fact have crystalized into customary international law.

The parameters of self-defense are also wrought with tension. While it may be that the action was both proportional and necessary, on the basis of the "failing" State of Yemen's inability to adequately prevent threats emanating, there are strong arguments to suggest that the Al-Aulaqi strike lacked the imminence to be either in response to 9/11, or as a purely anticipatory measure. It is concluded, in lieu of

clear evidence to the contrary, that the strike crossed into the unlawful realms of pre-emptive self-defense.

Chapter 3 analyzed the framework of *jus in bello* to evaluate the U.S. invocation of a global NIAC with Al-Qaeda, to trigger the more permissive framework of IHL. Strong arguments were elucidated from both the *travaux préparatoires* and *lex posterior* to Common Article 3 of the Geneva Conventions to support the position that a NIAC contains a territorial limitation, consequently precluding a NIAC ever being global in nature. Alternative arguments, albeit outside the scope of U.S. formal justifications, were considered, such as whether the United States could legitimately claim to be in a localized NIAC with AQAP in Yemen, or was intervening to support the Yemeni government engaged in a NIAC with AQAP. The support for these arguments is far from compelling, and it was concluded that neither provide a justification for U.S. actions. In terms of the former, the situation has not crossed the threshold from sporadic acts of terrorism and counter-terrorism into the realms of NIAC. As to the latter, the United States was clearly acting to protect their own persons. Consequently, the rules of IHL do not govern the Al-Aulaqi strike.

Chapter 4 analyzed the framework of IHRL, with particular focus on U.S. obligations to respect the right to life under the ICCPR. While the United States has fervently denied the extraterritorial application of the ICCPR, strong arguments were identified that this position is archaic and unsustainable. In application of the legal framework, it was concluded that the United States would find it difficult to justify the strike, particularly noting the strict, traditional approach to "heat of the moment" imminence in IHRL. While the strike may be justifiable under the weaker evidential burdens promulgated under progressive approaches, this view cannot be accepted as part of the *lex lata*. As such, there are compelling arguments for the proposition that the strike against Anwar Al-Aulaqi breached IHRL.

While the above conclusions serve utility in establishing both the *lex lata* of international law and the legality of the Al-Aulaqi strike, they should not be viewed as confined to the events of September 30, 2011. Drone warfare is a matter of *lex ferenda* in international law, showing no sign of ceasing.[171] As such, the above conclusions should

171. Sources such as the *Long War Journal* are receiving daily updates of further strikes spanning Afghanistan, Pakistan, Yemen and Somalia. *Foundation for*

be utilized as a context to consider reform of U.S. policy. While reform is largely outside the aims of this Article, one key point is now made.

Permeating the conclusions reached in this Article is a paucity of public information, and the unwillingness of the United States to reveal the true intelligence behind the strike. This lack of transparency has been compounded by decisions in both United States and United Kingdom courts rendering targeting decisions non-justiciable,[172] and this lack of transparency has been met with growing scepticism and opposition from the international community.[173] Regardless of how reform is affected, through "drone courts"[174] or otherwise, one point is clear; the United States must meet the calls reverberating around the world for transparency, accountability, and above all, justice.[175]

Defense of Democracies, LONG WAR JOURNAL, http://www.longwarjournal.org (last visited Apr. 4, 2013).

172. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010); R (Noor Khan) v. Sec'y of State for Foreign and Commonwealth Affairs, [2012] EWHC 3728 (Eng.).

173. The United States has recently received criticism for strikes carried out in Pakistan. AFP, *Red Cross Chief Criticises US' Drone Use in Pakistan*, EXPRESS TRIB., (Apr. 16, 2013), http://tribune.com.pk/story/536312/red-cross-chief-criticises-us-drone-use-in-pakistan.

174. Jeh Johnson, *A "Drone Court": Some Pros and Cons,* Address at Fordham Law School (Mar. 18, 2013), *available at* http://www.lawfareblog.com/2013/03/jeh-johnson-speech-on-a-drone-court-some-pros-and-cons/.

175. Alston, *supra* note 14, at 27-29; HCJ 769/02 Public Comm. Against Torture in Israel v. Gov't of Israel, ¶ 40 [2006], *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf; David Kaye, *International Law Issues in the Department of Justice White Paper on Targeted Killing*, 17 AM. SOC'Y OF INT'L L. (Feb. 15, 2013) *available at* http://www.asil.org/insights/volume/17/issue/8/international-law-issues-department-justice-white-paper-targeted-killing.