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TARGETING ANWAR AL-AULAQI: A CASE STUDY IN U.S. DRONE STRIKES AND TARGETED KILLING

BENJAMIN R. FARLEY*

On September 30, 2011, Hellfire missiles fired from CIA-operated drones struck a car traveling through a remote Yemeni governorate, killing Anwar al-Aulaqi.¹ Al-Aulaqi—a Yemeni-American best known for his jihadist tracts delivered in colloquial American English—was reportedly added to U.S. targeted killing lists in early 2010 and was the target of at least one earlier U.S. airstrike.² The killing of al-Aulaqi has focused attention on the U.S. practice of targeted killings. It has also raised questions about the United States’ legal justifications for conducting targeted killings: self-defense and armed conflict.³ When applicable, each of these frameworks provides legal authority for a state to use force against an individual.⁴ However, neither framework provides a blanket justification for—or a blanket prohibition against—targeted killings. Instead, each framework provides authority for the use of force, including targeted killings, when that framework’s particular requirements are satisfied.

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

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1 Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *Two-year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

2 *Id.*

3 *See, e.g.*, Harold Koh, Legal Adviser, U.S. Dep’t of State, International Law and the Obama Administration, Keynote Address Before the American Society of International Law (Mar. 25, 2010); Mem. in Supp. of Defs’ Mot. to Dismiss at 4-5, 8-9, *Al-Aulaqi v. Obama*, No. 10-1469 (D.D.C. Sept. 25, 2010).

4 For a discussion of whether targeted killings should be governed by the law enforcement paradigm or the “war” paradigm in counterterrorism contexts, *see* CHARLES A. SHANOR, COUNTERTERRORISM LAW 642–74 (2011); *see also* GABRIELLA BLUM & PHILIP B. HEYMANN, LAWS, OUTLAWS, AND TERRORISTS 69–91 (2010).

conflict between al-Qaeda in the Arabian Peninsula (AQAP) and Yemen, a conflict in which the United States is intervening.

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

I. BACKGROUND

A. *Anwar al-Aulaqi*

Anwar al-Aulaqi was an American-born Islamic cleric.⁵ Although he emerged as a voice of moderate Islam in the aftermath of the 9/11 attacks,⁶ he has since been linked to the 9/11 hijackers,⁷ as well as to several recent attempted and consummated terrorist attacks against the United States by AQAP.⁸

Although the exact nature of al-Aulaqi's involvement with AQAP is unclear, he appears to have evolved from an inspirational to an operational leader. As of January 2010, senior U.S. officials stated, "[T]he best way to describe him is inspirational rather than operational."⁹ More recently, though, U.S. officials have described him as being a "recruiter" and as being "involved in plots."¹⁰ He was reportedly responsible for AQAP's interest in attacking targets within the United States.¹¹ He was even described as being more dangerous than Osama bin Laden, "probably the most significant risk

5 James Gordon Meek & Katie Nelson, *Cleric Anwar al-Awlaki puts 'Everybody Draw Mohammed' Cartoonist Molly Norris on Execution List*, N.Y. DAILY NEWS, July 11, 2010.

6 Scott Shane, *Born in U.S., a Radical Cleric Inspires Terror*, N.Y. TIMES, Nov. 19, 2009 at A1 ("A month after the Sept. 11 attacks, . . . he told the New York Times that he would no longer tolerate 'inflammatory rhetoric.'"); Bobby Ghosh, *How Dangerous is the Cleric Anwar al-Awlaki?*, TIME, Jan. 13, 2010 ("Indeed, [al-Aulaqi] spoke out against radicals, prompting the New York Times in October 2001 to label him as one of a 'new generation of Muslim leader capable of merging East and West.'").

7 Scott Shane, *Born in U.S., a Radical Cleric Inspires Terror*, N.Y. TIMES, Nov. 19, 2009 at A1 ("[Al Aqlaki's] contacts with three of the Sept. 11 hijackers . . . remain a perplexing mystery about the 2001 attacks . . .").

8 Chris McGreal, *Cargo Terror Plot: Wanted Men: Al-Qaida bombmaker who Sacrificed his Brother*, GUARDIAN (UK), Nov. 1, 2010, at A4; *Muslim Cleric Aulaqi had Lunch at Pentagon*, WASH. POST, Oct. 22, 2010, at A11.

9 Ghosh, *supra* note 6.

10 Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Ties to Domestic Terror Suspects*, N.Y. TIMES, Apr. 7, 2010 at A12; Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, L.A. TIMES, Jan. 31, 2010 ("Over the past several years, [al-Aulaqi] has gone from propagandist to recruiter to operational player," said a U.S. counter-terrorism official.')

11 See, e.g., LYDIA KHALIL, *The Next Base?: Concerns About Somalia and Yemen*, AUSTRALIAN STRATEGIC POLICY INSTITUTE 5 (2011) (attributing the increase in AQAP attacks targeting the West to al-Aulaqi's role in the organization); Thomas Hegghammer, *The Case for Chasing al-Awlaki*, FOR. POL'Y, Nov. 24, 2010 ("[Al-Aulaqi] is arguably the single most important individual behind the group's efforts to carry out operations in the West . . .").

to the U.S. homeland.”¹²

Government officials reportedly added al-Aulaqi to the Joint Special Operations Command’s list of targets for kill or capture as of January 2010.¹³ On April 6, 2010, Obama administration leaks revealed that al-Aulaqi had been placed on the CIA’s separate targeted killing list because he was “believed to have shifted from encouraging attacks to directly participating in them.”¹⁴ In July 2010, the U.S. Treasury Department formally designated al-Aulaqi a terrorist.¹⁵ On May 5, 2011, a U.S. air-strike in Yemen targeted but narrowly missed al-Aulaqi.¹⁶ Finally, on September 30, 2011, a battery of Hellfire missiles launched from CIA-operated drones struck al-Aulaqi’s car, killing him.¹⁷

B. *Al-Qaeda in the Arabian Peninsula*

In January 2009, al-Qaeda in Yemen and the remnants of an al-Qaeda cell from Saudi Arabia merged to form AQAP.¹⁸ Both of these local cells were formed following the so-called “Yemeni Great Escape of 2006.” On February 3, 2006, twenty-three inmates escaped from Yemen’s Political Security Organization (PSO) headquarters in Sana’a by tunneling 460 feet from their basement cell to a neighboring mosque.¹⁹ Two of these escapees emerged as the leaders of al-Qaeda in the Southern Arabian Peninsula, or al-Qaeda in Yemen.²⁰

As an organization, AQAP is distinct from al-Qaeda proper.²¹ An *emir*, currently Nasir al-Wahayshi, heads the group. AQAP maintains its own propaganda arm, which produces a bimonthly magazine entitled *Salab al-Malabim*. It has earned a place unto itself on the United States’ list of

12 Josh Gerstein, *Official: Bin Laden Takes Back Seat*, POLITICO, Feb. 9, 2011, (quoting former National Counterterrorism Center Director Michael Leiter); Matthew Cole & Aaron Katersky, *Awlaki: The Most Dangerous Man in the World*, ABC NEWS (Nov. 10, 2010), <http://abcnews.go.com/Blotter/awlaki-dangerous-man-world/story?id=12109217>.

13 Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, at A01.

14 Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 6, 2010 (citing unnamed U.S. “intelligence and counterterrorism officials”); see also Memo. in Supp. of Defs’ Mot. to Dismiss at 6, *Al-Aulaqi v. Obama*, No. 10-1469 (D.D.C. Sept. 25, 2010); James Clapper, Decl. in Supp. of Formal Claim of State Secrets Privilege, at ¶¶ 13-15, *Al-Aulaqi v. Obama*, No. 10-1469 (D.D.C. Sept. 25, 2010).

15 Press Release, U.S. Dep’t of the Treasury, *Treasury Designates Anwar Al-Aulaqi Key Leader of Al-Qa’ida in the Arabian Peninsula* (July 16, 2010), <http://www.treasury.gov/press-center/press-releases/Pages/tg779.aspx>.

16 *US Drone Attack in Yemen ‘Missed’ al-Awlaki*, AL JAZEERA ENGLISH (May 7, 2011), <http://english.aljazeera.net/news/middleeast/2011/05/2011572342146775.html>.

17 See Mazzetti, *supra* note 1.

18 JOHN ROLLINS, CONG. RESEARCH SERV., R41070, *AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY* 14 (2011). AQAP should not be confused with the Al Qaeda cell operating in Yemen at the time of the *U.S.S. Cole* bombing. That attack occurred in 2000, nine years before AQAP’s formation. *Id.* at 8.

19 Christine Hauser, *Mastermind of U.S.S. Cole Attack Escapes Jail*, N.Y. TIMES, Feb. 5, 2006.

20 *Id.*

21 Despite AQAP’s apparent autonomy, unnamed U.S. officials have recently claimed that al-Qaeda proper has increased its communication with “semi-autonomous affiliate groups [including AQAP as] part of a broader strategy . . . to establish closer ties to affiliates than ever before.” Dina Temple-Raston, *Al-Qaida, Affiliates Show Greater Coordination*, NPR (Nov. 11, 2010), <http://www.npr.org/2010/11/11/131249324/al-qaida-affiliates-showing-greater-coordination>.

designated terrorist organizations.²² It has also been described as having “eclipsed [al-Qaeda] central as the primary threat to U.S. national security.”²³ AQAP’s goals, though, are similar in scale to those of al-Qaeda. AQAP seeks to establish an Islamic caliphate and also attempts to launch attacks on a regional and global scale. Since its founding, AQAP has launched attacks targeting both the Yemeni and Saudi states.²⁴ AQAP and its pre-merger Yemen predecessor have also targeted Western diplomats and installations in Yemen.²⁵

C. Targeted Killings

A targeted killing is the “intentional, premeditated and deliberate use of lethal force by [a] State[] . . . or by an organized armed group . . . against a specific individual who is not in the physical custody of the [State employing the targeted killing].”²⁶ A handful of states have embraced targeted killings and have employed the killings in a variety of contexts, including international armed conflict, non-international armed conflict, and non-conflict situations. Though once critical of targeted killings—particularly Israel’s use of targeted killings²⁷—since September 11, 2001, the United States has vigorously embraced the tactic.²⁸

The United States’ first targeted killing outside of Afghanistan occurred on November 3, 2002 in Yemen.²⁹ Since that strike, the United States has engaged in targeted killing in Yemen, Somalia,³⁰ and Pakistan. In Pakistan, U.S. drone strikes, some of which are presumably part of the U.S. targeted killing program, have increased from just nine strikes between 2004 and 2007, to thirty-four

22 Office of the Coordinator for Counterterrorism, U.S. Dep’t of State, Foreign Terrorist Organizations, *available at* <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

23 Christopher Boucek, *The Evolving Terrorist Threat in Yemen*, CTC SENTINEL, Sept. 1 2010, at 5.

24 Scott Stewart, *AQAP: Paradigm Shifts and Lessons Learned*, STRATFOR, Sept. 2, 2009; James Gallagher, *AQAP and Suspected AQAP Attacks in Yemen Tracker 2010*, AEI: CRITICAL THREATS (Mar. 8, 2010), <http://www.criticalthreats.org/yemen/aqap-2010-intensification-near-war-march-8-2011>.

25 See, e.g., Rollins, *supra* note 18, at 17 (describing pre-merger militants’ attacks on western embassies in Sana’a, foreign oil companies and their facilities, and tourists, and assassination attempts on foreigners, including the British Ambassador and Embassy workers).

26 Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 1, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston); see also KENNETH ANDERSON, TARGETED KILLING IN U.S. COUNTERTERRORISM STRATEGY AND LAW 2 (2009) (defining targeted killing as “the targeting of a specific individual to be killed”).

27 Joel Greenberg, *Israel Affirms Policy of Assassinating Militants*, N.Y. TIMES, July 5, 2001, at A5 (“The United States government is very clearly on the record as against targeted assassinations,” [American Amb. to Israel Martin Indyk] said. “They are extrajudicial killings, and we do not support that.”).

28 See, e.g., Peter Bergen & Katherine Tiedemann, *Washington’s Phantom War: The Effects of the U.S. Drone Program in Pakistan*, FOREIGN AFFAIRS, Aug. 2011, at 12–18 (describing the Bush and Obama administrations’ increasing use of drone attacks); PETER BERGEN & KATHERINE TIEDEMANN, THE YEAR OF THE DRONE: AN ANALYSIS OF U.S. DRONE STRIKES IN PAKISTAN, 2004-2010 1 (2010).

29 Norman G. Printer, *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT’L L. & FOREIGN AFF. 331, 332 (2003).

30 Karen DeYoung, *U.S. Says Raid in Somalia Killed Terrorist With Links to Al-Qaeda*, WASH. POST, Sept. 15, 2009, at A9.

in 2008, fifty-three in 2009, and 118 in 2010.³¹ While the frequency of drone strikes in Pakistan is unparalleled, the United States has deployed drones to Yemen,³² threatening to emulate its Pakistan campaign there.³³

The United States maintains at least two targeted killing lists.³⁴ The specific criteria for inclusion on either list are not publically known. However, reports indicate that the inclusion of a target on the CIA's list is contingent on the target being "deemed . . . a continuing threat to U.S. persons or interests."³⁵ According to reports, counterterrorism analysts nominate individuals for addition via memoranda, in which the analysts make the case for inclusion.³⁶ Such reports also indicate that, once targeted, an individual is continuously eligible for killing.³⁷

II. CAN THE UNITED STATES RELY ON AN ARMED CONFLICT TO JUSTIFY ITS TARGETING OF ANWAR AL-AULAQI?

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

31 *Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2011*, NEW AMERICA FOUNDATION, <http://counterterrorism.newamerica.net/drones> (last visited May 17, 2011).

32 Greg Jaffe & Karen DeYoung, *U.S. Drones on Hunt in Pakistan*, WASH. POST, Nov. 7, 2010, at A1.

33 Adam Entous & Siobhan Gorman, *U.S. Weighs Expanded Drone Strikes in Yemen*, WALL ST. J., Aug. 25, 2010, at A1.

34 See Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Tied to Domestic Terror Suspects*, N.Y. TIMES, Apr. 7, 2010, at 12; Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, L.A. TIMES, Jan. 31, 2010 (describing the lists maintained by JSCO and the CIA). Inclusion on one list does not necessarily indicate inclusion on the other list. For example, al-Aulaqi was added to the U.S. military's targeted kill list at least by the end of January 2010; at that point, al-Aulaqi had not yet been added to the CIA's targeted kill list.

35 Miller, *supra* note 34.

36 *Id.*

37 Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK (Feb. 13, 2011), <http://www.newsweek.com/2011/02/13/inside-the-killing-machine.html>. McKelvey quotes former Acting General Counsel for the CIA, John A. Rizzo, as saying, "It's [the list of targets] basically a hit list." *Id.* The program Rizzo describes is one in which CIA staffers produce memoranda justifying the targeting of particular individuals. The CIA General Counsel then approves those individuals for targeting. At that point, the target joins a group of "individuals [the United States is] searching for [that the United States has determined] it is better now to neutralize the threat [those individuals pose]." *Id.* It is this process—the nomination for targeting followed by the search for that target—that suggests targeted individuals become continuously subject to lethal force. *Id.*

with which it is fighting.³⁸

Thus, the first step in determining whether the United States may rely on international humanitarian law for authority to kill Anwar al-Aulaqi is to determine whether both the United States and al-Aulaqi participated in an armed conflict.

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

The Geneva Conventions of 1949 categorize all armed conflicts as either armed conflicts of an international character (international armed conflict) or armed conflicts not of an international character (non-international armed conflict).³⁹ Common Article 2 of the Geneva Conventions provides that the Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”⁴⁰ Common Article 3 sets forth minimum provisions applicable “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”⁴¹

Although the Geneva Conventions adopted the term “armed conflict” in lieu of the term “war,” neither Common Article 2 nor Common Article 3 provides a definition of armed conflict. Instead, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) articulated the most commonly cited contemporary definition of armed conflict in *Prosecutor v. Tadić*. There, the Tribunal held that, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁴² The *Tadić* definition separates the two categories of armed conflict recognized by international humanitarian law: international armed conflict—“resort to armed force between States”—and non-international armed conflict—“protracted armed violence between governmental authorities and organized armed groups or between such groups.” According to the authoritative Commentary to the Geneva Conventions, “[a]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state

38 OSCAR M. UHLER & HENRI COURSIER, INT’L COMM. OF THE RED CROSS, COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 26 (Pictet ed., 1958) [hereinafter GC IV Commentary] (“Born on the battlefield, the Red Cross called into being the First Geneva Convention to protect wounded and sick military personnel. Extending its solicitude little by little to other categories of war victims, in logical application of its fundamental principle, it pointed the way, first to the revision of the original Convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle in *all* cases of armed conflicts, including internal ones.”) (emphasis in original).

39 *Id.*

40 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 31.

41 *Id.* at art. 3

42 *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶ 561 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1995) (citing *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 45 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)).

of war.”⁴³ The duration of the hostilities or the number of wounded or killed does not impact the characterization of armed conflict.

Although foreign armed forces have intervened in Yemen, nothing indicates that these interventions have been driven by “difference[s] arising between” those states. The hostilities that are taking place in Yemen are not taking place between Yemen and another state—the government of Yemen has consented to the U.S. presence in Yemen and has collaborated on U.S. operations there. Thus, it is clear that any armed conflict taking place in Yemen is not one of an international character.

In light of the absence of an international armed conflict, if there is an armed conflict taking place in Yemen, then, it must be a non-international armed conflict. The *Tadić* Trial Chamber explained that the inquiry to determine the existence of a non-international armed conflict “focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.”⁴⁴ These two factors “are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist-activities, which are not subject to international humanitarian law.”⁴⁵

For a non-international armed conflict to exist, the intensity of armed hostilities must exceed those associated with banditry or mere internal disturbances. To determine whether hostilities between a state and a non-state actor rise to the level of an armed conflict, the ICTY looked to the duration and intensity of individual confrontations; the frequency of clashes; the duration of the conflict overall; the types of weapons and other military equipment used; the deployment of regular armed forces against the non-state actor; the geographic and temporal distribution of the clashes; and the number of casualties.⁴⁶

Additionally, for a non-international armed conflict to exist, the putative parties to that armed conflict need possess only “some degree of organization.”⁴⁷ Factors considered in examining the organization of an armed group for determining the existence of an armed conflict have included: the group’s hierarchal structure; its control and administration of territory; its ability to recruit and train fighters; its ability to launch attacks using military tactics; and its ability to enter into cease-fire or peace agreements.⁴⁸

Applying the law of non-international armed conflict to the situation in Yemen strongly suggests that Yemen and AQAP are engaged in a non-international armed conflict. However, the hostilities between the United States and AQAP are not alone sufficient to place the United States and AQAP

43 GC IV Commentary, *supra* note 38, at 20.

44 *Tadić*, IT-94-1-T ¶ 562.

45 *Tadić*, IT-94-1-T ¶ 562 (referencing INT’L COMM. OF THE RED CROSS, COMMENTARY I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA (Pictet ed., 1952)).

46 Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶¶ 49,60 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 90 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); *Tadić*, IT-94-1-T, at ¶¶ 564-6.

47 *Limaj*, IT-03-66-T, at ¶ 89.

48 *Haradinaj*, IT-04-84-T, at ¶ 60; Prosecutor v. Lukic, Case No. IT-98-32/1-T, Judgment, ¶ 884 (Int’l Crim. Trib. for the Former Yugoslavia July 20, 2009).

in an armed conflict. Still, U.S. intervention in Yemen's armed conflict—on behalf of Yemen—likely does place the United States in a non-international armed conflict with AQAP. Alternatively, the United States may be engaged in an armed conflict with AQAP based on AQAP's relationship with al-Qaeda and the ongoing armed conflict between the United States and al-Qaeda.

The following sections first examine whether Yemen and AQAP are engaged in a non-international armed conflict. Second, hostilities between AQAP and the United States are analyzed in isolation of the hostilities taking place between AQAP and Yemen to determine whether they rise to the level of a non-international armed conflict. Third, U.S. operations in Yemen are examined within the context of Yemen-AQAP hostilities to determine if they constitute a foreign-armed intervention in an ongoing non-international armed conflict. Fourth, AQAP's relationship with al-Qaeda is explored to determine whether that relationship impacts the characterization of hostilities between the United States and AQAP.

1. The Armed Conflict Between Yemen and AQAP

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

a. Organizational Capacity of AQAP

AQAP is sufficiently organized to constitute a party to an armed conflict. As described above, to be a party to an armed conflict a group must possess a degree of organization, although that level of organization need not rise to the level required to establish command responsibility.⁴⁹ Rather, the degree of organization required must merely be sufficient to distinguish an organized armed group from a mob engaged in a riot.⁵⁰ Factors to support the necessary level of organization include possessing a hierarchical structure, recruiting and training fighters, and employing military tactics. AQAP exhibits all of those characteristics. Taken together, these factors suggest that AQAP is sufficiently organized to constitute a party to an armed conflict.

Hierarchy

AQAP does not possess the rigid hierarchy generally associated with regular armed forces. Instead, it mimics the al-Qaeda model of “centralization of decisions and decentralization of

49 *Limaj*, IT-03-66-T, at ¶ 90.

50 Geoffrey S. Corn, *What Law Applies to the War on Terror?*, in *THE WAR ON TERROR AND THE LAWS OF WAR A MILITARY PERSPECTIVE* 1, 16-17 (2009); see also Richard A. Falk, *Janus Tormented: The International Law of Internal War*, in *INTERNATIONAL ASPECTS OF CIVIL STRIFE 197-99* (James N. Rosenau ed., 1964).

execution.”⁵¹ Importantly, this structure is not indicative of organizational failings on the part of AQAP, but rather, a response to the nature of the conflict in which AQAP is involved.⁵² Thus, Nahir al-Wihayshi, *emir* of AQAP, is responsible for approving all AQAP suicide strikes in Yemen and attacks abroad—with input from a senior council of advisers⁵³—but AQAP’s various operational units are “an alliance of components,”⁵⁴ drawn together through either tribal or ideological linkages.⁵⁵ This structure is designed to lend the group robustness so that it might survive a decapitation strike in contrast to the al-Qaeda cell that operated in Yemen immediately following the 9/11 attacks.⁵⁶

The operational decentralization of AQAP makes its structure analogous to the structure employed by the Kosovo Liberation Army (KLA), which the ICTY found to be sufficiently organized to constitute a party to an armed conflict.⁵⁷ Like AQAP, the KLA possessed a central command but delegated operational responsibility to local commanders responsible for fairly large portions of territory.⁵⁸ In fact, the KLA arguably delegated more operational responsibility to local commanders than does AQAP. Whereas al-Wihayshi reportedly personally approves AQAP operations, local KLA commanders were merely obligated “to inform the General Staff about all developments in their respective areas of responsibility.”⁵⁹

In its analysis, the ICTY also emphasized the increasing organizational strength of the KLA over time.⁶⁰ Similarly, over the last four years, AQAP has “transformed itself from a fractured and fragmented group of individuals into an organization that is intent on launching attacks throughout the Arabian Peninsula.”⁶¹ At the same time, AQAP attacks within Yemen have been “strik-

51 Gregory D. Johnsen, *The Impact of Bin Laden’s Death on AQAP in Yemen*, CTC SENTINEL May 2011, at 9.

52 *Cf. Limaj*, IT-03-66-T, at ¶ 132 (“In the Chamber’s finding, the evidence does not establish the non-existence of a KLA organisational [sic] structure. Rather, it reflects the conditions under which the KLA operated at the time. The KLA was effectively an underground organisation [sic], operating in conditions of secrecy out of concern to preserve its leadership, and under constant threat of military action by the Serbian forces.”).

53 Johnsen, *supra* note 51, at 9.

54 *Al-Qaeda in the Arabian Peninsula (AQAP)*, JANE’S WORLD INSURGENCY AND TERRORISM, Mar. 22, 2011, at 15.

55 *See id.* at 5-6 (noting the varied and sometimes conflicting ideologies influencing AQAP); *see also* Ryan Evans, *From Iraq to Yemen: Al-Qa’ida’s Shifting Strategies*, CTC SENTINEL, Oct. 2010, at 11, 13–14 (asserting that AQAP has consolidated tribal support in some regions by adopting local grievances against the Yemeni government).

56 *See* Johnsen, *supra* note 51, at 9 (providing a brief description of the United States attacks against Al-Qaeda in Yemen in the months after 9/11); *see also* Gregory D. Johnsen, *The Expansion Strategy of Al-Qa’ida in the Arabian Peninsula*, CTC SENTINEL, Jan. 2010, at 4, 6 (“[A]l-Qa’ida [in the Arabian Peninsula] has been working single-mindedly to create a durable infrastructure that can withstand the loss of key leaders and cells.”).

57 *Limaj*, IT-03-66-T, at ¶ 134..

58 *Cf. id.* at ¶ 95 (“[T]he territory of Kosovo was divided by the KLA into seven zones Each zone had a commander and covered the territory of several municipalities. The level of organisation [sic] and development in each zone was fluid and developing and not all zones had the same level of organisation [sic] and development . . .”).

59 *See id.* at ¶¶ 97–98 (noting that KLA commanders generally—but not absolutely—complied with directions from the KLA’s General Staff).

60 *See id.* at ¶ 129 (referring to the increased political power of the KLA in Kosovo).

61 Johnsen, *The Expansion Strategy*, *supra* note 56, at 4.

ingly consistent⁶² with the group's stated objectives: targeting foreigners, the Yemeni state, and oil infrastructure while avoiding Yemeni civilians⁶³ and exhibiting strong operational coordination and consistency, a factor the ICTY found significant when assessing the KLA's organizational capacity.⁶⁴ Indeed, AQAP may well have evolved from primarily a terrorist organization to "an insurgent group willing to wage guerrilla war and contest control of portions of the Yemeni hinterland with the Yemeni government."⁶⁵ Though the ability to contest control of Yemeni territory does not rise to the KLA's ability to exert administrative control over portions of Kosovo,⁶⁶ it certainly distinguishes AQAP from a riotous mob.

Also like the KLA, AQAP maintains a propaganda and public relations operation.⁶⁷ Upon its formation, AQAP released a statement describing its goals, objectives, and leadership structure.⁶⁸ Since then, it has operated both Arabic-language and English-language publications, including both *Sada al-Malahim* and *Inspire*, which extol the group's operations and seek to inspire potential recruits to join AQAP. Additionally, AQAP consciously and, according to one observer, "shrewd[ly],"⁶⁹ employs "soft power" to strengthen its position in Yemen while avoiding the pitfalls that have plagued other al-Qaeda-linked groups, such as alienating the local civilian population or internecine fighting.⁷⁰

Recruiting Fighters

In determining that the KLA had the necessary degree of organization to be a party to a non-international armed conflict, the ICTY emphasized the KLA's "consistent effort to persuade people to join the organisation [sic]."⁷¹ AQAP has similarly mounted a concerted effort to recruit fighters to its cause. It publishes Arabic-language and English-language magazines online to reach out to local and foreign fighters.⁷² As such, and due in part to its media-wing's ability to capitalize on a botched

62 Boucek, *supra* note 23, at 5–6.

63 See JANE'S WORLD INSURGENCY, *supra* note 54; Evans, *supra* note 55, at 13–14; Boucek, *supra* note 23, at 5–6; W. ANDREW TERRILL, THE CONFLICT IN YEMEN AND U.S. NATIONAL SECURITY 55 (2011).

64 See *Limaj*, IT-03-66-T, at ¶ 112 (recognizing that the distribution of Regulations to KLA units was a significant step in developing greater coordination and consistency between the KLA and the units).

65 W. ANDREW TERRILL, THE CONFLICT IN YEMEN AND U.S. NATIONAL SECURITY 62–63 (2011) (discussing AQAP forces' willingness to remain and fight the Yemeni military in the August 2010 battle in Loder).

66 See generally, *Limaj*, IT-03-66-T (discussing how the General Staff of the KLA maintained control of occupied "zones"). Note, however, that AQAP's ability to administer territory is in flux. As the strength of the Yemeni state recedes, AQAP reportedly polices the territory that it has taken and held.

67 See, e.g., Boucek, *supra* note 23, at 6 (describing AQAP's media strategy as "highly sophisticated").

68 See JANE'S WORLD INSURGENCY, *supra* note 54.

69 Barak Barfi, *AQAP's Soft Power Strategy in Yemen*, CTC SENTINEL, Nov. 2010, at 1.

70 See *id.* at 1–5 (discussing how AQAP has used a more practical approach in dealing with disputes local tribes rather than the typical hard-line approach); TERRILL, *supra* note 63 (noting that much of the Yemeni population do not view al-Qaeda as a serious threat because they do not target Yemeni civilians).

71 *Limaj*, IT-03-66-T, at ¶ 118.

72 See, e.g., Chris Harnisch, *The Continued al-Qaeda Threat from Yemen*, DAILY CALLER (Nov. 1, 2010), <http://dailycaller.com/2010/11/01/the-continued-al-qaeda-threat-from-yemen/> (noting that Al-Qaeda has released two issues of an English language magazine, "Inspire").

U.S. airstrike, AQAP is stronger today than it was in December 2009.⁷³ AQAP has also bolstered its ranks by co-opting local Yemeni concerns and through strategic intermarriage with various Yemeni tribes. In particular, AQAP has concentrated on recruiting secessionist-minded southern Yemenis, disaffected by the Saleh regime.⁷⁴ These strategies have allowed AQAP to grow from a few dozen fighters to several hundred since the group's formation.⁷⁵

AQAP's strategy of attacking Yemeni government targets that collocated in the region of Yemen influenced by the secessionist Southern Movement has furthered the group's recruitment efforts.⁷⁶ AQAP attacks have incited a heavy-handed and coarse Yemeni government response, which in turn enrages local civilians who already oppose the Yemeni state, encouraging them to join AQAP.⁷⁷

Employing Attacks Using Military Tactics

Beginning in late 2009, AQAP began a gradually intensifying campaign targeting the state of Yemen. AQAP now regularly attacks targets associated with the state of Yemen.⁷⁸ While some of these attacks involve the use of suicide bombers or other acts of perfidy,⁷⁹ most employ common military tactics like ambushes using small arms, mortars, and rocket propelled grenades. AQAP targets convoys of Yemeni troops, military installations, as well as infrastructure. For example, on May 13, 2011, AQAP militants fired a rocket propelled grenade at an army vehicle, killing five Yemeni soldiers;⁸⁰ on April 26, 2011, AQAP militants ambushed a Yemeni Republican Guard convoy, killing eight Republican Guard soldiers;⁸¹ and on March 26, 2011, AQAP militants sacked a weapons factory and seized control of two towns, a presidential palace, and a radio station.⁸² Importantly, these attacks have not just been harassment operations but have resulted in AQAP control of Yemeni towns and, in some cases, whole districts—in fact, on March 31, 2011, AQAP seized control of

73 See Johnsen, *The Impact of Bin Laden's Death*, *supra* note 51, at 9 (explaining how al-Qaeda used a botched bombing raid in the southern Yemeni village of al-Majalla to bolster support).

74 See Ronan McGee, *Why Awlaki Should Not be the Focus of Concern in Yemen*, INT'L AFFAIRS REV. (Apr. 26, 2010), <http://www.iar-gwu.org/node/165> ("AQAP has been attempting to recruit southerners disenchanted with the grim economic and political conditions—conditions caused largely by the government's policies.")

75 See Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, at A01.

76 TERRILL, *supra* note 63, at 59–60.

77 *Id.* at 61.

78 *Id.* at 62–65. See also *AQAP and Suspected AQAP Attacks in Yemen Tracker 2010 and 2011*, AEI CRITICAL THREATS, <http://www.criticalthreats.org/yemen/aqap-and-suspected-aqap-attacks-yemen-tracker-2010> (providing information on al Qaeda's continued insurgency in Yemen and attacks for which AQAP has taken credit and incidents attributed to AQAP by the government).

79 For example, on June 19, 2009, four AQAP militants, dressed as women, attacked the Yemeni intelligence headquarters in Aden. See *Al Qaeda in the Arabian Peninsula in 2010: The Intensification of the Near War*, AEI CRITICAL THREATS, <http://www.criticalthreats.org/yemen/aqap-2010-intensification-near-war-march-8-2011>.

80 See *id.*

81 See *id.*

82 See *id.*

Abyan governorate and declared it an Islamic emirate.⁸³

AQAP's tactics—targeting police and security forces, laying ambushes, and making use of small arms and mortars or rocket propelled grenades—are the same tactics that the ICTY found sufficient indicia of organizational strength in the *Limaj* case.⁸⁴ Also like the KLA, AQAP conducts operations over a wide swath of territory. AQAP attacks have occurred in nine of Yemen's twenty-one governorates⁸⁵—governorates that cover some 366,269 square kilometers—an area about 30 times as large as the KLA's total operating area. The ability of AQAP to consistently launch attacks over such a large amount of territory is another indication of its organizational capacity.⁸⁶

Based on its hierarchical structure, concerted effort to recruit fighters, and its employment of military tactics in launching attacks, AQAP is sufficiently organized to constitute a party to an armed conflict.⁸⁷

b. Intensity of Hostilities between Yemen and AQAP

Several factors when combined strongly suggest that the hostilities between Yemen and AQAP are sufficient to rise to the level of an armed combat. For instance, the intensity of individual clashes and the rate of hostilities between the Yemeni government and AQAP militants, as well as the duration of the conflict as a whole suggest that it is not simply a rebel uprising. Furthermore, Yemen's resort to use of its regular armed forces, the flight of civilians, and AQAP's capture of Yemeni territory lend credence to the notion that hostilities have reached the level of an armed conflict.

The conflict between AQAP and the government of Yemen has been ongoing since 2009. Individual confrontations have been both sustained and sudden. For example, on June 12, 2010, AQAP gunmen reportedly attacked and killed a senior security official outside his home.⁸⁸ Such drive-by assassinations of security service officials have become commonplace.⁸⁹ Other clashes, though, have involved large-scale Yemeni military operations, sieges of towns held by AQAP, and the displace-

83 *Yemen: Al Qaeda Declares South Province as "Islamic Emirate,"* EURASIA REVIEW (Mar. 31, 2011), available at <http://www.eurasiareview.com/yemen-al-qaeda-declares-south-province-as-islamic-emirate-31032011/>.

84 *See* Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 172 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 30, 2005).

85 *See* AEI CRITICAL THREATS, *supra* note 79 (indicating AQAP attacks have taken place in Abyan, Adan, Bayda, Hadramaut, Jawf, Lahij, Ma'rib, Sana'a, and Shabwah governorates).

86 *Cf.* Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 172 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 30, 2005).

87 *Cf. id.* at ¶ 171.

88 *See* AEI CRITICAL THREATS, *supra* note 79 (citing specifically the June 12, 2010 attack and referencing other dates in which militants have attempted drive-by assassinations).

89 *See id.*

ment of thousands of civilians.⁹⁰ For example, a five-day Yemeni offensive against AQAP militants in September 2010 displaced at least 15,000 civilians.⁹¹

The rate of hostilities between the Yemeni government and AQAP militants has increased steadily between 2009 and 2011. While there were only a handful of clashes between Yemen and AQAP in all of 2009 and fewer than twenty in the first half of 2010, there were nearly eighty reported clashes in the second half of 2010, and there have been nearly sixty in 2011.⁹² In these attacks, AQAP has demonstrated “operational boldness and sophistication.”⁹³ The Yemeni government has “declared war on AQAP”⁹⁴ and attempted to recapture towns and other territory from AQAP.⁹⁵ In its attempts to oust AQAP, Yemen has deployed its regular armed forces alongside its civilian security forces.⁹⁶ Those forces have employed heavy weapons indicative of an armed conflict including tanks, artillery, and the Yemeni air force.⁹⁷

The increase in the hostilities between AQAP and the Yemeni government, the frequency with which they occur,⁹⁸ the government’s use of its regular armed forces, and the government’s “declaration of war” all indicate that the government of Yemen and AQAP are engaged in a non-international armed conflict.

90 See, e.g., *Al-Qaeda Fighters Seize Yemeni City*, AL JAZEERA ENGLISH, (May 29, 2011), <http://english.aljazeera.net/news/middleeast/2011/05/201152815531552947.html> (describing clashes that displaced “thousands” of civilians); Nasser Arrabyee, *Four al-Qaeda Fighters Killed as Army Starts All-Out Attack in Al Huta*, YEMEN OBSERVER (Sept. 25, 2010), <http://www.yobserver.com/front-page/10019720.html> (detailing an attack outside the town of Al Huta that prompted 300 local families to flee); Boucek, *supra* note 23, at 5-7 (describing the Yemeni government’s use of “large-scale” offensives against suspected AQAP operatives).

91 INT’L CRISIS GROUP, CRISIS WATCH No. 86, Oct. 1, 2010, at 11.

92 See AEI CRITICAL THREATS, *supra* note 79 (detailing seventy-seven AQAP attacks between June 7, 2010 and Dec. 25, 2010, and sixty attacks between Jan. 1, 2011 and Oct. 11, 2011).

93 Fawaz A. Gerges, *Yemen’s Summer of Discontent*, THE MAJALLA (Aug. 25, 2010), <http://www.majalla.com/eng/2010/08/article55113178>.

94 *Yemen Declares War on AQAP*, UPI.COM (Jan. 7, 2010), http://www.upi.com/Top_News/Special/2010/01/07/Yemen-declares-war-on-AQAP/UPI-16041262890800/.

95 See Mona El-Naggar & Robert F. Worth, *Yemen’s Drive on Al-Qaeda Faces Internal Skepticism*, N.Y. TIMES, Nov. 3, 2010 (“One thing is clear: Yemen’s president, Ali Abdullah Saleh, has stepped up his commitment to fighting al-Qaeda in the past year, with far more military raids and airstrikes, including some carried out by the American military. His government has paid a price. On Saturday, a day after the discovery of the air freight bomb plot, Mr. Saleh said during a news conference that al-Qaeda had killed 70 police officers and soldiers in the past four weeks. That is a sharp increase over previous years, and some analysts have taken it as proof that al-Qaeda’s Yemen-based branch is growing.”).

96 *Id.*

97 See, e.g., Jeffery Fleishman, *Yemen Pursues Al-Qaeda Munitions Expert Linked to Package Bomb Plot*, L.A. TIMES, Nov. 3, 2010, at A3 (describing Yemeni Special Forces’ search for a Saudi-born bomb maker implicated in a threat to United States-bound planes); Laura Kasinof, *Yemen’s Delicate Dance Between US Pressure, Al-Qaeda Threat*, CHRISTIAN SCI. MONITOR, Nov. 2, 2010 (describing Yemen’s use of military jets and air strikes); Laura Kasinof, *Yemen Goes On Offensive Against Al-Qaeda*, CHRISTIAN SCI. MONITOR, Sep. 22, 2010 (describing Yemen’s use of tanks against AQAP).

98 See AEI CRITICAL THREATS, *supra* note 79.

2. *Armed Conflict Between the United States and AQAP Alone*

Viewed in isolation, the United States and AQAP are likely not engaged in an armed conflict. Whether the United States is engaged in an isolated armed conflict with AQAP turns on the same factors as whether AQAP and Yemen are engaged in such a conflict. Namely, whether AQAP has sufficient organization to be a party to an armed conflict and whether the hostilities between AQAP and the United States are sufficiently intense to constitute an armed conflict. Assuming that AQAP is organized enough to constitute a party to a non-international armed conflict,⁹⁹ the intensity of the hostilities between the United States and AQAP likely do not rise to the level necessary for an armed conflict.

In examining the intensity of hostilities, international humanitarian law seeks to separate the violence of armed conflict from the violence associated with riots or banditry. As such, the intensity analysis examines the seriousness of the hostilities, considering such factors as the number, the duration, and the intensity of individual confrontations; the types of weapons employed; the number of persons and the types of forces engaged in clashes; the territory that has been captured and held; the number of casualties; the extent of material destruction; and the number of civilians who have fled fighting. Other relevant factors include whether the U.N. Security Council has taken notice of the fighting; whether the state has resorted to its regular armed forces; the duration of the conflict; and the frequency of hostilities.¹⁰⁰

While U.S. strikes against AQAP targets have involved the deployment of regular armed forces and the use of weapons generally associated with armed conflicts, these airstrikes have been infrequent and sporadic, not sustained and prolonged. Similarly, AQAP has only infrequently attacked—or attempted to attack—the United States. Since 2009, the United States has reportedly conducted just a handful of airstrikes in Yemen.¹⁰¹ During the same period, only three reported AQAP-linked operations have directly targeted areas within the United States.¹⁰² AQAP has not captured any territory possessed by the United States, and the United States has not reportedly ousted AQAP from any territory it has captured in Yemen. Finally, there have been no reports of civilians in either the United States or Yemen being displaced by fighting between the United States and AQAP.

Unlike where the ICTY found an armed conflict to exist, these infrequent airstrikes by the United States and disparate attempted terrorist attacks by AQAP do not rise to the level of intense hostilities associated with an armed conflict. However, when one considers U.S. operations against AQAP within the context of the ongoing armed conflict between Yemen and AQAP, it appears that the United States is intervening in that armed conflict. Such intervention transforms the hostilities

99 See *supra* Part II.A.1.a (asserting that AQAP is sophisticated enough to constitute a party to a “non-international armed conflict”).

100 See *gen. Haradinaj*, IT-04-84-T at ¶¶ 49,60; *Limaj*, IT-03-66-T at ¶ 90; *Tadić*, IT-94-1-T, at ¶¶ 564-6.

101 See Scott Shane, Mark Mazzetti & Robert F. Worth, *A Secret Assault on Terror Widens on Two Continents*, N.Y. TIMES, Aug. 15, 2010 (describing a May 25, 2010 airstrike in Yemen as the fourth U.S. airstrike in Yemen since December 17, 2009).

102 See NAT'L COUNTERTERRORISM CENTER, REPORT ON AL-QA'IDA IN THE ARABIAN PENINSULA, available at <http://www.nctc.gov/site/groups/aqap.html> (last accessed Nov. 19, 2011).

between the United States and AQAP into an armed conflict.

3. Armed Conflict Between the United States and AQAP Through U.S. Intervention in Yemen

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

Armed intervention by a third-party state into an ongoing non-international armed conflict complicates the character of that armed conflict,¹⁰³ affecting the scope of the applicable international humanitarian law.¹⁰⁴ Depending on the configuration of the parties to the armed conflict, intervention will have one of two possible effects. Armed intervention in support of a non-state actor against the territorial state will internationalize an armed conflict, placing the intervening state and the territorial state in an international armed conflict.¹⁰⁵ For example, many view the U.S. invasion of Afghanistan in the aftermath of the September 11th attacks as an intervention of a third state on behalf of a non-state actor. The Northern Alliance, a non-state actor, had been engaged in a civil war against the Taliban regime of Afghanistan since the mid-1990s.¹⁰⁶ Once the United States intervened in early October 2001, the armed conflict was internationalized because two states—the United States and Afghanistan—were engaged in hostilities with each other.¹⁰⁷

Alternatively, armed intervention in support of a state government against a non-state actor puts

103 See generally ANTONIO TANCA, FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT 17–25 (1993) (discussing the legal implications of consent in respect to foreign intervention in international conflicts).

104 See, e.g., Anwar T. Frangi, *The Internationalized Noninternational Armed Conflict in Lebanon 1975–1990: Introduction to Confligology*, 22 CAP. U. L. REV. 965, 966–67 (1993) (distinguishing four different types of internationalized noninternational armed conflict); Denise Bindschedler-Robert, *A Reconsideration of the Law of Armed Conflicts*, in REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 52–53 (1971) (explaining the difference between foreign intervention on behalf of a sovereign state and foreign intervention on behalf of insurgents).

105 Bindschedler-Robert, *supra* note 104, at 52, 85–87; Dietrich Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, 64 INT'L REV. RED CROSS 255, 258–60 (1982); see also Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 72 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

106 Although the Taliban government of Afghanistan was only recognized by three states, it was, at least, the *de facto* government of Afghanistan. U.S. recognition of its initial invasion of Afghanistan as an international armed conflict indicates that the United States accepted that the Taliban government was the government of Afghanistan. Geoffrey S. Corn, *What Law Applies to the War on Terror?*, in THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 1, 4 (Michael Lewis et al. eds., 2009).

107 See *id.* (noting that the United States ultimately conceded that the conflict between the United States and the Taliban government of Afghanistan was an interstate armed conflict); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT 14 (2004).

the intervening state and the non-state actor in a non-international armed conflict.¹⁰⁸ Thus, following the Taliban's ouster and the establishment of the Karzai government, the conflict between the United States and the now-insurgent Taliban became a non-international armed conflict with the United States intervening on behalf of the Karzai government.¹⁰⁹

This was also true in 1979 when the Soviet Union intervened in Afghanistan on behalf of the government of Afghanistan against the *mujahideen*. The Soviet Union became entrenched in a non-international armed conflict with the *mujahideen*.¹¹⁰ Notwithstanding significant complicating circumstances,¹¹¹ the Soviet intervention was clearly in opposition to the *mujahideen* and in defense of the Soviet-style government then in place in Afghanistan, even if the Soviet Union had orchestrated a change in that government's leadership. Thus, the Soviet intervention is most often viewed as an intervention on behalf of a government against the non-state actor challenging it, placing the USSR in a non-international armed conflict with the *mujahideen*.

Though this bifurcated approach to the characterization of armed conflicts in which foreign states intervene is—and has long been—disputed,¹¹² it is the majority view and the one endorsed by International Committee for the Red Cross and, implicitly, by the International Court of Justice. Indeed, in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, the ICJ separately characterized the armed conflict between Nicaragua and the *contras*, and the potential armed conflict between Nicaragua and the United States:

The conflict between the *contras*' forces and those of the government of Nicaragua was an armed conflict "not of an international character." The acts of the *contras* towards the Nicaraguan Government were therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.¹¹³

As was the case with the Soviet intervention in Afghanistan, U.S. operations in Yemen target members of an organized armed group engaged in a non-international armed conflict with government of the territorial state. Though the scale of the U.S. intervention in Yemen is markedly different than the scale of the Soviet intervention in Afghanistan, this difference in degree is irrelevant.

108 See Bindschedler-Robert, *supra* note 104, at 52; see also YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 7 (2005); Jelena Pejic, *Status of Armed Conflicts*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 92 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

109 See, e.g., Laurie R. Blank & Benjamin R. Farley, *Characterizing US Operations in Pakistan: Is the United States Engaged in an Armed Conflict?*, 34 FORDHAM INT'L L.J. 151, 178-184 (2011); Geoffrey S. Corn, *Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, Al Qaeda, and the Limits of the Associated Militia Concept*, 85 INT'L L. STUD. 181, 181-82 (2009); Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV. 145, 150-52 (1983).

110 See Gasser, *supra* note 109, at 148-52.

111 See TANCA, *supra* note 103, at 176-77 (1993); see also Gasser, *supra* note 109, at 148-52. But see Michael Reisman & James Silk, *Which Law Applies to the Afghan Conflict*, 82 AM. J. INT'L L. 459, 466-74 (1988).

112 For example, Bindschedler-Robert notes that "[t]his distinction between the international and internal aspects of the conflict [in which a foreign state has intervened] is disputed. It is often difficult to apply in practice" Bindschedler-Robert, *supra* note 108, at 53.

113 *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 114 (June 27).

Instead, the relevant considerations here are whether Yemen is engaged in a non-international armed conflict with AQAP and whether the United States is employing force in support of the government of Yemen in that armed conflict. Thus, the United States is intervening in Yemen's non-international armed conflict with AQAP in support of Yemen. Due to that intervention, the United States is in a non-international armed conflict with AQAP even though the hostilities between the United States and AQAP, standing alone, are insufficient to constitute an armed conflict.

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

The United States is engaged in a non-international armed conflict with al-Qaeda.¹¹⁴ If the relationship between al-Qaeda and AQAP can be characterized as co-belligerency, then hostilities between the United States and AQAP would be an extension of that armed conflict.

In international armed conflict, co-belligerency describes the relationship among states cooperatively engaged in an armed conflict against one or more opposing states.¹¹⁵ An armed conflict between two states places each state in an armed conflict with its opposing state's co-belligerents.¹¹⁶ States may achieve co-belligerency through formal processes such as treaties of alliance.¹¹⁷ A state may also become a co-belligerent through an informal process of "provid[ing] help and succor only in a limited way to a principal belligerent"¹¹⁸ or by "mak[ing] common cause" with a belligerent.¹¹⁹

Co-belligerency is unknown in non-international armed conflict.¹²⁰ However, Bradley and Goldsmith have suggested that the Authorization for the Use of Military Force should be interpreted in light of the customary principles of co-belligerency.¹²¹ That is, they suggest grafting the concept of co-belligerency onto non-international armed conflict. Bradley and Goldsmith's approach was rejected in obiter dicta by a recent panel decision from the Court of Appeals for the District of Co-

114 Hamdan v. Rumsfeld, 548 U.S. 557, 630–632 (2006).

115 GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW 693-695 (1968); L. OPPENHEIM, 2 INTERNATIONAL LAW 206 (1935); see also HENRY HALLECK, INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 3 (1908).

116 See, e.g., HALLECK, *supra*, note 115, at 3, ("We have the same rights of war against co-allies or associates as against the principal belligerent.")

117 Cf. 2 L. OPPENHEIM, INTERNATIONAL LAW A TREATISE 206 n.3 (Hersch Lauterpacht ed., Longmans, 5th ed. 1935) (1905) (asserting that co-belligerents are not necessarily allies and that they can be associated for the sole purpose of war even if actions have yet to arise or there is no agreement as to when the war will be terminated).

118 2 *id.* (examining minimal ways in which a state can act as an associate to a principal belligerent).

119 See HENRY HALLECK, SIR G. SHERSTON BAKER & MAURICE DRUCQUER, INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 11-12 (4th ed. 1908) (citing Vattel); see also Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶¶ 137-143 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (abjuring the formalized relationship between Croatia and Bosnia-Herzegovina in favor of an examination of the actual interactions between the armed forces of the two states to determine whether they were co-belligerents).

120 Cf. 2 OPPENHEIM, *supra* note 117, at 203 ("According to the Law of Nations, full sovereign States alone possess the legal qualification to become belligerents.")

121 See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2113 (2005) (suggesting that the laws of war would deem "neutrals" assisting terrorist organizations and systematically violating the law of neutrality as co-belligerents analogous to a traditional war).

lumbia Circuit.¹²² Moreover, it has yet to gain much traction among international law scholars.¹²³

Yet, there may be good reason to extend the concept of co-belligerency to non-international armed conflict. Currently, a state that intervenes in support of a state engaged in a non-international armed conflict is similarly placed in a non-international armed conflict.¹²⁴ A state that intervenes in support of a non-state actor against another state is placed in an international armed conflict with that state.¹²⁵ Moreover, two states supporting opposing non-state actors engaged in a non-international armed conflict are placed in an international armed conflict if those two states engage in hostilities against each other. However, similar intervention or support by one non-state group on behalf of another non-state group engaged in a non-international armed conflict does not necessarily place the intervening non-state group in an armed conflict. In some sense, then, extending co-belligerency to non-international armed conflict merely recognizes the realistic dimensions and configurations of modern armed conflict.¹²⁶

Additionally, extending the concept of co-belligerency to non-international armed conflict would not be as radical a shift as the D.C. Circuit intimates. Oppenheim's restriction of co-belligerency—really, belligerency—to States was not made in contradistinction to non-states but instead to “half and part sovereign States.”¹²⁷ Oppenheim even recognized that those “half and part” states, disqualified from becoming *de jure* belligerents, could become belligerents in fact.¹²⁸ It follows logi-

122 Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010). (“[E]ven if Al-Bihani’s argument were relevant to his detention and putting aside all the questions that applying such elaborate rules to this situation would raise, the laws of co-belligerency affording notice of war and the choice to remain neutral have only applied to nation states. The 55th clearly was not a state, but rather an irregular fighting force present within the borders of Afghanistan at the sanction of the Taliban. Any attempt to apply the rules of co-belligerency to such a force would be folly, akin to this court ascribing powers of national sovereignty to a local chapter of the Freemasons.”).

123 *But see* David Mortlock, *Definite Detention: The Scope of the President’s Authority to Detain Enemy Combatants*, 4 HARV. L. & POL’Y REV. 375, 395 (2010) (condoning the United States’ targeting of organizations that have an actual relationship with al-Qaeda and repeatedly violates the law of neutrality in the ongoing conflict, deeming these organizations as co-belligerents).

124 4 JELENA PEJIC, *Status of Armed Conflicts*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 77, 92 (Elizabeth Wilmschurst & Susan Breau eds., 2007).

125 *Id.*; *see also* Sylvain Vite, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L COMM. OF THE RED CROSS 69, 85-87 (2009), *available at* <http://www.icrc.org/eng/resources/documents/article/review/review-873-p69.htm> (noting that the ‘internationalization’ of the internal conflict between a non state actor and the government is favored by the International Court of Justice).

126 *See, e.g.*, M. Cheriff Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Approach*, 43 HARV. INT’L L.J. 83, 88 (2002) (recognizing the globalization of terrorist groups through increased communication, technology, and networking, which in turn maximizes their effectiveness in organized crime); *see generally* Jennifer Giroux, David Lanz & Damiano Sguaitamatti, *The Tormented Triangle: The Regionalisation of Conflict in Sudan, Chad, and the Central African Republic* (Crisis States Research Centre, Working Paper No. 47, 2009), *available at* <http://www2.lse.ac.uk/internationalDevelopment/research/crisisStates/Publications/wpPhase2/wp47.aspx> (recognizing the need for a new approach in combating regionalized armed conflict in North Central Africa due to cross border alliances and multiple ethnic groups).

127 2 OPPENHEIM, *supra* note 117, at 203-04.

128 *See 2 id.* (acknowledging that half and part sovereign states could in fact become belligerents when they possess armed forces and enter war).

cally, then, that “half and part” states could become co-belligerents in fact.

If co-belligerency were applicable to non-international armed conflicts, then the United States would almost certainly be placed in a non-international armed conflict with AQAP due to the ongoing non-international armed conflict between al-Qaeda and the United States. AQAP has made common cause with al-Qaeda—they have overlapping if not identical goals. There is evidence that individuals who have fought with al-Qaeda have subsequently fought with the AQAP and there is evidence that they share information, and expertise. These are indicators of the organizations providing each other what Oppenheim calls “help and succor,” similar in kind, if not degree, to a state paying subsidies or sending a certain number of troops to a principal belligerent.¹²⁹

B. Targeting Anwar al-Aulaqi

The existence of an armed conflict triggers the application of international humanitarian law—the body of law that defines the rights and obligations parties to the conflict. Regardless of a particular conflict’s characterization, one of two “cardinal principles”¹³⁰ of international humanitarian law governing the laws and customs of law demands that states use weapons that distinguish between combatants and civilians.¹³¹ Combatants may be targeted at any time and in any place, so long as they have not been rendered *hors de combat* “by sickness, wounds, detention, or any other cause.”¹³² Civilians, on the other hand, are protected from being directly targeted “unless and for such time as they take a direct part in hostilities.”¹³³ In both international and non-international armed conflicts, civilians who take a direct part in hostilities forfeit their protected status under international humanitarian law while they directly participate in hostilities.

Although there is no precise definition of direct participation in hostilities,¹³⁴ it is generally accepted that direct participation in hostilities requires an act that is likely to result in a harm to the adversary;¹³⁵ a sufficient causal relationship between the act and the harm; and a nexus between the act and ongoing hostilities. There is no precise and generally accepted definition of a sufficiently

129 See 2 *id.* at 206-07 (1935).

130 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

131 *Id.* Combatants include members of the armed forces of a state as well as “militia and volunteer corps who fulfill the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (3) To conduct their operations in accord with the laws and customs of war.” Convention between the United States and other Powers respecting the Laws and Customs of War, Annex § 1, ch. 1, Oct. 18, 1907, 36 Stat. 2277, 6 U.T.S. 3516; see also, HCJ 769/02 Public Committee Against Torture v. Israel [2005] (Isr.) at ¶ 24 [hereinafter Targeted Killing Case].

132 Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

133 AP I at art. 51 (3); AP II at art. 13 (3); see also ICRC, Volume I, Customary International Humanitarian Law, Rule 6 (2005).

134 Prosecutor v. Strugar, IT-01-42-A, ¶¶ 173, 175 (Int’l Trib. For the Prosecution of Person Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Terr. of the Former Yugoslavia since 1991 July 17 2008) <http://www.icty.org/x/cases/strugar/acjug/en/080717.pdf>.

135 See *id.* at ¶178. But see Schmitt, Deconstructing the Interpretive Guidance at 727 (arguing that acts that confer a benefit on one party should be considered direct participation in hostilities).

close causal connection between an act and a harm to render the actor to be directly participating in hostilities.¹³⁶ Instead, acts are assessed on a case-by-case basis. Similarly, there is no precise or generally accepted definition for the temporal component of direct participation in hostilities.¹³⁷ Instead, there is wide agreement over the extreme cases and vigorous debate over the close ones. Thus, for example, there is wide agreement that a civilian who picks up a weapon and fires it at enemy armed forces is directly participating in hostilities. Additionally, there is agreement that the individual who directed that civilian to pick up and fire that weapon is directly participating in hostilities.¹³⁸ But there is less agreement as to whether a civilian driving a truck loaded with munitions for delivery to the front line is directly participating in hostilities. Likewise, there is wide agreement that “a civilian who has joined a terrorist organization which has become his ‘home,’ and within in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack”¹³⁹

Anwar al-Aulaqi was not a combatant. He was not a member of any state’s regular armed forces. Nor is AQAP a militia or volunteer corps belonging to a party of a conflict that is subject to responsible command, whose members where a fixed distinctive sign, carry their arms openly, and conduct their operations in accord with the laws and customs of war.¹⁴⁰

There is likewise little doubt that Anwar al-Aulaqi was directly participating in hostilities—and, therefore, a legitimate target. Although al-Aulaqi was perhaps best known for his accessible, colloquial English-language calls for *jihad*, the United States argues—and open-source reporting suggests—that al-Aulaqi was not a mere *agent provocateur* but also an operational leader of AQAP.¹⁴¹ The distinction is significant. As an operational leader, al-Aulaqi was most certainly directly participating in hostilities:

[P]lanning at the operational level entails decisions about the conduct of particular military campaigns or operations, whereas tactical planning encompasses individual battles or engagements. All tactical level planning, such as mission planning for aerial operations, amounts to direct participation because specific military operations could

136 Targeted Killing Case at ¶ 34.

137 *Id.* at ¶ 39.

138 *Id.* at ¶ 37 (“In our opinion, the ‘direct’ character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take ‘a direct part’. The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities.”); *see also* Michael N. Schmitt, HUMANITARIAN LAW AND DIRECT PARTICIPATION IN HOSTILITIES BY PRIVATE CONTRACTORS OR CIVILIAN EMPLOYEES, 5 CHI. J. INT’L L. 511, 543 (2005).

139 Targeted Killing Case ¶ 39.

140 *Cf.* Targeted Killing Case ¶ 40 (stating that even if members of AQAP were subject to a responsible command, carried arms openly, and wore a fixed distinctive sign, its operations—some of which, like the printer cartridge bombs, rely on perfidy or sabotage, and directly target civilians—clearly do not accord with the laws or customs of war.)

141 *See, e.g.*, Alex Kingsbury, *Hunting Down Anwar al-Awlaki, Public Enemy No. 1*, U.S. NEWS & WORLD REPORT, Nov. 22, 2010, <http://www.usnews.com/news/articles/2010/11/22/hunting-down-anwar-al-awlaki-public-enemy-no-1?PageNr=2> (“There is no doubt that Awlaki is a senior figure in AQAP. He is now in their top leadership ranks with a role that focuses on external operations plotting.”).

not occur but for that planning.¹⁴²

Moreover, as an operational leader, al-Aulaqi has made AQAP his “home” and, in so doing, he has made himself continuously targetable.¹⁴³ Were he merely a propagandist, al-Aulaqi would not have been a legitimate target no matter how vile his message.¹⁴⁴

Thus, al-Aulaqi’s high-profile role as author and producer of AQAP’s English-language *Inspire* magazine does not amount to direct participation in hostilities. However, al-Aulaqi’s role as a leader of AQAP, responsible for that organization’s recent emphasis on attacking the United States and the recruitment of attackers like Umar Farouk Abdulmutallab,¹⁴⁵ does amount to direct participation in hostilities. By directly participating in hostilities, al-Aulaqi lost the protection accorded civilians and was subject to the use of force. Therefore, the United States’ targeting of al-Aulaqi was lawful to the extent that he was targeted within the context of a non-international armed conflict.

III. SELF-DEFENSE

The United States also justified its targeting of al-Aulaqi—as well as its targeted killing program generally—on the basis of self-defense.¹⁴⁶ International law imbues states with an inherent right of self-defense,¹⁴⁷ which provides states with the right to use force as a response to a particular wrongful use of force by another state¹⁴⁸ or a non-state actor.¹⁴⁹ A state may rely on self-defense to justify

142 Schmitt, *HUMANITARIAN LAW*, *supra* note 138, at 543.

143 Targeted Killing Case ¶ 39 (Dec. 11, 2005). *Cf.* Int’l Comm. of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L REV. OF THE RED CROSS 991, 1007-09 (2008) (establishing that membership in an organized armed group, based on assumption of a continuous combat function, renders an erstwhile civilian continuously targetable) [hereinafter ICRC Interpretative Guidance]; Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 Harv. Nat’l Sec. J. 5, 16-25 (2010) (criticizing the ICRC’s “continuous combat function” criteria on numerous grounds but agreeing that members of an organized armed group should be continuously targetable).

144 See *Strugar*, IT-01-42-A ¶ 177 (“Examples of indirect participation include . . . expressing sympathy for the cause of one of the parties to the conflict.”); Targeted Killing Case ¶ 34. See also ICRC Interpretative Guidance, *supra* note 143 at 1006 (“As with State parties to armed conflicts, non-State parties comprise both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. The term organized armed group, however, refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense.”).

145 *Abdulmuttalab: Cleric Told Me to Bomb Jet*, CBS NEWS (Mar. 18, 2010), <http://www.cbsnews.com/stories/2010/02/04/national/main6174780.shtml>.

146 See Memorandum in Support of Defendants’ Motion to Dismiss at 4–5, *Al-Aulaqi v. Obama*, No. 10-1469 (D.D.C. Sept. 25, 2010); Harold Koh, Legal Adviser, U.S. Dep’t of State, Keynote Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) available at: <http://www.state.gov/s/l/releases/remarks/139119.htm>; see also Harold Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIO JURIS (May 19, 2011) <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>.

147 See, e.g., U.N. Charter art. 51. Though codified in article 51 of the U.N. Charter, the inherent right to self-defense, as a matter of customary international law, predates the Charter.

148 D.W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 3-13 (1958).

149 Michael N. Schmitt, “Change Direction” 2006: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT’L L. 127, 145 (2008).

its use of force even when it is not engaged in an armed conflict. And, though it is a matter of some debate, a state may invoke self-defense in anticipation of an imminent armed attack.

The classical parameters of self-defense are famously described in an exchange of diplomatic notes between the United States and United Kingdom in the *Caroline* incident.¹⁵⁰ The *Caroline* incident elucidated the three limiting requirements of lawful self-defense: necessity, proportionality, and immediacy.¹⁵¹ The victim state's use of force must be necessary to disrupt the harmful attack it faces. The victim state's use of force must be proportional to the harm it faces. The victim state's use of force must either anticipate an imminent armed attack or immediately follow that attack. These three factors combine to differentiate self-defense, a fundamentally responsive and preventative action, from armed reprisal, a responsive but fundamentally punitive action. Notably, all three parameters of self-defense are defined in relationship to a particular opposing armed attack.

Under customary international law, anticipatory self-defense—the resort to force to stymie an impending attack—was presumed to be valid.¹⁵² However, the U.N. Charter's codification of the right to self-defense called into question the validity of anticipatory self-defense. Article 51 of the U.N. Charter declares that “[n]othing in the present Charter shall impair the inherent right of . . . self-defence if an armed attack occurs against a Member of the United Nations.”¹⁵³

The inclusion of the “armed attack” predicate for the invocation of self-defense in the U.N. Charter has led some scholars to argue that self-defense is only valid *after* an armed attack.¹⁵⁴ The better view, though, is that Article 51 embraces the customary practice of self-defense in anticipation

150 Maj. Jason S. Wrachfordhe, *The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?*, 60 A.F. L. Rev. 29, 53 (2007). The *Caroline* incident took place during the Mackenzie Rebellion in Canada. Citizens on the US side of the Niagara River who sympathized with the Canadian rebels ferried supplies to the rebels using the steamship *Caroline*. After the United Kingdom's diplomatic protests failed to stop the provision of supplies to the rebels, British soldiers crossed into the United States, captured and set fire to the *Caroline*, killing and wounding American citizens in the process. The United States filed a protest but the United Kingdom claimed it had acted in self-defense. The United States responded famously that Britain, to make out its justification, must

show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation. It will be for [Britain] to show, also . . . supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity.

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

151 E.g., Schmitt, “*Change Direction*,” *supra* note 149 (“The three universally accepted criteria of self-defense appear in the [*Caroline* incident exchange].”).

152 BOWETT, *supra* note 148, at 184.

153 U.N. Charter art. 51.

154 See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 275–78 (1963) (rebutting six key arguments in favor of an interpretation allowing anticipatory self-defense). See also STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 98–101 (1996) (discussing a jurist's summary of arguments for and against an interpretation permitting anticipatory self-defense).

of an imminent armed attack.¹⁵⁵ To hold otherwise would lead to the absurd result of compelling a state to suffer an armed attack of which the state had notice and the ability to disrupt—the very essence of self-defense.¹⁵⁶

Though the International Court of Justice has explicitly refused to consider the lawfulness of anticipatory self-defense,¹⁵⁷ state practice since the adoption of the U.N. Charter indicates that self-defense in anticipation of an imminent armed attack is lawful.¹⁵⁸ The anticipatory Israeli strike against the Egyptian air force in June 1967 provides the classic example of justified anticipatory self-defense. In that case, Egypt requested the U.N. force deployed in the Sinai as a buffer between Egypt and Israel to withdraw. At the same time, Syrian troops accumulated on the Syria-Israel

155 See BOWETT, *supra* note 148 at 184–89 (declaring that a State’s right to anticipatory self-defense is well-established under general international law and remains unchanged under Article 51 because the Charter did not explicitly alter that right); Rosalyn Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 435, 442–44 (Anthony Cassese, ed., 1986) (suggesting that reading Article 51 to preclude anticipatory self-defense creates an internal inconsistency between Article 2(4) and Article 51); see also Antonio Cassese, *Return of Westphalia? Considerations on the Gradual Erosion of the Charter System*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 505, 508–20 (Antonio Cassese ed., 1986) (asserting that the most likely interpretation is that preemptive strikes are lawful against imminent threats because the Superpowers would not have been willing to surrender that right).

156 See Christopher Greenwood, *International Law and the United States’ Air Operation Against Libya*, 89 W. VA. L. REV. 933, 942–44 (1987) (“Even if the Security Council functioned as an effective mechanism for the enforcement of collective security, it would be unrealistic to expect a state faced with an imminent armed attack to wait for that attack to be launched before resorting to force in self-defense.”).

157 See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 222 (Dec. 19) (“As was the case also in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case, ‘reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised’ (*I.C.J. Reports 1986*, p. 103, para. 194) . . . ‘[A]ccordingly [the Court] expresses no view on that issue.’”) [hereinafter *Congo v. Uganda*]. The Court determined that there had been no armed attack attributable to the Democratic Republic of the Congo. *Id.* The Court did not consider the criteria of self-defense beyond the armed attack predicate. See *id.*

158 See, e.g., BOWETT, *supra* note 148, at 189 (noting that only India objected to Pakistan’s invasion of Kashmir despite no predicate armed attack); Higgins, *supra* note 153, at 443 (noting that the Security Council supported Israel’s preemptive strike when Egypt mobilized troops and airplanes in 1967 but condemned Israel’s attack on an Iraqi nuclear facility in 1981); see also DINSTEIN, *supra* note 107, at 192 (justifying Israel’s strike against Egypt in 1967 because “when all of the measures taken by Egypt (especially the peremptory ejection of the United Nations Emergency Force from the Gaza Strip and the Sinai Peninsula; the closure of the Straits of Tiran; the unprecedented build-up of Egyptian forces along Israel’s borders; and constant sabre-rattling statements about the impending fighting) were assessed in the aggregate, it seemed to be crystal-clear that Egypt was bent on an armed attack, and the sole question was not whether war would materialize but when.”); Cassese, *supra* note 155, at 512 (mentioning asserted claims of anticipatory self-defense by Israel, the U.S., the U.K., and the former USSR); Greenwood, *supra* note 156, at 943; High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*: Rep. of the High-level Panel on Threats, Challenges and Change, ¶ 188, U.N. Doc. A/59/565 (Nov. 17, 2004) (“The language of [Article 51] is restrictive . . . [h] owever, a threatened State . . . can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.”); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*: Rep. of the Secretary-General, ¶ 124, U.N. Doc. A/59/2005 (Mar. 21, 2005) (“Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.”).

border. In light of these circumstances, the June 5, 1967, Israeli strike against the Egyptian air force was viewed as a lawful use of anticipatory self-defense: the strike was necessary; the threat posed by Egypt and Syria was immediate; and Israel's initial strike—attacking the Egyptian air force to deprive Egypt of air cover—was proportionate to the threat it faced.

In contrast, the Israeli raid on the Iraqi nuclear reactor at Osirak in 1981 was widely condemned for failing to satisfy the criteria of self-defense.¹⁵⁹ In that case, the threat to Israel was speculative and remote. The Iraqi nuclear reactor was not finished and the Iraqi government was not close to constructing a weapon, let alone commencing an armed attack with that hypothetical weapon. Similarly, the U.S. invasion of Iraq in 2003 failed to satisfy the criteria governing self-defense.¹⁶⁰ Thus, anticipatory self-defense is lawful in the face of an imminent armed attack but the mere threat of force will not justify self-defense.¹⁶¹

The armed attack predicate of Article 51 has also given rise to a debate over what level of force qualifies as an armed attack.¹⁶² In the *Case Concerning Military and Paramilitary Activities in and Against*

159 Notably, the United States seemed to adopt Israel's self-defense justification—that facilities for developing weapons of mass destruction change the imminence calculus for self-defense—in its 2002 National Security Strategy:

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

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

...

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

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.

NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002).

160 See Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 602–03 (2003) (emphasizing the United States' inability to articulate an imminent threat or make a strong enough case to win the support of the Security Council for anticipatory action).

161 See DINSTEN, *supra* note 158, at 182–83 (concluding that the Bush Doctrine—the asserted right to use force against mere threats—is not lawful under Article 51).

162 See ALEXANDROV, *supra* note 154, at 115–16 (determining that, for purposes of Article 51, an armed attack should be evaluated in light of the definition of “aggression” in Article 3(g), which has been interpreted to exclude “isolated small-scale acts of armed force”).

Nicaragua, the International Court of Justice impliedly adopted the notion that there is a threshold between the mere use of force and that level of force rising to an armed attack. There, the Court stated that it saw

no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, *because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident* had it been carried out by regular armed forces.¹⁶³

For the purposes of this paper, though, it is sufficient to note that there is widespread agreement that the bombing of a state's civilian aircraft qualifies as an armed attack against that state.¹⁶⁴ An attack like that attempted on Christmas Day 2009 could have resulted in the destruction of at least a civilian airliner and the deaths of nearly 200 civilians.¹⁶⁵ As such, continued attacks by al-Aulaqi and AQAP against U.S. aircraft constitute armed attacks against the United States.

Here, the United States invokes self-defense as a justification for its placing Anwar al-Aulaqi on a targeted kill list.¹⁶⁶ It also relies on self-defense as a justification for its use of targeted killings generally.¹⁶⁷ The United States claims that "there are . . . legal bases under . . . international law for the President to authorize the use of force against al-Qaeda and AQAP, including the inherent right to self-defense."¹⁶⁸ This statement is uncontroversial, so far as it goes. Self-defense is an inherent right of states under international law and self-defense does justify otherwise unlawful uses of force. The United States must, however, demonstrate that its killing of Anwar al-Aulaqi satisfies the requirements of necessity, proportionality, and immediacy. Those three requirements are addressed in turn.

163 Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 93 (June 27) (emphasis added).

164 See, e.g., TOM RUYLS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 204–12 (2010) (reasoning that civilian aircraft and merchant vessels are "external manifestations" of the State"); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 47–50 (2002) (proffering the incidents of September 11th as being firmly within the bounds of what constitutes an armed attack). *But see* Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L.Q. 589, 596 (1989) ("To qualify as an armed attack, international law requires that terrorist acts form part of a consistent pattern of violent terrorist action rather than just being isolated or sporadic attacks"). However, even if one were to accept Cassese's requirement that a series of attacks take place before they constitute an armed attack, at this point AQAP attacks and attempted attacks against the United States likely rise to the level of Cassese's interpretation of "armed attack."

165 Cf. Schmitt, "Change Direction," *supra* note at 149 (interpreting Hezbollah's cross-border rocket attacks against civilians as armed attacks).

166 Mem. in Supp. of Defs.' Mot. to Dismiss 9, *Al-Aulaqi v. Obama*, No. 10-1469 (D.D.C. Sept. 25, 2010).

167 Harold Koh, Legal Adviser, U.S. Dep't of State, International Law and the Obama Administration, Keynote Address Before the American Society of International Law (Mar. 25, 2010).

168 Mem. 4-5, 8-9, 24, *Al-Aulaqi*, No. 10-1469.

A. Necessity

Under self-defense, necessity means that the “measures taken . . . must never be excessive or go beyond what is strictly required for the protection of the substantive rights which are endangered.”¹⁶⁹ Practically, this means that the state must be compelled to use force to disrupt an ongoing or impending armed attack because no other effective means of redress are available.¹⁷⁰ In the *Nicaragua* case, the United States justified its arming of anti-Nicaraguan rebels and its mining of Nicaraguan waters in part as a self-defense response to Nicaragua’s arming of anti-Salvadorian rebels. The International Court of Justice (ICJ) found this invocation of self-defense unavailing because the U.S. actions in question had taken place months after the anti-Salvadorian offensive had been commenced and repulsed.¹⁷¹ Thus, armed force was unnecessary to repulse or prevent an attack already defeated. Similarly, the international community rejected Israel’s invocation of self-defense to justify its bombing of Iraq’s Osirak nuclear facility. There, the absence of an actual or imminent armed attack deprived Israel of its self-defense justification—force was not necessary to defeat a merely hypothetical armed attack.¹⁷²

In contrast, the Israeli invasion of Lebanon in 1982 was at least initially necessary in the face of Palestinian Liberation Organization (PLO) freedom of action in Lebanon and attacks against Israel. The Lebanese government’s inability or unwillingness to restrain PLO attacks on Israel is particularly important when considering whether Israeli action was lawful self-defense.¹⁷³ Notably, Israel targeted the PLO and not the Lebanese armed forces during its invasion.¹⁷⁴

In the case of Anwar al-Aulaqi and AQAP, it may well be that the use of force against al-Aulaqi disrupted an impending armed attack. However, whether that use of force was necessary turns on whether other non-forceful actions were available to disrupt that attack—including whether the State of Yemen was willing and able to take action against al-Aulaqi and AQAP. In this regard, it is to be noted that Yemen is actively pursuing AQAP¹⁷⁵ and was also pursuing Anwar al-Aulaqi.¹⁷⁶

169 BOWETT, *supra* note 148, at 269. *See also* Schmitt, “*Change Direction*,” *supra* note 149, at 151 (“[N]ecessity requires the absence of adequate non-forceful options to deter or defeat the armed attack in question. . . . [N]ecessity requires that ‘but for’ the use of force, [non-forceful measures] would not suffice.”).

170 Christopher Greenwood, *International Law and the United States Air Operation Against Libya*, 89 W. VA L. REV. 933, 945 (1987) (“The question is whether [other means short of armed force] would have been as effective as an air strike in preventing the imminent terrorist onslaught.”); DINSTEIN, *supra* note 158, at 209-210 (“Utopia must ascertain that there exists a necessity to rely on force—in response to the armed attack—because no realistic alternative means of redress is available. In other words, ‘force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile.’”); Schmitt, “*Change Direction*,” *supra* note 149, at 151.

171 *Nicaragua*, 1986 I.C.J. at 122.

172 *See* Thomas Mallison, *Aggression or Self-Defense in Lebanon in 1982?*, 77 AM. SOC. INT’L L. PROC. 174, 177-80 (1983).

173 YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 209-10 (2006).

174 *Id.* at 247-248. *But see* Mallison, *supra* note 172, at 177-80 (questioning Israel’s self-defense claim on the basis that there was no actual or imminent armed attack).

175 Patrick Martin, *Yemen on Offensive Against al-Qaeda Group*, GLOBE AND MAIL (LONDON), Nov. 2, 2010; Mohammed Jamjoom, *Official: Yemen Launches Fierce Offensive Against al-Qaeda*, CNN, Sept. 21, 2010;

176 Mohammed Hatem, *Yemen Militant Cleric Al-Awlaki’s Arrest Ordered by State Security Court*, BLOOMBERG, Nov. 6, 2010.

Moreover, the United States was cooperating with Yemen, providing it military, intelligence, and logistical support, and even carrying out air strikes in coordination with Yemen.¹⁷⁷

However, “necessity . . . does not require naivety.”¹⁷⁸ As such, the examination of the necessity of U.S. use of force against al-Aulaqi and AQAP must consider the efficacy of Yemeni efforts against to counter AQAP and capture or kill al-Aulaqi.¹⁷⁹ While Yemen is not a failed state, it is a failing state.¹⁸⁰ Its government is weak and currently confronting not only AQAP in southern Yemen but also a tribal rebellion in northern Yemen¹⁸¹ and a separate secessionist movement in the south. Additionally, since January 2011, the Yemeni government, like many autocratic governments in the region, has faced a broad-based and growing popular uprising that has inspired tribal factions to defect from the Saleh regime, further weakening the state.¹⁸² These multifaceted challenges call into question Yemen’s ability to effectively pursue AQAP and Anwar al-Aulaqi—in stark contrast to its highly effective post-September 11 campaign against al-Qaeda proper.¹⁸³

Importantly, the United States claims self-defense in relation to Anwar al-Aulaqi individually and not simply AQAP. Invoking self-defense to justify the use of force against Anwar al-Aulaqi himself required that he was personally responsible for an actual ongoing or imminent armed attack. Yet, if neither threats nor even use of force short of an armed attack will justify self-defense, it seems that mere calls for *jihad* similarly fails to satisfy the armed attack predicate of self-defense—regardless of the accessibility or inspirational quality of those calls for *jihad*. That said, al-Aulaqi’s history of planning actual attacks against the United States—like the Christmas Day bombing attempt or the printer cartridge bombing attack—makes it likely that al-Aulaqi was continuing to plot attacks on the United States at his death. If such a plot had advanced to the point of becoming an imminent armed attack on September 30, 2011, then use of force against al-Aulaqi in self-defense was appro-

177 *U.S. Airstrikes on Al Qaeda in Yemen*, CBSNEWS.COM, (Dec. 19, 2009), http://www.cbsnews.com/2100-202_162-5997532.html (stating the airstrikes carried out by the U.S. were conducted at the request of Yemen); *see also Wikileaks Cable Corroborates Evidence of US Airstrikes in Yemen*, AMNESTY INT’L, (Dec. 1, 2010), <http://www.amnesty.org/en/news-and-updates/wikileaks-cable-corroborates-evidence-us-airstrikes-yemen-2010-12-01> (examining the various ways the U.S. has collaborated with Yemen).

178 Schmitt, *supra* note 149, at 152.

179 *Id.* at 151-152.

180 *The Failed States Index 2010*, FOREIGNPOLICY.COM, http://www.foreignpolicy.com/articles/2010/06/21/2010_failed_states_index_interactive_map_and_rankings (analyzing a range of factors to determine whether a state is a failed state or is in danger of becoming a failed state) (last accessed Nov. 11, 2011).

181 *See, e.g.*, Joost R. Hiltermann, *Disorder on the Border*, FOREIGN AFF. (Dec. 16, 2009), <http://www.foreignaffairs.com/articles/65730/joost-r-hiltermann/disorder-on-the-border> (examining the conflict between Houthi rebels and Yemeni national army and the impact on an already weak Yemen).

182 Laura Kasinof, *Yemeni Forces Heighten Deadly Assault on Protesters in City Central to Uprising*, N.Y. TIMES (Nov. 12, 2011).

183 *See, e.g.*, Gregory D. Johnsen, *AQAP in Yemen and the Christmas Day Terrorist Attack*, CTC SENTINEL SPECIAL REPORT, Jan. 2010, at 1-2 (“During . . . the first phase of the war against al-Qa’ida in Yemen, the U.S. and Yemeni governments cooperated quite closely, even working together to kill the then head of al-Qa’ida in Yemen, Abu Ali al-Harithi, in an unmanned CIA drone strike in November 2002. Yemeni forces arrested his replacement, Muhammad Hamdi al-Ahdal, a year later. The successive losses of two key leaders as well as numerous other arrests effectively crippled the organization in Yemen.”).

prate—so long as the drone strike was both necessary and proportionate.

B. Proportionality

For use of force to be lawful under self-defense, that force must be proportionate. In the context of self-defense, proportionality demands that the force used be no more than required to deter or disrupt an impending attack.¹⁸⁴ Disproportionate use of force invalidates an otherwise lawful invocation of self-defense.

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

[W]hen Utopia sends an expeditionary force into Arcadia, the operation is to be directed exclusively against the armed bands or terrorists, and it must not be confused with defensive armed reprisals. Surely, no forcible action may be taken against the Arcadian civilian population. Furthermore, even the Arcadian armed forces and installations ought not to be harmed.¹⁸⁵

It is clear from Dinstein's discussion that a state's use of force in self-defense against attacks by a non-state actor must be directed at that non-state actor, leaving the host state free from harm, for the use of force to be considered proportionate.¹⁸⁶ Thus, in the *Congo* case the ICJ noted, "The Court cannot fail to observe . . . that the taking of airports and towns many hundreds of kilometers from Uganda's border would not seem proportionate to the series of transborder attacks [Uganda] claimed had given rise to the right of self-defence . . ." ¹⁸⁷ Similarly, in the *Oil Platforms* case, the ICJ remarked that, had the Iranian anti-ship attack originated from the oil platforms attacked by the United States, the United States' use of force may have been proportionate.¹⁸⁸ The United States' destruction of an anti-ship missile position would have been a reasonable level of force to counter anti-ship attacks.¹⁸⁹ However, the United States did not satisfy the proportionality requirement of self-defense because it was not reasonably calibrated to deter or defeat an attack; it used force against oil platforms from which no attack could be linked (or proven).¹⁹⁰

It is clear that any force used against Anwar al-Aulaqi or AQAP under the rubric of self-defense must be tied to an imminent armed attack for which either al-Aulaqi or AQAP is responsible. The level of force lawfully permitted is no more than that which is required to disrupt the impending

184 Schmitt, *supra* note 149, at 153.

185 DINSTEIN, *supra* note 173, at 250.

186 See also Schmitt, *supra* note 149, at 155 (discussing Israel's targeting of Lebanese infrastructure in relation to the 2006 Summer War against Hezbollah).

187 Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 223 (Dec. 19).

188 Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 198 (Nov. 6) (holding that the attack on Iranian oil platforms by the United States was not justified by self-defense and, even it had been established that the United States satisfied conditions required for an attack in self-defense, its attack on the oil platforms was not proportionate).

189 See *id.*

190 *Id.*

ing attack. Additionally, it is clear that the force must be directed against al-Aulaqi or AQAP and not the State of Yemen, its civilian population, its infrastructure, or its security services.

C. Immediacy

The final requirement of lawful use of force under self-defense is that of immediacy. Immediacy refers to the closeness in time of a wrongful act and the responsive use of force. When force is used in self-defense in anticipation of an armed attack, immediacy requires that the wrongful act be imminent.¹⁹¹ When self-defense occurs in response to an armed attack, there must not be an undue lag in time between the wrongful act and the corresponding use of force.

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

It may well be that when the United States launched a drone strike targeting al-Aulaqi on September 30, 2011, it reasonably believed that al-Aulaqi was responsible for an imminent armed attack. It is of no consequence that such an attack failed to materialize, but only that one was believed to be imminent.

More troubling, however, is the apparent continuous targeting of al-Aulaqi due to his presence on the CIA's targeted kill list.¹⁹² On its face, such continuous targetability seems to violate self-defense's fundamental principle relating a particular use of force to a particular armed attack and not merely the desire or hope of a state or armed group to launch an attack in the future. Some 208 days passed between al-Aulaqi's addition to the CIA's targeted kill list and the next publicly known attempted AQAP attack on the United States. It is possible that AQAP and al-Aulaqi were on the verge of an imminent armed attack against the United States each of those intervening 208 days. It is also possible, however, that during some of those 208 days al-Aulaqi and AQAP lay dormant, that they then planned the attack, recruited participants in the attack, prepared the attack, and then finally carried out the attempted attack. During at least some of this period, neither al-Aulaqi nor AQAP would have been lawful targets under self-defense because the attack would not have been imminent.¹⁹³

One answer to the apparent immediacy problem may be that al-Aulaqi and AQAP were avowed threats to the United States—even if they only carried out attacks sporadically. They have targeted

191 Christopher Greenwood, *International Law and the United States Air Operation Against Libya*, 89 W. VA. L. REV. 933, 945 (1987) ("It would not be enough, therefore, that the United States anticipated further attacks by Libya at some unspecified future date. To remain within the limits of self-defence, as they have been interpreted by the Security Council, the air strike against Libya must have been a response to a threat of terrorist attacks against the United States which could reasonably have been described as imminent by [the date of the U.S. air strike on Libya].").

192 See Mazzetti, *supra* note 1.

193 Compare, for instance, the Israeli airstrike on Egypt in 1967 with the Israeli airstrike on Iraq's Osirak nuclear reactor in 1981. See U.N. S.C. Meeting Notes of Security Council, ¶¶ 55, 59, U.N. Doc. S/2280 (June 12, 1981), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/NL8/100/21/pdf/NL810021.pdf?OpenElement>

the United States previously, they inspire others to target the United States, and al-Aulaqi provided religious justification for the killing of Americans. Moreover, AQAP's organizational capacity and access to resources may give it the ability to launch attacks on targets of opportunity. For those reasons, AQAP and al-Aulaqi continuously presented immediate threats to the United States, justifying their targeting under self-defense.

Yet, consider Israel's airstrike on the Iraqi Osirak nuclear reactor in 1981 and the Israeli strike against the Egyptian air force in 1967. In 1981, Iraq was an avowed enemy of Israel.¹⁹⁴ Iraq had repeatedly threatened Israel.¹⁹⁵ Iraqi army units had even fought against Israel in 1948, 1967, and 1973. Despite Iraq's threatening posture towards Israel, the international community rejected Israel's invocation of self-defense to justify its airstrike,¹⁹⁶ subjecting Israel to a unanimous Security Resolution condemning its action.¹⁹⁷ Israel's 1981 invocation of anticipatory self-defense failed because Iraq was a *mere* threat—even assuming it possessed the will and desire to use a nuclear weapon against Israel, it lacked the means to do so. It could not be argued that Iraq was on the verge of launching an armed attack against Israel—at least not with a nuclear weapon manufactured at the then-incomplete Osirak nuclear facility.

In contrast, Israel's strike against the Egyptian air force in 1967 is a paradigmatic example of anticipatory self-defense. In that case—as in the case of Iraq in 1981—Egypt was an avowed threat to Israel. Egypt had repeatedly threatened Israel and Egypt and Israel had already fought two wars. However, unlike with Iraq in 1981, in 1967 Israel reasonably believed that Egypt was on the verge of launching an armed attack against it. The difference in proximity of the anticipated attack is the critical difference between Israel's justified invocation of self-defense in 1967 and its failed invocation of self-defense in 1981.¹⁹⁸ This difference in outcomes between 1967 and 1981 suggests that even a dedicated, continuous threat will not justify self-defense in the absence of an imminent or

194 See *id.* (Indeed, following Israel's attack on Osirak, Yehuda Blum, Israel's Permanent Representative to the United Nations described Iraq as “one of Israel's most implacable enemies.”).

195 See, e.g., Nick B. Williams Jr. & Daniel Williams, *Iraq Threatens Israel With Use of Nerve Gas: Mideast: Leader denies nuclear capability but says he would destroy 'half' his adversary if attacked*, LOS ANGELES TIMES (Apr. 3, 1990) http://articles.latimes.com/1990-04-03/news/mn-702_1_gas-attack. In fact, Israel also claimed to be in a continuous state of war with Iraq.

196 Cf. W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense*, 15 VAND. J. OF TRANSNAT'L L. 417, 429-31 (1982) (noting that expert testimony and French and United States officials do not support Israel's response to Iraq's nuclear threat because of evidence that Israel's claims regarding Iraq's technological progress and nuclear posture were “erroneous or misleading”).

197 See S.C. Res. 487, ¶ 3, U.N.Doc. S/RES/487 (June 19, 1981) (“*Strongly condemns* the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.”).

198 See, e.g., Rosalyn Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force*, in ANTONIO CASSESE, THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 435, 442-443 (Martinus Nijhoff Publishers 1986); Antonio Cassese, *Return of Westphalia? Considerations on the Gradual Erosion of the Charter System*, in ANTONIO CASSESE, THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 505, 515 (Martinus Nijhoff Publishers 1986); Stanimir Alexandrov, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 159-161 (Kluwer Law International 1996); W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense*, 15 VAND. J. OF TRANSNAT'L L. 417, 429-431 (1982); see also YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 186 (Cambridge University Press 2006).

ongoing armed attack.

Thus, while al-Aulaqi and AQAP may continuously threaten the United States, their continuous desire to harm the United States alone does not satisfy the immediacy requirement of self-defense—and does not justify their continuous targeting as self-defense. Instead, al-Aulaqi (or AQAP) could only be attacked by the United States on the basis of self-defense when he (or it) was responsible for an ongoing or imminent armed attack against the United States. Notably, though this analysis suggests that self-defense is an inappropriate basis for any targeted killing program in which a listed individual is continuously subject to use of force, the actual use of force on a particular day may still be lawful. That is, it may be that the drone strike on September 30, 2011, against al-Aulaqi was lawful self-defense, but that a similar hypothetical strike on September 1, 2011, or March 1, 2011, would not have been.

CONCLUSION

That al-Aulaqi was a threat to the United States is beyond argument. He recruited and encouraged individuals to take part in *jihad* against the United States. He was directly involved in the planning of operations directed against the United States. However, the utility of killing al-Aulaqi is not itself sufficient to satisfy the requirement of self-defense. Self-defense requires that al-Aulaqi was more than a mere threat—he must have been responsible for an ongoing or imminent armed attack against the United States. And use of force as self-defense must have been responsive to that armed attack. Thus, it is the nature of self-defense that undermines its use as a justification for a broad targeted killing program in which targets, once selected, are continuously subject to the use of force.

Instead, in the case of al-Aulaqi at least, the United States is better served by relying on international humanitarian law and al-Aulaqi's conduct as an operational leader of AQAP to justify his killing. As such a leader, al-Aulaqi has forfeited his protected status by directly participating in hostilities in a non-international armed conflict between Yemen and AQAP. The United States is intervening in that armed conflict, placing it similarly in a non-international armed conflict with AQAP. The United States was thus justified in its use of force against al-Aulaqi so long as he directly participated in hostilities—something he appeared to have been doing continuously until his death.