

T · M · C · A S S E R P R E S S

Yearbook of International Humanitarian Law

2010



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Yearbook of International Humanitarian Law Volume 13, 2010

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Abbreviations

AALCO	Asian-African Legal Consultative Organization
Abl.	Amtsblatt
AC	Appeal Cases
ACTR	Australian Capital Territory Reports
AD	Annual Digest of Public International Law Cases
Adelaide LR	Adelaide Law Review
ADF	Australian Defence Force
AFDI	Annuaire français de droit international
AFRC	Armed Forces Revolutionary Council (Sierra Leone)
African HRLJ	African Human Rights Law Journal
African JI & CL	African Journal of International and Comparative Law
African YIHL	African Yearbook on International Humanitarian Law
Air Force LR	Air Force Law Review
Air LR	Air Law Review
Airpower J	Airpower Journal
Air Univ. Rev.	Air University Review
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
AJLP	Australian Journal of Legal Philosophy
Albany LR	Albany Law Review
All ER	All England Law Reports
ALR	Australian Law Reports
Amer. Crim. LR	American Criminal Law Review
Amer. Univ. JIL & Pol.	American University Journal of International Law and Policy

Amer. Univ. ILJ	American University International Law Journal
Amer. Univ. ILR	American University International Law Review
Amer. Univ. LR	American University Law Review
AMISOM	African Union Mission to Somalia
ANA	Afghanistan National Army
AP	Additional Protocol
AP	Associated Press
APL(s)	Anti-personnel landmine(s)
ARABSAT	Arab Satellite Communications Organization
Arizona JI & CL	Arizona Journal of International and Comparative Law
Army Law.	The Army Lawyer
ASEAN	Association of South East Asian Nations
ASF	African Standby Force
ASIL Proc.	American Society of International Law Proceedings
ATCA	Alien Tort Claims Act (USA)
ATT	Arms Trade Treaty
AU	African Union
AMIB	African Union Mission in Burundi
AMIS	African Union Mission in Sudan
AMISOM	African Union Mission in Somalia
Australian YIL	Australian Yearbook of International Law
Austrian JPIL	Austrian Journal for Public International Law
Austrian Rev. Int. & Eur. L	Austrian Revue of International and European Law
AVM	Anti-vehicle landmine
Berkeley JIL	Berkeley Journal of International Law
B.O.	Boletín Oficial de la República Argentina
BGBI	Bundesgesetzblatt
BGH	Bundesgerichtshof
Boston Univ. ILJ	Boston University International Law Journal
Boston College Int. & Comp. LR	Boston College International and Comparative Law Review
Brooklyn JIL	Brooklyn Journal of International Law
BTF	Balkans Task Force
BverfGE	Bundesverfassungsgericht
BYIL	British Yearbook of International Law

California LR	California Law Review
Calif. Western ILJ	California Western International Law Journal
Can. JL & Jur.	Canadian Journal of Law and Jurisprudence
Canadian YIL	Canadian Yearbook of International Law
Cardozo LR	Cardozo Law Review
Case Western Reserve JIL	Case Western Reserve Journal of International Law
Catholic Univ. LR	Catholic University Law Review
CCW	Convention on Certain Conventional Weapons
CD	Conference on Disarmament
CDF	Civil Defence Forces (Sierra Leone)
CENTCOM	Central Command
Chicago JIL	Chicago Journal of International Law
Chinese JIL	Chinese Journal of International Law
CHR (UN)	Centre for Human Rights
CIA	Central Intelligence Agency
CICC	Coalition for the International Criminal Court
CICR	Comité International de la Croix Rouge
CID	Criminal Investigation Division
CIS	Commonwealth of Independent States
CIVPOL	Civilian Police
CLA	Chief Legal Advisor
CLJ	Criminal Law Journal
CLR	Commonwealth Law Reports
CMAC	Court Martial Appeal Court
Cmnd.	Command Paper
Columbia HRLR	Columbia Human Rights Law Review
Columbia JTL	Columbia Journal of Transnational Law
Columbia LR	Columbia Law Review
Connecticut JIL	Connecticut Journal of International Law
Cornell ILJ	Cornell International Law Journal
Cr. App. R	Criminal Appeals Reports
CRC	Convention on the Rights of the Child
Criminal LF	Criminal Law Forum
Criminal LR	Criminal Law Review
CSP	Conference of States Parties
CTBT	Comprehensive Test Ban Treaty
CTED	Counter-Terrorism Committee Executive Directorate
CTS	Commonwealth Treaty Series

CWC	Chemical Weapons Convention
Dalhousie LJ	Dalhousie Law Journal
Denver JIL & Pol.	Denver Journal of International Law and Policy
DLR	Dominion Law Reports
DMU	Detainee Management Unit
DoD	Department of Defense (USA)
Drake LR	Drake Law Review
DRC	Democratic Republic of Congo
Duke JCIL	Duke Journal of Comparative and International Law
ECCAS	Economic Community of Central African States
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR Rep.	European Convention on Human Rights Reports
ECHR	European Convention on Human Rights
ECOMOG	ECOWAS Cease-Fire Monitoring Group
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
ECtHR	European Court on Human Rights
EECC	Eritrea-Ethiopia Claims Commission
EHRR	European Human Rights Reports
Emory ILR	Emory International Law Review
EJIL	European Journal of International Law
ERW	Explosive Remnants of War
EU	European Union
Eur. Ct. HR	European Court of Human Rights
EUFOR	European Union Force
Eur. Comm. HR	European Commission of Human Rights
Eur. J Crime, Crim. L & Crim. Jus.	European Journal of Crime, Criminal Law and Criminal Justice
Ex D	Exchequer Digest
F	Federal
F Supp.	Federal Supplement
FARDC	Armed Forces of the Democratic Republic of the Congo
FCJ	Federal Court of Justice (Canada)
FCR	Federal Court Reports
FDC	Force Detention Centre

FDTL	East Timorese Defence Force
Fed. Reg.	Federal Register (United States)
Fed. Rep.	Federal Reporter
Finnish YIL	Finnish Yearbook of International Law
FNI	Front des Nationalistes et Intégrationnistes (Congo)
Fordham ILJ	Fordham International Law Journal
Fordham LR	Fordham Law Review
FPLC	Forces Patriotiques pour la Libération du Congo
FRETILIN	Frente Revolucionaria Timor Lest
FRPI	Independence
FRY	Force de Résistance Patriotique en Ituri (Congo)
FYROM	Federal Republic of Yugoslavia
	Former Yugoslav Republic of Macedonia
GA	General Assembly (United Nations)
GAOR	General Assembly Official Records
GA Res.	General Assembly Resolution (United Nations)
GC	Geneva Conventions
Georgetown Int. Environ. LR	Georgetown International Environmental Law Review
Georgetown JIL	Georgetown Journal of International Law
Georgia JI & Comp. L	Georgia Journal of International and Comparative Law
German LJ	German Law Journal
GR2P	Global Responsibility to Protect
GW ILR	The George Washington International Law Review
GW JIL and Econ.	The George Washington Journal of International Law and Economics
GU	Gazzetta Ufficiale (Italian Official Gazette)
GYIL	German Yearbook of International Law
Hague YIL	Hague Yearbook of International Law
Harvard ILJ	Harvard International Law Journal
Harvard JHR	Harvard Journal of Human Rights
Harvard JL & Pub. Pol.	Harvard Journal of Law & Public Policy
Harvard JOL	Harvard Journal on Legislation
Harvard LR	Harvard Law Review
Harvard NSJ	Harvard National Security Journal
HCJ	High Court of Justice
HRLJ	Human Rights Law Journal

HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
I/A Court HR	Inter-American Court of Human Rights
I/A Comm. HR	Inter-American Commission on Human Rights
I/A YBHR	Inter-American Yearbook on Human Rights
ICA	International Council on Archives
ICBL	International Campaign to Ban Landmines
ICBS	International Committee of the Blue Shield
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
ICLR	International Criminal Law Review
ICLQ	International and Comparative Law Quarterly
ICOM	International Council of Museums
ICOMOS	International Council on Monuments and Sites
ICRC	International Committee of the Red Cross
ICRtoP	International Coalition for the Responsibility to Protect
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDR	International Defense Review
IFLA	International Federation of Library Association and Institutions
IFOR	Implementation Force
IHL	International Humanitarian Law
IJLM	International Journal of Legal Medicine
IJRL	International Journal of Refugee Law
ILAS JI & Comp. L	ILAS Journal of International and Comparative Law
ILC	International Law Commission

ILC Yearbook	Yearbook of the International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IMO	International Maritime Organization
IMT	International Military Tribunal (in Nuremberg)
IMTFE	International Military Tribunal for the Far East (in Tokyo)
Indian JIL	Indian Journal of International Law
Indiana I & Comp. LR	Indiana International & Comparative Law Review
INTELSAT	International Telecommunications Satellite Organization
Int. LF	International Law Forum
INTERFET	International Force in East Timor
IRA	Irish Republican Army
Iran-US CTR	Iran-United States Claims Tribunal Reports
IRRC	International Review of the Red Cross
ISAF	International Security Assistance Force
Israel LR	Israel Law Review
Israel YB	Israel Yearbook
Israel YB HR	Israel Yearbook on Human Rights
IYIL	Italian Yearbook of International Law
JAMA	Journal of the American Medical Association
J Armed Conflict L	Journal of Armed Conflict Law
JCSL	Journal of Conflict and Security Law
JICL	Journal of International and Comparative Law
JIL & Prac.	Journal of International Law and Practice
J Int. Criminal Justice	Journal of International Criminal Justice
JPI	Judicial Police Inspectors
J Trans. L & Pol.	Journal of Transnational Law & Policy
J Trauma	The Journal of Trauma
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
LAS	League of Arab States
Leiden JIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LOAC	Law of Armed Conflict

Loy. LA I & CLJ	Loyola of Los Angeles International and Comparative Law Journal
Loyola I & CLJ	Loyola International and Comparative Law Journal
LQR	Law Quarterly Review
Maryland JIL & T	Maryland Journal of International Law and Trade
MCC	Military Criminal Code
Melbourne JIL	Melbourne Journal of International Law
Melbourne Univ. LR	Melbourne University Law Review
Michigan JIL	Michigan Journal of International Law
Michigan LR	Michigan Law Review
Mil. LR	Military Law Review
MINURCAT	United Nations Mission in the Central African Republic and Chad
MINURSO	United Nations Mission for the Referendum in Western Sahara
MINUSTAH	United Nations Stabilization Mission in Haiti
MLR	Modern Law Review
MNF	Multinational Force
Monash LR	Monash Law Review
Moniteur Belge	Belgian Official Parliamentary Journal
MONUC	United Nations Mission in the Democratic Republic of Congo
Moscow JIL	Moscow Journal of International Law
MPYBUNL	Max Planck Yearbook of United Nations Law
MPYIL	Max Planck Yearbook of International Law
MRT	Militair Rechtelijk Tijdschrift
NATO	North Atlantic Treaty Organisation
Naval LR	Naval Law Review
NCOs	Non-Commissioned Officers
Nebraska LR	Nebraska Law Review
New England LR	New England Law Review
NGO	Non-Governmental Organisation
NILR	Netherlands International Law Review
NJ	Nederlandse Jurisprudentie
NLA	Albanian National Liberation Army
NLR	Naval Law Review
Nordic JIL	Nordic Journal of International Law

North Carolina LR	North Carolina Law Review
Northwestern JIHR	Northwestern Journal of International Human Rights
Northwestern Univ. LR	Northwestern University Law Review
Notre Dame JL	Notre Dame Journal of Law
Notre Dame LR	Notre Dame Law Review
NPC	New Penal Code
NQHR	Netherlands Quarterly of Human Rights
NYIL	Netherlands Yearbook of International Law
NY Univ. JIL & Pol.	New York University Journal of International Law and Politics
NY Univ. LR	New York University Law Review
NZLR	New Zealand Law Review
ÖAD	Österreichische Außenpolitische Dokumentation
OAS	Organization of American States
OECS	Organization of Eastern Caribbean States
OEF	Operation Enduring Freedom (Afghanistan)
OIF	Operation Iraqi Freedom
ONU	Organisation des Nations Unies
ONUB	United Nations Operation in Burundi
ONUC	United Nations Operation in the Congo
OPCW	Organisation for the Prohibition of Chemical Weapons
OSA	Operational Support Arrangement
OTP	Office of the Prosecutor (of the ICTR and/or ICTY)
Palestine YIL	Palestine Yearbook of International Law
PCIJ	Permanent Court of Justice
PD	Probate Division, English Law Reports
Penn. State ILR	Pennsylvania State International Law Review
PKF	Peace Keeping Force
PMG	Peace Monitoring Group
POC	Protection of Civilians
POW	Prisoner of War
Proc. ASIL	Proceedings of the American Society of International Law
QB	Queen's Bench

RBDI	Revue Belge de droit international
RDI	Rivista di diritto internazionale
RDPC	Revue de droit pénal et de criminologie
Recueil des Cours	Collected Courses of the Hague Academy of International Law
RGDIP	Revue générale de droit international public
RIAA	Reports of International Arbitral Awards
RICR	Revue International de la Croix Rouge
RPF	Rwandan Patriotic Front
RQDI	Revue Québécoise de Droit International
RSC	Rules of the Supreme Court
RSCDPC	Revue de science criminelle et de droit pénal comparé
RSDIE	Revue Suisse de droit international et de droit européen
RSK	Republic of Serbian Krajina
RUF	Revolutionary United Front (Sierra Leone)
Rutgers LR	Rutgers Law Review
R2P-RtoP	Responsibility to Protect
SADC	South African Development Community
San Diego LR	San Diego Law Review
SASC	South African Security Council
Saskatchewan LR	Saskatchewan Law Review
SC	Security Council
SC CTC	Security Council's Counter-Terrorism Committee
SCOR	Security Council Official Records
SC Res.	Security Council Resolution
SCR	Supreme Court Reports
S. Ct.	Supreme Court Reporter (United States)
SCU	Serious Crimes Unit
SFOR	Stabilization Force
SFRY	Socialist Federal Republic of Yugoslavia
SG	Secretary-General
SIPRI	Stockholm International Peace Research Institute
SOFA	Status of Force Agreement
South African YIL	South African Yearbook of International Law
South Texas LR	South Texas Law Review
Stanford JIL	Stanford Journal of International Law
Stanford JIR	Stanford Journal of International Relations
Stanford LR	Stanford Law Review

Syracuse JIL & Com.	Syracuse Journal of International Law & Commerce
SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht
Tel Aviv Univ. LR	Tel Aviv University Law Review
Temple LR	Temple Law Review
Tennessee LR	Tennessee Law Review
Texas ILJ	Texas International Law Journal
Texas LR	Texas Law Review
TFG	Transitional Federal Government (Somalia)
TIAS	Treaties and other International Acts Series
Tilburg For. LR	Tilburg Foreign Law Review
TLPS	Timorese Police Force
Transn. L & Contemp. Probs.	Transnational Law and Contemporary Problems
TRC Report	Truth and Reconciliation Commission Report (South African)
Tulane JI & Comp. L	Tulane Journal of International & Comparative Law
Tulsa J Comp. & IL	Tulsa Journal of Comparative and International Law
TVF	Trust Fund for Victims
UCLA LR	University of California Los Angeles Law Review
UN	United Nations
UNAKRT	United Nations Assistance to the Khmer Rouge Trial
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMET	United Nations Mission in East Timor
UNAMI	United Nations Assistance Mission for Iraq
UNAMID	United Nations/ African Union Hybrid Operation in Darfur
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNCHR	United Nations Commission on Human Rights
UNCHS	United Nations Centre for Human Settlements
UNCIVPOL	United Nations Civilian Police

UNCTAD	United Nations Conference on Trade and Development
UN Doc.	United Nations Documents Series
UNDOF	United Nations Disengagement Observer Force
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force (in the Sinai)
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFICYP	United Nations Force in Cyprus
UNGCI	United Nations Guards Contingent in Iraq
UNHCR	United Nations High Commissioner for Refugees
UNHFOR	United Nations Human Rights Field Office in Rwanda
UNICEF	United Nations (International) Children's (Emergency) Fund
UNIDIR	United Nations Institute for Disarmament Research
UNIFEM	United Nations Development Fund for Women
UNIFIL	United Nations Interim Force in Lebanon
UNIIMOG	United Nations Iran/Iraq Military Observer Group
UNIKOM	United Nations Iraq/Kuwait Observer Mission
UNIPSIL	United Nations Integrated Peacebuilding Office in Sierra Leone
UNITAF	United Nations Unified Task Force
UNITAF	United Nations Task Force (in Somalia)
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNMIL	United Nations Mission in Liberia
UNMIN	United Nations Mission in Nepal
UNMIS	United Nations Mission in Sudan
UNMIT	United Nations Mission in Timor-Leste
UNOCI	United Nations Operations in Côte d'Ivoire
UNOMIG	United Nations Observer Mission in Georgia
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNOSOM	United Nations Operation in Somalia
UNPF	United Nations Peacekeeping Force

UNPOS	United Nations Political Office for Somalia
UNPROFOR	United Nations Protection Force (in Bosnia and Herzegovina)
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Authority in East Timor
UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission
Univ. Calif. Davis LR	University of California Davis Law Review
Univ. Chicago LR	University of Chicago Law Review
Univ. Miami I & Comp. LR	University of Miami International & Comparative Law Review
Univ. Pa. J Const. L	University of Pennsylvania Journal of Constitutional Law
Univ. Pitt. LR	University of Pittsburgh Law Review
Univ. Richmond LR	University of Richmond Law Review
USAFA JLS	United States Air Force Academy Journal of Legal Studies
Vanderbilt JTL	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
Vermont LR	Vermont Law Review
Virginia JIL	Virginia Journal of International Law
Virginia LR	Virginia Law Review
VWU	Victims and Witness Unit of the Registry (Congo)
Wake Forest LR	Wake Forest Law Review
WBR	Wound Ballistics Review
WCR	War Crimes Reports
WHO	World Health Organisation
Whittier LR	Whittier Law Review
Wisconsin ILJ	Wisconsin International Law Journal
WLR	Weekly Law Reports
Yale HR & Dev. LJ	Yale Human Rights & Development Law Journal
Yale JIL	Yale Journal of International Law
Yale LJ	Yale Law Journal
Yb Eur. Conv. HR	Yearbook of the European Convention of Human Rights
Yb ILC	Yearbook of the International Law Commission

YIHL	Yearbook of International Humanitarian Law
Yug. Rev. IL	Yugoslav Review of International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZöR	Zeitschrift für öffentliches Recht

Part I
Articles

Chapter 1

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

Robert Chesney

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1.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2.1 AQAP in relation to al Qaeda

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

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

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

⁵ See Schmitt and Mekhennet 2009.

⁶ See Whitlock 2007.

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

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

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

⁷ See *ibid.*

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

⁹ See e.g., Harris 2010, p 3.

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

¹¹ See *ibid.*

¹² See Harris 2010, p 2.

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

1.2.2 Anwar al-Awlaki in relation to AQAP

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

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

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

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