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1. Introduction

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The killing of Osama bin Laden in Pakistan in May 2011 and Anwar al-Aulaqi in Yemen in September 2011 both raise the question of when the killing of an identified individual posing a threat to a nation-state is lawful.[1] Although it has not yet been forced to publicly defend either killing in any great detail, the Obama Administration has insisted on the legality of both operations by deploying an amalgam of legal and rhetorical arguments that explicitly or implicitly invoke multiple bodies of law. As an administration spokesperson stated in connection with the Bin Laden operation:

> The operation was conducted in a manner fully consistent with the laws of war. … There is simply no question that this operation was lawful. Bin Laden was the head of al Qaeda, the organization that conducted the attacks of September 11, 2001. And al Qaeda and bin Laden himself had continued to plot attacks against the US. We acted in the nation's self-defense. The operation was conducted in a way designed to minimize and avoid altogether, if possible, civilian casualties.[2]

In litigation brought by al-Aulaqi's father in 2010, the Administration likewise argued both that Congress authorized the President to use force overseas to protect the U.S. from threats of attack and that additional legal authority comes from, *inter alia*, the inherent right of national self-defense recognized by international law.[3]

These statements reveal that the legality of such targeted operations can be evaluated along a number of dimensions—under public international law devoted to the *jus ad bellum*, under international humanitarian law and the *jus in bello*, under international human rights law, and under the applicable domestic legal regimes. Of particular relevance in U.S. law are two instruments: the long-standing Executive Order proscribing resort to assassination and the 2001 Authorization to Use Military Force. Common law prohibitions against murder may also apply in Pakistan and Yemen.

Notwithstanding these multiple legal regimes, there is little positive law that speaks definitively to the legality *vel non* of the Bin Laden and al-Aulaqi operations. In particular, the law is not entirely clear with respect to: the legality of the United States' use of force in these foreign territories; the United States' use of lethal force against these two individuals; the reach of the *jus in bello* beyond active theaters of war; and the question of whether the U.S. was under a duty to endeavor to capture either Bin Laden or al-Aulaqi rather than kill them outright. In light of the gaps in the law on these fundamental questions, a legal analysis of these operations threatens to yield a situation of *non liquet*—"it is not clear."

Although the relevant legal regimes developed along different historical, doctrinal, and philosophical trajectories, they increasingly collide and even overlap in contemporary counterterrorism and counterinsurgency operations. With only rudimentary choice of law tools to

[1] To a certain extent, the attack on Col. Muammar el-Qaddafi's compound in Tripoli in May 2011, days before the Bin Laden raid, also engages these questions. Van Schaack 2011.
[2] White House Press Secretary 2011.
[3] *Al-Aulaqi v. Obama*, Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, Case Civ. A. No. 10-cv-1469, at pp. 4-5 (Sept. 25, 2010) [hereinafter '*Al-Aulaqi*, Obama brief'], available at **http://www.aclu.org/files/assets/Al-Aulaqi_USG_PI_Opp__MTD_Brief_FILED.pdf**.

draw upon, it is not yet clear which body of law is authoritative in the event of tensions and contradictions between them. Because the doctrinal and conflicts of law questions are difficult to sort out in a vacuum, the definitive legality of such events may turn on which domestic or international legal forum—if any—ultimately asserts jurisdiction. Judicial review, however, is not likely to be forthcoming, given that there are limited fora in which to raise any sort of formal legal challenge, there is no obvious sovereign or individual complainant, there is only limited personal jurisdiction over potential sovereign and individual respondents, and there are vast disparities of power between the U.S. and other involved states. As such, where the law is incomplete or indeterminate, a form of jurisprudential relativity sets in, by which states are free to make policy choices, subject only to the constraints—none trivial, to be sure—imposed by military strategy, diplomatic relations, and the political process.[4] The multiplicity of legal regimes also invites a "mixing and matching" of doctrinal elements that blurs the distinctions between the various paradigms and can lead to doctrinal imbalances.

In the light of the legal indeterminacy surrounding these two operations, this article will endeavor to systematically tease out the various arguments advanced in their defense and to map the contiguous and overlapping legal regimes that speak to the killing of these two men. I compare the legality of the two operations primarily under international law, leaving to others to develop whatever domestic constitutional limitations may exist by virtue of the 4th and 5th Amendments to the U.S. Constitution. The paper outlines several doctrinal pathways within international law that lead to the conclusion that both operations were legal. Along the way, I identify established landmarks in positive law. Reaching the ultimate destination, however, requires one to traverse uncertain terrain by deploying legal theories that remain under-developed, in flux, and contested. At these crossroads, the necessary arguments often do not enjoy textual support in the relevant treaties or reflect consistent state practice or *opinio juris.* Nor are there authoritative judicial pronouncements that provide validation. Furthermore, our expedition requires us to navigate between overlapping legal regimes with no compass to help resolve potential conflicts of law that arise. In my accounting of this journey, I provide a rather cursory treatment of established law and linger more at those junctures that could lead to a conclusion of illegality because there is a diversity of viewpoints in the literature. All told, the law can be made to work in defense of the United States' actions, but there are points along the way at which an authoritative decision-maker might reach a defensible contrary conclusion.

Although this paper is primarily about law, the policy implications of these operations are momentous.[5] And, the "should we" question is often as compelling as the "can we" question. The U.S. may enjoy a technological monopoly on certain means and methods of warfare for the moment. Like the proverbial pocket calculator, however, it is only a matter of time before other states and entities have access to the same tools and techniques, given the dizzying pace of technological diffusion in war fighting. Any legal claims now employed will be up for grabs for other states and entities to appropriate.[6] And, because polynormativity is unsustainable in any system of law, the U.S. precedent will be cited as influential state practice and its legal claims as

[4] Corn and Jenson 2008, at pp.827-28.
[5] See Blum and Heymann 2010.
[6] Reisman and Armstrong 2006, at pp.525-6 (noting the mimetic tendency of customary international law arguments).

authoritative *opinio juris*, notwithstanding claims of U.S. exceptionalism. From a policy perspective, this suggests prudential grounds for caution when operating at the edge of the law.

2. The Operations and Their Justifications

Although the complete details of how Osama bin Laden and Anwar al-Aulaqi met their demise may never be fully known, it is possible to piece together a composite account by drawing on press coverage, government legal briefs, and statements from the Obama Administration. The following narratives assume the accuracy of such public records, bearing in mind that much relevant information remains classified.

2.1. Operation Neptune Spear: Osama Bin Laden

It has been reported that, in the early hours of May 2, 2011, about two dozen Navy SEALs departed by helicopter from a base in Jalalabad, Afghanistan, and entered Pakistani sovereign territory.[7] The SEALs were part of the Naval Special Warfare Development Group ("DEVGRU") under the Joint Special Operations Command (JSOC), a subunified component of the U.S. Special Operations Command (USSOCOM) dedicated to conducting antiterrorism operations.[8] In two helicopters (MH-60 Black Hawks),[9] the team entered the garrison town of Abbottabad and approached a compound that had been under surveillance for months.[10] The original plan was for members of the team to rappel out of the helicopters and raid the compound from the roof.[11] The plan did not unroll as planned, however, when the high temperatures, tall security walls, and the thin air of the compound caused one helicopter to "settle with power" and crash.[12] The other helicopter landed, and the SEALs moved toward the buildings in the compound after blasting through several internal walls with C-4 explosives. Some accounts tell it that the team immediately took fire from in a peripheral building. The source was Abu Ahmed al-Kuwaiti, the courier who inadvertently revealed Bin Laden's whereabouts after a 10-year manhunt.[13] Other accounts suggest that the team was not fired upon until they entered the main house and confronted Bin Laden's son, Khalid, who was armed with an AK-47.[14] It now appears that these were the only shots fired against the Americans.[15]

Upon entering the structure where Bin Laden was thought to be residing, the SEAL team proceeded to the upper floors, killing Bin Laden's son on the way up.[16] Bin Laden was visually identified on an upper floor. Although reports originally suggested that Bin Laden had used one

[7] Schmidle 2011 (on an apparently "insider" account). See also New York Times 2011a; BBC News 2011.
[8] See generally Feickert 2011. Reports of the Bin Laden raid indicate that while the Pentagon implemented the operation, it was carried out under CIA authority. Ambinger 2011.
[9] It has been surmised that the Pentagon may have developed a stealth helicopter for such missions. Hennigan and Vartabedian 2011. See also Shalal-Esa 2011.
[10] Mazzetti 2011.
[11] BBC News 2011.
[12] Shalal-Esa 2011.
[13] Wilson, Whitlock and Branigan 2011.
[14] Schmidle 2011.
[15] Landler and Mazzetti 2011.
[16] New York Times 2011.

of his wives as a human shield,[17] later accounts suggested that she, her daughter, and/or another wife may have tried to position themselves in front of him or even rushed at the SEALs.[18] Versions of the story were also conflicting as to whether Bin Laden fired at the U.S. troops when he confronted them;[19] now it appears that he resisted capture,[20] or seemed ready to resist,[21] and that there were weapons within reach although he was unarmed.[22] One of the SEALs shot Bin Laden in the chest and then the head. All told, four other people were killed in the raid: the courier, Bin Laden's son Khalid, the courier's brother (who was armed), and the latter's wife (who was not).[23] One of Bin Laden's wives was later treated for a bullet wound in her leg.[24]

Accounts suggest that Bin Laden made no effort at surrender.[25] That said, some narratives have suggested that the order was made to kill not capture Bin Laden, perhaps due to the spectacle that would no doubt have ensued.[26] This view has been vociferously contradicted by official spokespersons, who insist that "consistent with the laws of war, bin Laden's surrender would have been accepted if feasible."[27]

Meanwhile, a rescue MH-47 Chinook helicopter was dispatched. The SEALs destroyed the downed helicopter and the troops departed, carrying Bin Laden's corpse and a voluminous amount of intelligence with them. After DNA testing confirmed Bin Laden's identity, his remains were given Islamic funeral rites and were wrapped in a burial shroud. After the Saudi government indicated that it did not want the body, Bin Laden's corpse was dumped into the Arabian Sea from the aircraft carrier, USS *Carl Vinson*.[28]

2.2. Anwar Al-Aulaqi

Al-Aulaqi, a dual U.S.-Yemeni citizen whose parents left the U.S. when he was seven, was an al Qaida cleric, ideologue, and propagandist.[29] Although once a seemingly moderate voice, Al-Aulaqi's lectures had increasingly been linked to attacks around the world, such as the violent rampage by Major Nidal Malik Hasan in Texas, and the attempted Northwest Airlines bombing by Umar Farouk Abdulmutallab, both in 2009.[30] Originally the editor of *Inspire*, al Qaida's jihadist magazine, al-Aulaqi was alleged to have increasingly assumed an operational role in al

[17] Wilson, Whitlock and Branigan 2011.
[18] Drogin, Parsons and Dilanian 2011.
[19] The White House Blog 2011 ("After a firefight, they killed Osama bin Laden and took custody of his body.").
[20] Drogin, Parsons and Dilanian 2011.
[21] Waraich 2011.
[22] Williams 2011.
[23] Worldwatch 2011.
[24] Wilson, Whitlock and Branigan 2011.
[25] Williams 2011 (quoting Attorney General Eric Holder to the effect that "'If he had attempted to surrender, I think we should obviously have accepted that, but there was no indication that he wanted to do that. And therefore his killing was appropriate.'").
[26] See Robertson 2011.
[27] White House Press Secretary 2011. See also Drogin, Parsons and Dilanian 2011; Brennan 2011.
[28] Drogin, Parsons and Dilanian 2011.
[29] New York Times 2011b.
[30] Mazzetti, Schmitt and Worth 2011.

Qaida in the Arabian Peninsula (AQAP)[31] by, for example, recruiting members, facilitating training camps, fundraising, and planning attacks on the U.S.[32]

Al-Aulaqi had been in U.S. sights for some time. It was reported that he had been placed on a list of individuals whom the Joint Special Operations Command, tasked with tracking suspected terrorists, was specifically authorized to kill.[33] This list is colloquially called the "kill or capture list."[34] Since at least April 2010, al-Aulaqi was on a separate list of suspected terrorists whom the CIA was authorized to kill.[35] The Treasury Department also included him on a list of Specially Designated Global Terrorists suspected of "supporting acts of terrorism and for acting for or on behalf of AQAP."[36] Pursuant to U.N. Security Council Resolution 1267, he was identified as an individual associated with al Qaida and thus subjected to a global asset freeze and travel ban.[37] The revelation that the National Security Council had authorized al-Aulaqi's killing provoked a lawsuit by al-Aulaqi's father and the American Civil Liberties Union (ACLU) seeking injunctive relief,[38] which failed on standing and political question grounds.[39]

Al-Aulaqi had apparently evaded drone attacks in December 2009 and May 2011.[40] He was finally killed in a remote area of Northern Yemen on September 30, 2011, by a Hellfire missile fired from a Remotely Piloted Vehicle (RPV) deployed from a base somewhere in the Arabian Peninsula. The drone was likely operated by the CIA, although some reports suggest involvement by JSOC.[41] Killed along with him was another U.S. citizen, Samir Khan, who also edited *Inspire*. There is no indication that the U.S. was aware of Khan's presence in the convoy in question, but his death has not been treated solely as collateral damage.[42] This was not the first such operation outside of Afghanistan or a recognized theater of war.[43] That distinction goes to the November 2002 drone attack in Yemen that killed another U.S. citizen, Kamal Derwish

[31] On January 19, 2010, Secretary of State Clinton designated AQAP as a Foreign Terrorist Organization pursuant to the Antiterrorism and Effective Death Penalty Act, 9 U.S.C. §1189.
[32] Shane 2010. See also *Al-Aulaqi*, Obama brief, *supra* n.3 at pp.1, 6, 21 (arguing that al-Aulaqi assumed an "operational leadership role" in AQAP); *Al Aulaqi v. Obama et al*, Unclassified Declaration in Support of Formal Claim of State Secrets Privilege by James R. Clapper, Director of National Intelligence, at paras.13-17 (Sept. 24, 2010), available at **http://www.fas.org/sgp/jud/statesec/aulaqi-clapper-092510.pdf**.
[33] Priest 2010.
[34] Hosenball 2011.
[35] Miller 2010. For a discussion of the legal and policy implications of generating secret "kill or capture" lists, particularly given the lack of transparency and accountability, see Alston 2011.
[36] Designation of Anwar Al-Aulaqi Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233, 43234 (July 23, 2010). See Fox News 2010.
[37] Security Council Resolution 1267, 15 October 1999, S/Res/1267, para.4.
[38] *Al-Aulaqi v. Obama*, Case 1:10-cv-01469, Complaint for Declaratory and Injunctive Relief (Aug. 30, 2010), available at **http://www.aclu.org/national-security/al-aulaqi-v-obama-complaint** [hereinafter '*Al-Aulaqi* Complaint'].
[39] *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010).
[40] Mazzetti, Schmitt and Worth 2011.
[41] Mazzetti, Schmitt and Worth 2011.
[42] Hosenball 2011. But see Finn 2011. Collateral damage is defined as "incidental loss of civilian life, injury to civilians and damage to civilian objects." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter 'API'], art 57(2) (a) (ii).
[43] The theater of war, also known as the area of operations, encompasses locations where actual military operations are taking place. Greenwood 2008, at para.53.

(a.k.a. Ahmed Hijazi). In that attack, CIA operatives based in Djibouti killed six alleged al Qaida members, including the individual then considered the head of al Qaida in Yemen.[44] These operations have continued. In October 2011, al-Aulaqi's teen-aged son, Abdul Rahman Al-Aulaqi (also an American citizen), and Ibrahim al-Banna, another AQAP media chief, were killed by a drone.[45]

2.3. Evolving Narratives and Appraisals

In the evolving narratives of what happened during these two incidents, an amalgam of different bodies of law, legal rules, and moral principles have been invoked. Official and unofficial statements by Obama Administration officials concerning these and related operations engage complex public international law principles concerned with: the legality of the sovereign use of force extraterritorially; the concept of combatant status and combat function within international humanitarian law (IHL); the principles of self-defense, distinction, and proportionality; and the applicability of human rights obligations extraterritorially. In these accounts, it is not clear wshether a single theory of legality is being advanced, or if there are multiple legal claims that provide alternative, or perhaps even mutually reinforcing, legal bases. Moreover, where multiple legal paradigms are invoked, there is a risk of taking the sugar without the salt: relying on permissive doctrinal elements while overlooking limitations or restrictions that exist to protect against excesses or abuse.

A primary articulated justification for both operations is "national self-defense."[46] The self-defense imperative operates to justify both the incursion into Pakistani territory without Pakistan's consent (assuming Yemen's consent to the presence of the drone in question) as well as the use of lethal force against the two men.[47] Even absent any territorial breach, self-defense has been invoked to provide a continuous targeting authority against individuals associated with al Qaida who pose a threat to the U.S. and its interests.[48] Appealing to self-defense as a public international law principle, however, requires a more lenient conception of what constitutes an imminent threat than would be acceptable under classic articulations of the doctrine. This doctrinal expansion is justified, according to the Administration, because "the threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts."[49] While self-defense has historically been cited in connection with attacks on hostile governments or military installations, invoking it in connection with these types of individualized operations outside of a law enforcement context is novel.

A separate rationale also appears in government statements: that both men were lawful military objectives according to the principle of distinction who were engaged in an armed conflict against the U.S. that is governed by IHL. In a blog post after the Bin Laden operation, State Department Legal Adviser Harold Koh stated,

[44] Abu Ali Al-Harithi had been associated with the attack on the USS *The Sullivans* and USS *Cole* in 2000 in Yemen. Derwish was suspected of being the ringleader of the Lackawanna Six terrorist cell. McManus 2003.
[45] Kasinof 2011.
[46] Brennan 2011. See also Koh 2010.
[47] Williams 2011.
[48] Brennan 2011. But in contrast, see Janin 2007, at p.98.
[49] Brennan 2011.

> Given bin Laden's unquestioned leadership position within al Qaeda and his clear continuing operational role, there can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda.[50]

The accounts of the Bin Laden mission also emphasize that the IHL principles of distinction and proportionality were strictly adhered to,[51] and that American lives were at risk.[52] This latter observation implies that the U.S. did not prioritize force protection over the principle of proportionality, which protects civilians from harm. This comment implicitly differentiates this operation from those involving the use of drones, such as the al-Aulaqi operation, which lack the element of reciprocity of risk.

Other statements, however, go beyond self-defense and the law of armed conflict and sound more of revenge and reprisal.[53] For example, in the first appearance by an Obama administration Cabinet official following the Bin Laden operation, Attorney General Eric Holder stated that Bin Laden:

> was the head of al-Qaida, an organization that had conducted the attacks of September 11th. He admitted his involvement and he indicated that he would not be taken alive.[54]

President Obama himself simply noted that "justice has been done."[55]

Fewer official details have emerged about the al-Aulaqi operation, as it is still deemed a covert action. A government spokesperson did describe al-Aulaqi as a leader of, and recruiter for, AQAP, which has been deemed a threat to the U.S.[56] The Justice Department reportedly produced a detailed memorandum *ex ante* setting forth the legal bases for placing al-Aulaqi on the JSOC list of potential targets, but this reasoning has not been publicly released (or acknowledged).[57] The memo apparently grapples with the question of whether the law-of-war rationale so prominent in the Bin Laden case is equally applicable when dealing with someone affiliated with an organization formed well after 9/11 with uncertain connections to al Qaida proper.[58] The fact that al-Aulaqi was a U.S. citizen evidently problematized, but did not alter, the memo's ultimate conclusion of legality.[59]

In the most comprehensive articulation of the Obama Administration's counterterrorism policy to date, John Brennan, Assistant to the President for Homeland Security and Counterterrorism, reiterated that the U.S. was engaged in a global armed conflict with al Qaida that is not restricted

[50] Koh 2011.
[51] Williams 2011
[52] White House Press Secretary 2011.
[53] Amnesty International 2011.
[54] Williams 2011.
[55] White House Blog 2011.
[56] Tapper 2011.
[57] See Finn 2011. As this article was going to press, it was announced that the Obama Administration would reveal publicly the legal reasoning behind the decision to kill al-Aulaqi. See Klaidman (2012).
[58] Cole 2011.
[59] Johnson 2011.

to "hot" battlefields, like Afghanistan.[60] He emphasized that the "Administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the U.S., whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of al-Qa'ida and its associated forces."[61] This statement embodies twin justifications for resorting to lethal force—national defense and the IHL principle of distinction. It is unclear if these are alternative, or mutually reinforcing rationales, for such operations.[62] If the killings are lawful under IHL, no separate self-defense rationale seems necessary, except to justify the breach of Pakistani territory.[63] Indeed, if IHL is applicable, it is unclear if a self-defense rationale remains viable or if IHL targeting rules occupy the field under a theory of *lex specialis* just as international human rights may be subordinated to IHL in situations of armed conflict. If IHL is not applicable, the two individuals retained the full force of their international human rights not to be arbitrarily killed.

Notwithstanding these arguments in favor of the operations' legality, the attacks raised distinct international law concerns from other perspectives.[64] Some voices from the right and left—including those from major civil rights organizations—invoked international human rights law exclusively and went so far as to characterize the operations as extrajudicial killings[65] or targeted assassinations.[66] Indeed, Christof Heyns, the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, and Martin Sheinin, the then-Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, requested more details about the Bin Laden operation. In particular, they sought clarification about whether capture was genuinely contemplated in order to address questions about whether the attack was legally justifiable and consistent with the United States' international human rights obligations.[67] The al-Aulaqi killing has raised even more dissension in light of his U.S. citizenship, the lack of certainty about his role in al Qaida and the group's links to AQAP, and the loose nexus between the operation and any extant armed conflict.[68] Heyns in particular has been quoted as saying, "the current use of drones and raids into countries where there is not a recognised armed conflict to kill an opponent, such as in Pakistan or Yemen, is highly problematic."[69]

Although academics and human rights organizations voiced these concerns, neither operation generated full-throated opprobrium from other states.[70] Several legal and non-legal explanations for this apparent sovereign acceptance (or at least acquiescence) suggest themselves. These

[60] Brennan 2011.
[61] Brennan 2011.
[62] Koh 2010 ("[S]ome have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes unlawful extrajudicial killing. But a state that is engaged in armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force.").
[63] Brennan in his Harvard speech reasoned that, "[b]ecause we are engaged in an armed conflict with al-Qa'ida, the US takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time." Brennan 2011.
[64] See Lewis 2011.
[65] Cohn 2011.
[66] Centre for Constitutional Rights 2011.
[67] UN Office of the High Commissioner for Human Rights (OHCHR) – Geneva 2011.
[68] Ito 2011.
[69] OHCHR – New York 2011.
[70] See Wikipedia 2011 (noting that only Hamas, the Taliban, and Venezuela, publicly objected to the killing). See also Amnesty International 2011b.

include: the realist recognition of the United States' position in the world as a global superpower, the feeling of many that both operations reached desirable outcomes, and the attitude that there may be certain individuals whose conduct is so heinous that they are—in a sense—outside the law.[71] Government elites may feel these actions are either legal, or—if not legal—then legitimate.[72] We may never know, however, whether U.S. officials received a diplomatic scolding—or more congratulations—outside the public eye.[73] Subtle public references, however, suggest that not all of the United States' actions have garnered unwavering support from other nations, even from the country's closest allies. The former Legal Adviser of the U.K. Foreign and Commonwealth Office has, for example, written that the U.S. "sees the conflict against Al Qaeda as without geographic limit…. Key allies see it differently, as a conflict geographically limited to 'hot battlefields.'"[74] In any case, there can be no doubt that the complexity of the international legal questions raised, and the persistent uncertainty about the relevant law, contributed to the muting of potential critical responses. It is to these issues that I now turn.

3. Adherence to the *Jus ad Bellum*

Turning to the operative international law, two bodies of public international law directly regulate a state's use of armed force: the *jus ad bellum* and *jus in bello*, which govern the right to use force and the type and degree of force used in an armed conflict, respectively. The consequences of violating the *jus ad bellum* are different than those of violating the *jus in bello*. The former protects sovereign values, and violations for the moment give rise only to state responsibility.[75] The latter protects individuals and may lead to individual responsibility in addition to state responsibility.

Starting with the *jus ad bellum*, both operations prompt a preliminary inquiry into the question of whether the U.S. was entitled—under international law and domestic law—to employ force in Pakistan and Yemen, two sovereign countries with which the U.S. is not at war. While regulating the use of force is a central feature of international law, elements of U.S. domestic law—including the 1973 War Powers Resolution,[76] the 2001 Authorization to Use Force,[77] and other constitutional and statutory provisions allocating the country's war powers—are also authoritative.

As discussed below, the *jus ad bellum* provokes a more searching inquiry with respect to the Bin Laden operation, given the apparent lack of Pakistani consent to the SEALs' incursion. By contrast, the al-Aulaqi operation appears to have had the benefit of Yemen's consent and perhaps its involvement. As such, the U.N. Charter-based *jus ad bellum* is largely silent in this latter

[71] Ratner 2002.
[72] Roberts 2008.
[73] In response to the Bin Laden operation, Pakistan insisted that an air base within Pakistan be vacated, although it later relented. Masood 2011.
[74] Bethlehem 2011.
[75] This will change once the International Criminal Court can exercise jurisdiction over the crime of aggression.
[76] 18 U.S.C. §§ 1541-1548.
[77] Authorization to Use Military Force, Public Law 107-40, 115 Stat. 224 (Sept. 18, 2001).

context.[78] By contrast, one reaches crisscrossing conclusions with respect to the legality of the operation under domestic law. While the Bin Laden operation seems to fall squarely within AUMF enacted following the September 11th attacks, the al-Aulaqi operation has a more uncertain domestic-law footing. Even assuming no violation of either territorial state's sovereignty, the *jus ad bellum* provides an uncertain justification for the use of deadly force against these two men absent a more imminent threat.

3.1. International Law Aspects of the *Jus Ad Bellum*

The U.N. Charter framework dictates that Article 2(4)'s use of force prohibition is an obligation *erga omnes*. The threat of transnational terrorism, however, has given rise to security imperatives—and concomitant legal arguments—that strain the classic *jus ad bellum*. This section recaps the basic tenets of this body of law and evaluates several theories that have been, or may be, employed to justify the United States' uses of force in these instances, including consent, self-defense, and a state of necessity.[79] Although a self-defense rationale is ultimately the most defensible *jus-ad-bellum* justification for the breach of Pakistan's territorial integrity occasioned by the Bin Laden operation, it is not unassailable. By contrast, consent provides an easy answer to the question of the legality of the American incursion into Yemen. A free-standing self-defense doctrine, independent of any territorial breach, also offers a justification for both killings, although the availability of this defense as articulated remains open to debate given the standard formulation of the doctrine.

3.1.1. Consent

Article 2(4) is not implicated where the territorial state consents to foreign intervention.[80] There is little indication that Pakistan was aware of the Bin Laden operation, let alone that it consented to it. This lack of consent potentially distinguishes the Bin Laden operation from the so-called "drone wars"[81] in Waziristan and the other Federally Administered Tribal Areas (FATA) in northwest Pakistan. These latter operations likely enjoy at least some tacit diplomatic acquiescence, even though Pakistani officials occasionally publicly criticize them for domestic political consumption.[82] Consent to action in FATA would not necessarily extend to the Bin Laden raid, however.[83] All that said, we may never know for sure whether Pakistan had at some time offered its open-ended consent to an operation of this kind notwithstanding the domestic

[78] "[W]hen the use of force is authorized by the territorial state (in accordance with the limits pertaining to 'intervention by invitation,' the *Ius ad Bellum* does not come into play. … For this reason, the US strike against a number of Al Qaeda suspects in Yemen in November 2002, and carried out in cooperation with Yemeni authorities, could not be justified on the basis of Article 51 UN Charter." Ruys 2010, at p.377 n.39. See Naert 2004, at p.151.

[79] One can imagine a doctrine of hot pursuit also being invoked, given that Bin Laden was subject to a ten-year manhunt, but the facts do not bear this theory out. See Ago 1980, at §56 (suggesting that the principle of necessity may countenance "incursions into foreign territory … in pursuit of an armed band or gang of criminals who had crossed the frontier and perhaps had their basis in the foreign country."); Beehner 2007.

[80] Article 20, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), available at **http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf** [hereinafter 'ILC Draft Articles'].

[81] Wall Street Journal – Editorial 2011. Bergen and Tiedemann 2009; Mayer 2009.

[82] Blank 2010, at p.183; Shane and Schmitt 2010.

[83] See *Armed Activities on the Territory of the Congo* (DRC v. Uganda) (2005) ICJ Rep. 168, paras.52-53 [hereinafter '*Armed Activities*'].

unpalatability of such an authorization. In addition, it could be argued that Pakistan consented to the operation *ex post*, thus forgoing any claims based on the territorial breach.[84] In any case, the ensuing analysis assumes a lack of Pakistani consent at the time of the operation.

The viability of a consent defense to a breach of Article 2(4) is a major distinction between the Bin Laden and al-Aulaqi attacks, the latter of which was implemented with Yemen's consent and, to a certain extent, assistance.[85] The only potential impediment to this conclusion turns on whether any offer of consent from the territorial state must be explicit and public to satisfy Article 2(4). This position is not strongly supported in the law; even if good policy, it may also be unreasonable.[86] While Yemen can consent to another state entering its territory, however, it cannot consent to that state violating IHL or human rights law while there. Thus, some lawful justification for the use of deadly force must still be identified.

3.1.2. Self-Defense

The doctrine of self-defense appears in multiple incarnations in this analysis. The first is as a U.N. Charter-based exception to Article 2(4)'s principle of sovereign inviolability. This permutation of self-defense governs inter-state relations and has been employed to justify the violation of Pakistani territory and Article 2(4) in light of the threat posed by Bin Laden and his organization. A second form of the defense, not likely applicable under the facts as we know them, derives from standard criminal law doctrine and operates to justify an individual's use of deadly force in a face-to-face confrontation with another individual posing a distinct threat to the actor or to third parties.[87] A third version is the most unsettled in the law. This variant operates as a free-standing justification for a nation to employ deadly force against particular individuals who pose a national threat, but not necessarily an immediate threat at the time they are targeted. As articulated, this justification for deadly force exists even absent any territorial breach, state of armed conflict, or imminent threat as required in the criminal law context and provides continuous targeting authority with respect to individuals deemed dangerous to a particular nation. The two relevant versions of the self-defense doctrine will be considered in turn.

3.1.2.1. Self-Defense as a Defense to the Article 2(4) Breach

Absent Pakistan's consent, the Bin Laden raid resulted in a *prima facie* breach of that country's sovereignty within the meaning of Article 2(4) of the Charter. The primary argument advanced to justify this use of force is that the U.S. was exercising its inherent right—and sovereign duty—of self-defense,[88] a codified exception to the general prohibition on the use of force in the U.N. Charter.[89] The Charter-based theory of self-defense is that since at least September 11, if not earlier, the U.S. has been subjected to a continuous armed attack and an ongoing risk of further attacks from al Qaida, with Bin Laden at the helm. This risk of future attacks is cited to

[84] O'Connell 2011.
[85] Indeed, Yemen apparently assisted with identifying al-Aulaqi's remains. Mazzetti 2011.
[86] Chesney 2011.
[87] Corn and Jensen 2008, at pp.813-15 (discussing standing rules of engagement authorizing the use of force in self-defense in war and peacetime conditions). See Chairman of the Joint Chiefs of Staff 2005, at p.82.
[88] Murphy 2009, at p.123.
[89] Article 51 states "Nothing in this Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."

justify the incursion into Pakistani territory. Notwithstanding this apparent Charter-based justification, a number of legal and factual hurdles exist to a smooth application of established self-defense doctrine in these circumstances.

For one, Article 51 by its terms is triggered by the commission of an "armed attack." Although the precise definition of "armed attack" remains the subject of dispute,[90] there was virtual international unanimity that the attacks of September 11th satisfied any necessary gravity threshold (from the perspective of scale and effect) to constitute such an attack. There is no precise formula for evaluating the temporal relationship and the degree of immediacy between the armed attack and the defensive response. At the moment, however, these tragic events might be deemed too long-passed to provide the predicate legal foundation for the operation under consideration absent some theory of extended or open-ended self-defense.[91]

It may be possible to accumulate effectuated and attempted attacks (starting with the embassy bombings through the failed Christmas bombing) against the U.S. both prior and subsequent to September 11th to justify a sustained invocation of self-defense. According to this so-called pinprick theory, such a chain of events indicates a strong likelihood of future attacks and gives rise to a potentially indefinite, but certainly protracted, right to engage in defensive action,[92] even when no particular attack is in progress that would, on its own, support a right to respond.[93] A state might then maintain a defensive response for some time in order to neutralize the ongoing threat. While it is possible to identify multiple armed attacks against the U.S. emanating from al Qaida proper, it is harder to do so with respect to AQAP if that is the relevant entity for analyzing the Al-Aulaqi operation. Although certain attempted attacks have been publicly attributed to AQAP, it remains uncertain whether any one act, or the acts taken together, has reached the necessary intensity to constitute an "armed attack" against the U.S. within the meaning of Article 51.

It is widely held that, notwithstanding the textual formulation of Article 51, international law continues to recognize some notion of anticipatory (as opposed to reactive) self-defense, such that a state need not await the launching of an attack in order to respond defensively.[94] Historically, as articulated in the exchange of notes generated in connection with the 1837 *Caroline* incident, any notion of preemptive self-defense required proof that the attack be

[90] It is clear that an armed attack is something short of a full-scale armed conflict or an act of aggression as envisioned by G.A. Resolution 3314, which the General Assembly promulgated to guide the Security Council in applying Article 39 of the Charter. The ICJ has opined that Article 2(4) and Article 51 are not co-extensive, which is to say not every act that violates Article 2(4) necessarily constitutes an "armed attack" that would trigger the inherent right of self-defense. See, e.g., *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. USA) (Merits) (1986) ICJ Rep. 14, paras.191, 195 [hereinafter '*Nicaragua*']; *Case Concerning Oil Platforms* (Islamic Republic of Iran v. USA) (2003) ICJ Rep. 161, para.64 [hereinafter '*Oil Platforms*'].

[91] *Nicaragua*, *supra* n.90, at para.237 (noting that U.S. response "continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated."). By contrast, see Murphy 2009, at p.124.

[92] Blum 1976, at p.233. Indeed, the U.S. invoked this theory to justify its attacks on Libya in 1986 following the bombing of a German discotheque frequented by U.S. service members. Ruys 2010, at p.171 n.228.

[93] On the accumulation of events doctrine see, for instance, Ago 1980, at p.70; Tams, at pp.388-90; and *Armed Activities*, *supra* n.83, at para.146.

[94] See generally Van den Hole 2003 arguing in favor of the doctrine; but see Ruys 2010, at pp.258-9 arguing that the Charter modified prior customary international law in this area.

imminent, such that the defensive imperative is "instant, overwhelming and leaving no choice of means and no moment for deliberation."[95] By this formulation, a state enjoys no privilege to act in the face of mere threats, remote risks, or inchoate dangers.[96]

This high barrier to action remains controversial and would render unlawful many efforts at anticipatory self-defense. The so-called Bush Doctrine, embodied in the President's 2002 National Security Strategy, endeavored to augment the right of anticipatory self-defense by relaxing the immediacy standard to allow for preventative attacks where there is a serious threat to American security but no concrete attack in progress.[97] Although compelling and influential,[98] it is doubtful whether this approach has been fully accepted by other members of the international community[99] such that it can be said with confidence that a new customary norm has developed.[100] Nonetheless, a self-defense rationale for the use of force in Pakistan requires the acceptance of some notion of anticipatory—indeed preventative—self-defense. This is because there is no suggestion that the U.S. was aware of any impending attacks being orchestrated by Bin Laden, although intelligence gleaned from seized materials suggests that future attacks were indeed contemplated.[101]

The risk of relaxing the immediacy requirement is that the self-defense exception could be invoked to mask unlawful aggressive acts or punitive measures taken in reprisal or retaliation. Although there are sources of international law that categorically prohibit reprisals,[102] military operations such as Operation Infinite Reach launched in response to the 1998 embassy bombings may suggest enduring support, and a continuing utility, for such a concept.[103] This is especially compelling given the difficulty of distinguishing between self-help actions taken in reprisal and those taken in genuine self-defense.

Another challenge to positioning the raid within the archetypical self-defense framework is that, by some accounts, the right of self-defense applies only in response to an armed attack by another sovereign entity, even though no such limitation appears in Article 51 itself. The International Court of Justice has adopted this position, even following the attacks of September 11th.[104] By this rationale, measures in self-defense may only be exercised against the state legally responsible for the initial attack. Because Pakistan did not engage in an armed attack against the

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[95] Letter from Daniel Webster to Mr. Fox (April 24, 1841), available in Webster and Everett 1853.
[96] See generally O'Connell 2002.
[97] The White House 2002, National Security Strategy of the US of America (Sept. 2002), available at **http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/**. See generally Murphy 2003.
[98] Reisman and Armstrong 2006.
[99] See, e.g., Paul 2004. But see UN Secretary General, High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, 2 December 2004, A/59/565, at p.54 available at **http://www.un.org/secureworld/report.pdf**.
[100] O'Connell 2002, at pp.12-13.
[101] Mazzetti and Shane 2011.
[102] UN General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations. General Assembly Resolution 2625 (XXV), 24 October 1970, A/2625.
[103] For support for the lawfulness of reprisals under international law, see Bowett 1972, at p.233, and O'Brien 1990.
[104] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ Rep. 136, para.139 [hereinafter '*Legal Consequences*'] and *Armed Activities*, *supra* n.83, at para.147. But see Separate Opinion of Judge Higgins, *Legal Consequences*, at para.33.

U.S., and no one is arguing that Bin Laden's actions may be attributed to that country, Article 51 would thus be inapplicable to justify the United States' use of force on Pakistani territory. There are indications, however, that the classically statist interpretation of Article 51 has given way to a more expansive and realistic view in light of the increasing threat posed by non-state actors in international relations.[105] Both the Security Council[106] and the North Atlantic Treaty Alliance (NATO)[107] invoked the right of self-defense following the attacks of September 11th, recognizing a more fulsome range of potential sovereign threats. This suggests that the Court's majority approach fails to fully correspond with state practice.[108] This may also signal either the emergence of a new custom[109] or the survival or revival of pre-Charter customary law.[110]

At a minimum, the right to use force in self-defense against non-state actors may extend to situations in which the target state is advertently or even inadvertently harboring militants,[111] given that the due diligence principle obliges states to prevent their territory from being used to the detriment of other states.[112] This obligation—which finds affinity in doctrines of neutrality originating in the law of armed conflict[113]—exists even when the acts of such non-state actors cannot be formally attributed to the territorial state under the *Nicaragua* effective control threshold[114] or other tests of state responsibility.[115] As former Secretary of State George Shultz argued, this position is based on the proposition that international law does not prohibit a state from "attacking [terrorists] on the soil of other nations … or from using force against States that support, train, and harbor terrorists or guerrillas."[116] Similar operations in the past, however, have provoked condemnation as violations of the territorial state's sovereignty. For example, in 1988, the Security Council considered Israel's "assassination" in Tunisia of an alleged Palestine Liberation Organization leader, Khalil El Wazir, to be an act of aggression[117]—one of the few instances in which the Council employed that term to describe the unlawful use of force by a

[105] Murphy 2002; Stahn 2003.
[106] S/RES/1368, 12 September 2001. See also S/PV.5489 (July 14, 2006) and S/PV.5493 (July 21, 2006).
[107] Statement by NATO Secretary-General, Lord Robertson (Oct. 2, 2001), available at **http://www.nato.int/docu/speech/2001/s011002a.htm.** The European Union also expressed support for Operation Enduring Freedom as an exercise of self-defense. Letter from the Representative of Belgium to the Secretary General, S/2001/967 (Oct. 8, 2001).
[108] See, e.g., *Armed Activities*, *supra* n.83, Separate Opinion of Judge Simma at paras.10-12.
[109] Ruys 2010, at p.455. Some scholars have adopted a middle position to the effect that a right of self-defense exists only against large-scale attacks by non-state actors. Wilmshurst 2005.
[110] Janin 2007, at p.89.
[111] Gray 2004, at pp.161, 165-167, 172-175.
[112] *Corfu Channel Case (United Kingdom v. Albania)*, 1949 ICJ Rep. 4, at p.22.
[113] Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 1907 (Hague V), Oct. 18, 1907, 36 Stat. 2310. The principle of neutrality dictates that no hostilities are allowed on the territory of neutral states and that neutral states must not offer an advantage to any side in the conflict.
[114] *Nicaragua*, *supra* n.90, at para.115; Ratner 2002, at p.908.
[115] For example, Article 8 of the ILC's Principle of State Responsibility states that it is appropriate to attribute private action to a state only if non-state actors are "in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." ILC Draft Articles, *supra* n.80.
[116] See U.S. Secretary of State George Shultz 1986. The Shultz Doctrine was at play in Operation Infinite Reach, which involved attacks by the US on Sudan and Afghanistan following the 1998 embassy bombings. See UN Doc. S/1998/780 (Aug. 20, 1998).
[117] Security Council Resolution 611, 25 April 1988, S/RES/611. On the assassination, for which Israel did not claim responsibility, see Smolowe 1988; O'Brien 1990.

state.[118] Likewise, states objected to Operation Phoenix, launched by Colombia into Ecuador to pursue Raul Reyes and other Revolutionary Armed Forces of Colombia guerrillas, although ultimately Colombia was not sanctioned in any meaningful way for its actions.[119] In a post-9/11 world, however, the international community (or at least powerful states) may evince greater tolerance for states taking defensive action within the territories of other states that are unwilling or unable to repress irregular fighters in their midst, even if the territorial state could not be held legally responsible for the acts of those militants. The theory is that such states forfeit their right to noninterference when they fail to deal with such transnational security threats.[120]

The case at bar presents some special considerations because the government of Pakistan has been under a continuing Security Council-imposed duty[121] since before September 11th to refrain from, and ensure that its nationals refrain from, harboring or assisting in any way Bin Laden and those who associate with him.[122] The most robust obligations in this regard are contained in Resolution 1373, which obliged all states to "deny safe haven to those who finance, plan, support, or commit terrorist acts" and "prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other states or their citizens."[123] Indeed, one wonders how Bin Laden's whereabouts in a fortified compound in the vicinity of an elite military academy for the past five years could possibly have been unknown to the Pakistani government.[124] This suggests that elements of the Pakistani government are incompetent, implicated, or woefully ignorant about events in their own territory. Regardless of which portrait is accurate, Pakistan's unwillingness or inability to act against Bin Laden offers a partial justification for the United States' resort to defensive self-help in its territory.[125]

By some accounts, if the territorial state is making a good faith effort to address the presence of armed groups in its midst, there is no right to use force in self-defense.[126] Others argue that the right to intervene with force exists only so long as some level of prior notice to, and consultation

[118] Van Schaack 2011b, at pp.565-7.
[119] When Colombia invoked the doctrine of self-defense (and hot pursuit) in connection with these killings, neighbouring states denounced the action as a violation of Ecuador's sovereignty, notwithstanding Ecuador's lack of control over its porous border region. Organization of American States, Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of a Commission, Doc. OEA/Ser.G, CP.Res.930 (1632/08) (March 5, 2008), available at **http://www.oas.org/council/resolutions/res930.asp**. Nagle 2008, at pp.360-1; Reinold 2011, at p.274.
[120] Reinold 2011, at p.285.
[121] See S/RES/1363 (30 July 2001) and S/RES/1368 (12 September 2001).
[122] See S/RES/1566 (8 October 2004), S/RES/1617 (29 July 2005), S/RES/1735 (22 December 2006) and S/RES/1822 (30 June 2008).
[123] See S/RES/1373 (28 September 2001).
[124] It has been suggested that some elements of the Pakistani military or security services may have known of Bin Laden's existence. Brulliard and DeYoung 2011; Perlez and Rhode 2011. But see *Armed Activities*, *supra* n.83, at para.300 (finding the DRC had not violated its due diligence duties vis-à-vis rebels operating in the eastern regions of the country given the remoteness of the area and absence of a central government presence there).
[125] Brennan 2011.
[126] O'Connell 2009; Murphy 2009, at p.129 (arguing that "the unilateral use of force to strike at Al Qaeda in Pakistan in response to the 9/11 attacks would be found disproportionate, in that the spatial and temporal displacement of the threat of Al Qaeda to a different country introduces competing values, to wit the territorial integrity and political independence of a country that did not knowingly support, sponsor, or tolerate Al Qaeda in the years preceding 9/11.").

with, the implicated territorial state is undertaken absent evidence of collusion.[127] According to Abe Sofaer, a former State Department Legal Adviser:

> While the U.S. regards attacks on terrorists being protected in the sovereign territory of other States as potentially justifiable when undertaken in self-defense, a State's ability to establish the legality of such an action depends on its willingness openly to accept responsibility for the attack, to explain the basis for its action, and to demonstrate that reasonable efforts were made prior to the attack to convince the State whose territorial sovereignty was violated to prevent the offender's unlawful activities from occurring.[128]

In addition, assuming it applies in one of the forms discussed above, the inherent right of sovereign self-defense is limited as a matter of customary international law by the twin principles of necessity and proportionality.[129] These principles place a check on each use of force after the outbreak of armed violence.[130] The principle of necessity mandates that any response in self-defense be strictly and objectively essential to protect core interests of the defending state and be a last resort after more peaceful means (such as diplomacy) are exhausted or deemed futile.[131] Proportionality in the *jus ad bellum* requires that any response to an armed attack be calibrated to repel the original attack and prevent future attacks.[132] Although no strict one-to-one force ratio is required, the operation as a whole should be proportionate to the original transgression in terms of scale of the response, the targets chosen, type and degree of force employed, and the results to be achieved.[133] The principle of proportionality might thus bar a state from widening the scope of the conflict, for example to new territories.[134] To the extent that non-state actors are the source of the threat, any right to engage in acts in self-defense would normally be confined to terrorist targets as contrasted to the infrastructure or installations of the territorial state,[135] except potentially in situations in which there is a high degree of symbiosis between the group and the host state.[136]

As a final constraint on invoking self-defense, Article 51 contains several procedural requirements, namely notification to the Security Council. These were adhered to in the

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[127] Lubell 2010, at p.46.
[128] Sofaer 1989, at p.121.
[129] *Nicaragua*, *supra* n.90, at para.194; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996) I.C.J. Rep. 9, para.41 [hereinafter '*Nuclear Weapons*']; Naert 2004, at pp.147, 155.
[130] Greenwood 2003, at p.16.
[131] *Oil Platforms*, *supra* n.90, paras.73 and 76 (noting that the U.S. did not complain to Iran about military activities on the platforms before the attacks).
[132] The principle of proportionality is also a feature of IHL, although the concept plays a different role in each paradigm. Nonetheless, the two concepts are often conflated in evaluations of a state's resort to forcible measures. Within IHL, the proportionality unit of analysis is the particular attack, rather than the military response as a whole. Each attack necessitates a proportionality analysis that measures the level and kind of force used against the risk to civilians, so-called collateral damage, in light of the military objectives to be achieved. Moussa 2008, at p.977. The *jus ad bellum* do not address the risk to non-combatants directly; this is rather the province of other sources of law, such as international human rights law.
[133] *Oil Platforms*, *supra* n.90, at para.77.
[134] *Armed Activities*, *supra* n.83, at para.147; Greenwood 2003, at p.17.
[135] Paust 2002, at p.540.
[136] Stahn 2002, at pp.225-6.

immediate aftermath of 9/11, although not since.[137] These requirements are not generally deemed an absolute precondition for invoking the defense, although they are relevant to evaluating the authenticity of a state's claim of self-defense.[138]

Any requirement to cooperate with the host state was clearly not satisfied in the Bin Laden killing.[139] Accounts indicate that although the U.S. contemplated involving Pakistani authorities in the operation, it ultimately resolved to act unilaterally.[140] It is clear, however, that little to no harm was done to Pakistani territory, which speaks to proportionality of response. In both cases, targeting a particular individual is a smaller-scale response than might be tolerated in light of the risks posed to the U.S. by al Qaida writ large and even by AQAP. In terms of necessity, decapitating a non-state group may result in its dissolution, disbanding, or considerable weakening, especially when the group is dominated by a messianic figure such as Bin Laden or al-Aulaqi.[141] Indeed, the Bin Laden plan was surgical by design to avoid confrontation with Pakistani authorities and damage to public infrastructure.[142] That said, the U.S. government has admitted that there were contingency plans in place in the event that the team was confronted by Pakistani military or police forces and had to fight their way out of the country.[143] Nonetheless, because there was no clear predicate armed attack and no imminent threat in the scenarios under consideration, neither operation fully complies with standard self-defense doctrine.

3.1.2.2. A Free-Standing Right of Self-Defense

The doctrine of self-defense has historically applied to national decisions to deploy military might on a macro scale against a threat to the nation. In the two scenarios under review, the unit of analysis is much smaller—the target is a single dangerous individual rather than a foreign regime or even a military asset or installation. This micro-level self-defense rationale does not seek to justify a violation of Article 2(4) by virtue of the use of force by a state in another sovereign's territory. Nor does it seek to justify individual action (i.e., by any one SEAL member) in the face of an imminent personal threat. Rather, the second relevant self-defense rationale is more in the nature of a hybrid of the classic *jus ad bellum* and criminal law versions of self-defense.[144] It also finds affinity in status-based targeting doctrines contained in IHL, although it is applied in situations outside of armed conflict when IHL is silent.

Presumably, this rationale is still bottomed on Article 51, which articulates a right to engage in defensive action absent any actual or anticipated breach of Article 2(4). If so, however, the textual necessity of a predicate armed attack and the debate over anticipatory self-defense remain paramount. All told, it is difficult to rely upon Article 51 for a continuous targeting authority

[137] Letter Dated 7 October 2001 from the Permanent Representative of the US of American to the United Nations addressed to the President of the Security Council, S/2001/946 (Oct. 7, 2001) [hereinafter 'U.S. Letter to the Security Council']. See also *Oil Platforms*, *supra* n.90, at paras.37, 48.
[138] *Armed Activities*, *supra* n.83, at para.145.
[139] But see Deeks 2011 (noting that the U.S. was absolved of the need to consult with Pakistan given the risk that Bin Laden would be tipped off and the limitations of Pakistan's capacity to respond appropriately in any case).
[140] Calabresi 2011.
[141] Ruys 2010, at p.377.
[142] Calabresi 2011 (noting that airstrikes were ruled out for fear of collateral damage).
[143] Walsh and Jones 2011.
[144] Obama Brief, *supra* n.3, at pp.4-5.

against individuals posing a more diffuse threat to the nation. If the Article 51-based requirements for self-defense cannot be met, this rationale must find expression in customary international law that either pre-dates or coexists alongside the U.N. Charter. The most applicable state practice may be the Israeli action in Tunisia, which was not well-received internationally.[145] That said, the Tunisia episode was pre-9/11 and did not involve an individual of Bin Laden's infamy, so a blanket rule may no longer be valid.

Assuming such a continuous targeting authority exists, necessity remains to be established: that each man posed a sufficient enough threat to justify the use of lethal force and that there were no other operational means to suppress this threat. Certainly, if Bin Laden still had operational or financial control over al Qaida activities, his killing would eliminate a serious and continuing threat to the U.S., but that does not fully answer the question of necessity. The targetability of al-Aulaqi under such a self-defense rationale may be more contestable. This is where it becomes important to establish his actions and role beyond the vituperative propaganda that is available in the public record, unless such calls to jihad constitute a sufficient threat to the U.S.—a proposition that is difficult to endorse in light of the United States' constitutional devotion to free speech principles. However, the U.S. has never had to fully establish al-Aulaqi's role in AQAP or provide solid evidence of his conduct beyond his ideological rants. In either case, invoking a self-defense rationale for the killing of a single individual is very far from the original paradigm, which is addressed to neutralizing a more macro sovereign threat. Indeed, it operates more like a conflation of *jus ad bellum* self-defense concepts with *jus in bello* targeting rules.

3.1.3. A State of Necessity

A final argument that might have been invoked to preclude any wrongfulness of the United States' conduct is the existence of a general state of necessity not presenting a case of self-defense *stricto sensu*.[146] The freeform principle of necessity finds expression in Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts; it also finds resonance in general principles of criminal law.[147] The Articles state that necessity may not be invoked unless the otherwise unlawful act:

> (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.[148]

This defense cannot, however, be invoked to justify or excuse the impairment of an essential interest of another state or to breach a peremptory rule of international law,[149] such as Article 2(4) of the Charter,[150] limitations on the use of deadly force in IHL, or human rights law.[151]

[145] See supra text accompanying note 117.
[146] See generally Boed 2000.
[147] Model Penal Code, § 3.02(1).
[148] Article 35, ILC Draft Articles, *supra* n.80. Ago 1980, at pp.14-51.
[149] Article 26, ILC Draft Articles, *supra* n.80.

In his discussion of the circumstances negating the wrongfulness of a state's conduct, Roberto Ago as the ILC's Special Rapporteur on State Responsibility opined that a state of necessity might, as a standalone imperative, preclude the wrongfulness of limited (in terms of duration and the means employed) sorties into sovereign territory falling short of acts of aggression. Ago specifically mentions the example of "incursions into foreign territory to forestall harmful operations by an armed groups which was preparing to attack the territory of the State."[152] The ICJ has made clear, however, that although such a defense may exist in customary international law, it is circumscribed such that it may only be invoked on an "exceptional basis" and under "strictly confined conditions."[153] In particular, the impugned conduct must be responsive to an imminent peril and be the sole means available to the responding state to safeguard an essential interest against such a danger.[154]

The high threshold for invoking the defense as formulated by the ILC and the ICJ means that it is difficult to apply to the incidents under consideration—which involve territorial intervention and the application of deadly force—notwithstanding that Bin Laden and al-Aulaqi had eluded capture in the past and that Pakistan and Yemen are undependable allies. A more micro application of the doctrine of necessity may, however, be useful in tandem with the self-defense doctrine to justify not informing Pakistan of the impending raid and other departures from the strict requirements of standard self-defense doctrine.

3.2. Domestic Law Aspects of the *Jus Ad Bellum*

Although the two operations prompt an immediate consideration of the international *jus ad bellum*, domestic law is implicated as well. The attack on Bin Laden had unequivocal authorization under U.S. law in the form of the 2001 AUMF, which remains extant.[155] The AUMF, whose preamble invokes the right of self-defense,[156] authorized the President to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001...[157]

In this way, the AUMF explicitly sanctions uses of force against the plotters of the attacks of September 11th and was drafted with Bin Laden in mind. Indeed, the operation arguably

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[150] See UN General Assembly, Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, 18 November 1987, G.A. Res. 42/22; Stahn 2002.
[151] Ago 1980, at pp.20-21, 36-37.
[152] Ago, 1980, at p.39.
[153] *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia) (1997) I.C. J. Rep. 92 at para.51.
[154] *Legal Consequences*, *supra* n.104, at para.140.
[155] The armed conflict in Afghanistan ostensibly presents no issue with the War Powers Resolution, because the AUMF states that it is intended to "constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." AUMF, *supra* n.77, at para.2(b)(1). This conflict can thus be contrasted with the situation in Libya, in which the continued involvement of the US past the War Powers Resolution's statutory 60 days without Congressional authorization was deemed by some to run afoul of the War Powers Resolution. See generally Chesney 2011b.
[156] AUMF, *supra* n.77, at Preamble, clause 3.
[157] AUMF, supra n.77. The AUMF marks the first time a joint resolution has authorized military force against organizations and persons rather than nations. Grimmett 2007.

accomplished exactly what Congress had in mind upon passage of the AUMF, albeit a decade later. The only wrinkle concerns whether members of the CIA are covered by this legislation or if some additional authority is required.

The AUMF provides a less stable foundation for military activities against groups and individuals with more tenuous connections to 9/11,[158] such as AQAP, which was not in existence in 2001, or Tehrik-e-Taliban and the Haqqani Network in Pakistan, which only emerged later as distinct threats to the U.S.[159] Various pieces of legislation have been proposed to expand the existing AUMF to authorize force against emerging hostile groups and terrorist suspects globally.[160] None of these efforts has yet borne fruit, and the Obama Administration has resisted such Congressional re-authorization.[161] Indeed, the National Defense Authorization Act for Fiscal Year 2012 expressly reaffirms the original scope of the AUMF.[162]

To date, few facts have emerged specifically linking al-Aulaqi to the attacks of September 11th, although he apparently knew some of the plotters.[163] As such, the AUMF provides an uncertain foundation for operations in Yemen against individuals such as al-Aulaqi. That said, theories of co-belligerency divorced from the law of neutrality[164] have been advanced to bring groups such as AQAP into the AUMF's folds.[165] Co-belligerency historically refers to a relationship among states that are engaged cooperatively in an international armed conflict against another state or other states. The theory is that an armed conflict between two parties automatically creates a state of armed conflict with the opposing state(s)' allies.[166] Although a feature of past IACs, it is not difficult to make the conceptual leap from states as co-belligerents to armed groups engaged in NIACs as co-belligerents.[167] As one U.S. district court noted, "'co-belligerents' as that term is understood under the law of war" means "fully fledged belligerent fighting in association with one or more belligerent powers" but does not include organizations that "merely share an abstract philosophy or even a common purpose with al Qaeda—there must be an actual association in the current conflict with al Qaeda or the Taliban."[168] In the litigation brought by al-Aulaqi's father, the Obama Administration argued that by virtue of making common cause with al Qaida, AQAP "is a part of al-Qaeda—or at a minimum an organized, associated force or co-belligerent of al-Qaeda in the non-international armed conflict between the U.S. and al-

[158] Bellinger 2010. Indeed, President Bush's proposed post-9/11 resolution would have granted an authorization to use force to "deter and pre-empt any future acts of terrorism or aggression against the U.S." Grimmett 2007, at pp.2-3, 5-6. Congress, however, removed this clause in the final resolution.
[159] See generally Rassler and Brown 2011.
[160] Pearlstein 2011. Presidential candidate Mitt Romney has proposed an expanded AUMF "to authorize the use of military force against any foreign terrorist entity that is waging war against the US." Romney 2011.
[161] Pearlstein 2011.
[162] NDAA, para.1021(d) (providing that "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.").
[163] See The 9/11 Commission Report 221, 229–30 (July 22, 2004), available at **http://www.911commission.gov/report/911Report.pdf**.
[164] Bothe (2008), at p.485.
[165] Obama brief, *supra* n.3, at p.1; Bradley and Goldsmith 2005, at p.2112.
[166] ICTY, *Prosecutor v. Blaškić*, Judgment of the Trial Chamber, IT-95-14-T, 3 March 2000, paras.137-143.
[167] *But see Al-Bihani v. Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010) (refuting the availability of theories of non-state co-belligerency in NIACs).
[168] *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74-75, n.17 (D.D.C. 2009).

Qaeda."[169] Even a notion of NIAC co-belligerency, however, may not be enough to satisfy the terms of the AUMF, which ultimately requires a link to 9/11.[170]

Some would argue that this discussion is moot. It is not settled whether domestic law is even necessary to authorize discrete drone attacks like the al-Aulaqi operation. The Obama Administration is on record stating that using drones in foreign countries does not require congressional approval unless some threshold of force is reached and the lives of U.S. solders are at risk. State Department Legal Adviser Harold Hongju Koh testified before the Senate Foreign Relations Committee in connection with the Libya intervention that U.S. involvement, including "limited strikes by Predator unmanned aerial vehicles against discrete targets,"[171] would not constitute participation in "hostilities" as understood by the War Powers Resolution, primarily because such operations do not involve the deployment of U.S. armed forces into situations that will expose them to exchanges of fire with hostile forces.[172] With no need for domestic legal authority, the al-Aulaqi operation would be evaluated under the international *jus ad bellum* only. This position has been, however, hotly contested within and without the U.S. government.[173]

3.3. Conclusion: *Jus Ad Bellum*

Absent Pakistan's consent, it is clear that Pakistan's territorial integrity was violated in the Bin Laden operation, although this infraction can be reasonably justified on expanded self-defense grounds. Complaints about breaches of the *jus ad bellum* and Article 2(4) are for Pakistan to raise against the U.S.[174] Although Pakistan has grumbled about the violation of its sovereignty, no formal claims have been pursued to date.[175] Nor are they likely to be forthcoming given the lack of actual damage to Pakistani property or interests[176] and the embarrassment factor stemming from the fact that Bin Laden was living in relative comfort in Abbottabad for so long. The al-Aulaqi operation does not run afoul of Article 2(4) in light of Yemen's consent to U.S. territorial engagement. That said, the employment of deadly force by a state even absent a territorial breach still requires justification. For this, a more expanded form of self-defense is required that hinges on a showing of the risk posed by the individual being targeted and his or

[169] *Al-Aulaqi*, Obama brief, *supra* n.3, at p.33. See also *Hamlily v. Obama*, 616 F.Supp.2d 63, 75 (D.D.C. 2009) (interpreting the term "associated forces" to mean "'co-belligerents' as that term is understood under the law of war.").
[170] Grimmett 2007, at p.3.
[171] Testimony by Legal Adviser Harold Hongju Koh, U.S. Department of State, on Libya and War Powers Before the Senate Foreign Relations Committee, (June 28, 2011), available at **http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf**, at p.11.
[172] *Id*. at p.8.
[173] Huffington Post 2011.
[174] Compare ICTY, *Prosecutor v. Nikolić*, Decision On Defence Motion Challenging The Exercise Of Jurisdiction By The Tribunal, IT-94-2-Pt, 9 October 2002, at para.97 ("Traditionally, such breaches were considered a possible dispute between States with no role as such for the person involved. Much therefore depends on the reaction of the injured State itself.") with ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, at para.55 ("an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on a violation of State sovereignty.").
[175] Perlez and Rhode 2011.
[176] But see *Corfu Channel*, *supra* n.112, at pp.35-36.

her amenability to continuous targeting.[177] All told, relying on self-defense to justify these operations requires a number of controversial doctrinal leaps. These include: that a terrorist act can constitute an "armed attack;" that in the face of multiple attacks, self-defense applies on a continuous basis and not only in the immediate aftermath of any one attack; that self-defense can be exercised in the territory of a state that is not acting in collusion with the menace; that self-defense can be exercised against a single individual in keeping with the principle of necessity; and—most importantly—that the law supports a form of anticipatory self-defense that can be exercised in the absence of a concrete threat of future attack.

Even if these international law *jus ad bellum* arguments prove satisfactory, our inquiry cannot end here. Domestic law governing the United States' war powers also have a say. Although the Bin Laden operation falls within the text and purpose of the AUMF, the domestic law foundation for the al-Aulaqi killing remains uncertain if al-Aulaqi cannot reasonably be connected to the September 11th attacks. In any case, it is difficult to imagine how any claims under domestic law would be raised, given the historical reticence of courts to challenge executive decisions about exercising the war powers.[178] This is all assuming that domestic authorization is needed at all. Yemen's consent coupled with the argument that there is no need for domestic authorization for discrete drone attacks means that the *jus ad bellum* may offer little resistance to the al-Aulaqi operation.

If the *jus ad bellum* authorizes these operations, the *jus in bello* may further constrain the way in which they were implemented. This depends on whether or not IHL applies to these events. If it does, the U.S. government cannot exclusively rely on a *jus ad bellum* framework to justify both killings to the exclusion of IHL. With this in mind, the next Section considers the *jus in bello* implications of the two operations after considering the preliminary question of whether this body of law applies at all. A subsequent Section discusses the human rights implications under either a *jus ad bellum* or *a jus in bello* framework bearing in mind that Bin Laden and Al-Aulaqi, no matter how odious, still enjoy the protection of human rights law.

4. Adherence to the *Jus in Bello*

The *jus ad bellum* and *jus in bello* are often conceived of as applying sequentially, with the latter assuming greater salience once a party has resorted to armed force.[179] With the initiation of the *jus in bello*, however, the *jus ad bellum* does not recede entirely, as certain aspects (such as the principle of proportionality) continue to regulate the use of force once initiated. Moreover, not every use of force triggers the applicability of the law of war; it is only when a use of force rises to the level of an armed conflict, or has a sufficient nexus to an existing armed conflict, that international humanitarian law (IHL) is implicated. Assuming IHL is applicable, however, the *jus in bello* applies to all parties to the armed conflict pursuant to the equal application principle,[180] regardless of the outcome of any *jus ad bellum* analysis.[181] The law insists on this

[177] Kretzmer, at p.193.
[178] See *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989) (rejecting case by Libyan nationals arguing for the illegality of U.S. and British airstrikes on Libya).
[179] Greenwood 2006, at pp.13, 28.
[180] Roberts (Adam) 2008.

acoustic separation for pragmatic as well as philosophical reasons.[182] The point is to ensure the application of the regulatory *jus in bello* no matter the cause or legality of the underlying conflict so that both the aggressor and the aggressed—as well as the privileged and the unprivileged—are bound by the same rules of conduct. The justness of one side's cause thus does not modify the application of the *jus in bello* between the parties. As such, the question of whether the U.S. was entitled to use force *vel non* in Pakistan and Yemen does not resolve questions about whether these particular applications of force were in compliance with the *jus in bello*.

It is natural to assume that IHL is the appropriate body of law to resolve questions of this nature, given the use of combat power as well as ongoing military operations in Afghanistan and elsewhere against elements of al Qaida. However, it is worth considering more closely the *a priori* question of whether IHL applied in Abbottabad, Pakistan, and in Khashef, Yemen, which are far from any active battlefield in Afghanistan and even from the border region between Afghanistan and Pakistan where a spillover conflict is under way.[183] If IHL is not applicable, then the deaths of Bin Laden and al-Aulaqi could not be characterized as the kind of wartime killing sanctioned as a normal—indeed expected—incident of war. The killings would then be evaluated under other bodies of law to dramatically different conclusions, as discussed in the next Section.

4.1. Is International Humanitarian Law The Operative Body of Law?

The law governing armed conflicts—IHL or the law of armed conflict—exhibits a Janus-like character. On the one hand, IHL is protective toward certain classes of persons who are considered *hors de combat*—detainees, surrendering combatants, civilians, the shipwrecked, the sick, and the wounded. It is unlawful to deliberately target such individuals. At the same time, IHL is permissive with respect to other classes of persons, namely active combatants and those who engage in hostilities. In contrast to the immunities afforded to protected persons, this latter class of persons may be lawfully targeted and killed. In situations in which it applies, IHL thus tolerates—and indeed anticipates—many forms of violence that would be unlawful outside of the context of war.[184] In particular, IHL countenances the use of deadly force against the adversary as a first resort as compared with peacetime law enforcement scenarios, in which the use of such force is allowed only to respond to the exigencies of self-defense, the defense of others, and halting a fleeing felon.[185] In this way, IHL challenges default rules premised on the right to life, such as the prohibitions against intentionally killing another human being

The triggering of IHL is no longer dependent on a declaration of war but rather turns pragmatically on empirical facts on the ground, most saliently the presence of an armed conflict or situation of occupation. It is widely accepted that an armed conflict is deemed to exist when "there is resort to armed force between States or protracted armed violence between

[181] API, *supra* n.42, Preamble, Clause 5. The U.S. has not ratified API, although in public statements it has accepted the binding nature of certain provisions. See The White House - Fact Sheet (2011).
[182] Moussa 2008.
[183] Blank 2010, at pp.165, 178.
[184] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, A/HRC/14/24/Sdd.6 (28 May 2010), available at **http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf** [hereinafter 'Alston Report'] at para.47; Blank 2010, at p.15.
[185] Blank 2010, at p.187.

governmental authorities and organized armed groups or between such groups within a State."[186] The triggering conditions of IHL differ depending on whether the conflict is an international (IAC) or non-international armed conflict (NIAC).[187] Common Article 2 of the 1949 Geneva Conventions indicates that those treaties apply in all cases of "declared war or any other armed conflict which may arise between two or more of the High Contracting Parties." The law of armed conflict thus would apply wherever the armed forces of at least two states are embattled. Indeed, Pictet's authoritative commentary suggests that those treaties become activated upon a very low threshold of inter-state violence,[188] although this view has been qualified in several modern sources to effectively exclude border incidents and other small-scale military confrontations between states.[189] Indeed, the U.S. has argued that military responses undertaken pursuant to the inherent right of self-defense as set forth in Article 51 of the Charter do not under all circumstances rise to the level of an armed conflict.[190]

By contrast, a higher threshold exists for establishing the existence of a NIAC that is premised on two factors: the scale or intensity of the violence[191] and the degree of organization of the parties.[192] This higher threshold exists to distinguish such conflicts from a number of situations that do not trigger IHL, even if such events provoke a military response by the state. These include: small scale operations involving military assets that cannot be deemed to be part of a larger armed conflict; situations of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature;"[193] and acts of "banditry, unorganised and short-lived insurrections, or terrorist activities."[194]

All NIACs are governed by Article 3, which is common to the four Geneva Conventions and applies to all conflicts "occurring in the territory of one of the High Contracting Parties."[195] The

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[186] *Tadić* 1995, *supra* n.174, at para.70.
[187] *Tadić* 1995, *supra* n.174, at para.67.
[188] Pictet 1960. Pictet indicates that an armed conflict exists between states when "any difference arising between two States and leading to the intervention of members of the armed forces." See also ICTY, *Prosecutor v. Mucić*, Judgment of the Trial Chamber, IT-96-21-T, 16 November 1998, at para.184
[189] O'Connell 2009b, at p.397; Greenwood 2008, at pp.39, 42.
[190] Report of the Working Group on the Universal Periodic Review: United States of America, A/HRC/16/11, 4 January 2011, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-11-Add1.pdf, at para.54.
[191] ICTY, *Prosecutor v. Boškoski*, Judgment of Trial Chamber, IT-04-82-T, 10 July 2008, at para.177.
[192] ICTY, *Prosecutor v. Limaj*, Judgment of Trial Chamber, IT-03-66-T, 30 November 2005, at para.84; *Boškoski*, *supra* n.191, para.173-186.
[193] Article 1(2), Convention on Prohibitions on Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to have Indiscriminate Effects (as amended December 21, 2001), 2260 U.N.T.S. 82.
[194] ICTY, *Prosecutor v. Tadić*, Judgment of Trial Chamber, IT-94-1-T, 7 May 1997, para.562.
[195] Although not applicable to the events under consideration, Additional Protocol II to the Geneva Conventions applies to a subset of NIACs that

> take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts of 8 June 1977, Article 1(1), 1125 U.N.T.S. 609 (1979) [hereinafter 'APII']. This threshold excludes "internal disturbances and tensions such as riots and isolated and sporadic acts of violence."

International Committee of the Red Cross (ICRC) commentary offers several criteria for triggering common Article 3 (CA3) that turn on whether the party in revolt manifests a sufficient degree of organization and hierarchy, the legal government is obliged to have recourse to its military forces, the dissident group has popular support, the dispute has been placed on a U.N. agenda, and the insurgents exercise some level of control over territory.[196] The international tribunals, in turn, have identified a number of additional factors relevant to evaluating whether the intensity of the violence is sufficient to pass through the IHL gateway. These include: the number and duration of individual confrontations, the types of weaponry and equipment employed, the degree of physical destruction, the number of embattled individuals and casualties, the geographical and temporal breadth of clashes, the number of civilians displaced or otherwise impacted by fighting, and the involvement of the United Nations (particularly the Security Council).[197] This same case law employs criteria for identifying what constitutes an organized armed group. These mirror the characteristics of a formal national army and include: a hierarchical structure and rules of engagement, infrastructure to enlist and train recruits, the ability to launch military operations, a central authority empowered to negotiate with governmental representatives, and a leadership corps capable of being held responsible for the group's acts.[198] It has been argued that in light of Article 3's reference to the "territory" of a High Contracting Party, CA3 is meant to govern classic civil wars and does not apply to situations in which a state is engaged in an armed conflict with a non-state actor outside its own borders and on the territory of another High Contracting Party.[199] Most commentators agree, however, that CA3 provides a floor of protection for all conflicts not of an international character.[200] Notwithstanding these treaty-based triggers for IHL, an emerging customary IHL applies across the conflict spectrum and is less dependent on the increasingly artificial classification dichotomy[201] that frames the Geneva Conventions and their Protocols.[202]

Situations of terrorism and counterterrorism do not constitute "armed conflicts" until a certain threshold of intensity, continuity,[203] group organization,[204] and military reciprocity is reached.[205]

Id. at Article 1(2). CA3 governs those NIACs that do not meet APII's standards of organization or territorial control. Because many rebel groups do not satisfy the high bar set forth in APII—often by design—CA3 provides important protections for a broader range armed conflicts.

[196] Pictet 1960, at pp.35-36. See also *Juan Carlos Abella v. Argentina*, Case 11.137, Report No. 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.98, Doc. 6 rev., 18th November 1997, at para.155.

[197] *Prosecutor v. Haradinaj*, Judgment of the Trial Chamber, Case No. IT-04-84-T, Judgment, 3 April 2008, para.49; *Limaj*, *supra* n.192, at paras.84-90.

[198] *Haradinaj*, *supra* n.197, paras.63-88; ICTY, *Prosecutor v. Lukic*, Judgment of Trial Chamber, IT-98-32/1-T, 20 July 2009, paras.879-88.

[199] *Hamdan v. Rumsfeld*, 548 U.S. 557, 718-20 (2006) (Scalia, J., dissenting).

[200] See, e.g., Pejic 2011.

[201] Corn 2007.

[202] International Law Association 2010. Henchaerts 2005, at p.189. Many states apply the same norms regardless of classification as a policy matter. See, e.g., U.S. Dep't of Defence (2006) *Department of Defense Directive No. 2311.01E*, para.4.1, available at **http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf**.

[203] ICTY, *Prosecutor v. Kordić & Cerkez*, Judgment of the Appeals Chamber, IT-95-14/2-A, 17 December 2004, at para.341.

[204] International Law Association 2010, at p.28.

[205] *Public Committee Against Torture in Israel v. Israel*, HCJ 769/02 [2005] Isr.SC 57(6), para.16 [hereinafter '*Pub. Committee Ag. Torture*'].

For example, the Council of Europe's Venice Commission—an advisory body on constitutional matters—determined in 2006 that

> sporadic bombings and other violent acts which terrorist networks perpetrate in different places around the globe and the ensuing counter-terrorism measures, even if they are occasionally undertaken by military units, cannot be said to amount to an 'armed conflict' in the sense that they trigger the applicability of International Humanitarian Law.[206]

Some commentators have gone further and resisted the application of IHL to terrorist (and criminal) organizations altogether, on the putative ground that to do so would give the members of such groups the status and legitimacy of belligerents.[207] Instead, they have urged the adoption of a pure law enforcement model for counterterrorism operations, acknowledging the occasional necessity to deploy military might in this context.[208]

Notwithstanding the distinction often drawn between armed conflicts and acts of terrorism, the international tribunals regularly consider acts that would be described as "terroristic" in determining whether the required intensity of violence has been reached for the purpose of applying IHL.[209] Indeed, a blanket rejection of the application of IHL to terrorism fails to acknowledge the evolution of modern threats to peace and security, the way in which classic terrorist attacks can be strategically employed in armed conflict situations, the ease of access to advanced and destructive weaponry by a slew of non-state actors, the reach and degree of organization of modern terrorist groups, the necessity of resorting to military assets in counterterrorism efforts, and the potency of ideology in the absence of territorial ambitions. Moreover, conceding that a situation amounts to a NIAC that is governed by IHL does not accord any legitimation or privilege to use force to non-state actors, be they rebels, insurgents, paramilitaries, drug-traffickers, insurrectionists, pirates, or terrorists. Such fighters remain unprivileged belligerents who enjoy neither combat immunity nor prisoner-of-war (POW) status and who can be prosecuted domestically for their acts of violence.

Accepting that IHL does apply in principle to terrorist groups and to conflicts pitting sovereign forces against such armed groups, the U.S. has been involved in an armed conflict with al Qaida since at least September 11th and the ensuing invasion of Afghanistan on October 7, 2001.[210]

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[206] Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, 17 March 2006, Op. No. 363/2005, CDL-AD (2006)009, para.78, available at **http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp** [hereinafter 'Venice Commission']. See also Paust 2007, at p.760.

[207] Greenwood 2004, at p.529; Rona 2003, at p.61.

[208] See generally Roth 2004.

[209] See, e.g., *Boškoski*, *supra* n.191, at paras.187-190.

[210] This conflict is now characterized a one with "al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks." Koh 2010. See also G.W. Bush, President's Address to the Nation on the Terrorist Attacks, 37 Weekly Comp. Pres. Doc. 1301 (Sept. 11, 2001); G.W. Bush, President's Address to Joint Session of Congress on the US Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347 at 1348 (Sept. 20, 2001). See U.S. Letter to Security Council, *supra* n.137. Although this date provides an obvious starting point for any armed conflict involving the U.S., military commissions—which may only prosecute offenses "committed in the context of and associated with hostilities"—have twice convicted Guantánamo detainees for acts committed prior to September 11th. See § 950p(c), Military Commission Act of 2009 ("An offense specified in this

Prior to this point, the U.S. had responded to acts of terrorism attributable to al Qaida (such as the first World Trade Center attack in 1993[211] or even the U.S.S. *Cole* attack in Yemen in 2000[212]) primarily within a law enforcement framework.[213] Since September 2011, however, the U.S. has assumed a war footing by enacting an authorization to use military force, deploying troops abroad, and establishing military commissions. In so doing, it has eschewed, or at least de-emphasized, the criminal law framework. In terms of the customary factors for finding the existence of an armed conflict, the level of intensity of violence in Afghanistan and in certain spillover regions obviously continues to exceed that necessary to signal the existence of an armed conflict. It is clear that al Qaida manifests a sufficient degree of organization to launch effective attacks against a range of military objectives and civilian objects. Although not necessary to trigger IHL, al Qaida exercises some control over territory in parts of Afghanistan, in pockets of the Af-Pak border region, and perhaps even in enclaves within the Arabian Peninsula, although territorial dominion is not really its *modus operandi*. The Security Council has described the situation as a threat to international peace and security[214] and expanded its counterterrorism agenda considerably in response, but—as is customary—it has never declared the existence of an armed conflict *per se*.

As a matter of U.S. law, the conflict originating in Afghanistan has been deemed a NIAC to which at least CA3 applies.[215] In an IAC, military operations can—at a minimum—be carried out throughout the sovereign territory of the parties at war.[216] However, it is unclear how to apply this concept to conflicts and to organized armed groups that are not confined to discrete territory. Thus, the precise temporal span, geographic boundaries, and spatial reach of the NIAC with al Qaida—and concomitantly of IHL—remains uncertain and variable.[217] If the killings of Bin Laden and al-Aulaqi are to be evaluated according to IHL, it is necessary to develop and defend a theory that IHL, and especially its targeting rules, applies to these extra-battlefield events.[218] This requires the extension of IHL to areas well beyond the territory where IHL's predicate requirements of intensity and organization have been met, far from those locations where a "hot" conflict is being waged, and even beyond areas where terrorist attacks are being planned or launched.

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sub-chapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities."). One theory is that the armed conflict started as far back as 1996 or 1998, when Bin Laden purported to issue *fatwas* against the U.S. See PBS 1996 and PBS 1998.

[211] *U.S. v. Rahman*, 189 F.3d 88 (2d Cir. 1999) (per curiam).

[212] Soufan 2011 (describing FBI investigation in Yemen).

[213] The U.S. did respond militarily under a self-defense rationale to the 1998 attacks on U.S. embassies. See Letter Dated 20 August 1998 from the Permanent Representative of the United States to the United Nations Addressed to the President of the Security Council, S/1998/780 (1998). These uses of force were controversial, although primarily on account of the choice of targets rather than the decision to respond militarily. Bennet 1998.

[214] See *supra* text accompanying note 106.

[215] *Hamdan*, 548 U.S. at 628-30. See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality).

[216] The trend in the caselaw has been to extend the reach of IHL in an effort to maximize its protective potential. *Tadić* 1995, supra n. 174, at paras.67-70. This has consequences, however, because where IHL's protections go, so too do its permissions.

[217] *Tadić* 1995, *supra* n.174, at para.69 ("the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations").

[218] Aldrich 2002, at p.893.

Several theories exist for applying IHL to both events. Adopting a territorial perspective reminiscent of the law governing IACs and the concept of neutrality, one can argue that IHL extends to any territory where combat activities between warring parties are under way.[219] Thus, IHL will apply to spillover conflicts that do not respect sovereign boundaries such that "the situation in the neighbouring country [is] immediately qualified as a non-international armed conflict."[220] At the moment, the conflict against al Qaida proper has leaked through the porous borders of Afghanistan and into the FATA regions of Pakistan, although it is unclear to what extent the U.S. has troops on the ground there. How much farther IHL extends—to Abbottabad (roughly 120 miles from the Afghan border), to the Arabian Peninsula, or even to the U.S. itself—remains open to argumentation. In any case, from a territorial or combat activity perspective, the contention that the armed conflict with al Qaida extended at a minimum to the events in Abbottabad is defensible given the degree of cross-border hostilities already.

An alternative perspective premised on the identity of the parties would provide that so long as IHL has been triggered, it can be deemed to regulate the relationship between adversaries wherever they engage each other, regardless of the location of combat activities *stricto sensu*. By this more expansive, and more controversial, account,[221] IHL essentially follows the warring parties wherever they go,[222] and geographic borders are largely irrelevant to the application of IHL rights and duties.[223] The theater of war is thus non-static and potentially global when dealing with violent groups that are motivated by ideology rather than territorial aspirations or political ambitions and that spurn international borders. Out-of-theater attacks by and on members of an opposition force are thus automatically subject to IHL, regardless of where the predicate conflict is being waged geographically.[224] This approach finds some indirect support in the Geneva Conventions, which envisage the protective aspects of IHL extending anywhere that a protected person is "in the hands of" a party to an IAC.[225] So, in a NIAC, IHL may be deemed to apply any time a state uses forcible measures against a non-state fighter, whether on the state's own territory or extraterritorially and regardless of the proximity to hostilities. Thus, IHL would apply to any confrontation between U.S. forces and an al Qaida member, be it in the Near East or the Eastern Seaboard. A consequence of this approach, however, is an increased threat to civilians who are at risk of becoming "collateral damage" even when far from any battlefield.

In addition to needing a theory of IHL applicability writ large, it is also necessary to show that any use of force has a nexus to the predicate armed conflict. Although hostilities within Pakistan are part of the pre-existing conflict with al Qaida, it is more difficult to argue that events in the

[219] International Law Association 2010, at p.32. See Venice Commission, *supra* n.206, at para.80.
[220] Geiß 2009, at p.138.
[221] Thorp 2011.
[222] Anderson 2010. But in contrast, see Lubell 2010, at p.255.
[223] President George W. Bush signaled this idea in the immediate aftermath of September 11th when he stated "Our war on terror will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan." President George W. Bush, Radio Address of the President to the Nation (September 29, 2011) available at http://avalon.law.yale.edu/sept11/president_031.asp; see also Schmitt and Mazzetti 2008 (noting secret order issued by then Secretary of Defense Donald Rumsfeld authorizing attacks on Al Qaida members anywhere in the world, even in countries without ongoing hostilities).
[224] Chesney 2011, at pp.47-49.
[225] See, e.g., Article 19, Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter 'Geneva III']; International Law Association 2010, at p.32.

Arabian Peninsula are connected to this particular conflict given the identity of the parties. Indeed, central to al-Aulaqi's father's lawsuit was that the U.S. was "not at war with Yemen, or within it."[226] Satisfying the requirement that operations in Yemen have a nexus to the larger al Qaida conflict would depend on the relationship between AQAP and al Qaida proper, an inquiry central to satisfying the AUMF as well.[227] In the alternative, it could be argued that IHL was activated by a different, parallel NIAC being waged in Yemen. This conflict pits AQAP against the government of Yemen,[228] with the U.S. occasionally intervening on the side of Yemen, but not a full party to the conflict.[229] The United States' actions would be governed by IHL under these circumstances, although arguably the nexus requirement would dictate that only attacks against unprivileged combatants waging war against Yemen (as opposed to against the U.S.) would be governed by IHL targeting rules.

If the United States' forcible measures in Yemen are not perforce part of the original conflict with al Qaida or part of the internal conflict being waged by Yemen, then a separate IHL trigger analysis is necessary in order to invoke IHL's permissive targeting rules for the al-Aulaqi killing. This would require the existence of an armed conflict between the U.S. and AQAP itself. In terms of the two criteria developed by the ICTY for determining the existence of an armed conflict—the existence of organized groups engaged in hostilities of a sufficient intensity—AQAP is now probably sufficiently coherent to satisfy the first criterion.[230] However, notwithstanding that the U.S. has engaged in a number of drone strikes against terrorist targets in Yemen since 2002, it is doubtful whether the required intensity of violence has been reached for the hostilities between the U.S. and AQAP on their own to have passed through the IHL gateway.[231] If they have, of course, then there would be domestic law implications in light of the War Powers Resolution.[232]

Assuming that IHL applies to these events because this body of law follows warring parties wherever they engage each other with force, the legality of both operations can be established, although it still remains necessary to make several crucial doctrinal leaps to do so. As discussed in the next section, these leaps turn on the fact that the positive law governing NIACs does not

[226] *Al-Aulaqi* Complaint, *supra* n.38, at 2.
[227] *Hamdi*, 542 U.S. at 518.
[228] Gerges 2011.
[229] Terrill 2011; Shane, Mazzetti and Worth 2010; Farley 2011.
[230] *Limaj*, *supra* n.192, at para.89 ("This degree [of organization] need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organization"). *But see Al-Awlaki v. Obama*, No. 10-cv-01469 (D.D.C. Oct. 7, 2010) (Declaration of Prof. Bernard Haykel), available at **http://ccrjustice.org/files/Declaration%20of%20Bernard%20Haykel%2010-08-2010.pdf**.
[231] Rona 2003, at p.62.
[232] See Letter from the President Regarding the Consolidated War Powers Report (Dec. 15, 2010), available at **http://www.whitehouse.gov/the-press-office/2010/12/15/letter-president-regarding-consolidated-war-powers-report** (noting that "consistent with" the War Powers Resolution, the President "has deployed US combat-equipped forces to assist in enhancing counterterrorism capabilities of our friends and allies, including special operations and other forces for sensitive operations in various locations around the world" (but not mentioning Yemen in the unclassified portion of the submission)).

fully recognize the concept of combatancy or continuous status-based targeting, which is central to the principle of distinction in, and thus the targeting rules of, IHL.[233]

4.2. Bin Laden and Al-Aulaqi as Lawful Targets

Combatants engaged in an IAC are considered to be lawful military objectives; as such, they are vulnerable to continuous targeting, notwithstanding their conduct or role at the time they are engaged. There is no duty to endeavor to capture such individuals, unless they offer their surrender. While these permissive rules clearly apply to uniformed members of a state's armed forces, they also apply to officials occupying political positions so long as such individuals play a role within the military's chain of command. Civilians, by contrast, enjoy immunity from direct targeting unless and until they directly participate in hostilities. Individuals who offer indirect assistance to hostilities—by way of financing, training, or inspiration—retain their immunity from direct attack (although they may be prosecuted for their actions). In NIACs, according to APII, members of non-state groups employing military force are civilians directly participating in hostilities subject to conduct-based targeting rather than combatants subject to status-based targeting. States that have engaged in NIACs contest this view. Although the ICRC has accepted the notion that individuals may be targeted on the basis of their undertaking a continuous combat function within an organized armed groups, there is no consensus on whether the notion of combatancy and true status-based targeting exists in NIACs. Because neither Bin Laden nor al-Aulaqi were directly participating in hostilities at the time they were killed, this debate is central to confirming the legality of both operations.

4.2.1. The Right to Target Enemy Combatants as Military Objectives

If we are satisfied that IHL applies to these operations at all, the legal analysis goes rather smoothly—to a point.[234] The principle of distinction—foundational to the law of war—dictates that only military objectives may be the target of direct attack.[235] Military objectives are defined, "in so far as objects are concerned" as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[236] Although enemy combatants are deemed military objectives under IHL, the text is unclear as to whether such persons are targetable only if their "destruction, capture or neutralization" offers "a definite military advantage."[237] The text implies otherwise by defining only military "objects" with reference to these limitations. Even with such a limitation, it can be argued that there is target engagement authority for all enemy combatants, because their

[233] The law governing NIACs recognizes no generalized notion of privileged combatancy; as such, there is no requirement that non-state fighters be granted POW status, privileges, or immunities. See Rule 3, Henckaerts and Doswald-Beck 2005 (noting that "combatant status … exists only in international armed conflicts").

[234] In this analysis, it is often necessary to invoke customary international law, because the U.S. has ratified neither Protocol to the Geneva Conventions. Customary international law is also important because most IHL treaty rules—especially those regulating the means and methods of warfare—govern IACs, and only extend to NIACs as a matter of customary international law. Henckaerts and Doswald-Beck 2005.

[235] Article 48, API. The same rule applies in NIACs governed by APII. Article 13(2), APII. See also Rule 1, Henckaerts and Doswald-Beck 2005, at p.3.

[236] Article 52(2), API. See Rule 8, Henckaerts and Doswald-Beck 2005.

[237] Compare Melzer 2008, at pp.288-90, with Parks 2010, at pp.803-804.

elimination will inexorably offer a military advantage to the other side.[238] Indeed, the sole objective of hostilities is to "weaken the military forces of the enemy."[239]

The principle of distinction also embodies an "inward-looking responsibility:"[240] in exchange for the privilege of engaging in hostilities, combatants must distinguish themselves from the civilian population in order to signal their targetability.[241] Combatants are targetable as such by virtue of their status rather than their conduct.[242] Vulnerability to status-based targeting follows them wherever they go such that they may be attacked even when not directly engaged in hostilities.[243]

NIACs, by definition, involve the participation of non-state organized armed groups whose members are not accorded the status of combatants *per se*.[244] Violations of the principle of distinction are often the hallmark of NIACs, in which rebels and insurrectionists strategically use the civilian population for cover. In so doing, these fighters exploit the principle of distinction—and the presumption that their opponents will respect it—to compensate for asymmetries in military might. Because these armed groups act independently of any state, their members do not have the right to participate in hostilities; nor do they enjoy the privileges and immunities that are accorded to members of a state's armed forces, such as POW status or combat immunity.[245] As such, every act of violence committed by members of such militia in the context of an armed conflict is unlawful under the operative domestic law. Participating in an armed conflict without the privilege of doing so, however, does not violate humanitarian law *per se* unless particular acts rise to the level of a punishable war crime.[246]

4.2.2. No Express Duty to Capture Combatants

As a matter of established IHL doctrine, there is no express duty to capture privileged combatants in IACs in lieu of killing them[247] in the absence of an unambiguous offer of unconditional surrender.[248] Assuming no risk to civilians or civilian objects, the standard doctrine dictates that the right to kill combatants is only limited by rules prohibiting perfidy and proscribing the use of means and methods that cause *maux superflus*—"unnecessary suffering and superfluous injury."[249] The ability to make combatants the object of attack terminates once a

[238] Blum 1976.
[239] St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868.
[240] Gasser 1987, at p.919.
[241] Article 44(3), API.
[242] ICRC 2008b, at p.1005.
[243] Parks 2010, at p.778. See also Corn and Jensen 2008, at p.812.
[244] See *supra* note 233. Although members of armed groups are not considered "combatants" in NIACs, the treaties governing such conflicts do envision the existence of non-state armed groups. See, e.g., CA3(1), Geneva III (referring to "members of armed forces" of all parties to the conflict); APII (referring to "organized armed groups," "dissident armed forces," and "other armed groups.").
[245] Baxter 1951.
[246] ICRC 2008b, at p.1045.
[247] Parks 1989 and Corn 2009, at p.29.
[248] Article 41(2)(b), API.
[249] Article 35(2), API.

combatant is *hors de combat* through illness, injury, surrender, capture, or other incapacitation.[250]

This categorical principle—that combatants may be targeted at any time regardless of their conduct—developed when troops confronted each other primarily on formal battlefields, far from civilian society. Arguably, it applies in full force to the soldier taking his family to the cinema, subject to the proportionality and precautionary principles. While doctrinally and operationally valid, this principle has rarely been fully tested in such non-theater-of-war contexts and is not without controversy. The weak form of the critique would countenance the killing of combatants only if there is no reasonable chance of apprehension,[251] with some allowance provided for considerations of force protection.[252] Thus, this continuous targeting authority may be lessened by the principle of military necessity where targets pose no threat to opposing forces or where any potential threat can be neutralized through lesser means.[253] The strong form of this revisionism rejects the premise of the "dispensability" of combatants altogether and would require the resort to non-lethal force whenever the military objective can be still be accomplished, even if military effectiveness, efficiency, or force protection may be compromised.[254] Neither of these critiques, however, finds full expression in standard doctrine. All that said, there may be tactical, strategic, pragmatic, and moral reasons—including the imperatives of intelligence gathering, public relations, and mercy—for offering to accept the surrender of, or capturing, someone posing a threat rather than killing the person outright.

Although there may be no duty to capture fighters in lieu of killing them, especially in a theater of war, the right to kill the adversary is limited by the duty to accept surrender if genuinely offered.[255] Since ancient times,[256] it has been unlawful to declare *ex ante* that no quarter shall be given,[257] which includes the issuance of orders to not accept surrender.[258] Individuals who offer to surrender are deemed *hors de combat* and enjoy immunity from direct attack. As a general proposition, however, combatants need not be given an opportunity to surrender before they may be engaged. Moreover, a fighting force need not immediately take surrendering fighters into custody if it is not safe to do so; however, such individuals may no longer be the object of attack unless they resume hostilities.[259]

4.2.3. Targeting Heads of State, Commanders-in-Chief, and Political Leaders

[250] Article 41(1), API.
[251] Pictet 1985, at p.75
[252] Solis 2010, at p.538. Kasher and Yadlin 2005, at p.51.
[253] ICRC 2008b, at p.1041. Lieber 1863, Article 14.
[254] Blum 2010.
[255] Feigning surrender constitutes the war crime of perfidy. Article 37(1)(a), API.
[256] Lieber 1863.
[257] Article 23(d), Hague Land Warfare Regulations (1907); Article 40, AP I; Article 4(1), APII. The ICC Statute penalizes declaring that no quarter will be given in NIACs in addition to IACs. Rome Statute of the International Criminal Court, A/CONF.183/9, at Article 8(2)(e)(x). See also Rule 46, Henckaerts and Doswald-Beck 2005, at p.161; Section (c)(2), War Crimes Act of 1996, 18 U.S.C. § 2441.
[258] Parks 2010, at p.778.
[259] Dinstein 2004, at p.202.

Military officers, as well as the rank and file, operating on a battlefield within a chain of command are clear military objectives under IHL. By contrast, a blanket authorization to kill political leaders in their capitals, even in a time of armed conflict, may give pause.[260] Indeed, some early international law commentators expressed concern about targeting a sovereign leader outside the field of battle.[261] Many modern commentators still assume that IHL prohibits such acts of assassination. For support, they cite Article 23(b) of the 1907 Hague Regulations, which proscribes "assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'"[262] This prohibition, however, is now-a-days interpreted to address acts of treachery or perfidy,[263] and modern IHL contains no specific rules[264] governing the targetability of heads of state or other political individuals *per se*.[265]

Evaluating the legality of attacks on political, rather than military, leaders thus proceeds according to default IHL targeting principles. What ultimately matters is the combat role played by the political leader and the manner and circumstances of the operation. A logical application of the military objective construct suggests that lawful targets would include any political leader (including a Minister of Defense or head of state) within a chain of command who ultimately designs or directs military operations as well as the civilian commander-in-chief of a national army.[266] Nonetheless, the rhetoric surrounding scenarios in which the targeting of heads of state is contemplated suggests lingering discomfort with this conclusion.[267] As a result, *post hoc* attack justifications often focus on the less troubling objective of targeting an army's command and control apparatus, which is often difficult to separate from the leader him- or herself. In light of the principle of distinction, IHL offers little to justify the killing of political leaders whose roles are purely civilian (e.g., a Minister of Education) or who are mere figureheads.

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[260] Wingfield 1998-9, at p.314.
[261] Zengel 1991, at p.126.
[262] Regulations Respecting the Laws and Customs of War on Land, Article 23, annexed to Convention No. IV Respecting the Laws and Customs of War on Land (Oct. 18, 1907).
[263] The Department of the Army's Law of Land Warfare makes a distinction between assassination and outlawry on the one hand and a lawful wartime killing on the other. The prohibition against treacherous killing, assassination, and bounties "does not … preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere." *Field Manual 27-10: The Law of Land Warfare*, para.31 (1956), available at **http://www.aschq.army.mil/gc/files/fm27-10.pdf**; Dinstein 2004, at p.199.
[264] The British law of war manual states this explicitly: "Whether or not the killing of a selected enemy individual is lawful depends on the circumstances of the case. There is no rule dealing specifically with assassination." The Joint Service Manual of the Law of Armed Conflict, JSP 383 (2004), at para.513, available at http://www.mod.uk/NR/rdonlyres/82702E75-9A14-4EF5-B414-49B0D7A27816/0/JSP3832004Edition.pdf.
[265] Heads of state are designated as "protected persons" by the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, although this treaty limits protection to when such a person is in a foreign state. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, Article 1(1), 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167.
[266] Solis 2010, at p.539; Zengel 1991, at p.148.
[267] For example, during Operation Odyssey Dawn, Libyan government officials accused NATO coalition powers of launching "a direct operation to assassinate the leader" of Libya in violation of international law. Fahim and Mazzetti 2011. NATO commander Lt-General Charles Bouchard, however, stated that the intention was not to kill Qaddafi, but rather to immobilize his military apparatus and in particular the command and control nodes in Qaddafi's residence. Romero 2011.

4.2.4. Targeting Civilians

Although the principle of distinction provides that civilians normally enjoy full immunity from direct attack, the Protocols provide that civilians can be targeted when and for such time as they take a direct part in hostilities (DPH).[268] These provisions are premised on the idea that civilians lose their immunity from attack when they behave like combatants. The DPH doctrine applies in both IACs and NIACs.[269] That said, in today's armed conflicts, it is most salient in the NIAC context in which armed non-state actors are not considered "combatants" even when they do battle with governmental authorities or each other. The Protocols thus consider militants linked to non-state groups to be civilians who are targetable only when directly participating in hostilities.[270]

The ICRC Interpretive Guidance has set forth a three-part test for determining when an individual can be considered to be directly participating in hostilities.[271] This includes consideration of the threshold of harm posed by his or her actions, the causal link between his or her actions and potential harm to the opponent, and a nexus to hostilities.[272] Under this framework, it is not enough to contribute to the war-fighting capabilities of an armed group; rather, the potential target must be in a position to bring about the harm in question in "one causal step."[273] In this way, the DPH construct offers a conduct-based, rather than status-based, targeting doctrine.

Persons posing an immediate danger, such as an insurrectionist sniper or someone laying an improvised explosive device (IED), or persons providing direct assistance to such endeavors, easily satisfy the three-step DPH test.[274] The ICRC also accepts that direct participation in hostilities includes more than involvement in the physical attack itself; rather, a penumbra of preparatory and concluding activities may also qualify so long as the proximate causality criterion is met. By contrast, the test would tend to exclude from targetability persons planning a belligerent act, recruiting others to participate in such an act, financing violence, formulating ideology, or engaging in strategic decision-making about hostile activities.[275] That said, most thinking in this area has been in the nature of the hypothetical, so there is little positive law to draw on.

One jurisprudential source is the Israeli Supreme Court's opinion in the so-called *Targeted Killing* opinion. Here, the Court was asked to consider the Israeli policy in the context of an

[268] Article 51(3), API. Article 13(3), APII.
[269] ICRC 2008b, at p.1015. CA3 makes no mention of DPH, but it does prohibit the commission of violence to life and person against "persons taking no active part in the hostilities." Presumably, if a conduct-of-hostilities rule applies in conflicts meeting the stricter requirements of APII, it also applies in CA3 conflicts. Article 1(1), APII.
[270] *Pub. Comm. Against Torture*, *supra* n.205, at para.31. See also Henckaerts and Doswald-Beck 2005, at pp.12-13. See also *Pub. Committee Ag. Torture*, Opinion of Rivlin, *supra* n.205, at para.2.
[271] See ICRC 2008b, at p.991; see also Melzer 2008, and Watkin 2010, at pp.643-4.
[272] ICRC 2008b, at p.1016.
[273] ICRC 2008b, at p.1021.
[274] ICRC 2008b, at pp.1017-8. War-sustaining activities do not generally qualify. *Id*. at p.1020.
[275] Kasher and Yadlin 2005, at p.48. See also *Pub. Committee Ag. Torture*, *supra* n.205, at paras.33, 35; Fleck (1995), at p.232.

occupation and IAC and in the absence of concrete facts.[276] Rather than reaching a blanket conclusion, the Court mandated a case-by-case approach.[277] Nonetheless, it signaled that it would find that "a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid" is taking only an *indirect* part in hostilities.[278] Likewise, an individual engaged in creating or distributing propaganda would not be targetable under this view.[279] The Court considers the person sending others to be taking a direct part in hostilities or otherwise planning operations, however, to be lawfully subject to direct attack.[280] This latter conclusion is contestable as it reads "direct" more broadly than would the ICRC, which considers the generalized recruitment and training of fighters to be "indirect" participation because of a lack of an immediate causal link between the conduct and harm to the enemy.[281] According to the ICRC, in cases of doubt, the potential target must be presumed to be a civilian who is immune from direct attack.[282] The Israeli Supreme Court, by contrast, seems to flip this presumption in order to encourage civilians to avoid hostilities in order to protect them.[283]

The treaty language governing the DPH doctrine suggests that civilians are targetable only "for such time as" they are directly participating in hostilities.[284] This implies that the concept governs targeting decisions by state actors based on observing the commission of hostile acts *in flagrante* rather than on exterior manifestations of combatant status, such as a uniform or fixed distinctive sign. Armed forces are expected to internalize and employ the test to respond to targets of opportunity on the basis of incomplete information in an operational environment. The DPH doctrine also provides a criminal defense in the context of a prosecution for the unlawful killing of a civilian.[285] In light of its complexity, the multi-factor DPH test is perhaps more amenable to such an *ex post* application than to *ex ante* targeting decisions that may require virtually instantaneous decision-making. This temporal limitation also raises the specter of a revolving door, whereby individuals regain civilian status—which accords protection against direct attack—every time they suspend their participation in hostilities. As a result of this textual limitation, unprivileged combatants in NIACs are able to evade direct attack more easily than are privileged combatants in IACs.[286]

To respond to the operational realities of NIACs and pressure from states seeking greater targeting authority vis-à-vis the members of organized armed groups engaged in NIACs, the

[276] *Pub. Committee Ag. Torture*, *supra* n.205, at para.2. See also, Melzer 2008, at p.5.
[277] *Pub. Committee Ag. Torture*, *supra* n.205, at para.60.
[278] *Pub. Committee Ag. Torture*, *supra* n.205, at para.35. See also ICRC 2008b, at pp.1020-21.
[279] *Pub. Committee Ag. Torture*, *supra* n.205, at para.35. See also ICRC 2008b, at p.1020.
[280] *Pub. Committee Ag. Torture*, *supra* n.205, at para.37.
[281] ICRC 2008b, at p.1022. Training for a specific mission, however, is considered sufficiently direct to remove civilian immunity. *Id.*
[282] ICRC 2008b, at p.1037. The treaties create a presumption of civilian status. Article 50(1), API. They do not, however, create a presumption that a civilian is not directly participating in hostilities. See Boothby 2010, at p.766.
[283] See also Schmitt 2004, at pp.505 and 509.
[284] ICRC 2008b, at p.1034.
[285] ICTY, *Prosecutor v. Strugar*, Judgment of Appeals Chamber, Case No. IT-01-42-A, 17 July 2008, at paras.164-186.
[286] *Pub. Committee Ag. Torture*, Opinion of Rivlin, *supra* n.205, at para.2. Henckaerts and Doswald-Beck 2005, at p.21 (noting imbalance in the law). Scholars have also criticized the ICRC's "narrow" interpretation of direct participation, particularly when it comes to preparation, deployment, and return. See Boothby 2010.

ICRC proposed the "continuous combat function" concept, which envisions a notion of quasi-combatancy in NIACs[287] and a concomitant function-based (rather than merely conduct-based) targeting doctrine.[288] As the theory goes, when an individual's participation in hostilities is not "spontaneous, sporadic, or unorganized" but rather continuous, he or she may be deemed to be a member of an organized armed group belonging to a party to the conflict. [289] Individuals who take up such a continuous combat function within an organized armed group lose their civilian status "for so long as they assume their continuous combat function."[290] As such, so long as such individuals carry out a combat function, they may be targeted at any time, even when not directly participating in hostilities.[291] It is only once individuals disengage from the group or cease to perform a continuous combat function—however defined—that they regain their civilian status and their immunity from direct attack (but not from prosecution for war crimes or their acts of belligerency that violate domestic law).[292]

This concept hinges on what constitutes a "combat function." Logically, this could apply to those individuals who do not participate directly in tactical combat activities in the sense of regularly discharging weapons. Thus, it would encompass individuals who organize, equip, provide intelligence for, or otherwise direct the hostile activities of subordinates and collaborators on a continuous basis.[293] From this point, it may be difficult to draw the line to exclude those who, on a continuous basis, inspire and fund hostile activities in a collective operation; these activities, however, are not uniformly accepted as "combat functions."[294] In any case, within the continuous combat function framework, it is crucial to develop reliable, objectively verifiable, and current intelligence of a potential target's conduct and role because that individual will be targetable at any time or place by virtue of his or her function rather than contemporaneous conduct.[295] The strength of this evidence will be debated *ex ante* when target lists are drawn up; it may also be tested—in accordance with penal burdens of proof—in the event of a criminal prosecution for potential breaches of the principle of distinction.

The ICRC has also proposed additional restraints on the right of a state to target unprivileged combatants who are directly participating in hostilities, or who assume a continuous combat function in an organized armed group, that derive from the principles of military necessity and humanity.[296] These principles prohibit "the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes."[297] The ICRC notes that in certain circumstances—especially in NIACs in which the national force exercises plenary

[287] Chesney notes that the three elements of combatancy are "disaggregated" in NIACs. Chesney 2011, at 41.
[288] ICRC 2008b, at p.995.
[289] *Pub. Committee Ag. Torture*, *supra* n.205, at para.39.
[290] ICRC 2008b, at pp.996, 1036.
[291] Solis 2010, at p.544.
[292] ICRC 2008b, at pp.996 and 1045. Relevant crimes include treason, perfidy, and murder as well as the full panoply of war crimes.
[293] Solis 2010, at p.546.
[294] See Watkin 2010, at pp.657, 660; but see Melzer 2008, at pp.320-321.
[295] ICRC 2008b, at p.1008. See also *Pub. Committee Ag. Torture*, *supra* n.205, at para.40.
[296] ICRC 2008b, at p.996.
[297] ICRC 2008b, at p.1042. The ICRC Study distinguishes such situations from IACs involving well-equipped armed forces where there are no restrictions on "the use of force against legitimate military targets beyond what is already required by specific provisions of IHL." *Id*. at p.1043.

or at least partial control over territory—these limitations may require the capture of, or the offering of surrender to, a civilian directly participating in hostilities, rather than his or her outright killing.[298] In this way, the ICRC would accord civilians who are directly participating or assuming a continuous combat function in hostilities a measure of protection that is not accorded to privileged combatants in an IAC. This position finds resonance in the Israeli decision, which held that a civilian taking a direct part in hostilities "cannot be attacked at such time as he is doing so, if a less harmful means can be employed."[299] The Court traced this sequential least-injurious-means approach to a general principle of proportionality found in Israeli domestic law (and perhaps also to the state of occupation), rather than to IHL *stricto sensu*.[300]

The ICRC's guidance has not been universally accepted. In particular, the ICRC has been criticized by some governments and academics for aligning members of organized armed forces closer to civilians than to regular state armed forces and for unreasonably circumscribing the targetability of those who join organized armed groups.[301] In particular, the continuous combat function construct disallows the direct targeting of individuals who undertake many non-combat support functions that are regularly performed by uniformed service members and that are integral to a fighting force, but that are not combat functions *per se*.[302] The counter-argument is that civilians who join an organized armed group unaffiliated with a state should be equally as targetable as privileged combatants engaged in an IAC, regardless of their assumption of a combat versus support function. Indeed, there is state practice in NIACs asserting a continuous targeting authority that does not hinge upon a showing that the individual was participating in hostilities or even engaged in a continuous combat function but rather that the target was a member of an organized armed group that is engaged in hostilities.[303] In addition, the continuous combat function concept unrealistically assumes that militants occupy a permanent functional role in any fighting force, which may not be the case with non-state groups whose members may occupy roles that are more fluid than in a national army.[304] There is also objection to the purported obligation to employ least injurious means in NIACs on the ground that militants should be targetable regardless of whether capture is possible, as is the rule in IACs. This latter criticism hinges in part on the fact that it is difficult to come up with defensible reasons to limit the proposed sequential approach to NIACs and to unprivileged belligerents.[305] Such limitations, whether applicable in NIACs or IACs, would constrain the use of lethal force in ways that the dissenters are unwilling to countenance. These perceived problems with the ICRC's guidance gave rise to intense controversy and caused several of the experts involved to recuse themselves from mention in the final report.[306]

4.2.5. The Events in Question

[298] ICRC 2008b, at p.1043. See also *Pub. Committee Ag. Torture*, *supra* n.205, at para.40; Melzer 2008, at p.108.
[299] *Pub. Committee Ag. Torture*, *supra* n.205, at para.40.
[300] *Ibid.*
[301] Watkin 2010, at p.686; Boothby 2010, at p.758.
[302] Watkin 2010, at pp.672-3.
[303] Chesney 2011, at p.41.
[304] Boothby 2010, at p.754.
[305] Parks 2010, at p.797 n.82.
[306] Parks 2010, at pp.784-85.

Turning to the events at issue, al Qaida has manifested an enduring intention to engage in hostilities against the U.S. and other states. Determining the targetability of particular members of al Qaida within the IHL targeting schema and the ICRC's DPH guidance nonetheless raises a number of ambiguities. Al Qaida has been characterized as a loosely-organized and internationally-dispersed organization whose subunits share an overarching ideology, but enjoy a high degree of autonomy in terms of tactics and objectives.[307] Perhaps by design, individual units may not meet the criteria employed in IHL for an organized armed group, which assume such groups are objectively identifiable and sufficiently organized to launch military operations of a particular intensity and duration. It is unclear to what extent al Qaida cells operating outside of Afghanistan take orders from any central authority in the sense of their being a "terrorism franchise."[308]

Not surprising, the U.S. took the position that both individuals were military objectives, equated to enemy commanders in the field. In statements following their deaths, U.S. spokespersons stressed the two men's continuing or growing (in the case of al-Aulaqi) operational roles.[309] If al Qaida satisfies the organized armed group criterion, Bin Laden—separate and apart from his command and control apparatus—as the head of an organized armed group involved in the conflict can be conceptualized as a lawful military objective. Of course, it is fair to query whether he still exercised any operational leadership at the time he was killed. In the alternative, his role may have become purely symbolic or ceremonial, especially given the apparent decentralization and compartmentalization of al Qaida and Bin Laden's relative isolation in Pakistan.[310] Likewise, al-Aulaqi has been described as a propagandist and media personality rather than a tactician. An argument could thus be made that both Bin Laden and al-Aulaqi were akin to political leaders, rather than military personnel, which would place them in the grey area surrounding the right to target civilian leaders. This may be a distinction without a difference when it comes to terrorist groups. Although "many of the world's most sophisticated non-state warring parties have distinct political and military wings,"[311] in terrorist groups, there may be little division between the political and military leadership.[312]

None of the reports of the incidents reveals evidence that either individual was directly participating in hostilities at the time he was killed, hence the importance of the continuing combat function concept for legalizing both attacks. That concept provides cover, however, only if both men in fact occupied *combat* roles on a continuous basis, which might be more difficult to prove if the two men were ideologues or financiers. These distinctions lose their force if continuous targeting authority exists vis-à-vis members of organized armed groups in NIACs on the basis of mere membership alone, as contended by many states. By this approach, both men were fully assimilated to combatants engaged in an IAC for targeting purposes who could be engaged at any time based on their status rather than their conduct or functional role without running afoul of the principle of distinction.

[307] Hoffman 2006, at pp.285-288.
[308] Paulus and Vashakmadze 2009, at p.119.
[309] Williams 2011.
[310] Mazzetti 2011; Schmidle 2011.
[311] Mahnad 2011.
[312] Kasher & Yadlin 2005, at p.55.

In terms of the United States' adherence to IHL proportionality in Operation Neptune Spear, collateral damage was minimal, especially when assessed against the high value of the target.[313] The raid resulted in the death or injury of two colorable civilians (excluding the courier and Bin Laden's son). This is an impressive result in light of the fact that upwards of thirty people, including potentially thirteen children, were thought to have been present or residing in the compound.[314] Apparently, there was some dissension among President Obama's inner national security circle about how to respond to the intelligence of Bin Laden's whereabouts. It has been reported that President Obama ultimately "vetoed a plan to obliterate the compound with an airstrike."[315] One concern with this plan was that Bin Laden's presence in the compound may have been impossible to verify. Given Bin Laden's residence in a civilian neighborhood, the risk of collateral damage would also no doubt have been higher with an air strike than a ground raid. That said, IHL tolerates a higher degree of collateral damage with high value targets.

Because accomplished face-to-face, the Bin Laden operation does not raise many of the concerns inherent to the use of RPVs as in the al-Aulaqi operation.[316] The use of drones in modern warfare has raised discomfort on a number of grounds, including the lack of reciprocity of risk, the concern that their use stems from an excessive preoccupation with force protection,[317] the inability to precisely calibrate the level of force employed, and the fact that their use precludes the ability to capture suspects or to accept their surrender[318] (which, of course, is true of all aerial attacks).[319] From a *jus in bello* perspective, there is nothing about using continuous surveillance and precision-guided missiles *per se* that runs afoul of the principle of proportionality so long as the object of the attack is a lawful one and precautions against incidental harm are implemented. Indeed, we might ultimately prefer a decapitation strike in which key individuals are targeted with precision, after detailed pattern-of-life analyses, rather than eliminated in large-scale clashes between armed forces or following airstrikes using heavier munitions.[320] In terms of collateral damage, there appears to have been no prior knowledge that Samir Khan, the other American citizen killed, was in the vehicle with al-Aulaqi that day.[321] Without an expressly operational role, it is unclear if Khan himself would have been considered a military objective. According to reports, he too played a central role in al Qaida's propaganda machine, but whether such machinery is a military objective remains controversial.[322] We have little insight into the identities of the other individuals in the car that day, although one of the dead may have been Ibrahim Hassan al-Asiri, an alleged bomb maker.[323]

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[313] Koh 2011.
[314] Gall 2011; see also WorldWatch 2011.
[315] Drogin, Parsons and Dilanian 2011.
[316] Bergen and Tiedemann 2011; c.f. Alston 2011, at pp.35-36.
[317] Kahn 2002.
[318] There are reports of soldiers attempting to surrender to drones. Shelsby 1991.
[319] Alston 2011, at p.31. This is, of course, unlikely given the remote-control nature of drone strikes and the asymmetries of power between the US and other involved states.
[320] See, e.g., Gross 2011.
[321] The U.S. government eventually offered its "condolences" to the family of Khan. Funk 2011.
[322] In the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), available at **http://icty.org/x/file/Press/nato061300.pdf**, at p.74.
[323] Mazzetti 2011.

Even if Bin Laden is a legitimate military objective, his death could still constitute a war crime if he was *hors de combat* (i.e., if he was surrendering, sick, or injured so as to pose no further threat) or killed treacherously or perfidiously (i.e., if he could have reasonably thought the SEALs were civilians). Accounts do not bear these scenarios out,[324] but we may never know for sure whether a genuine surrender was offered. Even if the attack was lawfully executed by the immediate actors, a war crime could have been committed by their superiors in the event that an order to take no prisoners was issued. The Administration insists, however, that contingency plans were in place for the team to accept Bin Laden's surrender if it was offered, implying that there was no order to take no quarter. A spokesperson stated:

> The team had the authority to kill Osama bin Laden unless he offered to surrender; in which case the team was required to accept his surrender if the team could do so safely. … Consistent with the laws of war, bin Laden's surrender would have been accepted if feasible. [325]

Even if surrender was offered, it may not have been safe for the SEAL team to immediately take Bin Laden into custody given the presence of weapons and other threatening individuals in the compound. That said, so long as he did not take up arms or attempt to flee, Bin Laden had he surrendered would have remained immune from direct attack until the hostile situation was defused. One final lingering objection to the way in which the operation was implemented concerns the two shots fired at Bin Laden. This invokes the controversial phenomenon of "double-tapping," which involves using a second shot to "finish off" a combatant who has been fully disabled by a first shot.[326]

In evaluating the legality of these operations, it is not enough to examine the status of the target; the status of the attacker may also be relevant. Navy SEALs—who would be deemed privileged combatants in an IAC—carried out the Bin Laden operation. By contrast, the drone program in Yemen is run largely by civilians in the CIA's Counterterrorism Center, thus signaling the evolution of the intelligence agency into a paramilitary force.[327] This actuality raises the question of whether these state actors are entitled to engage in hostilities under IHL. If members of the CIA involved in such an operation in an IAC were to be captured or extradited by the territorial or nationality state, they may not be entitled to assert the defense of combatant immunity, even if the operation were conducted lawfully under the law of war.[328] According to the Special Rapporteur on Extrajudicial Killings, Summary or Arbitrary Executions:

> [I]ntelligence personnel do not have immunity from prosecution under domestic law for their conduct. They are thus unlike State armed forces which would generally be immune from prosecution for the same conduct (assuming they complied with IHL requirements). Thus, CIA personnel could be prosecuted for

[324] But see The Telegraph 2011.
[325] Whitehouse Press Secretary 2011. See also Koh 2011 and Brennan 2011 for similar remarks. But c.f. Schmidle 2011 (quoting one of the team members indicating that there was no intention to capture Bin Laden: "'There was never any question of detaining or capturing him—it wasn't a split-second decision. No one wanted detainees.'").
[326] Simpson 2006.
[327] Alston 2011.
[328] Davis 2011.

> murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law.[329]

The ICRC's study of customary IHL takes a pragmatic approach to the question of the involvement of law enforcement and intelligence personnel in hostilities: "[w]hen these units take part in hostilities and fulfil the criteria of armed forces, they are considered combatants."[330] The incorporation of armed law enforcement agencies into the armed forces is normally accomplished through a formal legislative act.[331] Likewise, the ICC Statute reflects the diversity of state actors who may engage in hostilities by discussing armed conflicts involving "governmental authorities" rather than designating such participants as members of the "armed forces" *stricto sensu*.[332]

As a matter of established doctrine, combat immunity is a feature of the law governing IACs that protects privileged combatants from prosecution for lawful acts of war by another state. It does not exist as a formal matter in the law governing NIACs, where rebels and other non-state fighters are not privileged to use force and can be prosecuted for any acts of violence they commit or even for mere participation in an insurrection if domestic law penalizes such conduct.[333] This asymmetry stems from the fact that NIACs historically occurred on the territory of a single state, as in the classic civil war scenario, such that there was little risk that the state's own armed forces would be prosecuted for lawful acts of war. It bears consideration, however, of whether a doctrine of combat immunity should be developed to protect privileged combatants from being prosecuted for lawful acts of war committed in an extraterritorial NIAC. As it stands, international law would not constrain either Pakistan or Yemen from prosecuting a U.S. soldier or member of the CIA for committing a violent act on their territory.

4.3. Conclusion: *Jus in Bello*

The contention that both Bin Laden and al-Aulaqi were lawful military objectives subject to continuous targeting authority on the basis of their status, as opposed to their activities at the moment of their deathes, emerges as a central justification for both operations. *A priori*, this position requires a theory for the applicability of IHL to the events in question. If IHL follows our protagonists wherever engage with each other—as opposed to applying only to territory where combat activities regularly occur—then IHL offers support for these operations. Legal certainty in the Yemen context requires a theory for why the conflict with AQAP is either part of the conflict against al Qaida writ large or triggers IHL on its own or in connection with some other armed conflict being waged on the Arabian Peninsula. The conclusion of legality also requires, at a minimum, acceptance of the ICRC's continuous combat function concept, with a rejection of the least-injurious-means limitation that the ICRC proposes on such targeting

[329] Alston Report, *supra* n.184, at para.71. This ambiguity of status has given rise to the practice of double-hatting. Alston 2011, at p.7. See also Feickert and Livingston 2010 (noting the increased fluidity between the CIA and Special Forces in terms of intelligence gathering and the use of kinetic force).
[330] Henckaerts and Doswald-Beck 2005, at p.17.
[331] ICRC 2011b, at p.1011 n.71.
[332] Zimmerman 1999, at p.286.
[333] Henckaerts and Doswald-Beck 2005, at pp.11 and 384.

authority. If the two men did not occupy a combat role, however, then a more robust targeting authority is required premised exclusively on their membership in an organized armed group.

All this analysis presumes the applicability of IHL. Outside of this framework, these events become more suspect given non-derogable prohibitions against summary execution[334] set forth in many human rights instruments, not to mention prohibitions against murder and assassination under relevant domestic law and the constitutional imperative of due process. The applicability of these latter bodies of law depends, in part, on complex and contested questions of choice of law and extraterritoriality. Indeed, even if IHL is applicable, it is not entirely settled that these other legal regimes do not also apply in parallel. There are conflicting views on whether IHL as the *lex specialis*, within the meaning of the adage *lex specialis derogate legi generali* ("the special rule overrides the general law"),[335] fully displaces or merely qualifies other otherwise applicable bodies of international law, such as human rights law, in a state of armed conflict. The next Section explores this choice of law dilemma.

5. Alternative Bodies of Law

All of the foregoing analysis assumes that IHL is the right framework from which to evaluate the two operations. If IHL is not applicable at all, then other bodies of law rise to the fore, including U.S. domestic law and international human rights law (IHRL) (presuming their extraterritorial application) alongside the *lex fori*, Pakistani and Yemeni domestic law.[336] Even if IHL has been triggered and regulates these events, IHRL may still apply in parallel as a source of rules to fill gaps in IHL, to interpret undefined or imprecise concepts in IHL, or even to mitigate certain more permissive aspects of IHL.[337] IHRL may be particularly relevant in regulating the conduct of states engaged in NIACs, where rules are less developed as compared to IACs. Likewise, elements of the relevant domestic law will continue to regulate aspects of these events in parallel with these bodies of international law. This Section will focus primarily on the international choice of law question, but will identify points of intersection and tension between international and domestic law. Taken as a whole, this inquiry reveals the existence of overlapping regimes without clear rules on resolving conflicts of law that arise.

5.1. International Human Rights

Starting with human rights law, even if IHL does apply to these events, it is not entirely clear that IHRL is silent.[338] This query invokes the vexing issue in contemporary international law of how to resolve the normative tensions that exist at the intersection of these two bodies of law. Many theories have been espoused in the literature and jurisprudence to resolve potential conflicts of law that may arise at this interface. The first theory is one of *lex specialis*, which comes in a

[334] Alston Report, *supra* n.184, at p.9.
[335] See, e.g., International Law Commission, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, a*vailable at*: **http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf** [hereinafter 'Fragmentation Study'], at 2(5).
[336] In any case, the existence of an armed conflict does not mean that every law enforcement exercise is governed by IHL; a nexus to the conflict is required. Geiß 2009, at p.141.
[337] Melzer 2008, at p.176.
[338] ICRC 2008b, at p.993.

strong and a weak form.[339] The strong form envisions a total displacement of IHRL upon the commencement of armed conflict.[340] By this view, humanitarian law and human rights law are self-contained, mutually exclusive regimes. Where IHL does not speak to a situation, actors are free to choose a course of action, unfettered by legal rules drawn from elsewhere.[341] Gaps in the law are deemed purposeful in a sense such that they should not be filled from other sources.

The weak form of the *lex specialis* theory does not envision the total displacement of international human rights norms in armed conflict situations except where the rules of IHL and IHRL are in direct contradiction. Where the applicable rules are not directly opposed to each other, this approach would dictate that the two bodies of law should be harmonized[342] through interpretive techniques[343] and formal declarations of derogation.[344] As such, where there are gaps in IHL, there may be other rules—including human rights norms and domestic law—that are applicable.[345] Human rights law can thus be employed as an interpretive aid to add content to undefined terms in IHL, such as "judicial guarantees" and "humane treatment," or to expound upon treaty obligations, as in situations of occupation when the occupying state exercises plenary power over territory.[346] In a recent submission to the Human Rights Committee, the U.S. acknowledged that IHL and IHRL are "complementary and mutually reinforcing."[347] This is a departure from prior statements that adopted a more robust *lex specialis* position.[348]

While many adherents to a *lex specialis* approach consider human rights to be an invasive species vis-à-vis IHL, it cannot be gainsaid that positive IHL invites in these very norms. Thus, many IHL treaties create space for a consideration of, or even interlineations with, human rights norms and concerns. The Martens Clause is the precursor to this phenomenon,[349] and Articles 72 and 75 of API are more modern and fulsome manifestations of this tendency. These textual portals go far toward debunking the *lex specialis maximus* approach to the humanitarian law/human rights interface. By the same measure, there are IHRL treaties that specifically make allowances for situations governed by IHL. The European Convention on Human Rights, for

[339] *Coard et al v. U.S.*, Case 10.951, Inter-Am. C.H.R., Rep. No. 109/00, para.42 (1999); Watkin 2004, at pp.2-9.
[340] Greenwood 2008, at p.39.
[341] Parks 2010, at p.806.
[342] U.N. Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted March 29, 2004, CCPR/C/21/Rev.1/Add.13 (May 26, 2004), para.11; *Legal Consequences*, *supra* n.104, at para.106. Greenwood 2008, at p.40; Lubell 2010, at pp.193-235.
[343] See Fragmentation Study, *supra* n.335, at para.4.
[344] Article 4 of the ICCPR, for example, allows for states to derogate from certain of its provisions in times of national emergency. See Human Rights Committee, General Comment No. 29 of 31 August 2001 (States of Emergency), CCPR/C/21/Rev.1/Add.1, available at **http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361?Opendocument**.
[345] *Nuclear Weapons*, *supra* n.129, at para.26; *Legal Consequences*, *supra* n.104, at para.106.
[346] *Armed Activities*, *supra* n.83, at para.178.
[347] Fourth Periodic Report of the United States of American to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (Dec. 20, 2011), para.507, available at **http://www.state.gov/g/drl/rls/179781.htm** [hereinafter 'Fourth Periodic Report'].
[348] See Inter-American Commission on Human Rights, Response of the US to Request for Precautionary Measures—Detainees in Guantánamo Bay (April 15, 2002), available at **http://www.derechos.org/nizkor/excep/usresp1.html**.
[349] Article 1(2), API.

example, specifically exempts from censure "deaths resulting from lawful acts of war."[350] This formulation necessarily imports elements of IHL into the human rights analysis such that in a situation of armed conflict, IHL defines what constitutes an "extrajudicial" killing.

A third approach to managing this interface rejects the idea of *lex specialis* and of a hierarchy of rules altogether. Instead, it presumes that the most appropriate rule or body of law should be applied in any particular scenario to promote "systemic integration."[351] This may result in a sliding scale between the two bodies of law depending on the circumstances. So, activities on the battlefield or in an active theater of hostilities may be governed almost exclusively by IHL, but human rights law may have more to say vis-à-vis detention practices in light of its detailed rules on conditions of confinement and judicial protections. Thus, the applicability of IHL is not necessarily binary, in the sense that the corpus of IHL either applies in its entirety to an incident, territory, or individual, or not at all. Finally, one can envision a reverse *lex specialis* prioritization, where by international human rights norms temper elements of classic IHL. This may be due to the fact that many human rights norms constitute later in time legal pronouncements.[352] Or, it may be by virtue of human rights rules' strong normative force.[353] This latter approach might demand the additive application of applicable rules to ensure maximum protection to the individual.[354]

Most courts and commentators have adopted a harmonizing approach to this question. The ICJ, for example, stated that IHL as the *lex specialis* would determine whether a particular killing was "arbitrary":

> The test of what is arbitrary deprivation of life, however, … falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict is which designed to regulate the conduct of hostilities. Thus whether a particular loss of life … is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[355]

Even the former Special Rapporteur on Extrajudicial Killing, Summary on Arbitrary Executions conceded that targeted killing can be lawful in the context of IHL: "[A]though in most circumstances targeted killings violate the right to life, in the exceptional circumstances of armed conflict, they may be legal."[356] This conclusion reveals the importance of the *a priori* question of the applicability of IHL and the existence of a predicate armed conflict.

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[350] Article 15(2), Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, 222.
[351] Fragmentation Study, *supra* n.335, at para.17.
[352] Fragmentation Study, *supra* n.335, at para.24.
[353] Fragmentation Study, *supra* n.335, at paras.31-32 (discussing *jus cogens* and other fundamental norms expressing "elementary considerations of humanity").
[354] Schabas 2007, at p.593.
[355] *Nuclear Weapons*, *supra* n.129, at para.25. See also *Legal Consequences*, *supra* n.104, at para.106, *Armed Activities*, *supra* n.83, at para.216 (noting that human rights protections continue to apply in armed conflicts).
[356] Alston 2011, at p.12.

Resolving the conflict of law question is not the only impediment to applying human rights norms to these events. In many of today's conflict situations—especially transnational conflicts involving the U.S.—theories for the pertinence of human rights law also presume the extraterritorial application of states' IHR obligations.[357] This remains contested, especially by the U.S., which until recently could have been described as a persistent objector to the proposition that such extraterritorial obligations exist. This position, however, is increasingly out of step with the caselaw.[358] At a minimum, the current state of the law would dictate that human rights norms apply wherever a state exercises *de facto* control over territory (including in the sense of undertaking governmental functions)[359] or individuals.[360] An argument could be made that Bin Laden was in—or could easily have been brought into—the effective control of the SEAL team. It is more difficult to argue that al-Aulaqi was within the effective control of the U.S. since he was killed from a distance, without actually being physically in the hands of state agents.[361] If this distinction is valid, state responsibility under IHRL could turn on the way in which an individual was killed, rather than the question of whether state exercised control over the individual's life. Any requirement of physical custody for showing effective control, however, offers a perverse loophole for states to avoid their human rights violations by operating remotely.[362]

Turning to the content of IHRL, most human rights instruments contain a broad articulation of the right to life,[363] although some treaties qualify the formulation of this right by prohibiting only the "arbitrary" deprivation of life.[364] Furthermore, this right is considered non-derogable except when a sovereign employs deadly force in situations of self-defense, to otherwise protect life, or to prevent the escape of a dangerous suspect.[365] State actors can thus employ deadly force in law enforcement actions only when the target poses an immediate danger to the arresting officer.[366] The European Court of Human Rights has mandated a strict test of necessity be employed to determine if lethal force is warranted; there must also be proportionality between the state's

[357] General Comment 31, *supra* n.342, at para.10.
[358] U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Comments of the Human Rights Committee: United States of America*, CCPR/C/79/Add 50 (1995), available at **http://www1.umn.edu/humanrts/hrcommittee/US-ADD1.htm**, at para.19. But see Fourth Periodic Report, *supra* n.347 (softening stance).
[359] *Al Skeini & Others v. United Kingdom*, Judgment of 7 July 2011, No.55721/07 ECHR 2011, at para.141.
[360] *Ocalan v. Turkey*, Judgment of 12 May 2005, No. 46221/99 ECHR 2005 at para.91 (finding that applicant was under the effective authority of Turkey, thus within the "jurisdiction" of the state within the meaning of the Convention). See also *Boumediene v. Bush*, 553 U.S. 723 (2008).
[361] *Bankovic & others v. Belgium & others*, Judgment of 19 December 2001, No. 52207/99 ECHR.
[362] *Alejandre v. Cuba* ("Brothers to the Rescue"), Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106, Doc. 3 rev. at 586 (1999) at paras.25, 53 (holding that victims were within the "authority and control" of Cuba when they were shot down by a military aircraft in international airspace).
[363] See, e.g., Article 3, Universal Declaration of Human Rights, G.A. Res. 217A (Dec. 10, 1948); Article 6, International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter 'ICCPR'].
[364] See, e.g., Article 4, African Charter on Human and People's Rights (Oct. 23, 1986); Article 4, American Convention on Human Rights (July 18, 1978).
[365] Principle 9, U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, G.A. Res. 45/166 (Dec. 18, 1999).
[366] *McCann v. United Kingdom*, Judgment of 27 September 1995, No. 324 Ser.A ECHR 1995, at paras.146-214. See *Public Committee Against Torture*, *supra* n.205, at para.40 (citing *McCann* for the proposition that capture should be effectuated where possible).

response and the perceived threat, and alternatives to lethal force must be considered.[367] Generally, law enforcement personnel are expected to offer warnings and attempt apprehension before resorting to deadly force.[368]

Theoretically, the right to life adheres even in situations of armed conflict. Indeed, the former U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions concluded that "extrajudicial executions can never be justified under any circumstances, not even in time of war."[369] Accordingly, the Rapporteur decried the first airstrike in Yemen in 2002 as "a clear case of extrajudicial killing."[370] Nonetheless, assuming the applicability of both bodies of law, the human right regime may cede regulatory authority to the *jus in bello*, which—as discussed above—can be interpreted to characterize the two killings as lawful wartime killings of the enemy.[371]

This analysis reaches a contrary conclusion if IHL is removed from consideration. If there is no armed conflict, and the *jus ad bellum* self-defense justification governs the decision to use military force, international human rights law continues to protect individuals from arbitrary deprivations of life. The *lex specialis* debate is less conceptually salient in the literature when only the *jus ad bellum* is applicable. In the operations under consideration, the degree of force employed exceeded that which would be acceptable under a law enforcement framework (although the Bin Laden raid is a closer call in light of the inherent dangerousness of the situation that day[372]). It is unclear, however, if *jus-ad-bellum* operations targeting a single dangerous individual should be analyzed as law enforcement operations or if some other harmonization of IHR and the *jus ad bellum* is necessary. Certainly there is some role for IHRL to play here, particularly to protect civilians from harm in light in the absence of a concept of collateral damage outside of situations of armed conflict.

There are multiple theories for how the law governing the use of force and human rights law interact. In particular, there will be situations in counterterrorism operations, such as the events in question, when the *jus ad bellum*, the *jus in bello*, and IHRL simply cannot be perfectly

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[367] *Isayeva v. Russia*, Judgment of 24 February 2005, No.57950/00 ECHR 2005, at para.191; Paulus 2006; Abresch 2005; Doswald-Beck 2006.

[368] UN Human Rights Committee, *Husband of Maria Fanny Suarez de Guerrero v. Colombia*, Decision on Admissibility, 37th Sess., No. R.11/45, Supp. No. 40 (A/37/40) (1982), at para.13.2.

[369] UN Commission On Human Rights, Question Of The Violation Of Human Rights And Fundamental Freedoms In Any Part Of The World, With Particular Reference To Colonial And Other Dependent Countries And Territories, Extrajudicial, Summary Or Arbitrary Executions, Report Of The Special Rapporteur, Mr. Bacre Waly Ndiaye Submitted Pursuant To Commission On Human Rights Resolution 1997/61, E/Cn.4/1998/68/Add.2 (Mar. 12, 2998), at III.B.1.

[370] Report of the Special Rapporteur, Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2002/36, E/CN.4/2003.3, (January 13, 2003), at paras.37-39. In response, the U.S. argued that the events fell outside the Special Rapporteur's mandate and that the killing of an enemy combatant in a legitimate military operation could not constitute an extrajudicial killing. See Response of the Government of the United States of America to the letter from Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Asma Jahangir's letter to the Secretary of State dated November 15, 2002 and to the Findings of the Special Rapporteur contained in her report to the Commission on Human Rights (E/CN.4/2003/3), E/CN.4/2003/G/80 (April 22, 2003), at pp.4-5, available at **http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/138/04/PDF/G0313804.pdf?OpenElement**.

[371] But see *Isayeva*, supra n.367, at para.191.

[372] O'Connell 2011.

harmonized because the two bodies of law permit forms of action or impose obligations and restraints that are inherently incompatible. In such situations, it comes down to a pragmatic policy choice by the state as to which body of rules to follow. This choice is, of course, subject to the recognition that the state will have to accept any consequences, even if just reputational, for having breached an equally applicable legal obligation.

5.2. Domestic Law

As this article is primarily focused on international law, a full treatment of the domestic law implications of these operations is beyond its scope. It is worth simply highlighting several considerations that would be relevant to synchronizing the *jus in bello* considerations discussed above with U.S. statutory and constitutional law and with the *lex fori*.

5.2.1. U.S. Domestic Law

There are several elements of U.S. domestic law that might govern the events in question. Most saliently, the U.S. has banned assassination as a matter of national policy through an iterative series of executive orders, the last of which remains extant.[373] In the wake of alleged peacetime assassination plots against foreign leaders in the 1960s and 1970s,[374] U.S. Presidents Gerald Ford, Jimmy Carter, and Ronald Reagan issued executive orders (E.O. 11905 (1976),[375] E.O. 12036 (1978),[376] and E.O. 12333 (1981),[377] respectively) banning assassination without Presidential approval. E.O. 12333, for example, provides:

> No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.

Over the years, legislation has been introduced to fortify[378] or limit[379] the express prohibition against assassination in these decrees, but nothing has been enacted to date. Indeed, the Executive Order was likely passed originally in order to head off a legislative ban.

In an exercise of concerted ambiguity, none of the E.O.s actually defines assassination, although "the context in which [the first order] was promulgated suggests that it was understood to apply to circumstances similar to those that recently had been the subject of investigation."[380] Colloquially, the concept of assassination—which carries a distinctly negative connotation—encompasses the intentional and premeditated killing of a particular individual (often a government official, influential civilian, or other prominent figure) for political purposes. To many, it embodies a notion of treachery[381] as in death by poison cigar or exploding umbrella.[382]

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[373] For more on this topic, see Bazan 2002.
[374] Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, S. Rep. No. 465, 94th Cong., 1st Sess. (1975).
[375] President Gerald R. Ford, Executive Order 11905, US Foreign Intelligence Activities, §5(g) (Feb. 18, 1976).
[376] President Jimmy Carter, Executive Order 12036, US Foreign Intelligence Activities, §2-305 (Jan. 24, 1978).
[377] President Ronald Reagan, § 2.11, Executive Order 12333, 3 C.F.R. 200 (1982) (Dec. 4, 1981).
[378] See Senate Report, *supra* n.374, at 281-84; see also Brandenburg 1987, at pp.685-6.
[379] Brandenburg 1987, at p.686 n.196.
[380] Zengel 1991, at p.145.
[381] See generally Kasher and Yadlin 2005.

This element of a betrayal of trust is not, however, inherent to the concept. The full reach of the Order has been the subject of speculation given recent events, such as with respect to the bombing of Libya in 1986[383] or calls to eliminate Saddam Hussein in the first Gulf War.[384]

For our purposes, the ban on assassination must be reconciled with the use of lethal force in the context of armed conflicts, counterinsurgency operations, and counterterrorism measures taken in self-defense. In its broadest terms, the Executive Order could be interpreted to mean that the U.S. cannot kill a pre-selected individual under any circumstances. In the alternative, the ban may remain applicable unless there is a valid authorization to use force emanating from Congress.[385] Another interpretation would exclude the Order's applicability in wartime altogether on the basis of the argument that it applies to intelligence rather than military activities.[386] To this end, the U.S. executive orders have been interpreted to apply only in peacetime or, at a minimum, to embody implicit exceptions in conventional military, counterinsurgency, and counterterrorism operations.[387] Col. W. Hays Parks, when he was Special Assistant for Law of War Matters to the Judge Advocate General of the Army, concluded that

> clandestine, low visibility or overt use of military force against legitimate targets in time of war, or against similar targets in time of peace where such individuals or groups pose an immediate threat to US citizens or the national security of the US, as determined by competent authority, does not constitute assassination or conspiracy to engage in assassination, and would not be prohibited by the proscription in EO 12333 or by international law.[388]

The classic historical example cited is the downing of the aircraft carrying Japanese Admiral Yamamoto Isoroku in 1943 far from any battlefield.[389] By this reasoning, the killing of the head of an organized armed force, even in a NIAC, would be governed by IHL as a form of *lex specialis* rather than the assassination ban. Even if some ban on assassination exists in IHL, it likely covers the killing of senior officers by treachery or trickery, which would not be the case where uniformed SEALs and remote attacks are involved.

Although outside the scope of this study, there is no question that other foundational elements of domestic law, such as the 4th and 5th Amendments to the U.S. Constitution, may speak to these events. Indeed, it is also worth considering whether these protections may be more robust vis-à-vis al-Aulaqi as a U.S. citizen, even though the 5th Amendment clearly applies to all persons and not just citizens. There is early precedent suggesting that citizenship might be relevant to determining the sliding scale between the law of war and domestic law (at least when it comes to

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[382] Vattel, for example, defined assassination as treacherous murder perpetrated "by the hand of any other an emissary, introducing himself as a suppliant, a refugee, a deserter, or, in fine, a stranger." Vattel 1758, at p.359. See also Zengel 1991, at pp.131-2 (noting that assassination is understood to mean the selected killing of an individual by treacherous means).
[383] O'Brien 1990, at pp.463-467.
[384] Zengel 1991, at p.124.
[385] Chesney 2011, at p.52 n.218; Lubell 2010, at p.175.
[386] Zengel 1991, at pp.147, 150.
[387] Janin 2007, at p.96.
[388] Parks 1989, at p.8.
[389] Parks 1989, at p.4.

the reach of military jurisdiction), but the issue of the rights of non-citizens was not squarely presented.[390] A devotion to universal human rights principles, however, might counsel against asserting any distinction between the two operations based on citizenship alone. The strength of constitutional protections may also turn on whether these events are perceived to have occurred on a battlefield. Indeed, in *Hamdi*, the Supreme Court specifically distinguished between actions "on the battlefield" against a U.S. citizen and the detention of that citizen, which "meddles little, if at all, in the strategy or conduct of war."[391] At the same time, prudential doctrines—such as the political question doctrine—may intrude to neutralize any potential constitutional claims arising out of these events.[392] All this said, assuming the parallel applicability of IHL, a robust *lex specialis* conclusion could theoretically override any limitations imposed by the 5th Amendment due process clause.[393] Absent a strong theory of *lex specialis*, the due process clause may mitigate the more permissive aspects of IHL, particularly outside of a "hot" conflict situation, which will be discussed in greater detail in the next Section.

5.2.2. Pakistani and Yemeni Law

It must not be forgotten that the law of the territorial state continues to apply to the actions of foreign states within its borders. Standard penal prohibitions against murder and mayhem would govern the events in question absent displacement by the *jus ad bellum* or IHL as the *lex specialis*. One can imagine a counter-factual scenario in which one of the SEALs was captured by Pakistani forces and prosecuted for murder. That defendant would no doubt invoke combat immunity as a defense (along with individual self-defense perhaps). Pakistani jurists, however, would be under no international law obligation to recognize the defense in this NIAC context, especially given that the U.S. was employing forcible measures without Pakistan's consent. Because it was launched remotely, the Al-Aulaqi operation would not likely yield a prosecutable defendant, unless the base itself was located in Yemen. In any case, these contingencies are all extremely unlikely, given the state of the United States' relations with these two countries and the high profile nature of the targets.[394]

5.3. Conclusion: Domestic Law

It is, of course, unlikely that the U.S. would ever actually apply the assassination ban to the events in question, even if it were applicable. In any case, there is an authoritative interpretation of the Executive Order that suggests it is meant to govern peacetime killings of public figures rather than wartime killings of military objectives. Pakistani and Yemeni law continue to apply to these events. Even though the operations might be lawful under international law, there would be no bar to Pakistan or Yemen prosecuting one of the actors involved if custody could be obtained absent a doctrine of combatant immunity in the law governing NIACs.

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[390] *Ex Parte Milligan*, 71 U.S. 1, 119 (1866).
[391] *Hamdi*, 542 U.S. at 534.
[392] See, e.g., *El-Shifa Pharmaceutical Industries Co. v. U.S.*, 378 F.3d 1346 (D.C. Cir. 2004).
[393] *Ex Parte Quirin*, 317 U.S. 1 (1942). In *Quirin*, one of the saboteurs, Haupt, may have been a U.S. citizen who was treated identically to his co-conspirators. See also In re *Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (treating U.S. citizen who fought with the Italian army as a prisoner of war). But see Ex parte *Milligan*, 71 U.S. 2, 120-1 (1866).
[394] But see Mazzetti *et al* 2011 (noting American arrested by Pakistanis after a robbery attempt).

6. Locating a Duty to Capture In International or Domestic Law

These operations have given rise to the claim that the U.S. was under a duty to endeavor to capture Bin Laden and/or al-Aulaqi in lieu of killing them outright, especially given that neither was confronted on a "hot" battlefield. There are a number of places in this international law schema where one might locate such an obligation, especially given the fuzziness of the interfaces between the relevant legal regimes and the potential for normative overlap. Within the *jus ad bellum*, the proportionality requirement inherent to the customary doctrine of self-defense may demand capture in certain circumstances when a state is addressing a threat posed by a single individual rather than by a sovereign entity, military installment, hostile force, or combat asset. This may especially be the case when the individual is found outside of an established battlefield. Similarly, the necessity requirement might place limits on the robustness of defensive action where capture is feasible. Relevant considerations may include the strength of the relationship between the targeting state and the territorial state, the dependability of the territorial state as a partner in effectuating capture, and the sophistication of the intelligence, technology, and military assets that the targeting state has at its disposal (bearing in mind the debate over whether international law creates relative obligations among nations depending on their level of development). Indeed it could be argued that where the territorial state has consented to foreign intervention, there is a greater duty to attempt to capture rather than kill an individual, in light of the potential to gain cooperation and assistance from local law enforcement officials. At the same time, a state such as Yemen may be more willing to allow a remotely-piloted vehicle to enter its airspace than troops on its territory. Alternatively, it could be argued that where the exercise of self-defense is reactive (as in following a completed armed attack) or strictly preventative (as in the face of an inchoate threat, rather than imminent attack), international law—through the principles of necessity or proportionality—imposes heightened restrictions on the lethality of any defensive response.

Within the *jus in bello* and the rules governing NIACs, the ICRC's theory of least restrictive means might not countenance resort to lethal force unless the target is engaged while directly participating in hostilities, even if the individual is a member of an organized armed group who has assumed a continuous combat function in the group. In addition, the right to use lethal force might be limited by principles of military necessity, proportionality, or humanity in out-of-theater situations. Thus, while a state may be entitled to directly target a non-state fighter who is in the process of attacking national forces, armed forces may be limited to less injurious means when confronting an unarmed fighter who is not posing an immediate threat.

Human rights norms—and particularly the more robust version of proportionality governing law enforcement scenarios—might temper the *jus ad bellum* or IHL's targeting rules when an operation is undertaken outside of actual combat. In particular, the principle of military necessity might dictate the use of less than lethal means in such a scenario because it is difficult to argue that the killing (as opposed to capture) of fighters is "indispensable" under the circumstances.[395] Turning to domestic law, while the assassination ban is likely inapposite here, it remains to be fully explored whether the 5th Amendment due process clause, *a fortiori* with respect to al-

[395] Article 23(g), Hague IV. Indeed, the British Manual of the Law of Armed Conflict provides that "the use of force which is not necessary is unlawful, since it involves wanton killing or destruction." The Joint Service Manual, *supra* n.264, at § 2.2.1.

Aulaqi, might impose any limits along the lines of the Israeli Supreme Court's conclusion in the *Targeted Killing* opinion.[396] This may be especially true when chargeable crimes—such as terrorism or treason—exist in domestic law. In short, there are places within this journey to legality where an authoritative decision maker might impose heightened obligations on a state actor to endeavor to capture rather than kill an individual posing a threat to the nation.

The argument that members of such groups may be targeted wherever they are may be palatable when dealing with embattled foreign lands. It may be more problematic when applied to individuals found on U.S. soil—a scenario not presented by the two operations under consideration but logically foreseeable. Any arguments employed to justify unrestricted targeting of enemy combatants abroad with lethal force could be domesticated with little effort. And yet, the application of a pure law-of-war framework to alleged members of al Qaida apprehended in the U.S. has been controversial and remains the subject of litigation. In the face of legal challenge, the executive branch has eventually foregone detention and charged such individuals in Article III courts with violations of Title 18 of the U.S. Code.[397] As a result, whether or not the U.S. Constitution or any other source of law places limits on the application of IHL to exclusively domestic events in the absence of an armed conflict on U.S. territory has never been fully tested.

7. Conclusion

This epistemological journey has revealed multiple bodies of law under intense pressure from exogenous forces of globalization and the metastasis of transnational terrorism. The relevant law is unclear, indeterminate, or in flux at many key junctures along the way to a finding of legality vis-à-vis the two events in question. Thus, there is no definitive answer to the question of whether the doctrine of self-defense provides a justification for both the incursion into Pakistani sovereign territory and the use of deadly force against an individual posing an expected but inchoate threat to a nation. Likewise, assuming a self-defense rationale alone is insufficient or unavailable to justify both operations, IHL offers another source of potential authority. This, however, assumes that IHL follows militants wherever they may go, even if they journey far from the combat activities that activated this body of law in the first place. Nor is it certain that there is continuous targeting authority over individuals whom the core IHL treaties would classify as civilians, targetable only when directly participating in hostilities. The claim to legality requires an acceptance of the ICRC's continuous combat function construct—whose reach and limiting principles remain subject to debate—or a more robust targeting theory equating fighters in NIACs to privileged combatants in IACs. Finally, if there is an obligation to endeavor to capture a dangerous individual before killing him or her, from whence does such an obligation flow—the *jus ad bellum*, IHL, IHRL, or domestic law principles of proportionality and due process?

Determining the legality of these events also requires a consideration of the normative relationship between multiple potentially applicable bodies of law, including the *jus ad bellum,*

[396] See *Pub. Committee Ag. Torture, supra* n.205.

[397] See, e.g., *Al-Marri v. Spagone*, 555 U.S. 1220 (2009). In the context of cases involving the capture of enemy combatants, courts have characterized the US as "outside a zone of combat." *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003).

the *jus in bello*, and human rights law. While it has been argued that IHL displaces IHRL, IHL may also displace other targeting theories, such as national self-defense, as independent rationales for these types of operations. Most of the debate on doctrinal hierarchies has focused on when and to what degree IHRL constrains actors engaged in armed conflicts governed by IHL; as such, there is little to suggest that IHRL does not apply in full force to pure self-defense operations absent a state of armed conflict.

This legal indeterminacy and doctrinal overlap has been lamented as a consequence of the "fragmentation" of international law.[398] This is, however, an inapt metaphor as it presumes a primordial whole that has since disintegrated. The fact that multiple conclusions on legality are possible is more likely due to the fact that modern conflicts and counterterrorism operations—which take place transnationally and outside of traditional theaters of war against non-state actors who countenance no limitations on their own actions whatsoever—generate novel legal questions that invoke multiple legal regimes. Secondary rules of recognition, interpretation, and choice of law have yet to catch up. Furthermore, notwithstanding the evolution of today's acute threats to world order, it has been decades since the existing IHL treaties were negotiated and drafted.

In all systems of law, regulatory gaps produce legal uncertainty but also a freedom to act. Thus, in the absence of clear legal rules, states are—in essence—free to choose a course of action. This suggests that while jurisprudentially discredited,[399] the legal legacy of the *Lotus* case—which set forth the proposition that what is not expressly forbidden by international law is permitted—continues to exert a strong gravitational pull.[400] There may, however, be consequences to acting along the edge of the law even in the absence of clear proscriptions, mandatory jurisdiction, and robust enforcement institutions. Negative repercussions may be diplomatic, reputational, and political. Furthermore, there remains the risk that where international reaction to controversial events is muted—for whatever reason—customary international law may evolve in ways that are ultimately undesirable.[401]

These observations also have implications for whether states should—as a matter of legal obligation or prudence—justify their actions when they choose to operate on the outer bounds of positive law.[402] On the one hand, it could be argued that legal indeterminacy behooves governments to provide insight into the relevant facts, legal theories, and analyses—consistent with national security concerns—so that the international community can evaluate the state's claims to legality and shape the development of law with their reaction. The remarks by Brennan[403] and Koh[404] reflect this approach, although the reported withholding of the

[398] See Fragmentation Study, *supra* n.335.
[399] *Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium), 2002 I.C.J. Rep. 3, at para.51 (Joint and Separate Opinion of Higgins, Kooijmans, & Buergenthal) ("the [*Lotus*] dictum represents the high water mark of *laissez-faire* in international relations, and an era that has been significantly overtaken by other tendencies.").
[400] *S.S. Lotus* (France v Turkey), 1927 P.C.I.J. (ser. A), No. 10, at paras.18-19.
[401] Roberts 1993/4, at p.198 (noting that where states acquiesce in breaches of the law, new law may be formed).
[402] Rona 2003, at p.54.
[403] Brennan 2011.
[404] Koh 2010; Koh 2011.

justificatory al-Aulaqi memorandum suggests a contrary impulse.[405] On the other hand, of course, enabling such scrutiny may aid the enemy by revealing means and methods of war; it may also generate statements against interest in the event that a judicial forum does eventually assert jurisdiction over some aspect of a controversial operation. Moreover, states are not monolithic entities, and it may be impossible to formulate a definitive legal theory justifying actions of this nature.[406] Articulating the legal, factual, and political basis for engaging in controversial conduct, however, will go far toward ensuring that such actions are treated as exceptional rather than precedential.

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[405] Finn 2011; DeYoung 2011. But see Klaidman 2012.
[406] Aldrich 2011, at p.892.

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