

PROPRIETY OF SELF-DEFENSE TARGETINGS OF MEMBERS OF AL QAEDA AND APPLICABLE PRINCIPLES OF DISTINCTION AND PROPORTIONALITY

*Jordan J. Paust**

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I. INTRODUCTION

The United States has engaged in the targeted killing of certain members of al Qaeda both within the theatre of an actual war in Afghanistan and parts of Pakistan, and outside the theatre of war as a matter of self-defense in areas such as Yemen, including the killing of United States national Anwar al-Awlaki in Yemen on September 30, 2011.¹ It has been reported that the United States (U.S.) Executive had a secret June 2010 memorandum that sanctified the killing of al-Awlaki as a law of war measure because he allegedly played a direct part in an alleged war between the United States and al Qaeda and its affiliates.² Under international law,

* Mike & Teresa Baker Law Center Professor, University of Houston.

1. Martin Chulov, *Al-Qaida Cleric Anwar al-Awlaki is Dead, says Yemen*, THE GUARDIAN, Sept. 30, 2011, available at <http://www.guardian.co.uk/world/2011/sep/30/anwar-al-awlaki-dead> (last visited Mar. 15, 2012).

2. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1, available at <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all> (last visited Mar. 13, 2012).

is it possible for the United States to be at war with al Qaeda as such? In any event, are laws of war and self-defense targetings of certain members of al Qaeda in the theatre of the actual war in Afghanistan and parts of Pakistan generally permissible? Outside the theatre of a real war, are the targetings of some members of al Qaeda permissible as measures of self-defense under Article 51 of the United Nations Charter? During self-defense targetings, is there a need to attempt to comply with general principles of distinction among persons, reasonable necessity, and proportionality and what others call the collateral damage rule? These and related questions are explored below.

II. THE UNITED STATES CANNOT BE AT WAR WITH AL QAEDA

A. Traditional Customary International Legal Criteria Regarding the Existence of War

Despite claims of the Obama Administration that the United States campaign against al Qaeda is an armed conflict,³ under traditional international law the United States cannot be at war or involved in any form of armed conflict with al Qaeda as such, although, the United States is involved in a real war in Afghanistan and parts of Pakistan within which certain members of al Qaeda are lawfully targetable either because they are direct participants in hostilities (DPH) or are direct participants in armed attacks against United States military personnel and other United States nationals that allow the United States to respond with military force in self-

3. Barack Obama, President, United States of America, Obama's Mideast Speech (May 19, 2011), available at <http://www.nytimes.com/2011/05/20/world/middleeast/20prexy-text.html> (last visited Mar. 13, 2012); Barack Obama, President, United States of America, Remarks by the President on National Security (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (last visited Mar. 13, 2012); Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (last visited Mar. 13, 2012) (claiming that "the United States is in an armed conflict with al-Qaeda, . . . they continue to attack us" during "this ongoing armed conflict" . . . Harold Koh also rightly noted that certain targetings of members of al Qaeda can be lawful measures of self-defense.); Savage, *supra* note 2 (If the U.S. has been at war with al Qaeda, under the laws of war attacks on the Pentagon, the U.S.S. Cole, and U.S. military and CIA personnel in Afghanistan would have been permissible if engaged in by privileged fighters and were not otherwise impermissible under international law.); See also Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 270-72, 275 (2010), available at <http://ssrn.com/abstract=1520717> (last visited Mar. 13, 2012) [hereinafter *Self-Defense Targetings*]. As explained in Part II, *infra*, in the theatre of a real war both the law of war and the law of self-defense provide a competence to engage civilians who are directly participating in hostilities and/or armed attacks. Both paradigms (i.e., the law of war and self-defense paradigms) are operative in a theatre of war.

defense against those who are directly participating in the armed attacks (i.e., those who are DPAA).⁴ It is evident, therefore, that the laws of war are not applicable with respect to United States targetings of members of al Qaeda outside the context of an actual war and where they are not directly participating in hostilities, for example, by issuing or transferring orders or authorizations by cell phone or computer flash drives to others who are within the theatre of an actual war and engaged in violence.

Under traditional international law, it is obvious that al Qaeda is not a state, nation, belligerent, or insurgent group. Indeed, al Qaeda is not known to have even purported to have the characteristics of a state, nation, belligerent, or insurgent. Under customary international law, an insurgency is the lowest level of warfare or armed conflict, otherwise known as an armed conflict not of an international character.⁵ Under traditional legal criteria used to determine whether an insurgency exists, the putative insurgent group would need to:

- a) Represent an identifiable group of people or to have a relatively stable base of support within a given population;
- b) Have the semblance of a government;
- c) Have an organized military force and be able to field its military units in sustained hostilities; and
- d) Control significant portions of territory as its own.⁶

The next highest level of warfare or armed conflict is a belligerency. A belligerent must meet each of the four criteria noted with respect to an insurgency as well as a fifth criterion—it must have recognition as a belligerent, nation, or state, by a state that it is engaged in an armed conflict with or by other states in the international community.⁷ A well-known example of a belligerent engaged in an armed conflict to which all of the customary laws of war applied was the CSA or the Confederate States of America during the United States Civil War. It met the four customary

4. See, e.g., *Self-Defense Targetings*, *supra* note 3, at 270–72, 275.

5. See, e.g., JORDAN J. PAUST, M. CHERIF BASSIOUNI, ET AL., *INTERNATIONAL CRIMINAL LAW* 646–48, 651, 654 (3 ed., 2007) [hereinafter *ICL*]; Jordan J. Paust, *Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 *NOTRE DAME L. REV.* 1335, 1341 (2004) [hereinafter *Overreaction*].

6. See, e.g., Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 *YALE J. INT'L L.* 325, 326 (2003) [hereinafter *War and Enemy*]; *Overreaction*, *supra* note 5; *ICL*, *supra* note 5.

7. See, e.g., *id.* at 326, n.6. There is no magic number or percentage of states that must recognize such a status.

legal criteria and also had recognition as a “belligerent” by the United States as well as by a few European states.⁸

In contrast, al Qaeda has never met the legal criteria for insurgent status and has certainly lacked any outside recognition as a belligerent, nation, or state. In particular, al Qaeda does not have the semblance of a government; does not have an organized military force; does not field military units in sustained hostilities; and does not control significant portions of territory as its own.⁹ In view of the above, any fighting between the United States and al Qaeda as such cannot amount to war or an armed conflict, and therefore, cannot trigger application of the laws of war for such purposes as targeting, capture, status, detention, treatment, prosecution, and application of a law of war collateral damage rule.¹⁰ For

8. See, e.g., *The Prize Cases*, 67 U.S. 635, 666–67, 669 (1862) (addressing criteria for belligerency status which include the need to “occupy and hold in a hostile manner a certain portion of territory; have declared their independence; . . . have organized armies; have commenced hostilities . . . [and] the world acknowledges them as belligerents.”); NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 248–49 (2008) [hereinafter *TARGETED KILLING*]; ICL, *supra* note 5, at 645, 651, 657, 661; U.S. DEP’T OF ARMY, *FIELD MANUAL 27-10: THE LAW OF LAND WARFARE* 13 §1.11(a) (1956) (“The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents.”) [hereinafter *FM 27-10*]; *Overreaction*, *supra* note 5, at 1341 n.24. The Civil War between the United States and the Confederate States of America is an example of a classic civil war between a state and a “belligerent” which also has the status of an armed conflict of an international character to which all of the customary laws of war apply.

9. See, e.g., *War and Enemy*, *supra* note 6 at 326–27; *Overreaction*, *supra* note 5, at 1340–42.

10. Most writers agree that the U.S. cannot be at “war” or in “armed conflict” or “combat” with al Qaeda as such, much less a mere tactic of “terrorism.” See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW* 410 (2 ed. 2005) (“As for Al Qaeda members, they must be regarded as civilians engaging in criminal activities”); Bruce Ackerman, *This Is Not a War*, 113 *YALE L.J.* 1871, 1872–73 (2004); Lawrence Azubuike, *Status of Taliban and al Qaeda Soldiers: Another View*, 19 *CONN. J. INT’L L.* 127, 152 (2003); Natasha Balendra, *Defining Armed Conflict*, 29 *CARDOZO L. REV.* 2461, 2503, 2511 (2008); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror”*, 87 *INT’L REV. RED CROSS* 39, 45 (2005); Michael Byers, *Terrorism, the Use of Force, and International Law After 11 September*, 51 *INT’L & COMP. L.Q.* 401, 408 (2002); David Cole, *Enemy Aliens*, 54 *STAN. L. REV.* 953, 958 (2002); Chad DeVeaux, *Rationalizing the Constitution: The Military Commissions Act and the Dubious Legacy of Ex Parte Quirin*, 42 *AKRON L. REV.* 13, 16 n.11 (2009); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 *AM. J. INT’L L.* 345, 347–48 (2002); Matthew Fleischman, *A Functional Distribution of War Powers*, 13 *N.Y.U. J. LEGIS. & PUB. POL’Y* 137, 159 (2010); Christopher Greenwood, *War, Terrorism, and International Law*, 56 *CURRENT L. PROBS.* 505, 529 (2004); Daryl L. Hecht, *Controlling the Executive’s Power to Detain Aliens Offshore: What Process is Due the Guantanamo Detainees?*, 50 *S.D. L. REV.* 78, 94 (2005); Berta E. Hernandez Truyol, *Globalizing Terror*, 81 *OR. L. REV.* 941, 972, n.140 (2002); Wayne McCormack, *Emergency Powers and Terrorism*, 185 *MIL. L. REV.* 69, 70, n.6 (2005); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 *DENV. J. INT’L L. & POL’Y* 33, 36 (2006); Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 *CASE W. RES. J. INT’L L.* 349, 349–

57 (2005); Mary Ellen O'Connell, *When Is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT'L & COMP. L. 535, 538 (2005); *War and Enemy*, *supra* note 6, at 327; Michael Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, 16 J. CONFLICT & SEC. L. 385, 390 (absurd claim of a "global NIAC between the USA and Al-Qaeda, and such view finds little support outside of the USA"); Gabor Rona, *International Law Under Fire: Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, 27 FLETCHER F. WORLD AFF., at 55, 61 (Summer/Fall 2003); Kenneth Roth, *The Law of War in the War on Terror*, 83 FOREIGN AFF., at 2, 7 (Jan./Feb. 2004); Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 140 (2004); Marco Sassoli, *Use and Abuse of the Laws of War in the "War on Terrorism"*, 22 LAW & INEQ. 195, 195–196 (2004); Scott Silliman, Testimony before the United States Senate Committee on the Judiciary on DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism (Nov. 28, 2001) (U.S. not at war with al Qaeda and the 9/11 attacks could not be violations of the laws of war); Detlev F. Vagts, *"War" in the American Legal System*, 12 ILSA J. INT'L & COMP. L. 541, 543–45 (2006); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 4 n.18 (2004); INT'L COMM. RED CROSS, THE RELEVANCE OF IHL IN THE CONTEXT OF TERRORISM (July 21, 2005), available at <http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm> (last visited Mar. 13, 2012); Warren Richey, *Tribunals on Trial*, CHRISTIAN SCIENCE MONITOR, at 1 (Dec. 14, 2001) (quoting Professor Leila Sadat, "actions of Sept. 11 aren't war crimes . . ."), available at <http://www.publicbroadcasting.net/wvnr/news.newsmain/article/0/0/314920/Opinion/Tribunals.on.Trial> (last visited on Mar. 13, 2012). See also Mark A. Drumbl, *Guantanamo, Rasul, and the Twilight of Law*, 53 DRAKE L. REV. 897, 908 (2005) (Bush policy had the unwanted consequence of "absurdly glorifying terrorism as armed conflict and terrorists as 'warriors. . .'"); Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with al-Qaeda, and It's a Good Thing, Too: A Response to Chang*, 47 TEX. INT'L L.J. 1, 3 n.10 (2011) (stating that "[t]he idea that there is a global NIAC between the U.S. and al-Qaeda is both legally questionable . . . and has been consistently rejected by states other than the U.S.," citing Kress, *infra* note 19 at 266); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2500 (2006) (quoting Lord Hoffman in *A (FC) & Others (FC) v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, 96 "Terrorist violence, serious as it is, [is not a] war or other public emergency threatening the life of the nation"); Interview by Wolf Blitzer of CNN with Zbigniew Brzezinski, Former National Security Adviser (May 14, 2006) ("I don't buy the proposition we are at war. . . . [T]his is really a distortion of reality. We have a serious security problem with terrorism. . . . But to create an atmosphere of fear, almost of paranoia, claiming that we're a nation at war, opens the door to a lot of legal shenanigans." Without compliance with FISA, "[w]e slide into a pattern of illegality"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (O'Connor, J.) (rightly classifying the war in Afghanistan as "[a]ctive combat operations against Taliban fighters" and declaring that detention can last "for the duration of these hostilities *Pan American Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1013–15 (2d Cir. 1974) (United States could not have been at war with the Popular Front for the Liberation of Palestine (PFLP), which had engaged in terrorist acts as a non-state, non-belligerent, non-insurgent actor). Cf. Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 337 n.6 (2005); Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 189–90 (2005) ("important to distinguish the rhetoric of the 'war on terrorism' from the congressional authorization," "the current war on terrorism"). But see JOHN YOO, *WAR BY OTHER MEANS* 12–13 (2006) (recognizing that we cannot be at war with terrorism, but claiming without consideration of even the customary legal criteria that must be met even for the existence of an insurgency that we are "in an international armed conflict with al Qaeda"). See generally, Jane Gilliland Dalton, *What is War? Terrorism as War After 9/11*, 12 ILSA J. INT'L & COMP. L. 523 (2006); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003);

this reason, outside the context of an actual war to which the laws of war apply, members of al Qaeda who were not otherwise attached to the armed forces of a belligerent, nation, or state cannot be “combatants,” much less, “enemy,” or so-called “unlawful” combatants or prisoners of war as those terms and phrases are widely known in international law.¹¹

B. Newer Criteria in Geneva Protocol II

One set of legal criteria for application of certain laws of war to an insurgency is slightly different than that reflected in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.¹² Article 1(1) of the Geneva Protocol requires that there be an “armed conflict” between a state’s armed forces and at least an “organized armed group” that is “under responsible command” and that “exercise[s] such control over a part of . . . [a state’s] territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.”¹³ It is evident that outside the theatre of an actual war in Afghanistan and parts of Pakistan, al Qaeda does not engage in an “armed conflict” with military forces of the United States; is not more generally an “organized armed group;” is not under a “responsible” command;¹⁴ does not “exercise such control over a part” of territory of a state as to enable al Qaeda “to carry out sustained and concerted military operations;” and certainly does not intend to implement the Geneva Protocol. In fact, al Qaeda does not carry out “sustained and concerted military operations” anywhere around the globe. The Geneva Protocol also recognizes that “isolated and sporadic acts of violence” are not “armed conflicts” of any sort.¹⁵

Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006) (stating that Hamdan “was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban,” but citing nothing for such a notion of “conflict” and paying no attention to traditional law of war criteria for an insurgency or legal criteria set forth in Geneva Protocol II noted *infra*).

11. See, e.g., *War and Enemy*, *supra* note 6, at 327–33.

12. See Geneva Convention Additional Protocol Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II].

13. *Id.* art. 1(1).

14. See, e.g., Aaron M. Drake, *Current U.S. Air Force Drone Operations and Their Conduct in Compliance with International Humanitarian Law—An Overview*, 39 DENV. J. INT’L L. & POL’Y 629, 654–55 (2011) (regarding general attributes of responsible command); Michael A. Newton, *Flying into the Future: Drone Warfare and the Changing Face of Humanitarian Law*, 39 DENV. J. INT’L L. & POL’Y 601, 606–07 (2011).

15. Geneva Protocol II, *supra* note 12, art. 1(2).

C. *An ICTY Preference for Lower Levels of Warfare*

In 1995, an opinion of the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia (ICTY) chose a much lower threshold, preferring that “an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between a governmental authority and organized armed groups or between such groups within a state.”¹⁶ This preference has been shared by some writers, but is generally without support in continual practice and generally shared patterns of legal expectation or *opinio juris*—two elements needed for the formation of a norm of customary international law¹⁷—and has no direct support in treaty law. Even under this preference, however, it is evident that al Qaeda is not an “organized armed group” and that outside the theatre of the real Afghan war, al Qaeda does not engage in “protracted” armed violence or “armed force” as opposed to sporadic or isolated acts of violence, especially as such phrases have been further clarified in subsequent cases.¹⁸ Responding to such a preference, other textwriters, including those who participated in a report for the International Law Association, underscore that protracted armed violence exists only where

16. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995); Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. For the Former Yugoslavia, Trial Chamber II, May 7, 1997) (“terrorist activities . . . are not subject to international humanitarian law.”); Prosecutor v. Boskoski & Tareulovski, Case No. IT-04-82-T, Judgment, ¶¶ 175, 177–78 (Int'l Crim. Trib. For the Former Yugoslavia, July 10, 2008) (“the Trial Chamber in *Tadic* interpreted this test . . . as consisting of two criteria, namely (i) the intensity of the conflict, and (ii) the organization of the parties to the conflict” and “care is needed not to lose sight of the requirement for protracted armed violence...when assessing the intensity of the conflict. The criteria are closely related. . . .”); *id.* ¶ 185 (regarding “protracted” violence, what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities,” and quoting The Prosecutor v. Kordic: “[t]he requirement of protracted fighting is significant.”); *id.* ¶¶ 199–203 (identifying various other factors); Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶ 248 (Jan. 27, 2000) (“The expression ‘armed conflicts’ introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. . . .”); Rome Statute of the International Criminal Court, art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90, (“isolated and sporadic acts of violence” are not “armed conflict”). Al Qaeda does not engage in a “protracted campaign that entails engagement of . . . [other] parties in hostilities,” “open hostilities,” or use “armed forces” in “protracted fighting.” It should be noted that Professor Cassese, as Judge in the Appeals Chamber of the ICTY, wrote the opinion noted above in *Tadic*, and he later recognized that members of al Qaeda are mere civilians engaged in criminal activities. CASSESE, *supra* note 10, at 410.

17. See, e.g., ICL, *supra* note 5, at 6–9.

18. See, e.g., *supra* note 16.

there is intense fighting.¹⁹ Clearly, al Qaeda does not engage in intense fighting outside the theatre of the Afghan war and it is doubtful that al Qaeda, as such, has ever done so in the theatre of war.

The International Committee of the Red Cross (ICRC) has defined “organized armed groups” for a different purpose, i.e., for the purpose of deciding whether particular persons can be targeted during an actual armed conflict. In my opinion, the ICRC description of organized armed groups should be useful for interpretation of the same phrase that was used in ICTY decisions as well as their use of related phrases such as “armed force” and “protracted armed violence.” The ICRC has declared that members of “organized armed groups” are members of “fighting forces” composed “of individuals whose continuous function is to take a direct part in hostilities—continuous combat function.”²⁰ Using the ICRC’s approach, it is quite obvious that al Qaeda does not meet such a test for an “organized armed group,” since it does not have a “fighting force” composed of individuals who have a “continuous combat function.”²¹

II. TARGETINGS OF MEMBERS OF AL QAEDA IN THE THEATRE OF A REAL WAR

Even though the United States cannot be at war with al Qaeda as such, some members of al Qaeda have been directly involved in ongoing hostilities during the real war in Afghanistan and parts of Pakistan. As noted in another writing, members of al Qaeda within the theatre of such a war who directly participate in hostilities, and those outside the general theatre of war who directly participate in such a war, are targetable under

19. See, e.g., Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SEC. L. 245, 261 (2010) (the threshold “requires the insistence on a degree of quasi-military organization of the non-State party that enables it to carry out large-scale armed violence in a coordinated manner” and such does not pertain at least after “Al Qaeda’s subsequent transformation into a rather loosely connected network of terrorist cells”); Mary Ellen O’Connell, *Remarks: The Resort to Drones Under International Law*, 39 DENV. J. INT’L L. & POL’Y 585, 596–97 (2011), citing Use of Force Comm. of the Int’l L. Ass’n, Final Report on the Meaning of Armed Conflict in International Law 1 (2010), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> (last visited Mar. 12, 2012) [hereinafter O’Connell, *Remarks*]; Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SEC. L. & POL’Y 343, 355–57 (2010). See also *supra* note 16.

20. See, e.g., Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC, 16, 27, 36, 70–73 (May 2009), available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf> (last visited Feb. 20, 2012) [hereinafter Melzer, *Interpretive Guidance*].

21. See *id.*

the laws of war as civilians who directly participate in hostilities (DPH).²² As noted, whenever the United States uses armed force outside its territory against an actual insurgent military force—and therefore, not in the case of force used merely against al Qaeda as such—the armed conflict:

should be recognized as an international armed conflict to which all of the customary laws of war apply. It is in the interest of the United States and other countries to recognize the international character of such an armed conflict so that members of their armed forces have “combatant” status, prisoner of war status if captured, and “combatant immunity” for lawful acts of warfare engaged in during an international armed conflict. . . . The armed conflict between U.S. military forces and those of the Taliban inside and outside of Afghanistan since October 7, 2001 is an international armed conflict.²³

III. TARGETINGS OF MEMBERS OF AL QAEDA CAN BE PERMISSIBLE AS MEASURES OF SELF-DEFENSE

Both within and outside the theatre of an actual war, some members of al Qaeda can be targeted or captured as part of lawful United States responses in self-defense under Article 51 of the United Nations Charter against ongoing non-state actor armed attacks on the United States, its embassies abroad, and its military personnel and other nationals abroad.²⁴ There are no geographic limits to permissible self-defense targetings and they can occur outside an actual theatre of war and in time of relative

22. See, e.g., *Self-Defense Targetings*, *supra* note 3, at 270–72, 275; Jordan J. Paust, *Permissible Self-Defense Targetings and the Death of bin Laden*, 39 DENV. J. INT’L L. & POL’Y 569, 571–72, 579 (2011) [hereinafter, *Permissible Self-Defense Targetings*]. As noted, one wants to consider participation over a period of time or the process of participation over time, for example, by using a movie camera instead of a rigid snap shot approach to inquiry and by noting whether there exists a relatively continuous participation over time (with short interruptions). If so, it is appropriate to conclude that there is a process of direct participation and one does not have to inquire merely whether the next form of direct participation is imminent (which would involve a rigid snap shot approach) and one can note that the process of participation realistically did not stop. See, e.g., *Self-Defense Targetings*, *supra* note 3, at 271 n.90. This is somewhat different from the ICRC’s notion of a continuous combat function (CCF), which is also process-oriented. See, e.g., Melzer, *Interpretive Guidance*, *supra* note 20, at 16–17, 27, 34, 36, 65–68, 70–73 (discussing the ICRC’s CCF-type of inquiry); *Self-Defense Targetings*, *supra* note 3, at 271–72 n.90.

23. *Self-Defense Targetings*, *supra* note 3, at 261.

24. See also *Self-Defense Targetings*, *supra* note 3; *Permissible Self-Defense Targetings*, *supra* note 22. It should be noted that most self-defense responses to prior armed attacks will involve the motive to prevent such attacks from continuing, but the existence of mixed motives will not limit the permissibility of otherwise lawful measures of self-defense against an ongoing process of self-defense.

peace.²⁵ It is evident, therefore, that with respect to permissible targetings the self-defense paradigm is different in some respects from the law of war paradigm. In fact, the international law of self-defense allows the targeting of persons who directly participate in armed attacks (DPAA)²⁶ wherever such forms of direct participation occur. For example, as noted in another writing, “significant armed attacks or attempted armed attacks have emanated from parts of Yemen, thereby permitting self-defense targetings of direct participants located in Yemen.”²⁷

More recently, the United States targeted a United States national in Yemen. The targeting of al-Awlaki was recognizably permissible under the law of self-defense, if the Executive is correct that he had migrated from being an al Qaeda propagandist and effective recruiter for al Qaeda to a person who engaged in direct incitement to armed violence and a leader or member of an operational team of al Qaeda in the Arabian Peninsula that continued to engage in planning armed attacks initiated in Yemen to take place in the United States or on board a U.S. aircraft—such as the failed Christmas underwear bomber attack in 2009 and the failed Fed-Ex and UPS cargo bomb attacks in 2010.²⁸ In such a case, he would have become a

25. See, e.g., *Self-Defense Targetings*, *supra* note 3, at 250–52, 255, 258, 260, 279–80.

26. If there is direct participation in armed attacks over time with occasional interruption, one wants to use a process approach and note whether direct participation occurs over a period of time, for example, by using a movie camera instead of a rigid snap shot approach to inquiry that would merely focus on whether the next attack is imminent instead of focusing on the fact that a process of direct participation in attacks realistically never stopped. See also *Self-Defense Targetings*, *supra* note 3; *Permissible Self-Defense Targetings*, *supra* note 22. One might even consider that those who directly participate in armed attacks over time are those who demonstrate a continual armed attack function (CAAF).

27. *Permissible Self-Defense Targetings*, *supra* note 22, at 572 n.18, 575.

28. Concerning such failed armed attacks, see for example, *Permissible Self-Defense Targetings*, *supra* note 22, at 572 n.18, 575; Concerning Al-Awlaki’s participation in armed attacks, see, e.g., President Barack Obama, *Remarks at the Change of Command Ceremony for the Chairman of the Joint Chiefs of Staff at Fort Myer, Virginia*, Daily Comp. Pres. Docs., DCPD-201100695, Sept. 30, 2011, at 1, available at <http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony> (last visited Feb. 20, 2012) (He was “a leader of al Qaeda in the Arabian Peninsula . . . the leader of external operations for al Qaeda in the Arabian Peninsula. In that role, he took the lead in planning and directing efforts to murder innocent Americans,” including the failed Christmas day 2009 aircraft bombing and the failed U.S. cargo plane bombings in 2010.); Attorney General Eric Holder, *Remarks As Prepared For Delivery By Attorney General Eric Holder At Northwestern University School Of Law* (Mar. 5, 2012) (The Christmas Day bomber received “specific instructions [from al-Awlaki] to wait until the airplane was over the United States before detonating his bomb.”), available at <http://opiniojuris.org/2012/03/05/ag-holders-national-security-speech-text> (last visited Mar. 12, 2012) [hereinafter Holder]; Ramsden, *supra* note 9, at 398–400; Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, Oct. 1, 2011, at A9.

direct participant in ongoing armed attacks (DPAA) against the United States and its nationals and he would have been lawfully targetable under the law of self-defense. Because the United States cannot be at war with al Qaeda or its affiliates, the laws of war were not applicable in order to permit the targeting of al-Awlaki as a civilian who was a direct participant in hostilities. Moreover, there was no indication that al-Awlaki had been directly participating in the real war in Afghanistan and parts of Pakistan, which would have made him targetable as a DPH under the laws of war wherever he had been directly participating in such a war.

With respect to human rights and the human rights paradigm, human rights law applies globally and in all social contexts. Yet, those who are entitled to human rights *vis-à-vis* the United States must either be within the territorial jurisdiction of the United States or within its actual power or “effective control.”²⁹ Al-Awlaki was not within such jurisdiction or control at the time of his death. Moreover, if he had been, his human right to life would have attached, but would have been a freedom from “arbitrary” deprivation of life and, because he was lawfully targetable as a DPAA, his death was recognizably not arbitrary.³⁰

With respect to the nationality of the person being targeted, in the context of a real war, it is irrelevant under the laws of war whether the targetable direct participant in hostilities is a United States national.³¹ Similarly, it is irrelevant under the international law of self-defense whether a direct participant in armed attacks is a United States national. Therefore,

29. See, e.g., *Permissible Self-Defense Targetings*, *supra* note 22, at 573, 581; *Self-Defense Targetings*, *supra* note 3, at 264–66. It has been suggested that the test requiring that a person be within the actual power or effective control of a state engaged in targeting should be interpreted in an expanded fashion to include the “targeting or killing [of] an individual . . . as a form of exercise of control” and that “the act of targeting” involves “some degree of effective control.” Meagan S. Wong, *Targeted Killings and the International Legal Framework: With Particular Reference to the US Operation against Osama bin Laden*, 11 CHINESE J. INT’L L. 127, 159–60 (2012). In my opinion, this is an unacceptable use of the word “control,” much less “effective” control, because if a person has not been captured, in certain contexts at least, the person can raise a weapon and shoot, run away to continue attacks in the near future, quickly hide in a manner that prevents capture or killing. The fact that killing is an outcome does not necessarily mean that the person killed was in the “effective control” of the person engaged in the targeting. This is especially true if a drone used for targeting is at 40,000 feet above the person killed. Also consider the circumstance in war where soldier X has aim at enemy soldier Y who is about 20 meters away, but soldier Y does not indicate she wishes to surrender and falls to the ground rolling to her right and pulls out a pistol and kills soldier X (who had shot at soldier Y but missed). Soldier X obviously did not have actual power or effective control over soldier Y.

30. See *Self-Defense Targetings*, *supra* note 3, at 263–64 n.65, 269. Similarly, in the context of a real war, the lawful killing of a DPH would not be “arbitrary.”

31. See, e.g., *id.* at 262 n.60; Holder, *supra* note 28 (“[I]t’s clear that United States citizenship alone does not make such individuals immune from targeting” either under the laws of war or the law of self-defense.)

under both the law of war and self-defense paradigms, there is no room for an American exceptionalism with respect to the legality of targetings.³²

32. With respect to “due process” under the U.S. Constitution, it should be evident that if a U.S. national is lawfully targetable abroad under the international laws of war or the international law of self-defense the process that is due such a national is met by compliance with international legal standards. *See* *Hamdi v. Rumsfeld*, 542 U.S. at 519 (2004) (“We held that ‘[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction . . . [are] bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war. . . .’ A citizen, no less than an alien, can be ‘part of or supporting forces hostile to the United States’ . . . and ‘engaged in an armed conflict against the United States. . . .’” quoting *Ex parte Quirin*, 317 U.S. 1, 20, 37–38 (1942)); *Holder*, *supra* note 28 (addressing law of war principles to be considered with regard to Fifth Amendment due process requirements). More generally, international law has been used as an aid for interpreting provisions of the Constitution. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (Human rights precepts used as an aid for interpreting the Eighth Amendment); *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 132–33 (1923) (Sutherland, J., dissenting) (Use of international law to interpret the Eighteenth Amendment); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 *et seq.* (1893) (International legal principles support interpretation of congressional power regarding exclusion and deportation of aliens); *United States v. Tinoco*, 304 F.3d 1088, 1110 n.21 (11th Cir. 2002); *United States v. Caicedo*, 47 F.3d 370 (9th Cir. 1995) (“Principles of international law are ‘useful as a rough guide’ in determining . . . due process”) (quoting *United States v. Davis*, 905 F.2d 245, 249 n.2 (9th Cir. 1990)); *Finzer v. Barry*, 798 F.2d 1450, 1463 (D.C. Cir. 1986); *United States v. Gonzalez*, 776 F.2d 931, 938–41 (11th Cir. 1985); *United States v. Usama bin Laden, et al.*, 92 F.Supp.2d 189, 220 (S.D.N.Y. 2000) (“[I]f the extraterritorial application of a statute is justified by the protective principle [of customary international law regarding jurisdiction] such application accords with due process.”). *See also* *Brown v. United States*, 12 U.S. 110, 125 (1814) (“In expounding . . . [the] Constitution, a construction ought not lightly to be admitted which would” not be in conformity with or “fetter” discretion under customary international laws of war “which may enable the government to apply to the enemy the rule that he applies to us.”); *United States v. Toscanino*, 500 F.2d 267, 275–76 (2d Cir. 1974) (due process inquiry “guided by” government’s “illegal conduct,” which included violations of two treaties); *Daliberti v. Republic of Iraq*, 97 F.Supp.2d 38, 52–54 (D.D.C. 2000) (rejecting a due process-minimum contacts claim by Iraq with respect to alleged acts of state sponsored terrorism “condemned by the international community,” and implicating universal jurisdiction, especially since international law provides “adequate warning of possible U.S. sanctions” (quoting *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 23 (D.D.C. 1998))); *Ex parte Toscano*, 208 F. 938, 942–44 (S.D. Cal. 1913) (Executive detention of persons from Mexico was appropriate under a treaty and the treaty-based “duty devolves upon the President,” “the President has full authority . . . and it was and is his duty to execute said treaty provisions.”); JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 250–67 (West Group, 3d ed., 2009) (cases regarding international law’s enhancement of congressional power), 272–73 (cases regarding international law’s enhancement of presidential power); JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 205, 212, 218–22, 275–76 nn.389–93 (Carolina Academic Press, 2d ed., 2003) (documenting judicial references to human rights in connection with the 1st, 4th, 5th, 6th, 8th, 9th, 13th, 14th, and 15th Amendments).

IV. APPLICABLE PRINCIPLES OF DISTINCTION, REASONABLE NECESSITY, AND PROPORTIONALITY

In her article, Professor Valerie Epps aptly demonstrates why it is necessary to attempt to comply with the principles of distinction among persons, reasonable necessity, and proportionality with respect to lawful targetings during an armed conflict, and she rightly demonstrates why there can be no automatic or programed applications of what she terms the “collateral damage rule” in terms of numbers of civilians killed in proportion to numbers of combatants killed.³³ In one of my writings, I have noted that these three principles also provide useful guidance with respect to methods and means of self-defense outside the context of war, because all measures of self-defense must comply with the same general principles.³⁴

Articles 48 and 50–51 of Protocol I to the 1949 Geneva Conventions reflect treaty-based and customary international legal requirements concerning necessity and proportionality. These include:

- a) The need to distinguish between civilians (who are protected from attack “unless and for such time as they take a direct part in hostilities”) and lawful military targets (the so-called principle of distinction);
- b) The prohibition of attacks directed at protected civilians or civilian objects as such; and
- c) The prohibition of indiscriminate attacks.³⁵

A customary prohibition related to the prohibition of “indiscriminate” attacks is the more general prohibition of unnecessary death, injury, or suffering during war,³⁶ one that is also partly reflected in the duty set forth in Geneva Protocol I to avoid attacks “expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and

33. See Valerie Epps, *The Death of the Collateral Damage Rule in Modern Warfare*, Suffolk University Law School Research Paper No. 11–39, Sept. 16, 2011, at 3, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1929029 (last visited Feb. 20, 2010).

34. See, e.g., O’Connell, *Remarks*, *supra* note 19, at 591–92 nn. 40, 42; *Self-Defense Targetings*, *supra*, note 3, at 244, 245 n.19, 269 n.81, 270; *Permissible Self-Defense Targetings*, *supra* note 22, at 572, 574–76.

35. See *id.*

36. See, e.g., ICL, *supra* note 5, at 639, 679–80, 697–99 (The International Committee of the Red Cross (ICRC) considers this customary principle to be reflected in what it terms the “principle of humanity.”); Melzer, *Interpretive Guidance*, *supra* note 20, at 79–80.

direct military advantage anticipated.”³⁷ Some “incidental” loss of civilian life might be foreseeable but still permissible if the requirements of reasonable necessity and proportionality are met. As explained in *United States v. List*³⁸ during the subsequent Nuremberg proceedings, “military necessity . . . permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable.”³⁹

As noted in another writing, with respect to a contextually attentive application of the principles in a given context:⁴⁰

[W]hen applying principles of reasonable necessity and proportionality with respect to use of drones for targeting, one should consider all relevant features of context. Among appropriate considerations are: (1) identification of the target (e.g., as a DPAA, combatant, fighter with a continuous combat function, or DPH as opposed to a non-targetable civilian); (2) the importance of the target; (3) whether equally effective alternative methods of targeting or capture exist; (4) the presence, proximity, and number of civilians who are not targetable; (5) whether some civilians are voluntary or coerced human shields; (6) the precision in targeting that can obtain; and (7) foreseeable consequences with respect to civilian death, injury, or suffering.⁴¹

37. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 41(5)(b), June 8, 1977, 1125 U.N.T.S. 3, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf> (last visited Feb. 20, 2012) [hereinafter Protocol I]; Epps, *supra* note 33, at 3 (directly related to what Professor Epps describes as the collateral damage rule).

38. *United States v. List, et al. (The Southeast Hostages Case)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 757 (1950), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf (last visited Feb. 20, 2012).

39. *Id.* at 1253–54. See also Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, April 24, 1863 (the Lieber Code), art. 15 (“Military necessity admits of all direct destruction of life or limb of armed enemies and of other persons whose destruction is incidentally unavoidable in the armed contests of the war”); *id.* art. 22 (there must be a “distinction between the private individual . . . and the hostile country itself, with its men in arms” and “the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit”); *id.* art. 155 (“noncombatants . . . [are] unarmed citizens. . . .”); Melzer, *Interpretive Guidance*, *supra* note 22, at 37 (noting that civilians might risk “incidental death or injury” because of “[t]heir activities or location.”); TARGETED KILLING, *supra* note 8, at 278–86, 297–98.

40. *Permissible Self-Defense Targetings*, *supra* note 22, at 575–76.

41. See, e.g., *Self-Defense Targetings*, *supra* note 3, at 275–77. See also Amos N. Guiora, *Responses to the Ten Questions*, 37 WM. MITCHELL L. REV. [J. NAT’L SEC. L.] 5034, 5042–5048 (2011); Amos N. Guiora, *Not “By All Means Necessary:” A Comparative Framework for Post-9/11 Approaches to Counterterrorism*, 42 CASE W. RES. J. INT’L L. 273, 278–82 (2009); Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing*, 2011

As a legal expert with the ICRC avers, part of a nuanced contextual inquiry should involve consideration of “the actual level of control exercised over the situation by the operating State” and an appropriate consideration of “required intensity or urgency may” actually involve “a generous standard of ‘reasonableness’ in traditional battlefield confrontations.”⁴² For this reason and because of other features of context that can be relevant to nuanced application of the principle of reasonable necessity, there should be no rigid rule that would require ground verification of target selection and engagement when ordinary civilians are known to be nearby. As the ICRC expert added more generally, there should be inquiry into qualitative, quantitative, and temporal necessity and whether methods and means to be used “contribute effectively to the achievement of a concrete and direct military advantage . . . without unreasonably increasing the security risk of the operating forces or the civilian population.”⁴³

V. THE WAR IN LIBYA

It is evident that during future armed conflicts in which developed states participate one will see an increasing use of robots for various purposes, including use of weaponized drones for targeting. The recent war in Libya is an example of an international armed conflict that involved United States and NATO use of guided missiles, drone targetings, fighter aircraft targetings, and various other traditional weaponry. It would be interesting to identify the number of deaths and injuries of civilians who were not targetable as direct participants in hostilities with respect to each use of guided missiles, drone targetings, and fighter aircraft targetings.⁴⁴ Which weapon systems allowed greater compliance with principles of distinction, reasonable necessity, and proportionality? It may be that drone targetings were generally more precise and caused less incidental death, injury, and suffering. In any event, weaponized drones are capable of more precise targetings of lawful military targets.⁴⁵

U. ILL. L. REV. 1201, 1222, 1228–38 (2011) (addressing a U.S. military six-step decisional and review process and suggesting relevant criteria and considerations with respect to targetings by CIA personnel).

42. See TARGETED KILLING, *supra* note 8, at 397–98.

43. *Id.*

44. Claims have been made regarding unspoken civilian casualties. See, e.g., C.J. Chivers & Eric Schmitt, *Confronting NATO's Careful War*, INT'L HERALD TRIB., Dec. 17, 2011, at 1.

45. See, e.g., Drake, *supra* note 14, at 637–40, 642–45; *Permissible Self-Defense Targetings*, *supra* note 22, at 572–73 n.20.

Quite clearly, during the war in Libya there were also direct attacks on civilians and civilian populated areas committed by other actors that were violations of the laws of war. One of the reasons why the United Nations Security Council authorized the use of armed force in Libya involved the fact that civilians had been targeted in violation of international law, especially by armed forces of the Qaddafi government, and a United Nations authorized use of force had become necessary in order “to protect civilians and civilian populated areas under threat of attack in” Libya.⁴⁶

The Security Council’s authorization is actually an important reaffirmation of the need to comply with the principles of distinction, reasonable necessity, and proportionality or, as some prefer, the collateral damage rule.

VI. CONCLUSION

This article has provided detailed disclosure why the United States cannot be at war with al Qaeda under international law. Attention has been paid to traditional customary international legal criteria concerning belligerent and insurgent status, newer criteria for an insurgency under Geneva Protocol II, and an ICTY preference for lower levels of armed conflict in order to demonstrate that the existence of an armed conflict with al Qaeda, as such, is not possible.

Nonetheless, targetings of members of al Qaeda in the theatre of a real war with the Taliban is lawful under the laws of war if members of al Qaeda directly participate in hostilities. Moreover, targeting of members of al Qaeda can be permissible under the law of self-defense if they are directly participating in armed attacks. As the article explains, the targeting of U.S. national Anwar al-Awalki in Yemen was permissible under the self-defense paradigm. Under either the law of war paradigm or the self-defense paradigm, general principles of distinction, reasonable necessity, and proportionality must be followed.

46. U.N. S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement> (last visited Feb. 20, 2012). In addition to the U.N. Security Council authorization to use all necessary measures of protective force, during later stages in the armed conflict there was a change in the international legal status of the Libyan rebel-insurgents to belligerents who consented to and welcomed U.S. and NATO uses of force. Still later, as the Libyan National Transitional Council gained recognition as the legitimate representative of the Libyan people, its consent provided additional independent legitimacy for use of force to support regime change, provide self-determination assistance to the Libyan people, and participate in collective self-defense against continuous armed attacks by remnants of the Qaddafi regime. With respect to the legitimacy of self-determination assistance in certain contexts, see, for example, Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533, 547–48 (2002).